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# ACCOUNTABILITY FOR POLITICAL ABUSES IN PRE-DEMOCRATIC MALAWI: THE PRIMACY OF TRUTH

A. Peter Mutharika\*

## I. ACCOUNTABILITY

Accountability is a fundamental principle of good governance. To the extent that legitimate government is based on the consent of its people, consent can only be reasonably given when there is accountability. No people would willingly consent to a government that can act with impunity.

Accountability implies responsibility, responsibility to the people governed. Here, it implies responsibility of the Malawi government to its citizens. This responsibility is two-fold: the government of Malawi is retroactively responsible for past abuses and proactively responsible for the prevention of future abuses.

The new government of Malawi may be held retroactively accountable, even without its cooperation, based on theories of liability under customary international law. These theories are well established<sup>1</sup> and will not be belabored here. In the African context, these theories have been reinforced by their incorporation in the African Charter on Human and People's Rights. Interpreting the Charter in a case from Malawi, the African Commission on Human and People's Rights has held that "a new government inherits the previous government's international obligations, *including the responsibility for the previous government's mismanagement. . . .* Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses."<sup>2</sup>

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<sup>1</sup> See, e.g., *Arbitration Between Great Britain and Costa Rica*, 18 AM.J.INT'L L. 147 (1924). See also, CHRISTINE GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* (1990), and Michael Garcia Bochenek, *Compensation for Human Rights Abuses in Zimbabwe* 26(2) COL. HUM. RTS. L. REV. 483 (1995).

<sup>2</sup> See COMMUNICATION 64/92 ET AL., AF COMM HPR, OPINION of 3 November 1994 / 28 June 1995 (emphasis added). This decision involved the unlawful political detention of Aleke Banda and Orton and Vera Chirwa. Mr. Banda had been arrested and held without trial for over twelve years, while the Chirwas were kidnapped from exile in Zambia and sentenced to death - later commuted to life sentences. The Commission found numerous violations of the African Charter on Human and Peoples' Rights, and expressed hope that with political changes, "a new era of respect for the human rights of Malawi's citizens has begun."

There are many reasons why a successor government may not want to accept responsibility for the actions of a previous regime. The incentives to avoid responsibility include the high cost of reparations, a reluctance to be associated with the past, and a desire to move forward. However, the success of a new government may depend on how it chooses to deal with the excesses of a previous government. By fully and openly assuming responsibility for past abuses, the new government reassures the people that governments may not act with impunity, and thus gains the trust and consent of its people.

It is not enough though for the new government to merely make reparations; it must also develop institutions and policies that are designed to prevent a repetition of past abuses. In the case of Malawi, the task 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."<sup>3</sup>

## II. BRUTALIZATION

The need for accountability is most acute in cases where the previous regime had engaged in widespread brutalization of its people. The Banda regime was, without doubt, the most brutal civilian regime in Africa. Malawi has been described as a "one-party state" during the period between 1966 and 1994. A more accurate description is that Malawi was a "one-man state" with state, party, and civic institutions playing a subservient and supporting role to Dr. Banda.<sup>4</sup> It was thus common for political opponents to be subjected to long periods of detention without charge and without trial. For those political opponents who were charged, their convictions were assured through a system of parallel traditional courts where the judges [traditional chiefs] had no legal training, where there was no legal representation, and where the rules of evidence did not apply.

Even more sinister than the existence of these subverted courts were the acts of violence perpetrated by government security forces against political opponents and unexplained disappearances of political opponents of the

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<sup>3</sup> See MAKAU MUTUA, *CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI*, THE ROBERT F. KENNEDY MEMORIAL CENTER FOR HUMAN RIGHTS, May 1994, at 2.

<sup>4</sup> See generally, AFRICA WATCH, *WHERE SILENCE RULES: THE SUPPRESSION OF DISSENT IN MALAWI* (1990); THE SCOTTISH FACULTY OF ADVOCATES AND THE LAW SOCIETY OF ENGLAND AND WALES, *A REPORT OF HUMAN RIGHTS IN MALAWI* (1992); *CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI*, *supra* note 3.

regime. Among the most notorious acts of brutality was the death of four prominent politicians in 1983 [two of them cabinet ministers and the secretary-general of the ruling Malawi Congress Party (MCP), the number-two position in Banda's one-man state] who, according to the regime, died in a car accident at the Mwanza border town with Mozambique as they "fled" Malawi. It has now been established beyond doubt that the four politicians were brutally murdered by agents of the Banda regime. One lasting effect of the Mwanza incident and the government's other brutal activities, and a sinister contribution to the Malawi lexicon, is that in Banda's Malawi, a political opponent could get "accidentalised"! The regime was also able to exert control over the Malawi people by limiting freedom of expression and confiscating property belonging to political opponents under the Forfeiture Act if an opponent had, in the regime's opinion, acted in a manner "prejudicial to the safety or economy of the state." A decision taken by the regime under the Act could not be challenged in a court of law.

In order to ensure complete control of the country, the regime isolated Malawi from the international and African regional community. No foreign media were allowed entry into the country and Malawi journalists were prohibited from communicating with outside journalists and news organizations. Nongovernmental organizations were denied entry into Malawi; ethnic, geographic, and religious divisions were encouraged; and a large part of the economy was controlled by the regime and the ruling political party through the Press Trust Corporation. The regime had therefore succeeded in creating the equivalent of a national political and economic concentration camp.

### III. THE NEED FOR TRUTH

Any time a country experiences brutalization, there is a need for reconciliation.<sup>5</sup> The discovery and dissemination of truth, about abuses, victims, perpetrators, and government involvement, has been identified as essential to finding closure for the past and successfully approaching the future.<sup>6</sup> Allowing open discussion of brutalization may begin the healing

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<sup>5</sup> Reconciliation is needed to engender trust in government and the rule of law, lessen divisions among the people that were created by the previous regime, and enable the new government to effectively function.

<sup>6</sup> See *CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI*, *supra* note 3.

process and aid in determining culpability.<sup>7</sup> Not only may discovery and dissemination of truth be important in reconciliation, but also international scholars and other groups have begun to describe access to truth as a right of people.

ARTICLE 19, an NGO, has thoroughly articulated the basis for a right to truth for victims of human rights abuses under international law. For human rights victims, this right to truth has been identified as the essence of Article 19 of the Universal Declaration of Human Rights. The text provides that the right to freedom of opinion and expression includes the "freedom . . . to seek, receive and impart information and ideas." There is support for recognition of this right on a wider scale, evidenced by interpretations of other international instruments and case law, and statements by international organizations.<sup>8</sup>

The right to truth is very simply conditioned on the need for accountability as a fundamental principle of good governance. Truth is knowledge, and armed with this knowledge, the people can demand accountability. The Indonesian Truth and Justice Commission has stated, "reconciliation without exposing truth and justice could be considered an act of deceiving the victims."<sup>9</sup> The Robert F. Kennedy Memorial Center for Human Rights recommended, in a report on Malawi, that the "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."<sup>10</sup>

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<sup>7</sup> See ARTICLE 19, "WHO WANTS TO FORGET?" TRUTH AND ACCESS TO INFORMATION ABOUT PAST HUMAN RIGHTS VIOLATIONS. An actual truth commission is not necessary in order to discover the truth; information can be collected through media investigations, civil society initiatives, and even criminal prosecutions. The organization advocates access to almost all information - particularly that related to issues of human rights - as the touchstone of democracy. The "right to truth" about past human rights violations is viewed as a subset of the broader right to freedom of information. There are no time limits for this rights, thus, a government must cooperate in the uncovering of past abuses as well as provide information about its current activities.

<sup>8</sup> *Id.*

<sup>9</sup> See *The Painful Path to Justice*, WORLD PRESS REVIEW, January 2000, at 14.

<sup>10</sup> See CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI, *supra* note 3, at 39.

## IV. ACCOUNTABILITY IN MALAWI

A. *Truth*

In Malawi, there has been an undeniable resistance to discovery and dissemination of the truth on the part of Western donors and the new government. Western donors claim that there is no need to uncover the past, that doing so would serve no purpose. Even if it does not aid in closure, and even if none of the perpetrators are brought to justice, the truth is still important for the simple fact that history repeats itself. It is therefore important for the Malawi people to know what happened and for the government to operate under the threat of exposure. An obvious explanation of the donors' resistance to truth discovery is that they supported the Banda regime even in the face of uncontroverted evidence that the regime was engaged in large scale brutalization of the Malawi people.<sup>11</sup>

The current government is in certain respects a continuation of the old government both in style and attitude. It has therefore not supported calls for the creation of a truth commission. Many current politicians, both in and out of the government, served in the Banda regime and some of them quite possibly participated in, or at least condoned, some of the excesses of the Banda regime. Without pressure from western donors and civil society to establish a truth commission, these individuals will never support the establishment of a truth commission. Other than the limited Mwanza Commission of Inquiry mentioned elsewhere in this article, no effort to establish a truth commission has been made.

## 1. Commission of Inquiry

While there have been no wide-reaching truth commissions, the Mwanza incident had enough political and social significance to eventually prompt government action.<sup>12</sup> A Commission of Inquiry was formed, but its mandate was limited to the narrow issues surrounding the Mwanza incident. However, the passage of over a decade without any investigation had taken its toll; several of the potentially key witnesses were dead. The commission made a finding that Banda and his assistant John Tembo had ordered the

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<sup>11</sup> See "WHO WANTS TO FORGET?" *supra* note 7. "Foreign donors effectively exercised a veto over the government budget and could have exercised strong pressure in favour of an investigation if they had chosen to. But they had not."

<sup>12</sup> See CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI, *supra* note 3, at 14-15.

murders, but they were later found innocent in a court of law. Arguably the prosecution would have increased its chances of success had there been a fuller truth inquiry to explore all avenues and which may have uncovered convincing evidence of guilt.

In fact, the Commission of Inquiry only served to undermine truth discovery in Malawi. By deliberately limiting its investigation to a small group of people and a single incident, the government signaled its intent to avoid meaningful discovery of the truth.

## 2. Malawi History Project

The Malawi History Project was an attempt by scholars and historians to record the history of the Banda regime. Restrictions on freedom of expression, and the severe consequences of challenging the Banda regime had prohibited the recording of many events during the regime - particularly of acts of brutalization. In the aftermath of the Banda regime, the University of Malawi formed a nine-person committee to begin accumulating information, conducting interviews and developing a strategy of investigation.<sup>13</sup> Unfortunately, this effort elicited the same response as calls for the creation of a truth commission did - that there is no need to dwell on the past - so the Project was unable to obtain adequate funding.

Even if the History Project had received adequate funding, it would not have been an appropriate alternative to a government-initiated truth inquiry for several reasons. First, the non-governmental nature of the Project raises issues of credibility. The committee members were from the private sector, with unclear political affiliation or motivation.<sup>14</sup> Further, a process that does not involve the government would not be accompanied by any admissions of governmental responsibility. Additionally, the Project would have limited value because of its inability to compel testimony. The Project would have no power to subpoena witnesses or conduct inquiries under oath. Thus, while the efforts of those who attempted to launch the Malawi History Project were admirable - and certainly preferable to no investigation of abuses at all - the Project would still have been a second-best substitute for governmental investigation and official publication of findings.

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<sup>13</sup> See *Probing Into Human Rights Atrocities*, MALAWI NEWS ONLINE 30 November 1996 (<http://www.sydrafrica.dk>).

<sup>14</sup> The efforts of these professionals might be better utilized in a project similar to one recently established in South Africa - rewriting history textbooks to reflect the truth. See Daisy Jones, *New History Textbooks Proposed*. BUSINESS DAY, 15 December 2000 ([www.allafrica.com](http://www.allafrica.com)).

## ***B. Reparations***

The Malawi government has chosen to make very few reparations. There has been some symbolic compensation - for example, the Mikuyu Detention Camp was opened as a museum<sup>15</sup> - but no truth commissions have been established and very few perpetrators have been subjected to criminal or civil liability. The government has made the greatest effort in the area of actual compensation, but with dubious commitment and success. Malawi citizens have two possible avenues of actual compensation: the National Compensation Tribunal and Malawi civil courts.

### **1. National Compensation Tribunal [NCT]**

The NCT was established under the constitution to "redress the excesses of the Banda dictatorship."<sup>16</sup> Its mandate is limited to ten years from its creation, and it has exclusive jurisdiction over any civil and criminal claims against the previous government. Awards are paid out from the National Compensation Fund, a practice that has drawn criticism because Malawi taxpayers bear the burden of supporting the Fund.<sup>17</sup> This process has been described as a form of "amnesty for past abusers."<sup>18</sup>

The NCT has been criticized for its management of the Fund because while some prominent members of the new government have received large payments, many ordinary claimants have received small interim payments, and the government has in some cases attempted to influence decisions of the tribunal. Further, the information revealed through the claims is not publicly disseminated.

The NCT is currently processing more than 7,000 claims, including one by a former minister of the Banda regime, who is now the leader of MCP, for \$357,000 in compensation for property confiscated by the MCP at the time of his arrest.<sup>19</sup> Less than 2,000 of the claimants have been given interim

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<sup>15</sup> See Steven Nhlane, *Malawi: Soothing the Pain of 30 Years' Oppression*, ANB-BIA SUPPLEMENT, Issue 354. 15 October 1998.

<sup>16</sup> See PETER MUTHARIKA, *LEGAL SYSTEMS OF THE WORLD: MALAWI*, forthcoming.

<sup>17</sup> See Peter Mutharika, *The Democratic Constitution of Malawi*, 1996 J.A.L. 219.

<sup>18</sup> See CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI, *supra* note 3.

<sup>19</sup> See *Opposition Leader Wants \$357,000 Government Compensation for Lost Property*, PANAFRICAN NEWS AGENCY, 27 September 2000. Gwanda Chakuamba was arrested for attempting to assassinate Banda.

payments, and only US \$800,000 had been disbursed between 1996 and 1998. Interim payments are made to former detainees on the following schedule: \$200 for people detained up to three months, \$400 for those detained between three and six months, and \$600 to those detained between six months and one year.<sup>20</sup>

## 2. Malawi Civil Courts

Under a constitutional amendment, Malawi citizens were given the right to pursue compensation from any private person acting in a governmental capacity during the previous regime, in the regular civil courts. However, the real "purpose of the amendment is to rid the present government of responsibility for compensating people who were victimized under the Banda regime."<sup>21</sup> One problem with pursuing compensation through the civil courts is the evidentiary standard used as with the Mwanza incident, evidence can be very difficult to collect because of the passage of time. Witnesses may have died or been forced into exile, and important documents may have been destroyed. Claimants may lack the resources necessary to accumulate evidence. In addition, although a claimant may be able to generally prove that the government was responsible for committing abuses, it can be almost impossible to assign responsibility to a specific person acting in a governmental capacity.

## C. Reconstruction

Reconstruction involves establishment of new institutions and policies, and ending previously divisive practices. It is necessary to prevent further or future brutalization.

## 1. Constitution

Malawi's constitution, which was officially enacted in 1995 and amended in 1998, is the most visible and far-reaching effort toward reconstruction. Although plagued by several drafting problems, it is extremely detailed and addresses many of the sources of previous abuses.<sup>22</sup> It has been the vehicle for much of the change that has occurred in the past few years. The Constitution has established several different institutions designed to create

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<sup>20</sup> See Steven Nhlane, *Malawi: Soothing the Pain of 30 Years' Oppression*, ANB-BIA SUPPLEMENT, Issue 354. 15 October 1998.

<sup>21</sup> See Peter Mutharika, *The Democratic Constitution of Malawi*, *supra* note 17.

<sup>22</sup> See PETER MUTHARIKA, *LEGAL SYSTEMS OF THE WORLD: MALAWI*, *supra* note 16.

both retroactive and proactive accountability. They include: the National Compensation Tribunal, the Office of the Ombudsman, a Human Rights Commission, an independent Electoral Commission, and the Anti-Corruption Bureau.

## 2. Human Rights Commission

Under the constitution, the Human Rights Commission is "charged with the responsibility of investigating cases where violations of rights guaranteed by the Constitution or any other law are alleged."<sup>23</sup> This is a very broad responsibility and the HRC is constrained by time and budget with its current cases, effectively preventing inquiry into violations of the previous regime. Nonetheless, it has been recommended that the Human Rights Commission should take the form of a truth commission and publish its findings.<sup>24</sup> The general feeling among human rights activists in Africa is that African Human Rights Commissions, generally established in response to demands by western donors, have had negligible impact on the promotion of human rights in Africa.<sup>25</sup>

## 3. Ombudsman

The Office of the Ombudsman, established under the constitution, has a very broad mandate: to investigate all cases in which an individual has suffered an injustice. Where the Ombudsman concludes that an injustice has taken place, he or she may take administrative action to ensure that the injustice is redressed. If it is concluded that prosecution is warranted, the Ombudsman shall make such a recommendation to the Director of Public Prosecutions and has the right to demand reasons for the Director of Public Prosecution's refusal to prosecute.<sup>26</sup>

The Ombudsman has broad-reaching powers and has become a lawyer of sorts for the unrepresented. The office has received thousands of complaints in its five years of existence. Although the office has suffered somewhat from budgetary limitations and political constraints, it has performed well and earned the respect of various segments of Malawi

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<sup>23</sup> See Peter Mutharika, *The Democratic Constitution of Malawi*, *supra* note 17.

<sup>24</sup> See MAKAU MUTUA, *CONFRONTING THE PAST: ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN MALAWI*, *supra* note 3.

<sup>25</sup> See *Human Rights Commissions Often Silent, Have Little Effect*, PAN AFRICAN NEWS AGENCY 26 February 2001.

<sup>26</sup> See Peter Mutharika, *The Democratic Constitution of Malawi*, *supra* note 17.

society. The fact that the current holder of the office was named the 2000 Man of the Year is illustrative of the respect the office enjoys.<sup>27</sup>

#### 4. Anti-Corruption Bureau

The Anti-Corruption Bureau was established to "investigate suspected cases of corruption by public officials and to refer cases where it appears that corruption has taken place to the Director of Public Prosecutions for possible prosecution."<sup>28</sup> The Bureau forms an integral part of the World Bank's anti-corruption program in Malawi.<sup>29</sup> As part of the program, the Bureau is required to conduct awareness campaigns about the rule of law.

The Bureau's activities, or lack thereof, continue to draw attention. Speaking on behalf of the donors, the British High Commission to Malawi, for example, has recently condemned Malawi for its ineffective anti-corruption stance. The Bureau has responded by claiming that the anti-corruption laws are vague and prevent successful prosecutions.<sup>30</sup> Out of the three thousand cases pending, the Bureau has lost in the courts almost all of the twenty cases it has completed.<sup>31</sup> Transparency International, an anti-corruption organization, has also criticized the Anti-Corruption Bureau for its failure to publicly report findings - a step which it views as crucial in preventing future corruption.<sup>32</sup> Another source of weakness for the Bureau is its lack of political autonomy; the Bureau does not have independent prosecutorial powers, and the President has the power to dismiss the Bureau Director at any time. Recently, there have been allegations of massive corruption at the highest levels of the government and several cabinet ministers have been dismissed. Corruption has therefore become a political rather than a law enforcement problem. In such a context, it is questionable whether the Anti-Corruption Bureau can succeed in its mission.

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<sup>27</sup> See Frank Nkondetseni, *Malawi Going to the Ombudsman* ANB-BIA SUPPLEMENT, Issue 392 15 June 2000.

<sup>28</sup> See PETER MUTHARIKA, *LEGAL SYSTEMS OF THE WORLD: MALAWI*, *supra* note 16.

<sup>29</sup> See *Malawi's National Anti-Corruption*, STRATEGY INTERNATIONAL ANTI-CORRUPTION CONFERENCE (<http://www.transparency.de>)

<sup>30</sup> See *Donors Unimpressed By Malawi's Anti-corruption Gimmicks*, PANAFRICAN NEWS AGENCY 19 February 2001 (<http://www.allafrica.com>).

<sup>31</sup> See *Britain Pressures Malawi to Prosecute Corrupt Civil Servants*, AFRICAN EYE NEWS SERVICE 20 February 2001 (<http://www.allafrica.com>).

<sup>32</sup> See *Corruption Watchdog Slams Malawi for Lack of Transparency*, AFRICAN EYE NEWS SERVICE 28 November 2000 (<http://www.allafrica.com>).

## 5. Other Efforts

In addition to creating institutions that promote accountability, the government of Malawi must repeal laws and change government practices that undermine democratization as part of reconstruction. The government has already repealed the Forfeiture Act, the Decency in Dress Act, and the Preservation of Public Security Act, three of the laws most used to brutalize the people of Malawi. There has also been an amendment to the penal code that makes it harder to imprison people for acts of sedition, and small measures toward developing a policy of non-discrimination.<sup>33</sup> The government has removed the ban on Jehovah's Witnesses and is re-evaluating oppressive policies against Malawi citizens of Asian origin.

### *D. Current Processes of Change*

Reconstruction is a continual process; there are still many changes that need to be made in Malawi in order to prevent a repetition of the past. There needs to be further reform with regard to the civil service, the internal democracy of political parties, internal security, regional and international integration, and governmental policies concerning exiled peoples or refugees.

#### 1. Civil Service

The Malawi Civil Service is still suffering from the unprofessional, hierarchical structure that existed during the Banda regime. Civil servants are "immensely overworked and under-compensated at all levels of government service," a situation that makes corruption far more likely.<sup>34</sup>

#### 2. Political Parties

In the past, the Malawi Congress Party [MCP] was undeniably an instrument of repression for the government. In the new multi-party system, many of the same politicians from the MCP are leaders of the new parties, limiting the apparent choices the new system offers. These members have not completely changed their former ways. For example, during the 1999 election the Malawi Broadcast Company [MBC], the state-owned radio, only covered presidential events, but the ruling party would take advantage of

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<sup>33</sup> See TREVOR CULLEN, MALAWI: A TURNING POINT 93-94 (1994).

<sup>34</sup> See JAMES TOLEDANO MALAWI ENVIRONMENTAL MONITORING PROGRAM. 2 July 1998. The system has impeded technology transfers.

this practice and include campaign speeches at the events. The High Court of Malawi ruled that principles of the Constitution regarding equal treatment of political parties should not be subverted through MBC.<sup>35</sup> More than the “proliferation of uncensored newspapers” is needed to balance coverage of the political parties and provide real choices for the people.<sup>36</sup> Furthermore, the general concern in the country is that some of the members of the old political order, who now profess to be committed to the democratization process, may not be positive forces in the truth discovery process.

The political parties also suffer from a lack of internal democracy. Most political parties in Malawi have not held party conventions, as provided for in their constitutions, and sometimes candidates have been appointed to positions to which they should have been elected. If there is no democracy within parties, there cannot be democracy within the country.

### 3. Internal Security

The police system was the primary instrument used by the previous Banda regime to brutalize the people; the military remained remarkably uninvolved. Thus, there is a strong need to regain the trust necessary for the police to perform its intended function as a protector of the people. This will take serious measures designed to create accountability and improve the people's expectations for internal security.

The new Constitution anticipates this need. It contains provisions forbidding political affiliation or utilization of the police force. It depoliticizes the office of the Inspector General and establishes a Police Service Commission to exercise disciplinary control over the force. Previous excesses of the Inspector General have now been constrained through oversight by the National Assembly. Internal security would benefit most from practical improvements. There is a strong need for modernization, which should include communications technology, advanced training, and instituting community-based policing programs.

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<sup>35</sup> See *Malawi Court Orders Fair Election Coverage* (<http://www.fxj.org.za/Medialaw/fairelect.htm>). MBC was ordered to provide equal coverage of campaign speeches of the different political parties.

<sup>36</sup> See TREVOR CULLEN, *supra* note 33, at 98. Many of these newspapers are described as tabloids.

i. **Exiled Peoples or Refugees**

Thousands of Malawians were either forcibly expelled from their country or left because they feared for their safety. These people include some of the most severe victims of brutalization, and for accountability to be genuine, it is important to include returning people in these efforts. However, there are no provisions for their reparation, evidenced by their ineligibility for compensation from the NCT.<sup>37</sup> They have also not been included in reconstruction policies.

Most notably, Malawi citizens who reside outside Malawi, have been denied the right to vote. Under the new Constitution, there are no provisions for absentee balloting; in order to vote, a voter must register as a voter in his or her constituency. Ironically, non-citizens who have been residents for more than seven years have been given the right to vote. The 1966 Citizenship Act also continues to circumscribe the activities of Malawi citizens. The Act penalizes those who attempt to obtain a foreign citizenship, by forcing them to renounce their Malawian citizenship. While Malawi citizens often have legitimate business reasons for obtaining a second citizenship, the Banda regime operated on the assumption that there were always political motives for seeking foreign naturalization. Reconstruction requires the repeal of both the franchise provision in the Constitution and the 1966 Citizenship Act.

i. **Approaches to Accountability**

Each of the countries experiencing situations similar to Malawi [reconstruction periods after brutalization] have approached the process of reconciliation differently, with different approaches to the issue of accountability. Some countries have chosen to only pursue reparations, while others have chosen limited reparations and instead focused on reconstruction. Reconciliation is highly contextual, and depends on the priorities that the new government chooses.

a) **Reparations**

There are several different forms of reparations that governments may make. They include: discovery and dissemination of truth, punishment of perpetrators, symbolic compensation, and actual compensation. Although each form has expected benefits, many concerns or problems arise whenever

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<sup>37</sup> See "WHO WANTS TO FORGET?", *supra* note 7.

a new government decides to make reparations for the abuses perpetrated by the old government.<sup>38</sup>

#### i. Truth Commissions

A “truth commission” may be established by the government in order to share information about past abuses in a public forum. The truth commission approach is intended to provide closure and healing, both on an individual and national level. Further, the information discovered by a truth commission may aid in identifying perpetrators for later prosecution.

There is some risk in establishing truth commissions, as they might cause political instability or even thwart reconciliation efforts, particularly when the new government is comprised of many of the perpetrators of the old government. Truth commissions may also have limited utility in situations where truth is virtually unascertainable – for example, all witnesses are dead and the perpetrators are unwilling to come forward.

In Guatemala, a truth commission was convened, and the commission found conclusively that the military was guilty of specific acts of brutalization, but many of the names of perpetrators were not publicly disseminated.<sup>39</sup> Subsequent efforts by the civil society to identify perpetrators were often met with violence. In contrast, the Truth and Justice Commission in Indonesia has used its findings as a catalyst for legal action.<sup>40</sup>

#### ii. Punishment of Perpetrators

Some countries may decide to institute criminal proceedings or grant victims the right to pursue civil claims against perpetrators as opposed to establishing truth commissions. Criminal and civil liability of perpetrators may provide a sense of “real” justice for the victims, deter future governments from behaving similarly, and restore faith in a government that people know is accountable for its actions.

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<sup>38</sup> These concerns are particularly applicable in the case of Malawi. See COMMUNICATION 64/92 ET AL., AF COMM HPR, OPINION OF 3 NOVEMBER 1994 / 28 JUNE 1995. “Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparations of these abuses.”

<sup>39</sup> See Matt Moffet, *Suits of Armor: Guatemalans Begin to Seek War Redress by Marching to Court*, THE WALL STREET JOURNAL, 18 July 2000, at A12.

<sup>40</sup> See *The Painful Path to Justice*, WORLD PRESS REVIEW, January 2000, at 14.

Such punishment is not always feasible, as prosecution may be nearly impossible due to lack of witnesses or evidence, guilt may be too widespread to focus on a single perpetrator, the

new government may have made amnesty agreements with the previous regime, or members of the new government may be perpetrators themselves. In Guatemala, the army has only limited amnesty - in contrast with the widespread amnesty other militaries in Latin America received.<sup>41</sup>

b) Symbolic Compensation

A government may make certain concessions or gestures with the intent to acknowledge the brutalization, without actual monetary or restorative compensation. This type of reparation may take the form of reburials, memorial services, small monetary offerings, or establishing museums. Symbolic compensation often serves the purpose of "national" healing at a much lower cost than actual compensation, important for new governments with limited resources.

However, symbolic compensation is not always effective. Victims may desperately need actual compensation, such as medical treatment or payment of lost wages. Also, victims may cynically view the gesture as a superficial effort toward reconciliation. Symbolic compensation has been most utilized by countries dealing with the aftermath of World War II and the Holocaust in which actual compensation also played no small part.

c) Actual Compensation

A government may attempt to actually compensate victims of brutalization, usually monetarily, with the intent of returning the victim to his virtual position before the abusive act occurred. The obvious benefit of this is that the victim may feel completely compensated and thus be ready to move forward.

There are numerous drawbacks to actual compensation. Sometimes it is impossible to compensate a victim, that is, in cases of death or destruction of irreplaceable property. This may lead to the conclusion that all compensation is really symbolic. In addition, monetary figures seem arbitrary. What is fair for 10 years of false imprisonment? Should it be double for 20 years? There may be inequality in access to compensation, for example, people in visible positions are often thought to receive more

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<sup>41</sup> See Matt Moffett, *Suites of Armor*, *supra* note 39.

compensation, more quickly. In Zimbabwe, there are indications that the government favors military officers and high-ranking officials when making financial reparations.<sup>42</sup> Victims may not be prepared to handle a large sum of unexpected money, particularly if they have not had means in the past. One of the most disturbing aspects of actual compensation is that the victims may technically bear the monetary burden, as in the case of Malawi, where taxpayers support the National Compensation Tribunal. Additionally, large monetary settlements can place constraints on the budget of a struggling new government.

## V. CONCLUSION

Accountability may be accomplished by any combination of reparations and reconstruction efforts, but real and lasting accountability can only be achieved through the revelation of meaningful truth. There are no absolutes in the process of reconciliation; reparations are only temporary and reconstruction efforts cannot perfectly guarantee prevention of future abuse. However, the truth is an absolute, and it is the only way to achieve real accountability. Future governments will shape their behavior based on the likelihood that their actions will be exposed, and the people will measure their respect for the rule of law and authority of the government by the protection that truth can provide for them.

The right to truth has been established under international law and should be claimed by the people of Malawi. There is an insatiable curiosity on the part of Malawi citizens to finally know what happened during the three decades of the Banda regime and to have the information exposed to the world. To that end, the Malawi History Project should be revived and donors should support it - without arbitrary conditions on funding. Civil society can also make important contributions to discovering the truth by conducting studies, interviewing citizens, and publishing reports. But in the end, what is needed most is an official inquiry, whether in the form of a "truth commission" or otherwise, in order to achieve accountability in Malawi. There is a need for truth, and for the sake of accountability, a need for the government to recognize the people's right to truth.

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<sup>42</sup> See "WHO WANTS TO FORGET?" *supra* note 7.