



Malawi

Successes and Challenges in Relation to Actions against Trafficking in Persons and Smuggling of Migrants in Malawi

I. Introduction

Albeit there being significant challenges to obtain and maintain up-to-date statistics on the state of human trafficking and smuggling of migrants in Malawi, reliable information demonstrates that Malawi is used as a transit and source country for human trafficking. The porous nature of its borders and its position between some source and destination countries makes it one of the favourite routes for traffickers and smugglers. As a consequence, Malawi registers considerable numbers of trafficking within its borders and without. The purpose of trafficking is usually for labour and sexual exploitation (prostitution). In some instances, the case of trafficking will have transformed from a case of smuggling. A victim of trafficking might have given consent to be smuggled out of their country, paying sums of money, only later to turn into a victim of trafficking. This presentation will highlight some of the hallmarks of Malawi's legal regime when it comes to trafficking in persons (TIP) and smuggling of migrants (SOM). It will then provide some statistics and discuss the trends in terms of prosecution. This will be followed by a discussion on the challenges, and how stakeholders have responded to them. Finally, the presentation will highlight some of the achievements and conclude with proposing the best practices in dealing with TIP and SOM.

II. The Legal Regime on TIP and SOM

1. The Trafficking In Persons Act ('TIPA')

The Trafficking in Persons Act (2015) is the principal Act dealing with issues concerning trafficking in persons. This Act provides for the prevention and elimination of trafficking in persons. The punishments for the TIP and allied offences range from 14 years' imprisonment to life imprisonment in aggravated circumstances.

2. The Child Care Protection and Justice Act ('CCPJA')

The Child Care Protection and Justice Act also criminalizes trafficking in persons but specifically relating to children under section 79. However, the sentence in the TIPA is lower than that provided for under the CCPJA. The CCPJA provides for a maximum sentence of life imprisonment, whereas the TIPA provides for a maximum sentence of 14 years' imprisonment.

3. The Immigration Act

Malawi addresses the criminalisation of smuggling of migrants through the Immigration Act under section 36, which criminalises the aiding and abetting of another person to enter the Republic of Malawi illegally. Indeed, international standards do require the criminalisation of SOM specifically and the attachment of stiff punishment to reflect the seriousness of the offence.

III. Malawi Statistics on Trafficking in Persons

Data for the year 2018 has not yet been consolidated by the police. Therefore, this part will provide statistics as at the year 2017. Malawi Police Service in 2017 registered cases in the districts of Mulanje, Mwanza, Phalombe, Mchinji, Nkhoskhosha, Mangochi and Chitipa.

In the year 2013, a total of 15 suspects were prosecuted and convicted representing conviction rate of 47%, whilst in the year 2014 the rate of prosecution was 51%, depicting an increase by 4%. In the year 2015 a total of 142 victims were rescued, 68 suspects arrested and 58 of them convicted, representing a conviction rate of 85%. There was an increase in the prosecution rate in the year 2016 by 2%. In the year 2017 a total of 121 victims were rescued, 42 suspects arrested and 26 of them convicted, representing conviction rate of 62%, representing an increase of 2% during same period of the year 2016.

For prosecutions and convictions that were tenable before the coming into force of the TIPA, the prosecutions used to prosecute the offenders on offences under the Employment Act, and the Penal Code. Hence, the enactment of the Trafficking in Persons Act is an important development in Malawi's legal system, and in the fight against TIP and allied offences.

IV. Notable Achievements in the Fight against TIPa and SOM

Malawi has made a number of important strides before and after the enactment of the TIPa. Just to highlight a few:

Establishment of Child Protection Section in Malawi Police Service

Firstly, there was established a Child Protection Section in the Community Policing Services Branch of Malawi Police Service (MPS) in 1998, with the aim of contributing towards the provision of a protective environment for residents of Malawi. This also focuses on TIP cases and child victims.

Launch of National Plan of Action against TIP

Secondly Malawi launched the National Plan of Action against Trafficking in Persons (2017-2022), which sets concrete and specific time-bound measures. One of the aims, for instance, is the reduction of trafficking in persons' cases by 50% by 2022.

Operationalisation of the Anti-Trafficking Fund

Thirdly, Malawi operationalised the Anti Trafficking Fund established under the Act, whose aim is to be used towards the safeguarding of the interests of the victims of trafficking and SOM, and the advancement towards the training of enforcement officers under the Act. The fund is generally instrumental to the implementation of the Act. It takes resources to take down a lucrative criminal enterprise.

The Development of Training Programmes in Response to Challenges Encountered in the Prosecution of TIP Cases

Challenges encountered during the prosecution of TIP cases, which brought out among other facts, that of the lack of familiarity among investigators, prosecutors and the courts with the unique nature of these offences, led to the development of training programmes to address those challenges.

Just to illustrate – in the case of *Raphael Saidi v Republic Crim App. No. 4 of 2016*, the appellant was convicted by the First Grade Magistrate (FGM) of the offence of forgery, contrary to section 35 of the Immigration Act. The clear intention of the prosecution in this case was to charge the Appellant for trafficking in persons – but the TIPa was not yet in operation at the time – as the particulars of the offence detailed some elements of trafficking in persons. The court found that there was absurdity and lack of clarity in the particulars of the offence. The court also elaborated the manner in which a TIP charge should be drafted by the prosecutor and the elements that needed to be proved for the offence to be made out at the required standard. This case is one of the lesson cases, as it revealed the need for the prosecutor to exercise great care in charging TIP or related offences.

Similarly, in the case of *Joseph Pasula Phiri v Republic Criminal App. No. 101 of 2017*, the Appellant was charged with offending section 14 (1) of the TIPa, and was convicted on his own plea of guilt, sentenced to 10 years by the First Grade Magistrate's ('FGM') Court. He appealed on the basis that the FGM did not follow proper procedure following a plea of guilt. The other challenge was that the charge did not properly outline the essential elements of the offence charge. The court set aside the conviction and ordered a retrial on the request of the State.

These developments have been responded to by working towards the training of all stakeholders through the National Coordination Committee that is established to oversee the implementation of the TIPa, and the Women Judges Association of Malawi ('WOJAM').

High Court Decisions that Have Served to Provide Guidance

Judgments handed down from the High Court of Malawi sitting as Appellate Court in TIP cases have served to provide guidance in the prosecution of TIP cases that in Malawi is a relatively new area.

Just as an example, in the case of *Dyson Kampani v The Republic Criminal App. No. 485 of 2017*, although the case faced similar challenges in the subordinate court, the High Court upheld the State's submissions that the procedural errors were curable, as all the elements of the offence of TIP were proffered before the First Grade Magistrate at Dedza. The court confirmed the sentence of 9 years IHL. Even though the procedural errors were held to be curable – the fact that the High Court found them to be errors is very instructive to both investigators and Prosecutors, who would want to avoid such errors.

A more recent case is that of *Republic v Gerald Phiri and Nine Others*, Criminal Case No. 109 of 2018. This case, although it is still ongoing before the High Court of Malawi, registered a conviction with respect to a trafficking in persons charge against the first accused person alone on his own plea of guilt.

IV. Challenges in Handling TIP and SOM Cases

Earlier prosecution of cases revealed challenges among investigators, prosecutors and the courts in their understanding of the unique nature of these offences. This is demonstrable by the cases that have been handled in the First Grade Magistrate's Court. The cases on appeal had manifested inadequacies in evidence provided by the investigators, inadequacies which were not identified by the prosecutors and not addressed by the Magistrates. The result has been acquittals, and convictions for lesser offences. In rare cases, the convictions have been upheld. This, among other initiatives, has been responded to by working towards the training of all stakeholders through the National Coordination Committee that is established to oversee the implementation of the TIPA, as well as WOJAM.

Secondly, inadequacies in terms of material resources have been a major drawback, particularly in the investigation of such crimes of a transnational nature. As a result, the gathering of intelligence by the investigators, to enable them to have a more proactive rather than a reactionary investigative approach, has been highly impeded. The response has been to work, again through the NCC that has now activated the Anti-Trafficking Fund established under the TIPA, to facilitate the meeting of such needs.

Thirdly, the other notable challenge is the minimal coordination between the investigator and the prosecutor. This has resulted in the gathering of insufficient or irrelevant evidence for proving the TIP and allied offences. This challenge may be coupled with the fact that the cases have mostly been handled in lay magistrate courts and prosecuted by untrained prosecutors.

Fourthly, the presence of two Acts, TIPA and CCPJA, that criminalise trafficking in children poses a great difficulty as CCPJA punishes the offence with life imprisonment, whilst TIPA with 21 years' imprisonment.

Finally, with respect to the SOM, the challenge has been that the Immigration Act is not adequate to hold smugglers accountable. For instance, were a smuggler to be a subject of an extradition request in Malawi, he or she might not be extradited if there was a challenge in Court, because it is not a relevant offence under the Extradition Act.

V. Conclusion

Agreed international best practices on combating TIP and SOM include the use of progressive methods of investigations, the fluid interaction between TIP and SOM investigators and prosecutors, the maintenance of proper records, the provision of clear and specific laws on TIP and SOM, victim/witness support and protection, and the provision of clear mechanisms of disgorging the proceeds of these crimes from the beneficiaries of the crime.

The TIP legal regime in Malawi is strong enough to ensure that offenders are brought to book. Although the statistics may not show fully to what extent TIP is a problem in Malawi, present data shows that the country is more of a transit and source country than it is a destination country for trans-border trafficking. There is hope in terms of some of the notable cases that have made their way before the High Court right before and after the enactment of the TIPA. There is a lot of room for improvement, but the country is heading in the right direction.