

8

A SLOW BUT STEADY SEARCH FOR JUSTICE: THE COMMISSION OF INQUIRY INTO THE JULY 2011 'RIOTS' IN MALAWI

*John Kotsopoulos**

1 Introduction

Malawi was left reeling after the deaths and damage that followed anti-government demonstrations on 20 and 21 July 2011. Twenty individuals lost their lives, many more were injured and extensive damage was caused to property in several of the main cities throughout the country. All but one of the deaths were caused by live ammunition fired by the police. The scale of the protest movement and the carnage that followed was unprecedented in Malawi in the democratic era, contributing to a general sense of shock.¹

The demonstrations had been organised by a national alliance of civil society organisations (CSOs), and represented the culmination of months of frustration not only with the perceived mismanagement of the economy, but also with the lack of responsiveness to citizens' concerns exhibited by President Bingu wa Mutharika. CSOs had met with the President earlier in 2011, demanding action from the government to remedy an economy that had ground to a near halt, with large-scale fuel shortages directly

* This study was primarily conducted through the use of semi-structured interviews. Sixteen individuals based in three of the cities in which protests took place (Lilongwe, Blantyre and Zomba) were interviewed. The interviewees represented all of the entities singled out by the Commission of Inquiry as having played a role in the events of July. Two of the six commissioners were also interviewed. Interviews were conducted over nine days in late May to early June 2016. The author conducted the interviews with the assistance of Anyango Yvonne Oyieke (University of Pretoria) and Trevor Milandzi (an honours student from the Department of Political Science at Chancellor's College, Zomba, Malawi). All interviews were conducted in English. Other sources used for the analysis included the Commission's report itself, newspaper articles and an NGO report. The author would like to thank Thomas Probert for his thoughts on earlier drafts of this manuscript. As far as is known by the author, no other academic work concerning the Commission of Inquiry existed at the time of writing.

1 Godfrey Mapondera & David Smith 'Malawi Protesters Killed During Anti-Regime Riots' *The Guardian* (21 July 2011).

affecting the livelihoods of ordinary citizens. However, little came of the meetings, which further stoked the country's ire.

Most of the demonstrations progressed in a similar fashion: large groups assembled in the major cities on the morning of 20 July, only to be delayed by an application from a private citizen for an injunction to stop the demonstrations, submitted late on 19 July and accepted by the Lilongwe High Court. The injunction sowed confusion, creating tension as demonstrators were forced to wait while officials sought clarity about the validity of the injunction.² Finally, at 13:00 on 20 July the injunction was vacated by 'consent of the parties'.³ Most of the demonstrations then proceeded with relative calm. In Blantyre one procession was able to march to the City Council offices to submit a petition requesting a variety of governmental reforms. A second procession, however, was blocked by police who as yet were unaware of the vacation of the injunction and also feared that the crowd were intending to attack a nearby office of the Democratic Progressive Party (DPP) – the party of President Mutharika. Tear gas was used, triggering mayhem. Only after the police were informed that the injunction had been vacated did they desist.⁴ No deaths were reported during this melee, but by late afternoon on 20 July, news of looting in three of Blantyre's townships had trickled in.⁵ The first two deaths were also reported at that time – both having occurred away from the main route of the demonstration.⁶

In Lilongwe, Malawi's capital, on 20 July demonstrators were met by police officers who had been organised to uphold the injunction and to disperse the crowd. Reports of beatings of civil society leaders were corroborated by the Inspector-General of Police himself.⁷ Yet, as with Blantyre, reports of deaths occurred outside of the main demonstration area. Seven deaths and many casualties were reported in the vicinity of extensive looting of shops, with police reporting that live ammunition had been used to protect private property.⁸

2 Presidential Commission of Inquiry into the Demonstrations, Deaths, Injuries, Riots, Looting, Arson, Public Disorder and Loss of Property That Took Place on 20th and 21st July 2011: Report of Findings and Recommendations (Lilongwe, 2011) (Report of the Presidential Commission of Inquiry) p.34.

3 *Ibid.*

4 *Ibid.*, p.35.

5 *Ibid.*, p.36.

6 *Ibid.*, pp.37–38.

7 *Ibid.*, p.41.

8 *Ibid.*, p.43.

By contrast, in the northern city of Mzuzu the loss of life occurred in a more direct connection to the demonstration. Impatient to start before the vacation of the injunction, and without the potentially-mollifying presence of civil society leaders who had gone to seek clarification about the injunction, protestors began to march in defiance of the law. Violent clashes with police occurred at the first road block near the Mzuzu City Council offices, where one demonstrator died of suffocation resulting from the tear gas. The situation further degenerated with similar instances of looting and destruction of property, with a further eight people killed by police.⁹

The violence and destruction throughout Malawi led to immediate calls for clarity and justice. Demands were made of the Mutharika administration to explain how the incidents had occurred, whose conduct had contributed to the breakdown in law and order, and what sort of restitution could be provided for victims of the violence. The President's response was initially defiant, seeking to blame political adversaries and an unruly civil society for what had happened. This did little to quell the simmering disenchantment.

Indeed, within a month of the July incidents, new stirrings were occurring with plans for further nationwide protests in mid-August. These were averted when officials from the United Nations Development Programme (UNDP) in Malawi were able to convince civil society groups to withhold action and hold crisis meetings with the government.¹⁰

Finally, on 7 October, two and a half months after the events in question, President Mutharika appointed a Commission of Inquiry, the purpose of which was spelled out in its full title: a 'Presidential Commission of Inquiry into the Demonstrations, Looting, Riots, Arson, Public Disorder, Deaths, Injuries and Loss of Property That Occurred on the 20th and 21st July 2011'. This Commission embarked on an extensive eight-month programme of data gathering, conducting public hearings in all the areas affected by the violence, ultimately interviewing 170 witnesses from all sectors of society. The report was released in June 2012.

The purpose of this chapter is to examine the effectiveness of the 2011 Malawi Commission of Inquiry as an accountability mechanism following violations of the right to life. The chapter is divided into five parts. The next part provides context by briefly exploring each of the entities to which

9 *Ibid.*, pp.45–46.

10 Simon Allison 'Malawi Protests Paused, but Who Will Compromise?' *Daily Maverick* (11 August 2011).

the Commission attributed varying levels of responsibility for the July incidents, as well as the violations themselves. Further parts will include a description of the Commission's genesis and scope, its effectiveness as an investigation, its impact and legacy, and provide some conclusions.

The chapter will show that the lack of responsiveness to citizens' concerns about broader governmental accountability and the economy – which had precipitated the protests – also manifested itself in terms of the implementation (or lack thereof) of the recommendations of the Commission. Its effectiveness was further limited by its legal scope, namely, the non-binding nature of its recommendations. In addition, the failure to provide compensation to those who suffered physical or material damage continues to serve as a strong point of criticism. At the same time, important achievements in terms of effectiveness were noted, especially concerning the degree of police reform subsequent to the report. The Commission also managed to establish levels of detail in terms of culpability for violence or for physical damage done which remain of relevance for ongoing trials of alleged perpetrators of the violence as well as for compensation claims.

2 Background to the July 2011 protests

The Commission of Inquiry listed several entities as having 'triggered'¹¹ the events of July:

- The police;
- civil society;
- city councils;
- the media;
- the government.

This part briefly explores the status of these entities prior to the July protests in order to provide better context for a comparative look at how these same entities responded to the recommendations made by the Commission.

As the central protagonists of the July events, the police received particular scrutiny. Yet structural problems afflicted the force well before 2011. Some of these were directly exposed by the July 2011 events, such as their lack of crowd-management capabilities.¹² For one, the force itself

11 Report of the Presidential Commission of Inquiry, p.53.

12 *Ibid.*, pp.4–6.

was understaffed, with a ratio of one police officer to 1 350 civilians – a far higher ratio than the standard of 1:500 recommended by SADC.¹³ Police officers were also poorly equipped for the demands of crowd management, with inadequate less lethal weapons (such as rubber bullets) and communications and logistical equipment. Likewise, police skills were questionable, with little training in crowd management and the graduated use of force.

The Commission also drew attention to ambiguities in the Police Act itself. For example, the provision regarding the use of force included the following: 'Where any person destroys or attempt to destroy or shows a manifest intention of destroying property, a police officer of or above the rank of inspector may order the use of force including the use of firearms.'¹⁴

The Commission highlighted the fact that the phrase 'manifest intention' left space for contradictory interpretations of how and to what extent the police could resort to force.¹⁵ However, the Commission reasoned that, although the permission to use potentially lethal force in defence of property clearly was not in conformity with the UN Basic Principles on the Use of Force and Firearms, it could not 'fault' the Police Act on that account. To justify this, the Commission drew attention to the fact that the European Convention on Human Rights includes language allowing the use of lethal force 'for the purpose of quelling a riot or insurrection' but did not engage with the Court's jurisprudence interpreting that language.

It should be noted that police deficiencies were known and efforts to improve their capacity already underway at the time of the July incidents, including a UK government-sponsored plan for training and equipment. In 2010 the Police Act was overhauled to provide more clarity on the regulation of assemblies and demonstrations with specific obligations for organisers, police and civic authorities. The Act was deemed 'very strong' by a senior official at the Malawi Ministry of Justice, but not 'tested' until the July 2011 events.¹⁶ That said, another 2010 change to the Police Act allowed police to search properties without a warrant. To critics of

13 *Ibid.*, p.90. The SADC ratio was cited as coming from 'Malawi Police records'.

14 Malawi Police Act, (Chap. 13:01) Act No.12 of 2010, sec.105(4).

15 Report of the Presidential Commission of Inquiry, p.6.

16 Pacharo Kayira 'A Full Circle of Public Protests in Malawi' Paper presented at the ISS 5th International Conference on National and International perspectives on Crime Reduction and Criminal Justice, 2014.

the Mutharika administration, this change reflected his increasingly authoritarian tendencies.¹⁷

Along with the police, civil society were also viewed by the Commission as having been chief protagonists in the events of July 2011. Malawian civil society organisations at the time of the demonstrations was roughly divisible into two camps.¹⁸ Some groups tended to follow religious lines organised under the umbrella of the Public Affairs Committee (PAC), while others served as partners or extensions of international organisations. PAC in particular has played a central role in mediating conflict in Malawi since 1992.¹⁹ Yet despite their differences, civil society organisations coalesced around three sets of complaints: economic opportunities; the deterioration in civil rights; and alleged political and economic abuses.²⁰

Civil society's relationship with the Mutharika administration had for some time been turbulent. An Amnesty International report released at the time of the 2011 events exposed 'increasing intolerance of dissent, and vilification of human rights activists by senior members of the government'.²¹ The First Lady, Callista Chimombo, had also been harshly critical of civil society, in particular with respect to issues of advocacy concerning lesbian, gay, bisexual, transgender and intersex (LGBTI) rights. Resentment was further stoked by the denial of permission from city councils and the police to carry out demonstrations earlier in 2011, despite at the same time allowing the governing DPP to hold public rallies in support of the future role of the President's brother, Peter Mutharika.²²

The media was also identified by the Commission as having played a contributory role in the July incidents. The private media's relationship with the Mutharika administration had deteriorated sharply over the course of the President's second term (2009 to 2012). Several interviewees from the media described their sense that the Mutharika administration had become increasingly authoritarian and sensitive to criticism from inside and outside the country. One said he felt 'gagged' under Mutharika's

17 Diana Cammack 'Malawi's Political Settlement in Crisis' in *Background Paper 04 APPP* (2011).

18 Interview with the author, May/June 2016.

19 Government of the Republic of Malawi 'Development of a National Peace Architecture for Malawi' Office of the President and Cabinet (2013).

20 Diana Cammack 'Malawi Risks Becoming "Fragile State"' *The Guardian* (17 November 2011).

21 Amnesty International 'Malawi Must Investigate Protest Killings' (2011).

22 Cammack, 'Malawi Risks Becoming "Fragile State"'.

tenure.²³ Changes to section 46 of the Penal Code were subsequently made in 2011 (and approved in 2012), giving the Minister of Information the right to prohibit publications deemed 'contrary to the public interest'.²⁴ Meanwhile the public broadcaster, the Malawi Broadcasting Corporation (MBC), had been dubbed by some as the 'Mutharika Broadcasting Corporation'.²⁵

In terms of the government itself, President Mutharika's first term in office (2004 to 2009) had been greeted with acclaim for the 'Malawi Miracle' – a sustained period of high growth based on surplus agricultural production mostly linked to a programme of fertiliser subsidies. Yet the miracle was soon reduced to something of a chimera, as structural issues inhibiting longer-term growth, such as the high cost of imported inputs, access to land and the soil erosion, remained unaddressed.²⁶ Coupled with the global economic downturn, by 2009 to 2010 Malawi's economic growth began to slow down.

Furthermore, Mutharika's insistence on maintaining the Malawian currency (Kwacha) at a fixed rate with the US dollar created new strains on the economy. A subsequent lack of faith in the Kwacha in turn placed more pressure on foreign exchange, which soon became short in supply. This quickly undermined the ability to finance petrol purchases, the shortages rapidly trickling down to all levels of society. Much of the impetus for the July 2011 protests came directly from this economic crisis.

Politically, much had also changed by the President's second term. Perhaps tellingly, he added 'Ngwazi' ('Conqueror') to his title, a term also used by the first President (and, to some, dictator) of the country, Hastings Kamuzu Banda. Mutharika's administration began exhibiting symptoms of democratic backsliding. For instance, local council elections, already long overdue, had been postponed until 2014 on the pretext of needing time to investigate instances of fraud in the Electoral Commission.²⁷

Internationally too, President Mutharika found himself at loggerheads with Malawi's main Western development partners over issues of economic governance as well as transparency and corruption. The most prominent example was a serious diplomatic spat with the United Kingdom. The

23 Interview with the author, May/June 2016.

24 Freedom House 'Malawi' in *Freedom of the Press 2012* (New York, 2012) p.229.

25 Richard Lee 'Chickens Coming Home to Roost' *OSISA Blog* (11 April 2012) available at: <http://old.osisa.org/rights-wrongs/chickens-coming-home-roost>.

26 GRAIN 'Unravelling the "Miracle" of Malawi's Green Revolution' (January 2010).

27 Cammack, 'Malawi's Political Settlement in Crisis' p.8.

British High Commissioner to Malawi was declared *persona non grata* in 2011 after a leaked cable revealed him stating that Mutharika was ‘becoming ever more autocratic and intolerant of criticism’. The acting Malawian High Commissioner to the UK in turn was expelled and some aid to the country was withheld.²⁸

3 Genesis and scope of the Commission of Inquiry

This part delves deeper into the establishment of the Commission, its mandate, and the challenges that it faced. Responses from interviewees were mixed concerning the impetus to establish the Commission, as were official reports. The Commission’s final report sheds no light on the motivations. Perhaps telling of the lack of clarity about what drove the establishment of the Commission was the period of almost three months that passed between the July incidents and the official announcement of the establishment of a formal investigation.²⁹

Calls for an inquiry did come almost immediately after the July incidents from local and international non-governmental organisations (NGOs), as well as many outlets in Malawi’s news media. ‘The Malawian authorities must immediately launch an independent, impartial and thorough investigation into their use of firearms resulting in these killings’, said Erwin van der Borgh, Amnesty International’s Director for Africa. ‘It is high time that President Mutharika’s government addresses the wider human rights and political concerns that gave rise to this situation.’³⁰

Mutharika had used combative tones in the aftermath of the July incidents, pointing the blame at the demonstrators and forcefully defending the actions of the police. He said: ‘If someone is holding a petrol bomb, someone has a gun and they are torching shops and I am asking even Western media, what do you expect the police to do. Sit down and watch, while things are being burnt?’³¹ He added: ‘They [the police] act within their own mandate to maintain peace and security of this country. And this

28 Aislinn Laing ‘Britain Expels Malawi Diplomat in Tit-for-Tat Move’ *Telegraph* (27 April 2011).

29 Mutharika in fact announced the establishment of both Commissions of Inquiry at the same time. See ‘Bingu Orders Probe on Chasowa Murder, “Satanic” Riots’ *Nyasa Times* (6 October 2011).

30 Amnesty International ‘News Release: Malawi Must Investigate Protest Killings’ (21 July 2011) available at: <https://www.amnesty.org/en/latest/news/2011/07/malawi-must-investigate-protest-killings/>.

31 ‘Bingu Orders Probe on Chasowa Murder, “Satanic” Riots’ *Nyasa Times* (6 October 2011).

is what every country in the world would do. But from here the opposition took this as issues saying this was an excessive force.³²

There seemed to have been a number of reasons that the President eventually relented and established an inquiry. One senior official affiliated with the Commission itself noted that public pressure to investigate had come through both domestic and international civil society.³³ This was reiterated in our interviews with members of civil society.³⁴ This pressure included calls from NGOs (such as Amnesty International) but also from development partners.³⁵ In fact, almost immediately after the July incidents, the USA suspended \$350 million in funds through its Millennium Challenge Corporation. The UK, Malawi's biggest single donor, had already suspended funds prior to the July incidents because of the aforementioned diplomatic spat with the Mutharika administration.

Another reason for establishing the Commission appears to have been the government's own wish to absolve and protect itself.³⁶ One civil society interviewee suggested that the government had launched the Commission in order to punish civil society. It should be recalled Mutharika himself had publicly blamed civil society, on several occasions suggesting that it had been 'led by Satan'.³⁷ By creating an equivalence of responsibility between the police and the organisers of the rallies ('civil society') the government arguably was deflecting the culpability of its agents.

Interestingly, very little responsibility for the establishment of the Commission was ascribed to other political parties, with one interviewee noting that they had been 'battered' by Mutharika's 2009 re-election.³⁸ The lack of organised opposition was also relevant at the time of the release of the Commission's findings, which will be explored below.

3.1 Establishment and mandate

The Commission of Inquiry was established in accordance with the Malawian Commissions of Inquiry Act. The 1914 Act bestows on the

32 *Ibid.*

33 Interview with the author, May/June 2016.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 'Malawi's Mutharika Promises Enquiry into Deadly Riots' *BBC News* (6 October 2011).

38 Interview with the author, May/June 2016.

President the power to establish a Commission ‘to inquire into any matter in which an inquiry would be for the public welfare’.³⁹

The mandate of the Commission, which Mutharika announced in October was ‘to inquire into and report to the President the circumstances leading to and surrounding the demonstrations, looting, riots, arson, public disorder, deaths, injuries and loss of property that occurred on the 20th and 21st July 2011’.⁴⁰ This broad mandate explicitly was both investigative and recommendatory. The Commission was to establish all the details surrounding the demonstrations, from the actors involved to the exact cause of each death and injury, the value of properties damaged, and the conduct of those who responded to the demonstration and to make recommendations.⁴¹

Perceptions regarding the clarity of this mandate were mostly positive. Almost all interviewees noted that the terms of reference were clear and comprehensive.⁴² Only one strongly dissenting voice was registered by a prominent civil society activist who believed that the mandate missed the opportunity to question the President himself.⁴³

4 Effectiveness of the Commission of Inquiry as an investigation

The Commissions of Inquiry Act defines the duties of Commissioners in the following way:

to make a full, faithful, and impartial inquiry into the matter specified in the Commission, to conduct such inquiry in accordance with the directions (if any) contained therein; to report in due course to the President, in writing, the result of such inquiry, and also, if required, to furnish to the President a full statement of the proceedings of the Commission, and of the reasons leading to the conclusions arrived at or reported.⁴⁴

Seven commissioners were originally appointed, including Catholic Bishop Felix Mkhori to act as Chairperson. The Bishop, however, did not take the oath of office and hence did not serve on the Commission, with Apostle Timothy Khoviwa, originally nominated as Vice-Chairperson,

39 Commissions of Inquiry Act (Ch.18:01) Act 3 of 1914, sec.2(1).

40 Report of the Presidential Commission of Inquiry, p.xiv.

41 *Ibid.*, pp.17–19.

42 Interview with the author, May/June 2016.

43 *Ibid.*

44 Commissions of Inquiry Act, sec.7.

taking on Mkhori's position. This left six commissioners from a variety of backgrounds: lawyers, a former police officer, clergy and a businessman.⁴⁵ All were Malawian citizens.

Despite the range of individuals interviewed for this study, none expressed a personal criticism of any of the individual commissioners appointed. Some elements of the media, however, were critical of the group overall, stating that it comprised 'loyalists' to the Mutharika administration.⁴⁶ For some civil society interviewees, one glaring omission from the panel was a representative from the formal CSO sector.⁴⁷ While one interviewee maintained that the commissioners were credible and from diverse professional backgrounds, an official close to the Commission conceded that its composition was largely 'tribal' in that most members were from the same ethnic group.⁴⁸ However, the official maintained that their conduct had remained impartial.⁴⁹ Another interviewee felt that the addition of an international presence to the Commission would have further increased its credibility.⁵⁰

In addition to its specific terms of reference, the Commission was guided in its actual powers by the Commissions of Inquiry Act, which empowers a commission to develop its own procedures of work. The Commission decided that it would summon those it wanted to interview by 'prescribed summons'.⁵¹

The Commission also decided to conduct its interviews through public hearings. At the discretion of the Commission and upon request by the person to be interviewed, some hearings were conducted *in camera*. However, the Commission stressed in its report that 'having embraced transparency as a cornerstone of the proceeding, [the Commission] kept *in camera* hearings to a minimal [*sic*] and conducted four hearings *in camera* at the request of the witnesses'.⁵² Each person summoned for

45 The members of the Commission were Vice-Chairman Apostle Timothy Khoviwa; lawyer James Naphambo; former police official Titus Thyolamwendo; anti-corruption advocate Levi Mihowa; large-scale business owner Christos Giannakis; and Bishop Brighton Malasa. One commissioner, Father Raymond Likupe, died of an illness early in the Commission's work and was replaced by Bishop Brighton Malasa.

46 'Bishop Mkhori to Head Commission of Inquiry' *Nyasa Times* (8 October 2011).

47 Interview with the author, May/June 2016.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 Report of the Presidential Commission of Inquiry, p.19.

52 *Ibid.*

a hearing was required to testify under oath, ‘to ensure honest disclosure of material facts’.⁵³ They were also allowed to be accompanied by a legal representative. The role of the legal representative was to advise the interviewed person about his or her legal rights, where necessary.⁵⁴

With respect to the rules of evidence, the commissioners agreed that, being a commission of inquiry, they should not rigidly apply the rules of evidence that would be required in a court proceeding. As such, the Commission accepted hearsay evidence. However, such evidence ‘was used solely for purposes of unearthing potential witnesses or further evidence but has not been used in arriving at the Commission’s findings and recommendations’.⁵⁵

An additional area to consider in terms of the Commission’s potential effectiveness is the level of participation from all parties identified as contributors to the violence, as well as the general public. It is difficult to gauge with precision the number of participants in the events of July 2011, since thousands of people were involved in some way in the demonstrations throughout the country. In the end, some 170 witnesses were summoned to appear before the Commission. The Commission traversed the country, enhancing its legitimacy, according to one interviewee, by the very public and open nature of its process.⁵⁶ Announcements about the presence of the Commission in a particular town were made in the local press and through word of mouth. As noted above, almost all witness testimony was heard in sessions open to the general public.

However, there was some criticism about the actual organisation of the Commission, which was akin to a tribunal, with individuals placed very formally before the commissioners and asked to respond to questions. To some, the structure did not encourage dialogue because of its question and answer format.⁵⁷ One official interviewed (by the author) claimed that the panel was perceived as intimidating by ordinary members of the public on account of its officious and juridified procedures.⁵⁸

In terms of the safety of both the commissioners and witnesses, most respondents who served as witnesses before the Commission said they felt secure. The two commissioners interviewed both separately reaffirmed

53 *Ibid.*

54 *Ibid.*, p.20.

55 *Ibid.*

56 Interview with the author, May/June 2016.

57 *Ibid.*

58 *Ibid.*

this, also noting that security was in place wherever the Commission had conducted its work.⁵⁹ Some differences however did exist between places visited, with some tension in Mzuzu – the site of most of the deaths – according to one commissioner because of loud army drills deliberately arranged to be taking place outside at the same time.⁶⁰ By contrast, the situation in Blantyre was considered ‘relaxed’.⁶¹ One notable exception to the general feeling of safety came from a well-known civil society activist who had gone into hiding after the July events because of direct threats to his safety (from undisclosed individuals). He noted that he felt unsafe even when appearing before the Commission.⁶² No specific protective measures were put in place for his safety during or after his testimony.

5 The impact and legacy of the Commission

Many interviewees observed that public interest in the Commission had decreased over time. Almost a full year had elapsed since the July 2011 incidents by the time the Commission published its findings in June 2012. This had an inevitable effect on public interest and fatigue with the issue.⁶³ The media, which had keenly followed the early phases of the Commission’s proceedings, was muted in its coverage of the final report. The lack of media coverage was a complaint echoed by many interviewees, even if some attributed it less to media (ir)responsibility or topic fatigue and more to the lack of an organised dissemination plan by the Commission itself.⁶⁴

The Commission’s final report indeed suffered from an inadequate communication campaign;⁶⁵ so much so that there was little public knowledge of the release of the report.⁶⁶ For instance, the report was not made available online.⁶⁷ This was corroborated by our own interviews, in which on many occasions individuals close to the Commission process confessed that they had never even seen the report. The two commissioners interviewed also conceded that more could have been done in terms of a

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 The Commissions of Inquiry Act stipulates clearly that the results of the inquiry must be provided to the President of the Republic (sec.7). The Act provides significant leeway to the commissioners to decide on the public release of the results.

66 Interview with the author, May/June 2016.

67 And remains unavailable at the time of writing (2017).

media campaign. One explained that funding for the dissemination of the report had been overlooked, meaning that physical copies (of the 119-page document) were wanting.

5.1 Results and recommendations

As discussed above, the Commission's mandate had two main components: to establish how the July 2011 incidents occurred and to quantify loss of property and causes of death and, second, to provide recommendations. With respect to the first component, the Commission's areas of focus, as outlined in chapter 3 of the report, were as follows:

1. causes of the riots, arson, looting and public disorder;
2. identities of persons who died or were injured and the causes and circumstances of those deaths or injuries;
3. loss of property, estimated value of the property and identity of the victims;
4. conduct, proficiency and operational effectiveness of the police in dealing with the demonstrators, looters, rioters and arsonists; and
5. findings in relation to the position of law.

In order to determine the professionalism, proficiency and operational effectiveness of the police, the Commission approached the question from the following angles:

- a. whether the use of force, in particular the use of firearms by the police was reasonable and within the legal requirements;⁶⁸
- b. whether the conduct of the police demonstrated sufficient capacity to handle demonstrations of that magnitude;
- c. whether security planning at national and regional levels was satisfactory; and
- d. whether the police demonstrated satisfactory crowd control and crowd management skills.

The report examined seven chief causes of the July incidents. The first concerned the injunction obtained the afternoon before the demonstrations as an attempt to stop them from taking place. Most interviewees cited this incident as having been a crucial spark for the events that followed, for a number of reasons. First, it sowed confusion by forcing the delay of

68 The Commission's report expanded on what rights the police must protect. The five listed were freedom of assembly and association; the right to economic activity; the right to life; the right to personal liberty; and the right to property. See Report of the Presidential Commission of Inquiry, pp.79–82.

marches throughout the country, thus unnecessarily ratcheting up tension as thousands of protesters were forced to sit for hours and wait for the outcome of the appeal or for the police and city councils to act upon the injunction. Second, some wondered why the judiciary so easily granted the injunction, sought late (16.00) on 19 July by a little-known figure by the name of Chiza Mbekeani.⁶⁹ Although Mr Mbekeani's political connections were unclear, some speculated that his move was a politically-motivated and ultimately misguided attempt to protect the President and his party.⁷⁰ Summoned to appear before the Commission, Mr Mbekeani during his testimony claimed that his move had been based on a wish to 'protect lives and property'.⁷¹

Other areas of focus included the conduct of the police, where the report declared that excessive force had been used in certain cases, and that deaths could have been avoided.⁷² The public and private media also came in for criticism: the former for failing to broadcast accurate and balanced information and the latter for broadcasting live coverage with 'unnecessary' detail, which incited violence in other parts of the country.⁷³

Political intolerance was also cited by the Commission as a key factor in the violence. The report noted that some properties and businesses targeted were linked to Mutharika's DPP party, making some of the attacks directly political in nature. The government itself was criticised for an incident in which a group of machete-wielding young men – known as the 'panga boys' – drove through the streets of Blantyre the day before the scheduled protests chanting DPP songs and threatening violence.

The civil society organisers of the demonstrations were also criticised for planning poorly and failing to anticipate the magnitude of participation. The demonstrators themselves were singled out for unlawful behaviour and in the cases of the demonstrations in Mzuzu and Lilongwe, where people failed to wait for the results of the appeal against the injunction issued the afternoon before.

Finally, the Commission noted that xenophobia may have motivated some demonstrators to specifically target foreign-owned shops for damage and looting.⁷⁴

69 *Ibid.*, p.33.

70 Interview with the author, May/June 2016.

71 Report of the Presidential Commission of Inquiry, p.33.

72 *Ibid.*, pp.78–92.

73 *Ibid.*, p.95.

74 *Ibid.*, pp.57–59.

The second component of the Commission's mandate was to provide recommendations. Five entities were targeted: government (largely the executive); the police; the judiciary; the media; and civil society. As far as the executive was concerned, recommendations included the need for quicker response and dialogue mechanisms to issues of concern to the public, more respect for the freedom of expression and better material support to the police for capacity building within the force and for better crowd management. Furthermore, the recommendations stipulated that 'eligible victims of the public disorder are compensated' and that 'police officers responsible for the deaths and injuries are thoroughly investigated and prosecuted where unlawful conduct is established'.⁷⁵

The police were presented with recommendations to create operational guidelines and a comprehensive policy for crowd control; to improve training for police officers in crowd control techniques; to conduct prompt investigations into instances of death or injury attributable to police action; and to act independently rather than as an 'arm of a ruling party'.⁷⁶

City councils were advised to respond promptly to notices by conveners of demonstrations; to uphold the constitutional right to demonstrate, and to ensure that a 'demonstration contract' would be signed by all parties to a demonstration which would clearly outline responsibilities and consequences for contravening the 'contract'. City councils were also obliged to provide sufficient numbers of marshals along demonstration routes.⁷⁷

Civil society, or 'organisers of demonstrations' as they were referred to in the recommendations, were targeted for improvements in the logistics and the organisation of demonstrations, as well as the need to be prepared to alter or cancel plans if dictated by authorities.

Finally, the media practitioners were urged to be 'sensitive' with their broadcasting, and to adhere to their code of ethics. At the same time, the Commission insisted that the independence of the state broadcaster, MBC, must be assured and upheld at all times.⁷⁸

Interviewee reaction to the implementation of these recommendations was mixed. Some criticised the fact that the Commission itself could not

75 *Ibid.*, p.100.

76 *Ibid.*, p.9.

77 *Ibid.*, p.103.

78 *Ibid.*, p.105.

provide legally-binding recommendations.⁷⁹ Similarly, one interviewee said that no one was actually accountable to the Commission, given its structural limitations – something which made the final report itself a “white elephant”.⁸⁰ Another criticism was that the recommendations failed to identify the police officers directly responsible for the shootings.⁸¹

5.2 Implementation

Breaking down the implementation of recommendations by each entity, we observe the following: In the case of government and particularly the executive, a frequently-repeated criticism was the lack of provision of compensation for the victims. One senior official linked to the Commission lamented that a compensation tribunal was outside the mandate of the inquiry and therefore could not have been established.⁸² President Mutharika’s successor, Joyce Banda, had made some intimations about compensation on a visit to Mzuzu in 2012,⁸³ but at the time of writing little progress had been made. The government also failed to provide any trauma counselling for those who had suffered mental anguish during or after the unrest.⁸⁴

The passing of President Mutharika two months before the release of the report was also cited as affecting the implementation of recommendations. His absence, and his replacement by Joyce Banda (who had legally retained her vice presidency despite having been expelled from Mutharika’s DPP party before the events in question, in 2010) meant that by the time the Commission issued its recommendations, government interest in the results of the inquiry had dissipated.⁸⁵ For one, it was easy to ‘pin the blame’ on the former administration. After all, much of the rancour behind the protests was specifically directed at Mutharika himself, his perceived increasing authoritarianism and poor management of the economy. With him gone and Banda at least initially signalling a decidedly different way of doing business,⁸⁶ and also with the short-term benefit of

79 Interview with the author, May/June 2016.

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 ‘JB says July 20 Killings During DPP Won’t Happen Under Her Leadership’ *Nyasa Times* (20 July 2013).

84 Interview with the author, May/June 2016.

85 Interview with the author, May/June 2016.

86 David Smith ‘Malawi’s Joyce Banda Discards Presidential Jet and Luxury Car Fleet’ *The Guardian* (1 June 2012).

a stabilisation in the economy, the chief object(s) of dissatisfaction had dissipated.

Moreover, some interviewees noted that the clientelistic nature of Malawian politics ensured that even the new administration would not seek to ruffle many feathers. Decision makers in government ultimately had to 'protect themselves', even if that meant inaction.⁸⁷ Likewise, because the bureaucracy was relatively stable in Malawi whatever the administration changes, many functionaries themselves had a 'dirty closet' and therefore the motivation to remain quiet.⁸⁸

The initiative for police reform is the most explicit instance of an entity implementing the Commission's recommendations. The Ministry of Home Affairs, which has oversight over the police force, pushed for improvements based on the Commission's report.⁸⁹ The police were acknowledged by the majority of interviewees as having done an earnest job at 'learning'.⁹⁰ A senior police official interviewed conceded that the report in fact 'talked truth about us'.⁹¹ The Commission's recommendations also helped further to strengthen initiatives that were either just starting or had been in the incubation phase, such as the earlier mentioned assistance of the UK government for a 'police improvement programme'.⁹² Over one thousand officers were trained by the Scottish police force to build capacity in public order management. Scottish funds were also provided for better equipping the police with less lethal weapons such as rubber bullets.

Civil society's willingness to embrace the Commission's final report had waned over the course of the inquiry's work. According to one interviewee, this was partly attributable to the change in government, with President Joyce Banda quickly able to create a more positive atmosphere for civil society organisations and consequently making them less interested in condemning the government.⁹³ There were also the aforementioned long-standing cleavages between civil society groups, which undermined either side's willingness to accept some responsibility for the July 2011 incidents.⁹⁴

87 Interview with the author, May/June 2016.

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 Trevor Lupick 'Malawi: Cracks Forming in Civil Society?' *Africa Report* (28 September 2011).

Regarding the media, it too was reticent to shoulder any responsibility, arguing that it was simply doing its work in reporting what was going on. This view was echoed by the two private media officials interviewed. They also shifted the focus to MBC, which they argued was relatively mute in responding to the recommendations.⁹⁵

5.3 Legacy

As demonstrated above, the implementation of the Commission's recommendations was patchy at best. Excluding the police force's attempts, the remaining targeted entities did little that could be directly linked to the results of the Commission. Of course, the change of regime from one that had been so provocative toward civil society and increasingly erratic under Mutharika to one under the ostensibly more conciliatory Banda contributed to a different context in which the results were delivered. However, that was not attributable to the Commission itself.

Nevertheless, beyond its recommendations, interviewees highlighted several other dimensions of the Commission's process as crucial, indicating the breadth of the accountability it offered. The Commission's presence and conduct, traversing the country and remaining open to all interested parties, allowed the public to 'calm down' over time.⁹⁶ It also fulfilled 'the right to know',⁹⁷ placating those looking for detailed answers about the circumstances surrounding the death of their loved ones in July 2011.⁹⁸

The Commission, through its hearings, provided a chance for reconciliation between the aggrieved parties. The very process of dialogue, even if not always optimal under the tribunal-style format of the Commission, was often cited as useful for the process of reconciliation. The Commission similarly obliged all those subpoenaed to respond to questioning.⁹⁹ The establishment of a written record (in the final report) of what actually occurred, including detailed lists of property damage and values, could thus to some extent be considered an achievement of the Commission and a partial fulfilment of its mandate.

In addition, the Commission provided an opportunity for reflection upon what its mandate referred to as the 'position of the law', specifically on the Police Act, and the limits of what constituted 'reasonable' use of

95 Interview with the author, May/June 2016.

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

force by the police. The Commission clarified the primary duty of law enforcement officials in protecting the right to life.¹⁰⁰ It also highlighted ‘that while the Police Act extends to protection of property as justification for the use of firearms, the UN Basic Principles only recognise protection of life as a justification for the use of firearms by police officers’.¹⁰¹ However, as noted above, the Commission then engaged in a slightly odd process of suggesting that since the European Convention allows for the use of potentially lethal force for the purpose of ‘quelling a riot’, there was no problem with the provision of the Police Act that permits the use of force, including firearms, to defend property. The Commission found that ‘[i]mplicitly therefore, life lost in the process of protecting property in rioting situations is not unlawful killing under the European Convention, as long as the force used was proportionate to the situation’.¹⁰² Unfortunately the Commission did not fully expand on this crucial final phrase, or explain why in its view the absence of a similar proportionality test in the Malawian law was not problematic.

In sum, the appropriateness of establishing a commission was not questioned by those interviewed. When asked if there could have been an alternative way of investigating the July incidents, almost all the respondents agreed that a commission of inquiry was the best choice – even if there were plenty of criticisms about its overall effectiveness. One official noted that commissions were the most appropriate choice in a ‘politicised’ Malawi.¹⁰³ While there was notable disappointment with the utility of the Commission’s final report as a recourse for justice, as long as it remained a ‘living document’,¹⁰⁴ it was perceived as important and useful (especially with respect to future compensation and the prosecution of individuals).

Finally, many respondents suggested that, since there had been no subsequent repetition of events like those of July 2011, this represented indirect proof that the Commission had been effective. While it is true

100 *Ibid.*

101 Report of the Presidential Commission of Inquiry, p.95.

102 *Ibid.* Such an interpretation of the European Convention pays dangerously little regard to the jurisprudence of the European Court which, while not establishing clear criteria for what constitutes a ‘riot’, has at least made clear the need for a clear threat of death or serious injury to exist before the use of potentially lethal force by the police could be sanctioned. The Court has repeatedly cited the UN Basic Principles (and particularly Basic Principle 9) as a reference point for the use of firearms. For an examination of the use of firearms in the context of what some have viewed as ‘riot control’, see *Guiliani and Gaggio v Italy* (App. 23458/02) Judgment (24 March 2011).

103 Interview with the author, May/June 2016.

104 *Ibid.*

that demonstrations on the scale of 2011 have not since occurred, sporadic protests, such as those related to the election results in 2014, have occurred, without similar levels of violence.

5.4 A forum for local values?

Another question posed to all interviewees concerned the presence of any type of community-based 'moral resource', such as the concept of *ubuntu*. This question often created confusion. The Commission was a legal entity established according to Malawian law and under the prerogative of the President.¹⁰⁵ It was not 'traditional' in the sense of being associated with customary law or practices. Interestingly, no one stated that the Commission was inherently any less 'Malawian' than a traditional form of justice. It raised the question of whether the distinction between the two in fact was moot.

Nevertheless, some interviewees stated that the spirit of *umunthu* – the Malawian equivalent of *ubuntu* – in fact was inculcated in the process of the Commission's work, particularly with respect to victims' ability to speak about what was 'in their heart'.¹⁰⁶ Two interviewees suggested elements of 'contact and dialogue' – the philosophical legacy of President Hastings Banda, which was established as a way of justifying diplomatic engagement with apartheid South Africa – had also contributed to the spirit of the Commission.¹⁰⁷ In fact, only two weeks after the July incidents, President Mutharika had established a 'Presidential Contact and Dialogue Group' to engage a range of interest groups in the country as a process of creating mutual agreement and reconciliation.¹⁰⁸

Aspects of Malawian culture were also referred to, particularly the deferential nature of Malawian civil relations.¹⁰⁹ 'Respect overrides rules', said one respondent; another suggested that it was in the 'national character of Malawians' to resist passively; role expectations, it was explained, were relatively rigid.¹¹⁰

105 Constitution of the Republic of Malawi, Ch.8–89-g.

106 Interview with the author, May/June 2016.

107 *Ibid.*

108 'Presidential Dialogue Group: Bingu's White Elephant' *Nyasa Times* (14 August 2011).

109 Interview with the author, May/June 2016.

110 Interviews with the author, May/June 2016.

6 Conclusion

The central purpose of this study was to explore how effective national commissions of inquiry can be as accountability mechanisms in securing the right to life in Africa. The evidence from the Malawian example seems balanced. While there was universal agreement among those interviewed that a commission of inquiry was the most appropriate vehicle for investigating the deaths and destruction in Malawi of 20 to 21 July 2011, our research revealed a wide variety of views about the Commission's ultimate effectiveness in securing the right to life.

To assess effectiveness, both elements of the Commission's two-pronged mandate (first to establish the causes of the incidents and to record the extent of personal and physical damage, and second to provide recommendations going forward) have to be considered. Therefore, even accounting for the overall lack of implementation of the recommendations, the fact the police force generally embraced the Commission's report should not be underestimated. After all, it was the police who ultimately were responsible for discharging the weapons which killed the 20 protesters. The Commission served as an impetus for the police force to carry out reforms. It also provided some clarity about the Police Act and its interpretation, which ultimately was to prioritise the right to life.

Furthermore, in its comprehensive attempt at establishing the circumstances surrounding the incidents and how various entities contributed to them, the Commission also managed to provide a level of detail about accountability and responsibility which, even if not necessarily acted upon in the years following the release of the report, remains in the public record and serves as motivation for potentially bringing perpetrators to justice. In fact, at the time of writing the very first trial and conviction of a police officer involved in the killing of demonstrators was concluded.¹¹¹ According to media reports, a further four police officers stand accused. In this respect, the legacy of the Commission remains a work in progress, more than five years after its report was released.

These relative successes can at least partly be attributed to the comportment of the Commission and its commissioners. It was deemed impartial and competent by our interviewees, despite some quibbles about its composition. This was important because, whatever the patchy implementation of the recommendations, the findings of the Commission

111 Zawadi Chilunga 'Malawi Police Officer Jailed 12 Years for July 20 Murder' *Nyasa Times* (21 December 2016).

itself were not questioned. The fact that the investigation was not rushed, moved throughout the country and thereby facilitated the access of witnesses, while maintaining an open-door policy for interested citizens to follow, certainly benefited its legitimacy and ultimately its cause.

However, success was tempered by significant disappointments. Some of this may be attributed, as many respondents suggested, to the non-binding nature of the Commission's recommendations. In this respect, interviewees perhaps had unrealistic expectations of the Commission. Furthermore, the country's laws do not provide for other entities to take up cases on behalf of victims for prosecution as *locus standi* is only given to 'a plaintiff who has suffered damage of a special kind or greater degree than that suffered by the rest of the members of the public'.¹¹² As one respondent commented, most people in Malawi are too poor to afford legal representation. This further undermined the victims' ability to access justice despite the Commission revealing facts that supported the victims' claims.¹¹³ While on the one hand the sentencing of the one police officer may be viewed in a positive way, the fact also remains that only one person had been convicted at the time these interviews were conducted, more than five years after the fact.

Furthermore, the period leading up to the establishment of a commission of inquiry and ultimately the reactions to the Commission's findings on the part of various parties, revealed several cleavages in Malawian society, especially in terms of the level of responsibility each of the identified groups contributing directly or indirectly to the violence of July 2011 was willing to accept. The Commission's attempt at apportioning responsibility to a number of entities in effect allowed each to 'pass the buck' from one to the other. As is often said, if everyone is responsible, then no one is.

However, it should be noted that the Commission's final report did direct one sentence – to the government, not to the police – on the need to prosecute those police officers who could be found criminally responsible:

The executive must make sure that police officers responsible for the deaths and injuries are thoroughly investigated and prosecuted where unlawful conduct is established. Indeed any person suspected to have been responsible

112 *Civil Liberties Committee & Ministry of Justice v Registrar General* Civil Cause 55 in the High Court of Malawi (1998).

113 Interview with the author, May/June 2016.

for any unlawful conduct before, during and after the demonstrations must be investigated and where necessary, prosecuted.¹¹⁴

Time also played a role both positively and negatively. The time that the Commission took to do its work served to defuse some of the tension simmering in Malawian society. Citizens were willing to be more patient knowing that a formal process of establishing what had happened and what to do next was in progress. On the other hand, the passage of time also reduced interest in the process and its results. The final report was published with a whimper, not a bang.

Finally, Malawi's 'game of survival'¹¹⁵ also undermined the extent of the Commission's effectiveness. With many government officials and public servants being the beneficiaries of cronyism, there was little inclination to rock the boat too much. This is a structural problem endemic not only to Malawi but to any state in which patronage networks are prominent. As one interviewee put it, the Commission – a body with no representative from a formal non-governmental organisation – in effect was a component of the very structure it was being asked to fix.¹¹⁶

114 *Report of the Presidential Commission of Inquiry*, p.100.

115 Interview with the author, May/June 2016.

116 *Ibid.*