

CONFRONTING THE PAST:
Accountability for Human Rights Violations in

MALAWI

May 1994

THE ROBERT F. KENNEDY MEMORIAL CENTER FOR HUMAN RIGHTS

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Confronting the Past was prepared by Makau Mutua, the projects director for Harvard Law School's Human Rights Program, based on a visit to Malawi on behalf of the Robert F. Kennedy Memorial Center for Human Rights in March 1994. It was edited by James Silk, the RFK Center's director, and Joel Solomon, program director for Africa at the Center. Dr. Mutua's trip followed an August 1993 delegation to Malawi by RFK Center Executive Director Kerry Kennedy Cuomo, Member of the Board Gay McDougall, consultant Jonathan Klaaren and Solomon.

THE ROBERT F. KENNEDY MEMORIAL CENTER FOR
HUMAN RIGHTS

1206 30th Street, N.W.
Washington, D.C. 20007 USA
Phone: (202) 333-1880
Fax: (202) 342-7445

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CHAPTER ONE

INTRODUCTION

Malawi became one of the last African countries to officially adopt multi-partyism, after two thirds of the voters in a June 14, 1993, referendum chose to end repressive, one-party rule. The speed and scope of change since then has been impressive. Opposition political parties, church and human rights groups and the government itself have participated in discussions to restructure society completely. The signs of the new Malawi are everywhere: newspapers write freely about the developments of the day; a new constitution has been drafted that includes a bill of rights; Parliament scrapped detention-without-trial laws; and the courts have rendered judgments in support of human rights. Multi-party presidential and parliamentary elections are slated for May 17, 1994. The changes augur well for respect for human rights and are a most welcome development. However, continued improvements are needed to ensure respect for human rights in the new Malawi and to address the violations of the past.

After Malawi won independence from Britain in 1964, the southern African nation became a fortress of tyranny under the rule of Dr. Hastings Kamuzu Banda. The government maintained control over its citizens by requiring absolute loyalty to its leaders and by terrorizing those who would speak out against the regime. It is common today to hear Malawians assert that every family, including Dr. Banda's, has been touched by political assassination, arbitrary detention or torture.

The most common abuses in Malawi included detention without trial, "disappearances," torture in custody, judicial interference, punitive confiscation of property, sexual and work-related exploitation of women, dismissal from work and complete controls on freedom of expression and religion. As Malawians work to restructure their society -- re-defining the laws and common understandings by which they wish to govern and be governed -- they will have to confront this past. Already this process is taking place, as newspapers report on the past repressive actions of politicians, and courts rule on cases of abuse dating back three decades. The draft constitution contains vague provisions for compensating victims and explicitly acknowledges the possibility of establishing a truth commission. But thus far, no attempt has been made in Malawi to establish broad principles of accountability and to come to a comprehensive understanding about the breadth and scope of human rights abuses that have occurred since 1964. Nor has a consensus developed about whether or how to account for the past, or what to do with individuals found guilty of committing abuses.

The task that faces Malawi at this crucial juncture in its history is not to choose between "complete forgetfulness" on the one hand and a "witch hunt" on the other. Rather, it is to balance retribution and a measure of forgiveness in order to achieve a peaceful transition to multi-party democracy while promoting respect for the rule of law and human rights, without which no democracy can thrive.

Accounting for the past in any country is difficult, given the complex and explosive political, legal and moral issues at stake. The process is made more difficult in Malawi because reliable and extensive documentation about abuses is scarce. The government of Dr. Banda was so repressive that local organizations that might have documented abuses were not established. Such organizations have played a crucial role in the human rights debates of other countries dealing with abusive histories, including South Africa, Chile and El Salvador, by being able to provide and analyze complete data about thousands of abuses. International organizations did report on Malawi, but their information was limited due to restricted access to the country. Interviews conducted by the Robert F. Kennedy Memorial Center for Human Rights in Malawi¹ clearly indicate that new information is available because people are now willing to talk openly about the past. The Center has also reviewed government documents indicating that official information about systematic abuses exists that has not been previously reported. However, this information has not been compiled and analyzed.

Although there are no international standards on how far a country should go in accounting for past abuses, there is a growing international consensus that, at the very least, the past must be investigated and those responsible for abuses publicly identified; gross abusers of human rights must be brought to justice.² The "right to truth" about the past has also been recognized as important.³ Such calls are sounded in Malawi by human rights and church groups. The determination of the norms, processes and institutions to address past abuses must be debated as publicly and as openly as possible to give all Malawians a chance to influence the final outcome of the debate and to come to terms with its history.

A full public accounting is important for several reasons. If an official and systematic report is not made, thirty years of abuses will likely remain the subject of rumor and ultimately become debilitating to the process of reconstruction. If the bill of

¹ Interviews conducted by the Robert F. Kennedy Memorial Center for Human Rights, August 1993 and March 1994.

² See Africa Watch, *South Africa: Accounting for the Past* (New York: Human Rights Watch, October 1992), p. 2.

³ See, for example, Article 19, *Malawi's Past: The Right To Truth* (London: Article 19, November 19, 1993).

rights in the draft constitution is to be fully respected, and if the rule of law and respect for human rights are to be observed in Malawi, what was unacceptable about the past must be made explicit. Malawians must be able to make a fully informed decision about the kind of society they want; in a country such as Malawi, where news and information was, as a matter of government policy, denied to its citizens, Malawians must have the chance now to understand the last 30 years.

To accomplish the tremendous task of accounting for the past -- documenting not just the best-known cases, but as many abuses as possible -- the government, perhaps in coordination with an intergovernmental organization such as the United Nations, would have to take charge of the process. The information gathered may or may not be used by a new government to take legal action against those found responsible. It might be made public in a report listing cases, as it was in Argentina's *Nunca Más* (Never Again), or used to offer an official government apology, as did civilian President Patricio Aylwin when he was elected to replace Chile's military leaders.

Although international standards do not govern the documentation and reporting of all past abuses, it is clear that those responsible for gross violations of human rights must be prosecuted. Failure to do so in Malawi will ultimately damage respect for human rights and the rule of law; gross abuse of human rights may be seen as a legitimate strategy for future governments to follow, a strategy that is free of adverse consequences for its practitioners. In addition, failure to prosecute such perpetrators would fall short of Malawi's obligations under international law. As summarized by Human Rights Watch:

A few international treaties have specifically established the duty to bring those who have [committed gross violations of human rights] to justice: these include the Genocide Convention, the Convention Against Torture, and the Geneva Conventions. . . . Finally, many human rights treaties, and the Universal Declaration of Human Rights, require states parties to provide an effective remedy for abuses. The combination of these provisions is widely accepted to have created a duty to investigate and punish abuses of rights, a duty which has also entered customary law.⁴

A systematic accounting of past abuses is fundamental to the process of reconstruction taking place in Malawi, and, under international law, those responsible for gross abuses of human rights that took place in Malawi must be brought to justice. This paper first summarizes current knowledge about well-known past abuses, then analyzes the role accountability has played in public debate, the courts and the draft constitution. It concludes with recommendations for approaching the issue of accountability in Malawi.

⁴ *South Africa: Accounting for the Past*, pp. 19-20.

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CHAPTER TWO

MALAWI'S AUTHORITARIAN PAST

From independence until 1993, when the referendum ended his absolute one-man rule, Life-President Hastings Kamuzu Banda ruled Malawi through the administration of terror by his feared and brutal security and paramilitary forces.⁵ President Banda, together with Official Hostess Cecilia Tamanda Kadzamira and her uncle, John Tembo, exercised total control over the country through the armed forces, the police, the Malawi Congress Party (MCP) and the notoriously cruel and violent Malawi Young Pioneers (MYP), a paramilitary unit with wide powers of arrest. In 1965, the Preservation of Public Security Regulations gave President Banda the power to detain anyone indefinitely without charge. In 1966, Banda warned that he would "detain anybody who is interfering with the political stability of [the] country."⁶ In the same year, the MCP's supremacy in the political process was achieved with the declaration of the one-party state. In the geopolitical language of the Cold War, these measures bought Malawi the status of a "stable" ally of the West.

⁵ Recent human rights reports on Malawi give an excellent review of human rights in Malawi. See, for example: Africa Watch, *Where Silence Rules: The Suppression of Dissent in Malawi* (New York: Human Rights Watch, October 1990); Africa Watch, *Malawi: Government releases many political prisoners* (New York: Human Rights Watch, April 24, 1991); Amnesty International, *Malawi: Prison Conditions, Cruel Punishment and Detention without Trial* (London: Amnesty International, February 1992); Lawyers Committee for Human Rights, *Malawi: Ignoring Calls for Change* (New York: Lawyers Committee for Human Rights, November 13, 1992); Lawyers Committee for Human Rights, *Malawi: The Referendum and Building Civil Society* (New York: Lawyers Committee for Human Rights, May 15, 1993); Amnesty International, *Malawi: Preserving the One Party State* (London: Amnesty International, May 1993); Amnesty International, *Malawi: Amnesty International's Recommendations for Permanent Protection of Basic Human Rights Following the Pro-democracy Vote* (London: Amnesty International, September 1993).

⁶ *Where Silence Rules*, p. 2.

Even the most detailed and well-researched human rights reports on Malawi do not establish the full scope of abuses under the Banda regime, given the total control exercised over society by the government until 1993. In fact, control was so tight that direct attacks against Malawians were not always necessary to enforce compliance with President Banda's demands. Put succinctly by Africa Watch, "Although many states in sub-Saharan Africa suffer from greater political violence than Malawi, there are few African countries with such a combination of totalitarianism and personal despotism."⁷ While highly political cases were sometimes reported, other abuses often went undocumented due to this atmosphere of repression and isolation.

Information about previously unknown or lesser-known cases is now coming to light. In August 1993, for example, the Center received testimony from a man whose father, a local MCP official who had disagreed with the government's strong-arm tactics in 1964, had been "disappeared" by MCP officials. "My father was living in Zambia since 1964 and was invited back to Malawi by the MCP. He returned hoping for reconciliation. He was picked up from a hotel by MCP officials and never seen again."⁸ According to a cleaning woman at the hotel, "I saw him being taken away. Since we were from the same district, I recognized him immediately. He got into a government vehicle. I recognized the driver, too. Mr. M. left his suitcase in the hotel room and never came back for it."⁹

The total number of cases like this is unclear, and figures on other types of abuses are similarly vague. Previous documentation and new sources of information clearly establish that a pattern of abuses existed that deserves serious, in-depth investigation. The following sections give a sense of the information available on better-known cases.

Detention Without Trial

Detention without trial has been one of the Banda regime's primary weapons in the suppression of dissent. Employed by the British colonial authorities to quash demands for independence, this method proved particularly useful during the post-colonial period for silencing opponents and imposing order within the ruling elite. Detention without trial was based on the Preservation of the Public Security Ordinance. The regulations promulgated under the law allowed for indefinite detention without trial or judicial or administrative review. In the 1960s and '70s, thousands of Malawians were detained for long periods on suspicion of dissent or disloyalty to the government. Detention has also been used against senior government and party officials who lost favor. For example, Gomile

⁷ Ibid., p. 1.

⁸ RFK interviews in Blantyre, August 18, 1993.

⁹ Ibid.

Kuntumanji, a former minister who was himself involved in human rights violations, was detained from 1969 until his death in 1990.

Detainees were held under harsh prison conditions, frequently in leg irons, and tortured routinely. Most were denied access to medical treatment and visits by family members and lawyers, and were fed a very poor diet.

One of the most prominent detainees was Aleke Banda, the former secretary general of the Malawi Congress Party and the man generally credited with the creation of the Malawi Young Pioneers¹⁰. The secretary general of the MCP was often the second most powerful political personality; the constitution designated the position the interim successor to the Life-President. It was for precisely this reason that the position was also very dangerous. In 1973, Aleke Banda was removed from the position after speculation in the Zambian media that he was a likely successor to President Banda.

In 1974, he was partially rehabilitated when he was appointed to the position of managing director of Press Holdings Limited, the MCP company chaired by President Banda. However, in the late 1970s, Aleke Banda became increasingly critical of the president's misuse of the company's finances for personal purposes. He was arrested in 1980 and detained without charge until his release on July 10, 1992.¹¹

Aleke Banda was not the only senior official to fall from grace and be promptly detained. Others included Matupi Mkandawire, a member of Parliament who was detained in the 1970s and later died in prison, and Margaret Marango Banda, a prominent party official who was detained in 1988. Other lesser-known figures were detained for political dissent or rebellion.

Martin Machipisa Munthali was arrested in 1965 on charges of supporting a rebellion led by government ministers dismissed in 1964. He was convicted after a grossly unfair trial. After serving his full 11-year sentence, he was detained by presidential order until his release in 1992.

According to court documents:

¹⁰ Aleke Banda was the first commander of the Malawi Young Pioneers. See *Aleke Banda v. Robert Dangwe and the Malawi Congress Party*, Civil Cause No. 279 of 1993, in the High Court of Malawi, p. 4. Aleke Banda is not related to President Kamuzu Banda.

¹¹ *Ibid.*, p. 6. Aleke Banda is now a leading official of the United Democratic Front (UDF) and is expected to be its vice-presidential candidate in the parliamentary and presidential elections scheduled for May 17, 1994.

He was taken to Dzeleka Prison in Dowa. He was put in a dark solitary room. He was ordered not to speak to anyone. He was further told that he was a very influential person and that he would influence them and others because he told them that he wanted multi-party to come into the country. He was at Dzeleka for two months.

After those two months he was sent to Mikuyu Prison. According to him, it was worse there. He was in a solitary cell measuring three feet by six feet. The room was much darker. There was no window and no ventilation. He was alone in Mikuyu up to 1974. His only companion was Chakufwa Chihana who joined him later and was released subsequently. He remained at the Mikuyu Prison till the 12th of June 1992 when he was released.¹²

While in detention, Munthali was kept under filthy conditions, denied access to family members and given a very poor diet. As a result, he developed high blood pressure and partially lost his sight. Security forces and the MYP burned his home, bar and coffee farm to the ground. In 1993, a court awarded Munthali record damages.¹³

Detained for 18 years after the completion of his 11-year sentence, Munthali's case has taken on particular importance for current human rights discussions.

Traditional Courts: Repression Disguised As Justice

Although detention without trial was the method most preferred by authorities for disposing of government critics, it was not the only means of silencing opponents. Through the use of sedition and other laws that criminalize independent political activity, the compliant judiciary had until recently remained another tool in the Banda government's arsenal of repression. Malawi relied on a dual judicial system comprised of regular and traditional courts. The former functioned within the common law tradition, providing, at least in principle, a presumption of innocence, and entitling the accused to legal representation. However, until recently, all criminal cases with a political element were heard by the traditional courts, which do not obey any of the internationally recognized guarantees for a fair trial.¹⁴

¹² *Martin Machipisa Munthali v. The Attorney General*, Civil Cause No. 52 of 1993, p. 2.

¹³ See Chapter Four, Section D, of this paper, "The Reclamation of Judicial Authority," for details on the settlement of the case for damages brought by Munthali.

¹⁴ *Malawi: Preserving the One Party State*, p. 15.

The traditional courts¹⁵ are a relic of the colonial era. They were created by the British to address minor offenses, but their jurisdiction was expanded in 1970 to include murder and rape; treason was added in 1976 to facilitate the trials of Albert Nqumayo, the secretary general of the MCP, and Focus Martin Gumede, the head of the Special Branch police intelligence unit. Both were tried and convicted of plotting to assassinate President Banda and sentenced to die. Nqumayo was executed, but Gumede was pardoned.

After the June 1993 referendum, the jurisdiction of traditional courts was limited. Regional and national traditional courts, which heard criminal, capital and political cases, were suspended. Local traditional courts still handle cases such as land disputes. But the powers that had been exercised by the traditional courts for three decades were immense. The prosecution decided whether a case was to be heard before the regular or traditional courts. The "bench" consisted of four chiefs, who were administrative officers appointed by the president, and one lawyer, who wrote the ruling. The procedure called for a summary trial. The accused had no right to legal representation and was not entitled to the prosecution's evidence for purposes of preparing a defense. Appeals, which could only be made to the traditional court system, were at the discretion of the minister of justice.

The most notorious traditional court case is that of Vera and Orton Chirwa. Orton Chirwa was independent Malawi's first attorney general. In 1964, he was dismissed along with several other ministers after policy disputes with President Banda. Vera Chirwa was Malawi's first female barrister. The Chirwas went into exile in Tanzania, where they founded the Malawi Freedom Movement (MFM). In 1981, the Chirwas and their son, Fumbani, were arrested by Malawian security forces. While the government charged that they had entered Malawi to incite armed rebellion against the government, the Chirwas maintained that they had been abducted by security forces in neighboring Zambia.

The government released Fumbani Chirwa without charging him, but put his parents on trial for treason. They were convicted and sentenced to death in a proceeding that failed to meet international standards for a fair trial.¹⁶ Although the conviction was confirmed on appeal in 1984, President Banda was pressured by the international community to commute their sentences to life imprisonment later that year. The two were held at Zomba Central Prison, but were never allowed to see each other. In October 1992, Orton Chirwa died in prison. He had been kept under harsh prison conditions and frequently

¹⁵ The term "traditional courts" is a misnomer. These courts have nothing to do with customary or traditional African law. They are a convenient method for dispatching opponents without regard to the "niceties" of procedural due process and other internationally recognized standards for a fair trial.

¹⁶ Among other irregularities, the Chirwas were denied the right to call witnesses on their own behalf in their treason trial.

held in leg irons. Vera Chirwa, who was released from prison in January 1993, was not allowed to attend the funeral of her husband.

Political Killings

The government did not hesitate to physically eliminate those suspected of endangering the president's grip on power. In addition to deaths of detainees in custody, there have been killings of political opponents.

Among the most prominent cases are those of Attati Mpakati and Austin Madinga. Mpakati, the leader of the outlawed Socialist League of Malawi (LESOMA), was maimed by a parcel bomb in Maputo, Mozambique in 1979. In 1983, he was found killed in Harare, Zimbabwe. Madinga, a former World Bank official who returned to Malawi to run the Malawi Development Corporation, died in a mysterious car accident after the World Bank pressed the Malawi government to replace John Tembo with Madinga as the governor of the Reserve Bank of Malawi.

Two other killings apparently reflected the paranoia of the Malawi state and the lengths to which it would go to eliminate its opponents. Fred Sikwese, a senior foreign ministry official, was tortured to death in 1989 after he was detained on suspicions that he leaked information about Malawi's relationship with South Africa. Mkwapatira Mhango, a journalist living in exile, was killed in a firebomb attack in Zambia in 1989 shortly after being attacked by name by President Banda.¹⁷

None of these killings have been officially solved.

¹⁷ For a more complete description of the circumstances surrounding these political killings, see *Where Silence Rules*.

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CHAPTER THREE

THE CASE OF THE GOVERNMENT MINISTERS

Since the introduction of multi-partyism and the advent of the independent press, one case of an apparent human rights abuse has been most frequently -- and passionately -- discussed: the 1983 murder of three cabinet ministers and a member of Parliament. The four victims were part of a clique within the ruling party that favored political reform and a moderation of the regime's excesses: Dick Matenje, the secretary general of the MCP and President Banda's likely successor; Aaron Gadama and John Twaibu Sangala, both cabinet ministers; and David Chiwanga, a member of Parliament. Matenje, Gadama, and Sangala were especially critical of President Banda and advocated a more collective form of leadership within the MCP.

On May 17, 1983, Matenje and Gadama introduced a motion in Parliament seeking changes in the electoral law to allow three candidates to compete in each constituency. Chiwanga supported the motion. According to reports, the four also opposed the proposed creation of a premiership, which would have gone to John Tembo. All four were reportedly arrested the same day.

Various reports indicate that the four had come to be viewed by the president and his close aides as a threat to their stranglehold on power.¹⁸ Relatives of some of the deceased told the RFK Center that among the issues discussed during the parliamentary session was President Banda's succession.¹⁹ Other reports have suggested that President Banda was planning to spend a year in Europe and had wanted to create the post of prime minister to be occupied by Tembo in his absence.²⁰ This account holds that Matenje and Gadama opposed the proposal, thereby earning Tembo's deadly anger.

¹⁸ Many of those interviewed by the RFK Center believe that John Tembo, perhaps the second most powerful man in Malawi, was involved in the decision to eliminate the four politicians.

¹⁹ RFK Center interview with Claire Aaron Gadama, Mary Gama (nee Gadama), and Augustine Chiwanga (hereinafter "RFK Center Gadama-Chiwanga interview"), Blantyre, March 29, 1994.

²⁰ *Where Silence Rules*, p. 53.

The four disappeared after Parliament adjourned on May 17. Some reports suggest that the four were seen with police officers in Zomba and later in Blantyre.²¹ They were last seen alive in Blantyre on the evening of May 17. The government released contradictory stories after their disappearance: at first it stated that they were missing, but later announced that they had been killed in a car crash in Mwanza as they attempted to flee the country. The car in which they were allegedly traveling was recovered at the scene of the accident, apparently undamaged. Family members and other eyewitnesses have claimed that bullet holes were visible on the bodies of the dead officials.

What happened next has convinced relatives of the victims and observers of Malawian politics that the four were murdered. As a daughter of one of the deceased explained:

After the government announced the deaths, it transported the bodies to our homes in Land Rovers with instructions for us not to wash the bodies or have them examined. We were instructed to bury them as we had received them. Mourners who were not immediate family members were turned away from the funeral by the police and the MYP.²²

Those who saw the bodies noticed evidence of foul play. Augustine Chiwanga told the RFK Center he "saw four bullet holes on the face and the back of the head, which was partially blown off."²³ The families received no visits -- even at the funerals -- or messages of condolences from government officials, even though the deceased were senior and powerful politicians. Another daughter of one of the deceased told the RFK Center:

We think that they were killed in Blantyre and transported to Thambani, Mwanza, where the government put the bodies in a car and faked the accident by pushing it down a hill. The car was always at Chileka Police Station until last year [1993] when it disappeared after Muluzi [the leader of the political party UDF] called for an inquiry into the deaths.²⁴

²¹ RFK Center Gadama-Chiwanga interview.

²² RFK Center interview with Mary Gama, Blantyre, March 29, 1994.

²³ RFK Center interview with Augustine Chiwanga, Blantyre, March 29, 1994.

²⁴ RFK Center interview with Claire Gadama, Blantyre, March 29, 1994. Mordecai Msisha, the lawyer for the families of the deceased, confirmed that the "accident" car had indeed vanished from the police station.

A decade after the deaths, the government of Malawi has not provided the relatives of the deceased with autopsy reports or any acknowledgement that an investigation is warranted.

Newspapers, politicians and human rights activists have been united in their calls for a public explanation of what happened to the four politicians a decade ago. In August 1993, the families of the deceased issued a strong press statement in which they accused the government, the MCP and President Banda himself of the killings. The statement read, in part, "We call upon and challenge [President Banda], the MCP and the Malawi government to account for their actions and to commission an inquiry into the reasons for the arrest by the Malawi Police and subsequent deaths in custody of the four deceased persons."²⁵ On August 23, 1993, a Malawian newspaper heightened public interest in the killings when it published an interview with a police officer who claimed to have seen the bodies shortly after the murders. It also published pictures of the scene of the "accident".²⁶ Shortly thereafter, the UDF leadership started calling for a commission of inquiry.

On August 31, 1993, Nyirenda & Msisha, the law firm representing the families of the deceased, wrote to the attorney general, asking that the government produce, among other things, post mortem reports, records of inquests, a certificate from the road traffic commissioner on the condition of the vehicle in which the deceased were found, and police reports of the incident. The attorneys requested that a commission of inquiry be appointed to investigate the cause of the deaths in the event such records were not available. They also notified the attorney general of their intent to sue the Ministry of Health, the Malawi Police and the coroner for not carrying out the duties imposed on them by law.²⁷ They also indicated their intention to sue the government for damages.

The RFK Center obtained a copy of a confidential memorandum from the attorney general, relaying to President Banda the requests of Nyirenda and Msisha. Lovemore Munlo, the attorney general, sought President Banda's "directions that I obtain from the Police and other public offices" the records requested by the attorneys. Additionally, he proposed to "Your Excellency's consideration and guidance that after I have reviewed the

²⁵ Press Release, issued jointly by the families of Dick Tennyson Matenje, Aaron Gadama, John Twaibu Sangala, and David Chiwanga, August 16, 1993, p. 4.

²⁶ *The Nation*, August 23, 1993.

²⁷ Letter to the attorney general by Nyirenda & Msisha, August 31, 1993. The registrar of the High Court, which is the depository of all inquest files, did not have records of the inquest or investigation or any other official document on the 1983 murders. He has concluded that no records were made. RFK Center interview with Dunstain Mwaungulu, registrar of the High Court, Blantyre, March 29, 1994.

official reports, I should be allowed to discuss the matter with senior members of the cabinet and the National Executive Committee of the Party, namely, Hon. J. Z. U. Tembo" and several others "so that we could report back to Your Excellency. . . ."28

The memorandum was apparently returned to the attorney general signed "approved," presumably by President Banda, on September 23, 1993. In January 1994, one newspaper reported that President Banda had approved a commission of inquiry in response to the attorney general's memorandum.²⁹ However, the government has not acknowledged such approval. Munlo was in fact reported to have expressed "doubts about the usefulness" of a commission.³⁰

Following the attorney general's comments, the press and the families of the deceased stepped up their demands for a commission of inquiry. The families stated that they did not "see how an inquiry into a road accident as claimed by the MCP government can derail a political process to multiparty elections."³¹ They interpreted "Mr. Munlo's claim as a tacit admission that the four were indeed murdered in politically motivated circumstances."³² Public pressure mounted as Edward Bwanali, a cabinet minister under President Banda at the time of the murders and now a senior UDF official, publicly announced that he would be willing to testify before a commission of inquiry.³³ In January 1994, a newspaper published an interview with Lazaro Chakwiya, who said that, as a police officer, he had been ordered to shoot the four people, and that he had done so.³⁴

Several suits have been instituted against the government to compel it to appoint a commission of inquiry. In one case, the UDF has sued the attorney general to compel the

²⁸ Confidential memorandum to His Excellency the Life President, from L. G. Munlo, minister of justice and attorney general, September 22, 1993, pp. 2-3.

²⁹ *The Enquirer*, January 18, 1994, p. 1.

³⁰ *Malawi Democrat*, January 6-12, 1994, p. 1.

³¹ *Malawi Democrat*, January 13-19, 1994, p. 1.

³² *Ibid.*

³³ Bwanali was reportedly one of the ministers targeted to be killed on the same day; he was tipped off and managed to escape. RFK Center Gadama-Chiwanga interview.

³⁴ *The Nation*, January 20, 1994, p. 1.

state to establish a commission.³⁵ In another, the families of the deceased have sued the government, seeking damages against the state for causing the deaths. They have also asked for an independent investigation into the killings.³⁶

In the view of many lawyers, such steps are critical for the judiciary: respect for human rights will receive an important boost if the court issues an order compelling the government to establish a commission of inquiry. The public discussion and judicial consideration of an inquiry into the killings provide focus for the larger debate in Malawi of how to account for the past. As Malawians grapple with restructuring their society, the uncertainty created by the lack of conclusive information on such cases is bound to lead to instability, both in the short term, by allowing distrust to remain a common sentiment, and in the long term. If the government of Malawi cannot clarify the most prominent cases and bring to justice those found responsible, respect for the rule of law will be undermined.

³⁵ *The United Democratic Front v. Attorney General*, Civil Cause No. 11 of 1994, the High Court of Malawi.

³⁶ *M. Gadama, S. Matenje, J. Sangala, and B. Chiwanga v. Attorney General*, Civil Cause No. 77 of 1994, the High Court of Malawi.

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CHAPTER FOUR

POLITICS, LAW AND HUMAN RIGHTS IN TRANSITIONAL MALAWI

Government resistance to the 1993 referendum was the last gasp of a repressive system. The current campaign for democracy was sparked by the pastoral letter issued by Malawi's Roman Catholic bishops in March 1992. The letter criticized the government for human rights abuses and called for democracy.³⁷ It was the first such public criticism by a non-governmental entity in Malawi, and led to a torrent of criticism about the ruling MCP by Malawians from all walks of life. It was as though the bishops opened a dam of anger. In unprecedented numbers, Malawians reclaimed their right to independent political activity. The state greeted this burst of freedom with naked and harsh repression.

The pro-democracy movement gained a personal political identity when Chakufwa Chihana, the secretary general of the Southern African Trade Union Co-ordination Council (SATUCC), who was living in exile, was arrested on April 6, 1992, at Lilongwe International Airport upon his return to announce the start of the campaign for democracy. Detained for three months, he was released on bail on July 10. He was charged with the possession of seditious publications on July 13.³⁸ Chihana was finally convicted of the importation and possession of seditious publications on December 14 and sentenced to two years' imprisonment. In March 1993, the Supreme Court upheld his conviction, but reduced his sentence to nine months' imprisonment with hard labor. He was released on June 12, 1993, days before the referendum.

In addition to Chihana's arrest and conviction, hundreds of Malawians were subjected to arbitrary arrest and detention, criminal charges and other forms of harassment for their peaceful advocacy for democratic reform. But as repression heightened, the people of

³⁷ Makau Mutua, "Democracy in Africa: No Easy Walk to Freedom," *Reconstruction*, v. 2, p. 40 (no. 1, 1992).

³⁸ The publications were the Catholic bishops' pastoral letter, the speech Chihana intended to read at Lilongwe International airport, and several other documents and press releases from a conference in Lusaka, Zambia.

Malawi appeared determined to reject one-party rule. That determination was affirmed with the victory for multi-partyism in the referendum on June 14.

Although the government continued to harass, arrest and place severe restrictions on multi-party advocates prior to the referendum, the defeat of one-party rule by popular vote dramatically changed the political landscape and signaled a break with the past.³⁹ On June 29, 1993, bowing to the referendum result, the Malawi Parliament, hitherto limited to members of the Malawi Congress Party (MCP), repealed section 4 of the Constitution, thus allowing for the registration of opposition political parties. Parliament also passed an amnesty law for all exiles and freed most political prisoners.⁴⁰

To help guide the creation of a new political order, the National Consultative Council (NCC) was established. The NCC is composed of seven representatives from each of the political parties. Of those representatives, two from each party sit on the National Executive Council (NEC), a subcommittee of the NCC that monitors the implementation of state policies.⁴¹ It tracks abuses of power, public finances and property and brings such transgressions to the attention of the cabinet. It also monitors access to the Malawi Broadcasting Corporation (MBC) to ensure that all political parties are treated fairly and equally.⁴²

³⁹ According to many observers of the Malawi political scene, the government miscalculated in allowing the referendum; the humiliating defeat, even after widespread harassment of its opponents, had not been anticipated by senior officials.

⁴⁰ Those exiles who had been arrested during the campaign for the referendum were also released without charge. Charges of sedition were dropped against government opponents, and most political prisoners were released.

⁴¹ *Malawi: Amnesty International's Recommendations for Permanent Protection of Basic Human Rights Following the Pro-democracy Vote*, p. 2. The NCC was created following negotiations between the MCP and the opposition parties. The NCC has reduced President Banda's single-party parliament and government to a caretaker administration. Both the NCC and the NEC were created following negotiations between the Public Affairs Committee (PAC) and the President's Committee on Dialogue (PCD). The PAC was initially composed of pro-democracy religious and professional organizations, as well as leaders of the Alliance for Democracy (AFORD) and the United Democratic Front (UDF), the two leading opposition political parties, and other smaller opposition parties. The PCD was constituted by leading government ministers and MCP stalwarts.

⁴² Malawi does not have a television station, a fact that makes access to the state radio station of paramount importance.

The NCC was entrusted with the formulation of policy and initiation of laws to govern the transitional process until after the May 1994 presidential and parliamentary elections. Significantly, it was given the mandate to propose a draft constitution, a bill of rights and new electoral laws to be presented to the Malawi Parliament for passage.⁴³

Since the referendum and the introduction of multi-partyism, political discourse in Malawi has assumed new vigor. Dozens of privately owned newspapers have appeared, and, for the first time in Malawi's history, views other than those of the government receive substantial coverage in the print media. Legal impediments to free expression still exist, and people are still harassed at times for expressing their views.⁴⁴ Nonetheless, in this climate of freer expression, some attempts at confronting the past have been made.

At the legal level, some encouraging steps to restore formal protection and recognition of certain basic rights have been taken at the initiative of the NCC. The constitutional provision establishing Dr. Banda as life president was scrapped, and the detention-without-trial provisions of the Public Security Act were repealed by Parliament.

Public calls for the disarmament of the Malawi Young Pioneers, the cruel and repressive paramilitary wing of the MCP, were another indication that Malawians were intent on a genuine transition to democracy. In late 1993, the army swung its weight behind the pro-democracy movement when it attacked and disbanded MYP camps across the country.

The transition has shown that any meaningful discussion about democracy would be difficult without an examination of the lessons of history. What institutional and personal failures caused the disrespect for human rights and the rise of a despotic state? What does the past teach Malawians about the organization of the state and the uses of state power? What do various political actors -- both institutional and individual -- think should constitute the society's confrontation with the past as it struggles to craft and mold a new political culture? How would the nation safeguard the new order in view of the past and make sure that the likelihood of history repeating itself would be remote?

⁴³ Although the NCC did not replace the Malawi Parliament as the supreme legislative authority, its legislative power is almost final; its recommendations are certain to be passed by the MCP parliament.

⁴⁴ Article 19, *Freedom of Expression in Malawi: More Change Needed* (London: Article 19, February 3, 1994).

At times, these questions have been addressed publicly, but several factors have combined to diminish the chances for a vigorous public debate on accountability for past abuses of human rights.

The Fears and Hopes of Political Parties

Malawi's transition, like that of many other countries, is fertile ground for the germination of destructive tendencies based on regional, political, social and religious differences. Political actors, a good number of whom were complicit in the repressive actions of the past, now compete to shape the political future of Malawi. The public discussion of the manner in which the new Malawian state should deal with the past is deeply influenced by the effect that discussion is likely to have on various political forces. Part of the debate regarding the past revolves around the role of individuals in shaping the government institutions of repressive Malawi. Another part of the discussion has to do with the role of specific individuals in specific abuses. It is important to separate these two distinct focuses when reviewing the debate about accountability in Malawi.

An accounting for past abuses in Malawi would necessarily focus on the actions of government officials and the MCP since independence. From a historical standpoint, the MCP stands to lose the most by the adoption of legal and political measures to address the past comprehensively. It was the MCP one-party state that authored, formulated and implemented the repression. A thorough examination of the past would implicate many current and former senior officials of the MCP, the MYP, the government and the police and security forces. Since the June 1993 referendum, government officials have not pushed for any measures to address past human rights abuses, but they have not publicly ruled out the possibility of such steps.⁴⁵

In August 1993, Minister of State John Tembo told the Robert F. Kennedy Memorial Center for Human Rights, "The government of Malawi does not condone anyone abusing or torturing anybody. We have to eliminate the possibility of abuses. I can't say what we'd do about the past."⁴⁶ Questioned about redress for past violations of human rights, the minister suggested that people with complaints "go to court."

⁴⁵ Most Malawians interviewed by the RFK Center in both Blantyre and Lilongwe in March and April 1994 were convinced that the MCP had not pushed for an accounting of the past because its senior officials stood to lose the most. Attempts by the Center's representative to meet with Lovemore Munlo, the minister for justice and attorney general, to clarify the government's position, were unsuccessful.

⁴⁶ RFK Center interview, Blantyre, August 19, 1993.

There are concerns among some activists that the presence of old-style politicians in the leadership of opposition political parties has compromised public debate about the past. Mordecai Msisha, secretary of the Malawi Law Society (MLS) and a leading human rights lawyer, told the RFK Center that the "transition process appears to have been hijacked by opportunists who at the very beginning were cautious and stayed out".⁴⁷ This is a criticism that has been leveled particularly at the UDF leadership, many of whom served under President Banda and were imprisoned or exiled after losing favor. This view, which focuses on the role of these people in shaping repressive Malawian society, was vividly captured in a newspaper article:

Since the advent of multiparty democracy in Malawi last year, there has been growing dissent amongst many people about the leadership of some of the opposition parties whose leaders were senior MCP functionaries and have been linked to the atrocities of the Banda regime. The United Democratic Front (UDF) has been singled out by people and nick-named "MCP team B" because of the history of its senior leadership in MCP. The party's president Bakili Muluzi, the vice president Aleke Banda, were once MCP Secretary-Generals. Aleke was also at one time Commander of the notorious Young Pioneers.⁴⁸

UDF officials reject this analysis. In an opinion article published in Malawi's *The Nation*, J.J.J. Sonke, who recently left AFORD and joined its rival UDF, argued that UDF leaders who were in the MCP, like Muluzi and Aleke Banda, had fallings-out with the government over principle. "[Aleke Banda] was the first one who had the guts to go to the president and tell him that he could not carry on drawing money from the Press group for the president's private projects. This earned him 12 years in prison. . . ." Pointing to a lack of information linking Muluzi and Aleke Banda to atrocities, Sonke writes, "Some people must have been digging very hard to find evidence of something really bad done by Mr. Muluzi and Mr. Banda! The fact that they failed means enough, and to me both gentlemen deserve full respect and support."⁴⁹

The only way to lay these issues to rest adequately is to see a full accounting of the past. The vitriolic and personal attacks that take place in Malawi, perhaps intensified by the political campaign, will do nothing to answer these questions, which will persist long after the May 17 vote.

⁴⁷ RFK Center interview with Mordecai Msisha, Blantyre, March 28, 1994.

⁴⁸ "Kalua to Expose Murderers in Opposition Party Before May 17," *Malawi Democrat*, January 13-19, 1994, p. 1.

⁴⁹ J.J.J. Sonke, "Confessions of a weak-willed soul," *The Nation*, April 21, 1994.

The UDF has not called for such a process, but has led the public in urging an inquiry into the 1983 murder of the three cabinet ministers and a member of Parliament. In an August 1993 discussion with the RFK Center, Bakili Muluzi agreed, in principle, with the acceptability of expanding a commission of inquiry into the ministers case to cover other abuses that occurred during the last 30 years.⁵⁰ The UDF has not made such a call part of its political platform.

Within the opposition, the only push for measures to address past human rights abuses have come from AFORD and the MDP.⁵¹ AFORD reportedly stimulated accountability discussions in the NCC and constitutional drafting committee.⁵² According to Mapopa Chipeta, an AFORD official, "The issue of accountability is hotly contested because a lot of abusers have returned to politics under the banner of democracy. There have been attempts to downplay the role they played and to blame it all on [President] Banda."⁵³

Leaders in both the MCP and UDF have expressed fears that AFORD intends to use the accountability issue to blackmail and marginalize them in a democratic Malawi. "Our aim," insists AFORD's Chipeta, "is not to seek reprisal but merely to record what happened for posterity."⁵⁴ AFORD is, however, split on the nature that accounting should take.

⁵⁰ Interview with the RFK Center, Blantyre, August 1993. Although the RFK Center repeatedly visited the offices of the UDF in Blantyre and Lilongwe in March 1994, party officials and candidates for the forthcoming elections declined to comment on the party's position on accountability for past human rights abuses. Instead, the RFK delegate was asked to see Bakili Muluzi and Aleke Banda, who would speak for the party. Attempts to see them were unsuccessful because they were out of town.

⁵¹ The MDP is led by former exiles, mostly from South Africa. It has repeatedly raised the issue of accountability in the popular press although it lacks political clout because of its small following. The president of the MDP told the RFK Center that "the lessons of the past must be the basis for a brighter future. All atrocities committed in the past must be addressed to build the future. This is why we need a commission of truth." RFK Center interview with Kamlepo Kalua, president of the MDP, Lilongwe, March 30, 1994.

⁵² RFK Center interview with Simon Pamdule, vice publicity secretary of AFORD and member of NCC, Blantyre, March 28, 1994.

⁵³ RFK Center interview with Mapopa Chipeta, AFORD secretary for political affairs, Lilongwe, March 30, 1994.

⁵⁴ Ibid.

While no political party can afford to oppose openly an examination of the past, AFORD also realizes the danger of being seen as too vindictive. This concern is heightened because the political parties tend to be split along regional lines, further politicizing the transition. AFORD draws its support from the north, a part of the country that has historically been discriminated against by the MCP, whose base of support has been in the central and southern regions.⁵⁵ Strong calls by AFORD for individual sanctions could be seen by southerners as an attack on them. It would most likely depress whatever support AFORD enjoyed in the south.

These factors, together with UDF control of the major private newspapers and the lack of both independent sources of well-analyzed human rights data and an experienced human rights movement, have pushed the accountability issue to the side. "Most of the parties," says Vera Chirwa of the Legal Resources Centre, "have not done anything apart from empty condemnations."⁵⁶

The Draft Constitution

The 1964 Malawi Constitution, which was repeatedly amended by President Banda's rubber-stamp Parliament to deny basic rights, was eventually rejected by the NCC, which had appointed a constitution committee to rewrite the existing constitution or draft a replacement.⁵⁷ At first, the NCC focused on amending the existing constitution, but then, in January 1994, decided to prepare a new one.⁵⁸ According to several of its members, the committee's lack of expertise in constitution-making prompted the NCC to request the United Nations Electoral Assistance Commission to provide a team of technical advisors to help draft the new constitution. Kevin Bampton, a British constitutional lawyer, and Mordecai Msisha, the Malawian human rights lawyer, were appointed co-draftsmen.

The committee hoped to finish its work early enough for Parliament to approve a new constitution before the May elections. This left little time for the NCC to foster

⁵⁵ See United States Department of State, *Country Reports on Human Rights Practices for 1993* (Washington, D.C.: U.S. Government Printing Office, 1994).

⁵⁶ RFK Center interview with Vera Chirwa, Blantyre, March 29, 1994.

⁵⁷ The committee was composed of one representative from each party represented on the NCC.

⁵⁸ Most NCC members felt that the old constitution was terminally flawed and could not be the basis for a democratic process. Hence, the NCC decided to debate and create a totally new document.

debate among Malawians regarding the constitution's content. According to Bampton, the committee had only one option:

There should first have been a public discussion about the need and content of a constitution through a civic education program or a long, drawn-out constitutional conference. This would have been the right way to do it. But we did it the reverse way by drafting it -- dispensing with the technical aspects first -- and then soliciting a public discussion: the back-to-front way.⁵⁹

A second problem was a conflict about the leadership of the constitution-drafting process. Lawyers with the Malawi Law Society were resentful of the dominance of foreign advisors over the process.⁶⁰ In addition, there has never been a systematic and protracted effort -- by any sector of society -- to solicit public opinion about the draft constitution, although some attempts have been made to receive public comments.

There have been at least two public conferences on the proposed constitution. The first was a three-day constitutional symposium organized by Vera Chirwa's Legal Resources Centre from February 3 to 5, 1994. Participants included members of the NCC, chiefs, students, representatives of women's groups, professional, human rights, religious and teachers' organizations, and international constitutional advisors. The meeting focused attention on the bill of rights and sought the views of various sectors of Malawian society about the content and nature of the proposed constitution.

Another constitutional conference was organized by the NCC from February 17 to 26. It was attended by a cross section of Malawians, including chiefs and representatives of professional organizations. The draft constitution, which was completed by then, was not made available to the delegates at the NCC constitutional conference. Instead, only a four-page abstract of the draft constitution was circulated. A church official who attended the conference was highly critical of the "arrogance of many of the NCC delegates and their distance from the poor in whose name they were debating the constitution."⁶¹

A Malawian newspaper summarized the concerns about the drafting process. "Some are unhappy with certain specific provisions on which they feel debate has not been

⁵⁹ RFK Center interview with Kevin Bampton, Lilongwe, March 31, 1994.

⁶⁰ RFK Center interview with Mordecai Msisha, Blantyre, March 28, 1994. Rev. Dr. Ncozana also felt that the Malawi Law Society had been marginalized in the constitution-drafting process. RFK interview with Rev. Dr. Ncozana, Blantyre, March 29, 1994.

⁶¹ RFK Center interview with a church official [name withheld upon request], March 28, 1994.

thorough enough," the paper stated. "Others wonder what is all the hurry, and point at the contradictions of having a document of the people approved by a one-party parliament."⁶²

The draft constitution was circulated more widely abroad than in Malawi.⁶³ High-ranking Malawian officials and other influential Malawians, including Richard Banda, the nation's chief justice, and Rev. Dr. Silas Ncozana, the head of the PAC, had not seen the draft constitution when interviewed by the RFK Center. Virtually no ordinary citizens had seen it; many did not even know of its existence. Although some of those close to the drafting process acknowledged these problems, they believed that the constitution would be accepted by the public if it was good enough. As John Barker, an advisor to the NCC, put it:

The legitimacy of a constitution is a question of ownership. Has there been adequate public discussion to make it reasonably legitimate? Has the consultation of international experts been broad enough to add legitimacy to the process? Finally, is the constitution good enough for people to accept and want to identify with it? While it is true that the draft constitution has not been circulated, the summary has been widely passed around. The only thing that is left now is to publicize the constitution and get it adopted.⁶⁴

The NCC hopes to submit the draft constitution to Parliament before the May 17 elections. The constitution would be in full force before the vote.

As this report was going to press, the NCC reportedly made changes in the draft constitution and appeared to agree to a provisional period of constitutional review, after the new Parliament is seated and the new constitution is in place. A broad effort would be made to seek the input of Malawians in the review phase.

⁶² "There Was Once Talk of a Constitution," *The Nation*, April 21, 1994.

⁶³ RFK Center interview with John Barker, Blantyre, March 28, 1994. John Barker had been working with Kevin Bampton, advising the NCC on various electoral and constitutional issues. The RFK Center received a draft copy of the constitution a week before its mission to Malawi.

⁶⁴ RFK Center interview with John Barker, Blantyre, March 28, 1994. Certainly, circulation abroad is one method of receiving feedback that can help make a draft constitution stronger. When the RFK Center received a copy from Barker, it circulated the draft to several other human rights groups, which provided comments.

Human Rights and Accountability in the Draft Constitution

The draft constitution⁶⁵ provides an institutional framework for dealing with certain aspects of past abuses, including the creation of a national compensation tribunal to hear claims for alleged criminal or civil liability. The draft would also allow Parliament to create a human rights commission.⁶⁶ Despite problems with the drafting process, a draft constitution was finished by April and clearly reflected an intent to ensure basic human rights. Chapter three of the draft is a bill of human rights. While it contains some vague or ambiguous provisions that need clarification, it is nevertheless a substantial bundle of rights that would establish the rights routinely denied by the Banda regime. These include the right to participate in politics and to enjoy freedoms of expression, association, opinion and assembly. The draft also provides the right to a fair trial and to legal representation for detainees, who must be informed promptly of the charges against them.⁶⁷

Human Rights Tribunal and Fund

The national compensation tribunal would receive claims for liability of the government in power prior to the effective date of the new constitution. The compensation fund would "be for the exclusive benefit of those applicants to the National Compensation Tribunal who have been granted an award, gratuity, pension or other allowance" by the tribunal.⁶⁸ Both the tribunal and the fund would expire not later than ten years after the commencement of the constitution, except that both could be terminated if, by the end of the second year, the tribunal has not received at least ten claims.⁶⁹

Although the tribunal would have exclusive original jurisdiction over claims against the former government for past abuses, the High Court could still review decisions of the tribunal. The draft also provides that a decision by the tribunal would not "be a bar to

⁶⁵ The RFK Center's comments are based on the draft constitution circulated internationally for comment in early March.

⁶⁶ Draft Constitution of Malawi, 1994, Section 138.

⁶⁷ Draft Constitution of Malawi, 1994, Chapter Three. Among the other categories of rights enunciated in the draft are the rights to life, liberty, privacy and equality, the rights of children, rights to education, to development and to engage in economic activity, religious and press freedom and freedom of movement and residence.

⁶⁸ *Ibid.*, Section 145(2)(a).

⁶⁹ *Ibid.*, Section 146.

further criminal or civil proceedings in an appropriate court against a private person for the duration of the existence of the fund.⁷⁰ A private person is defined as one who was a member or an agent of the past government who would have been "personally liable" under the laws then in force for an "act that is the subject of the criminal or civil proceedings".⁷¹ The tribunal or any ordinary court could waive the statute of limitations to permit a suit against a private person.⁷²

The draft constitution does not spell out the composition of the tribunal or the tenure and conditions for the appointment and service of its members.⁷³ It does provide for procedural due process by requiring procedures of the tribunal to conform to the standards of evidence required in a normal civil court. They would also have to conform to the bill of human rights in the constitution.⁷⁴ The constitution would require the provision of legal representation to third parties whose property or money may be the subject of a claim before the tribunal, but it contains no provision requiring representation for claimants.⁷⁵

The Human Rights Commission

In addition to the compensation tribunal, the draft constitution provides for the establishment of a human rights commission whose task it would be to investigate human rights abuses. The draft, however, does not require the next government to establish the

⁷⁰ Ibid., Section 143(1).

⁷¹ Ibid., Section 143(2).

⁷² Ibid., Section 144.

⁷³ The provisions dealing with the composition of the tribunal and the manner of appointment of its members were still being drafted.

⁷⁴ Draft Constitution of Malawi, 1994, Section 141.

⁷⁵ Ibid., Section 142.

commission, but says only that Parliament "may" provide for such a commission.⁷⁶ If created, the draft says,

The Human Rights Commission shall, with respect to the applications of an individual or class of persons, or on its own motion, have such powers of investigation and recommendation as are reasonably necessary for the effective promotion of the rights conferred by or under this constitution, but shall not exercise a judicial or legislative function and shall not be given powers so to do.⁷⁷

The constitution does not specify or clarify the reach of the commission's mandate. It is unclear, for example, whether the body would act as a commission of inquiry able to investigate all past human rights abuses and publish information about them (this is what most of those interviewed by the RFK Center indicated they understood), whether it would be permanent or transitory, and whether it would be composed of only Malawians or would include international human rights scholars and activists.

According to Kevin Bampton, the main draftsman:

There is no groundswell of demands for retribution at the personal level, but there is certainly a desire to expose the past. But if you talk about punishment, people are less clear; there is an overwhelming civic view that punishment will not solve anything. The only drawback of a commission of inquiry -- a truth commission -- is that it may be perceived as a vehicle for an AFORD or UDF government to go after their political enemies. But such fears would be minimized if the commission was composed of Malawian and international NGOs and persons.⁷⁸

⁷⁶ Ibid., Section 130. Several NCC delegates told the RFK Center that at the NCC constitutional conference there was general agreement that both a commission of inquiry and a compensation tribunal were essential. However, the draft constitution does not explicitly spell out the powers of the commission or make its establishment within a certain period mandatory. Of all the major political parties, only AFORD has publicly committed to the immediate establishment of the commission to investigate past abuses. RFK Center interview with Chakufwa Chihana, Lilongwe, March 30, 1994.

⁷⁷ Draft Constitution of Malawi, 1994, Section 131.

⁷⁸ RFK Center interview with Kevin Bampton, Blantyre, March 31, 1994. Bampton felt that the truth commission should be a cathartic national experience that would empower civil society. He said that a substantial involvement of local NGOs in investigating the past would strengthen the emergent civic organizations and act as a check on the history of unbridled governmental monopoly of power and influence.

While appropriate international participation in a truth commission could temper any tendency toward political manipulation, ultimate responsibility for the mandate of any such commission must rest with Malawians.

Rev. Chande Mhone, who heads the Malawi Human Rights Movement, an organ of the Christian Council of Malawi, called for a "thorough investigation of the past to send a signal in the future that abusive officials will be held accountable."⁷⁹ He also called for the punishment of the perpetrators and the compensation of victims. He expressed the hope that the proposed Human Rights Commission would address these issues. Many, such as Chakufwa Chihana, who said he would name a commission if elected, stressed the need for documenting abuses as opposed to taking action against individuals.⁸⁰

Analysis of the Tribunal, Fund and Commission

Not surprisingly, the draft constitution's formula for addressing past abuses has come under sharp attack from those who advocate stronger measures. A critique by a group of lawyers within the Malawi Law Society criticized the constitution's handling of accountability on two basic grounds. First, the tribunal should not have been elevated to constitutional status; it is transitional because it expires in ten years at the most. According to this view, the constitution should simply have provided "the right to just and fair compensation for all past wrongs and abuses and that Parliament may pass legislation to provide for this."⁸¹ Second, they said, the draft constitution should have prohibited the "statute of limitations" defense in cases related to claims for compensation for past abuses.⁸² As drafted, the constitution would only permit the tribunal or a court to waive the statute of limitations "if it seems equitable to do so."⁸³ This provision does not prohibit use of the statute of limitations to avoid liability for past abuses, even serious ones. Nor does it give any guidance as to what circumstances would justify waiving the statute of limitations.

⁷⁹ RFK Center interview with Rev. Mhone, Lilongwe, March 31, 1994.

⁸⁰ RFK Center interview with Chakufwa Chihana, Lilongwe, March 30, 1994.

⁸¹ "Draft Constitution: Comments by Concerned Lawyers," unpublished document given to the RFK Center by Mordecai Msisha, who worked on it with members of the Malawi Law Society.

⁸² *Ibid.*, p. 15.

⁸³ Draft Constitution of Malawi, 1994, Section 144.

Mordecai Msisha felt strongly that the compensation tribunal as the sole remedy is inadequate:

People who were victims of abuses suffered those abuses because they had no rights under the old order. Ironically, the tribunal takes away their rights. You cannot begin by taking away their rights. You can, of course, create a fund, but you cannot make it the only option. This contradicts the bill of rights in the draft constitution.⁸⁴

The draft provides:

No person shall institute proceedings against any government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the Government of Malawi in power before the commencement of this Constitution, save by application first to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest.⁸⁵

The draft would empower the tribunal to remit a case to the "normal courts" if its chair "is satisfied that the Tribunal does not have jurisdiction" or the chair "feels it is in the interest of justice" to do so.⁸⁶ Those provisions, however, do not appear to give victims any right to pursue their claims against the government in the courts. Furthermore, the tribunal's limited duration, especially in the event an adequate number of claims are not presented in the first two years, means that victims of past abuses could soon be left with no recourse. While the draft allows for judicial review of tribunal decisions, it provides no procedure for claimants to seek judicial review and does not ensure their right to do so. Instead, it states only, "The High Court shall not be excluded from hearing applications for judicial review of the decisions of the Tribunal." (emphasis added)⁸⁷

These concerns are heightened by the limitation of cases to those "initiated by persons with sufficient interest." This vague provision, especially with no guarantee of judicial review of tribunal determinations of "sufficient interest," would contribute to the risk that victims will be precluded from having their claims heard.

⁸⁴ RFK Center interview with Mordecai Msisha, Blantyre, March 28, 1994.

⁸⁵ Draft Constitution of Malawi, 1994, Section 139(1).

⁸⁶ *Ibid.*, Section 139(2).

⁸⁷ *Ibid.*, Section 143(1).

Providing legal representation to third parties, but not to claimants, is also problematic. The expense of hiring a lawyer, or the daunting prospect of proceeding without counsel, might have a chilling effect on individual Malawians who suffered abuse and who would otherwise seek remedies from the tribunal.

Msisha also criticized the constitution for failing to address individual responsibility. Instead, it "collectivizes" responsibility through the creation of the fund. He argued that individual responsibility -- through criminal and civil liability -- was essential in order to fully uncover the past and put it to rest. He felt that the MCP and UDF leadership had accepted the "collectivized" formula of the compensation tribunal because it would not affect them individually.⁸⁸ Several critics of the transitional process told the RFK Center that the compensation fund amounted to an amnesty for past abusers.

Indeed, while the draft provides that a decision of the tribunal would not bar "further proceedings" in court against private persons, the restrictive language with which "private persons" are defined may effectively immunize individual past offenders from liability. Also, the use of the language "further proceedings" carries the possible implication that actions may be initiated against private persons only following a decision by the tribunal. As a result, especially given the tenuousness of the authority for judicial review of tribunal decisions regarding claims against the government, the grant of exclusive original jurisdiction to the tribunal could be read as effectively ousting the jurisdiction of normal courts.

The compensation fund was also criticized as unrealistic, given the government's limited resources. This would not be a problem if the tribunal were able to hold individuals personally liable and order them to pay compensation.⁸⁹ At least one person suggested that the tribunal was granted exclusive original jurisdiction to limit liability to the state and to avoid bankrupting the impoverished economy.⁹⁰ An AFORD official summed up this view when he told the RFK Center that the "idea and spirit of the compensation tribunal is to make a token compensation possible as an acknowledgement of wrongdoing".⁹¹

⁸⁸ RFK Center interview with Mordecai Msisha, Blantyre, March 28, 1994.

⁸⁹ The draft constitution does not spell out the fund's sources of revenue although several people suggested that property known to have been illegally acquired by individuals since 1964 would be returned to the state and put in the fund. However, it was not clear how, when and by whom such actions would be taken. RFK Center interview with John Barker, Blantyre, March 28, 1994.

⁹⁰ Ibid.

⁹¹ RFK Center interview with Mapopa Chipeta, Blantyre, March 30, 1994.

The UDF has pointed out what it sees as another problem in the draft constitution. Brown Mpinganjira, an NCC member from the UDF, highlighted a restriction that would bar anyone with a past record from being president. This, he said, is an attack on the UDF's presidential candidate, Bakili Muluzi, who was sentenced decades ago in a case involving the alleged theft of a minimal amount of money. In cases where clear political motivation was the reason for criminal charges, Mpinganjira opposes this bar, as it would eliminate many Malawians from eligibility. For other cases, he said, there should be a shorter period of exclusion for past offenses, some five or ten years.⁹²

The draft constitution's provisions on the tribunal and fund will require further clarification if they are to be effective means for dealing with past abuses. Similarly, uncertainties about the human rights commission, particularly whether its establishment will be mandatory, the extent of its mandate, its composition and its tenure, must also be addressed.

The Reclamation of Judicial Autonomy

No society can protect human rights without a fully functioning and independent judiciary. Until recently, Malawi's judiciary was just another tool for President Banda's absolute rule. But since 1993, both the judiciary and institutions of civil society have slowly begun to reassert their independence from the executive and the MCP. In the past year, a number of measures to improve human rights conditions, including the suspension of the traditional courts' jurisdiction over political cases, have been taken by transitional authorities.⁹³ A number of recently decided cases signal increased judicial autonomy.

The most celebrated of these cases is that of Martin Machipisa Munthali, who sued the government for false imprisonment and trespass to land. In 1965, the government arrested Munthali for allegedly possessing firearms.⁹⁴ He served his 11-year sentence, but was further held until 1992. Munthali sued the government in 1993 in the High Court of Malawi, seeking compensation. The state did not deny liability. After noting that Malawi common law was of little guidance in determining the amount of exemplary damages to

⁹² RFK Center telephone interview with Brown Mpinganjira, April 20, 1994.

⁹³ See, generally, Amnesty International, *Malawi: A New Future for Human Rights* (London: Amnesty International, February 1994).

⁹⁴ Munthali was accused by the government of participating in an armed insurrection allegedly organized by some of the cabinet ministers dismissed by President Banda in September 1964. See Chapter Two, Section A, of this paper, "Detention Without Trial."

be awarded for false imprisonment, Justice Dunstain Mwaungulu, the registrar of the High Court, remarked:

[T]his is surely a case where exemplary damages should be awarded. The plaintiff was sentenced to four years imprisonment with hard labor for the offense which he had committed for which he was convicted. The state felt that this sentence was wholly inadequate; they appealed. That sentence was enhanced almost three times over to 11 years' imprisonment to reflect the seriousness of the offense and to allay fears that might have been there as to the security of the nation. Then to keep the man for another 19 years without any court order or conviction shocks every sense of justice or punishment.⁹⁵

Criticizing the state for denying Munthali his liberty and the benefit of association with society, the court awarded him the equivalent of US \$1 million.⁹⁶ Although the award was criticized in some sections of the local press as too high for a country as poor as Malawi, Mwaungulu told the RFK Center that large awards "underline the reprehensible nature of such government misconduct and punish it accordingly."⁹⁷

In *Aleke Banda v. Robert Dangwe and the Malawi Congress Party*,⁹⁸ the court similarly asserted its independence by rejecting and punishing the abridgment of individual rights by party officials acting under the aegis of the state. The plaintiff, Aleke Banda, sued the defendants for defamation. On February 23, 1993, Robert Dangwe, a district MCP chairman, had said in a political rally attended by President Banda that "Aleke Banda

⁹⁵ *Martin Machipisa Munthali v. The Attorney General*, p. 9. "The ignominy in this case lies in the [blatant way] in which public officials disregarded the constitutional and legal avenues available to justify the incarceration or release of the plaintiff. . . . In my mind, this is a case where not only should he be adequately compensated but a case also where public officers who are called upon to act within the confines of the law and authority should get the signal that the court will award such damages as would prevent and deter the repetition of what has happened." *Ibid.*

⁹⁶ *Martin Machipisa v. The Attorney General*, Civil Cause No. 52 of 1993, High Court of Malawi.

⁹⁷ RFK Center interview with Dunstain Mwaungulu, Blantyre, March 29, 1994. Mwaungulu told the Center that unlawful detentions had decreased over the past year as a result of the high awards.

⁹⁸ *Aleke Banda v. Robert Dangwe and the Malawi Congress Party*, Civil Cause No. 279 of 1993, High Court of Malawi.

was dismissed from Press Limited because he stole money there."⁹⁹ In finding for the plaintiff, the court said:

The allegation [that Aleke Banda is a thief] really undermines and demeans and diminishes his reputation. Worse still, this was broadcast on radio. It must have been intended that it should be spread further. Up to that time the radio was controlled by a Government belonging to the defendant's party. The party supports a one-party state. . . . The defendants were deliberately using a medium of communication partly controlled by a Government of their party to advantage by undermining the plaintiff's renown.¹⁰⁰

In another recent case, the High Court declared unconstitutional a directive by the Inspector General of Police denying lawyers access to their clients in custody or prison.¹⁰¹ Judge L. A. Chatsika ruled on July 8, 1993:

It is, therefore, hereby declared that the directive made by the Inspector General of the Malawi Police not to allow legal practitioners access to prisoners who are in Police custody or in Prison custody, unless specific approval for the visit has been made by the police, is inhuman, ultra vires, unconstitutional and illegal. It is, therefore, ordered that directive should have no legal validity whatsoever.¹⁰²

The position of the courts in these decisions shows a new-found vigor in holding the state accountable for past and current violations. Problems still exist. The attitude of security officials toward such changes in court procedure do not always mirror the changes in the attitude of the courts themselves. When the RFK Center was in Malawi in August 1993, for example, police still refused to recognize some court orders. In addition, not all judges have shown the same inclination toward independence. One troubling decision was taken in March 1993, when the Supreme Court upheld Chakufwa Chihana's conviction on sedition charges. According to the registrar of the High Court, "in the Chihana case,

⁹⁹ Ibid., p. 4. Aleke Banda, a former secretary general of the MYP, fell out with President Banda in 1973 and was dismissed from his party post. A year later, he was appointed managing director of Press Holdings Limited, President Banda's financial and business empire, but was sacked in 1979 and detained for being critical of the president. The company was started by Aleke Banda and President Banda in the 1960s. Ibid., pp. 4-5.

¹⁰⁰ Ibid., p. 19. The court awarded damages in the amount of US \$60,000.

¹⁰¹ *Ralph Mhone v. Attorney General*, Miscellaneous Civil Cause No. 115 of 1993, High Court of Malawi.

¹⁰² *Ralph Mhone v. Attorney General*, July 8, 1993, pp. 4-5.

both the High Court and the Supreme Court lost a monumental opportunity to pronounce the importance of human rights in Malawian law."¹⁰³

While an independent judiciary is generally important for the rule of law and respect for human rights, it is also key to the accountability process. Only through the involvement of independent, credible and respected courts can accountability be achieved without creating an environment prone to the same types of abuses that characterized the Banda regime.

¹⁰³ RFK Center interview with Dunstain Mwaungulu, Blantyre, March 29, 1994.

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CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

Three decades after leading Malawi to independence from the British and creating one of the most autocratic regimes of the Cold War era, President Hastings Kamuzu Banda has seen his fortress of tyranny crumble. President Banda was pressured into agreeing to a referendum on the one-party state, the result of which was a rejection of both single-party rule and the gross and consistent human rights violations engendered by it. However, the rejection of one-party rule may turn out to have been easier than creating institutions that will safeguard human rights and nurture political and legal systems that support the rule of law.

The flourishing of political party activity is one indication that Malawi wants to break with its repressive past. Since the lifting of the prohibition on opposition parties, at least seven new parties have registered to compete in the May 1994 presidential and parliamentary elections. Although there have been reports of problems, including inter-party harassment and intimidation of political activists,¹⁰⁴ the political campaign appears to be proceeding relatively smoothly. Numerous independent newspapers have energized the political process and given vent to views other than those of the government and the ruling MCP.

Other components of civil society, including non-governmental human rights organizations, give cause for hope. Several groups have begun to work in the last year: the Malawi Legal Resources Centre, established by the Malawi Law Society and directed by Vera Chirwa; the Foundation of Integrity of Creation, Justice and Peace, which was founded by Rev. Aaron Longwe, a former AFORD publicity secretary; the Malawi Human Rights Movement, which is led by Rev. Chande Mhone; the Civil Liberties Committee, a

¹⁰⁴ See, for example, press releases by the Malawi Human Rights Movement, March 24 and 31, 1994, in which the organization condemned the MCP manipulation of students and expressed concern about the intimidation of opposition candidates by MCP functionaries. Another press release by the Foundation of Integrity of Creation, Justice and Peace on January 4, 1994, condemned UDF activists for violently attacking Gwanda Chakuamba Phiri, the MCP vice presidential candidate.

group organized by lawyers; and the Foundation for Justice and Human Rights, created by Bazuka Mhango, Chakufwa Chihana's legal counsel.

The churches and church-based organizations and individuals have also played a leading role in the political process. The work of the Roman Catholic bishops, and in particular their March 1992 pastoral letter, opened the doors to public criticism of the Banda regime. The PAC -- the organization created by pro-democracy political parties and pressure groups, the business community, and religious organizations -- was instrumental in developing the national dialogue on the form of transitional structures. The Church and Society Program of the Presbyterian Church, under the leadership of Rev. Silas Ncozana, the current head of the PAC, has also launched projects in civic education.

While these organizations and individuals form the base on which a vibrant civil society could emerge, many of them are still too young and weak to influence the political process substantially. Their lack of influence was demonstrated, for example, by their exclusion from the constitutional drafting process. Their absence from the process -- because of the lack of resources, experience in lobbying, inadequate access to the print and broadcast media, and the monopolization of the process by political parties -- diminished public debate and stands to minimize the sense of public ownership of the constitution.

The lack of civic engagement has had a limiting effect on the national discussion of the issue of accountability for past human rights abuses. The fact that many organizations in the civil sector had not seen the draft constitution before it was completed meant that they did not know what it provided in regard to past abuses. Although some newspapers have called for an investigation into past abuses, most attention has been focused on the need for a commission of inquiry into the murders of the ministers in May 1983. There has been little acknowledgement that other abuses that took place should receive similar attention. There has been no widespread discussion or debate about the societal and legal reasons for promoting accountability. There have been no concerted public calls for the establishment of an independent body to determine the truth and take appropriate measures.

The lack of public debate on accountability underscores the need for politicians and news media to endeavor to inform the public about the issues involved. The voices of members of human rights and other groups need to be heard on a national level. Political leaders and the news media, particularly the Malawi Broadcasting Corporation, should seek out spokespeople from the human rights movement and give them the opportunity to express their views in news programs and at public events.

The effectiveness of the human rights movement in Malawi will be strengthened to the extent members of diverse groups involved in that movement work in concert and, to the degree possible, coordinate efforts to promote human rights. Such joint work should include a campaign on accountability, alone or as part of a broader campaign of human

rights education. This would serve the complementary functions of sensitizing the Malawian population about the importance of human rights and making the human rights movement a more visible and important constituency in Malawi.

On the basis of these observations, the Robert F. Kennedy Memorial Center for Human Rights makes the following recommendations:

- There is no "correct" formula for addressing past human rights abuses. However, any process of transition must fully uncover the scope of past abuses and make such information public. Without such a step, it is impossible to learn from the mistakes of the past and create institutions, norms and processes that will ensure that repression is not repeated. The moral, legal and political issues raised by the accountability debate make the matter difficult to discuss publicly, particularly when the delicate balance of democratic stability seems at stake. Nonetheless, without a clear identification and repudiation of past repressive policies and actions, democratic stability will be equally threatened. Provisions should be made for producing a report that would achieve these goals, and any human rights commission must be endowed with sufficient resources and power to receive the evidence and testimony it needs to do so.
- The government should form a commission of inquiry into the death of Dick Matenje, Aaron Gadama, John Twaibu Sangala and David Chiwanga. The commission should have powers similar to those listed above. Such a commission should not limit the creation of any other commission with similar goals regarding other cases.
- International law calls for the prosecution of gross abusers of human rights. The government of Malawi should bring such people to justice. There should be no legal provisions designed to give amnesty to those responsible for gross abuses of human rights.
- Malawian law should specifically and clearly provide for individual criminal and civil liability for human rights offenders. The government of Malawi should ensure that normal courts are granted both criminal and civil jurisdiction over past abuses. No statute of limitations should be available as a defense with regard to the most serious abuses. Obedience to orders by superiors should be explicitly invalidated as a defense unless the person was acting under duress.
- Provisions in the draft constitution that establish a compensation tribunal and fund to hear claims of past abuses and compensate victims are a welcome contribution to the process of accountability. Their attributes need

to be further developed. For example, such a tribunal also must have sufficient resources and authority to receive the evidence and testimony needed to carry out its mandate. A tribunal should not be used to thwart efforts by individual victims or relatives of victims to seek justice through the courts. The draft constitution should ensure that victims have access to the ordinary courts for redress of their claims involving past abuses and to judicial review of tribunal decisions.

- The proposed human rights commission should be established as a truth commission whose duties would be to investigate all human rights abuses and to publish its findings. It should be empowered to make recommendations to the legislature for further action. Care must be taken to ensure that the commission's members are broadly respected and representative of Malawian society.

- The diplomatic and legal communities should explicitly encourage Malawian politicians to support a process of accountability that encompasses broad public clarification of the abuses of the past and prosecution for gross violators of human rights. They should express their views to political leaders in private, but should also publicly support efforts to account for the past in order to help build a climate in which the principle of accountability will be widely accepted.

- The creation of a strong and independent civil society is an important part of creating a political system in which the rule of law and respect for human rights are integral values. For this reason, the international and diplomatic communities should endeavor to provide moral and material support for groups working toward these goals. For example, projects should be promoted that focus on human rights education and the development of skills and unity within the human rights community.