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ROUND TABLE ON TRANSITION TO MULTI-PARTY DEMOCRACY IN
MALAWI

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Malawi meeting on transition to democracy

From 21 to 23 July 1993 a Round Table on Democratic Transition took place in Lilongwe, Malawi. It was organised by the Electoral Assistance Unit of the United Nations in New York with the collaboration of the United Nations Development Programme (UNDP) and other national and international agencies. The Round Table was attended by representatives of the Government of Malawi, as well as representatives of various groups which have been agitating for democratic transition in Malawi to a multi-party democracy. These included the churches, the Law Society and leaders of the new political parties which have sprung up in the year past in the wake of the moves in Malawi to dismantle the One Party State. That form of government, hitherto common in Africa and in other parts of the world, but increasingly coming under question and pressure for reform, is enshrined in the *Malawi Constitution*. Section 4 provides:

- "4(1) *There shall be in the Republic, after the appointed day, only one National party;*
- (2) *The National Party shall be the Malawi Congress Party."*

Section 9 of the Malawi Constitution provides for the office of "Life President". This provision was adapted in 1970 when the Life Presidency was first introduced. The section now reads:

"9 *The first President, having been duly elected to that office in accordance with the Election of a First President of the Republic Act, 1966, shall be Ngwazi Dr H Kamuzu Banda, who shall hold the office of President for his life-time."*

The word "Ngwazi", roughly, "Conqueror". It is to be contrasted to the African title given to Dr Kwame Nkrumah, first Prime Minister and later President of Ghana, of "Osegyefo" ("the Redeemer").

The emergence of Malawi

The *Malawi Constitution* is, in turn, adapted from the constitution provided when independence of the former protectorate of Nyassaland was secured from Britain pursuant to the *Republic of Malawi (Constitution) Act 1966*.

The early contact between what is now Malawi and Britain came about as a result of missionary expeditions. One of the first of these was Dr David Livingstone's Zambezi expedition of 1858. Dr Livingstone continued his visits to present day Malawi and explored the lake now called Lake Malawi which extends over much of the length of the country. Livingstone was searching for the source of the River Nile. His writings, and their great popularity in Britain, attracted missionaries to the highly populated land which he vividly and sympathetically described. Those missionaries sought to keep what they named Nyassaland independent of the commercial interests which were extending from British South Africa through the Rhodesias. They were only partly successful.

Part of the early effort of British traders in Nyassaland was devoted to attempts to suppress the slave trade. Even until the early 1860s, this flourished in nearby regions of Africa, then under Portuguese rule.

The British protectorate over the Central African "Highlands" was proclaimed in 1889. This local action was ratified in London in 1890. In the following year, a British Central African Protectorate was declared over the entire region now

constituting Malawi. In 1907, the country was renamed Nyassaland. It retained that name until its independence as Malawi. Since independence, it has had only one President, Dr H K Banda. Before his return to his homeland in 1958 he was a physician practising in England. He immediately focussed his attention on the struggle for independence from Britain and was soon elected President of the Congress Party. One of the major planks of that party was to bring down the Federation of Rhodesia and Nyassaland which had been imposed by colonial officials in 1953 upon the different ethnic communities. As the campaign for independence intensified, the colonial government declared a state of emergency in March 1959. Dr Banda and over a thousand of his supporters were arrested. Many were killed. As a result of this unrest, an inquiry was conducted by Mr Justice Patrick Devlin. His report, sympathetic to the nationalist movement, ultimately produced free elections in August 1961. These resulted in a sweeping victory for the Malawi Congress Party. Malawi became an independent state on 6 July 1964. The republic followed two years later.

The One Party State and Life Presidency of Dr Banda necessarily imposed severe limitations upon political dissent and unrest in Malawi. Opponents of the Congress Party were regularly arrested. In addition to the constitutional amendments mentioned, legislation enacted by the One Party Parliament entrenched the privileged position of the Congress Party. Thus, the *Civil Procedure Act*, s 11 rendered the Attorney-General of Malawi the legal practitioner "for the Party". It required that any damages awarded against the Party, or any of its officers, should be paid out of the Consolidated Fund. The *Penal Code*, ss 46-48 enlarged the power of the Minister to prohibit the importation of publications which, in the Minister's opinion, would be "contrary to the public interest". A widely expressed offence of sedition (including criticism of the government, the ministers and the judiciary) was enacted. Freedom of association was controlled. Section 60A of the *Penal Code* made it an offence to communicate false statements, including rumours. *The*

These powers were allegedly used against persons perceived as opposed to the Congress Party, the Government or the President. By the *Traditional Courts Act* the powers of traditional courts were enlarged. In these courts legal representation was denied, although the courts routinely imposed substantial penalties.

Demands for democracy and a referendum

The turning point in the history of Malawi occurred in March 1992. The Bishops of the Roman Catholic Church caused a pastoral letter to be read calling for political reform and the re-establishment of a multi-party democracy. A similar call soon followed from the Blantyre Synod of the Presbyterian Church of Malawi. Support for the churches' calls soon came from the Law Society, the business community and the Muslim community. In October 1992, President Banda, in response to increased unrest formed a "Presidential Committee for Dialogue". At that time, the various Opposition groups were not united as later they were to be in the Public Affairs Committee. The first meeting between proponents and opponents of democracy took place on 19 October 1992. On the eve of this meeting, President Banda announced that there would be a referendum to assess the popular desire in the country for constitutional reform. Against the background of that announcement, the dialogue about reform proceeded in earnest. The date of the referendum was originally fixed for 15 March 1993. However, in co-operation with the United Nations Electoral Assistance Unit, the conduct of the referendum was postponed until 14 June 1993. By this stage, the division of opinion was clear-cut.

The referendum was conducted. According to the reports of observers from the United Nations, the Commonwealth Secretariat, the European Community and other interested groups, it proceeded peacefully and fairly. A dispute arose just before polling when it was proposed by the Government that different ballot boxes should be used for affirmative and negative votes. To meet the fear that this would undermine the secrecy of the ballot (and expose voters to retaliation) the Secretary General of the International Commission of Jurists (Mr Adama Dieng) proposed a solution involving

the use of different ballot papers. That solution was accepted by all parties. The result was that 3.1 million citizens voted. Of these, 63% (1.9 million) voted in favour of a change to multi-party democracy. The 210 international observers representing 11 governments and several inter-governmental agencies declared that the vote was "free and fair" and "an expression of the will of the people of Malawi". On 17 June 1993, President Banda announced his unequivocal acceptance of the referendum. He declared that section 4 of the Constitution would be amended and that dialogue with Opposition groups would continue. He said that a general election would be held throughout Malawi within a year. A time-table was set for a general review of the *Malwai Constitution* and for consideration of other expressed human rights concerns.

In the aftermath of the referendum and these announcements, a few Malawian political dissidents began to return to Malawi from abroad. However, large numbers of Malawian dissidents have not as yet returned. Several persons who had been imprisoned, allegedly for political offences and sometimes for very long periods of years, were released. Political groups began to form. Attention was soon given to the urgent tasks of reconstituting an independent Electoral Commission and establishing accurate boundaries for electorates. The Opposition groups, concerned about the possible repetition of the election in Kenya (in which President Moi's government was returned, although on a minority vote) commenced dialogue amongst themselves in the hope of finding a single candidate to lead the Opposition forces. Proposals were put forward to control the establishment and representation of minority Parties. These proposals were rejected by the Government of the Congress Party.

On 29 June 1993 the Malawi Parliament met. By the requisite majority it amended section 4 of the Constitution. It also enacted a general amnesty and undertook a review of the electoral law. Various alternative time-tables for the conduct of a multi-party election were considered. To some extent these time-tables depend upon the reform of the necessary laws; the availability of an infrastructure and international support for the conduct of free elections; and the climatic seasons. It

was generally agreed that the elections would need to be conducted outside the rainy season.

Some of the early disputes between the Government and Opposition Parties have centred around the moves to establish a National Consultative Council and a National Executive Council, comprising representatives of the Congress Party and other leading groups in the Opposition. The disputes have centred upon the powers to be afforded to these Councils and their relationship to the organs⁴ of Government which still remain under the control of the Presidential Council and the Malawi Congress Party.

The programme of the meeting on transition

It was against the background of these remarkable developments in Malawi that the United Nations Electoral Office in New York and the United Nations Development Programme in Malawi convened the Round Table on Democratic Transition in Lilongwe, Malawi. It was held between 21 and 23 July 1993. It was attended by representatives both of the Parties supporting the Government and of the Opposition Parties, church and other religious groups, and the Law Society which had led the moves towards constitutional reform. In addition, there were in attendance a number of officers of the Malawi Executive Government, and the Chief Justice and two judges of the Malawi Supreme Court who took up a position at the Round Table, with appropriate neutrality, between the Government and Opposition personnel.

The Round Table was opened with an explanation on the establishment and consolidation of democratic institutions in Africa given by Professor Tessy de Bakary of the Ivory Coast, now teaching in Montreal, Quebec, Canada. His presentation, which covered moves in other African States towards democratic institutions, was followed by a talk by Ms Helen Hopps on the civic education necessary to provide a firm foundation for democratic institutions. Ms Hopps's paper was followed by one delivered by Mr Michael Meadowcroft on the political aspects of electoral reform. Mr Meadowcroft was a past Member of the House of Commons in

England. He explained the different systems of electoral law and their various advantages and disadvantages. He examined various electoral models. He tested these by reference to the criteria of proportionality of representation; accountability of the elected representative; the achievement of equal value for equal votes; and the promotion of effective choice in the electorate.

Mr Meadowcroft's presentation was followed by one by Professor William Tordoff. He examined processes for decentralisation, the development of local government and the devolution of power from central control to effective local decision-making. Professor Tordoff (UK) has had a lifetime's experience in various forms of local government in Africa, particularly in Nigeria, Tanzania and Kenya.

There then followed a session on the rôle of the media which was presented by Ms Robin Ludwig of the United Nations Electoral Assistance Unit in New York. The two closing presentations were given by the writer. In one sessions the rule of law and the importance of a trusted, independent judiciary as a guardian for constitutional reform was explained. In another, reference was made to the human rights considerations which were necessary to informed democratic elections and respect for the processes of democracy and the peaceful transition of power, if that course was chosen.

The United Nations Principles on the Independence of the Judiciary were explained by reference to work of the International Commission of Jurists. Amongst the features of an independent judiciary which, it was urged, Malawi should ensure, were: the guarantee of independence in the *Constitution*; the definition of the exclusive jurisdiction of the courts; the acceptance of the principle of non-interference in the work of the courts; the minimisation or abolition of extra-ordinary courts; the guarantee of free expression in courts; and the promotion of high quality in the judiciary, protected by the immunity of all judicial officers. The rule relating to the limitations on the removal of judicial officers (only for proved incapacity or misconduct) was explained. So were procedures for the discipline of judicial officers

Against these criteria, the present terms of the *Malawi Constitution* were criticised. A number of provisions were highlighted as not reaching the international standards necessary for a truly independent judiciary.

After the foregoing sessions the participants divided into various working groups. The working group on the law, judiciary and human rights was chaired by the writer. Other working groups examined the topics of building democratic institutions; achieving electoral reform; securing decentralisation and improved local government; assisting in civic education of the populace and promotion a constructive rôle for the media.

Recommendations for reform

In each of the reports on these subtopics detailed proposals were put forward with recommendations for action and follow-up. About half of the rapporteurs of the sessions came from the Government's ranks and half from the Opposition. However, it was notable that the rapporteurs presented what was generally agreed to be fair and impartial reflections of the discussion and debates in their working groups. Both long-term and short-term reforms of the law were proposed. The detail of these goes beyond the purposes of this note.

Some of the more important suggestions, however, were the following:

- * Steps should be taken to guarantee the neutrality of both the Malawi Army and the Judiciary throughout the whole process of transition;
- * The participation of women in public life in Malawi should be encouraged to repair a suggested lack of involvement by women in the past;
- * The Electoral Commission should be guaranteed efficiency in conducting the coming elections, if necessary by support from the United Nations Electoral Unit and/or the Commonwealth Secretariat;

The electoral roll should be computerised and its establishment should have regard to the fact that many citizens entitled to enrolment would not be able to produce birth certificates;

The weaknesses in local government should be repaired and in particular by improving the staffing and financing of local authorities and providing for the election, rather than the appointment, of mayors and councillors;

Public land under the control of local government should be made available to facilitate development and housing;

Civic education should target the management of change in Malawi and promote the fair representation of different opinions to replace the high measure of uniformity of opinion hitherto presented by the Malawi Broadcasting Corporation;

A Code of Conduct should be established providing for fair access to the Malawi Broadcasting Corporation by all groups competing in the election. The editorial freedom of the Corporation and its journalists should be assured. The statute governing the Corporation should be reviewed to eliminate any limits on its freedom and neutrality;

The Judiciary should be protected from any form of pressure from any source. The salaries and conditions of judges should be improved and the judiciary should have a large measure of independence in the management of the judicial branch of government;

The police powers of arrest and criminal investigation should be redefined and the jurisdiction of the traditional courts should be curbed, notably by the removal from their jurisdiction of all capital offences;

The protection of basic human rights should be incorporated in the *Constitution* and the utilisation of universal human rights norms should be encouraged in judicial decisions.

In their closing addresses at the final plenary, the representatives of the Opposition and of the Government voiced their hopes for the future. The Opposition spokesmen noted that the exchanges had been substantially amicable. From the Malawi point of view they were considered "historic". The Opposition group committed themselves to create a government which would ensure a more equitable share in the benefits of national development and the establishment of a society which upheld diversity of opinions, no longer regarding such differences as subversive.

For the Government, Dr Ntaba (Minister of Health) stressed the "complex and highly technical exercise" in which Malawi was now engaged. He said that it would require support from both within Malawi and from outside. He believed that a high degree of consensus had been reached on many issues. Upon others the parties had "gracefully agreed to disagree". The report on the Round Table would be an important contribution to Malawi and democratisation. The process now in train could not be reversed. But until the constitutional order were changed, it was the duty of the Government to retain effective control and it would do so.

Urgent priority was assigned to the establishment of the Electoral Commission, completion of an authentic electoral roll and the determination of the boundaries of electorates. The time-table for elections would have to be set. The process of change would occur in accordance with law. Although the Government was not willing to share its executive powers with the Opposition groups, believing that course to be unconstitutional, it would certainly discuss the process of change with the Opposition in the hope of ensuring the success of the future phases of transition.

The hope for civic peace and democracy

At the conclusion of the Round Table, some of the participants took the journey from Lilongwe to Lake Malawi. The road passed the refugee housing constructed for the flood of immigrants who had entered Malawi during the worst of the armed insurgency in neighbouring Mozambique. Now, the huts and villages are empty. With peace in Mozambique, most of the refugees have crossed the invisible border

and returned to their homes. To reach the great lake which is the third largest in Africa, it is necessary to descend through a mountain pass to the plateau which leads to the water. On the way, children besieged visiting officials, presenting them with the most elaborate carvings of tractors and aeroplanes, perfectly constructed in balsa wood. On the side of the road, busy mothers tended to their large families. Children everywhere demonstrated the truth which Livingstone found. This is one of the most heavily populated parts of Africa. But its natural resources are limited. Its economic future depends upon controlling the population explosion and harnessing the relatively well-educated and disciplined community. Until now, it has not known the challenges and dangers of democracy.

At Lake Malawi, the tourist resorts seemed sadly deserted. The great stretch of water shone brilliantly in the afternoon light. Lake Malawi seemed peaceful, even eerily so. It is to be hoped that the process of consultation described above will ensure that civic peace is enjoyed throughout Malawi in the challenging years ahead. Meanwhile, Ngwazi, Dr H Kamuzu Banda remains in the President's residence. The Government remains very much in control of executive power. The Opposition forces are divided in a way reminiscent of the Opposition of Kenya. The promise of democratic transition remains only partly fulfilled.

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* The Hon Justice Kirby. President of the Court of Appeal of New South Wales, Australia. Chairman, Executive Board of the International Commission of Jurists. Personal opinions.