

# **PROTECTING THE RIGHTS OF CHILDREN WITH ALBINISM – CASE STUDIES MALAWI AND TANZANIA**

Dissertation submitted in partial fulfilment of the requirements  
of LLM Child Law of the University of Pretoria

By

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31 October 2017

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## **CHAPTER ONE**

### **Motivation**

The motivation for researching this topic was the media coverage in Malawi of the killings of persons with albinism and the subsequent selling of their body parts to others for use in rituals. This dissertation focuses on children because my Master's program is in the area of Child Law.

### **Problem Statement**

The *Report of the Human Rights Council Advisory Committee on the study on the situation of human rights of persons living with albinism (The Report of the HRCAC)*<sup>1</sup> states that persons with albinism face different types of discrimination depending on the region they live in.<sup>2</sup> In places like North America, Europe and Australia, children with albinism experience name-calling, persistent teasing and bullying.<sup>3</sup> The Report states that the media and popular culture in North America, Europe and Australia perpetuate misconceptions and misunderstandings about albinism as they portray persons with albinism in a negative light.<sup>4</sup> The Report further states that there is little information available from Asia, South America and the Pacific.<sup>5</sup> The Report does state that in China and other Asian countries children with albinism are abandoned and rejected by their families.<sup>6</sup> The Reports also states that persons with albinism in Pakistan face a lack of understanding of the condition, social rejection, medical and psychological problems.<sup>7</sup> In India, persons with albinism are viewed as a curse and in addition to that as a contagious curse. As a result they are ostracized and isolated from mainstream society.<sup>8</sup> The Report further states that '[p]ersons with albinism

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<sup>1</sup> United Nations, Human Rights Council, Report of the Human Rights Council Advisory Committee on the study on the situation of human rights of persons living with albinism, A/HRC/28/75, 10 February 2015

<sup>2</sup> As above page 10

<sup>3</sup> As above

<sup>4</sup> As above page 11

<sup>5</sup> As above page 11

<sup>6</sup> As above

<sup>7</sup> As above

<sup>8</sup> As above

face more severe forms of discrimination and violence in those regions where the majority of the general population are relatively dark-skinned...[t]hat appears to be the case in some sub-Saharan countries where albinism is shrouded in myth and dangerous and erroneous beliefs.<sup>9</sup> This dissertation focuses on the situation in Malawi and Tanzania. News websites have described the serious human rights violations committed against persons with albinism in both Malawi and Tanzania. *Nyasa Times*, a Malawian online news website, has reported on the abduction and killing of persons with albinism, and the subsequent cutting off of their body parts as well as the exhumation of their bodies in different areas of Malawi. An example of a newspaper account is the following:

*“Patrick Katutu, a teacher at Mbachundu Primary School which is near the graveyard told Mana that villagers were surprised to see a coffin of Sopriano Felix who died on 20th April, 2016 lying on top of the deceased’s grave with its cover broken.... “[y]esterday, when we passed by the cemetery, we saw the coffin with Felix’s remains, which were buried on 21st April, on top of the grave with the cover of the coffin broken into pieces and we alerted the Police,” he said...[m]chinji Police spokesperson Moses Kajawa Nyirenda confirmed the body of the deceased with albinism who died at Kamuzu Central Hospital after battling tuberculosis was exhumed from the grave...[n]yirenda said the police and a medical official from Mchinji District Hospital discovered that arms and legs of the deceased were all removed. The remains have since been reburied.”<sup>10</sup>*

*BBC News Africa* section has reported on the situation in Tanzania and states that:

*“A family of a young girl with albinism had to flee their home twice, in 2011 and 2012, when unidentified men attacked them, saying that they were sent by the father of the home, a fisherman, to get the girls' hair.. There are also*

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<sup>9</sup> As above

<sup>10</sup> *Nyasa Times* (2016-05-10): Sarah Munthali Albino body exhumed: Malawi police confirm arrest of herbalists over rituals

*139 names of victims who were killed, attacked, or whose bodies were stolen from graves...<sup>11</sup>*

Cultural beliefs have been identified as being a factor in driving the practice of committing violent acts against persons with albinism. *Nyasa Times* reports that:

*“Superstitions feed myths that albinos are ghosts, sorcerers or demons who have been cursed and, when hunted and killed for body parts, bring good luck to others... Witch doctors use their body parts in potions to bring good fortune to those who are willing to pay for it....”<sup>12</sup>*

*“After killing Machinjiri, took some of the body parts to Mozambique for rituals...Witchdoctors say potions made from the body parts of albinos – who lack pigment in their skin, eyes and hair – can bring good luck and wealth.”<sup>13</sup>*

*BBC Africa* reports that:

*“[a] representative of the Sengerema Albino Society, Mashaka Benedict, told the BBC that even educated people still believe that albino body parts can bring wealth”<sup>14</sup>*

The *Washington Post* states that:

*“The United Nations believes the recent surge of attacks may be associated with the upcoming elections, as politicians have been known to seek out seers who use albinos’ body parts to predict the future, USA Today reported. They think it will improve their chances on election day. Erick Kabendera, a well-known Tanzanian journalist who has reported on the ritual killings for years, told National Geographic in 2013 that, in the past, politicians have been*

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<sup>11</sup> BBC News, Africa Section Salim Kikeke (2014-12-09) Tanzania albino community: ‘Killed like animals’

<sup>12</sup> Nyasa Times Wanga Gwede (2016-04-29) K1.1 billion offered for albino bones, killer tells Malawi Police Chief: Blames Satan

<sup>13</sup> Nyasa Times Chancy Namadzunda (2016-05-05) Malawi albino killers sentenced to 25 years in jail

<sup>14</sup>Please refer to fn 2

*suspected of playing a part in the murders. 'If a politician needs to win an election, they will consult a witch doctor, but then politicians will blame the fishermen for murdered albinos, he said.'*<sup>15</sup>

Poverty has also been identified as a factor that drives the practice. *Nyasa Times* reports that:

*"An albino bone market agents in Lilongwe offered K1.1 billion (about \$1.5million) to Gerald Phiri, convicted of the murder of his 21-year-old albino niece Eneless Nkhata at Madisi in Dowa mid this month, Malawi Police chief has been told at a special hearing."*<sup>16</sup>

*"Witchdoctors... They are prepared to pay K50 million for a complete set of albino body parts."*<sup>17</sup>

The *Washington Post* states that:

*"Other theories for the rise in violence have been attributed to an increase in food prices, among other things. A complete set of body parts from an albino, including 'all four limbs, genitals, ears, tongue and nose,' can bring in up to \$75,000 on the black market, according to a 2009 report by the International Federation of Red Cross and Red Crescent Societies."*<sup>18</sup>

Relatives and conmen have been blamed for fuelling the attacks. *Nyasa Times* reports that:

*"Speaking during Tikhale Tcheru programme monitored on MBC television, National police Public Relations officer, Nicholas Gondwa disclosed that*

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<sup>15</sup> Washington Post (2015-03-13) Where albino body parts fetch big money, albinos still get butchered

<sup>16</sup> Please refer to fn 3

<sup>17</sup> Please refer to fn 4

<sup>18</sup> Please refer to fn 15

*investigations revealed that relatives for people with albinism were the ones fuelling the malpractice...It is very sad development; our investigations discovered that it is the relatives of the victims who are on forefront fuelling this practice. How can one from Blantyre know a graveyard of albino in area they have never been before? People with albinism bank their trust on relatives, not knowing they have twisted mind,” explained Gondwa.”<sup>19</sup>*

BBC Africa states that:

*“A family of a young girl with albinism had to flee their home twice, in 2011 and 2012, when unidentified men attacked them, saying that they were sent by the father of the home, a fisherman, to get the girl's hair.”*

The violations described above infringe upon rights in the United Nations Convention on the Rights of the Child (UNCRC), Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child. They also infringe rights in the Constitutions of Malawi and Tanzania. They also constitute crimes under the criminal laws and infringe other national laws in Tanzania and Malawi. The laws in Tanzania and Malawi are put in place to protect all their citizens. The human rights violations that persons with albinism, but more specifically children with albinism are facing, demonstrate that the laws are not fulfilling their purpose. The newspaper and UN reports demonstrate that the law is failing to enforce the rights of children with albinism and the process for redress of any violations is not allowing them to access justice.

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<sup>19</sup> Nyasa Times (2016-05-16) Malawi Police, APA blame relatives and comen for increased albino killings

## **Significance**

The topic is important because the rights of children with albinism are being violated. The *UNCRC* states that "...childhood is entitled to special care and assistance..."<sup>20</sup> This places an obligation on the governments of Malawi and Tanzania to protect children with albinism from the human rights violations they are experiencing. This obligation is of extra importance given that children with albinism are a vulnerable group that deserves protection.

## **Research Question/ Objectives**

- a) What is the prevalence of attacks on people living with albinism and what are the reasons for the attacks?
- b) Which rights have been infringed? Are there any gaps in the law or weaknesses in legal institutions?
- c) What is witchcraft? What is its connection to the attacks against children with albinism? How can the law respond to the witchcraft beliefs that are fuelling the attacks?
- d) What remedies or improvements do I suggest as a solution to the problem?

## **Literature Review**

The *Report of the HRCAC*<sup>21</sup> on the study on the situation of human rights of persons living with albinism states that the Human Rights Council condemned the attacks against persons with albinism in a resolution in 2013, and in addition requested the Office of the United Nations High Commissioner for Human Rights to produce a report on the attacks and the discrimination suffered by persons with albinism. The *Report* further states that in 2013, the Council requested the Advisory Council to prepare a report on the human rights situation of persons with albinism. The *Report*

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<sup>20</sup> Preamble

<sup>21</sup> Please refer to fn 1

also states that in 2014, the Human Rights Council recommended that 13 June be declared International Albinism Awareness Day. The General Assembly declared 13 June International Albinism Awareness Day from the year 2015. The *Report* states that persons with albinism have special needs. It also states that the following rights have been violated: rights to life and security, rights to an adequate standard of living, discrimination, access to justice, and the rights of women and children. The *Report* also details various responses to the attacks against persons with albinism. These include advocacy, assistance to the victims, international, human rights mechanisms and regional human rights mechanisms. It also details the challenges faced and its recommendations.

The United Nations has appointed an Independent Expert, Ms. Ikponwosa Ero, whose mandate is to engage with states and other stakeholders, promote good practices, report on developments and challenges to the enjoyment of human rights by persons with albinism, gather information on human rights violations, facilitate the 'provision of advisory services, technical assistance, capacity building and international cooperation in support of national efforts'<sup>22</sup>, raise awareness of rights of persons with albinism and combat harmful beliefs, promote awareness of PWA positive contributions, focus on the situation of women and girls and to report to the Human Rights Council and General Assembly.

Amnesty International has described the attacks suffered by persons with albinism in a statement on its website.<sup>23</sup> It has acknowledged that the President of Malawi has issued a statement condemning the attacks and telling the police to arrest perpetrators and to protect person with albinism and their families. However Amnesty International has expressed their concern with the police and government response after the statement stating that '[a]lthough some people have been arrested for albinism-related crimes, we have serious concerns about the inadequacy of police investigations, and perpetrators being dealt sentences not in line with the severity of the crime.'<sup>24</sup> Amnesty International called on the government

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<sup>22</sup> Human Rights Council Resolution [A/HRC/RES/28/6](#), 10 April 2015

<sup>23</sup> Amnesty International UK, Malawi, Stop Ritual Murders of People with Albinism

<sup>24</sup> Amnesty International UK, Malawi, Stop Ritual Murders of Persons With Albinism



to protect people with albinism, give the police adequate resources, bring perpetrators to justice and to tackle the harmful beliefs fuelling the attacks.

The Ministry of Justice and Constitutional Affairs in Malawi has produced a handbook that can be utilised by investigators, prosecutors and magistrates when handling cases concerning persons with albinism.<sup>25</sup> The handbook contains new offences that have been created under the Penal Code, the Anatomy Act, the Child Care, Protection and Justice Act, the Trafficking in Persons Act and the Witchcraft Act. It also contains guidelines for the officials it targets.

Carolina Ackley has written a paper on "*The Fetishization of Albinos in Tanzania*"<sup>26</sup> in which she suggests two theories for the attacks against persons with albinism. The first theory is the failure by the government to meet its promises of improving the lives of the poor, more especially the fishermen and gold mine workers, after the end of colonisation. The second theory is that the government gains international favour and thus aid if they present a picture that reflects them condemning the attacks as barbaric and against human rights.

Aleksandra Cimpric has written conducted an anthropological study on children accused of witchcraft<sup>27</sup> in which Cimpric states that the attacks are linked to modernisation and the pursuit of wealth in Africa.

Although it is not cannot be classed as literature, the Disability Conference held by the Centre for Human Rights<sup>28</sup> highlighted issues that are important. One of the issues is the word witchdoctor is often confused with the word traditional healer. They have two different meanings. Another issue is the fact that Malawi has focused on changing the law while Tanzania has focused on educating the public.

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<sup>25</sup> Kapindu, Handbook for investigators, ;prosecutors and magistrates concerning offences against persons with albinism, 2016

<sup>26</sup> Ackley, *The Fetishization of Albinos in Tanzania*, 2010 University of Chicago

<sup>27</sup> Cimpric, *Children Accused of Witchcraft*, 2010, UNICEF

<sup>28</sup> *Advancing the rights of persons with albinism in Africa*, Pretoria, 9 – 10 November 2016

## **Methodology**

I will use desktop research to investigate the research question. For background I have looked at newspaper articles that describe the violations that are occurring. I will look at legal sources to find out if they provide any protection for children with albinism, and assess if it's adequate. Internationally I will look at United Nations Convention on the Rights of the Child and other applicable Conventions as well as their reports. Regionally I will look at the African Charter on Human and People's Rights and African Charter on the Rights and Welfare of the Child and their reports. I will also look at other regional instruments that are applicable. Nationally I will look at the Constitutions of Malawi and Tanzania as well as the criminal and witchcraft laws of those countries and any other relevant laws. I will also look at the institutions available in these countries to address these rights violations. I will also look at journal articles on the topic. I will look at any information that international and national human rights organisations may have on the issue.

## **Chapterisation**

In Chapter One, I will set out my motivation for writing the dissertation, the significance of the dissertation, the problem statement, the research questions, the methodology as well as the literature review.

In Chapter Two, I will set out a definition of albinism, include a description of the attacks in Malawi and Tanzania, indicate the reasons for such attacks and set out what has been done so far by national, regional and international bodies.

In Chapter Three, I will set out the rights that have been violated in terms of international, regional and national laws. I will also critique the laws.

In Chapter Four, I will focus on witchcraft as a cause of the attacks on children with albinism. I will define important concepts and who the actors are. I will also discuss whether the belief in witchcraft or the acts committed as a result of witchcraft should be the focus of prosecution. I will further discuss the laws that can be used to

prosecute witchcraft crimes. I will then discuss freedom of belief, the cultural defence, the best interests principle and the aims of punishment.

In Chapter Five, I will describe my recommendations.

## **CHAPTER TWO**

### **2.1 Introduction**

This chapter discusses what albinism is, describes the attacks that are being committed in Malawi and Tanzania, explains the causes of the attacks, and describes actions that have been taken nationally, regionally and internationally.

### **2.2 What is albinism?**

Albinism is an inherited condition in which a person has a lack of pigmentation in their eyes, hair and eyes. Different types of albinism exist. The most common type of albinism is oculocutaneous albinism which affects the eyes, hair and skin. People with this form of albinism suffer from eye problems which include abnormal flickering eye movements, poor vision and crossed/ lazy eyes. Another form of albinism is called ocular albinism where only the eyes lack colour. It also causes eye problems. Persons with albinism may also suffer from skin cancer. There is no cure for albinism. Medical professionals can only treat the problems associated with the condition.<sup>29</sup>

A *Human Rights Council Advisory Committee* Report states that '[w]hile numbers vary, it is estimated that in North America and Europe 1 in every 17,000 to 20,000 people have some form of albinism. The condition is much more prevalent in sub-Saharan Africa, with estimates of 1 in 1,400 people being affected in Tanzania and prevalence as high as 1 in 1,000 reported for select populations in Zimbabwe and for other specific ethnic groups in Southern Africa.'<sup>30</sup>

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<sup>29</sup> [www.medical-dictionary.thefreedictionary.com/Albino+human](http://www.medical-dictionary.thefreedictionary.com/Albino+human)

<sup>30</sup> Human Rights Council Report of the Human Rights Council Advisory Committee on the study on the situation of human rights of persons living with albinism (2015) 4

The *Office of the High Commissioner for Human Rights* has stated that '[the term "person with albinism" is preferred to "albino", which is often used in a derogatory way.]'<sup>31</sup>

### **2.3 Attacks on Persons with Albinism**

The attacks on persons with albinism have been vicious and shocking in both Malawi and Tanzania. This section will look at various accounts that have been presented by assorted sources on the attacks in both countries.

#### **2.3.1 Malawi**

*Nyasa Times*<sup>32</sup> has reported that a body of a 20 year old man with albinism was found exhumed in Meme village Traditional Authority (T/A) Sampras in Chinju. The arms and legs of the man had been removed. The report further states that two more people with albinism living in the area were living in fear of being attacked and that the community had requested protection for them. The same report states that two herbalists were arrested in Mozambique for the murder of a Malawian boy with albinism who was kidnapped and killed for his bones. *Nyasa Times* has also reported that a man murdered his niece who had albinism because he was promised a large sum of money.<sup>33</sup> *Nyasa Times* has further reported that two men killed a person with albinism and took some of the body parts to Mozambique.<sup>34</sup>

#### **2.3.2 Tanzania**

*BBC Africa* has reported that persons with albinism are being hunted in Tanzania.<sup>35</sup> The report states that May Mosi was almost abducted at the age of three months old. His mother had to jump out of a window and run to safety while holding May. The

<sup>31</sup> <http://albinism.ohchr.org/about-albinism.html>: Albinism Beyond Race, Ethnicity and Gender

<sup>32</sup> *Nyasa Times* : Sarah Munthali (2016-05-10) Albino body exhumed: Malawi police confirm arrest of herbalists over rituals

<sup>33</sup> *Nyasa Times*: Wanga Gwede (2016-04-29) K1 billion offered for albino bones, killer tells Malawi Police Chief: Blames Satan

<sup>34</sup> *Nyasa Times*: Chancy Namadzunda (2016-05-05) Malawi albino killers sentenced to 25 years in jail

<sup>35</sup> *BBC Africa* section: Salim Kikeke (2014-12-09) Tanzania's albino community: 'Killed like animals'

attackers kept on chasing them and only left them alone when the neighbours woke up. The report states that more than 70 persons with albinism have been killed within the space of three years. The report further states that persons with albinism in Tanzania live on a remote island called Ukerewe. The report also states that the island does not provide them with safety. It states that the Chairmen of the Regional Tanzanian Albinism Society, Alfred Kapole had to flee from the island. It states that he was one of the first people whose case reached the court after a village leader attempted to kill him for his hair. It further states that his home was attacked and he survived another attempt on his life. The report also states that a young girl's family had to flee twice from attackers who said they had been sent by the girl's father to get the girl's hair. The *BBC Africa report* states that Vicky Ntetema, the head of Under the Same Sun, an non-governmental organisation whose focus is persons with albinism, said that the perpetrators of crimes against persons with albinism, run away to neighbouring islands where they cannot be found.

An article in the *Washington Post*<sup>36</sup> states that persons with albinism in Tanzania are kidnapped, dismembered and turned over to witchdoctors. The article states that a young girl with albinism went missing and was never found. The article also states that a 1 year old boy with albinism was taken from his home and was later found with his arms and legs severed. The article further states that a 6 year old boy with albinism was attacked in his home and had his hand cut off. His mother was also hacked with machetes. The article states that a 2013 Human Rights Council report says that more than 200 cases were reported. The report states that “[i]n a few other cases, the victims were beheaded; genitals, ears and bits of skin were removed; tongues were cut out and the eyes and the heart gouged out.”

#### **2.4 Causes of the attacks on persons with albinism**

The attacks are committed for a variety of reasons that I will outline below.

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<sup>36</sup> Washington Post: Lindsey Bever (2015-03-15) Where albino parts fetch big money, albinos still butchered

#### 2.4.1 Malawi

*Nyasa Times*<sup>37</sup> reports that the bones of people with albinism are sold in order to be used to make a people rich. In another article *Nyasa Times* also states that people hold superstitious beliefs that persons with albinism are ghost or demons or sorcerers that have been cursed.<sup>38</sup> It further states that there is a belief that if a person with albinism is killed for their body parts, the body parts can be used by a witchdoctor to give a person good luck.<sup>39</sup> The monetary amounts that people are willing to spend also drives the attackers to commit the acts that they do. *Nyasa Times* reports that a person was willing to pay MK 1.1 billion for the body parts.<sup>40</sup> *BBC Africa* has reported that Ms Ikponswa Ero, the UN human rights council expert on albinism, stated that people believe that the body parts of persons with albinism can 'increase wealth, make businesses prosper and facilitate employment.'<sup>41</sup> She also stated that Malawi is one of the poorest countries in the world and as such the sale of the body parts of persons with albinism is lucrative.<sup>42</sup>

#### 2.4.2 Tanzania

*BBC Africa* reports that people in Tanzania believe that 'potions made from their body parts bring good luck and wealth.'<sup>43</sup> The reports also states that a representative of the Sengerema Albino Society said that even educated people believe that albino body parts bring wealth.<sup>44</sup> The *Washington Post* reports that the United Nations and Erick Kabendera, a well-known Tanzanian journalist, have stated that politicians seek the assistance of witchdoctors who use the body parts of persons with albinism to ensure victory in the elections.<sup>45</sup> The *Washington Post* further reports that '[a] complete set of body parts from an albino, including "all four limbs, genitals, ears, tongue and nose," can bring in up to \$75,000 on the black

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<sup>37</sup> As per fn 5

<sup>38</sup> As per fn 6

<sup>39</sup> As per fn 6

<sup>40</sup> As per fn 6

<sup>41</sup> BBC Africa (2016-04-29) People with albinism in Malawi face 'total extinction' - UN

<sup>42</sup> As per fn 13

<sup>43</sup> As per fn 8

<sup>44</sup> As per fn 8

<sup>45</sup> As per fn 9

market, according to a 2009 report by the International Federation of Red Cross and Red Crescent Societies.<sup>46</sup>

## **2.5 Actions taken nationally, regionally and internationally as a consequence of the attacks**

### **2.5.1 Malawi**

*Nyasa Times* reported that President Peter Mutharika has ordered that the police should be vigilant and arrest all those involved. The President also stated that he would send a delegation to Tanzania to find out how the country was dealing with the problem.<sup>47</sup> The government has introduced new laws specifically to deal with the attacks on persons with albinism. I will say more about them in chapter 3. The Ministry of Justice and Constitutional Affairs held a workshop to train investigators, prosecutors and magistrates on how to handle cases involving persons with albinism.

### **2.5.2 Tanzania**

*Washington Post* reports that President Jakaya Kikwete has called the attacks 'disgusting and a big embarrassment for the nation.'<sup>48</sup>

### **2.5.3 African Union**

The African Commission on Human and Peoples' Rights has adopted Resolution 263 which expresses concern over the attacks and discrimination against persons with albinism, acknowledges the action taken by the states involved and acknowledges the human rights obligations to take action. It also urges state parties

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<sup>46</sup> As per fn 9

<sup>47</sup> As per fn 5

<sup>48</sup> As per fn 13



to protect persons with albinism, to ensure access to justice, encourages public education and awareness, asks states to report on the situation of persons with albinism, urges states to work with regional and international bodies, urges its special mechanisms to protect persons with albinism, asks its Working Group on Older Persons and People with Disabilities to include the rights of persons with albinism.

#### 2.5.4 United Nations

The United Nations Human Rights Council adopted Resolutions 23/L.25 which expressed concern about the attacks and discrimination against persons with albinism and urged state parties to take action. The United Nations Human Rights Council also adopted 24/L.36 which encourages technical cooperation for the prevention of attacks against persons with albinism. The United Nations Human Rights Council proclaimed 13 June as International Albinism Awareness Day when it adopted Resolution 26/L.7 in 2014. The United Nations Human Rights Council created the mandate of the Independent Expert on the enjoyment of human rights of persons with albinism by adopting Resolution 28/L.10 in 2015.

#### 2.6 Conclusion

The attacks demonstrate a need for Malawi and Tanzania to take action to protect persons with albinism. The actions that has been taken shows an acknowledgement of the problem by both governments of the fact that there is a problem but acknowledgement is not enough. The governments need to ensure that the rights of persons with albinism are protected in practice. The next chapter will focus on analysing the laws in place. This dissertation will focus on children with albinism as my Masters is in the area of Child Law.

## **CHAPTER THREE**

### **3.1 Introduction**

This chapter focuses on looking at the various laws that are in place in Malawi and Tanzania that can be applied to the perpetrators of the various acts outlined in chapter two.

### **3.2 Why should action be taken to prevent the attacks against children with albinism?**

#### **3.2.1 The actions constitute discrimination**

The failure by the governments of Malawi and Tanzania to prevent the attacks on children with albinism is a form of discrimination. Article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination* states that

*“racial discrimination’ shall mean any distinction... based on... colour...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”*

[underlining added for emphasis]

The word ‘distinction’ is relevant to this discussion. The *Cambridge Dictionary* defines distinction as “a difference between two similar things”.<sup>49</sup> Children with albinism are of a similar race as the majority of the people in the communities that they live in. However they are treated differently by those same people. The discrimination suffered by children with albinism is based on colour. Colourism is defined by *Webb* as “prejudice attitudes and/or discriminatory acts against people based on the colour (shade/ tone) of their skin.”<sup>50</sup> Children with albinism are treated

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<sup>49</sup> <http://dictionary.cambridge.org/dictionary/english/distinction>

<sup>50</sup> Webb ‘Colourism and racism: What is the difference?’ [www.colorismhealing.org](http://www.colorismhealing.org)

differently because their skin is a different colour from the communities they live in. The communities believe that their white skin gives them magical powers, and as a result attack them for their body parts. The discrimination infringes many human rights of children with albinism. The specific rights infringed are outlined below.

### 3.2.2 The target of the actions is a minority group

The *English Oxford Living Dictionary* defines a minority as

*“a small group of people differing from the rest of the community in ethnic origin, religion, language, etc.; (now sometimes more generally) any identifiable subgroup within a society, esp. one perceived as suffering from discrimination or from relative lack of status or power.”<sup>51</sup> [underlining added for emphasis]*

Children with albinism are a minority as they are a small group that differs from the rest of the communities they live in because of their skin colour. They also suffer from discrimination and a lack of status and power. The discrimination is demonstrated by the fact that people attack them because of their skin colour. Their lack status is demonstrated by the fact that people see them as potential sources of body parts instead of seeing them as human beings, and also by the fact that they have no power to protect themselves. Their lack power is demonstrated by the fact that they can be repeatedly attacked and insufficient action is taken to remedy the situation.

### 3.2.3 The actions are targeted at a vulnerable group

The *Oxford English Dictionary* defines vulnerable as being

*“exposed to the possibility of being attacked or harmed, either physically or emotionally’ or ‘(of a person) in need of special care, support, or protection”*

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<sup>51</sup> <http://en.oxforddictionaries.com/definition/minority>

*because of age, disability, or risk of abuse or neglect.*<sup>52</sup> [underlining added for emphasis]

Children with albinism are vulnerable because they are constantly attacked physically and the fear of attacks causes them emotional harm. They also need special care, support and protection due to the fact that they are at risk of abuse (as a result of the attacks targeted against them) and neglect (as a result of the insufficient action taken by the governments of Malawi and Tanzania). The court in *Shibi v Sithole and Others* stated that

*"...[a]frican women and children,[are] regarded as arguably the most vulnerable groups in [our] society."<sup>53</sup> The court further stated that "[children] are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves."<sup>54</sup>*

This quote justifies the conclusion that the vulnerable status of children with albinism, because they are children, requires that the state protect them. The court in *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration and Others* stated that

*"[t]he Constitution, several statutes including the EEA and the LRA and Codes of Practice<sup>89</sup> protect employees with disabilities as a vulnerable group because they are a minority<sup>90</sup> with attributes different from mainstream society."<sup>55</sup>*

This quote justifies the conclusion that children with albinism as a group with disabilities require protection as they are a minority with attributes different from

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<sup>52</sup> <https://en.oxforddictionaries.com/definition/vulnerable>

<sup>53</sup> *Shibi v Sithole and Others* CCT 69/03 para 32

<sup>54</sup> *Shibi* para 93

<sup>55</sup> *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration and Others* JR 662/06 para 61

mainstream society. They are a minority due to the colour of their skin. The court in *R v Moqhali* stated in the context of the murder of a woman that

*“[i]n addition, the Court has the duty to protect society from such wanton and reckless acts perpetrated by those who have no respect for the rule of law and the rights of others. Society has to know and see through the sentences that the Courts pass that such criminal and violent behaviour will not be tolerated especially when it is done against the more vulnerable groups such as women and in this case I might add, an old one, as well as against young defenceless children.”<sup>56</sup>*

This quote justifies the conclusion that action should be taken by the governments of Malawi and Tanzania to protect children with albinism because they are a vulnerable group, and society requires them to act.

### **3.3 International, regional and local laws applicable**

Malawi and Tanzania have various laws that can be used against the perpetrators of the acts against children with albinism.

#### **3.3.1 Crimes linked to killing of children with albinism**

The right to life is protected by both human rights and criminal law. The applicable laws are article 6 of the *CRC*, article 6 of the *ICCPR (International Covenant on Civil and Political Rights)*, article 5(1) and (2) of the *ACRWC (African Charter on the Rights and Welfare of the Child)*, article 10 of the *CRPD*, article 4 of the *ACHPR (African Charter on Human and People Rights)* and the preamble, section 44(1)(a) of the *COM (Constitution of Malawi)*, section 209 of the *Malawian Penal Code (MPC)*, section 196 of the *Tanzanian Penal Code (TPC)* and section 14 of the *Constitution of the Republic of Tanzania (COURT)*. General Comment 9 states that

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<sup>56</sup> R v Moqhali CRI/T/80/05 para 11

*“[t]The inherent right to life, survival and development is a right that warrants particular attention where children with disabilities are concerned...States parties are urged to undertake all the necessary measures required to put an end to these practices, including raising public awareness, setting up appropriate legislation and enforcing laws that ensure appropriate punishment to all those who directly or indirectly violate the right to life, survival and development of children with disabilities.”<sup>57</sup>*

This General places a moral obligation on the governments of Malawi and Tanzania to take action against the perpetrators who violate the right to life of children with albinism because they are children with disabilities. Both governments have legislation in place that outlaws murder and other crimes that affect the right to life. The problem may then lie in enforcement of the law as well as public awareness of the criminal nature of the acts. An attempt to kill a child with albinism is criminalised in section 223 of the *MPC* and section 211 of the *TPC*. *Kapindu* has stated that the crime of genocide is applicable to the killing of children of albinism.<sup>58</sup> The killing meets one of the requirements for the crime of genocide, which is that members of a group are being killed. However an intention on the part of the perpetrators, to destroy the group in part or as a whole, needs to be proved. Another requirement is that the perpetrator causes the members of the group serious bodily and mental harm. Children with albinism are mutilated. They also live in constant fear of being attacked. Thus the requirement is fulfilled. However, the requirement of an intention to destroy is missing again. The genocide can be committed outside Malawi, thus where the crime is a cross border crime, it can still be prosecuted in Malawi. The fact that the crimes are committed across the borders of Malawi and Tanzania was highlighted at a workshop in Malawi.<sup>59</sup>

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<sup>57</sup> Para 31

<sup>58</sup> *Kapindu R Handbook for investigators, prosecutors and magistrates concerning offences against persons with albinism 2016 at 31*

<sup>59</sup> *Workshop to train investigators, prosecutors and magistrates on dealing with crimes against persons with albinism, Lilongwe, Malawi*

### 3.3.2 Crimes committed and human rights affected by physical attacks committed against children with albinism

The right to freedom from exploitation, violence and abuse is found in article 16 of the *CRPD*. The right to respect for physical and mental integrity is found in article 17 of the *CRPD*. The right to freedom and security of person is protected by article 14 of the *CRPD*, section 19(6) of the *COM* and section 16(1) of the *COURT*. This right is violated when children with albinism are physically attacked. Section 235 of the *MPC* and section 222 of the *TPC* criminalize actions taken by a person who

*“unlawfully wounds or does any grievous harm to any person by any means whatever; or unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or dangerous or offensive weapon, with intention to maim, disfigure, disable or do grievous harm, resist or prevent the lawful arrest or detention of a person.”*

This provision can be divided into two parts that apply to different actors. The first part is acting with the intention to maim, disfigure, disable and do grievous harm. The first part covers anyone who physically attacks a child with albinism. The second part covers those who prevent the lawful arrest or detention of a perpetrator.

The right of health is protected by article 24 of the *CRC*, article 25 of the *CRPD*, article 12 of the *ICESCR*, article 14 of the *ACRWC* and article 16 of the *ACPHR*. The *World Health Organisation* defines health as *“state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”*<sup>60</sup> Children with albinism's right to health is violated when they are physically attacked as well as when they suffer from mental torture as a result of the fear they feel after being attacked or in anticipation of it.

The right to education is protected in article 28(1)(e) of the *CRC*, article 24 of the *CRPD*, article 13 of the *ICESCR*, article 11 of the *ACRWC*, article 17 of the *ACPHR* and section 25(1) of the *COM*, section 13(f)(iv), section 11 and section 11(3) of the *COURT*. Section 13(f)(iv) of the *COURT* obliges the government of Tanzania to devise programmes to promote unity and eliminate intolerance. Even though the

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<sup>60</sup> [www.who.int](http://www.who.int)

form of intolerance that children with albinism are subjected to is not stated in the section, it is possible to expand the definition to include it as this will be in their best interests. Vulnerable groups require special protection. If children with albinism are seen as equals by all people in that country then they will act in a way that protects and promotes their rights. The right to education is infringed when the governments of Malawi and Tanzania do not take action to ensure that children with albinism will not be attacked along the way to school or be subjected to bullying. General Comment 9 states that

*“...social discrimination and stigmatization leads to their [children with disabilities]...marginalization and exclusion, and may even threaten their survival and development if it goes as far as physical or mental violence against children with disabilities.”<sup>61</sup>*

This General Comment applies to the situation presented in this dissertation because children with albinism are excluded from exercising their right to education and this in turn affects their development.

### 3.3.3 Crimes linked to actions connected to a human corpse

The government of Malawi has introduced new crimes to deal with the attacks being committed against persons with albinism. Section 131A of the *MPC* criminalizes the actions of a person who,

*“with the intention of extracting tissue from a human corpse or exhuming a human corpse for sale, ritual or other purpose, enters a place of sepulture [sic] or depository for the remains of the dead.”*

The provision is a welcome addition to the law as it specifically targets a crime committed against persons with albinism. There have been newspaper accounts of people who have entered gravesites for the purposes outlined in the section.<sup>62</sup> Section 131B of the *MPC* criminalizes the actions of a person who unlawfully

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<sup>61</sup> Para 8

<sup>62</sup> Nyasa Times: Sarah Munthali (2016-05-10) Albino body exhumed: Malawi police confirm arrest of herbalists over rituals



exhumes a human corpse. Sections 131C(1) of the *MPC* criminalizes actions by a person who unlawfully causes another person to exhume a human corpse or extract tissue from a human corpse. Section 131C(2) of the *MPC* criminalizes actions by a person who is *deemed* to have caused an act under subsection (1) where the person “*instructs, encourages, promotes, incites, directs, demands, requests or otherwise makes another person to do any of the proscribed acts.*” The sections are a welcome addition to the law as they specifically target the people who instruct the attackers to exhume a human corpse or to extract tissue from a human corpse. Thus the witchdoctor or the witchdoctor's client can be prosecuted. Section 224A of the *MPC* criminalizes the actions of a person who “*extracts; is found in possession of; sells; buys; or otherwise transacts in a human corpse; or human tissue extracted from a human corpse or living person.*” The section is a welcome addition to the law as it specifically targets crimes that have been committed against children with albinism. The section contains an exception in the case of possession of a human tissue or corpse in accordance with law or for any other justifiable reason which limits the potential wide scope of the section.

Section 16 of the *Malawian Anatomy Act (MAA)* criminalizes the actions of a person who

*“sells or buys the body of a deceased person or a tissue removed from the body of a deceased or living person; or for gain or profit, supplies to any person for... any other purpose whatsoever, tissue removed from the body of a deceased or living person.”*

It is a useful section because it can be used to prosecute the attackers as well as the witchdoctors and the clients. Section 18(1)(a) of the *MAA*, criminalizes the actions of a person who

*“removes any tissue from the body of a deceased person or the body of a living person otherwise than in accordance with this Act or any other written law or, in pursuance of a profession or calling he lawfully practice.”*

Section 18(1)(f) of the *MAA* criminalizes the actions of a person who has in his possession a deceased body or any human tissue, without a valid explanation for such possession. Section 18(2) of the *MAA* criminalizes possession of an item which includes

*“not only having in one’s own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place, whether belonging to, or occupied by oneself or not, for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”*

The provisions can be used to prosecute attackers who obtain the body parts, as well as witchdoctors and clients who keep body parts in their possession. Therefore they are useful provisions. Section 128(1) of the *TPC* criminalizes the actions of a person who

*“without lawful authority in that behalf or otherwise than in accordance with rules made by the Minister (which rules the Minister is hereby authorized to make) disinters, dissects or causes damage to the dead body of any person...”*

It is useful because it can be used to prosecute those who exhume human corpses of children with albinism.

### 3.3.4 Crimes linked to and human rights affected by the taking away of children with albinism

The abduction, sale and traffic of children is prohibited by article 35 of the *CRC* and article 29(a) of the *ACRWC*. The articles encourage state parties to take measures to prevent such acts. Kidnapping of a child with albinism across the borders of Malawi is prohibited by section 260 of the *MPC*. This is a useful provision as newspaper accounts have reported that body parts of persons with albinism who were killed in Malawi have been taken to Tanzania and Mozambique.<sup>63</sup> Section 258 of the *MPC* criminalizes the actions of a person who

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<sup>63</sup> Nyasa Times: Chancy Namadzunda (2016-05-05) Malawi albino killers sentenced to 25 years in jail; Independent (2016-03-05) Albino 9 year old “decapitated” in Malawi as shoot to kill policy fails to prevent ritual killings

*“unlawfully takes or induces from lawful guardianship any child under the age of sixteen year...out of the keeping of the lawful guardian of such child..., without the consent of such guardian.”*

Section 167 of the MPC criminalizes the actions of a person who

*“with intent to deprive any parent, guardian, or other person who has the lawful care or charge of a child under the age of fourteen years, of the possession of such child forcibly or fraudulently takes or entices away, or detains the child; or receives or harbours the child, knowing it to have been so taken or enticed away or detained.”*

Section 78(1) of the *Malawian Child Care, Protection and Justice Act (MCCPJA)* criminalizes the acts of a person who *“unlawfully takes, retains or conceals a child without the consent of the parent or without the consent of any other person who has lawful custody of the child.”* Section 244 of the *TPC* criminalizes the acts of a person who *“conveys any person beyond the limits of Tanganyika without the consent of that person, or of some person legally authorized to consent on behalf of that person.”* Section 244 [sic] of the *TPC* criminalizes the acts of a person who

*“takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female..., out of the keeping of the lawful guardian of such minor..., without the consent of such guardian.”*

Section 245 of the *TPC* criminalizes the acts of a person who *“by force compels, or by deceitful means induces, any person to go from any place, is said to abduct that person.”* Section 247 of the *TPC* criminalizes the acts of a person who *“kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered.”* This section is relevant to the attacks on children with albinism because the attackers kidnap or abduct children with albinism for the purpose of murdering them. Section 250 of the *TPC* criminalizes the acts of person who *“kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm...or knowing it to be likely that such person will be so subjected or disposed of.”* This section is relevant to the attacks on children with

albinism because the attackers know the child will be subjected to grievous harm. Section 251 of the *TPC* criminalizes the acts of a person who “*knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person.*” This section can be used to prosecute people who conceal the actions of the attackers, or hides the kidnapped or abducted child with albinism. Section 244 [sic] of the *TPC* criminalizes the acts of a person who

*“takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female..., out of the keeping of the lawful guardian of such minor..., without the consent of such guardian.”*

Thus we can conclude that there are many sections that can be used to prosecute the abductors or kidnappers of children with albinism.

Section 79(2) of the *MCCPJA* criminalizes the acts of a person who takes part in any transaction the object or one of the objects of which is child trafficking. Section 79(3) of the *MCCPJA* defines child trafficking as the “*recruitment, transaction, transfer, harbouring or receipt of a child for the purposes of exploitation.*” Section 14(1) of the *Malawian Trafficking in Persons Act (MTPA)* criminalizes the acts of a person who trafficks another person. Section 14(2) of the *MTPA* states that “[t]he consent of a trafficked person is immaterial where any of the means set out in section 2 have been used.” This section is very important in the context of child law as children are judged to be not mature enough to make proper decisions as well as susceptible to persuasion. Thus consent should not be a barrier to prosecution fro crimes committed against them. Section 2 states that “trafficking in persons” means

*“recruitment, transportation, transferring, harbouring, receiving or obtaining another person, within or beyond the territory of Malawi, through – (a) threats, or use of force or coercion; (b) abduction; (c) fraud or deception; (d) abuse or threats of abuse of power or position; (e) abuse or threats of abuse of position of vulnerability; (f) abuse of threats of abuse of the law or legal process; (g) giving or receiving of payments to obtain consent of a person having control of that other person, for the purpose of exploitation of that person.”*

This section is relevant because it describes actions taken by attackers. They have transported, transferred or obtained children with albinism. It is realistic to assume they have used threats, use of force or coercion and possibly fraud or deception.

Section 2 states that a “trafficked person” is a

*“person or child who has suffered harm, including mental and physical injury, emotional suffering...or substantial impairment of the person’s fundamental human rights through acts that contravene sections 14 and 15.”*

Children with albinism have suffered both mental and physical harm as a result of the attacks on them. The attacks have also impaired their human rights.

Section 2 states that *“exploitation” includes...(c) the removal of body parts or the extraction of organs or tissue...* This definition describes what happens when children with albinism are attacked. Section 15 of the MTPA states that *“[n]otwithstanding section 14, a person who trafficks a child, commits an offence termed trafficking in children.”* The longer punishment serves to highlight the importance of protecting children as they are vulnerable. Section 16 of the MTPA states that *“[a]ggravated forms of trafficking are...whether the accused is a relative of the trafficked person...(d) where the offence is committed by an organized criminal group...; where the offence is committed for the purpose of removing body parts or extracting tissue or organs...; where, on occasion of the commission of the offence, the trafficked person dies, suffers mutilation, disfigurement or permanent bodily injury...”* The attacks on children with albinism are aggravated forms of trafficking because the perpetrators have been relatives of the child, the police believe that the criminals are organized into groups, the purpose has been to extract tissue or organs of children with albinism, and the children trafficked suffer death or a physical injury. Section 22(1) of the MTPA encourages people to report crimes to the police. Section 22(2) of the MTPA makes it an offence to fail to report a crime to the police. These two provisions are good because they allow witnesses or other members of the public to report crimes to the police. Section 4(1)(g) of the *Tanzanian Anti – Trafficking Act (TATA)* states that *“[a] person commits an offence of trafficking in person if that person... (g) recruits, hires, adopts, transports or abducts...”* This section also fits the description of the actions taken against children

with albinism. Section 4(1)(i) of the *TATA* states that “[a person commits an offence of trafficking in persons if that person...(i) a person, by means of threat or use of force, fraud, deceit, violence, coercion or intimidation for the purpose of removal or sale of organs of the person...” This section describes the actions taken by the attackers and it also describes the purpose for their actions. Section 4(3) of the *TATA* states that

“[w]here a victim of trafficking in persons is a child, consent of the child, parent or guardian of the child shall not be used as a defence in prosecution under this Act regardless of whether there is evidence of abuse of power, fraud, deception or that the vulnerability of the child was taken advantage of.”

This section also acknowledges the vulnerability of a child to persuasion and force.

Section 4(4) of the *TATA* states that “consent of a victim of trafficking in persons shall be immaterial where any of the means referred to under subsection (1) has been used against the victim.” Section 6(1) of the *TATA* states that “[s]ubject to the provisions of this Act, certain acts or circumstances shall be considered as severe trafficking in persons.” Section 6(2) of the *TATA* states that

“[s]evere trafficking in persons shall be considered to exist if - (a) the trafficked person is a child or a disabled person...(c) the crime is committed by a syndicate or in large scale; (d) the offender is an ascendant, parent, sibling, guardian or a person who exercises authority over the trafficked person; (e) the offence is committed by a public officer, an employee or a religious leader; (h) by reason or on occasion of the act of trafficking in persons, the trafficked person dies, becomes insane, suffers mutilation or is infected with Human Immunodeficiency Virus (HIV), the Acquired Immune Deficiency Syndrome (AIDS), Sexual Transmitted Diseases (STDs), communicable diseases or other -diseases.”

The comments made about aggravated forms of trafficking in the *Malawian Trafficking in Persons Act* above also apply here. Section 6(3) of the *TATA* states that “[f]or the purpose of subsection (2)(c), trafficking in persons is deemed to be committed by a syndicate if it is - (a) carried out by a group of two or more persons;

*or (b) committed against two or more persons, individually or as a group.*" This section applies because the police suspect that the perpetrators work in groups, and because the crime is committed against the whole community of children with albinism. Section 7(2)(a) of the *TATA* states that "[f]or the purpose of this section "an intermediary" means a person who knowingly participates in or is concerned with any aspect of trafficking in persons under this Act..." This section can be used against any person who assists the attackers, or witchdoctor or client. Section 7(2)(b)(ii) of the *TATA* states that "to be concerned with" means to give a consent for a person to be trafficked...or (iv) enter into agreement whether oral or written for the purpose of trafficking in persons or to subject a person into trafficking in persons." This section allows for the prosecution of relatives who give access to the child with albinism. Section 24(1) of the *TATA* states that "[i]t shall be the duty of the Government to establish, implement and coordinate preventive, protective and rehabilitative programmes for trafficked persons." This section places an obligation on the government of Tanzania to take the above measures in the context of the attacks on children with albinism. Section 24(2)(d)(i) obliges the Tanzanian government to take prompt action against traffickers. Section 24(2)(d)(ii) obliges the government to train prosecutors to deal with trafficking offences. This is a good measure as prosecutors sometimes lack skills to do their job, and this affects children with albinism's right to access to justice. Section 24(2)(d)(iii) of the *TATA* states that "[f]or the purpose of subsection (1), establish a mechanism for free legal assistance for victims of trafficking in persons..." Section 24(2)(d)(iii) is a good provision as it ensures access to justice for children with albinism who will most likely come from poor families due to challenges faced obtaining an education and employment due to the discrimination. Government lawyers should be able to assist children with albinism and their families to seek justice.

### 3.3.5 Crimes linked to the use of hurtful words

Section 181 of the *MPC* criminalizes the actions of "[e]very person who in any public place conducts himself in a manner likely to cause a breach of the peace." *Kapindu* states that

*“There have been numerous instances in which people in various communities in Malawi have openly ridiculed, poked fun at, or used hateful and criminally inciting language against persons with albinism in a manner likely to put such persons in fear of harm to themselves, or likely to arouse a sense of resentment and anger in persons with albinism, with potential for such persons to take instant revenge. Such conduct, in the context of the attacks on persons with albinism, is highly reprehensible and general moral standards would require that it should carry a heightened level of criminal responsibility. However there is no specific law that proscribes such conduct as it relates to persons with disabilities and specifically persons with albinism. Investigators, prosecutors and magistrates have therefore resorted to charging offenders with the offence of conduct likely to cause a breach of the peace.”<sup>64</sup>*

Section 182 of the *MPC* states that “[e]very person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the peace or to commit any offence against the person.” Section 89(1)(a) of the *TPC* states that “[a]ny person who uses obscene, abusive or insulting language to any other person, in such a manner as is likely to cause a breach of the peace...” These sections can be used against the people who speak abusive language to children with albinism. General Comment 9 states that

*“[s]chool bullying is a particular form of violence that children are exposed to and more often than not, this form of abuse targets children with disabilities.”<sup>65</sup>*

General Comment 9 states that “[i]n addressing the issue of violence and abuse, States parties are urged to take all necessary measures for the prevention of abuse of and violence against children with disabilities, such as:.. (e) [e]nsure that schools take all measures to combat school bullying and pay particular attention to children with disabilities providing them with the necessary protection while maintaining their inclusion into the mainstream education system...”<sup>66</sup>

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<sup>64</sup> Kapindu 21

<sup>65</sup> Para 42

<sup>66</sup> Para 43



From these General Comments, we can conclude that the governments of Malawi and Tanzania have a moral obligation to prevent the bullying of children with albinism by educating teachers about the seriousness of the issue and giving them skills on how to deal with it. *General Comment 9 states that*

*“[i]t is crucial that the education of a child with disability includes the strengthening of positive self-awareness, making sure that the child feels he or she is respected by others as a human being without any limitation of dignity. The child must be able to observe that others respect him or her and recognize his or her human rights and freedoms. Inclusion of the child with disability in the groups of children of the classroom can show the child that he or she has recognized identity and belongs to the community of learners, peers, and citizens.”<sup>67</sup>*

This General Comment shows that preventing bullying will have the effect of ensuring the dignity of children with albinism.

### 3.3.6 Crimes linked to persons with albinism

*Section 224C of the MPC states that*

*“[w]here a person who commits any act under section 224A and 224B was, at the time of the commission or attempted commission of the offence – (a) a relative of the person on whom the offence was committed; (b) lived with the person against whom the offence was committed; or (c) provided care, support or protection to the person against whom the offence was committed, he shall be liable to imprisonment for life without possibility of parole.”*

This provision is a good one because it will target the relatives or other people who have a close relationship with the child with albinism. As stated by a member of the Malawi Police Force<sup>68</sup> these people have been involved in the crimes committed

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<sup>67</sup> Para 64

<sup>68</sup> Nyasa Times Maurice Nkawihe (2016-05-16) Malawi Police, APA blame relatives and conmen for increased albino killings: Relations are the ones on forefront fuelling the abduction and killing of people with albinism aside exhuming their body parts, Malawi police have said.

against children with albinism. The government of Malawi has a duty to protect children with albinism as they fall within the category of children with disabilities. This duty comes from article 13(1) and (2) of the *ACRWC* and section 13(g) of the *COM*. In addition to the law that is quoted there, section 4 of the *Tanzanian The [sic] Persons with Disabilities Act (TPDA)* also applies. The attacks affect children with albinism's right to education, which affects the respect for their right to independency, non-discrimination, full and effective participation and inclusion in all aspects in the society, equality of opportunity and accessibility. The government of Tanzania has a duty to "...undertake measures to effectively comply with the rights of persons with disabilities as provided for under this Act" This duty is in section 5(1)(a) of the *TPDA*. One of those rights is the right to education. In order to promote this right, the government has to prevent bullying at school and prevent the attacks that make children with disabilities fear going to school. The government of Tanzania has a duty to "take legislative and administrative measures available, with a view to achieving the full realization of rights of persons with disabilities as set out under the provisions of this Act." The government of Tanzania has a duty to ensure that children with albinism can access their rights as outlined in the *TPDA*. The government also has a duty to prevent discrimination against children with albinism and ensure them "equal and effective" legal protection. The government of Tanzania has a duty to work together with civil society to raise awareness about the rights of children with albinism and to combat stereotypes, prejudices and harmful practices. The Act suggests actions that can be taken to achieve this such as

*"(ii) fostering at all levels of the education system, including children of early age, an attitude of respect for the rights of persons with disabilities; (iii) encouraging all organs of the media to portray persons with disabilities in a manner consistent with this Act; and (iv) promoting awareness and training programmes in relation to persons with disabilities and their rights."*

Section 15(1) of the *TPDA* obliges local government to assist a child with albinism to integrate into his community. Failure to create a safe environment at school by preventing bullying and to protect children with albinism while they travel to school is a failure to fulfil this duty. Section 20(1) of the *TPDA* obliges local government to

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safeguard and promote the rights and welfare of a child with albinism. Section 20(5) of the *TPDA* obliges the local government to keep and maintain a register of people of disabilities. This will be a good way to collect data on children with albinism. Section 21 of the *TPDA* obliges any member of the community to report to the local government authority or any other relevant authority if the rights of a child with disabilities are being infringed. This is a good provision as a member of the public can report and actions being taken against a child with albinism. Section 27(3) of the *TPDA* makes it mandatory for every child with albinism to attend an ordinary public and private school unless a “*need for special communication is required.*” This duty means that the government of Tanzania has a duty to prevent bullying at schools so that children with albinism can attend such schools. Malawian government has the duty to form partnerships to create programmes to remove social, cultural and attitudinal barriers that affect persons with disabilities. Thus the government should create programmes to remove the barriers facing children with albinism. This duty comes from section 3(2) of the *Malawian Disability Act (MDA)*. The government of Malawi has a duty to provide children with disabilities with equal access to education. This duty comes from section 10(o) of the *MDA*. That duty would require the government to prevent the bullying and attacks that prevent children with albinism from going to school.

### 3.3.7 Laws that apply to all actions taken by perpetrators

The *preamble to the CRC* and to the *ACRWC* states that children need special care and attention. This is due to the fact that children are a physically and mentally vulnerable group because of their age. Children with albinism require even more special attention because they are part of a minority group that is experiencing serious discrimination and attacks due to other people's misguided beliefs. The *ACRWC* also states that “...*the situation of most African children, remains critical due to....their socio-economic, cultural, traditional...circumstances...*” Children with albinism generally live in poor economic situations and their lives are adversely affected by culture and traditions linked to witchcraft beliefs. The inadequate action taken by the governments of Malawi and Tanzania to protect children with albinism

demonstrates that they are not giving children with albinism the special attention that they require. General Comment 9 states that

*“[a]ccording to paragraph 2 of article 23 States parties to the Convention recognize the right of the child with disability to special care and shall encourage and ensure the extension of assistance to the eligible child and those responsible for his or her care. The assistance has to be appropriate to the child’s condition and the circumstances of the parents or others caring for the child.”<sup>69</sup>*

This General Comment encourages the governments of Malawi and Tanzania to provide assistance to children with albinism and their families because of the special care that children with albinism deserve because they are children with disabilities.

### 3.3.8 Duty to provide care and protection

The government of Malawi has a duty to provide care and protection to children with albinism. This is because of the physical and psychological injuries they suffer as a result of the attacks on them. The government is failing in its duty by allowing the attacks to continue. This is in violation of section 23(1)(a) of the *Malawian Child Care, Protection and Justice Act (CCPJA)*. Providing care and protection would entail successfully catching and prosecuting attackers as well as implementing campaigns to change the misguided attitudes that are causing the attacks. Tanzania does not have a similar provision.

### 3.3.9 Right to human dignity

The governments of Malawi and Tanzania have an obligation to respect the human dignity of children with albinism. Human dignity means having value and worth as an individual. A child with albinism who is being hunted for their body parts is not being valued as an individual. Therefore the child’s human dignity is being violated. Respect for human dignity is guaranteed in the preamble to the *CRC*, the preamble

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<sup>69</sup> Para 12

of the (*Convention on the Rights of Persons with Disabilities*) *CRPD*, the preamble of the *ICCPR*, the preamble to the *ICESCR*, the preamble to the *ACHPR*, section 19(1) and section 12(iv) of the *COM* and the preamble, section 9 and section 12 of the *COURT*.

### 3.3.10 Right to non-discrimination

Non-discrimination requires that all people inside a country to be given access to the same rights and protection. Children with albinism are being discriminated against because of the inadequate of protection given to them by the governments of Malawi and Tanzania. The governments of Malawi and Tanzania have an obligation to ensure that children with albinism benefit from the protection provided in various legal instruments. The right to non-discrimination is stated in the preamble and article 2(1) of the *CRC*, the preamble, article 1, article 3, article 5 and article 7 of the *CRPD*, the preamble, article 24, 26 and article 2(1) of the *ICCPR*, the preamble to the *ICESCR*, the preamble to the *African Charter on the Rights and Welfare of the Child ACRWC*, article 2 of the *ACPHR* and section 13(4) of the *COURT*.

### 3.3.11 Right to equality

The governments of Malawi and Tanzania have a duty to guarantee the right to equality to children with albinism. This means that children with albinism deserve to benefit from the same protection and rights as other people in Malawi and Tanzania. The inadequate protection from the attacks faced by children with albinism demonstrates that they are not being treated equally. This duty emanates from article 19 of *ACPHR*, section 20(1) and (2) of the *COM* and section 12(1) of the *COURT*.

### 3.3.12 Right to full and effective participation

The preamble to the *CRPD* states that “...attitudinal barriers hinder the full and effective participation of persons with disabilities in society on an equal basis with others...” This describes the situation face by children with albinism who are prevented from going to school, living and more because of the cultural beliefs of those around them. This principle is also supported in article 3 of the *CRPD*. Article 3 also includes the phrase “equality of opportunity.” This phrase also supports the right to full and effective participation.

### 3.3.13 Right to freedom of movement

The governments of Malawi and Tanzania have a duty to guarantee to children with albinism the right to freedom of movement. Their right to freedom of movement is violated because they are unable to go to school or to any other place as a result of a fear of being attacked. They are also kept at home by fearful parents. This then impacts on other rights such as the right to education. General Comment 9 states that “[c]hildren with disabilities have the same right to education as all other children and shall enjoy this right without any discrimination and on the basis of equal opportunity as stipulated in the Convention.” This General Comment encourages the governments of Malawi and Tanzania to acknowledge that children with albinism have the same right to education as other children in the countries. The requirement that education should be on the basis of equal opportunity means that the governments of Malawi and Tanzania should take action to prevent attacks on children with albinism so that they have an equal opportunity to access education as other children.

The right to freedom of movement is guaranteed in article 18 of the *CRPD*, article 12 of *ACPHR*, section 39(1) of the *COM* and section 17(1) of the *COURT*. General Comment 9 states that

*“[p]aragraph 1 of article 23 should be considered as the leading principle for the implementation of the Convention with respect to children with disabilities: the enjoyment of a full and decent life in conditions that ensure dignity,*

*promote self reliance and facilitate active participation in the community. The measures taken by States parties regarding the realization of the rights of children with disabilities should be directed towards this goal. The core message of this paragraph is that children with disabilities should be included in the society. Measures taken for the implementation of the rights contained in the Convention regarding children with disabilities, for example in the areas of education and health, should explicitly aim at the maximum inclusion of those children in society.”<sup>70</sup>*

This General Comment places a moral obligation on the governments of Malawi and Tanzania to ensure that children with albinism are free to attend school without fear of being attacked. This will ensure their active participation in the community in the present time as well as in the future as educated individuals. It will also ensure their maximum inclusion in society.

#### 3.3.14 Elimination of harmful cultural practices

The governments of Malawi and Tanzania have a duty to eliminate harmful cultural practices. A belief in witchcraft that results in people attacking children with albinism in order to obtain their body parts for use in a ritual is a harmful cultural practice. It causes physical and psychological injuries, and it traumatises the child's family members. The actions taken against children with albinism affect their “...*welfare, dignity...[and] development of the child...*”<sup>71</sup> They are also “...*customs and practices [that are] prejudicial to the health or life of the child...*”<sup>72</sup> The duty comes from article 1(3) and article 21(1)(a) of the ACRWC. The duty to “*modify and abolish existing...customs and practices that constitute discrimination...*” is found in article 4 of the CRPD. Joint General Comment No 31<sup>73</sup>/ General Comment No 18<sup>74</sup> on harmful cultural practices states that

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<sup>70</sup> Para 11

<sup>71</sup> Article 21(1)(a) of the ACRWC

<sup>72</sup> Article 21(1)(a) of the ACRWC

<sup>73</sup> Of the Committee on the Elimination of Discrimination against Women

<sup>74</sup> Of the Committee on the Rights of the Child

*“[o]verall, harmful practices are often associated with serious forms of violence or are themselves a form of violence against women and children.”<sup>75</sup>*

The obtaining of body parts of children with albinism is a form of violence against them as it requires murder or assault. The General Comment also stated that *“[m]any other practices having been identified as harmful practices... sometimes reflect negative perceptions of or discriminatory beliefs regarding certain disadvantaged groups of women and children, including individuals with disabilities or albinism.”<sup>76</sup>*

This is the case with the harmful practice associated with children with albinism. The misguided beliefs of the community about the magical power of the body parts of children with albinism drives the harmful practice. The Comment further states that

*“[t]hey [state parties] also have a due-diligence obligation to prevent acts that impair the recognition, enjoyment or exercise of rights by women and children and ensure that private actors do not engage in discrimination against women and girls, including gender-based violence, in relation to the Convention on the Elimination of All Forms of Discrimination against Women, or any form of violence against children, in relation to the Convention on the Rights of the Child.”<sup>77</sup>*

This General Comment places a moral obligation on the governments of Malawi and Tanzania to take action to prevent any form of violence against children with albinism. The General Comment states that

*“h]armful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of the human*

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<sup>75</sup> Para 7

<sup>76</sup> Para 9

<sup>77</sup> Para 11



*rights and fundamental freedoms of women and children. There is also a negative impact on their dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status.*<sup>78</sup>

This General Comment describes perfectly the effect that the attacks on children with albinism has. The attacks affect various rights as outlined in this chapter and the infringement of those rights affects further rights. For example, the fear of attacks (infringement of freedom of movement) prevents children with albinism going to school, which then affects the right to education, which then affects the right to employment.

### 3.3.15 Right to access to justice

The governments of Malawi and Tanzania have a duty to ensure access to justice for all children with albinism. This right is violated when the legal system fails to prosecute the people involved in the attacks on children with albinism. It is also violated when police officials fail to investigate crimes and judicial officer fail to prosecute crimes. It is further violated when children with albinism are prevented from accessing the justice system because of financial constraints, ignorance of the legal system and the availability of legal aid. The governments of Malawi and Tanzania are not acting in the best interests of children with albinism as obliged in *Article 3(1) of the CRC*. They are also not ensuring children with albinism “...*protection and care as is necessary for his or her well-being...*” as provided for in *Article 3(2) of the CRC*. The duty comes from *article 3 of the ICCPR, article 3(1) and (2) and 26 of the ACPHR, article 12, 13 and 16 of the CRPD, section 12(v), section 41 and section 44(1)(g) of the COM, section 13(1), section 26(2), section 13(1), 13(4), 13(5), 26(2), section 29(2) and 30(3) of the COURT* also apply. The governments of Malawi and Tanzania are required to put in place the measures outlined in General Comment 31/18. General Comment 31/18 states that

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<sup>78</sup> Para 15

*“[f]urthermore, the obligation to protect requires States parties to establish legal structures to ensure that harmful practices are promptly, impartially and independently investigated, that there is effective law enforcement and that effective remedies are provided to those who have been harmed by such practices. The Committees call upon States parties to explicitly prohibit by law and adequately sanction or criminalize harmful practices, in accordance with the gravity of the offence and harm caused, provide for means of prevention, protection, recovery, reintegration and redress for victims and combat impunity for harmful practices.”<sup>79</sup>*

General Comment 13 states that *“[s]tates parties, furthermore, shall ensure that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence and in the justice systems are addressing the needs and respecting the rights of children.”<sup>80</sup>* This General Comment places a moral obligation on the governments of Malawi and Tanzania to ensure that all those in the justice system are given the required training to be able to give justice to children with albinism.

### 3.3.16 Duty to implement rights

The governments of Malawi and Tanzania have a duty to implement the rights in the *CRC*, the *ICCPR*, the *ACPHR*, the *COM* and the *COURT*. By inadequately dealing with the attacks on children with albinism they are failing to implement the rights in the abovementioned legal instruments. This duty comes from article 4 of the *CRC* and article 2(2) of the *ICCPR*, article 1 of the *ACHPR*.

### 3.3.17 Duty on local authorities to safeguard and promote the welfare of children

Section 70(1)(a) and (b) of the *CCPJA* imposes duties on local authorities in Malawi to safeguard and promote the welfare of children and mediate in any situation where the rights of a child are infringed. This places a duty on local authorities to protect

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<sup>79</sup> Para 13

<sup>80</sup> Para 5

children with albinism within the areas they have authority over. The fact that the attacks have continued for a while demonstrates that the local authorities may be failing to fulfil these duties. Tanzania does not have a similar provision.

### 3.3.18 Duty to report

Section 75(1) of the *CCJPA* places a duty on members of the community in Malawi to report any infringement of a child's rights. Section 75(2) of the *CCJPA* allows the Secretary for Children's Affairs to summon the person who has been reported on to discuss the matter and make a decision in the best interests of the child. Thus people in Malawi can report any attack and the Secretary can summon the person involved. I have not investigated whether the Secretary for Children Affairs has ever summoned a person to discuss the attacks on children with albinism and what decision s/he has made. However this provision is useful because if the police fail to act when a child with albinism is attacked, then a concerned individual can approach the Secretary for assistance. Of course a criminal sanction is preferable when a child with albinism has been attacked. As long as it is within the scope of his/her authority, the Secretary can pass the case onto a senior police official or report the failure to take action to the Police Headquarters.

### 3.3.19 Conspiracy

The agreement that the witchdoctor or the client has with the attackers to obtain the body parts of the child with albinism fits the definition of conspiracy as defined in and section 227 of the *MPC*. It also fits the definition of conspiracy as defined in section 215, section 390 and section 215 of the *TPC*.

### 3.3.20 Accessory after the fact

According to *Kapindu*<sup>81</sup>, section 225 of the *MPC* can be used to prosecute persons who act as accessories after the fact to murder. Thus if a person hides and assists a witchdoctor, attacker or client, they will also be prosecuted. Section 213 of the *TPC* is a similar provision.

### 3.3.21 Participants in a crime

Section 21 of the *MPC* allows for prosecution of persons who are not directly involved in the crimes but who nevertheless contribute to the crimes. An example would be a witchdoctor or client who arranges for an attacker to obtain the body parts of a child with albinism. Section 22 of the *TPC* is similar to section 21 of the *MPC*.

## **Conclusion**

An analysis of the law shows that both Tanzania and Malawi have laws in place that protect the rights of children with albinism. *General Comment 31/18* states that

*“[t]he Conventions outline the obligations of States parties to establish a well defined legal framework in order to ensure the protection and promotion of human rights. An important first step in doing so is through the incorporation of the instruments into national legal frameworks. Both Committees stress that legislation aimed at eliminating harmful practices must include appropriate budgeting, implementing, monitoring and effective enforcement measures.”*<sup>82</sup>

Malawi and Tanzania have national legal systems in place that offer protection to children with albinism. The two countries also have regional and international obligations, emanating from regional and international legal instruments, that oblige them to protect children with albinism. Malawi has added new crimes that specifically

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<sup>81</sup> Kapindu in Handbook for investigators, prosecutors and magistrates concerning offences against persons with albinism (not proper reference).

<sup>82</sup> Para 12

deal with crimes against children with albinism. Tanzania has not created new laws but relies on the laws in place which criminalize some of the acts encountered by children with albinism but leave out some crimes such as entering a grace yard for the purpose of extracting human tissue etc. Therefore the inadequate protection being provided to children with albinism is a result of a failure to enforce the laws in place. There have been few prosecutions of perpetrators. This may be the result of either fear of witchcraft by or bribery of judicial officers. The Witchcraft Acts of both Malawi and Tanzania are relevant to this discussion. These pieces of legislation will be dealt with in the next chapter.

## **CHAPTER FOUR**

### **Legal strategies to combat witchcraft as a cause of attacks on children with albinism**

#### **4.1. Introduction**

This chapter focuses on witchcraft as a cause of the attacks on children with albinism. It defines important concepts and who the actors are. It also discusses whether the belief in witchcraft or the acts committed as a result of witchcraft should be the focus of prosecution. It further discusses the laws that can be used to prosecute witchcraft crimes. It then discusses freedom of belief, the cultural defence, the best interests principle and the aims of punishment.

#### **4.2. Background**

The colonial authorities who ruled African countries prior to independence drafted the first witchcraft acts. Their acts were written in a way that denied the belief in witchcraft as they did not believe a reasonable person could believe in such an idea. *Minnaar* states that witchcraft was considered superstitious nonsense. *Comaroff and Comaroff* state that colonial officials and others members regarded witchcraft as primitive, dangerous and superstitions. They also state that witchcraft accusations were outlawed and ritual murder was treated like a common crime. They further state that colonial authorities believed that under the influence of European ideas the practice of witchcraft would disappear. Despite this, *Comaroff and Comaroff* state that witchcraft continued to be practiced.

For purposes of this discussion, I will use the term witchdoctor to refer to the people who utilise the body parts of children with albinism for magical purposes. This is to distinguish them from traditional healers and witches.

### **4.3. What is witchcraft?**

The term witchcraft was introduced to Africa by the English colonial authorities. The term was used to cover a range of roles played by different people who use supernatural forces in African societies. African people have objected to the use of the term to cover so many different African practices. Witchcraft is a part of the lives of African people. According to *Comaroff and Comaroff*, witchcraft is used to explain why human misfortune or natural catastrophe happens. It's a way to make sense of the painful and negative experiences of life. To people who live according to the belief in witchcraft, they view witchdoctors and traditional healers as a people who protect them from the bad magic of witches.

*Alston* states that *Fisiy and Geschiere* suggest that the term witchcraft be replaced by the term occult force. I think it would be a good thing to do because it would cover many practices that use supernatural forces. It would also remove the objection that African people have to the term witchcraft and its colonial definition.

*Geldenhuys* states that the South African Police Service (SAPS) uses the following definition of occult-related crime as “...*any human conduct that constitutes any legally recognised crime, the modus operandi of which relates to or emanates primarily from any belief...in the occult, witchcraft, Satanism, mysticism, magic, estotericism and the like...*”<sup>83</sup> The SAPS includes ritual muti/ medicine murders under the definition. The term occult-related crime and its definition by SAPS gives a clearer idea of what the crime involves. I would suggest that the governments of Malawi and Tanzania should incorporate this term into their legislation as a step towards combating the attacks against children with albinism and respecting the views of African people.

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<sup>83</sup> [www.saps.gov.za/youth\\_desk/occult/occult.htm](http://www.saps.gov.za/youth_desk/occult/occult.htm) Quoted by *Geldenhuys* in *When cultural beliefs turn into crime: The Witchcraft Issue* Servamus 2016 at 27

#### 4.3.1 Malawi

There is no definition of witchcraft in the *Witchcraft Act*. This is in conflict with the principle that laws should be clear to everyone. A definition would assist the public, those who practice occult related practices and legal authorities to know which acts are illegal. Having no definition of witchcraft will slow the process of punishing perpetrators because the legal authorities will have to determine what witchcraft is first before either investigating a crime or prosecuting a perpetrator. It also carries the risk of some perpetrators not being punished because different police officials and judges come up with different definitions of what witchcraft is.

However *Tebbe* argues that a legal definition of witchcraft would result in the definition becoming inflexible and not accounting for any changes in the practice. Thus it would not cover any new practices that caused harm.

Such a system of determining traditional beliefs would mimic the system used by courts in South Africa to determine the best interests principle. In *Minister of Welfare and Population Development v Fitzpatrick* the court stated that “[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.”<sup>84</sup> If applied to the situation outlined in this dissertation, a flexible system allows the courts to take notice of new traditional beliefs that are unknown to the legal system at that point. The legal systems of Malawi and Tanzania developed from the system of law that the colonial authorities put in place in each country. Thus it is a westernized system of law that only takes into account a small part of the traditional systems of the African people it was used to regulate. Thus the legal system will have gaps in it concerning traditional systems of African culture. A flexible definition of witchcraft will allow for unknown practices to be incorporated in the concept. The criticism of African people that the concept witchcraft incorporated practices that Africans do not consider harmful, also shows that the authorities concluded that all African beliefs are the same, but that is not the case. Therefore the term witchcraft could have various definitions amongst different African people.

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<sup>84</sup> Minister of Welfare and Population Development v Fitzpatrick CCT 08/00 at para 18



#### 4.3.2 Tanzania

The Tanzanian statutory definition is found in Section 2 of *The Witchcraft Act* which states that

*“witchcraft includes sorcery, enchantment, bewitching, the use of instrument of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge.” [underlining added for emphasis]*

The inclusion of the definition of witchcraft is an example of legal certainty because the public as well as legal authorities are clear about what the practice is. A witchdoctor that is consulted and who advises that body parts of children with albinism are vital for the magic to work for can be said to be exercising occult powers and as being in possession of occult knowledge.

#### 4.4. The term witchdoctor

The term witchdoctor is important in prosecuting any crimes related to witchcraft as it identifies who the perpetrator is. The term witchdoctor was created by the colonial authorities. It was used to describe any person who utilises supernatural forces. It thus covered those who use supernatural forces to determine the cause of an illness, to connect with the ancestors, to seek good fortune for a client or cause bad fortune to an enemy. It's a term that has not been welcomed by Africans because it does not differentiate between traditional healers, witchdoctors and witches. *Tebbe* states that the term traditional healer has replaced the term witchdoctor. *Tebbe* states that African people felt that the term witchdoctor wrongly associated healing with witchcraft and it showed disrespect for African traditions.

In Africa those who believe in supernatural forces have different names to describe the different persons who use supernatural forces. A witch is a person who uses supernatural forces to achieve evil ends. In Malawi a witch is called *mfiti*. In Tanzania a witch is called a *mchawi*.<sup>85</sup> A traditional healer is a person who uses supernatural

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<sup>85</sup> <https://swahili.english-dictionary.help/english-to-swahili-meaning-witch>

forces as well as herbs to heal people. In Malawi, a traditional healer is called a *sing'anga*. In Tanzania a traditional healer is called *mganga wa kienyeji*.<sup>86</sup>

Law requires certainty in order for people to understand the crimes that are outlawed. A definition of who a witchdoctor is essential to any prosecution. Therefore it is essential that the governments of Malawi and Tanzania decide on a term that reflects the true nature of what a witchdoctor is. In the present situation, I would suggest using the term witchdoctor as it has an accepted use for a person who uses supernatural forces for their clients for evil. The persons involved in obtaining or requesting body parts of persons with albinism for use in rituals and to make magical charms are using supernatural forces for evil. Therefore, the term witchdoctor is fitting.

#### **4.5. Actors**

*Weich*<sup>87</sup> states that there are five actors involved in the obtaining of the body parts of children with albinism. The buyer is the person who wants to buy the body parts of a child with albinism. The witchdoctor uses the body parts of the child with albinism to create witchcraft for the buyer (I use the term client). The attacker or transporter captures, kills and then cuts off the limbs of child with albinism or obtains the body parts from a gravesite and takes them to the witchdoctor or the client. The scouter identifies the child with albinism. Finally the seller provides access to the child with albinism. That person can be a family member.

#### **4.6. Should the law criminalize the acts resulting from a belief in witchcraft or the belief in witchcraft itself ?**

*Comaroff and Comaroff* include this quote in their article:

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<sup>87</sup> Advancing the rights of persons with albinism in Africa: A call to action 9 – 10 November 2016, Pretoria

*“Hence the question put by social commentator John Matshikiza during a nationally aired debate on the topic: “How can the killing be stopped? Must we deny our traditional beliefs, or is there another way?””<sup>88</sup>*

During a conference on advancing the rights of persons with albinism in Africa held in Pretoria,<sup>89</sup> an issue that came up was whether to prosecute people for the acts resulting as a consequence of the attacks or to prosecute the actual witchcraft belief itself. Some participants supported the prosecution of the acts because they argued that it is difficult to prosecute someone for a belief as evidence of a witchcraft belief is difficult to produce. Evidence of an attack is easily produced. This highlights a difference in the Tanzania and Malawi's approaches to the attacks. Malawi has decided to introduce new laws in order to prosecute the acts committed by offenders. They have also begun the process of amending the Witchcraft Act. Tanzania has not amended its Witchcraft Act. Thus we can conclude that Tanzania is focussed on the acts while Malawi is targeting both the acts as well as the belief.

#### 4.6.1 Should the law criminalize the acts resulting from a belief in witchcraft?

Criminalizing the acts resulting from a belief in witchcraft is easier because the production of evidence is easier. The crimes charged are already used in practice therefore the legal officials already have practice collecting evidence and prosecuting perpetrators.

The judicial system could allow the use of experts to give evidence of the belief. Witchcraft is a specialised field that only those who understand occult forces understand. Some countries have used witchdoctors to investigate whether a person is a witch. *Pelican* states that the use of witchdoctors would cast doubt on the court's impartiality. According to Pelican, the reason for this is that “[w]itch-doctors are perceived as part of the occult world and thus lack credibility and moral authority...”<sup>90</sup>

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<sup>88</sup> Comaroff 530

<sup>89</sup> As per fn 12

<sup>90</sup> Pelican M “Witchcraft containment in Cameroon: the dynamics of changing legal strategies” Paper presented at the ECAS 2 / AEGIS Conference Leiden, 11-14 July, 2007. To be published later.

The police forces in Tanzania and Malawi will face the problem of producing proof. *Tebbe* points out that police have refused to investigate and prosecute witchcraft crimes because of the problem of proof. *Tebbe* further states that it is difficult for the police to investigate and prosecute a suspect who operates in secret and cannot be detected without consulting the ancestors. *Tebbe* further states that liberal democrats would agree that it is unnecessary to consider whether and how to regulate witchcraft because it does not exist. The reason for this is because the government should not accommodate majority beliefs that are false.

The view expressed by *Tebbe* would be welcomed by those who do not accept the existence of witchcraft. It would also be welcomed by those who do not think the law should criminalize the belief of witchcraft because why should a legal system criminalize a belief that isn't even true. It would be a waste of the legal system's resources. It would however be rejected by those who believe the colonial authorities did not respect the beliefs of the African people they ruled over.

#### 4.6.2 Should the law criminalize the belief in witchcraft itself ?

Support for criminalizing the belief is found in the writing of *Tebbe*. According to *Tebbe*, many Africans don't see witchcraft as a belief but as a matter of knowledge. Therefore the government should recognise the belief and criminalize any harmful beliefs. *Tebbe* also states that some South African leaders have encouraged the government to recognize the existence of occult powers. *Tebbe* states that John Hund, a law professor, encourages the legal system to impose fines on people guilty of practicing witchcraft. *Tebbe* also states that Africanists also advocate for the criminalization of witchcraft because occult forces are not imaginary.

The problem with prosecuting belief is that a belief does not itself cause harm. In this regard, *Gerrie ter Haar*<sup>91</sup> makes the point that it is the action taken as a result of the belief that causes harm. If we criminalize the belief, then, according to *Strasburger*

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<sup>91</sup> Cimpric A, Children accused of witchcraft, 2010, UNICEF 12

the judicial authorities will end up policing culture and not crime. *Strasburger* states that with witchcraft related crimes, crime and culture become intertwined.

Courts in South Africa have listened to expert witnesses present evidence on witchcraft beliefs in order to support a defendant's cultural defence. The evidence of an expert in witchcraft beliefs could also be used in Malawi and Tanzania. However can we rely on the evidence of a witness who works in a supernatural world. How will we prove if the evidence is true?

The law takes cognisance of new situations in a society and outlaws behaviour it sees as against the morals of society. Therefore it can criminalize the belief of witchcraft if lawmakers believe that criminalizing the acts would be insufficient.

#### **4.7 Laws to prosecute witchcraft related crimes**

##### **4.7.1 Malawi**

The *Witchcraft Act* criminalizes certain acts. The *Act* imposes a fine and a 5 year term of imprisonment for anyone who accuses another of being a witch or of practicing witchcraft.<sup>92</sup> This can impact the production of evidence because no one can verbally testify in court as to the fact that someone is a witch. Therefore how would the legal system prove who the perpetrator is. The *Act* also imposes a fine and imprisonment on anyone who "...employs or solicits any other person to name or indicate by the use of any non-natural means any person as the perpetrator of any alleged crime or other act complained of..."<sup>93</sup> This section would prevent the use of witchdoctors as experts in trials. The *Act* also imposes a fine and imprisonment on anyone who "...by his statements or actions represents himself to be a wizard or witch or as having or exercising the power of witchcraft..."<sup>94</sup> This section can be used against the witchdoctor who uses the body parts of children with albinism. It

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<sup>92</sup> Any person who, otherwise than in laying information before a court, a police officer, a Chief, or other proper authority, accuses any person with being a witch or with practicing witchcraft or names or indicates any person as being a witch or wizard shall be liable to a fine of £25 and imprisonment for five years.

<sup>93</sup> Section 5: Any person...shall be liable to a fine of £25 and to imprisonment for five years.

<sup>94</sup> Section 6: Any person...shall be liable to a fine of £50 and to imprisonment for ten years.

limits the application to witches and wizards, and thus cannot be used to prosecute traditional healers. It therefore will meet the criticism of those who want the law to differentiate between traditional healers and witchdoctors. The *Act* further declares that it is illegal to be a witchfinder or witchdoctor and imposes a sentence of life imprisonment on anyone who practices as a witchdoctor, witch finder or professional maker or mixer of poison.<sup>95</sup> This section could be used to prosecute witchdoctors who use the body parts of children with albinism. However there is a conflict between these sections and section 4 which punishes anyone who accuses anyone of being a witch or of practising witchcraft. How will the legal system prove that someone is representing himself as a having or exercising the power of witchcraft if they can't rely on a witness account? The *Act* also imposes a fine and imprisonment on anyone who uses or assists in using any lot or charm with a view to the commission of any unlawful act.<sup>96</sup> Therefore if the body part of a child with albinism is used by the witchdoctor to give a person powers to commit a crime, the *Act* will apply. The *Act* further states that “[n]othing in this Act shall affect the liability to the death penalty of any person who under pretence of... using any lot or charm commits wilful murder.”<sup>97</sup> Therefore if a body part of a child with albinism is used in such a way that the result is murder of another person, the *Act* will apply.

#### 4.7.2 Tanzania

The *Witchcraft Act* describes the crimes punishable. The *Act* states that it is an offence to represent yourself to have the power of witchcraft, have a supply and advise a person on the use of an instrument of witchcraft, threatens or uses witchcraft or an instrument of witchcraft.<sup>98</sup> This section can be used to prosecute witchdoctors. The *Act* also states that a person who names or indicates any person

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<sup>95</sup> Section 8

<sup>96</sup> Section 9: Any person...shall be liable to a fine of £5 and to imprisonment for one year.

<sup>97</sup> Section 10

<sup>98</sup> Section 3: Any person who— (a) by his statements or actions represents himself to have the power of witchcraft; (b) makes, uses, has in his possession or represents himself to possess any instruments of witchcraft; (c) supplies to any other person any instrument of witchcraft; (d) advises any other person upon the use of witchcraft or any instrument of witchcraft; or(e) threatens to use or resorts to the use of witchcraft or any instrument of witchcraft upon or against any person or property, commits an offence under this Act.

as being a witch or wizard with the intentions stated in the Act commits an offence.<sup>99</sup> This section is similar to a section in the *Malawian Witchcraft Act*. It will also make producing evidence difficult as a witness cannot testify against a witchdoctor. The Act further states the punishment of committing an offence with the intentions stated. It also states the punishment for committing an offence with none of the intentions stated.<sup>100</sup> The Act also punishes a person who abets or attempts to commit an offence.<sup>101</sup> The Act punishes a person who “*employs or solicits any person to resort to the use of witchcraft or any instrument of witchcraft for any purpose whatsoever.*”<sup>102</sup> This section can be used against witchdoctors.

#### **4.8. An analysis of the use of the cultural defence in the context of crimes against children with albinism in Malawi and Tanzania**

This section defines the cultural defence and shows its application in the context of the crimes against children with albinism.

##### **4.8.1 Definition**

*US Legal* states that

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<sup>99</sup> Section 4: Any person, otherwise than in the course of communicating information to or obtaining advice from a court, a member of the police force, a local government authority or any public officer— (a) whether with or without any of the intents mentioned in subsection (1) of section 5, names or indicates any person as being a witch or wizard by imputing to him the use of witchcraft or any instrument of witchcraft with intent to cause injury or misfortune to any person or class of persons or to cause damage to any property; or (b) with any of the intents mentioned in subsection (1) of section 5, names or indicates any person as being a witch or wizard, commits an offence under this Act.

<sup>100</sup> Section 5: (1) Any person who commits an offence under this Act with intent to cause death, disease, injury, or misfortune to any community, class of persons, person, or animal, or to cause injury to any property shall be liable to imprisonment not less than seven years. (2) Any person who commits an offence under this Act without any intent such as is described in subsection (1) of this section shall be liable to a fine of not less than one hundred thousand shillings or imprisonment of not less than five years.

<sup>101</sup> Section 6: A person who abets or attempts to commit an offence under this Act commits such an offence.

<sup>102</sup> Section 7: Any person who employs or solicits any other person to resort to the use of witchcraft or any instrument of witchcraft for any purpose whatsoever commits an offence.

*“[i]n criminal law, a cultural defense, a novel theory, is a defense to the prosecution for a criminal act which, according to the defendant results from his/her cultural background.”<sup>103</sup>*

#### **4.8.2 Usage/ effect in criminal law**

If the perpetrators of the crimes are tried in a court, they are likely to use the cultural defence to avoid being found guilty, or to reduce the sentence given by a judge. *Strasburger* states that the defence is used to assert that even though the defendant's actions are unacceptable in the legal system in which they occurred, the actions are legally and socially acceptable in the defendant's culture. Thus according to *Strasburger*, the defendant's culture exerts more influence on the defendant and causes the defendant to act in a way that is consistent with that influence. If we apply this thinking to the situation that is the focus of this dissertation, we can say that witchcraft exerts a stronger influence on the perpetrators of the crimes than the legal system in place in Malawi and Tanzania.

*Strasburger* states that treaties such as the *CRC* place an obligation on states to protect the right to culture. Thus the governments of Malawi and Tanzania would be obliged to respect the right to practice witchcraft as a form of culture and a belief. However the governments cannot respect a belief that causes the human rights of children with albinism to be violated. The right to life and freedom of person have to outweigh the right to culture and belief in this case. Even if the client or witchdoctor could prove that witchcraft exerted a powerful influence on them, it cannot justify the murders and physical attacks on children with albinism. The cultural defence has been used by the defence in South African courts to mitigate the sentence imposed by the court by stating that the accused acted as a result of a belief in witchcraft. It has can also be used to negate the element of unlawfulness. The defence has been used in South Africa in cases where the accused killed a person whom they believed is a witch. Thus they were acting out of self-defence as the actions of the witch are likened to a violent act perpetrated by another person upon them. The actions taken by witchdoctors, attackers and clients cannot be defined as self-defence because

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<sup>103</sup> <https://definitions.uslegal.com/c/cultural-defense/>



persons with albinism are not attacking them but are actually the victims of violent attacks by the aforementioned persons.

*General Comment 9* states that children with disabilities must be protected from cruel inhuman or degrading treatment. It also states that “[p]articular attention should be paid here on areas where the rights of children with disabilities are more likely to be violated or where special programmes are needed for their protection.”<sup>104</sup> The *General Comment* places a moral obligation on the governments of Malawi and Tanzania to not allow the use of the cultural defence against the crimes committed children with albinism because it's an area where the rights of children with disabilities are more likely to be violated.

#### **4.8.3 Freedom of belief in Tanzania and Malawi**

The right to practice of a witchcraft belief is protected by article 18 of the *UDHR*<sup>105</sup>, article 18(1) of the *ICCPR*<sup>106</sup>, section 33 of the *COM*<sup>107</sup> and section 19(1) of the *COURT*<sup>108</sup>. Article 8 of the *ACPHR*<sup>109</sup> does not include the word belief, only conscience and religion. Witchcraft is not considered a religion in Africa as it is in Europe. Therefore the term does not fall under the term religion. It also doesn't fall under the term conscience. Therefore article 8 does not apply. The culture that this dissertation focuses on is witchcraft.

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<sup>104</sup> Para 34

<sup>105</sup> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

<sup>106</sup> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

<sup>107</sup> Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.

<sup>108</sup> 19.-(1) Every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion of faith. (2) without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation Of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.

<sup>109</sup> Freedom of conscience, the profession and free practice of religion shall be guaranteed...

The right to freedom of thought, conscience and religion is guaranteed in section 33 of the *COM*.<sup>110</sup> The right to freedom of belief cannot be limited in terms of section 44(1)(h) of the *COM*.<sup>111</sup> This means that the right to practice witchcraft cannot be limited in Malawi. The government thus is obliged to prosecute the acts committed as a consequence of the belief.

The right to freedom of thought or conscience, belief or faith is guaranteed in subsections 19(1)<sup>112</sup> and 19(2)<sup>113</sup> of the *COURT*. Witchcraft is an example of a belief. The right to freedom of belief can be limited in terms of subsection 19(2) of the *COURT*. This subsection allows the government to interfere with the exercise of this right. Thus if the practice of witchcraft violates any law the government can intervene. The practice of witchcraft is causing the violation of the rights of children with albinism. Thus the government can limit the practice of witchcraft. Subsection 30(1) of the *COURT*<sup>114</sup> does not allow the exercise of a right in a manner that infringes the rights of another person. The practice of witchcraft is infringing upon the rights of children with albinism. The exercise of the practice of witchcraft in this way is a violation of subsection 30(1) of the *COURT*.

#### **4.9. An application of the best interests principle in the context of the crimes against children with albinism**

This section outlines how the best interests of the child can be used to counter the cultural defence as outlined in the chapter above.

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<sup>110</sup> Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.

<sup>111</sup> There shall be no derogation, restrictions or limitation with regard to... (h) the right to freedom of conscience, belief, thought and religion and to academic freedom...

<sup>112</sup> Every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion of faith

<sup>113</sup> Without prejudice to the relevant laws of United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.

<sup>114</sup> The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.

The best interests of the child principle is contained in article 3(1) of the *CRC*<sup>115</sup>, article 4(1) of the *ACRWC*<sup>116</sup> and article 7 of the *CRPD*. The principle dictates that, in any decision made or action taken which has an impact upon a child, the child's interests must be one of the most important factors. *Alston* states that the best interests principle is used to resolve conflicts between different rights in the *CRC*.

In the context of children with albinism the competing interests are right to practice a belief and the best interests of the child. Therefore we need to resolve the conflict between these two rights. *Alston* also states that the best interests principle has not been defined in any legal document. Therefore we have to look at how the Committee on the Rights of the Child has interpreted it. *General Comment 9* states that the best interests of the child shall be a primary consideration. It also states that the principle covers all aspects of care and protection for children.

*Strasburger* states that Article 3 of the *CRC* gives insight into the content of the best interests principle. *Strasburger* states that the Article 3 shows that care and protection are important to the best interests of the child. *Strasburger* states that “[t]his text is used to ensure that situations regarding care and protection that are not explicitly covered by the text of the *CRC* do not slip through the cracks.”<sup>117</sup> Children with albinism require care and protection because they are threatened with violence and deprivation of their rights. Thus the governments of Malawi and Tanzania need to take all steps to care and protect them. The duty also comes from article 16 of the *CRPD* which mandates states to take action to protect persons with disabilities from “all forms of exploitation, violence and abuse...” The use of the body parts of children of albinism for magical purposes is a form of exploitation.

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<sup>115</sup> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

<sup>116</sup> In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

<sup>117</sup> *Strasburger*

*General Comment 13* states that

*“[t]he right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention...”*<sup>118</sup>

*General Comment 13* also states that the interpretation of the best interests principle must be consistent with the whole of the *CRC*. It further states that the principle cannot be used to justify practices that conflict with a child's human dignity and right to physical integrity. The *Comment* also states that the best interests of the child are served by preventing all forms of violence and by investing in human, financial and technical resources “*dedicated to the implementation of a child rights-based and integrated child protection and support system.*”<sup>119</sup> This *General Comment* emphasises that the best interests of a child outweighs any practice that results in violent conduct against a child. Thus the best interests of children with albinism are more important than any right to practice witchcraft that results in violence against them.

*General Comment 13* states that “...[t]he general comment is based on the following fundamental assumptions and observations: (a) “*No violence against children is justifiable; all violence against children is preventable...*”<sup>120</sup> This places a moral obligation on the governments of Malawi and Tanzania to prevent violent conduct taken against a child with albinism. *General Comment 13* states that “...shall take ...” “*Shall take*” is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake “*all appropriate measures*” to fully implement this right for all children.”<sup>121</sup> This *General Comment* means that the governments of Malawi and Tanzania have a moral obligation to provide care and protection to children with albinism.

The right to practice a belief is a recognised human right and is protected in a number of international, regional and national legal instruments. However the best interests of a child must be respected. *A/ston* also states that culture should not be

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<sup>118</sup> Para 3f

<sup>119</sup> Para 61

<sup>120</sup> Para 3

<sup>121</sup> Para 37

held to be a human right that cannot be limited. *Alston* also states that there are already many cultural practices that have been recognised as being against human rights norms such as foot binding and child slavery. The practice of killing children with albinism in order to cut off their body parts for use in witchcraft is a practice that has to yield to human rights norms. We cannot condone a practice that results in the death of children.

*Strasburger* states that when a court allows the cultural defence to succeed in child abuse cases, “*it is determining that the best interests of the child lie in cultural respect and not in the protection of children from violence.*”<sup>122</sup> We can use a similar line of thought in the context of the violations committed against children with albinism. If we allow courts to accept a cultural defence against a charge of for example murder, then we are determining that the best interests of children with albinism lie in witchcraft practices rather than in their protection from violence and murder.

*Strasburger* states that allowing the cultural defence results in a state violating its responsibility under the *CRC* to protect children from physical violence. In a similar way, the use of the cultural defence in the context of violations against children with albinism would violate the governments of Malawi and Tanzania's responsibility under the *CRC* to protect children from physical violence.

*Strasburger* states that the European Court of Human Rights has stated that children are “*entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.*”<sup>123</sup> The assaults that are experienced by children with albinism are serious breaches of personal integrity. Therefore the governments of Malawi and Tanzania should provide children with albinism with protection in the form of “effective deterrence.” The action taken by the governments does not fit into the description of effective deterrence. Prosecution of offenders would be a more effective deterrent.

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<sup>122</sup> *Strasburger* 163

<sup>123</sup> *Strasburger* 178

*Strasburger* states that

*“Therefore, the comparison between the right to protection from violence and the right to cultural enjoyment shows that the ECtHR favors the right to protection from violence.”<sup>124</sup>*

The fact that the capital punishment of children has been discouraged by article 37 of the *UNCRC*<sup>125</sup> shows that the international community sees the killing of children as a violation and seeks to protect their right to life. If the international community discourages state sanctioned killing of children, then it cannot lower the standard to allow individuals to kill children with albinism because they have a belief in witchcraft.

*Strasburger* states that the cultural defence can be used to escape conviction and mitigate punishment. *Strasburger* further states that the use of the cultural defence is a significant threat to protecting children from violence. A similar conclusion can be made in the context of violations against children with albinism. Allowing the use of the cultural defence against a case of murder for example, will be a condonation of violence against children. This will go against the shift in thinking that violence against children is wrong and has resulted in practices like corporal punishment in schools and homes and child abuse being outlawed in many countries.

*Strasburger* states that

*“While the exact number of child abuse cases involving the cultural defense is unknown, the number is definitely increasing and is continually difficult to determine. Accordingly, the use of the cultural defense presents a significant threat to children.”<sup>126</sup>*

The attacks on children with albinism have also become frequent. Thus allowing the cultural defence would protect persons who will continue to attack them, and thus in this context, the use of the cultural defence is also a significant threat to the lives of children with albinism.

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<sup>124</sup> *Strasburger* 194

<sup>125</sup> States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

<sup>126</sup> *Strasburger* 174

*Strasburger* states that only a few decisions are needed to determine the legitimacy of the cultural defence. If courts in Malawi and Tanzania continuously reject the cultural defence, then the legitimacy of the defence will be challenged and eventually the violence against children with albinism will be outlawed.

*Strasburger* states that the use of the cultural defence is a form of state action and is thus covered by the best interests principle. *Strasburger* further states that the use of the cultural defence means that a perpetrator is allowed to return to the same environment as a child victim (or other children or family members of children) and this fact also falls within the scope of the best interests principle. *Strasburger* also states that the perpetrator will return to the environment having received minimal reformatory or punitive measures. This then means that the government is not acting in a child's best interests. The same can be said for perpetrators of violations and crimes against children with albinism. If we allow the cultural defence to be used, they will be able to re-enter the society that the children with albinism live in and carry on perpetrating abuses.

*Strasburger* states that

*“Allowing parents to abuse their children and claim it was culturally acceptable seems at odds with a mandate to protect children from all forms of violence. If a parent can perform any type of violence and receive a reduced punishment or even no punishment at all, the child does not seem to be protected, as there is no deterrent or rehabilitation preventing the reoccurrence of the acts.”*<sup>127</sup>

The same can be said of perpetrators of violations and crimes against children with albinism. If we allow the cultural defence, then we are not honouring the mandate to protect children with albinism from violence.

*Strasburger* states that a parent who uses the cultural defence against a charge of child abuse will not comprehend the illegality of their acts. *Strasburger* points out that spending time in jail or in counselling has an opposite effect. The principle that can be gained from this quote is that if we allow perpetrators to use the cultural defence,

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<sup>127</sup> *Strasburger*

it will send out a message to other perpetrators that we are condoning the violations and crime committed. Thus we will encourage the same perpetrators to continue committing violations and abuses, and encourage other people to commit them.

Strasburger states that

*“The Derriviere case shows how the cultural defense is at odds with the right to protection from all forms of violence. The courts released an abusive, immigrant father without finding him culpable for fracturing his daughter’s wrists. In less than a year, the father was convicted of abuse for punching his son in the face. The court had an initial opportunity to protect the child from violence through counseling, imprisonment, or other punishment but instead chose to let the father go. This case shows how contradictory to the CRC and the right to protection from violence the cultural defense actually is. In- stead of protecting children from violence, the cultural defense essentially condoned violence in this case, resulting in more violence towards children.”<sup>128</sup>*

The same situation will happen if we allow the cultural defence to be used. Perpetrators will attack more children with albinism and instead of solving the current situation, the governments of Malawi and Tanzania will be allowing it to continue. They will be failing to meet their international, regional and national commitments to children with albinism.

## **10. Aims of punishment**

The crimes committed against children with albinism deserve the harshest punishment as they violate the rights to life and freedom of person of children with albinism. Children require more protection as they are considered vulnerable. Children with albinism are in a more vulnerable position as they belong to a minority that has suffered due to incorrect cultural beliefs. Hoctor states that

*“In S v Phama (1997 (1) SACR 485 (E) 487 (also reported in the All South African reports, cited supra)) Jones J, noting that two innocent people were*

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<sup>128</sup> Strasburger 190 - 191



*deliberately and needlessly killed, stated the following: “Nothing can undo the dreadful wrong that has been done to them. Society demands that other people like them should not suffer the same fate. The deterrent and preventive elements of criminal justice, and also, but not to the same extent, the retributive element, require that my sentence should reflect the revulsion of society at the readiness to resort to criminal violence; the horror of society that human life should be made so cheap; and the need to show the accused and other potential offenders that the price they must pay for resorting to murder in order to eliminate an alleged witch or wizard from their midst is not worth it.”<sup>129</sup>*

An application of this quote to the situation outlined in this dissertation obliges the courts in Malawi and Tanzania to reject the cultural defence and instead give a harsh sentence that fulfils the deterrent and preventive objects of sentencing. The crimes committed warrant such sentences.

*Hoctor* further states that

*In S v Alam (2006 (2) SACR 613 (Ck)), the court held, in the context of a killing to obtain blood for a “traditional healer”, that there was “no evidence that [the accused] believed in witchcraft when he stabbed the deceased” (par [19]). The context of ritual murder would suggest otherwise.<sup>130</sup>*

The same could be said of the attackers who attack children with albinism. Their motivation is money rather than witchcraft. Therefore the cultural defence should fail in their case. Children with albinism are also more vulnerable than other children because their communities are isolated, they are a minority group, they have access to fewer resources such as legal representation and they are not treated as human beings by the rest of society. Thus they deserve extra protection from the governments of Malawi and Tanzania.

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<sup>129</sup>Hoctor S, Belief in witchcraft as a mitigating factor, 2012, *Obiter*, 387

<sup>130</sup>Hoctor 388

## **Conclusion**

This chapter has shown that the concepts witchcraft and witchdoctor are controversial terms that need to be given concrete definitions so as to aid legal officials in their work. It has also shown that the witchcraft laws in place are archaic, confusing and of little assistance in combatting witchcraft related crimes. There is a need to review them in both countries. The chapter has also shown that the best interests principle cannot be sacrificed to respect the right to practice witchcraft. It would be a denial of the vulnerability of children and the right to protection from violence.

## **CHAPTER FIVE**

### **Recommendations**

#### **5.1 Recommendations for both governments**

- Establish a special body mandated with coordinating efforts to stop the victimisation of children with albinism, and to monitor the efforts
- Utilise the national human rights bodies in place to raise awareness and educate people about the rights of children with albinism, as well as investigate cases
- Train the legal personnel involved in combating the victimisation so that they understand the problem, the rights of children with albinism and counter any cultural beliefs that may be preventing them from assisting children with albinism to access justice
- Provide protection to witnesses and victims to ensure that they are protected from perpetrators
- Ensure that Legal Aid bodies have sufficient personnel and resources to assist children with albinism to access justice
- Educate children with albinism and their families about their rights at national, regional and international levels
- Use the media to discuss the challenges faced by and rights of children with albinism
- Undertake a study of the cultural practices that cause the attacks on children so as to understand them and in consequence act to change any practices or thinking that causes the attacks
- Collect data on children with albinism to use in the planning of efforts to combat their victimisation
- Provide enough money in the national budget to ensure that all personnel can combat the victimisation of children with albinism
- Provide counselling to family members of children with albinism who have been killed or attacked

## 5.2 Recommendations for the government of Malawi

- Educate and raise awareness among communities about the rights of children with albinism

## 5.3 Recommendations for the government of Tanzania

- Enact new laws similar to those in Malawi to prosecute perpetrators for crimes against children with albinism

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