

OFFICE OF THE OMBUDSMAN



MALAWI'S
UNHEALED
WOUNDS

A REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION
AND OTHER IRREGULARITIES BY MALAWI GOVERNMENT OVER THE MANNER
IN WHICH THE NATIONAL COMPENSATION TRIBUNAL WAS SETUP,
OPERATED AND WOUND UP.

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OCTOBER 2017

YOUR PROTECTOR AGAINST INJUSTICE

Sys/Inv/1/2017



EXECUTIVE SUMMARY

“Justice will not fail, though wickedness appears strong, and has on its side the armies and thrones of power, the riches and the glory of the world, and though poor men crouch down in despair. Justice will not fail and perish out from the world of men, nor will what is really wrong and contrary to God’s real law of justice continually endure.”
Anonymous

1. **‘Malawi’s Unhealed Wounds ’** is my report as the Ombudsman of the Republic of Malawi on an investigation into allegations of maladministration and other irregularities on the manner in which the National Compensation Tribunal was set up, operated and dissolved by the Malawi Government.
2. The investigation was conducted in terms of section 123 of the Constitution of the Republic of Malawi which gives me as Ombudsman the powers to investigate any and all cases of alleged injustice where it does not appear that there is any remedy reasonably available in the courts; and in terms of Section 5 of the Ombudsman Act which gives me powers to investigate ‘any alleged instance or matter of abuse of power or unfair treatment of any person by official in the employ of any organ of government, or manifest injustice or conduct by such official which would properly be regarded as oppressive or unfair in an open and democratic society.
3. The investigation was carried out in response to 29 complaints which had originally been registered with the National Compensation Tribunal during its 10 year lifespan from 1994 to 2004. They then lodged them in my office after the National Compensation Tribunal wound up as their claims were not resolved.
4. In the initial stages of investigating the 29 complaints, it was brought to my attention that there were about 21,000 more complaints outstanding before the National Compensation Tribunal.
5. I interviewed 3 of the 5 Chairpersons who were in charge of the National Compensation Tribunal during its life span and some of the assessors that worked with them. I also interviewed the administrative staff of the National Compensation Tribunal, law scholars, legal experts, some of the victims themselves, the representatives of Malawi National Returnees and Political Detainees Committee, the leadership of Jehovah’s Witnesses Organisation and the Group Village Headman Moto of Traditional Authority Chowe, Mangochi,.



6. I physically analysed all the National Compensation Tribunal files that my Office collected from the Registrar of High Court and Supreme Court of Malawi.
7. The investigation reveals maladministration and irregularities as follows:
 - i. Payments made to prominent political figures even before the National Compensation Tribunal was set up;
 - ii. Failure to set up the National Compensation Fund;
 - iii. Failure by the National Compensation Tribunal to verify and assess the claims;
 - iv. Undue emphasis on monetary awards without considering other forms of remedies;
 - v. Failure by the Government to resolve the cases within the National Compensation Tribunal's lifespan;
 - vi. Pressure on National Compensation Tribunal imposed by Government of that time resulted in favouritism in the priority of payment to Claimants;
 - vii. Insufficient funding to the National Compensation Tribunal by Government;
 - viii. Undignified winding up of the National Compensation Tribunal by Government.
8. The following are the remedial actions ordered:
 - i. Government to erect a National Monument within the National Heroes Acre in Lilongwe with meaningful messages that acknowledges the past atrocities and encourages reconciliation and healing;
 - ii. Government to hold a national function where there will be an unequivocal acknowledgement of the dreadful era and public announcement that no Government will ever subject Malawians to that treatment again;
 - iii. Government to construct a community centre in Moto Village which will be dedicated to those members of the village who in the very early hours of 2nd December 1971 were forcibly taken to various prisons across the country. Those who tried to flee were fatally shot on spot; and
 - iv. Government should pay compensation through negotiated settlement with the representatives of the individual Claimants whose claims were unresolved as at the date of winding up of the Tribunal.



ABBREVIATIONS

BCHI	Body of case Handling Institution
DPP	Democratic Progressive Party
MCP	Malawi Congress Party
MHRC	Malawi Human Rights Commission
OPC	Office of the President and Cabinet
The Act	National Compensation Tribunal Act
The Constitution	Republican Constitution of Malawi
The Fund	National Compensation Fund
The Office	Office of the Ombudsman
The Tribunal	National Compensation Tribunal
UDF	United Democratic Front
UNHCR	United Nations High Commissioner for Refugees



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A. HISTORICAL CONTEXT

1. Malawi attained independence from British Colonial rule in 1964 under the presidency of Ngwazi Dr. Hastings Kamuzu Banda, (Dr Banda) who also had served as a Prime Minister in the British Colonial Government from February 1963 to July 1964.
2. The attainment of independence brought with it the anticipation of democratic rule and freedom. However, this was not to be as a few months into independence, there arose political turmoil as a result of policy disagreements between Dr Banda and his Cabinet Ministers.
3. This led to the Cabinet crisis in 1964 where three Cabinet Ministers and a Parliamentary Secretary were dismissed. In solidarity, three more Ministers and another Parliamentary Secretary resigned. This left only the President and one Minister in Cabinet.
4. The Cabinet Ministers who had been dismissed and resigned fled to neighbouring countries where they reorganised themselves and formed armed groups to overthrow Dr Banda from power. In reaction to this, Dr Banda decided to consolidate his power by surrounding himself with people who were completely loyal to him and not question his authority.
5. On 6th July, 1966 Malawi adopted a new Constitution which declared the country a Republic. Subsequent amendments to this Constitution made Malawi Congress Party (MCP) the only legal party of the country, gave Dr. Banda powers to nominate members of Parliament and further declared him Malawi's life president.
6. With a strong grip on power the period between 1971 and early 1990s, saw those with different political ideals being persecuted, and the abuse also spilling over to general citizenry of the country.
7. As a result, serious human rights violations took place which included detention without good cause or trial of any one perceived to be a rebel or not towing along the philosophy of MCP, inhumane treatment in prisons, torture, unfair termination of employment, loss of property, loss of life and many were forced into exile.
8. In the late 1980s, winds of political change blew over Malawi forcing Dr Banda to hold a National Referendum in 1993 which resulted in Malawians overwhelmingly voting for multiparty democracy.



9. Immediately a provisional constitutional arrangement was made in February 1994 to allow for holding of multiparty elections which resulted in a democratically elected leader assuming power.
10. To ensure complete transition into multiparty democracy, a National Constitutional Conference took place that saw the adoption of the 1994 Republican Constitution (the Constitution).
11. Apart from containing provisions on democratic dispensation, the Constitution also acknowledged that for the country to move forward there was need for a proper closure of the autocratic period. As such one of the institutions created under the Constitution was the National Compensation Tribunal (the Tribunal).

B. SETTING UP AND MODE OF OPERATION OF THE NATIONAL COMPENSATION TRIBUNAL

1. Section 137 of the Constitution created the Tribunal to entertain claims of civil and criminal liability of the autocratic Government that was in power between 1964 and 1994.
2. The Tribunal was granted exclusive jurisdiction under section 138(1) to hear and investigate all cases in the exercise of its mandate.
3. Section 139 of the Constitution gave the Chief Justice powers to appoint Chairperson of the Tribunal after being nominated by the Judicial Service Commission for a period of not more than three years.
4. The Chairperson of the Tribunal was to be assisted by assessors and other experts as may be appointed in accordance with the provisions of the National Compensation Tribunal Act (the Act) (Cap 3:06 of the Laws of Malawi).
5. The said Act also gave a guide on how the Tribunal was going to operate.
6. Section 13 of the Act, provided for the establishment of 'expeditious procedures to deal with small claims,' and also granted the Chairperson 'discretion to give priority to cases on humanitarian grounds.
7. Section 144 provided for the establishment of the National Compensation Fund (the Fund). This was the Fund into which the Government was



supposed to make annual appropriation of money for purposes of paying out the reparations made by the Tribunal.

8. Under section 145(1) the Tribunal was supposed to have completed adjudicating all the claims that were registered within the 10 year period after the commencement of the Constitution. Thereafter, it was not to get any new claims. This meant the lifespan of the Tribunal lapsed in 2004.
9. Unfortunately, by this time the Tribunal had so many outstanding complaints forcing Claimants to seek remedies with other institutions such as the Courts, Malawi Human Rights Commission (MHRC) and Office of the Ombudsman (the Office).

C. THE COMPLAINT

1. In or about 2006 the Office started receiving complaints from people who alleged that they had suffered injustice by the winding up of the Tribunal before their complaints were resolved.
2. The gist of their complaint was that they lodged their complaint within the lifespan of the Tribunal but before they received their compensation, the Government wound up the operations of the Tribunal. They argued that the lapse of the 10 years cannot be used as a basis for denying liability to compensate.

D. EFFORTS BY THE OFFICE TO RESOLVE THE NATIONAL COMPENSATION TRIBUNAL COMPLAINTS

1. By 2006, the Office had registered a total of 29 complaints. Various steps were taken by my predecessors in an attempt to bring these cases to their logical conclusion but they yielded nothing.
2. Upon my assumption of office in December 2015, I renewed the efforts to bring these matters to conclusion.
3. I began engaging the then Attorney General, Mr. Kalekeni Kaphale, SC who informed me that my office was not the only one with the Tribunal files and that there were some files within Ministry of Justice and also Office of the President and Cabinet (OPC).
4. He further indicated that there was a general acknowledgment within Government on the necessity to conclude the Tribunal matters. He thus



asked me to compile a list of the complaints in my office and submit to him for consideration by Government alongside the ones within OPC and Ministry of Justice.

5. I submitted the required information on 21st March, 2016 with the expectation that the Attorney General's office would assist in the conclusion of the matters as undertaken.
6. Contrary to this expectation, the Attorney General issued a legal opinion to my office expressing Government's stand that it could not pay the Complainants based on a number of reasons which for propriety sake I find necessary to reproduce verbatim as follows;
 - ❖ *"As per section 138 (1) of the Constitution proceedings with respect to abuse of power by the one party state could only be brought before the Tribunal. The Tribunal's powers were strictly regulated by the Constitution and the Act (Section 137).*
 - ❖ *Those aggrieved by decisions of the Tribunal including decisions to award partial compensation (or in cases where the final assessment delayed) could seek judicial review under section 142 (1) of the Constitution.*
 - ❖ *Compensation payable to victims or claimants could only be paid out of the Fund and the Fund could only be charged by the Tribunal itself (section 144 (3) of the Constitution). In the absence of the Tribunal no one else has the right or power to assess the remainder of the award or to charge the Fund.*
 - ❖ *Funds to be paid out to victims must have been appropriated to the Fund by Parliament and in the absence of such appropriation there could be nothing to be paid out.*
 - ❖ *The Fund had limited life span under Section 145 and after its dissolution; no claims can be entertained although the Fund would continue until there was no longer any committed residue (Section 145 (4) of the Constitution). Where no balance due had been assessed by the Tribunal, any residue in the Fund cannot be said to be a "committed residue".*
 - ❖ *In my view, during the lifespan of the Fund and of the Tribunal, claimants would have been able to apply for orders of mandamus in judicial review applications to the High Court so that the balances due could be assessed and paid out or any unpaid sums could be paid out. It is now too late for any applications or requests for payment to be made to Government. The Attorney General took this position*



upon considering that the dissolution of the Fund and winding up of the Tribunal were not sudden acts but did occur after due notice.”

7. I expressed my dissatisfaction with the Government’s position through a letter dated 17th June, 2016 based on the following:
 - a. That Government’s failure to resolve the said complaints could not be attributed to the Complainants as they had lodged their complaints within the Tribunal’s lifespan;
 - b. The argument that the Complainants should have raised their complaints through judicial review could not hold as it ignored the fact that some Complainants had received part payments for their claims and were told to wait for their balances. There was a chance that such litigation would have been deemed as abuse of process.
8. Later the Attorney General through a letter dated 28th June, 2016 invited me to institute court proceedings for a conclusive determination by the courts on whether Government was liable or not.
9. Whilst at first I was in agreement with the proposition, on further consideration of my legal mandate I decided against the court action and opted for a systemic investigation and issuance of a report on my findings and direct necessary remedial actions.

E. JUSTIFICATION FOR SYSTEMIC INVESTIGATION

1. The position taken by Government through the Attorney General’s office meant that the complaints in my office and also those with other institutions like OPC, Ministry of Justice and MHRC literally had no any other forum where they could be resolved. Moreover, even after his legal opinion, the Attorney General kept on referring some Claimants on Tribunal files to my Office. Accordingly a lot of people were affected by this position and thus any intervention by my Office required that a more systemic approach to the issue be adopted.
2. Related to the above was my observation that whilst most of the complaints we received focussed more on the manner in which the Tribunal was wound up it was clear from the details on the files that the issue of winding up could not be looked and understood in isolation without looking at the issue of its



operationalization and even its setting up. The best approach was to look at the issue wholesomely through a systemic investigation.

3. The Tribunal was a constitutional body that signified a break with the past as Malawi set its foot on the democratic path that it had taken. With a short term life span it presented a test on the preparedness of the new democratic Government to comply with the adopted democratic principles in dealing with excesses and impunity of the previous Government and at the same time assuring Malawians that things would be different. In other words how the new democratic Government accounted for the previous Government's excesses was going to be an indication of its readiness to be held accountable in the future. Thus, the Tribunal had huge and long term implications on Malawi's democracy. Accordingly, this was a matter of public interest requiring systemic investigation.

F. ISSUES FOR INVESTIGATIONS

1. Whether the setting up of the Tribunal was in accordance with the law.
2. Whether the Tribunal's operations were properly carried out and in accordance with the law.
3. Whether the winding up of the Tribunal without completion of its cases amounted to acts of maladministration.

G. METHODOLOGY

1. The systemic investigation employed a desk review method where all the Tribunal registered files were collected and analysed individually. Literature on the Tribunal was also reviewed for the office to have an informed background.
2. The office conducted interviews with relevant people as a way of data collection. (*See Annex 1*)
3. Recourse was made on how the Truth & Reconciliation Commission and Khulumani Group (both of the Republic of South Africa) functioned and are still functioning today.
4. We had focus group discussions with some of the Complainants.



H. EVIDENCE

i. Whether setting up of the National Compensation Tribunal was in accordance with the Law

1. The Tribunal was housed in Fatima Arcade building in Blantyre and started its operations in 1996. The Chairperson of the Tribunal was appointed by the Chief Justice and assisted by assessors.
2. Evidence however suggests that even before the members of the Tribunal were appointed, some influential politicians had already started receiving payments directly from Treasury.
3. The Daily Times Newspaper of 1st August, 1995 carried an article titled, 'MCP Worried over Distribution of funds' which reported that some United Democratic Front (UDF) top officials had recourse to some funds in the form of compensation under the Tribunal budget line before the Tribunal had been established and become operational. Among the beneficiaries cited were Mr. J.C Malewezi (K612, 000); Mr. B.J Mpinganjira (K449, 311); Lester Muwamba (K605, 000); Mr. A.A. Upindi (K540, 000) and B.W.D Nhlema (K540, 000).
4. The paper quoted the then Publicity Secretary of MCP, Dr. Hetherwick. Ntaba, in a statement stating that *"the rules of procedure for the tribunal have not yet been laid down and so the payments made already to individuals who include certain top officials in the UDF government are an abuse of public funds."* Calling on the UDF Government to justify the payments Dr. Ntaba said, *"I am not saying people who suffered should not be paid. Those who deserve to be paid must be paid but it should be done in accordance with the rules laid down in the Constitution...top UDF officials were paid hefty amounts. How were the payments made and by which authority? There must be transparency in these payments. Establishment of the tribunal must be speeded up. Why the delays?"*
5. There is no evidence to show that the Fund was ever set up. Actually evidence shows that the Tribunal was regarded as a sub-program under the Malawi Judiciary vote.



ii. Whether the National Compensation Tribunal operated properly and in accordance with the law.

1. The establishment and operationalization of the Tribunal was not sufficiently publicised.
2. Claims were registered at the Tribunal registry and Claimants would be given a date when their matter would be heard.
3. The Claimants had to indicate clearly the basis for their claims by stating in writing the suffering that they had gone through.
4. My analysis of the files revealed the following as the major grounds for victimisation:

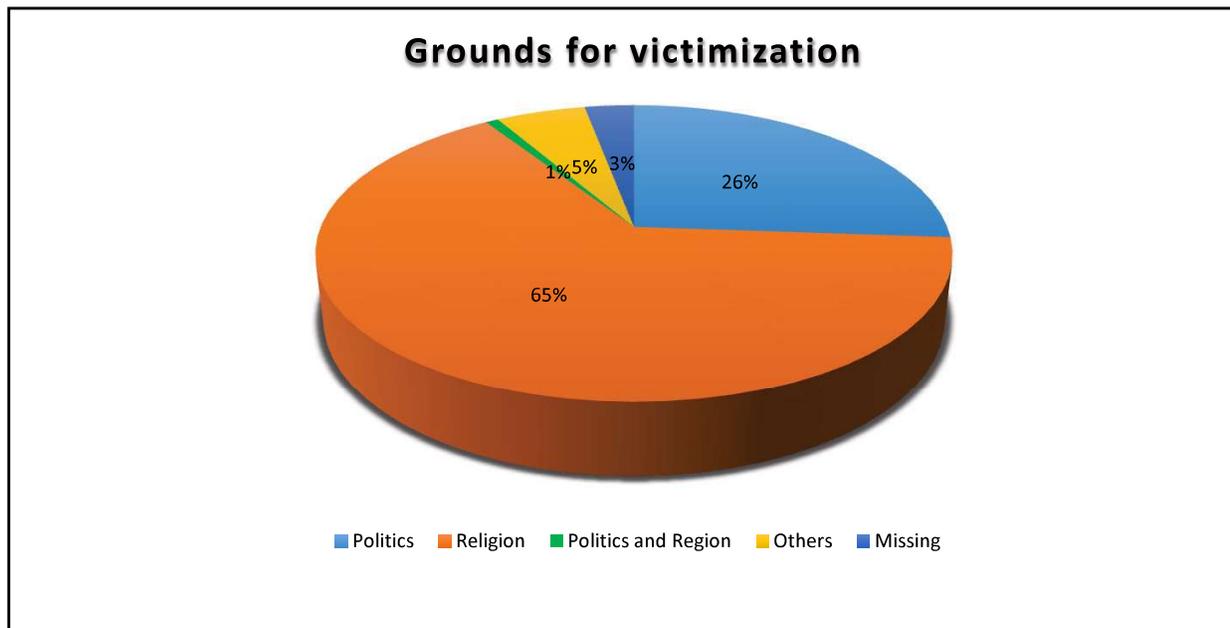


Figure 1

5. My further analysis revealed the following geographical dimensions of the claims:

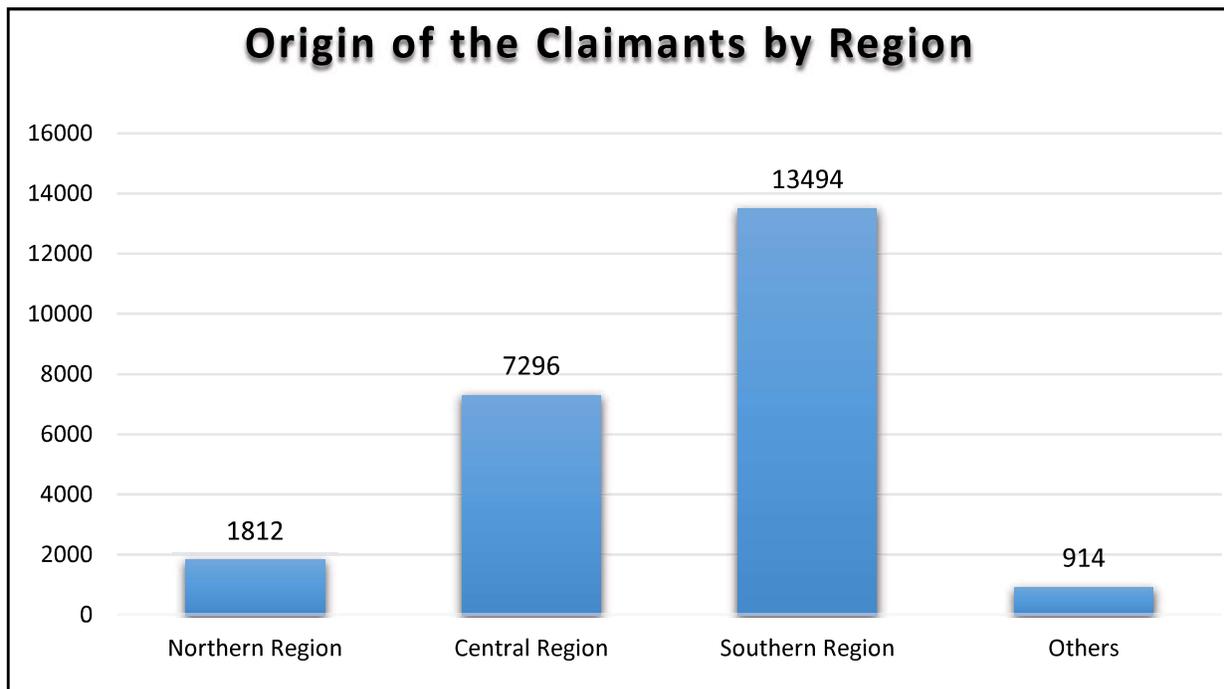


Figure 2

The table above shows that the Southern Region had the highest number of claims. 'Others' include those Claimants who did not indicate their home of origin or whose information was missing and those who made their claims from outside Malawi without indicating their home of origin.

- With regards to region of origin and grounds of victimization, Northern Region indicates a different pattern from Central and Southern Regions in that unlike the other regions, the people from the northern part were largely victimised on the grounds of politics.

		Grounds for victimization					
		Politics	Religion	Politics & Religion	Others	Missing	Total
Region of Origin	Northern Region	1154	387	14	198	59	1812
	Central Region	965	5861	65	231	174	7296
	Southern Region	3850	8453	97	766	327	13493
	International	19	99	2	11	4	135
	Missing	155	419	3	67	136	779
Total		6142	15219	181	1273	700	23516

Table 1



7. I further categorised the losses into monetary, non-monetary and a combination of both. For purposes of this investigation monetary losses consist of loss of property and employment. Non-monetary consists of loss of education opportunities, forced exile and detention. Files with insufficient information have been classified as ‘missing’. This is illustrated by the table below.

General categories of losses suffered		
Nature	Number of Claims	Percentage
Monetary	1097	4.7%
Non-monetary	15941	67.8%
Both monetary and non-monetary	6190	26.3%
Missing	288	1.2%
Total	23516	100%

8. The following are the excerpts from the files indicating some of the losses suffered:

- ❖ *“... anandilanda zigayo ziwiri, kundimanga komanso kuwononga katundu yense wapa nyumba ...”;*
- ❖ *“... anandimanga nditangofika ndikuchokela ku Zambia katundu yense anandilanda...”;*
- ❖ *“... Akanditsekela ku dzaleka chifukwa chokana kugula khadi kwa zaka ziwiri”;*
- ❖ *“... ine ndi mkazi wanga woyembekezera atatitsekela ku dzelaka ... mwana adabadwira ndi kufera konko”;*
- ❖ *“... nyumba yanga anandilanda kuyikamo wa chipani cha MCP pamene ndinathawira ku Zambia”;*
- ❖ *“anandimanga ndi kundilanda mwana wa zaka ziwiri kuti akamupeleka kwa abale anga kumudzi. Kusowa kwa mwana kunali komweko”;*
- ❖ *“I know these police officers and Malawi Young Pioneers were doing their job but they were unnecessarily cruel”;*



- ❖ *“Chifukwa cholephera kugula makhadi ine ndi akazi anga anatitenga kupita nafe ku Bulanchi, anachezela kutimenya usiku wonse komanso mkazi wanga anamuchita chigololo molandizana ali chinjatile”;*
 - ❖ *“my father was terminated from his office because he had sold a coffin to the relatives of the late honourable Gadama”;*
 - ❖ *“Bambowo anaphedwa ngati chome ndipo palibe munthu anaphedwa ngati bambo wanga ndi MCP...anawapha ndikudula nkhope yawo ndi kuaika kukamwa kwawo kad...”.*
9. To quantify the losses, the Chairperson of the Tribunal had to sit with assessors during hearing of claims. The Tribunal heard each case separately unless the facts of different claims were identical.
 10. For a claim to qualify for payment, the facts of the case had to be verified as it was discovered that there were many false claims that had been registered but not verified. The verification exercise was expensive as it required the Tribunal officials to travel to different localities in Malawi. This stalled the payment exercise.
 11. Verification was done by examining documents such as detention records for those who had been arrested and an affidavit or letter from United Nations High Commissioner for Refugees (UNHCR) for those who had gone into or were born in exile.
 12. A perusal of the files demonstrated that there was no thorough examination of the experiences suffered to justify an award that would be made. Further, after determining the extent of suffering, one would be given an interim payment or part payment without making an indication of when full payment would be made.
 13. The criteria used when it came to payment was on a ‘first come first serve’ basis. However it also depended on the discretion of the Chairperson where payment was done on humanitarian grounds considering the age and medical health of the Claimant.
 14. The majority of people interviewed and evidence gathered revealed that there was preferential treatment when it came to making payments. Most of those who received full payment or were paid faster were those who were politically connected to the Government then or known by the Tribunal officials.



15. It was also felt by many that the Tribunal might have been created for selfish reasons as most of the ‘democrats’ (those who fought for political change) were also victims in one way or another and their push for the establishment of the Tribunal was to compensate themselves. This notion is well supported by the unreasonably high compensation awards given to some politicians such as Clement Khembo (about MK 40 million) and Aleke Banda (an undisclosed amount) both were victims of one party rule and had become democrats with influential positions in the UDF government.
16. In an article titled “*Accountability for Political Abuses in Pre-Democratic Malawi: The Primacy of Truth*” (2003) Prof. A. Peter Mutharika criticised the management of the Fund for favouring some prominent members of the new Government then, who received large payments whilst many ordinary Claimants had only received some small interim payments. He further argued that in some cases, the Government attempted to influence decisions of the Tribunal.
17. Evidence further suggests that the second Chairperson of the tribunal, late Justice G. Chimasula Phiri was frustrated by the political interference. According to IOL online news dated 9th November 1999, the late Chairperson threatened to quit as Chairperson of the tribunal following pressure he received from politicians to favour their relations and close friends.
18. From my analysis of the data, below is the compensation status of the claims as at the date of winding up of the Tribunal.

Compensation Status	
Payment Status	Number of Claims
Partial	5650
Full	555
Not known	37
No payment	16895
Missing	379
Total	23516

Table 3

Note:

‘Not known’ means the claim was compensated but the claim file did not have details whether payment was full or partial. In most cases this was due to missing folios in the claimant’s files.



18. It was also stated that the Tribunal was highly underfunded and the little money that it received was largely spent on operations. This affected the rate of payment to Complainants.
 19. When asked as to the reasons why the non-monetary aspect of reparation was never utilised, almost all officials responded that there were no real reasons only that people had focussed on the monetary compensation.
- iii. Whether the winding up of the National Compensation Tribunal without completion of its cases amounted to acts of maladministration.**
1. By 2004, the Tribunal had clocked the 10 years provided for in the Constitution. It had had five chairpersons namely:
 - a. Justice M.P. Mkandawire ;
 - b. Justice I. Mtambo;
 - c. Late Justice G. Chimasula Phiri;
 - d. Justice J. Ansah; and
 - e. Justice M.C.C. Mkandawire.
 2. According to the Tribunal records, it had registered a total of 24,363 claims out of which 342 were fully paid and 23,969 remained unattended. This means that only 1.5% out of all the registered cases were fully finalised and paid throughout its 10 year existence.
 3. However, my physical assessment of the files revealed that the Tribunal had registered at least 24,323 as the last claim was registered as NCT/C/24,323. However, out of the 23,516 files handed over to me only 555 claims were fully compensated representing 2.4%.
 4. I further found from my analysis that 15,647 files were not verified. the following is the status of the files at the time of winding up:



Description of the Cases	
Status	Number of Claims
Not Verified	15647
Verified	1293
Compensation fully paid	555
Compensation partially paid	5650
Not known	37
Referred to court	15
Dismissed	18
Missing	301
Total	23516

Table 4

Note:

Not verified means that a claim was merely registered, verified means a claim had supporting documents, dismissed means NCT explicitly stated that a claim was not within its jurisdiction, missing means a file has some folios missing and where a claim was referred to court it was categorized "Referred to Court".

5. Evidence suggests that there were calls and efforts from various quarters for an extension of the lifespan of the Tribunal.
6. The Nation Newspaper of 5th March, 2004 quoted Justice Ansah expressing her views that the only way the Tribunal could finalise the handling of all the registered complaints was through a Constitutional amendment that would extend the lifespan of the Tribunal.
7. In or about 2004, a constitutional amendment Bill was drafted with the aim of amending section 145 of the Constitution to extend the lifespan of the Tribunal and the Fund by an additional five years. *According to the Hansard of 4th meeting – 37th Session of Parliament*, the Bill was debated on 17th and 19th March, 2004. Being a Constitutional amendment, it needed a two-thirds majority of the Parliamentarians. The numbers in Parliament were not enough for the Bill to pass. Hence it was withdrawn.
8. A meeting was held on 30th September, 2004 where the then Chairperson (Justice Jane Ansah) engaged the Ministry of Justice on the possibility of extending the lifespan of the tribunal.



9. The main argument advanced at the meeting was that if the Tribunal wound up its functions then, many Claimants will go and seek assistance somewhere else such as the courts and compensation to be awarded by these other institutions will be high and will result in depleting the Fund (which was never implemented). Another proposal was made to pay out a fixed amount of money (MK10, 000) to all the Claimants as final payment. However, this was never accepted.
10. On 15th March, 2005 the *Nation Newspaper* reported that the Tribunal through its Principal Administrative Officer had made indications of possibilities to extend the Tribunal's lifespan to the public in Balaka during a rally organised by Body of Case Handling Institutions (BCHI). He further stated that the Tribunal expected a positive response after the Bill was tabled in Parliament. This created high expectations in the victims.
11. In November 2006 Justice C. Mkandawire, the then incumbent Chairperson of the Tribunal, had a meeting with the then Attorney General Honourable Justice Ansah who was his predecessor as Chairperson. In the meeting the issue of Tribunal extension was discussed.
12. On 2nd January, 2007 again Justice M.C.C. Mkandawire submitted a position paper of the Tribunal to the Chairperson of the Constitutional Review Commission in which he proposed an extension to the lifespan of the Tribunal.
13. On 26th August, 2007 the *Nation Newspaper* carried an article in which the then Minister of Justice, Honourable Henry Phoya on behalf of Government categorically dismissed any intentions on the part of the Government to draft a Bill to extend the lifespan of the Tribunal.
14. Despite taking this definite position, the Government did not formally communicate to the Tribunal of this development. Between 2008 and 2009, the Tribunal had staff still attending to the Complainants and at the same time seeking guidance from the Registrar of the High Court on the future of the Tribunal.
15. On 20th February, 2009 the then Registrar of the High Court wrote a memo to the Chief Justice in which she expressed the uncertainties surrounding the Tribunal and sought direction of the Chief Justice.



16. In or about 2009, the funding for Other Recurrent Transactions was stopped. That marked the closure of the Tribunal.
17. Almost all Complainants the Office interacted with stated that they wished Government had made an unequivocal public announcement of the closure of the Tribunal. This should have been done through the office of the Attorney General. The Government had a duty to inform all those who had lodged their claims of the closure of Tribunal and where they would have gone with their claims that were still before Tribunal.
18. Most of the Complainants only came to know of the closure after they had gone to Tribunal to follow up on their matters and were advised to either go to MHRC, the Courts or the Office.
19. The Complainants stated that they had expected Government to ensure that cases that were already before the Tribunal would be fully finalised before its dissolution. In the event that Government had no immediate funding to settle the claims, the Government was expected to lay out settlement plan on how the claims would be honoured because it was under an obligation to settle them.
20. It was also the expectation of the Complainants that towards the end of the lifespan of the Tribunal, those responsible should have ensured that a whole sum payable to a Complainant was known as some of them had only been given interim or part payments.

I. ANALYSIS OF THE EVIDENCE AND THE LAW

1. Many Malawians are aware that this country's history is littered with some atrocious events perpetrated not only by the colonialists but also the succeeding leadership that assumed position on the promise of freedom for Malawians.
2. Malawians are further aware that whilst national incidents like the Cabinet crisis of 1964 and the Mwanza Accident of 18th May, 1983 represented an epitome of that period, there were other individual incidents that inflicted equally unfathomable pain, loss and suffering on Malawians and cumulatively on the national psyche.



3. This is a history that cannot be ignored. It was necessary that it gets squarely confronted. The Tribunal was created for that very purpose. To help Malawi make a journey from a past marked with bloodshed, injustice, oppression, high levels of impunity and exploitation to a new democratic dispensation characterised by human rights and rule of law. Considering all this Malawi had no other option but to ensure effective management of the Tribunal. Unfortunately this was not to be so.
4. The Tribunal started its operations in 1996. However as noted above, in 1995, some influential politicians started receiving compensation before their claims had been verified and amount payable determined. One tends to wonder the legal basis for such payments as the Tribunal itself had neither commenced its operations nor its members appointed.
5. In as far as the setting up of the Tribunal is concerned, evidence suggests that since it became operational, the Tribunal had always been fully empanelled as provided for in the law.
6. Despite the law providing for the Fund, it is clear from the evidence that the Fund was neither established nor is there evidence of any efforts by Government to set up the Fund.
7. According to the Constitution, the Fund was to act as a trust to those who had been awarded compensation by the Tribunal. As the Attorney General himself acknowledges in his legal opinion, it was only through the fund that Parliament could make appropriations for payment to the Claimants. Neither the Tribunal nor the Treasury were supposed to make the payments themselves. By making payments to Claimants, the Tribunal was acting illegally as it did not have that mandate.
8. The Fund would have assisted in making the outstanding payments even after the Tribunal had wound up. According to section 145 (4), government should have still been making payments until all claims were resolved.
9. In his 2016 opinion the Attorney General argues that the compensations payable to victims would only be paid out of the Fund which could only be charged by the Tribunal itself. Indeed this is what the law provided for in section 144(3) of the Constitution. However, the Attorney General himself is fully aware that the Fund was never established and as such there was no Fund to be charged by the Tribunal. Therefore his argument does not hold as it is merely theoretical.



10. The Government through the Minister of Justice in 2007 and also through the Attorney General in his recent legal opinion of 2016 relied on the need to adhere to the intents of the Constitution in justifying closure of Tribunal after the 10 year period. However, as it can be clearly observed, they failed to stand on the same principles when it came to the operation of the Tribunal during its lifespan. This was pure hypocrisy.
11. Despite the Act providing for different forms of compensation that included both monetary and non monetary, the Tribunal only focussed on monetary compensation such that the other options were completely ignored. The Tribunal never considered the other options as highlighted in the Act which included acknowledgement and apology, job retraining, medical care, establishment of memorials, and restitution of property.
12. Coupled with the non-establishment of the Fund, the non-sustainability of the set up was clear. The result being more than 22, 961 people left partially or fully uncompensated.
13. The way the Tribunal was set up by both the Constitution and the Act was in such a way that after its lifespan of 10 years, there would be no outstanding case. Contrary to this as at the date of winding up, the Tribunal had about 23, 000 outstanding cases representing 98.5% of the total registered cases.
14. Based on the evidence before me, I am convinced that some politicians supported the creation of the Tribunal for selfish reasons as they stood to benefit and indeed benefitted before anyone else.
15. Claimants were never officially notified that the Tribunal was closing. Looking at how many people remained unassisted, the reasonable thing to do was for the Government to ensure that no case remained unheard, give an unequivocal notice of the closure and direct Claimants where to seek further remedies.
16. As much as Government is to blame for the status of the cases at the time of winding up of the Tribunal, the Tribunal itself should share the blame. This is because by looking at the statistics, there is no sensible explanation on the Tribunal's failure to at least complete making the assessments so that the Claimants would only be waiting for the actual payment.
17. When the Claimants went to follow up on their cases, the Tribunal



officials would tell them to keep waiting for their compensation. The public utterances of the Tribunal officials also went on to assure the Claimants of the extension of the lifespan of the Tribunal and hence the resolution of their cases. Such assurances raised legitimate expectation on the Claimants.

18. To expect the Claimants to have applied for judicial review before the Courts as suggested by the Attorney General in his legal opinion was unreasonable as such litigation at the time would have been deemed as abuse of process.
19. Besides, judicial review would not have been the correct mode of instituting proceedings in the courts as judicial review is an application that only reviews the process and not the decision itself. In the end what the Courts would have done was to send it back considering the nature of the claim. In fact the meetings between the Tribunal and Government Officials (Minister of Justice and Attorney General) then already had ruled out the option of the Tribunal claims going to the ordinary Courts as it would have been costly and unmanageable.

J. FINDINGS

Going through the whole process of establishment, operationalization and winding up of the Tribunal, it is clear to me that there were a lot of irregularities, illegalities and general acts of maladministration. The following are my findings on the same:

1. The payments to some prominent politicians before the inception of the Tribunal amounted to flagrant abuse of power. This was maladministration;
2. The non establishment of the Fund contrary to the Constitution was illegal and it amounted to unreasonable, unjustifiable and unfair omission of duty. It was maladministration;
3. The payments by the Tribunal should not have been made in the first place as it did not have the legal mandate to do so. It was maladministration;
4. Undue emphasis on monetary awards and failure to consider relevant factors such as other forms of remedies as provided by the law was maladministration;



5. Failure to conclude and resolve the cases within the lifespan of the Tribunal was maladministration;
6. The laissez faire approach by the Tribunal as demonstrated through the unassessed claims was unjust and unfair to the Claimants. It was maladministration;
7. Favouritism in the priority of payments to Claimants amounted to unfair conduct and contrary to democratic principles. This was maladministration;
8. High reduction of funding to the Tribunal after the payments made to the politicians such that the Tribunal was unable to pay the other Claimants was unfair and discriminatory conduct. It was maladministration; and
9. Failure to notify the Claimants on the closure of the Tribunal was unfair treatment. It was maladministration.

K. INJUSTICE OCCASIONED

1. When one considers the political history of Malawi, the Tribunal concept was noble. It presented Malawi with a chance to bring to a close its past atrocities and presented a test on her preparedness to abide by the democratic principles it had undertaken.
2. The magnitude of irregularities, illegalities and various kinds of maladministration associated with the establishment, operationalization and winding up of the Tribunal resulted in almost 98% of its registered cases unresolved. This was enough indication that there would not be proper closure to the autocratic period and also that Malawi was not ready to abide by the democratic principles it had adopted.
3. Whilst some circles have argued that we should let the past be forgotten or let bygones be bygones, in my view such forced amnesia results in further victimisation of the victims as it simply denies their suffering and loss. Moreover there is something about a wrongly handled past. It refuses to die down quietly and has this uncanny habit of returning to haunt one. This is the very reason why 23 years after the Tribunal was established and spectacularly failed to carry out its duties this issue keeps coming up.



4. Under Customary International Law and even the African Charter on Human and People's Rights the liability of a Government for actions of a previous Government is well entrenched. Each of the successive Governments after MCP being the UDF Government of 1994 to 2009, the Democratic Progressive Party (DPP) Government of 2009 to 2014, had therefore a legal duty to deal with atrocities of the MCP era and unfortunately they failed. To date, even the present DPP Government has refused to take responsibility as demonstrated by legal opinion of the Attorney General.
5. This failure could be attributed to lack of political will but also as shown in this report, large sums of money were paid to very few individuals who in fact were part of the MCP architecture that inflicted terror on the nation but when the winds of political change blew over the country, they quickly repositioned themselves to the democratic side and ensured that they were the first to benefit.
6. Accordingly regardless of the social, economic and political status of the victims, the wounds of the past must be opened, cleansed and balm poured on them so that they can heal. Each and every Malawian deserves to heal. This is not to obsess with the past but to ensure that the past is properly taken care of for the sake of the future. At the moment there are approximately 23000 unhealed wounds in this country. The owners of these wounds may not hold political leverage and even be at the lowest social economic strata. But they are Malawians and they deserve justice.

L. REMEDIES

From the foregoing the losses that were suffered included education opportunities, employment, life and property. Notwithstanding the fact that these complaints were lodged by individuals, the magnitude of the injury impacted families, communities and the country as a whole. Therefore the remedies I am directing are in consideration of the injustices suffered at all these levels.

i. The Nation

1. The overwhelming 'yes' vote for multiparty democracy was a demonstration of the Nation's abhorrence to the dictatorship regime of Dr Banda. Every Malawian suffered either directly or indirectly due



to the fear that gripped the nation during that period. This was the period that the Tribunal ought to have brought to an end and provide Malawians with a dignified closure. By failing to effectively discharge its mandate, the Tribunal and therefore by extension Government failed the Nation. To this end, I direct the following remedial actions:

- a. Government through the OPC should facilitate the erection of a National Monument within the Hero's Acre compound in Lilongwe containing a meaningful message that acknowledges the past atrocities and encourages reconciliation and healing. The budget for the monument should be appropriated by Parliament in the fiscal year 2018/2019 and should be unveiled by the year 2020;
- b. Government should have a national function where there will be an unequivocal acknowledgment of the horrendous period and a public pronouncement that no Government will ever subject Malawians to such atrocities ever again. To save public resources, this function should be incorporated in the 3rd March, 2018 Martyr's day National prayers. Representative from Moto Village of Mangochi, (see below) Jehovah's Witnesses Organisation and Association of Detainees and Returnees should be given a chance to make a statement at this function.

ii. Community based

1. Whilst the whole country suffered under the one party rule, there were other communities that were specifically victimised as a result of the perception whether real or imagined that they were connected to political dissidents of the time. One such village was Moto village of T/A Chowe in Mangochi District.
2. Henry Chipembere who came from Mangochi District was one of the Ministers who had resigned during the 1964 Cabinet crisis. For that reason he was deemed as a rebel and he fled and hid in Malindi Hills and later on fled to the United States of America in fear of his life.
3. In 1971 some of Chipembere's supporters who remained in the hills after he fled to the United States of America killed a man and dumped the body in Chapola village which is adjacent to Moto village. The people of Chapola Village moved the dead body to Moto village and



reported the matter to police. As a result, almost the whole village, including women and children were arrested at dawn and kept in custody in different prisons across the country for a period of one to two years. Those who attempted to run away were fatally shot on the spot.

4. My interaction with the Group Village Head Man and some of the victims revealed that the memories and effects of the trauma of that incident are still fresh. It is on this basis that I believe Moto Village needs special consideration in the remedies. Having considered their proposed forms of reparation and all the relevant factors surrounding this issue I direct the following:-
 - a. Government to construct a Community Centre in the village to among other things be used as a platform for dissemination of information about what happened in the village about four decades ago and an assurance that the country remembers what the village went through and that there will be no repetition of such an experience;
 - b. A memorial monument to be constructed at the community centre with names of all the villagers that were arrested or killed on that fateful day. This should be appropriated in the 2018/2019 fiscal year.

iii. Jehovah's witnesses

5. Jehovah's witnesses members constituted the larger part of the victims that came to complain at the Tribunal. Out of the 23, 516 files that came to my office, 15, 219 belonged to the members of the Jehovah's Witness Organisation. The victimisation of the Jehovah's Witness was the result of their refusal to buy MCP party membership cards.
6. When I inquired from the leadership about the kind of reparation they would want as an organisation, this was left to my discretion.
7. I, therefore, direct that a formal written apology from Government to Jehovah's Witnesses in Malawi within 28 days from the date of issuance of this report. This apology should be issued by the OPC.



iv. Individual based

8. For avoidance of confusion, reference under this part is to those that lodged their complaint with the Tribunal. The loss and trauma suffered was huge and is evident to this date. During my interaction with the representatives, they proposed figures in the range of MK 600, 000 to MK 20, 000, 000 per person. However the impact that payment of such a figure will have on the national budget is equally huge for Malawi's size of economy and will be borne by each and every Malawian who also suffered under the regime in one way or another. It is in keeping this in mind that I direct that:

- a. The Government through the Office of the Attorney General should initiate a negotiated settlement with the Claimants' representatives. This process should be overseen by a mediator to be mutually agreed upon by the Parties. This process should be commenced and an agreement reached within three months from the date of this report. For the avoidance of doubt, I shall expect a report of the negotiations by 31st January, 2018. Failing which I shall make further directives.

Dated this 30th Day of October, 2017



Martha Chizuma
OMBUDSMAN



ANNEX 1: LIST OF PEOPLE WHO WERE INTERVIEWED

Name	Designation
1. Hon. Justice Isaac. Mtambo, SC	Former Chairperson of the Tribunal
2. Hon. Justice Dr. Jane Ansah, SC	Former Chairperson of the Tribunal
3. Justice Makhambera C.C Mkandawire	Former Chairperson of the Tribunal
4. Mr. Mordecai Msiska, SC	Legal Expert
5. Professor Edge Kanyongolo	Legal Expert
6. Mr. Geoffrey Nkhata	Former Assessor of the Tribunal
7. H/W Viva Nyimba	Former Assessor of the Tribunal
8. Mr. G.D Chimbamba	Former Admin. of the Tribunal
9. Traditional Authority Chowe	Chief
10. Mr. Mussa Adam Nakasira	Group Village Headman Moto
11. Mr. Amadu Nakumba	Councillor to GVH Moto
12. Professor Michongwe	Complainant
13. Mr. Van Guilder	Complainant
14. Mrs. Besina Banda	Complainant
15. Mr. Daniel K. Mhone	Complainant
16. Mr. H. Kaundala Mfuno	Complainant
17. Mr. Robertson Johnson	Complainant
18. Nyirenda & Msiska	Complainant
19. Mr. Gusto Nyirenda as Guardian for Brighton Nyirenda	Complainant
20. Mr. Mussa Hamuza	Complainant
21. Mr. Vinack Salani	Complainant
22. Mr. Moffat Majo son to Mr. Alfred Majo Ndolo	Complainant
23. Ms Pamela Kanjanga Phiri	Complainant
24. Edna Kanjanga Phiri	Complainant
25. Mr. Mavuto Kanjanga Phiri	Complainant
26. Mr. Tandu Chisuse Somanje	Complainant
27. Mr. Sangwani Mkandawire	Complainant
28. Mr. Alexander Msiska	Complainant
29. Chikanda Edson	Complainant





MALAWI'S UNHEALED WOUNDS





THE OFFICE OF THE OMBUDSMAN

MALAWI'S UNHEALED WOUNDS





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