



REPUBLIC OF MALAWI

**NATIONAL PLAN OF ACTION  
AGAINST TRAFFICKING IN  
PERSONS**

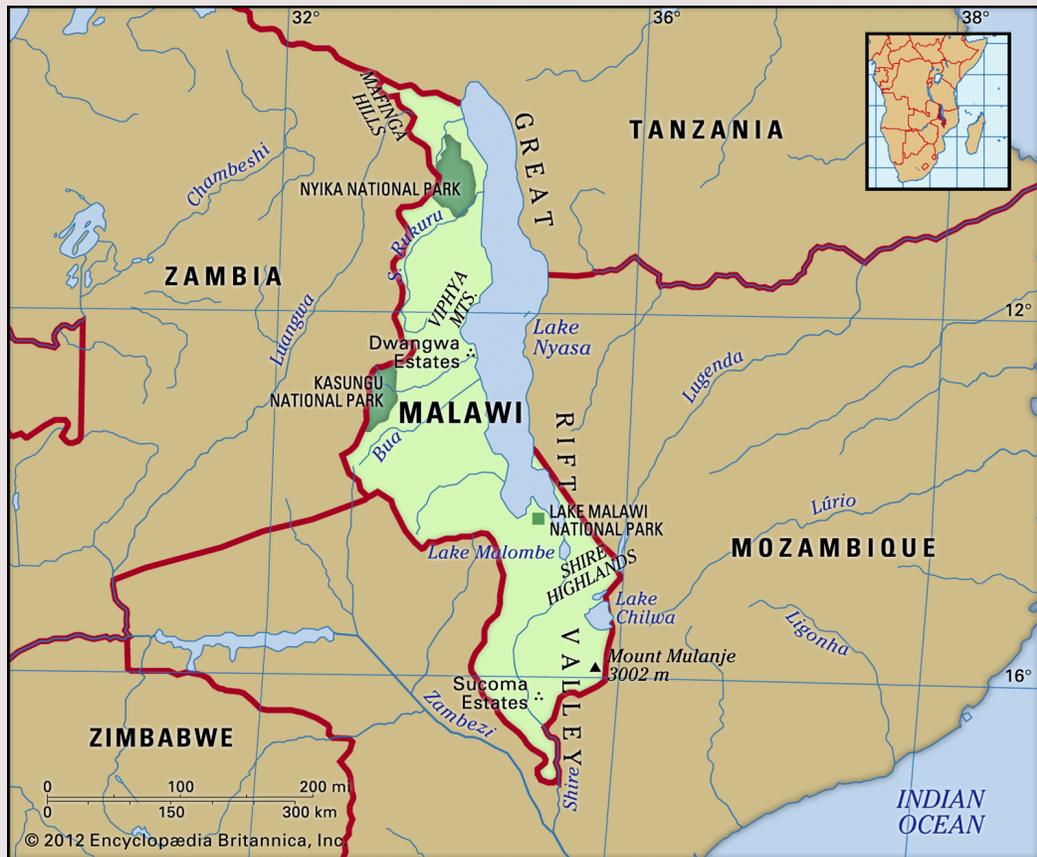
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MINISTRY OF HOMELAND SECURITY  
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MALAWI

# Smuggling of migrants- Malawi

Justice Fiona A Mwale



# Malawi - Context

**What is known about how migrant smugglers are organized and the types of services they provide?**

Context: Malawi is a landlocked country, historically a labour exporter (federation of Rhodesia and Nyasaland)

Largely low level actors between Malawi and Tanzania, Zambia and Mozambique mostly for fisheries and agriculture around border towns

Slightly more sophisticated and organized groups facilitating migration to mining and factory ventures in Zimbabwe and South Africa

More sophisticated smuggling syndicates (Chinese) factories in RSA and passing through traffic of smuggled migrants from Ethiopia (Horn of Africa) cross over to South Africa

# What is known about how migrant smugglers are organized and the types of services they provide?

There is an active process of recruitment for smuggled migrants, with an organized network usually involving known people within communities facilitating the process and immigration and police, while different actors may facilitate movement.

Extortion is also common, where the smugglers request for more money and in such cases, some smuggled victims have been killed on the journey so that the relations do not testify.

Shift of victims from traditional sectors with more demand (such as agriculture) or changed forms of exploitation.

There are indications of syndicates utilizing the asylum system working with registered and processed refugees connected to smuggling and trafficking syndicates.

New practices have evolved, including: increased use of internet; transporting migrants using bikes, canoes and government vehicles; hiring of passports (using fake travel documents); and educational scholarships.

Smuggling costs range from as low as USD10 to as high as USD2,000 for those traversing more countries to their final point of destination.

# Challenges

Type of challenge	Description
Technical	<ul style="list-style-type: none"><li>• Difficulty in distinguishing between trafficking in persons and smuggling of migrants</li><li>• Difficulty in determining where in the spectrum of offenders smugglers fit in – either full-time professionals belonging to organizations or individuals carrying out migrant smuggling activities on an ad hoc basis.</li><li>• Criminal justice approach pays little attention to the rights of the smuggled migrant</li></ul>

# Challenges contd.

Type of challenge	Description
Political	Lack of consensus in approach to smuggling and xenophobia as well as restrictive immigration policy amongst states
Attitudinal	Myths in law enforcement and adjudication about consent of victims
Physical	Porous borders and illegal crossing points
Corruption	Complicity of law enforcement immigration officers

# Challenges Contd.

Financial	<ul style="list-style-type: none"><li>• Limited financial resources to timely carry out cross border investigations, usually places victims at a greater risk since the perpetrators, in order avoid arrests, are able to move the victims to locations where tracing sometimes becomes almost impossible</li><li>• Most member countries do not have the capacity or are not comfortable to finance repatriation of victims of human trafficking from other countries since such activities are never included in their national budgets.</li></ul>

# Cases highlighting some of the challenges (technical and attitudinal)

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## **Criminal Case No. 356 of 2019, Republic v Richard Jeremia, FGM Mchinji**

- 4 counts of trafficking in persons contrary to section 14(1) of the TIPAA
- Fraudulently trafficked 4 persons for the purposes of exploitation in Zambia
- The trial court acquitted the accused on all 4 counts because although the 4 complainants were intercepted at the border to Zambia without travel documentation with the purposes of getting jobs in Zambia, the prosecution did not prove exploitation or recruitment since it was the complainants who approached the accused.
- Review: In the circumstances, the facts reveal the offence of smuggling rather than trafficking. Exploitation can be inferred from circumstances such as these where the victims are transported without travel documents.
- It is a known fact that you need travel document and work permits to reside and work in a foreign country. The victims had no papers whatsoever and the accused knew what he was doing was wrong because he told the victims not to reveal at the border that they were going to Zambia for work because that is not allowed.
- The only jobs illegal migrants get in foreign countries are exploitative. The accused has a Zambian wife, he knew the ropes. Even though he was the one who was approached to find the victims jobs, the moment he agreed to pay for their transport with a view to being reimbursed for his troubles meant he was being paid for recruiting people to go and work in Zambia where because they do not have papers, they will not get minimum wage. These circumstances are enough to infer exploitation.
- Prosecution could have done more by bringing evidence of the cell phone text messages between “the boss” and the accused. There was obviously more to their relationship than meets the eye.
- Prosecution should also have brought evidence that people with no work permits are often exploited and no one can get a work permit to work on a farm as a laborer because it is unskilled work. There are enough Zambians to do unskilled work so there is no way the victims would have been able to get work permits.

## Cases highlighting some of the challenges (technical and attitudinal)

Republic v Mzumba Phiri and Others (Criminal Review No. 234 of 2019)

[Being case No. 445 of 2019 before the FGM sitting at Mchinji]

- Referral by the Chief Resident Magistrate (Centre)
- 3 convicts were each convicted of **five counts of trafficking in persons** and were sentenced to 24 months imprisonment for each of the five counts, suspended for a period of 36 months on condition that the convicts do not commit similar offences in that time.
- Four accused persons were acquitted at the case to answer stage.

# Cases highlighting some of the challenges (technical and attitudinal)

## Facts:

- At plea, all 7 accused persons pleaded not guilty and the State called 3 witnesses.
- The first witness' evidence directly implicated the 6<sup>th</sup>, 7<sup>th</sup> and 1<sup>st</sup> accused persons, now the convicts. The 6<sup>th</sup> and 7<sup>th</sup> accused persons recruited the victims for farm work in Zambia, the 1<sup>st</sup> accused was the instigator who paid the other two to recruit the victims.
- The other four accused persons were "kabaza" or bicycle taxi operators whose job was to merely transport the victims.
- There were 9 victims, 6 adults and 3 children.
- The route they took to Zambia was unchartered one so as to evade the police.
- However, they were soon intercepted by the police and on the way to the police stations they found 1<sup>st</sup> 6<sup>th</sup> and 7<sup>th</sup> accused on the road, who were also apprehended at that point.

## **Cases highlighting some of the challenges (technical and attitudinal)**

### **Order on Review**

- Conviction was unsafe and quashed as plea was not entered correctly
- Accused to be retried by a different magistrate
- Issues of sentence to be addressed
- High Court noted that some accused were wrongly acquitted

# Conclusion

This case is typical of many cases- there has been a lot of training on trafficking, which is backed by a robust legal framework as opposed to smuggling for which there has been no training and the legal framework is weak.

# Recommendations

- Look beyond a legal solution- smuggling requires inter state cooperation and commitment to recognise and protect the rights of victims and this often goes against Government policy
- Too much emphasis on trafficking has left smuggling behind – the result is that because there is consensus on trafficking and better frameworks, every case is prosecuted as a trafficking case (failure to appreciate differences between trafficking and smuggling)
- Lack of technical expertise in prosecution of smuggling – lack of training there has been no attempt to determine who is a smuggler and the different levels of complicity – training in trafficking should always be accompanied by training in smuggling

# Recommendations

Training also needs to address attitudes, stereotypes and myths if victims are to be recognised and their rights protected.

Make TIP and smuggling a political commitment so that operational costs can be budgeted for

# References

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1. Chana Chelemu-Jere, *Assessing COVID-19 Impact on Mixed Migration Flows: Trafficking in Persons, Smuggling Of Migrants, and Related Protection Risks in Malawi, Mozambique And Zimbabwe*, 2<sup>nd</sup> Draft Report 12<sup>th</sup> September 2023
2. Barbra Mchenga Tsiga, *Analysis of the Criminal Justice Response to TIP and trends in the Malawi TIP Jurisprudence*, UNODC Malawi, January 2019