

# Country Report: Malawi<sup>1</sup>



Funding provided by  
the United States Government

## I. Introduction

### *Country Overview*

The Republic of Malawi (Malawi) is a presidential republic located in the Great Lakes region of Africa. It is bordered by Mozambique to the south, Zambia to the west, and Tanzania to the northeast.<sup>2</sup> Formerly a British protectorate, Malawi first gained its independence in 1964.<sup>3</sup>

Malawi is one of the world's most densely populated and least developed countries.<sup>4</sup> Its economy is “constrained by policy inconsistency, macroeconomic instability, limited connectivity to the region and the world, poor infrastructure, rampant corruption, high population growth, and poor health and education outcomes that limit labor productivity.”<sup>5</sup> The economy remains primarily tied to agricultural activity, with about 80% of the population living in rural areas; agriculture accounting for about one-third of GDP and 80% of export revenues.<sup>6</sup> Malawi’s economy and government depend heavily on assistance from the IMF, the World Bank, and individual donor nations.<sup>7</sup>

### *Trafficking in Persons (“TIP”) Context*

Malawi is a “source country for men, women, and children subjected to forced labor and sex trafficking. To a lesser extent, it is a destination country for men, women, and children from Zambia, Mozambique, the Great Lakes region, and the Horn of Africa who are subjected to labor and sex trafficking, and a transit country for people from these countries exploited in South Africa.”<sup>8</sup> As a result, Malawi has been rated a Tier 2 country by the U.S. Department of State’s Office to Monitor and Combat Trafficking in Persons (J/TIP) for a fourth consecutive year.<sup>9</sup>

J/TIP notes that most Malawian TIP victims are domestically exploited. They are transported from the southern to the northern part of the country for agricultural forced labor, predominantly in the tobacco industry, herding, and brickmaking.<sup>10</sup> Children may also be coerced from rural areas under the pretense of obtaining employment, clothing, or lodging, and tenant farmers in agricultural labor may be subjected to debt bondage.<sup>11</sup>

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<sup>1</sup> The statements and analysis contained within this report are the work of the American Bar Association Rule of Law Initiative, which is solely responsible for its content. The views expressed herein should not be construed as representing the policy of the ABA. This report was funded by a grant from the United States Department of State. The opinions, findings and conclusions stated herein are those of the author[s] and do not necessarily reflect those of the United States Department of State.

<sup>2</sup> *Malawi*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/mi.html> (last visited July 23, 2017) [hereinafter *Malawi*, CIA WORLD FACTBOOK].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016 253, available at <https://www.state.gov/documents/organization/258880.pdf> (last visited July 23, 2017) [hereinafter U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016].

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

In urban areas, girls are subjected to sexual exploitation in nightclubs or bars; also, girls who are recruited for domestic service are forced to marry and subsequently forced into child sex trafficking by their 'husbands'.<sup>12</sup> Children undergo forced labor in begging and small businesses, and are often coerced into committing criminal acts.<sup>13</sup> With respect to international trafficking, "Malawian victims of sex and labor trafficking have been identified in Mozambique, South Africa, Zambia, and Tanzania."<sup>14</sup>

The 2016 Trafficking in Persons Report finds that the Government of Malawi does not fully meet the minimum standards for the elimination of trafficking, but is making significant efforts to do so.<sup>15</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## II. Institution Mapping

### *Government Structure*

Until the 1990s, Malawi was ruled by an “entrenched Presidential dictatorship”<sup>16</sup> under the control of Hastings Kamuzu Banda.<sup>17</sup> By the mid-1990s, increasing pressure from the international community caused the government to hold a referendum, and ask the people to vote for the establishment of a multi-party democracy.<sup>18</sup> In 1994, a new Constitution was brought into place, which forms the basis for modern Malawian government.<sup>19</sup>

#### Executive

The Office of the Presidency comprises the office of the President, the Vice President, and—where relevant—the Second Vice President.<sup>20</sup> The President is the Head of State and the Head of Government, and the Commander-in-Chief of the Malawi Armed Forces.<sup>21</sup> The President and First Vice-President are elected together by simple majority popular vote for a 5-year term, and can serve up to two terms in office.<sup>22</sup> Where the President considers it desirable in the national interest, he or she may choose to appoint a second Vice-President from a different political party.<sup>23</sup>

The Cabinet is comprised of the President, both Vice-Presidents (if relevant), and “such Ministers and Deputy Ministers as may, from time to time, be appointed by the President.”<sup>24</sup> The Cabinet’ duties are to advise the President, direct, coordinate, and supervise the activities of government departments, and to draft bills for submission to the National Assembly.<sup>25</sup>

#### Legislative

Although the 1994 Constitution envisioned the formation of a bicameral legislature, in 2001 the National Assembly “passed a constitutional amendment abolishing the Senate.”<sup>26</sup> As a result, Malawi has a unicameral legislature consisting of 193 members elected by simple majority for five-year terms.<sup>27</sup>

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<sup>16</sup> Redson Edward Kapindu, *Malawi: Legal System and Research Resources*, GLOBALEX (Nov./Dec. 2014), available at <http://www.nyulawglobal.org/globalex/Malawi1.html> (last visited July 23, 2017).

<sup>17</sup> *Malawi Country Profile*, BBC NEWS (Apr. 11, 2017), <http://www.bbc.com/news/world-africa-13864367> (last visited July 23, 2017).

<sup>18</sup> *Malawi voters take part in the first multiparty election in three decades*, SOUTH AFRICAN HISTORY ONLINE (Mar. 16, 2011), <http://www.sahistory.org.za/dated-event/malawi-voters-take-part-first-multiparty-election-three-decades> (last visited July 23, 2017).

<sup>19</sup> Kapindu, *supra* note 16, at 1.

<sup>20</sup> Constitution of Malawi, 1994, arts. 78-79, available at [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>21</sup> *Id.* at art. 78.

<sup>22</sup> Kapindu, *supra* note 16, at 2.3; *Malawi*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/mi.html> (last visited July 23, 2017) [hereinafter *Malawi*, CIA WORLD FACTBOOK].

<sup>23</sup> MALAWI CONST., *supra* note 20, at art. 80(5).

<sup>24</sup> Kapindu, *supra* note 16, at 2.4.

<sup>25</sup> *Id.*

<sup>26</sup> Kapindu, *supra* note 16, at 2.5.

<sup>27</sup> *Malawi*, CIA WORLD FACTBOOK, *supra* note 22.

## Judicial

Malawi has an independent judiciary.<sup>28</sup> The highest court of Malawi is the Supreme Court of Appeal, which is comprised of a Chief Justice and three other judges.<sup>29</sup> The Chief Justice is appointed by the President upon the recommendation of the Judicial Service Commission.<sup>30</sup> The Supreme Court of Appeal has jurisdiction to hear appeals from the High Court, “and such other courts and tribunals as an Act of Parliament may prescribe”.<sup>31</sup>

Under the terms of the Constitution, the High Court has unlimited jurisdiction over all other civil and criminal proceedings;<sup>32</sup> however, pursuant to the cases of *Mungomo v. Mungomo & Others* and *Air Malawi v. Ombudsman*, the Malawian judiciary appears to have limited original High Court jurisdiction to those cases in which no other subordinate court has original jurisdiction.<sup>33</sup>

The High Court has jurisdiction to hear Constitutional questions sitting in panels of no less than three judges.<sup>34</sup> Furthermore, the High Court has a Commercial Division, created under the High Court (Commercial Division) Rules.<sup>35</sup>

Other statutory courts include the Magistrate Courts system,<sup>36</sup> which are courts of first instance and thus lack appellate jurisdiction;<sup>37</sup> the Industrial Relations Court, which has original jurisdiction over labor disputes;<sup>38</sup> and traditional or local courts, whose jurisdiction is limited to customary civil cases.<sup>39</sup>

## ***Criminal Justice***

The Malawi Police Service (MPS), operating under the Ministry of Home Affairs, has responsibility for law enforcement and order maintenance.<sup>40</sup> The Malawi Defense Force (MDF) supports the MPS and handles external security.<sup>41</sup> The Ministry of Home Affairs includes immigration officials, and has primary responsibility for the enforcement and prosecution of trafficking.<sup>42</sup>

## ***Anti-Corruption and Ethics***

Some anti-corruption mechanisms are build into the Malawian Constitution. For instance, the Constitution mandates that the state must “introduce measures which will guarantee

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<sup>28</sup> MALAWI CONST., *supra* note 20, at art. 103.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> MALAWI CONST., *supra* note 20, at 104(2).

<sup>32</sup> *Id.* at art. 108.

<sup>33</sup> Kapindu, *supra* note 16, at at 2.6.1.

<sup>34</sup> *See id.*, citing Malawi Courts Act of 1958, Ch. 3:02, arts. 9(2)-(3), available at [https://www.malawilii.org/mw/consolidatedlegislation/302/courts\\_act\\_pdf\\_20355.pdf](https://www.malawilii.org/mw/consolidatedlegislation/302/courts_act_pdf_20355.pdf) (last visited July 23, 2017).

<sup>35</sup> *Id.*

<sup>36</sup> MALAWI CONST., *supra* note 20, at art. 110(1).

<sup>37</sup> Kapindu, *supra* note 16, at 2.6.1.

<sup>38</sup> MALAWI CONST., *supra* note 20, at art. 110(2).

<sup>39</sup> Kapindu, *supra* note 16, at 2.6.1.

<sup>40</sup> U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2016: MALAWI 5 (2016), available at <https://www.state.gov/documents/organization/252913.pdf> (last visited July 23, 2017) [hereinafter U.S. DEP’T OF STATE, MALAWI HUMAN RIGHTS REPORT 2016].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

accountability[,] transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions.”<sup>43</sup>

To that end, Malawi has passed a Corrupt Practices Act, which defines a number of corruption-related crimes.<sup>44</sup> The Act also establishes an Anti-Corruption Bureau, and charges it with examining the practices and procedures of public bodies in order to discover the existence of corrupt practices, and adjust to eradicate them; advising on the means by which corrupt practices may be eradicated; engaging in information and awareness-raising campaigns; receiving complaints about corruption, and offenses under the Corrupt Practices Act; and finally report its findings to the relevant authorities.<sup>45</sup> In order to effectuate these responsibilities, the Anti-Corruption Bureau is empowered to demand the production of all relevant books, records, and reports, provided it obtains search warrants from a magistrate’s court; compel answers to questions about the duties of public officers; and “do or perform other such acts or things as are reasonably necessary or required for the exercise of [its] functions.”<sup>46</sup>

Prosecutions under the Corrupt Practices Act may not be instituted without the written consent of the Director of Public Prosecutions.<sup>47</sup>

Malawi’s Financial Intelligence Unit is authorized by law to take necessary measures for the prevention of corruption in public private bodies, including but not limited to: (i) examining the practices and procedures of public bodies and private bodies in order to facilitate the discovery of corrupt practices and secure the revision of methods of work or procedures which may be prone or conducive to corrupt practices; (ii) advising public bodies and private bodies on ways and means of preventing corrupt practices, and on changes in methods of work or procedures of such public bodies and private bodies compatible with the effective performance of their duties; and (iv) investigating corrupt practices and assisting in the prosecution of such practices.<sup>48</sup> ABA ROLI was unable to identify any manner in law or practice by which the Financial Intelligence Unit addresses TIP-related issues.

### ***Regulatory Bodies***

The Ministry of Labor is responsible for workplace standards compliance,<sup>49</sup> but a number of other institutions also regulate industry, trade, and commerce.

The Competition and Fair Trading Commission regulates, monitors, controls and prevents acts or behaviors which are likely to adversely affect competition and fair trading in Malawi.<sup>50</sup> The Ministry of Industry and Trade is responsible for promoting, supporting, and facilitating the development of industry in both existing and potential growth sectors in order increase the supply of value-added goods and services for domestic and international markets.<sup>51</sup> The Malawi

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<sup>43</sup> MALAWI CONST., *supra* note 20, at art. 13(o).

<sup>44</sup> Corrupt Practices Act of 1996, Ch. 7:04, arts. 24-41, *available at* [https://www.malawilii.org/mw/consolidatedlegislation/704/corrupt\\_practices\\_act\\_pdf\\_90548.pdf](https://www.malawilii.org/mw/consolidatedlegislation/704/corrupt_practices_act_pdf_90548.pdf) (last visited July 23, 2017).

<sup>45</sup> *Id.* at art. 10.

<sup>46</sup> *Id.* at art. 11.

<sup>47</sup> *Id.* at art. 42.

<sup>48</sup> Corrupt Practices Act No. 17 of 2004, Chapter 7:04, art. 10, *available at* [http://www.malawilii.org/mw/consolidated\\_legislation/704](http://www.malawilii.org/mw/consolidated_legislation/704) (last visited July 23, 2017).

<sup>49</sup> *Id.*

<sup>50</sup> Competition and Fair Trading Act of 1998, *available at* <http://www.itu.int/ITU-D/treg/Legislation/Malawi/act43.pdf> (last visited July 23, 2017).

<sup>51</sup> *Overview of the Industry Department*, MINISTRY OF INDUSTRY & TRADE, REPUBLIC OF MALAWI, ABA Rule of Law Initiative

Investment and Trade Centre is a trade and inward investment promotion agency, established to promote Malawi as an ideal destination for trade and investment in Africa.<sup>52</sup> Additionally, it operates as a 'One-Stop Service Centre' for business start-ups, as mandated by the Investment and Export Promotion Act of 2012.<sup>53</sup> The Malawi Confederation of Chambers of Commerce and Industry has the power to regulate, co-ordinate and monitor activities of members who carry out Chamber business within the country.<sup>54</sup> The Malawi Public-Private Partnership Commission facilitates the implementation of public-private partnership arrangements, and is the sole authority on implementing the divestiture of direct and indirect interests in state-owned enterprises.<sup>55</sup>

The Malawi Revenue Authority is responsible for the assessment, collection and receipt of specified taxes.<sup>56</sup>

ABA ROLI was not able to identify any laws or practices by which these institutions address TIP and TIP-related issues.

### ***Traditional Justice Systems***

The Parliament of Malawi is constitutionally authorized to "make provision for traditional or local courts presided over by lay persons or chiefs."<sup>57</sup> These courts apply the "customary law of the geographical area where the court is located" for civil matters.<sup>58</sup> A report by the Danish Institute for Human Rights describes how this type of legal pluralism operates in the country:

Broadly speaking, there are three types of legal pluralism. The first is where legal orders exist in parallel to the state system and are not formally recognized or state-sanctioned. Such non-state legal orders exist in every country, including Malawi. The second kind of legal pluralism is where the state legal order is plural such as when family and some property matters are governed by different laws for different religious or ethnic communities. The third kind of legal pluralism is where quasi-state legal orders are established or the State incorporates non-state legal orders, for example, through decentralization. The third type is the route taken by Malawi's new Local Courts Act. The Act has been adopted by the State to provide a means of resolving legal disputes and grievances without recourse to the formal court system.<sup>59</sup>

Decisions of the local courts applying customary law are part of Malawi's formal justice system, and may be appealed to higher courts.<sup>60</sup>

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<http://www.moit.gov.mw/index.php/home/departments/industry> (last visited July 23, 2017).

<sup>52</sup> MALAWI INVESTMENT AND TRADE CENTER, <http://www.mitc.mw/> (last visited July 23, 2017).

<sup>53</sup> *Id.*

<sup>54</sup> MALAWI CONFEDERATION OF CHAMBERS OF COMMERCE & INDUSTRY, <http://www.mccci.org> (last visited July 23, 2017).

<sup>55</sup> MALAWI PUBLIC PRIVATE PARTNERSHIP COMMISSION, <http://www.pppc.mw> (last visited July 23, 2017).

<sup>56</sup> MALAWI REVENUE AUTHORITY, <http://www.mra.mw/> (last visited July 23, 2017).

<sup>57</sup> MALAWI CONST., *supra* note 20, at art. 110(3).

<sup>58</sup> Local Courts Act 2011; DESMOND MUNDALA KAUNDA, EXPANDING ACCESS TO JUSTICE FOR THE POOR MALAWI'S SEARCH FOR SOLUTIONS 41 (Dec. 2011),

[www.humanrights.dk/files/media/billeder/udgivelser/desmond\\_report\\_ok.pdf](http://www.humanrights.dk/files/media/billeder/udgivelser/desmond_report_ok.pdf) (last visited July 23, 2017); OSISA, MALAWI: JUSTICE SECTOR AND RULE OF LAW (2006),

[https://www.opensocietyfoundations.org/sites/default/files/malawi\\_20060912.pdf](https://www.opensocietyfoundations.org/sites/default/files/malawi_20060912.pdf) (last visited July 23, 2017).

<sup>59</sup> MUNDALA KAUNDA, *supra* note 58, at 41.

<sup>60</sup> *Id.*

## ***Anti-Trafficking Institutions***

As of the reporting period for the U.S. Department of State's 2016 Trafficking in Persons Report (2016 TIP Report), Malawi lacked a national action plan to combat human trafficking.<sup>61</sup>

Nonetheless, a number of agencies play a role in anti-TIP initiatives. For instance, The Ministry of Gender, Children, Social Welfare, and Disabilities prioritizes the protection of marginalized groups within Malawi, including the operation of shelters for children,<sup>62</sup> and the Malawi Network Against Child Trafficking consisting of government officials, NGOs, and religious leaders, provides national-level guidance on trafficking issues.<sup>63</sup>

Additionally, the Trafficking in Persons Act (TIP Act) envisions the creation of a National Coordinating Committee against Trafficking in Persons, which is to be established under the authority of the Ministry of Home Affairs, or any other Ministry as directed by the President.<sup>64</sup> The Committee is to be comprised of the Secretary for Home Affairs, the Secretary of Justice, the Police Inspector-General, the Chief Immigration Officer, the Executive Director of the Human Rights Commission, in addition to a representative from the faith-based and NGO communities each.<sup>65</sup> The Committee's functions include overseeing TIP investigations, implementing guidelines for the respectful treatment of TIP victims, formulating education and awareness programs on TIP, in addition to other national policies and strategies to suppress TIP, collecting TIP-related data, and managing the Anti-Trafficking Fund.<sup>66</sup> Although the Committee is statutorily required to meet four times a year, as of the writing of the 2016 TIP Report it had not yet convened.<sup>67</sup>

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<sup>61</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016 254, *available at* <https://www.state.gov/documents/organization/258879.pdf> (last visited July 22, 2017) [hereinafter U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016].

<sup>62</sup> U.S. DEP'T OF STATE, MALAWI HUMAN RIGHTS REPORT 2016, *supra* note 40, at 19.

<sup>63</sup> *Id.*

<sup>64</sup> Trafficking in Persons Act no. 3 of 2015, arts. 4-5, *available at* <http://www.warnathgroup.com/wp-content/uploads/2015/03/Malawi-2015-TIP-Act.pdf> (last visited July 23, 2017).

<sup>65</sup> *Id.* at art. 5(1).

<sup>66</sup> *Id.* at art. 8(2).

<sup>67</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016, *supra* note 61, at 254.

### III. National Anti-Trafficking in Persons Legal and Institutional Framework

#### *Anti-TIP Legal Framework*

##### Domestic Statutory Authority

The Constitution of Malawi's anti-slavery provisions prohibit TIP.<sup>68</sup> Under the Constitution, "[n]o person shall be held in slavery or servitude" and "[n]o person shall be required to perform forced labor."<sup>69</sup>

Malawi's Trafficking in Persons Act of 2015 (TIP Act) defines TIP as:

recruiting, transporting, transferring, harboring, receiving or obtaining a person within or beyond the territory of Malawi." These actions under the law constitute TIP if they are done by "transferring, harboring, receiving or obtaining a 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 power of vulnerability; (f) abuse or threats of abuse of the law or legal process; or (g) giving or receiving of payments to obtain consent of a person having control of the trafficked person, for the purpose of exploitation of that person."<sup>70</sup>

The TIP Act applies to a natural or legal person where the offense is: (a) committed wholly or partially within Malawi; (b) committed outside Malawi and the trafficked person is a citizen of Malawi; (c) committed outside Malawi by a citizen of Malawi or a person who is resident in Malawi; or (d) committed outside Malawi with a view to the commission of an offence within Malawi.<sup>71</sup>

Where a person has already been convicted or acquitted of an offense under Malawi's TIP Act in a foreign jurisdiction, that person will not be prosecuted again for the same offense in Malawi, unless the proceedings of the court in the foreign jurisdiction were: (a) for the purpose of shielding the person concerned from criminal proceedings outside in a foreign jurisdiction; or (b) not conducted independently or impartially in accordance with norms of due process recognized by international law, and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>72</sup>

Trafficked persons in Malawi have some rights under the law. For example, a trafficked person has a right to (a) institute civil proceedings against any person, including public officers with respect to TIP offenses or (b) seek compensation, restitution, and recovery in damage from any person or from proceeds of disposal of assets of a person connected with an offense under the TIP Act.<sup>73</sup>

The TIP Act does contain provisions to protect victims, including the protection of a victim's

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<sup>68</sup> Constitution of Malawi, 1994, art. 27, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017).

<sup>69</sup> *Id.*

<sup>70</sup> Trafficking in Persons Act no. 3 of 2015, art. 1, *available at* <http://www.warnathgroup.com/wp-content/uploads/2015/03/Malawi-2015-TIP-Act.pdf> (last visited July 23, 2017) [hereinafter TIP Act].

<sup>71</sup> *Id.* at art. 3(1).

<sup>72</sup> *Id.* at art. 3(2).

<sup>73</sup> *Id.* at art. 40.



anonymity and confidentiality from the moment of first contact between them and law enforcement.<sup>74</sup> Indeed, the disclosure of information that is “capable of prejudicing the safety or provision of care and protection . . . acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him by or under” the TIP Act is a criminal offense, and the willful or negligent disclosure of certain types of sensitive information is also criminal.<sup>75</sup> These crimes carry sentences of up to two years or seven years, respectively.<sup>76</sup>

The TIP Act allows for persons to be informed of their rights under the law. Specifically, there is a requirement that each victim must clearly understand the content and purpose of the initial interview, the intended use of the information, their right not to answer questions, their right to terminate the interview at any time, and their right to impose restrictions on how the information is used.<sup>77</sup>

The TIP Act contains provisions for the psychological, physical and socioeconomic recovery of victims by providing that the government “ensure that trafficked persons are accorded proper treatment and are provided with the necessary care, assistance and protection” and that the government “may, by notice published in the Gazette . . . designate any premise to be a shelter for the care and protection of trafficked persons.”<sup>78</sup>

### Domestic Policies and Action Plans

Malawi has not yet implemented any domestic policies or action plans that universally address TIP. However, a number of other action plans may call for the implementation of measures that could be used to suppress TIP.

For instance, the National Plan of Action to Combat Gender-Based Violence in Malawi (2014-2020) specifically notes the dangers associated with child marriage,<sup>79</sup> which has been implicated in the trafficking of children.<sup>80</sup> The UN Development Assistance Framework (2012-2016) calls for a number of initiatives that could help to combat TIP and TIP-related practices, including the establishment of vocational training programs and a labor market information system to help collect and analyze labor data,<sup>81</sup> and the improvement of legal and regulatory frameworks to combat gender-based violence.<sup>82</sup> While neither of these action plans specifically mention TIP or migrant smuggling, a number of other policies and action plans specifically target the usage of child labor.<sup>83</sup>

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<sup>74</sup> *Id.* at arts. 43-47.

<sup>75</sup> *Id.* at arts. 46-47.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at Schedule 1.

<sup>78</sup> *Id.* at §§44(A) and 45(A).

<sup>79</sup> Ministry of Gender, Children, Disability and Social Welfare, National Plan of Action to Combat Gender-Based Violence in Malawi 2014-2020 22 (July 2014), *available at* <http://www.togetherforgirls.org/wp-content/uploads/National-Plan-of-Action-to-Combat-Gender-Based-Violence-in-Malawi-2014-2020.pdf> (last visited July 23, 2017).

<sup>80</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016 254, *available at* <https://www.state.gov/documents/organization/258879.pdf> (last visited July 22, 2017) [hereinafter U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016].

<sup>81</sup> United Nations Development Assistance Framework (UNDAF) Action Plan 2012-2016: Malawi, § 1.2.4, *available at* <http://www.mw.one.un.org/wp-content/uploads/2014/04/UNDAF-Action-Plan-2012-2016.pdf> (last visited July 23, 2017).

<sup>82</sup> *Id.* at § 2.5.1.

<sup>83</sup> *See Child Labor and Forced Labor Reports: Malawi*, U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFF., <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/malawi> (last visited July 23, 2017).

## International Agreements

Malawi has ratified a number of international instruments relevant to addressing TIP, including:

- the UN Convention against Transnational Organized Crime (UNTOC);
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime;
- the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol;
- the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
- the Convention on the Rights of the Child and both of its Optional Protocols;<sup>84</sup> and
- International Labor Organization (ILO) Conventions:
  - No. 29 (concerning Forced or Compulsory Labor);
  - No. 105 (concerning the Abolition of Forced Labor);
  - No. 138 (concerning Minimum Age for Admission to Employment); and
  - No. 182 (concerning the Worst Forms of Child Labor).<sup>85</sup>

Although Malawi has ratified or acceded to all of the international instruments listed above, it has not necessarily specifically incorporated all of them into domestic law.

### ***Anti-TIP Institutional Framework***

#### National Coordinating Committee Against Trafficking in Persons

The primary body charged with implementing the TIP Act is the National Coordinating Committee Against Trafficking in Persons (the Committee). As noted above, the Committee generally oversees the implementation of the TIP Act, by coordinating and overseeing TIP investigations, ensuring the protection and safety of victims, and formulating policies and preventive strategies.<sup>86</sup>

The Committee is additionally charged with managing and disbursing amounts from the Anti-Trafficking Fund, which is funded by Parliamentary appropriations, grants and donations, proceeds from the confiscation, seizure, or sale of TIP-related property following TIP convictions, and any other amounts from sources approved by the Minister for Home Affairs and the Minister for Finance.<sup>87</sup>

It is not clear that the government provided Parliamentary appropriations to the Anti-Trafficking Fund during the reporting period for the U.S. Department of State's 2016 Trafficking in Persons Report; however, the report does note that owing to "severe resource constraints, the government relied largely on NGOs to . . . provide long-term care and did not provide in-kind

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<sup>84</sup> See *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/TreatyParticipantSearch.aspx?clang=en> (last visited July 22, 2017) (select "Malawi" in the drop-down Participant list to access a full list of international treaties and agreements deposited with the U.N. Secretary-General that Malawi has ratified or acceded to).

<sup>85</sup> *Ratifications for Malawi*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103101](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103101) (last visited July 23, 2017).

<sup>86</sup> TIP Act, *supra* note 70, at art. 8.

<sup>87</sup> *Id.* at art. 51.

or financial support for most NGO services.”<sup>88</sup>

Malawi Police Service (MPS) and Immigration Service

The MPS and the immigration service are both authorized under the TIP Act as agencies responsible for TIP investigations.<sup>89</sup> The MPS in particular has anti-TIP curricula in a number of its training schools.<sup>90</sup>

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<sup>88</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016, *supra* note 80, at 254.

<sup>89</sup> TIP Act, *supra* note 70, at art. 26.

<sup>90</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016, *supra* note 80, at 254.

## IV. Justice System

### *Access to Justice*

#### Equality and Non-Discrimination Provisions

Malawi does not restrict legal standing or access to justice institutions for women, minorities, foreign citizens, stateless persons, or other marginalized groups.<sup>91</sup>

#### Access to Legal Aid

The Legal Aid Act establishes a Legal Aid Bureau, which represents indigent and vulnerable persons in legal proceedings.<sup>92</sup>

The Legal Aid act entitles individuals to the assistance of counsel in criminal matters provided that it is “in the interests of justice that such [a] person should have legal aid . . . and he has insufficient means to enable him to obtain the services of a private legal practitioner.”<sup>93</sup> The “interests of justice” requirement appears statutorily to require a review of a number of factors, including: (1) whether the individual faces a deprivation of liberty, loss of livelihood, or serious reputational loss as a result of conviction; (2) whether the case involves the consideration of a substantial question of law, and the provision of adequate counsel would make a material difference to whether the accused receives a fair trial; (3) whether the accused lacks sufficient knowledge of English, or otherwise has a physical or mental disability (or any other cause) that would inhibit their understanding of the proceedings; (4) whether the nature of the defense involves witness interviews or expert cross-examination; (5) whether it is in the interests of another that an accused obtain counsel; and (6) whether the accused, if convicted, would be unable to pay a fine for longer than a month after the imposition of sentence.<sup>94</sup> This determination must be made by a “competent authority.”<sup>95</sup>

The Legal Aid Act also gives individuals to civil legal aid on the basis of an application to the Legal Aid Bureau.<sup>96</sup> Assistance may be provided, subject to the discretion of the Director of the Bureau, provided that applicants have reasonable grounds to institute or defend the matter, and lack sufficient means to obtain the services of private counsel.<sup>97</sup> Civil legal aid will not be available for a number of causes of action listed in the First Schedule of the Act;<sup>98</sup> however, ABA ROLI has not been able to obtain a copy of the First Schedule for review.

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<sup>91</sup> Constitution of Malawi, 1994, *available at*

[https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017)

[hereinafter MALAWI CONST.]; Gender Equality Act of 2013, *available at*

<http://srs.violenceagainstchildren.org/sites/default/files/2016/malawi/Malawi%20Gender%20Equality%20Act%202013.pdf> (last visited July 23, 2017); JOINT CEDAW MALAWI CIVIL SOCIETY ORGANIZATIONS

SHADOW REPORT 2015, *available at*

[tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MWI/INT\\_CEDAW\\_NGO\\_MWI\\_21948\\_E.pdf](http://internet.ohchr.org/Treaties/CEDAW/Shared%20Documents/MWI/INT_CEDAW_NGO_MWI_21948_E.pdf) (last visited July 23, 2017); OSISA, MALAWI: JUSTICE SECTOR AND RULE OF LAW 18-24, 131-150 (2006), *available at* [www.opensocietyfoundations.org/sites/default/files/malawi\\_20060912.pdf](http://www.opensocietyfoundations.org/sites/default/files/malawi_20060912.pdf) (last visited July 23, 2017).

<sup>92</sup> Legal Aid Bill No. 28 of 2010, arts. 3-6, *available at* [https://namati.org/wp-](https://namati.org/wp-content/uploads/2013/01/Malawi-2010_Legal-Aid-Act.pdf)

[content/uploads/2013/01/Malawi-2010\\_Legal-Aid-Act.pdf](https://namati.org/wp-content/uploads/2013/01/Malawi-2010_Legal-Aid-Act.pdf) (last visited July 23, 2017).

<sup>93</sup> *Id.* at art. 18(1).

<sup>94</sup> *Id.* at art. 18(2).

<sup>95</sup> *Id.* at art. 18(1)(b).

<sup>96</sup> *Id.* at art. 20.

<sup>97</sup> *Id.* at art. 20.

<sup>98</sup> *Id.* at art. 19(2).

## ***Criminal Law and Procedure***

There are no binding professional codes of conduct or standard operating procedures for Malawi's judiciary or its prosecutorial services.<sup>99</sup> While there is a code of conduct for the police force, it does not address TIP.<sup>100</sup> ABA ROLI was unable to identify any codes of conduct for Malawi's border control agency, customs agency, citizenship and immigration agency, customs agency, armed forces, or foreign service.

Generally, the Malawi Police Service has the authority to receive information related to crime, investigate crime, and arrest perpetrators.<sup>101</sup> The Directorate of Public Prosecutions is responsible for prosecuting crimes.<sup>102</sup> However, authority for both of these functions is vested in the Anti-Corruption Bureau for offences under the Corrupt Practices Act.<sup>103</sup>

Malawi does not have specialized units within its criminal justice system for sexual and/or gender based violence or crimes against children. However, Victim Support Units and Community Victim Support Units have been established throughout Malawi. The aim of these units is "to assist victims who have suffered harm requiring special care and attention to restore their normal being, including cases that require victims to be assisted in private in order to respect their dignity."<sup>104</sup>

Malawi law does allow for private prosecution if the responsible government institution declines to prosecute a particular crime.<sup>105</sup>

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<sup>99</sup> INT'L BAR ASS'N, RULE OF LAW IN MALAWI: THE ROAD TO RECOVERY 40-42 (2012), *available at* [http://www.osisa.org/sites/default/files/malawi\\_report\\_august\\_2012.pdf](http://www.osisa.org/sites/default/files/malawi_report_august_2012.pdf) (last visited July 23, 2017) [hereinafter IBA, RULE OF LAW IN MALAWI]; *see also* RACHEL ELLET, POLITICS OF JUDICIAL INDEPENDENCE IN MALAWI, *available at* [https://freedomhouse.org/sites/default/files/inline\\_images/Politics%20of%20Judicial%20Independence%20in%20Malawi\\_1.pdf](https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf) (last visited July 23, 2017).

<sup>100</sup> See Malawi Police Act No. 12 of 2012, at Schedule 2 [hereinafter Police Act].

<sup>101</sup> Criminal Procedure and Evidence Code of 1968, arts. 20, 33, 38, *available at* <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90376/104138/F-2103641943/MWI90376.pdf> (last visited July 23, 2017) [hereinafter Criminal Procedure Code]; Police Act, *supra* note 100, at art. 4(1)(a).

<sup>102</sup> MALAWI CONST., *supra* note 91, at art. 99; Criminal Procedure Code, *supra* note 101, at art. 76; Police Act, *supra* note 100, at art. 4(1)(b); IBA, RULE OF LAW IN MALAWI, *supra* note 99, at 22-26.

<sup>103</sup> Corrupt Practices Act of 1996, Ch. 7:04, art. 10(1)(f), *available at* [https://www.malawilii.org/mw/consolidatedlegislation/704/corrupt\\_practices\\_act\\_pdf\\_90548.pdf](https://www.malawilii.org/mw/consolidatedlegislation/704/corrupt_practices_act_pdf_90548.pdf) (last visited July 23, 2017).

<sup>104</sup> OSISA, *supra* note 91, at 116-117; Sellah Singini-Mana, *Mangochi get victim support units funded by UNICEF*, NYASA TIMES (May 7, 2016), <http://www.nyasatimes.com/mangochi-get-victim-support-units-funded-by-unicef/> (last visited July 23, 2017).

<sup>105</sup> Criminal Procedure Code, *supra* note 101, at art. 82(2).

## ***Extradition***

Extradition in Malawi is governed by the Extradition Act.<sup>106</sup> This law permits the government of Malawi to extradite individuals upon the request of another state,<sup>107</sup> provided that an extradition treaty exists between the two states.<sup>108</sup> The extradition law makes no reference to TIP as an extraditable offense.<sup>109</sup>

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<sup>106</sup> Extradition Act No. 9 of 1968 (as amended, 2000), *available at* [https://www.malawilii.org/mw/legislation/num-act/1968/9/num\\_act\\_1968\\_9.pdf](https://www.malawilii.org/mw/legislation/num-act/1968/9/num_act_1968_9.pdf) (last visited July 23, 2017).

<sup>107</sup> *Id.* at art. 4.

<sup>108</sup> *Id.* at art. 3.

<sup>109</sup> *Id.*

## V. Economic System

### *Economic and Financial Crimes*

Malawi law does prohibit money laundering as a form of financial crime. The Financial Intelligence Unit is charged with the task of addressing money laundering.<sup>110</sup>

#### Financial Fraud

Malawi's penal code does not have a specific provision dealing with financial fraud as a whole. The fraud section of the Penal Code does govern a number of related crimes, including fraud on the sale or mortgage of property, the fraudulent appropriation of property by corporations, and the falsification of account books.<sup>111</sup>

#### Forgery

The Penal Code provides that "[f]orgery is the making of a false document with intent to defraud or to deceive" and that any person who forges any document will be subject to three years of imprisonment.<sup>112</sup> Counterfeiting is also a criminal offense.<sup>113</sup>

#### Terrorist Financing

Terrorist financing is criminalized under the Anti-Money Laundering Act.<sup>114</sup> Offences include organizing, directing, attempting to commit, conspiring to commit or participating as an accomplice in the commission of terrorist financing.<sup>115</sup> Natural persons who are convicted of terrorist financing are liable for imprisonment of up to 15 years and a fine of K3,000,000; legal persons are fined up to K15,000,000, and lose their business licenses.<sup>116</sup> Terrorist financing is an extraditable offense.<sup>117</sup>

### *Regulation and Monitoring of International Financial Transactions*

Foreigners require business residence permits to carry out any business activity in Malawi, and foreign investors must obtain business certificates,<sup>118</sup> and are also subject to capital registration requirements with the Reserve Bank of Malawi.<sup>119</sup> The law does not authorize undocumented foreigners to carry out business activity.<sup>120</sup>

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<sup>110</sup> See generally Money Laundering, Proceeds of Serious Crime Terrorist Financing Act No. 11 of 2006, available at <https://www.rbm.mw/Home/GetContentFile/?ContentID=3753> (last visited July 23, 2017) [hereinafter Money Laundering Act].

<sup>111</sup> Malawi Penal Code, Ch. 7:01, arts. 324, 333, 335, available at <https://srhr.org/abortion-policies/documents/countries/01-Malawi-Penal-Code.pdf> (last visited July 23, 2017).

<sup>112</sup> *Id.* at art. 356

<sup>113</sup> *Id.* at art. 372.

<sup>114</sup> Money Laundering Act, *supra* note 110, at art. 36.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at art. 103.

<sup>118</sup> Investment and Export Promotion Act, No. 11 of 2012, art. 6, available at <http://www.mitc.mw/attachments/article/296/Investment%20and%20Export%20Promotion%20Act%202012.pdf> (last visited July 23, 2017) [hereinafter Investment and Export Promotion Act].

<sup>119</sup> *Id.*

<sup>120</sup> *Investment Procedures*, MALAWI INVESTMENT AND TRADE CENTER, [http://www.mitc.mw/index.php?option=com\\_content&view=article&id=296&Itemid=573](http://www.mitc.mw/index.php?option=com_content&view=article&id=296&Itemid=573) (last visited July 23, 2017); U.S. DEP'T OF STATE, INVESTMENT CLIMATE STATEMENT 2014: MALAWI, available at

The Investment and Export Promotion Act of 2012 governs investment in Malawi. The Act does not require compliance with any TIP or TIP-related requirements for investors to receive investment incentives.<sup>121</sup>

Importantly, Malawi lacks laws or guidance for financial institutions on identifying TIP-related financial flows or financial fraud. Although the law does not generally impose requirements for entities to monitor financial transactions, any director, manager, officer or employee of the bank who permits or makes transactions where he knows or has reason to suspect that any of the funds involved have been obtained by any party as the direct or indirect result of an activity that is illegal inside or outside Malawi shall be guilty of an offense.<sup>122</sup> Furthermore, under the Banking Act, it is a criminal offence for directors, managers, officers or employees of the bank or financial institution to make or permit transactions including the opening of an account without taking all reasonable steps to establish the true identity of the person concerned in the transaction.<sup>123</sup>

### ***Asset Freezing and Forfeiture***

The Trafficking in Persons Act (TIP Act) provides that, upon conviction, assets involved in and proceeds from an offense under the Act may be subject to forfeiture; the relevant funds are directed towards the Anti-Trafficking Fund.<sup>124</sup>

### ***Remittances***

According to the information provided by the U.S. Department of State, there are no restrictions on remittances in Malawi.<sup>125</sup>

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[www.state.gov/documents/organization/227359.pdf](http://www.state.gov/documents/organization/227359.pdf) (last visited July 23, 2017).

<sup>121</sup> Investment and Export Promotion Act, *supra* note 118; MALAWI REVENUE AUTHORITY, INVESTORS' TAX INCENTIVES, *available at*

<http://www.mtc.mw/attachments/article/288/Investor%27s%20tax%20incentives.pdf> (last visited July 23, 2017).

<sup>122</sup> Malawi Banking Act, No. 19 of 1989, art. 6, *available at*

<https://www.malawilii.org/mw/legislation/act/1989/19> (last visited July 23, 2017).

<sup>123</sup> *Id.*

<sup>124</sup> Trafficking in Persons Act no. 3 of 2015, art. 51, *available at* <http://www.warnathgroup.com/wp-content/uploads/2015/03/Malawi-2015-TIP-Act.pdf> (last visited July 23, 2017).

<sup>125</sup> U.S. DEP'T OF STATE, INVESTMENT CLIMATE STATEMENT 2014: MALAWI, *supra* note 120.



## VI. Corporations

### *Liability of Legal Persons for Violations of Law*

A number of Malawian laws provide that corporate entities can be held liable for criminal offenses. For instance, the Penal Code provides that, where an offence is committed by any company or other legal entity, every person who has responsibility for or in the control or management of the affairs or activities of that entity shall be guilty of that offence, and may be punished accordingly;<sup>126</sup> however, this is not a blanket rule, and certain Penal Code provisions may not establish liability for legal persons.

Other laws that create corporate liability for criminal acts include the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act,<sup>127</sup> the Environmental Management Act, the Capital Market Development Act, and the Workers Compensation Act. The Capital Market Development Act specifically criminalizes the submission of securities reports containing false information, market manipulation, and insider trading. Under this legislation, corporate entities may be prosecuted and fined, and their directors may be imprisoned.<sup>128</sup>

### *Compliance with Laws on Incorporation*

The Companies Act provides that two or more persons associating for any lawful purpose may form a corporate entity by (1) subscribing their names to a memorandum of association, and (2) registering the entity under the provisions of law.<sup>129</sup> A memorandum of association must contain the name of the company, the nature of the objects for which it has been established, and a number of requirements related to the liability of the company and what should happen with its assets upon dissolution.<sup>130</sup> Companies may alter their memoranda of association by special resolution; amendments to the object and purpose of the company are permitted under law;<sup>131</sup> however, amendments must be re-certified by the registrar.<sup>132</sup>

Whether any penalties attach to a failure to meet incorporation requirements, or a failure to comply with the memorandum of association, are unclear. However, civil and criminal penalties may arise out of a number of violations of the Companies Act.<sup>133</sup>

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<sup>126</sup> Malawi Penal Code, Ch. 7:01, art. 24, available at <https://srhr.org/abortion-policies/documents/countries/01-Malawi-Penal-Code.pdf> (last visited July 23, 2017) [hereinafter Penal Code].

<sup>127</sup> Money Laundering, Proceeds of Serious Crime Terrorist Financing Act No. 11 of 2006, available at <https://www.rbm.mw/Home/GetContentFile/?ContentID=3753> (last visited July 23, 2017) [hereinafter Money Laundering Act].

<sup>128</sup> CORPORATE GOVERNANCE TASK FORCE, CODE OF BEST PRACTICES FOR CORPORATE GOVERNANCE MALAWI (2010), available at [http://www.track.unodc.org/LegalLibrary/LegalResources/Malawi/Laws/Code%20of%20Best%20Practice%20for%20Corporate%20Governance%20\(2001\).pdf](http://www.track.unodc.org/LegalLibrary/LegalResources/Malawi/Laws/Code%20of%20Best%20Practice%20for%20Corporate%20Governance%20(2001).pdf) (last visited July 23, 2017) [hereinafter CODE OF BEST PRACTICES FOR CORPORATE GOVERNANCE II]; Penal Code, *supra* note 126; McSyd Hubert Chalunda, *Anti-Corruption Bureau of Malawi*, in CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES IN MALAWI: RESOURCE MATERIAL SERIES No. 76, 66, 72 (2008).

<sup>129</sup> Companies Act, Ch. 46:03, art. 4, available at <http://www.wipo.int/edocs/lexdocs/laws/en/mw/mw024en.pdf> (last visited July 23, 2017).

<sup>130</sup> *Id.* at art. 6.

<sup>131</sup> *Id.* at arts. 8-10.

<sup>132</sup> *Id.* at art. 19.

<sup>133</sup> *See, e.g., id.* at arts 345-350.

### ***Corporate Social Responsibility Initiatives***

ABA ROLI has not identified any laws that require corporate officers and directors to comply with human rights and/or ethical standards.

However, professionals representing the Chambers of Commerce of Malawi, the Society of Accountants in Malawi, the Malawi Law Society, and the Malawi National Bank have produced a Code of Best Practice for Corporate Governance in Malawi. The Code creates obligations for managers and employees of a corporation to the larger society and community within which the corporation operates.<sup>134</sup> However, the Code is not legally binding, and relies only on the publicity factor associated with Corporate Social Responsibility initiatives to secure compliance.

A second code of corporate governance that was drafted in 2010 similarly requires the board of a company to take into consideration wider societal interests and other circumstances as part of its decision making processes. Additionally, it calls upon company owners to ensure that their organizations are good corporate citizens, and operate in sustainable ways. Again, these provisions are also voluntary.<sup>135</sup>

### ***Supply Chain Transparency and Accountability***

Malawi does not have any specific laws to prohibit the government from procuring goods and services from suppliers or contractors that engage in TIP or TIP-related practices.

ABA ROLI was unable to locate Malawian national legislation requiring companies to report or disclose any efforts they take to prevent, identify, and/or address TIP in their supply chains, or to conduct verification of product supply chains to evaluate TIP risks.

### ***Contract Law***

ABA ROLI has been unable to review any publicly-available specific provisions of statutory law that address when contracts may be rendered void or voidable, or specific case law that discusses the issue. However, because the Constitution provides for the continued application of the common law that had existed when it entered into force,<sup>136</sup> and because Malawi was a British colony, it is possible that the basic contract principles of English common law remain in effect unchanged in Malawian law and jurisprudence.

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<sup>134</sup> CODE OF BEST PRACTICES FOR CORPORATE GOVERNANCE I, *supra* note 128.

<sup>135</sup> Code of Best Practice for Corporate Governance II, *available at* [http://www.ecgi.org/codes/code.php?code\\_id=341](http://www.ecgi.org/codes/code.php?code_id=341) (last visited July 23, 2017).

<sup>136</sup> Constitution of Malawi, 1994, art. 200, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017).

## VII. Natural Resources, Environment, and Property

### *Natural Resource Extraction Laws*

#### Logging

The Forestry Act regulates the identification and management of Malawi's trees and forests.<sup>137</sup> It appoints a Director of Forestry to manage, plan, promote, and conduct activities related to the maintenance of biological diversity in forests and forest products.<sup>138</sup> The Act also establishes a Forestry Management Board, and charges it with advising the Minister responsible for forestry on all matters related to tree and forest management.<sup>139</sup>

The Forestry Act provides that licenses may be granted for the removal of forest produce from reserves, customary land, public lands, and protected forest areas, as well as for prospecting for and extracting minerals from forest reserves and protected forest areas.<sup>140</sup> Licenses may be refused if applicants have failed to comply with prescribed conditions, if they have previously suffered license revocations, if they have, in the previous 24 months, been convicted of a Forestry Act offense, if the Director of Forestry "is satisfied on reasonable ground[s] that the applicant is not a fit or proper person to hold such license," or if temporary freezes on licenses is warranted.<sup>141</sup> License denials are appealable.<sup>142</sup>

Notwithstanding the licensing requirements, villagers are authorized by law to collect forest produce from customary land for the purposes of domestic use; excess wood must be disposed of by village natural resource management committees, for the benefit of the local community.<sup>143</sup>

#### Mining

Mining is regulated by the Mines and Minerals Act.<sup>144</sup> The Act vests ownership over mineral rights in the President on behalf of the people of Malawi;<sup>145</sup> although this provision appears to be a holdover from the pre-democratic era, it does not appear that the provision has been repealed.

Mining and minerals operations are regulated by the Commissioner for Mines and Minerals, who is charged with generally administering the terms of the Act.<sup>146</sup>

The Act envisions the creation of a number of licenses and permits under which persons may

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<sup>137</sup> Forestry Act, No. 11 of 1997, *available at* [http://www.chmmw.org/publications/Forestry\\_Act\\_1997.pdf](http://www.chmmw.org/publications/Forestry_Act_1997.pdf) (last visited July 23, 2017).

<sup>138</sup> *Id.* at arts. 4-5.

<sup>139</sup> *Id.* at arts. 17-18.

<sup>140</sup> *Id.* at arts. 46(b)-(c).

<sup>141</sup> *Id.* at art. 52.

<sup>142</sup> *Id.* at art. 54(1).

<sup>143</sup> *Id.* at art. 50.

<sup>144</sup> Mines and Minerals Act of 1981, Ch. 61:01, *available at* <http://www.eisourcebook.org/cms/Malawi%20Mines%20and%20Minerals%20Act.pdf> (last visited July 23, 2017).

<sup>145</sup> *Id.* at art. 1.

<sup>146</sup> *Id.* at art. 5.

legally prospect for minerals. These include reconnaissance licenses, which are granted only if they are accompanied by a plan of the area over which the license is sought, an identification of the minerals, and a statement of particulars detailing the licensee's financial and technical resources;<sup>147</sup> exclusive and non-exclusive prospecting licenses, which are subject to similar restrictions;<sup>148</sup> and mining licenses, which are only granted to the holder of exclusive prospecting licenses, upon a showing that the mineral to which their license relates exists in commercial quantities.<sup>149</sup> Finally, the Act authorizes mineral permits, which permit holders to enter onto any public or customary land to mine any mineral prescribed by law.<sup>150</sup>

Reconnaissance license holders are not permitted to engage in any subsurface excavation techniques unless the terms of their license otherwise authorize it.<sup>151</sup> Prospecting license holders may carry on prospective operations, but are obliged to notify the Minister if they discover any mineral or mineral deposit that has commercial value, within 30 days of the discovery.<sup>152</sup>

Mining licenses may not be granted without an environmental impact assessment; notably, this assessment must note whether the mining of that mineral carries any particular health or safety risks, and provide solutions for their control or elimination.<sup>153</sup>

Mineral rights holders of all classes may have their licenses revoked for a number of violations, including a failure to use the land subject to the license in good faith or for any purpose other than the terms of the license, failure to comply with any requirements of the Mining Act or any other law, or failure to make payments as required by law.<sup>154</sup> It is not evident that mining licenses may be revoked for engagement in TIP or TIP-related practices.

### Fisheries

Malawi's fishing industry is regulated by the Fisheries Conservation and Management Act (Fisheries Act) and its accompanying rules and regulations.<sup>155</sup>

The Fisheries Act provides for the establishment of a Director of Fisheries, fisheries protection officers, and a Fisheries Advisory Board;<sup>156</sup> together, these entities are charged with conserving fish stocks, managing fisheries, collecting fees, and generally enforcing the terms of the Act.<sup>157</sup>

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<sup>147</sup> *Id.* at art. 16.

<sup>148</sup> *Id.* at art. 25.

<sup>149</sup> *Id.* at art. 37(2).

<sup>150</sup> *Id.* at art. 81.

<sup>151</sup> *Id.* at art. 23.

<sup>152</sup> *Id.* at art. 35(c).

<sup>153</sup> *Id.* at art. 37(2)(h)(v)-(vii).

<sup>154</sup> *Id.* at 57(1).

<sup>155</sup> Fisheries Conservation and Management Act, No. 25 of 1997, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw18341.pdf> (last visited July 23, 2017) [hereinafter Fisheries Act]; Fisheries Conservation and Management Regulations of 2000, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw44463.pdf> (last visited July 23, 2017); Fisheries Conservation and Management (Local Community Participation) Rules of 2000, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw44465.pdf> (last visited July 23, 2017); Fisheries Conservation and Management (Close Season for Lake Chilwa and Mpoto Lagoon) Notice of 2012, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw117950.pdf> (last visited July 23, 2017).

<sup>156</sup> Fisheries Act, *supra* note 155, at arts. 3-6.

<sup>157</sup> *Id.*

The Fisheries Act provides for the registration of fishing vessels and the grant of licenses for commercial fishing.<sup>158</sup> Fishing licenses specify not only the area, times, and quantities relevant to commercial fishing, but also the gear that is permitted to be used, the use to which fish may be put, and conditions regarding the navigation equipment to be carried on board the vessel.<sup>159</sup>

However, it is not clear that fishing licenses may be revoked for abuses of the labor law.

### Oil and Gas

Oil and gas exploration licenses are issued by the Commission for Petroleum Exploration and Production, under the terms of the Petroleum (Exploration and Production) Act.<sup>160</sup> Licenses may only be granted to Malawian citizens, or persons who have been resident in Malawi for the four years immediately preceding the license application.<sup>161</sup> Exploration licenses confer a right to explore for petroleum and engage in any operations that support that exploration, in the area stated in the license.<sup>162</sup> Significant petroleum deposits must be reported to the responsible minister,<sup>163</sup> and a failure to do so may constitute default such that the license may be revoked or not renewed.

Petroleum production licenses may not be issued unless the applicant's proposal "take[s] proper account of environmental and safety factors."<sup>164</sup> Licensees may be held liable for petroleum pollution;<sup>165</sup> however, it is unclear whether licenses may be revoked for violations of labor or environmental laws.

### ***Environmental Regulation***

Environmental regulations are promulgated under the Environment Management Act (EMA).<sup>166</sup> The EMA establishes a Director of Environmental Affairs and a National Council for the Environment, and charges both bodies with advising on all matters affecting the protection and management of the environment, and the conservation and sustainable utilization of natural resources.<sup>167</sup> The EMA lays out requirements for waste management, including regulations relating to the import, export, and transport of waste;<sup>168</sup> it provides that the Minister for Environment and the Minister for Agriculture may issue rules and regulations for the classification of hazardous substances and pesticides,<sup>169</sup> and otherwise generally provides prohibitions against pollution and the discharge of pollutants.<sup>170</sup>

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<sup>158</sup> *Id.* at art. 10, 14.

<sup>159</sup> *Id.* at art. 16.

<sup>160</sup> Petroleum Exploration and Production Act, no. 2 of 1983, art. 5, *available at* <http://www.eisourcebook.org/cms/Malawi%20Petroleum%20Act.pdf> (last visited July 23, 2017).

<sup>161</sup> *Id.* at art. 13(a).

<sup>162</sup> *Id.* at art. 18.

<sup>163</sup> *Id.* at arts. 24-25.

<sup>164</sup> *Id.* at art. 29(1)(a)(i).

<sup>165</sup> *Id.* at art. 55.

<sup>166</sup> Environment Management Act, No. 23 of 1996, *available at* <http://ilo.org/dyn/natlex/docs/ELECTRONIC/45482/97715/F548493060/MWI45482.pdf> (last visited July 23, 2017).

<sup>167</sup> *Id.* at art. 9.

<sup>168</sup> *Id.* at arts. 37, 39.

<sup>169</sup> *Id.* at art. 40(1).

<sup>170</sup> *Id.* at 44, 42.

The EMA also gives environmental inspectors broad authority to enter premises, examine activities which may be detrimental to the environment, and collect pollutant samples.<sup>171</sup>

Environmental impact assessments, audits, and monitoring requirements are laid out under the EMA; such assessments may be subject to review at public hearings.<sup>172</sup> It is not clear from the terms of the EMA whether such impact assessments must take any TIP- or TIP-related standards into consideration. However, failure to prepare environmental impact assessment reports, or knowingly providing false information in such reports, may result in imprisonment for a period not exceeding two years, and fines between K5000 and 200,000.<sup>173</sup>

Although Forestry management is generally vested in the Director of Forestry, the Director of Environmental Affairs may become involved in rules and regulations related to afforestation, forest protection, and environmental impact assessments that relate to logging.<sup>174</sup>

Wildlife conservation is governed by the National Parks and Wildlife Act, and administered by the Chief Parks and Wildlife Officer.<sup>175</sup> The Chief Parks and Wildlife Officer is generally responsible for the management of Malawi's national parks and wildlife, and appears to have jurisdiction over the national parks and wildlife reserves.<sup>176</sup> Hunting and game licenses may be granted, even with respect to protected species,<sup>177</sup> and the removal of wildlife from a reserve without a license is an offense under the Act.<sup>178</sup>

### ***Land Ownership and Eminent Domain***

While the Constitution of Malawi generally vests all lands and territories in the Republic,<sup>179</sup> the Land Act of Malawi recognizes private and customary land ownership interests.<sup>180</sup>

The Constitution grants the government the power of eminent domain, and provides that property may only be expropriated "when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law."<sup>181</sup> The Land Acquisition Act contains similar provisions, noting that government entities must pay the fair market value of the property.<sup>182</sup> Private landowners who object to the government's fair market value assessments may obtain independent

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<sup>171</sup> *Id.* at art. 46(1).

<sup>172</sup> *Id.* at 26(1)(a).

<sup>173</sup> *Id.* at art. 63.

<sup>174</sup> *See generally* Forestry Act, *supra* note 137.

<sup>175</sup> Malawi National Parks and Wildlife Act, no. 11 of 1992, art. 5, *available at* <http://extwprlegs1.fao.org/docs/html/mlw4733.htm> (last visited July 23, 2017).

<sup>176</sup> *Id.* at art. 6(1).

<sup>177</sup> *Id.* at art. 39, 53.

<sup>178</sup> *Id.* at art. 48(1).

<sup>179</sup> Constitution of Malawi, 1994, arts. 207, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>180</sup> Land Act of 1965, Ch. 57:01, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw41845.pdf> (last visited July 23, 2017).

<sup>181</sup> MALAWI CONST., *supra* note 179, at 44(4).

<sup>182</sup> Land Acquisition Act, No. 21 of 1970, art. 9, *available at* [https://www.malawilii.org/mw/legislation/num-act/1970/21/num\\_act\\_1970\\_21.pdf](https://www.malawilii.org/mw/legislation/num-act/1970/21/num_act_1970_21.pdf) (last visited July 23, 2017).

assessments.<sup>183</sup>

ABA ROLI researchers have been unable to locate any laws or regulations that prevent the government or private entities from engaging in “land grabbing”; however, reports indicate that it is a problem in the country.<sup>184</sup>

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<sup>183</sup> *Id.* at art. 11.

<sup>184</sup> *See, e.g.,* Ward Anseeuw, *Sugarcane cultivation worsens land grabbing in Malawi*, *The Oracle* (Aug. 11, 2014), <http://www.orakonews.com/sugarcane-cultivation-worsens-land-grabbing-in-malawi/> (last visited July 23, 2017).

## VIII. Individual Rights

### *Ratification of and Accession to International and Regional Human Rights Treaties*

Malawi has ratified or acceded to a number of international human rights treaties. These include:

- the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol;
- the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- the Convention on the Rights of the Child (CRC) and its Optional Protocol on the involvement of children in armed conflict; and
- the Convention and Protocol Relating to the Status of Refugees (Refugee Convention).<sup>185</sup>

Regional human rights treaties that Malawi has ratified or acceded to include:

- the African Charter on Human and Peoples' Rights (Banjul Charter);<sup>186</sup>
- the African Charter on the Rights and Welfare of the Child;<sup>187</sup> and
- the Organization for African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>188</sup>

Malawi is a dualist state, and as a result any treaty that has been entered into since the passage of the Constitution cannot have legal effect in the country without a ratifying act of Parliament.<sup>189</sup> However, any international agreement into which Malawi had entered prior to this point will be considered national law, unless an act of Parliament so provides.<sup>190</sup> All customary international law is to be considered national law, unless it is contrary to the Constitution or an act of Parliament.<sup>191</sup>

### *Legal Guarantees of Equality and Non-Discrimination*

The Malawi Constitution provides that all persons have equal status before the law and the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society. Discrimination is prohibited on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability,

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<sup>185</sup> Multilateral Treaties Deposited with the Secretary-General, United Nations Treaty Collection, [https://treaties.un.org/Pages/TreatyParticipantSearch.aspx?clang=\\_en](https://treaties.un.org/Pages/TreatyParticipantSearch.aspx?clang=_en) (last visited July 19, 2017) (select "Malawi" in the drop-down Participant list to access a full list of international treaties and agreements deposited with the U.N. Secretary-General that Malawi has ratified or acceded to).

<sup>186</sup> African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

<sup>187</sup> African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

<sup>188</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, Sep. 10, 1969, 1001 U.N.T.S. 45.

<sup>189</sup> Constitution of Malawi, 1994, art. 211, *available at*

[https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>190</sup> *Id.* at art. 211(2).

<sup>191</sup> *Id.* at art. 211(3).



property, birth, or other status.<sup>192</sup>

### ***Rights of Foreigners and Stateless Individuals***

Certain provisions of law limit the rights of foreigners, such as a foreigner's eligibility to obtain petroleum licenses.<sup>193</sup> However, ABA ROLI has been unable to determine the full scope of the laws that limit the rights of foreigners.

Malawi's Refugee Act generally follows the minimum requirements of the Refugee Convention and Protocol and the OAU Convention; however, this document does not lay out the rights of refugees beyond the right of *non-refoulement*.<sup>194</sup> Malawi has entered reservations to Article 22(1) of the Refugee Convention; as such, it does not recognize that refugees must be accorded the same treatment as nationals with respect to elementary education.<sup>195</sup> The Act also expressly restricts refugees' right to freedom of movement, and the right to engage in economic activity.<sup>196</sup>

### ***State Human Rights Guarantees***

The Constitution of Malawi recognizes a number of fundamental civil and political rights, including:

- The right to life;<sup>197</sup>
- The right to personal liberty;<sup>198</sup>
- The right to be protected against torture and/or cruel and inhuman treatment;<sup>199</sup>
- The right to be protected from slavery, servitude and forced labor;<sup>200</sup>
- The right to privacy;<sup>201</sup>
- Rights in the criminal justice system;<sup>202</sup>
- The right to free expression, religion, and association, which encompasses press freedoms;<sup>203</sup>
- The right to freedom of movement and residence;<sup>204</sup>
- The right to education, specifically primary education;<sup>205</sup>
- The right to marry and start a family;<sup>206</sup>
- The right to engage in economic activity, to work and to pursue a livelihood;<sup>207</sup>
- The right to vote and to stand for election for public office.<sup>208</sup>

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<sup>192</sup> *Id.* at art. 20.

<sup>193</sup> Petroleum Exploration and Production Act, no. 2 of 1983, art. 13(a), *available at* <http://www.eisourcebook.org/cms/Malawi%20Petroleum%20Act.pdf> (last visited July 23, 2017).

<sup>194</sup> Refugee Act of 1989, *available at* <http://www.refworld.org/docid/3ae6b4f28.html> (last visited July 23, 2017) [hereinafter Refugee Act].

<sup>195</sup> Levi Duma Mvula, Refugee Status Determination and Rights in Malawi 10 (2010), <https://www.rsc.ox.ac.uk/files/files-1/dp-rsd-malawi-2010.pdf> (last visited July 23, 2017).

<sup>196</sup> *Id.* at 11.

<sup>197</sup> MALAWI CONST., *supra* note 189, at art. 16.

<sup>198</sup> *Id.* at art. 18.

<sup>199</sup> *Id.* at art. 19(3).

<sup>200</sup> *Id.* at art. 27.

<sup>201</sup> *Id.* at art. 21.

<sup>202</sup> *Id.* at art. 42.

<sup>203</sup> *Id.* at arts. 32-36.

<sup>204</sup> *Id.* at art. 39.

<sup>205</sup> *Id.* at art. 25.

<sup>206</sup> *Id.* at art. 22.

<sup>207</sup> *Id.* at art. 29.

### ***State Human Rights Bodies***

The Constitution establishes a Human Rights Commission,<sup>209</sup> and grants it the authority to investigate human rights violations.<sup>210</sup> However, the Human Rights Commission's role is purely investigatory, and the body has no judicial or legislative power.<sup>211</sup>

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<sup>208</sup> *Id.* at art. 40(3).

<sup>209</sup> *Id.* at art. 129..

<sup>210</sup> *Id.*

<sup>211</sup> *About Us*, MALAWI HUMAN RIGHT COMMISSION, available at <https://web.archive.org/web/20170103162253/http://www.hrcmalawi.org/about.html> (last visited July 23, 2017).

## IX. Labor Rights

### *Work Protections Established by Law*

#### Applicable International Instruments

Malawi is party to a number of international instruments that protect workers, including:

- ILO Convention no. 29 (concerning Forced or Compulsory Labor);
- ILO Convention no. 87 (concerning Freedom of Association and Protection of the Right to Organise);
- ILO Convention no. 100 (concerning Equal Remuneration);
- ILO Convention no. 105 (concerning the Abolition of Forced Labor);
- ILO Convention no. 111 (concerning Discrimination in Employment and Occupation);
- ILO Convention no. 138 (concerning Minimum Age for Admission to Employment); and
- ILO Convention no. 182 (concerning the Worst Forms of Child Labor).<sup>212</sup>

#### Domestic Legal Protections

The Constitution of Malawi generally guarantees the right to work, and defines it as the right to “freely engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.”<sup>213</sup> It specifically states that persons with disabilities are to be granted fair employment opportunities,<sup>214</sup> and that women are to be free from discrimination in work, business, and public affairs.<sup>215</sup>

With respect to labor rights, the Constitution guarantees that all individuals have the right to fair and safe labor practices, fair remuneration, equal pay for equal work, and the right to form and join trade unions.<sup>216</sup>

The Employment Act expands upon these protections by issuing detailed provisions related to working hours, overtime pay, annual leave, minimum wages, unfair dismissal from work, and other matters.<sup>217</sup> The Employment Act applies both to private sector and government workers; however, it does not apply to non-civilian members of law enforcement bodies, including members of the armed forces, the prison services, and the police.<sup>218</sup> “Employees” are broadly defined under the terms of the Act as persons who “offer [their] services under an oral or written contract of employment, whether express or implied”, and as persons, “including tenant share cropper[s], who perform[] work or services for another person for remuneration or reward on such terms and conditions that [they] are in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more

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<sup>212</sup> *Ratifications for Malawi*, INT’L LABOR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:103101](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103101) (last visited July 23, 2017).

<sup>213</sup> Constitution of Malawi, 1994, art. 29, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>214</sup> *Id.* at art. 13(g)(ii).

<sup>215</sup> *Id.* at art. 24(2)(b).

<sup>216</sup> *Id.* at art. 31.

<sup>217</sup> Employment Act, No. 6 of 2000, *available at* <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/58791/65218/E00MW101.htm> (last visited July 23, 2017) [hereinafter Employment Act].

<sup>218</sup> *Id.* at art. 2.

closely resembling the relationship of employee than that of an independent contractor.”<sup>219</sup>

### Minimum Wage Requirements

Although the Employment Act only provides that the Minister for Labor *may* set minimum wages for particular groups of wage earners, following consultations with relevant workers’ organizations,<sup>220</sup> it does appear that Malawi has a national minimum wage.<sup>221</sup> Further minimum wage conditions appear to be located in the Regulation of Minimum Wages and Conditions of Employment Act,<sup>222</sup> however, ABA ROLI has been unable to locate a publicly-available copy of this law for review. It does not appear under the terms of the Employment Act that any group of workers would be exempt from minimum wage requirements.

An employer’s failure to pay their employees the minimum wage, as provided by law, may incur penalties of up to K50,000 and ten years’ imprisonment.<sup>223</sup>

### Working Hours Requirements

Employees and employers may contract for their normal working hours; however, no employee may be permitted to work for more than 48 hours a week before overtime.<sup>224</sup> Guards and shift workers may not generally work for more than eight hours a day,<sup>225</sup> and non-shift workers who only work five-day weeks may not be asked to work for more than 12 hours a day.<sup>226</sup> Those who work for six days a week may not work for longer than 8 hours daily.<sup>227</sup>

These working hours requirements may be suspended in case of accident, abnormal work pressures, *force majeure*, or the need for urgent work—but only so long as extended hours are necessary to avoid “serious interference” with business, and in order to prevent the loss of perishable goods.<sup>228</sup> Where exemptions from these requirements are granted, employees are to be granted a compensatory rest period, and all hours worked beyond the daily normal rate are to be compensated as overtime.<sup>229</sup>

### Overtime Remuneration

Overtime remuneration may be paid when employees work for an amount of time in excess of what would be normal in the undertaking (normal overtime), work on their days off (day off overtime), or on a public holiday (holiday overtime).<sup>230</sup>

Ordinary overtime is to be compensated at 1.5 times the hourly wage, and day off and holiday

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<sup>219</sup> *Id.* at arts. 3(a)-(b).

<sup>220</sup> *Id.* at art. 54.

<sup>221</sup> See, e.g., Mphatso Khutchi Richard, *Minimum Wage Increased in Malawi*, MALAWI24 (20 May, 2017), <https://malawi24.com/2017/05/20/minimum-wage-increased-malawi/> (last visited July 23, 2017).

<sup>222</sup> Regulation of Minimum Wages and Conditions of Employment Act, ch. 55:01.

<sup>223</sup> Employment Act, *supra* note 217, at art. 55(2).

<sup>224</sup> *Id.* at art. 36.

<sup>225</sup> *Id.* at art. 37(a).

<sup>226</sup> *Id.* at art. 37(b)(i).

<sup>227</sup> *Id.* at art. 37(b)(ii).

<sup>228</sup> *Id.* at art. 38(1).

<sup>229</sup> *Id.* at art. 38(2).

<sup>230</sup> *Id.* at art. 39(2).

overtime is to be compensated at twice the hourly rate.<sup>231</sup>

### Leave Requirements

The Employment Act guarantees a minimum of 18 days' annual leave for employees who work six days a week, and 15 days leave for those who work five days a week.<sup>232</sup>

The law also entitles employees to a minimum of four weeks' fully-paid, and eight weeks' half-paid sick leave, after they have completed 12 months of continuous service.<sup>233</sup> However, sick leave may not be granted without the provision of a medical certificate by the employee.<sup>234</sup>

The law guarantees eight weeks' fully-paid maternity leave to women, as well as additional leave for illness that arises out of pregnancy or confinement; women are generally entitled to return to the same job, unless it has ceased to exist or she is "incapable of continuing to perform".<sup>235</sup> ABA ROLI has been unable to confirm how broad the scope of this latter permission is in Malawian jurisprudence. Termination of pregnant employees may be grounds for an unlawful termination action, and the employer carries the burden of showing that the worker's pregnancy was not the cause of the termination; a violation of this provision may result in a fine of K20,000, and five years' imprisonment.<sup>236</sup>

### Labor Inspection and Oversight Systems

The Employment Act establishes an Office of the Labor Commissioner (Commissioner), and charges it with enforcing the Act—not in the least by granting it a labor inspection mandate.<sup>237</sup> Labor officers under these provisions have the authority to freely enter any workplace, at any time of day or night, and premises that they believe to be workplaces, at any time of day; however, if such premises are an employer's private home, they may not enter without the employer's consent or without a warrant.<sup>238</sup> Labor officers may inspect accident records, remove samples for analysis, and require the production of records.<sup>239</sup> Obstructing the work of a labor officer is a violation of the Employment Act, and may incur penalties of up to one year in prison and a fine not exceeding K5000.<sup>240</sup>

ABA ROLI has not identified any other laws or regulations that provide more detail on Malawian labor oversight and inspection mechanisms.

### Applicability of Labor Laws to Migrant Workers

To the extent that the Employment Act applies to all "persons" who enter into employment contracts or agreements, it appears that the labor laws generally extend to cover migrant workers. Additionally, the Second Schedule of the Employment Act indicates that Malawi has

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<sup>231</sup> *Id.* at art. 39.

<sup>232</sup> *Id.* at art. 44.

<sup>233</sup> *Id.* at art. 46(1).

<sup>234</sup> *Id.* at art. 46(3).

<sup>235</sup> *Id.* at arts. 47-48.

<sup>236</sup> *Id.* at art. 49.

<sup>237</sup> *Id.* at arts. 8(1)-(2).

<sup>238</sup> *Id.* at arts. 9(1)(a)-(c).

<sup>239</sup> *Id.* at art. 9.

<sup>240</sup> *Id.* at arts. 9, 66(1).

passed an African Emigration and Immigrant Workers Act;<sup>241</sup> however, ABA ROLI has been unable to procure a copy of this law for review.

### ***Child Labor Laws***

#### International Laws, Policies, and Agreements

Malawi has ratified the CRC, which recognizes the rights of children to be protected from economic exploitation by requiring State Parties to prohibit children from performing any work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or development.<sup>242</sup> State Parties also undertake to provide minimum age requirements for employment, regulate work hours and employment conditions, and establish sanctions to ensure that child labor laws are effectively enforced.<sup>243</sup>

Malawi has acceded to both the Optional Protocol on Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>244</sup>

It has ratified the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, which prohibits armed groups from recruiting children and bans the participation of children in conflict in any way.<sup>245</sup>

Finally, Malawi has ratified both the ILO Minimum Age Convention and the Worst Forms of Child Labor Convention.<sup>246</sup>

#### Domestic Laws and Policies

The minimum age for work in Malawi is 14 in agricultural, industrial, or non-industrial work.<sup>247</sup> However, minimum age restrictions do not apply to domestic work and noncommercial agriculture.<sup>248</sup>

Children under the age of 18 who are enrolled in school are not permitted to work for more than 20 hours a week during term time, 40 hours a week on school holidays, or more than 3 or 4 hours a day on school days.<sup>249</sup> Additionally, children under 18 are generally not permitted to

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<sup>241</sup> *Id.* at Schedule 2, *citing* The African Emigration and Immigrant Workers Act, Ch. 56:02.

<sup>242</sup> United Nations Convention on the Rights of the Child, art. 32(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>243</sup> *Id.* at art. 32(2).

<sup>244</sup> *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-11-b&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-b&chapter=4&lang=en) (last visited July 19, 2017); *Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-11-c&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en) (last visited July 19, 2017).

<sup>245</sup> STATUS LIST: AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA, *available at* [https://au.int/sites/default/files/treaties/7796-sl-african\\_union\\_convention\\_for\\_the\\_protection\\_and\\_assistance\\_of\\_internally.pdf](https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf) (last visited July 19, 2017).

<sup>246</sup> *See Child Labor and Forced Labor Reports: Malawi*, U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFF., <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/malawi> (last visited July 23, 2017) [hereinafter *Child Labor and Forced Labor Reports: Malawi*].

<sup>247</sup> Employment Act, *supra* note 217, at art. 21.

<sup>248</sup> *Child Labor and Forced Labor Reports: Malawi*, *supra* note 246.

<sup>249</sup> Employment (Prohibition of Hazardous Work for Children) Order of 2012, art. 2, *available at* <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93425/126730/F1363182240/MWI93425.pdf> (last

work between the hours of 6:00PM and 5:00AM.<sup>250</sup> They are not permitted to work in conditions of extreme temperature, or work that involves heavy lifting.<sup>251</sup>

The Education Act establishes mandatory and free primary education for all individuals below the age of 18.<sup>252</sup>

Malawi has implemented a number of policies and action plans related to child labor, including a National Action Plan on Child Labor, a Child Protection Strategic Plan, a National Action Plan for Vulnerable Children, and a National Youth Policy.<sup>253</sup>

#### Provisions Regarding the Worst Forms of Child Labor

Malawi law prohibits the government from recruiting child soldiers.<sup>254</sup>

Although children are permitted to work in the agricultural industry, the Schedule to the Employment (Prohibition of Hazardous Work for Children) Order prohibits them from working in the tobacco sector, deep water fishing, the meat slaughtering industry, or in any agricultural application involving the handling of agricultural chemicals or dangerous farm machinery.<sup>255</sup> Children are additionally not permitted to work in the logging, hazardous waste, alcohol, radiology, or electrical sectors; nor are they permitted to operate heavy machinery (or any other motor vehicle) or the metal industry.<sup>256</sup> Children are not generally permitted to work in establishments whose business is to sell alcoholic beverages, casinos, as models, or in any field that involves exposure to pornographic material; they may not work as tour guides, or in certain areas of the health sector.<sup>257</sup>

With respect to the commercial sexual exploitation of children, the Penal Code, the Child Care, Protection and Justice Act, and the Trafficking in Persons Act all contain provisions that prohibit the trafficking of children, the commercial sexual exploitation of children, and the use of children in illicit activities.<sup>258</sup>

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visited July 22, 2017).

<sup>250</sup> *Id.* at art. 4.

<sup>251</sup> *Id.* at arts. 5-8.

<sup>252</sup> Education Act of 2013, art. 13, *available at* [https://www.malawilii.org/mw/legislation/num-act/2012/35/num\\_act\\_2012\\_35.pdf](https://www.malawilii.org/mw/legislation/num-act/2012/35/num_act_2012_35.pdf) (last visited July 23, 2017).

<sup>253</sup> *Child Labor and Forced Labor Reports: Malawi*, *supra* note 246.

<sup>254</sup> Defense Force Act of 2004, art. 19.2.

<sup>255</sup> *Id.* at Schedule, part 1.

<sup>256</sup> *Id.* at part 2.

<sup>257</sup> *See generally id.* at Schedule.

<sup>258</sup> *Child Labor and Forced Labor Reports: Malawi*, *supra* note 246.

## **X. Rights of Communities and Indigenous People**

### ***Recognition of Customary and Communal Land Rights***

While the Constitution of Malawi generally vests all lands and territories in the Republic,<sup>259</sup> the Land Act of Malawi recognizes private and customary land ownership interests.<sup>260</sup>

The Land Act of 1965 and the Land Policy of 2002 recognize three categories of land rights: public, private, and customary land.<sup>261</sup> Public land is land that is used, acquired, or held by the government in the public interest, and may include parks, conservation, and historical areas.<sup>262</sup> Land used or owned by the government for public purposes would also fall into this category.<sup>263</sup> Private land includes land that is owned, held, or occupied under freehold title or lease, or is otherwise registered as private land under the terms of the Registered Land Act.<sup>264</sup>

Finally, customary land is defined as all land that is “held, occupied, or used by community members under customary law.”<sup>265</sup> Such land is held in trust by the President for the people of Malawi, and land disputes are determined under the terms of customary law.<sup>266</sup> Land held under customary tenure is generally administered by traditional leaders on behalf of communities; however, land may also be held individually, in the names of families and individuals.<sup>267</sup> The National Land Policy of 2002 seems to suggest that land held in customary tenure may not be sold outside the community;<sup>268</sup> however, as no act of Parliament has implemented the terms of the 2002 Land Policy into Malawian law,<sup>269</sup> it is unclear whether this provision currently has binding effect.

### ***Governance of Land Without Formal Title***

While Malawi has a number of laws that regulate title registration,<sup>270</sup> ABA ROLI has been unable to determine whether these laws effectively operate to vest ownership interests in land without title to the State.

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<sup>259</sup> Constitution of Malawi, 1994, arts. 207, *available at* [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017) [hereinafter MALAWI CONST.].

<sup>260</sup> Land Act of 1965, Ch. 57:01, *available at* <http://extwprlegs1.fao.org/docs/pdf/mlw41845.pdf> (last visited July 23, 2017).

<sup>261</sup> USAID, COUNTRY PROFILE: PROPERTY RIGHTS AND RESOURCE GOVERNANCE: MALAWI 6 (2016), *available at* [https://www.land-links.org/wp-content/uploads/2016/09/USAID\\_Land\\_Tenure\\_Malawi\\_Profile.pdf](https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Malawi_Profile.pdf) (last visited July 23, 2017) [hereinafter USAID, COUNTRY PROFILE: MALAWI].

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> MINISTRY OF LANDS, HOUSING AND SURVEYS, NATIONAL LAND POLICY §§ 9-10 (2002), *available at* [http://www.lands.gov.mw/phocadownload/land\\_policies\\_plans/national%20land%20policy%20january%202002.pdf](http://www.lands.gov.mw/phocadownload/land_policies_plans/national%20land%20policy%20january%202002.pdf) (last visited July 23, 2017) [hereinafter NATIONAL LAND POLICY].

<sup>269</sup> USAID, COUNTRY PROFILE: MALAWI, *supra* note 261, at 5-6.

<sup>270</sup> *See, e.g.*, A. T. B. Mbalanje, *Land Law and Land Policy in Malawi*, UN UNIVERSITY, <http://archive.unu.edu/unupress/unupbooks/80604e/80604E09.htm> (last visited July 23, 2017).



### ***Community Rights in Land-Based Development***

The National Land Policy of 2002 lays out a number of provisions that require community consultation for land use initiatives. For instance, the Policy provides that land use planning in villages must be done as a consultative process, in which the community fully participates.<sup>271</sup> With respect to lakeshore development, the National Land Policy strips local chiefs of the sole right to allocate land, and calls for stricter adherence to the Development of Lakeshore Plots (Control) Amendment Order.<sup>272</sup>

Other laws that call for community involvement in land-based development include the Environment Management Act, which provides that environmental impact assessments may be subject to public comment.<sup>273</sup>

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<sup>271</sup> NATIONAL LAND POLICY, *supra* note 268, at § 6.5.1.

<sup>272</sup> *Id.* at 6.7.

<sup>273</sup> Environment Management Act, No. 23 of 1996, art. 121, *available at* <http://ilo.org/dyn/natlex/docs/ELECTRONIC/45482/97715/F548493060/MWI45482.pdf> (last visited July 23, 2017).

## **XI. Immigration and Border Security**

### ***Immigration Law Prohibitions against TIP and Migrant Smuggling***

The Immigration Act of Malawi does not appear to create offenses for TIP and migrant smuggling. However, the Trafficking in Persons Act (TIP Act) does have a number of prohibitions against the illicit cross-border transport of migrants.<sup>274</sup> Additionally, the TIP act creates liability for international carriers that knowingly engage in human trafficking, or fail to transport persons in and out of Malawi who do not possess the necessary legal travel documents.<sup>275</sup>

### ***Protections for TIP Victims in Immigration Law***

The Malawi Immigration Act does not appear to provide special status for victims of TIP and migrant smuggling.<sup>276</sup> However, the Trafficking in Persons Act (TIP Act) does provide that “[a] person who has been certified as a trafficked person by an enforcement or protection officer . . . shall not be subjected to any criminal proceedings directly related to, or as a direct consequence of, the person's situation as a trafficked person.”<sup>277</sup> This provision would presumably apply to any violations of Malawi’s immigration laws. ABA-ROLI researchers did not identify any other immigration laws that pertain to TIP-related issues such as repatriation of TIP victims or special border security procedures for identifying TIP victims.

### ***Denial of Entry or Visa Revocation for TIP Offenders***

The Immigration Act does not include TIP or TIP-related offenses as specific grounds for inadmissibility. However, if an individual has been convicted of certain qualifying offenses, or is deemed to be an “undesirable inhabitant of or visitor to Malawi”, they would not be considered admissible under the terms of the immigration law;<sup>278</sup> thus, if TIP or TIP-related convictions may qualify under these provisions, TIP would constitute grounds for denial of an entry visa.

Similarly, conviction for offenses that result in terms of incarceration may be grounds for deportation in Malawi; as such, those who are convicted of TIP offenses may be subject to visa revocation.<sup>279</sup>

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<sup>274</sup> See generally Trafficking in Persons Act no. 3 of 2015, available at <http://www.warnathgroup.com/wp-content/uploads/2015/03/Malawi-2015-TIP-Act.pdf> (last visited July 23, 2017) [hereinafter TIP Act].

<sup>275</sup> *Id.* at art. 24.

<sup>276</sup> Immigration Act of 1964, available at <http://www.immigration.gov.mw/images/the-immigration-act.pdf> (last visited July 23, 2017) [hereinafter Immigration Act].

<sup>277</sup> TIP Act, *supra* note 274, at art. 42.

<sup>278</sup> Immigration Act, *supra* note 276, at art. 4.

<sup>279</sup> *Id.* at art. 39.

## **XII. National Security and Humanitarian Emergencies**

### ***National Security Laws and Strategies***

Malawi does not have a national security strategy. However, Malawi's Constitution provides that the President may declare a state of emergency in times of war, threat of war, civil war, or widespread natural disaster.<sup>280</sup> In the event a state of emergency is declared, there may be a limited derogation of certain rights, including freedom of expression, freedom of information, freedom of movement, and freedom of assembly.<sup>281</sup>

### ***Firearm Import/Export Regulations***

The Firearms Act of 1967 provides that "no person shall import or export any firearm or ammunition save under and in accordance with the terms of an import or export permission, as the case may be, issued by the Registrar of Firearms."<sup>282</sup> Such import permits may not be issued unless an individual otherwise possesses a firearms permit.

An exception from this law is permitted for tourists, provided that the Registrar of Firearms is satisfied that the tourist is authorized to possess a firearm in their own country or their country of import, and that the ammunition and arms are only for the tourist's personal use.<sup>283</sup>

### ***Conflict Resources Regulations***

ABA ROLI was unable to identify any Malawian laws that specifically regulate the trade of conflict resources. Resource extraction laws do not appear to list categories of persons who are ineligible to obtain mining or logging rights, such as members of the armed forces, the police, or security services.

### ***Emergency Management Laws and Strategies***

Malawi's Disaster Preparedness and Relief Act of 1991 does not address TIP or sexual and gender-based violence committed during a humanitarian emergency.<sup>284</sup> The government does not place any restrictions on the provision of emergency relief by foreign governments and international organizations.

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<sup>280</sup> Constitution of Malawi, 1994, art. 45(1), available at [https://www.constituteproject.org/constitution/Malawi\\_1999.pdf](https://www.constituteproject.org/constitution/Malawi_1999.pdf) (last visited July 23, 2017).

<sup>281</sup> *Id.*

<sup>282</sup> Firearms Act of 1967, art. 4(1).

<sup>283</sup> *Id.* at art. 5.

<sup>284</sup> Disaster Preparedness and Relief Act, ch. 33:05, available at <http://faolex.fao.org/docs/pdf/mlw117893.pdf> (last visited July 23, 2017).

### **XIII. Conclusion**

Malawi faces significant TIP issues including both labor and sex trafficking. The Government of Malawi is making significant efforts to eliminate TIP, but its efforts are hampered by a lack of resources.