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## An Anti-Corruption Bureau's Inexorable Endeavor: A Study of Malawi's Cashgate Scandal

Peter G. Strasser  
*Chaffe McCall, L.L.P.*

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# An Anti-Corruption Bureau's Inexorable Endeavor: A Study of Malawi's Cashgate Scandal

Peter G. Strasser\*

## *Abstract*

*The “Cashgate” scandal has had far-reaching consequences for the southern African nation of Malawi and its people. Western donors suspended budgetary aid—circa \$150 million annually—upon learning that civil servants and senior cabinet ministers in former President Joyce Banda’s administration had manipulated the government’s financial management system to embezzle more than \$45 million over an eighteen-month period. As a precondition to the resumption of aid, the donors required that the government not only implement financial management reforms but also fully prosecute the perpetrators and recover the stolen assets. The donors’ position solidified when audits of Malawian government ledgers from 2009 to 2014 could not account for \$356 million.*

*This essay examines whether Malawi’s Anti-Corruption Bureau (ACB) has the institutional capacity to achieve the prosecutorial benchmarks set by Western donors. Despite the obstacles inherent in an overstretched and underfunded criminal justice system, the ACB has made some progress, with fifteen convictions on theft and money laundering charges, and \$1.4 million in cash and property recovered. Yet, as this essay observes,*

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\* The author is a partner with the New Orleans office of Chaffe McCall, L.L.P. He earned his J.D. from Washington & Lee School of Law and B.A. from the University of Virginia. The author lived in Malawi from 2006 to 2008 while working for the Millennium Challenge Corporation on the Malawi Threshold Program. This essay was inspired by the author’s recent trip to Malawi in collaboration with the non-profit International Senior Lawyers Project of New York and London to work with the Malawi Police Prosecution Service. All research done in preparation for this essay involved public sources. Unless otherwise specifically attributed, the views expressed herein are the personal views of the author and do not necessarily reflect those of any other organization or individual.

*the quest to secure convictions and recover assets in the more complex cases of senior officials will become quixotic unless the government provides the ACB with sufficient independence, authority, and resources. Lacking ACB operational success, donors seem disinclined to resume direct budgetary support to Malawi. And as Western countries retract, China moves in, extending its influence.*

### *Table of Contents*

I. Introduction .....	304
II. ACB Framework .....	309
A. History of Corruption .....	309
B. Criminal Justice System .....	312
C. Development Cycles.....	315
D. Institutional Limitations.....	317
III. Legal Aspects of Cashgate Prosecutions .....	320
A. Initial Prosecutions .....	320
B. Plea Bargaining.....	323
C. Money Laundering.....	328
D. Asset Forfeiture .....	330
IV. Final Observations .....	332

### *I. Introduction*

*The donors' decision to pull out budgetary support because of the infamous Cashgate, among key factors, has led to the collapse of the economy, and the scarcity of staple food, maize that has triggered high inflation, has pushed the cost of life to unbearable levels.<sup>1</sup>*

– Owen Khamula, Nyasa Times

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1. Owen Khamula, *Goodall Says EU Should Not 'Cheat' Malawi*, NYASA TIMES (Feb. 15, 2016), <http://www.nyasatimes.com/goodall-says-eu-should-not-cheat-malawi-stance-on-no-budget-support-expected/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

Cashgate, described as a “murky tale of shooting and corruption,” is the biggest financial scandal in the history of the southern African nation of Malawi.<sup>2</sup> The scandal has had far-reaching consequences for Malawi and its people.<sup>3</sup> Malawi’s relatively stable and democratic government long made the small African country a “donor darling” compared to some of its autocratic and crisis prone neighbors.<sup>4</sup> But the Cashgate scandal prompted foreign donors to withdraw budgetary aid to Malawi worth about \$150 million annually, leaving the impoverished nation struggling to meet the basic needs of its people.<sup>5</sup> With a

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2. *Cashgate’ – Malawi’s Murky Tale of Shooting and Corruption*, BBC NEWS (Jan. 27, 2014), <http://www.bbc.com/news/world-africa-25912652> (last visited July 9, 2016) [hereinafter BBC Cashgate Report] (on file with the Washington and Lee Law Review). Known as Nyasaland until its independence in 1964, Malawi is a landlocked former British protectorate with population estimates approaching eighteen million. *See generally Malawi*, COMMONWEALTH YEARBOOK 2015 (Aug. 2015), [http://www.commonwealthofnations.org/yb-pdfs/malawi\\_country\\_profile.pdf](http://www.commonwealthofnations.org/yb-pdfs/malawi_country_profile.pdf) (providing a factual overview of Malawi). The name “Malawi” is derived from the Chichewa word *maravi*, meaning “reflected light,” an apparent reference to the brilliant sunlight that glitters on the surface of Africa’s third largest lake, Lake Malawi. *Id.* at 3. The country’s natural beauty coupled with its friendly and generous people has earned Malawi the appellation “The Warm Heart of Africa.” Carien Soldatos, *Malawi, the Warm Heart of Africa*, AFR. GEOGRAPHIC (Feb. 3, 2015), <http://africageographic.com/blog/malawi-the-warm-heart-of-africa> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

3. *See Misplaced Charity*, ECONOMIST (June 11, 2016), <http://www.economist.com/news/international/21700323-development-aid-best-spent-poor-well-governed-countries-isnt-where-it> (last visited July 9, 2016) (“Donors . . . punish corruption and back-sliding, as in Malawi.”) (on file with the Washington and Lee Law Review).

4. *Id.* The United Kingdom (Department for International Development (DFID)) has been the largest donor in Malawi, followed closely by the United States (Millennium Challenge Corporation), the European Union, Norway, Germany, Japan, the World Bank, and African Development Bank. MARKÉTA VON HAGEN AND NILS-SJARD SCHULZ, FRIDE PROJECT, SILENTLY LEAVING MALAWI: SWEDEN’S DELEGATED EXIT 4–5 (2009), [http://fride.org/descarga/IP\\_Malawi\\_version25\\_ENG\\_nov09.pdf](http://fride.org/descarga/IP_Malawi_version25_ENG_nov09.pdf). Malawi’s Constitution enshrines an independent Parliament and Judiciary, and guarantees the separation of powers, rule of law, and basic freedoms such as religious practice, association, and information. *See* Michael Keating, *Rethinking Corruption*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 317, 318 (2007) (discussing the “phalanx of Constitutional bodies” in Malawi). Statutory bodies include the Anti-Corruption Bureau, Human Rights Commission, Ombudsman’s Office, Law Commission, and Electoral Commission. *Id.*

5. *See* Alfred Chauwa, *Malawi Pleads with Donors for Aid: Chaponda*

population barely surviving on subsistence farming, Malawi has the world's lowest reported gross national income per capita.<sup>6</sup>

Malawians dubbed the scandal "Cashgate" because low-level bureaucrats found with stockpiles of cash in their homes and vehicles were among the first arrests made when the scandal came to light in September 2013.<sup>7</sup> In a country where the average government employee earns \$100 per month, these cash hoards in amounts up to 100 million kwacha (c. \$240,000) were, quite literally, a fortune.<sup>8</sup> A full-scale investigation was launched a

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*Says Nation in Desperate Need of Budgetary Support*, NYASA TIMES (Jan. 7, 2016), <http://www.nyasatimes.com/malawi-pleads-with-donors-for-aid-chaponda-says-nation-in-desperate-need-of-budgetary-support/> (last visited July 9, 2016) (noting that "the decision by donors to cut aid due Cashgate has contributed to the country's economic hardship") (on file with the Washington and Lee Law Review). The United States, which provides aid via program support to nongovernmental organizations (NGOs), did not suspend aid. By supporting NGOs, donors can control spending and exercise flexibility when responding to allegations of misuse. European and other donors, however, directly supported the government's budget, which allowed for increased volumes of aid but lessened controls. Donors commit themselves to using the recipient country's financial accountability systems in return for the recipient country ensuring that the accountability systems work effectively. See Kim Yi Dionne, *Donor Dependence, Donor Withdrawal: Implications of Malawi's Cashgate Scandal*, AIDDATA CTR. FOR DEV. POL'Y (Feb. 13, 2014), <http://aiddata.org/blog/donor-dependence-donor-withdrawal-implications-of-malawis-cashgate-scandal> (last visited July 9, 2016) ("Aid to support government budgets shifts control over how money is spent from the donors to the government.") (on file with the Washington and Lee Law Review).

6. Press Release, The World Bank, WB Update Says 10 Countries Move Up in Income Bracket (July 1, 2015), <http://www.worldbank.org/en/news/press-release/2015/07/01/new-world-bank-update-shows-bangladesh-kenya-myanmar-and-tajikistan-as-middle-income-while-south-sudan-falls-back-to-low-income> (reporting that Malawi's GNI per capita is currently \$250 and that "in 24 years its average per-capita income has increased by just \$70").

7. Cashgate unraveled when a maid informed the police that her employer, a twenty-seven-year old accounts assistant at the Ministry of Environment, had piles of cash concealed in his home. *Malawi Public Servant Arrested Over k120 Million Cash*, NYASA TIMES (Sep. 11, 2013), <http://www.nyasatimes.com/malawi-public-servant-arrested-over-k120-million-cash/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review). The maid had pocketed Malawi Kwacha (MK) 3 million (\$7,140), thinking it would not be missed, but her expenditures of large sums at the marketplace aroused the envy of her neighbors. *Id.* Arrested, she led the police to her employer's home, rented in a well-off enclave of Lilongwe. *Id.*

8. The MK has a limited tradable market and steadily loses value. See Chikondi Chiyembekeza, *Bumpy Rise as Kwacha Slips*, NATION (May 14, 2016), <http://mwnation.com/bumpy-rise-as-kwacha-slips/> (last visited July 9, 2016).

week later when Malawi budget director Paul Mphwiyo was ambushed and shot three times outside his home. Ralph Kasambara, the outgoing Attorney General, was accused of orchestrating the assassination attempt, allegedly because Mphwiyo planned to expose the Cashgate conspiracy.<sup>9</sup>

Allegations of official corruption implicated then President Joyce Banda, most of her senior ministers, and the President's two sons, who were her closest advisors.<sup>10</sup> A British-funded audit determined that civil servants and senior cabinet ministers in the Banda administration had manipulated the Malawian government's financial management system, known as IFMIS, to steal more than \$45 million.<sup>11</sup> The audit further determined that Cashgate funds were used to support the electoral campaigns of Banda and her party supporters in Parliament.<sup>12</sup>

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(discussing the value of the Malawi Kwacha post-Cashgate) (on file with the Washington and Lee Law Review). Amounts stolen during the Cashgate scandal will be converted at the 2012–2014 average exchange rate of MK 420 to 1 USD. *Id.* Any references to kwacha expended during the 2015–2016 period will be converted at the average exchange rate of MK 700 to 1 USD. *Id.*

9. *BBC Cashgate Report*, *supra* note 2.

10. Allan Ntata, *President Banda: Corrupt President or Upright Citizen?*, AFRIMIND (Oct. 17, 2013), <http://www.afrimind.org/president-banda-corrupt-president-or-upright-citizen/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

11. BAKER TILLY RISK ADVISORY SERVS. LLP, REPORT ON FRAUD AND MISMANAGEMENT OF MALAWI GOVERNMENT FINANCES 19 (Sep. 25, 2014), <http://banthutimes.com/wp-content/uploads/2014/10/20140925-Final-Report-overarching-report-to-AG.pdf>. The Integrated Financial Management Information System (IFMIS) was implemented in 2005 to support government departments with budgeting, accounting, and reporting. *See* Alan Bacarese, *Malawi's Cashgate Crisis – An African Corruption Metaphor or a Sign of Hope?*, INT'L CTR. FOR ASSET RECOVERY (Sep. 12, 2015), <https://forum.assetrecovery.org/icarforum/blog/malawi%E2%80%99s-cashgate-crisis-%E2%80%93-african-corruption-metaphor-or-sign-hope> (last visited July 17, 2016) (discussing the role of IFMIS in the Cashgate scandal) (on file with the Washington and Lee Law Review). Crucially, IFMIS also managed payments to suppliers, leading to the printing of Reserve Bank of Malawi checks at the Accountant General's Department. *Id.* By 2011, warning signs of corruption were missed and/or covered up. By 2013, IFMIS was issuing large numbers of government checks for services never delivered that were cashed by coconspirator businessmen at local banks. *Id.* The government accounts clerks then deleted the electronic trails. *Id.*

12. BAKER TILLY, *supra* note 11, at 115 (listing prominent businessman Oswald Lutepo, Attorney General Ralph Kasambara, and Roy Kachale, the son of President Banda). Malawi has no laws regulating campaign financing. *See* TRANSPARENCY INT'L, MALAWI NATIONAL INTEGRITY SYSTEM ASSESSMENT REPORT

The scandal brought the Malawian Directorate of Public Prosecutions (DPP)<sup>13</sup> and the Anti-Corruption Bureau (ACB)<sup>14</sup> to a critical juncture. Does the ACB, Malawi's lead anti-corruption institution, have the human and institutional capacity to fully investigate and successfully prosecute the perpetrators of the scandal, and, of equal importance, does it have the ability to recover a healthy percentage of the stolen assets? This essay will discuss the ACB's institutional challenges in the Cashgate

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117, 181 (2013) [hereinafter TI REPORT], [http://www.transparency.org/whatwedo/nisarticle/malawi\\_2013](http://www.transparency.org/whatwedo/nisarticle/malawi_2013) (noting that Malawi's "legal framework does not provide for any limitation on campaign expenditure"); see also Ephraim Nyondo, *Party Finances Under Spotlight*, NATION (Aug. 9, 2016), <http://mwnation.com/party-finances-under-spotlight/> (last visited Aug. 9, 2016) ("[P]olitical party financing in Malawi remains an area of unfairness, corruption, patronage and illegitimate policy influences") (on file with the Washington and Lee Law Review).

13. The Directorate of Public Prosecutions is headed by the Director of Public Prosecutions, who is appointed by the President under Section 99 of the Constitution of the Republic of Malawi (1994). *Director of Public Prosecution*, MINISTRY OF JUST. & CONST. AFF. MALAWI, <http://www.justice.gov.mw/thedpp.html> (last visited July 20, 2016) (on file with the Washington and Lee Law Review). The DPP is responsible for all public prosecutions, including general criminal cases, homicide, and corruption cases. It supervises the Police Prosecution Service (police officers), who nationwide try circa 85% of all the general criminal cases in the Magistrate courts. *Id.* The DPP has thirty prosecutors working in its principal office in the capital city, Lilongwe, and two regional branch offices. Most prosecutors have less than two years of experience trying cases; very few have more than five years. *Id.*

14. The Anti-Corruption Bureau is an independent agency with the legal mandate under the Corrupt Practices Act to prevent, investigate, and, with the DPP Director's consent, prosecute corruption in Malawi. See Corrupt Practices Act No. 17, Cap. 7:04 (2004), Laws of Rep. of Malawi [hereinafter Corrupt Practices Act] (establishing the ACB), [http://www.acbmw.com/wp-content/downloads/Corrupt\\_Practices\\_Act-No%2017\\_of\\_2004.pdf](http://www.acbmw.com/wp-content/downloads/Corrupt_Practices_Act-No%2017_of_2004.pdf). The ACB is headed by a Director and Deputy Director, both of whom are appointed by the President. *Id.* §§ 6–7. The ACB has its headquarters in Lilongwe, in the "World Bank Building," and has three regional branch offices. See *Clients & Role Players*, ANTI-CORRUPTION BUREAU, MALAWI, <http://www.acbmw.com/> (last visited June 30, 2016) (providing information on where to contact the ACB) (on file with the Washington and Lee Law Review). The ACB has three divisions (Management/Support, Operations, and Prosecutions) and two sections (Public Relations and Internal Audit). It currently employs 130 personnel, with prosecutors and investigators comprising about 25% of the staff. See generally Homepage, ANTI-CORRUPTION BUREAU, MALAWI, <http://www.acbmw.com/> (last visited June 30, 2016) (providing information on the ACB) (on file with the Washington and Lee Law Review).

prosecutions and offer observations on implications for the future of Malawi. It is posited herein that the gulf between the expectations of foreign donors and the capacities of the ACB may well ensure continued foreign donor disillusionment and permanent withholding of critical financial aid.<sup>15</sup>

## II. ACB Framework

*[T]he cash-flow situation at ACB has been [so] bad that even its telephone lines were disconnected.*<sup>16</sup>

– Archibald Kasakura, BNL Times

### A. History of Corruption

Studies in Malawi over the past decade have consistently found that corruption is entrenched, systemic, and getting worse.<sup>17</sup> Donor-driven legislative and institutional reforms proved inadequate to eradicate, let alone control, corruption.<sup>18</sup> Without popular demand for good governance and competence, and without high standards among the individuals responsible for

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15. See ALAN DOIG ET AL., U4 REPORTS, MEASURING ‘SUCCESS’ IN FIVE AFRICAN ANTI-CORRUPTION COMMISSIONS 4 (2005), <http://www.u4.no/publications/measuring-success-in-five-african-anti-corruption-commissions/> (remarking upon the lack of synchronicity and compatibility between the needs, capacities, and expectations of governments, donors, and anti-corruption agencies).

16. Archibald Kasakura, *Malawi’s Anti-Corruption Bureau Hit by Underfunding*, BNLTIMES (July 12, 2014), <http://timesmediamw.com/malawis-anti-corruption-bureau-hit-by-underfunding/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

17. TI REPORT, *supra* note 12, at 27–28. President Bingu wa Mutharika, the architect of the “zero-tolerance” policy, acknowledged he “did not know whether the war against corruption was being won.” *Id.* at 192. *But see* Thom Chiumia, *Corruption ‘Not Endemic’ in Malawi – President Mutharika*, NYASA TIMES (Apr. 25, 2015), <http://www.nyasatimes.com/corruption-not-endemic-in-malawi-president-mutharika/> (last visited July 9, 2016) (countering the view that widespread corruption exists in Malawi) (on file with the Washington and Lee Law Review).

18. See Keating, *supra* note 4, at 324 (“Efforts by donors to fight corruption that are not rooted in a national determination are unlikely to succeed.”).



accountability, the fight against corruption in Malawi was compromised.<sup>19</sup>

The ascension to the presidency of Vice President Joyce Banda, following the unforeseen death of President Bingu wa Mutharika in April 2012, was widely viewed as a singular opportunity to eradicate Malawi's legacy of high-level political corruption.<sup>20</sup> President Banda's public statements reaffirmed "political will at the highest level to fight this evil" and pledged her "utmost commitment to the fight against graft in Malawi."<sup>21</sup> But within two years, the escalating Cashgate scandal doomed

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19. See *id.* (arguing that "fighting corruption in a place like Malawi" depends upon these premises). "Low salaries, the lack of an effective whistle blowing system, and the lack of performance incentive systems all contributed to the culture of corruption and its broad acceptance as a way of life." *Id.* at 322. Bakili Muluzi, the country's first democratically elected President, was reportedly close to declaring bankruptcy when he took office, yet ended his presidency as a multi-millionaire. See Nyondo, *supra* note 12 ("Muluzi is currently in court accused of misappropriating the K1.7 billion [\$11 million] from known and unknown sources both locally and internationally."). Similarly, Muluzi's successor, Bingu wa Mutharika, had reportedly amassed MK 61 billion (\$85 million) by the time he died in office. See Thom Chiumia, *All the Fear, None of the Hope in Corruption Infested Malawi*, NYASA TIMES (June 23, 2016), <http://www.nyasatimes.com/fear-none-hope-corruption-infested-malawi/> (last visited July 9, 2016) (discussing the allegations against Bingu wa Mutharika) (on file with the Washington and Lee Law Review).

20. Banda was proclaimed by the West as "a beacon of hope" for her country and the continent inasmuch as she was Malawi's first female president and had ascended to the Presidency in a peaceful and constitutional succession. Elliot Gerson, *A New Leader for Africa*, HUFFINGTON POST (Jan. 19, 2013), [http://www.huffingtonpost.com/elliott-gerson/a-new-leader-for-africa\\_b\\_2511815.html](http://www.huffingtonpost.com/elliott-gerson/a-new-leader-for-africa_b_2511815.html) (last updated June 19, 2013) (last visited July 9, 2016) (on file with the Washington and Lee Law Review). Upon assuming office, Banda introduced government austerity measures and initiated economic and political reforms. See *id.* ("Shortly after assuming office—in a country where 40 percent of the people live on less than \$1 a day and the majority can't afford even a bicycle—Banda declared she would sell the presidential jet and a fleet of 60 Mercedes limousines."). Forbes magazine declared her the most powerful woman in Africa. *Joyce Banda*, FORBES, <http://www.forbes.com/profile/joyce-banda/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review). Time magazine listed her among the 100 most influential people on the planet. Ellen Johnson Sirleaf, *The 2013 TIME 100: Joyce Banda*, TIME (Apr. 18, 2013), <http://www.time100.time.com/2013/04/18/time-100/slide/joyce-banda/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

21. *President Banda to Preside over Malawi Anti-Corruption Day in Mangochi*, NYASA TIMES (Feb. 1, 2013), <http://www.nyasatimes.com/president-banda-to-preside-over-malawi-anti-corruption-day-in-mangochi/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

those expectations as well as her reelection prospects. In May 2014, her long-time adversary, Peter Mutharika, the brother of deceased President Mutharika, won the presidential election.<sup>22</sup> Three months later, Banda went into self-imposed exile outside Malawi as rumors circulated of her impending Cashgate arrest.<sup>23</sup>

Malawian commentators viewed foreign donors as complicit in the scandal for turning a “blind eye” to apparent signs of high-level corruption.<sup>24</sup> But taken aback by the brazen nature of the thefts, a united international donor community informed the Malawian government that it would suspend all direct budgetary support until the government (1) implemented financial management reforms to prevent future systematic thefts<sup>25</sup> and (2) fully prosecuted the Cashgate perpetrators and recovered the stolen assets.<sup>26</sup> This position further solidified after European

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22. *New Malawi President Gets Immunity from Treason Charge, May Seek Revenge*, TAIPEI TIMES (June 1, 2014), <http://www.taipetimes.com/News/world/archives/2014/06/01/2003591768> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

23. Lameck Masina, *Malawi – Why Won't Joyce Banda Come Home?*, AFR. ARGUMENTS (Dec. 30, 2015), <http://africanarguments.org/2015/12/30/malawi-why-wont-joyce-banda-come-home-2/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

24. See ALLAN NTATA, LICENSE TO LOOT: A REPORT ON THE CASHGATE CORRUPTION SCANDAL 47 (2013), <https://rebeccachimjeka.files.wordpress.com/2013/11/licence-to-loot-malawi-cashgate-scandal-report.pdf> (arguing donor complacency in Banda's refusal to disclose her assets).

25. Mike Kanguele, *Malawi: Donors Shun Malawi for Zimbabwe*, MALAWI24 (Feb. 16, 2015), <http://allafrica.com/stories/201502170083.html> (last visited July 9, 2016) (“[D]onors are not shaken. Their message, as articulated by UK and World Bank recently, is very clear: Put in place financial management reforms to stop a sequel to the cashgate scandal from happening.”) (on file with the Washington and Lee Law Review).

26. See Thom Chiumia, *Britain Won't Resume Malawi Aid: Resolve Cashgate from 2005–House of Lords*, NYASA TIMES (Oct. 24, 2014), <http://www.nyasatimes.com/britain-wont-resume-malawi-aid-resolve-cashgate-from-2005-house-of-lords/> (last visited July 9, 2016) (“Britain will not be able to resume aid support until the government clamped ‘firmly down on corruption’ and the cashgate scandal . . . is independently and properly resolved.”) (on file with the Washington and Lee Law Review); Green Muhya, *Malawi to Trace Cashgate Tainted Assets, Says Mutharika as German Calls for Recovery*, NYASA TIMES (Oct. 10, 2014), <http://www.nyasatimes.com/malawi-to-trace-cashgate-tainted-assets-says-mutharika-as-german-calls-for-recovery/> (last visited July 9, 2016) (“We are much interested in the recovery of money and the arrest of the culprits . . . [V]ery important to all of us is the recovery of the stolen assets.”) (on file with the Washington and Lee Law Review); *US Anticipate Convictions of*

funded audits of government ledgers from 2009 to 2014 could not account for MK 236 billion (\$356 million).<sup>27</sup>

Recent reports indicate that the Malawian government is slowly “moving in the right direction” to foster budget control and transparency.<sup>28</sup> The second prong of the donor demand has proven to be equally challenging; only fifteen mid-level defendants have been convicted and MK 1 billion (\$1.4 million) recovered.<sup>29</sup>

### *B. Criminal Justice System*

The Malawian courts’ structure was inherited from the British colonial system.<sup>30</sup> Cases are heard before a single judge,

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*Gurus in Malawi’s Cashgate*, NYASA TIMES (Mar. 6, 2015), <http://www.nyasatimes.com/us-anticipate-convictions-of-gurus-in-malawis-cashgate/> (last visited Aug. 7, 2016) (“[T]here should be convictions of senior officials.”) (on file with the Washington and Lee Law Review).

27. The unreconciled amount was initially thought to be MK 577 billion (\$850 million), but was recently corrected to MK 236 billion. Steven Nhlane and Rebecca Chimjeka, *Inside K577bn Forensic Audit*, NATION (July 9, 2016), <http://mwnation.com/inside-k577bn-forensic-audit/> (last visited July 18, 2016) (on file with the Washington and Lee Law Review).

28. Orama Chinamulungu, *IMF Extends Programme, Analysts Urge Caution*, NATION (June 22, 2016), <http://mwnation.com/imf-extends-programme-analysts-urge-caution/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review); see also Owen Khamula, *Malawi Govt Buys K2bn IFMIS Software to Prevent Another Cashgate*, NYASA TIMES (Feb. 18, 2016), <http://www.nyasatimes.com/malawi-govt-buys-k2bn-ifmis-software-to-prevent-another-cashgate/> (last visited July 9, 2016) (reporting that, per a \$2.6 million grant from the World Bank and United States, IFMIS received requisite upgrades) (on file with the Washington and Lee Law Review).

29. See Owen Khamula, *Financial Woes Affect Malawi Graft Busting Body’s Cashgate Probe*, NYASA TIMES (Apr. 23, 2016), <http://www.nyasatimes.com/financial-woes-affect-malawi-graft-busting-bodys-cashgate-probe/> (last visited July 9, 2016) (confirming fifteen convictions) (on file with the Washington and Lee Law Review). Six luxury buses purchased for the Banda campaign represent \$1 million of this sum; cash seized at the inception of the investigation and restitution connected with plea bargains comprise the other \$400,000. Owen Khamula, *K1bn Cashgate Criminal Proceeds: Malawi Yet to Decide How to Dispose It*, NYASA TIMES (Feb. 13, 2016), <http://www.nyasatimes.com/k1bn-cashgate-criminal-proceeds-malawi-yet-to-decide-how-to-dispose-it/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

30. Const. of Rep. of Malawi (1994), Cap. IX, established a hierarchical system of courts: a Supreme Court of Appeal, High Courts, and Magistrates’

without a jury, and consist of piecemeal hearings spanning months or even years.<sup>31</sup> As in many developing countries, the criminal justice system is handicapped by serious weaknesses, including a shortage of judges, inexperienced prosecutors, insufficient funding for trials, an overwhelming backlog of cases, dysfunctional courthouses, and overcrowded prisons.<sup>32</sup> NGO studies indicate there is a widespread lack of knowledge of the law, including the Constitution and relevant legislation, amongst both lawyers and magistrates.<sup>33</sup> The presentation of insufficient evidence in court by inexperienced prosecutors has required judges to intervene and play an inquisitorial role just to ascertain the facts of the case.<sup>34</sup>

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Courts (divided into four categories/grades).

31. Per Section 294(2) of the Criminal Procedure and Evidence Code, jury trials have been suspended at various times since 1996 and were suspended indefinitely in 2008 due to lack of funds and backlog of cases. Criminal Procedure and Evidence Code, Cap. 8:01, Laws of Rep. of Malawi [hereinafter Criminal Procedure Code], <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90376/104138/F-2103641943/MWI90376.pdf>. See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., MALAWI HUMAN RIGHTS REPORT 7–8 (2015), <http://www.state.gov/documents/organization/252913.pdf>. In high-profile cases, a verdict by a sole judge is invariably open to question, not just for error but also for motive. See, e.g., Thom Chiumia, *Kasambara Files Appeal to Supreme Court of Malawi: Judge Mtambo Made Multiple 'Errors in Law', Ignored Evidence*, NYASA TIMES (Aug. 2, 2016), <http://www.nyasatimes.com/kasambara-files-appeal-supreme-court-malawi-judge-mtambo-made-multiple-errors-law-ignored-evidence/> (“The appeal said Mtambo’s bias was ‘right from the start of the case all the way up to the time when he capriciously revoked [Kasambara’s] bail.’”).

32. IRISH RULE OF LAW INT’L, ANNUAL REPORT: MALAWI ACCESS TO JUSTICE 5 (Oct. 2013) [hereinafter IRISH RULE OF LAW], [http://irishruleoflaw.ie/wp-content/uploads/2013/12/Malawi-Annual-Report\\_Oct-2013.pdf](http://irishruleoflaw.ie/wp-content/uploads/2013/12/Malawi-Annual-Report_Oct-2013.pdf); see also INT’L BAR ASS’N’S HUM. RIGHTS INST., RULE OF LAW IN MALAWI: THE ROAD TO RECOVERY 23, 41 (Sep. 2012) [hereinafter RULE OF LAW IN MALAWI], <http://www.ibanet.org/Document/Default.aspx?DocumentUid=C9872074-1DF6-47E7-B2AA-728144009382>.

33. See IRISH RULE OF LAW, *supra* note 32, at 5 (discussing the flaws of Malawi’s criminal justice system); RULE OF LAW IN MALAWI, *supra* note 32, at 41 (same).

34. Discussion with Professor of Practical Legal Studies, Chancellor College, Zomba, Malawi (Jan. 2016) (“Malawi is supposed to be a British system, but we end up being French”). It is difficult for the DPP to retain experienced prosecutors. Poorly paid, they labor under substandard working conditions in dilapidated offices and routinely lack fundamental necessities such as reliable electricity, desktop computers, cell phones, toner for printers, cars and/or fuel to drive to court, and money to find and get witnesses to court. *Id.*; see also TI

Despite 2010 amendments to the Malawi Criminal Procedure Code, which specified thirty-to-ninety day custody time limits for pre-trial detainees, and mandated for less serious offenses the commencement of trial within a year of arrest and completion of trial within twelve months thereafter,<sup>35</sup> those provisions are routinely ignored. Defendants often spend years in pre-trial confinement because unavoidable delays are regarded as “a reason that trumps the right to release.”<sup>36</sup> As defendants languish in jail, prosecutors are transferred, court files are lost, and cases are forgotten.<sup>37</sup>

High-profile political cases drain the courts’ capacity. Prosecution of the Cashgate scandal alone required reallocation of judges’ time and new court spaces, further straining a criminal justice system already at its breaking point.<sup>38</sup>

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REPORT, *supra* note 12, at 96.

35. Criminal Procedure Code, §§ 161A, 302A.

36. CLIFFORD MSISKA ET AL., OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, PRE-TRIAL DETENTION CUSTODY TIME LIMITS: ENSURING COMPLIANCE IN MALAWI 6–7, 19 (2013), [http://www.prisonstudies.org/sites/default/files/resources/downloads/malawi\\_custody\\_time\\_limit\\_report\\_january\\_2013.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/malawi_custody_time_limit_report_january_2013.pdf).

37. See RULE OF LAW IN MALAWI, *supra* note 32, at 47 (“[P]re-trial detention could last up to nine years.”). In what is anticipated to alleviate the problem of lost files, the judiciary, with a \$1.4 million grant from the European Union, recently converted to an electronic case management system. See Precious Kumbani, *E-Justice System on Track*, NATION (June 24, 2016), <http://mwnation.com/e-justice-system-on-track/> (last visited July 9, 2016) (discussing Malawi’s new case management system) (on file with the Washington and Lee Law Review).

38. See RACHEL ELLET, FREEDOM HOUSE, POLITICS OF JUDICIAL INDEPENDENCE IN MALAWI 28–29 (2014), [https://freedomhouse.org/sites/default/files/inline\\_images/Malawi%20Judicial%20Independence%20Report%20Final.pdf](https://freedomhouse.org/sites/default/files/inline_images/Malawi%20Judicial%20Independence%20Report%20Final.pdf) (“The judiciary is so overstretched that budget issues are not simply a matter of increasing the efficiency of the courts; they are a matter of survival for the courts.”); Charlotte Mackenzie, *Malawi’s Criminal Justice System Is in Need of Urgent Reform*, THE GUARDIAN (Feb. 5, 2014), <http://www.theguardian.com/global-development-professionals-network/2014/feb/05/malawi-criminal-justice-system-reform> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

*C. Development Cycles*

The Corrupt Practices Act of 1995 established the Anti-Corruption Bureau (ACB) and vested it with broad powers to investigate and prosecute corruption, and to take necessary measures to prevent corruption in both the public and private sectors. The ACB is statutorily obliged under the Act to investigate “any” complaint of corruption it receives, but it can only initiate a prosecution subject to the “consent” of the Director of Public Prosecution.<sup>39</sup> The Corrupt Practices Act was amended in 2004 to grant the ACB increased powers by widening the definition of corruption to include, *inter alia*, offenses for abuse of office and possession of unexplained wealth.<sup>40</sup> Yet the legislative amendments did not ensure greater independence for the ACB. The Director and Deputy Director of the ACB, as well as the Director of Public Prosecutions, all hold their positions at the President’s discretion.<sup>41</sup>

Although the ACB made strides over the past decade in prosecuting corruption, its efforts were mostly limited to lower-level government officials.<sup>42</sup> Encouragingly, President Peter Mutharika vowed “zero tolerance” and declared he would “shield none.”<sup>43</sup> His newly appointed DPP and ACB Directors thereby proceeded with the indictments of more than seventy

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39. Corrupt Practices Act, §§ 10, 42.

40. *Id.* §§ 25B, 32.

41. Mabvuto Hara, *The Independence of Prosecuting Authorities: The Malawi Experience*, in FOSTERING CONSTITUTIONALISM IN AFRICA 61, 84 (C. Fombad & C. Murray, eds., 2010). The Parliament of Malawi consistently rejects amendments to the Corrupt Practices Act that would change the ACB’s status from a statutory body to a constitutional authority—thereby limiting presidential appointment and dismissal powers—as attempts to usurp executive power. See José Safarao, *Mutharika Must Be Impeached for Meddling with the Muluzi Case*, MALAWI24 (May 15, 2016), <http://malawi24.com/2016/05/15/no-holds-barred-mutharika-must-impeached-meddling-muluzi-case/> (last visited July 9, 2016) (“[T]he [ruling party] voted unanimously in parliament to defeat a bill that aimed at making the ACB independent.”) (on file with the Washington and Lee Law Review).

42. FARZANA NAWAZ, U4 ANTI-CORRUPTION RESOURCE CENTER, OVERVIEW OF CORRUPTION AND ANTI-CORRUPTION IN MALAWI 7 (2012), <http://issuu.com/cm-inorway/docs/120723082546-27b9f0c65ce6493cacbbceb4399d4e34/1?e=0>.

43. Safarao, *supra* note 41.

individuals—including senior civil servants, politicians, and business owners—in connection with Cashgate.<sup>44</sup>

A 2005 study on five African Anti-Corruption Commissions, including the Malawi Anti-Corruption Bureau, noted that the development cycles of the continent's anti-corruption agencies were invariably sporadic, erratic, and vulnerable to disruption by the volatility of government support and fluctuating donor enthusiasm and fatigue.<sup>45</sup> Today, the Malawi ACB mirrors that pattern, with its vulnerabilities exacerbated by two major constraints. First, there is no security in the tenure of the ACB Director's office; few Directors have fully served their terms.<sup>46</sup>

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44. Zawadi Chilunga, *APM Appoints New Malawi Anti-Corruption Czar*, NYASA TIMES (Oct. 8, 2014), <http://www.nyasatimes.com/apm-appoints-new-malawi-anti-corruption-czar-lucas-kondowe-a-financial-expert/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review); Collins Mtika, *Cashgate: Malawi's Bigwigs Feel the Heat*, MAIL & GUARDIAN (Oct. 24, 2014), <http://mg.co.za/article/2014-10-24-malawis-bigwigs-feel-the-heat> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

45. See DOIG ET AL., *supra* note 15, at 4–5. (discussing the differing “lifecycles” of foreign donors and anti-corruption agencies).

The lifecycle of governments involves the gradual displacement of anti-corruption as a high priority and indeed political commitment is frequently confined to exposing the crimes of previous regimes. Governments experience periods of instability and, where ACCs investigate corruption at the highest political levels, the response is not often supportive. Rather, ACC Directors are dismissed, authority to prosecute is withheld in sensitive cases and under-resourcing of the ACC becomes the norm, further undermining its capacity and reputation.

*Id.* at 4. “All African ACCs subsist in conditions far less propitious and with much scarcer resources and capabilities than the ACC prototype. In effect, African ACCs have been consigned to a form of existence that not only constrains, but almost guarantees their inability to attain achievable levels of success.” *Id.* at 6.

46. Hara, *supra* note 41, at 83. For example, when, in July 2006, the Director of the Anti-Corruption Bureau arrested former President Muluzi on corruption charges, President Bingu wa Mutharika immediately suspended the ACB Director, without giving reasons as required by the Corrupt Practices Act. *Id.*; see *infra* note 55 (discussing the circumstances of the ACB Director's removal). The Commissioner of Police Prosecutors was then appointed Acting ACB Director; a year later, he was removed when it was discovered that he was drawing two salaries, one from each institution. *Anti-Graft Chief Suspended*, NEWS24 (Sep. 11, 2007), <http://www.news24.com/Africa/News/Anti-graft-chief-suspended-20070910> (last visited July 9, 2016) (on file with the Washington and Lee Law Review). Later, his successor resigned for drawing allowances on official trips he never took. *Malawi Anti-Corruption Chief Nampota Arrested*,

Second, very limited resources are provided by the government.<sup>47</sup> In the past, donors largely contributed to the ACB's budget.<sup>48</sup> But due to Cashgate, foreign support is now limited to British technical advisors and training.<sup>49</sup> The financial deficit has not been offset by increased funding from the Malawian Treasury.<sup>50</sup> The ACB Director publically declared he required double the provided budget to run investigations in the Cashgate scandal.<sup>51</sup>

#### *D. Institutional Limitations*

The lack of secured tenure of senior management and the lack of budgetary independence have contributed to institutional bottlenecks that limit ACB operations.<sup>52</sup> Due to minimal funding and support, staffers have gone on strike to protest pay and conditions.<sup>53</sup> Investigators and prosecutors resign for higher-paying jobs elsewhere.<sup>54</sup> To add to the problem, there have been notable instances of political interference in sensitive cases.<sup>55</sup>

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*Given Bail*, NYASA TIMES (June 28, 2012), <http://www.nyasatimes.com/malawi-anti-corruption-chief-nampota-arrested-given-bail/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

47. TI REPORT, *supra* note 12, at 159–60.

48. *Id.* at 161.

49. DEP'T. FOR INT'L DEV., OPERATIONAL PLAN 2011-2016 DFID MALAWI 18 (Dec. 2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389289/Malawi.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389289/Malawi.pdf).

50. Khamula, *Financial Woes*, *supra* note 29.

51. Chiumia, *supra* note 17.

52. NAWAZ, *supra* note 42, at 6.

53. Wanga Gwede, *Malawi Anti-Corruption Bureau Staff Strike Over Pay*, NYASA TIMES (Dec. 8, 2014), <http://www.nyasatimes.com/malawi-anti-corruption-bureau-staff-strike-over-pay/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

54. TI REPORT, *supra* note 12, at 160; *Mass Resignation at Malawi Graft-busting Body ACB as Njauju Murder still Haunts*, NYASA TIMES (June 11, 2016), <http://www.nyasatimes.com/mass-resignation-malawi-graft-busting-body-acb-njauju-murder-still-haunts/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

55. TI REPORT, *supra* note 12, at 166; Hara, *supra* note 41, at 83. For example, in 2006, President Bingu wa Mutharika fired the ACB and DPP Directors for arresting former President Bakili Muluzi on corruption charges; President Mutharika needed cross-party support in Parliament to ensure passage of his budget, a requirement for IMF debt forgiveness. Keating, *supra* note 5, at 321; Hara, *supra* note 41, at 83–84. Recently, the reinstituted



Consequently, public surveys reflect a growing perception that the ACB is unable to act as an autonomous body and that, instead, it makes decisions that favor particular people or political parties.<sup>56</sup>

As in other countries with British common law traditions, such as Kenya or Pakistan, prosecutors in Malawi play no role in the investigations, although in theory they could exercise their advisory authority to guide an investigation.<sup>57</sup> Due to ingrained historical practice, investigators believe that the entire investigative domain is exclusively within their professional, skilled responsibility.<sup>58</sup> Prosecutors, furthermore, have institutional concerns over involvement in an investigation for fear of becoming witnesses. As a result, prosecutors will not receive a file from investigators until the investigation is complete.<sup>59</sup>

Consequently, ACB prosecutors were overwhelmed upon receiving Cashgate case files detailing complicated financial schemes. The prosecutors were faced with targets that had the money and power to hire highly experienced defense lawyers.<sup>60</sup>

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corruption case against Muluzi was thrown into disarray when the ACB Deputy Director withdrew, stating “personal reasons,” but, some allege, most likely due to political bargaining between the two parties. Safarao, *supra* note 41.

56. TI REPORT, *supra* note 12, at 166; MALAWI ECONOMIC JUSTICE NETWORK, MALAWI COMPLIANCE REPORT 2014 19 (2014) [hereinafter MEJN REPORT], <http://www.mejnmw.org/publications/Reports/Malawi-Compliance-Report-2014.pdf>.

57. See JOHN MARU ET AL., UNITED NATIONS ASIA AND FAR EAST INSTITUTE PREVENTION OF CRIME INTERNATIONAL SENIOR SEMINAR, COOPERATION BETWEEN THE POLICE AND PROSECUTORS 195 (2002), [http://www.unafei.or.jp/english/pdf/RS\\_No60/No60\\_21RC\\_Group2.pdf](http://www.unafei.or.jp/english/pdf/RS_No60/No60_21RC_Group2.pdf) (noting that “prosecutors play no role in investigation as such, but do exercise their advisory or supervisory authority to guide the police investigation in such ways as advising or instructing the police to carry out their investigation to certain direction”).

58. *Id.* at 196.

59. *Id.* at 195. In comparison, United States federal investigators and prosecutors consider early consultation useful in improving good working relationships and the likelihood of better results in investigations. *Id.* at 199.

60. See, e.g., Golden Matonga, *Savala's Bail After Conviction Raises Spectre of Richman's Justice*, GOLDEN MATONGA TODAY (July 18, 2015), <https://goldenmatonga.wordpress.com/2015/07/18/savalas-bail-after-conviction-raises-spectre-of-richmans-justice/> (last visited July 9, 2016) (“It is now widely accepted that the rich and the poor gets [sic] a different set of justice.”) (on file with the Washington and Lee Law Review).

The continuous stays and adjournments filed by defense counsel, and the lack of funds and resources to further investigate and try cases, began to contribute to a sense of dismay, pessimism, and insecurity.<sup>61</sup>

But the single greatest impediment hobbling the ACB soon became fear. Homes of those working on Cashgate investigations were burglarized.<sup>62</sup> The ACB Deputy Director and several investigators received death threats.<sup>63</sup> An ACB prosecution of fourteen defendants charged with the theft of MK 200 million (\$476,000) from the Ministry of Disability Affairs was discontinued due to death threats.<sup>64</sup> In a curious incident, an unidentified man deposited MK 2 million (\$2,800) into the ACB Director's private bank account in an attempt to make it appear that the Director was accepting cash bribes.<sup>65</sup> Even the High Court judges presiding over the Cashgate cases openly acknowledged they were living in constant fear.<sup>66</sup>

The determinative message to the ACB that it should tread lightly in the Cashgate prosecutions was forcefully delivered with the targeted killing of the ACB Director of Corporate Services, Issa Njauju. His burnt vehicle was found several miles away from

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61. Suzgo Khunga, *2014 Review: The Year Cashgate Went on Trial*, NATION (Dec. 30, 2014), <http://mwnation.com/2014-review-year-cashgate-went-trial/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

62. See, e.g., Golden Matonga, *Njauju: Terror of a Perfect Murder*, AFRIEM (Nov. 20, 2015), <http://www.afriem.org/2015/11/njauju-terror-of-a-perfect-murder/> (last visited July 9, 2016) (reporting that burglars stole computers and documents from the house of a German official involved in the Cashgate forensic audits) (on file with the Washington and Lee Law Review).

63. Wanga Gwede, *ACB Officials Receive Death Threats over Malawi Cashgate Crackdown*, NYASA TIMES (Nov. 11, 2014), <http://www.nyasatimes.com/acb-officials-receive-death-threats-over-malawi-cashgate-crackdown/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

64. Mphatso Nkhoma, *Death Threats in Malawi 2011 Cashgate Trial*, NYASA TIMES (Feb. 5, 2016), <http://www.nyasatimes.com/death-threats-in-malawi-2011-cashgate-trial-mphwiyo-corruption-rap-begins-march-16/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

65. Edwin Nyirongo, *ACB Boss Disowns Mysterious K2m Deposit*, NATION (Apr. 2, 2015), <http://mwnation.com/acb-boss-disowns-mysterious-k2m-deposit/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

66. *Cashgate Judges Threatened*, MALAWI24 (Sep. 2, 2015), <http://www.africanewshub.com/news/3793830-cashgate-judges-threatened> (last visited July 17, 2016) (on file with the Washington and Lee Law Review).

the forested area where his decomposed, bullet-riddled body was later discovered. Police believe that the murder was the result of mistaken identity. The real target might well have been the ACB Deputy Director, who headed the Cashgate prosecutions, previously received death threats, physically resembled Njauju, and drove a similar vehicle. The perpetrator(s) remain unidentified.<sup>67</sup>

### *III. Legal Aspects of Cashgate Prosecutions*

*“The convict [Oswald Lutepo] will serve a total of 11 years in prison,” Judge Redson Kapindu said in his ruling, adding that the scandal had had a “bad impact on Malawi society and those responsible should be held to account.”*

*Lutepo . . . said he would appeal. “The judge has been inconsiderate, because I pleaded guilty on my own undertaking. That should have been considered.”*<sup>68</sup>

– News24

#### *A. Initial Prosecutions*

As noted, fifteen defendants associated with the Banda administration have been found guilty at trial or pleaded guilty to theft and money laundering charges. Some critics view the Cashgate prosecutions as politically motivated against President Banda.<sup>69</sup> But few in Malawi would disagree that well-founded

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67. Matonga, *supra* note 62.

68. *Malawi 'Cashgate' Scandal Official Jailed for 11 Years*, NEWS24 (Sep. 4, 2015), <http://www.news24.com/Africa/News/Malawi-Cashgate-scandal-official-jailed-for-11-years-20150904-4> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

69. See Lucky Mkandawire, *Lawyers Query ACB Impartiality*, NATION (June 13, 2016), <http://mw.nation.com/lawyers-query-acb-impartiality/> (last visited July 9, 2016) (criticizing the ACB for failing to execute a Cashgate arrest warrant on a Mutharika party official) (on file with the Washington and Lee Law Review); Safarao, *supra* note 41 (criticizing the ACB for prosecuting Banda officials yet withdrawing from President Muluzi's prosecution); Owen Khamula, *Kamlepo Hits at ACB for Inaction in Malawi Grand Corruption*, NYASA TIMES (July 19, 2016), <http://allafrica.com/stories/201607190231.html> (last visited Aug. 5, 2016) (criticizing the ACB for failing to investigate current Cabinet ministers

corruption prosecutions are a reasonable exercise in the rule of law.<sup>70</sup>

The cases brought to date have been the simpler cases, consisting of businessmen who collected the cash and mid-level officials who authorized the payments.<sup>71</sup> The true test for the ACB's effectiveness will come with the trials charging the campaign finance schemes of former Budget Director Paul Mphwiyo, former Attorney General Ralph Kasambara, and other senior-level defendants.<sup>72</sup> Those trials were in abeyance for the past two years pending resolution of the ongoing trial of the former Attorney General for conspiring to assassinate the former Budget Director.<sup>73</sup> That trial, which concluded with a guilty verdict just prior to the publication of this essay, had riveted public attention and essentially pushed aside the theft and money laundering cases.<sup>74</sup>

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implicated in the European funded audits) (on file with the Washington and Lee Law Review).

70. See FIDELIS KANYONGOLO, AFRIMAP & OPEN SOCIETY INITIATIVE FOR SOUTHERN AFRICA, MALAWI: JUSTICE SECTOR AND THE RULE OF LAW 91 (2006), [https://www.opensocietyfoundations.org/sites/default/files/malawi\\_20060912.pdf](https://www.opensocietyfoundations.org/sites/default/files/malawi_20060912.pdf) (noting that such prosecutions are "justified as the legitimate performance of the government's obligation to uphold the principles of accountability and transparency").

71. See Golden Matonga, *Fight Graft – Donors*, NATION (May 21, 2016), <http://mw.nation.com/fight-graft-donors/> (last visited July 9, 2016) ("We have not benefited anything from the Anti-Corruption Bureau.") (on file with the Washington and Lee Law Review).

72. Mphatso Nkhoma, *Manondo Reveals Mphwiyo Was Kingpin of Malawi Cashgate, Funded Political Campaigns in PP, MCP*, NYASA TIMES (Jan. 28, 2016), <http://www.nyasatimes.com/manondo-reveals-mphwiyo-was-kingpin-of-malawi-cashgate-funded-political-campaigns-in-pp-mcp-there-was-no-deal-with-jzu-or-chakwera/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

73. Mphatso Nkhoma, *Malawi Court Fails to Accommodate Mphwiyo, 18 Others Cashgate Case*, NYASA TIMES (Apr. 14, 2016), <http://www.nyasatimes.com/malawi-court-fails-to-accommodate-mphwiyo-18-others-cashgate-case-no-plea-after-preliminary-objections/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

74. See *Malawi Lessons Galore: Guns, Smoke and Screens as State Wins Round One*, NYASA TIMES (July 22, 2016), <http://www.nyasatimes.com/malawi-lessons-galore-guns-smoke-screens-state-wins-round-one/> ("[T]he former Minister of Justice cum Attorney General, and arguably Malawi's most brilliant lawyer, is now incarcerated."); Thula Chisamba, *Expert Worried About Cashgate Trials*, MALAWI STAR (Feb. 20, 2016), <http://www.malawistar.com/2016/02/20/expert-worried-with-cashgate-trials> (last

Complicating matters, Kasambara represented himself in the attempted murder trial while serving as defense counsel for other Cashgate defendants.<sup>75</sup> The DPP moved to have him disqualified from representing other defendants, to no avail.<sup>76</sup> Ironically, the judge in Kasambara's theft and money laundering case had to recuse himself because he is married to the DPP Director – who personally prosecuted the attempted murder trial.<sup>77</sup> At one point, the judge in the attempted murder trial found Kasambara in contempt of court for accessing his (the judge's) private information and obstructing the progress of the case. He revoked Kasambara's bail and ordered Kasambara to spend five months in Lilongwe's notorious Maula prison.<sup>78</sup>

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visited August 3, 2016) (“[S]ince the inception of the scandal, there has been little progress in judicial proceedings to serve justice to Malawians who are still appalled by Cashgate and the international community which still waits for a valid solution to the evil that has left this ‘once’ vibrant nation in tatters.”) (on file with the Washington and Lee Law Review).

75. *Kasambara's Road to Ruin*, NYASA TIMES (Aug. 5, 2016), <http://www.nyasatimes.com/kasambaras-road-ruin-malawi-ex-justice-minister/> (last visited Aug. 6, 2016) (“Conducting his own defence, Kasambara schemed and plotted and blustered.”) (on file with the Washington and Lee Law Review).

76. *State Wants Kasambara Disqualified*, NATION (June 4, 2015), <http://mwnation.com/state-wants-kasambara-disqualified/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

77. Wanga Gwede, *Judge Kachale Steps Down from Kasambara Money Laundering Case*, NYASA TIMES (Aug. 18, 2015), <http://www.nyasatimes.com/judge-kachale-steps-down-from-kasambara-money-laundering-case/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

78. *Bail Restored for Kasambara, Kumwembe*, NYASA TIMES (Feb. 10, 2016), <http://www.nyasatimes.com/bail-restored-for-kasambara-kumwembe-judge-mtambo-issue-gag-order/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review). The judge, however, spared Kasambara from spending nights in Maula prison because the sleeping conditions were considered too horrific. See, e.g., Michael Wines, *The Forgotten of Africa, Wasting Away in Jails Without Trial*, N.Y. TIMES (Nov. 6, 2005), [http://www.nytimes.com/2005/11/06/world/africa/the-forgotten-of-africa-wasting-away-in-jails-without-trial.html?\\_r=0](http://www.nytimes.com/2005/11/06/world/africa/the-forgotten-of-africa-wasting-away-in-jails-without-trial.html?_r=0) (last visited July 9, 2016) (“The [Maula] cells contain 160 men, packed on the concrete floor, unable even to move. The water is dirty; the toilets foul. Disease is rife . . . Dickens in the tropics, places of cruel, but hardly unusual punishment.”) (on file with the Washington and Lee Law Review). As of this writing, Kasambara, recently convicted of conspiracy to commit murder, is on remand in Maula (including nights) pending sentencing. See *Malawi Lessons Galore*, *supra* note 74 (“[Kasambara] knows prison conditions. He knows that a stay in prison is, literally, a journey to and through hell.”). Conspiracy to commit murder carries a maximum term of fourteen years

*B. Plea Bargaining*

There is a worldwide trend favoring increased use of plea bargaining, with a resultant substantial reduction of the burden on courts and prisons.<sup>79</sup> The ACB has not, except under limited circumstances, availed itself of that trend. The problem has been that plea bargaining in Malawi takes place in a legal vacuum. Although the Criminal Procedure Code does not specifically prohibit plea bargaining, there is no legal framework to regulate the practice.<sup>80</sup> Until 2010, the Code was completely silent on the matter. In an effort to address this gap, the 2010 amendments provided that “[t]he Chief Justice [of the Supreme Court] may make rules that shall permit . . . plea bargaining.”<sup>81</sup> The Chief Justice, however, stated that prior to the issuance of such rules there should be civic education for the public and training for the judiciary on plea bargaining.<sup>82</sup>

Several Cashgate suspects initially indicated they wished to enter into pre-trial arrangements whereby they would become government witnesses and return stolen money. Although the ACB requested Supreme Court guidance on the proposed plea bargains, the Chief Justice declined, reaffirming the need for

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imprisonment. Penal Code, Cap. 7:01, Laws of Rep. of Malawi § 227, <http://www.iglhr.org/sites/default/files/Malawi%20Penal%20Code%207-01.pdf>.

79. STEPHEN THAMAN, WORLD PLEA BARGAINING: CONSENSUAL PROCEDURES AND THE AVOIDANCE OF THE FULL CRIMINAL TRIAL, at xvii (2010)

The ‘full-blown’ trial with ‘all the guarantees’ is no longer affordable. With the rise in crime and the more cost- and labor-intensive procedures required by modern notions of due process, legislatures and courts around the world are gradually giving priority to the principle of procedural economy and introducing forms of consensual and abbreviated criminal procedure to deal with overloaded dockets.

80. The absence of explicit regulatory frameworks has not prevented plea bargaining worldwide. *Id.* at 377–380; *see also* Danwood Chirwa & Esther Gumboh, *Malawi: Plea Bargaining in Malawi Cashgate Context – It Takes a Thief to Catch a Thief*, NYASA TIMES (Sep. 7, 2015), <http://www.nyasatimes.com/plea-bargaining-in-malawi-cashgate-context-it-takes-a-thief-to-catch-a-thief/> (last visited July 9, 2016) (“[T]he State has always been able to use plea bargaining in the prosecution process as part of prosecutorial discretion.”) (on file with the Washington and Lee Law Review).

81. Criminal Procedure Code, § 252A.

82. *See* Matonga, *supra* note 60 (“People can easily think the judiciary is letting the guilty walk free. And that can erode confidence.”).

public and judicial education.<sup>83</sup> ACB prosecutors nevertheless decided to proceed, envisaging charging a lesser offense and/or using the guilty plea as mitigation in sentencing.<sup>84</sup>

Malawians, embittered by the theft of public funds that resulted in suspension of \$150 million yearly in essential foreign aid, were in no mood for anything but harsh sentences.<sup>85</sup> The public image of the ACB—and, to a large extent, its ability to enforce anti-corruption laws effectively depended on the degree to which the public understood and supported its goals and policies. Arguably, the ACB's Public Relations Section should have educated the press and public on the benefits of plea bargaining in a justice system beset with severe docket overload.<sup>86</sup> In failing to do so, the ACB left unrebuted the public impression that plea bargaining was a triumph of administrative and organizational interests over justice whereby the well-connected protected each other.<sup>87</sup>

The ACB entered into its first plea bargain with the former Principal Secretary of the Tourism Ministry, Treza Senzani.<sup>88</sup> She became the first top official involved in Cashgate to be convicted and sentenced. Senzani confessed to stealing MK 63 million (\$150,000), pleaded guilty to theft and money laundering, and

83. *No Plea Bargains for Cashgate Suspects – Malawi Judiciary*, NYASA TIMES (Jan. 31, 2015), <http://www.nyasatimes.com/no-plea-bargains-for-cashgate-suspects-malawi-judiciary/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

84. Chirwa, *supra* note 80.

85. *See, e.g.*, NTATA, *supra* note 24, at 12

[P]eople are dying every day from treatable diseases and illnesses due to acute shortages of drugs in the country's public hospitals, and the Government's central medical stores frequently have to announce that there are no medicine reserves and the sick are told to go and buy medicines at private pharmacies, while billions of taxpayer [kwacha] are being found in bank accounts of senior government ministers.

86. Matonga, *supra* note 60; *see* ANTI-CORRUPTION BUREAU MALAWI, A COMMUNICATIONS STRATEGY 20 (2007), <http://www.acauthorities.org/sites/aca/files/countrydoc/Fighting%20Corruption%20through%20Communications-Communication-Strategy.pdf> (“ACB's communications initiatives can return their investments many-fold”).

87. Steven Kayuni, *Running to Standstill: Reflections on the Cashgate Scandal Heist in Malawi*, 19 J. MONEY LAUNDERING CONTROL (forthcoming 2016) (preprint copy at 2).

88. *Id.* at 1.

agreed to make restitution by turning over her bank account and one of her homes. Even though her bank account was practically empty and her released house was worth \$87,000 at current exchange rates, she was sentenced to only three years imprisonment.<sup>89</sup>

Predictably, a harsh public backlash ensued. The ACB learned too late that managing communications before a crisis event is much easier than rebuilding a damaged reputation afterwards.<sup>90</sup> The sentence was widely condemned as a setback in the fight against the Cashgate corruption by establishing a wrong, lenient precedent.<sup>91</sup> It was derided as a “total mockery” of the justice system, especially when compared to stiff sentences handed out for relatively minor violations.<sup>92</sup> For example, the crime of practicing witchcraft will net a defendant two-to-three years in prison.<sup>93</sup> Thus, this three-year sentence for a major

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89. *Id.* at 1; *Republic v. Treza Senzani*, Criminal Case Number 63 of 2014 (High Court), Lilongwe District Registry (Unreported).

90. See, e.g., *Malawians Want Cashgator Treza Senzani to Rot in Jail*, MARAVI POST (Oct. 1, 2014), <http://www.maravipost.com/2014/10/page/13/> (last visited July 9, 2016) (“A sample of Malawians, bitter with the looting of public funds in the historic Cashgate scandal . . . want to see the high court in Lilongwe deliver a harsh sentence to the first convict [Senzani].”) (on file with the Washington and Lee Law Review).

91. See Wanga Gwede, *Senzani Risks Vigilant Justice if Given Bail: Malawi Cashgate Prisoner*, NYASA TIMES (Oct. 17, 2014), <http://www.nyasatimes.com/senzani-risks-vigilant-justice-if-given-bail-malawi-cashgate-prisoner/> (last visited July 9, 2016) (“[P]erhaps it is worthwhile taking a risk of being in prison for three years and thereafter enjoy millions of [kwacha].”) (on file with the Washington and Lee Law Review).

92. *Senzani Sentence: A Mockery to Malawi's Tax Payers*, MAD CHIKUSAS (Oct. 10, 2014), <https://themadchikusas.wordpress.com/2014/10/10/senzani-sentence-a-mockery-to-malawis-tax-payers/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

93. See, e.g., *Man Slapped Two Years Jail Sentence For Practicing Witchcraft*, FACE OF MALAWI (Mar. 16, 2016), <http://www.faceofmalawi.com/2016/03/man-slapped-two-years-jail-sentence-for-practicing-witchcraft/> (last visited July 9, 2016) (“Mangochi Second Grade Magistrate’s Court on Monday convicted and sentenced a 74-year old man to serve two years imprisonment with hard labor upon finding him guilty of presenting himself as a wizard, contrary to section 6 of the Witchcraft Act.”) (on file with the Washington and Lee Law Review). The Witchcraft Act is a relic of the British colonial era, with prosecutions falling under the purview of Magistrate Courts. The Act does not explicitly criminalize the practice of witchcraft, but implicitly does so by its prohibition on “pretending witchcraft” and outlawing the occupation of “witchfinder or witchdoctor.” Approximately



Cashgate defendant called into question whether the ACB and judiciary had truly given any serious consideration to community values.<sup>94</sup>

The ACB thereafter demurred when other defendants sought to plead guilty to bargained charges.<sup>95</sup> The DPP Director, however, recognizing “the public’s desire to move more quickly on Cashgate cases,” spent half of the next year drafting internal guidelines for plea discussions in cases of serious or complex fraud.<sup>96</sup> The completed guidelines mandated that a prosecutor *must* evaluate the impact of a proposed plea on the community, victim, and the prospects of successfully prosecuting accomplices. ACB prosecutors would charge defendants with the most serious crime(s). Defendants understood that if they cooperated early and voluntarily forfeited assets, judges would be inclined to impose a more lenient sentence.<sup>97</sup> Although the guidelines were not

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ninety “witches” are imprisoned every year. See Chi Adanna Mgbako & Katherine Glenn, *Witchcraft Accusations and Human Rights*, 43 GEO. WASH. INT’L. L. REV. 389, 391, 396–97 (2011) (discussing witchcraft prosecutions Africa-wide and Malawi-specific).

94. Kayuni, *supra* note 87, at 2.

95. See Golden Matonga, *Cashgate Suspects Want Pre-Trial Bargains*, NATION (Oct. 26, 2014), <http://mwnation.com/cashgate-suspects-want-pre-trial-bargains/> (last visited July 9, 2016) (“[The Minister of Justice] said government has no stance on whether to accept those courting prosecuting agencies with proposed deals.”) (on file with the Washington and Lee Law Review); Mphatso Nkhoma, *Kalonga’s Cashgate Sentencing Deferred*, NYASA TIMES (Feb. 29, 2016), <http://www.nyasatimes.com/kalongas-cashgate-sentencing-deferred-serious-allegations-made-against-prosecutors/> (last visited July 9, 2016) (“[Kalonga] was willing to plead guilty to the charges at early stage of the case but some officers in ACB and prosecution were stopping him from pleading guilty.”) (on file with the Washington and Lee Law Review).

96. See Rebecca Chimjeka, *UK Lawyers in for Cashgate*, NATION (July 18, 2015), <http://mwnation.com/uk-lawyers-in-for-cashgate/> (last visited July 9, 2016) (noting that the DFID advisor was “instrumental” in drafting the guidelines) (on file with the Washington and Lee Law Review).

97. See Danwood Chirwa, *Analysing Justice Kapindu’s Sentence on Malawi Chief Cashgater Lutepo*, NYASA TIMES (Sep. 20, 2015), <http://www.nyasatimes.com/analysing-justice-kapindus-sentence-on-malawi-chief-cashgater-lutepo/> (last visited July 9, 2016) (“[I]f a person knows that he or she willingly committed Cashgate offences, it is better for [him or her] to plead guilty from the beginning, show real remorse, voluntarily make restitution, and assist the state in bringing to book others involved in the crimes. Only then will a court exercise leniency.”) (on file with the Washington and Lee Law Review); Paida Kadzakumunja, *Savala Gets 7 Years for Money Laundering*, THE NATION (June 27, 2016), <http://mwnation.com/savala-gets-7-years-for-money-laundering/>

Supreme Court sanctioned, the ACB finally had a recognized framework within which to negotiate acceptable pleas.<sup>98</sup>

Two high-profile pleas followed: Leonard Kalonga, the Chief Officer at the Ministry of Tourism, and Oswald Lutepo, a prominent businessman and senior official in President Banda's political party, each pleaded guilty to three counts of fraud and money laundering of MK 3.7 billion (\$8 million) and MK 2.1 billion (\$5 million), respectively.<sup>99</sup> Both men disclosed in their pleas that President Banda had masterminded the entire scheme and that they were conduits for funding her election campaign.<sup>100</sup> Kalonga admitted using \$1.3 million to purchase six luxury sixty-five-seater buses that were used to transport Banda's political party supporters to and from campaign rallies.<sup>101</sup> Lutepo had received the second highest amount of payments on the list of Cashgate contractors.<sup>102</sup>

Kalonga's sentencing date has been placed on indefinite hold, but it is expected that he will receive six-to-nine years in prison.<sup>103</sup> Lutepo, perceived by the Court as "marginally remorseful," was not granted leniency and sentenced to eleven years in prison.<sup>104</sup> Thereafter, some minor Cashgate figures who

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(last visited July 9, 2016) ("She was not cooperative [and thus received a harsher sentence].") (on file with the Washington and Lee Law Review).

98. Nonetheless, the validity of any bargained conviction will be an appellate issue for every defendant dissatisfied with his or her sentence. *See, e.g., Malawi 'Cashgate' Scandal Official Jailed for 11 Years*, *supra* note 68.

99. *See* Wanga Gwede, *Kalonga 'Cashgate' Sentencing Phase Begins*, NYASA TIMES (Sep. 22, 2015), <http://www.nyasatimes.com/kalonga-cashgate-sentencing-phase-begins-judge-asks-for-mitigation-submission/> (last visited July 9, 2016) ("[Kalonga] had pleaded guilty . . . not to waste [the] court's time.") (on file with the Washington and Lee Law Review); Suzgo Khunga, *When Plea Bargaining Failed Lutepo*, NATION (Dec. 30, 2015), <http://mwnation.com/when-plea-bargaining-failed-lutepo/> (last visited July 9, 2016) ("Lutepo decided it was time to stop the charade and plead guilty to all charges, made less through a plea bargain that neither the defense nor the prosecution have admitted to since then.") (on file with the Washington and Lee Law Review).

100. Wanga Gwede, *Kalonga's JB Cashgate Link 'Hearsay Evidence'*, NYASA TIMES (Aug. 27, 2015), <http://www.nyasatimes.com/kalongas-jb-cashgate-link-hearsay-evidence-dpp-says-guilty-plea-milestone-in-pursuit-of-big-fishes/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

101. *Id.*

102. BAKER TILLY, *supra* note 11, at 31.

103. Gwede, *supra* note 99.

104. Khunga, *supra* note 99.

entered guilty pleas received three-to-five year sentences.<sup>105</sup> With this series of pleas and sentences, community values were vindicated and the ACB and judiciary were redeemed.<sup>106</sup>

### *C. Money Laundering*

In 2006, Malawi passed an anti-money laundering law.<sup>107</sup> The law made it a criminal offense punishable by up to ten years in prison to launder money, specifically to conceal or disguise the illicit origin of property, knowing or having reason to believe that the property was derived from the proceeds of crime.<sup>108</sup> The law created a Financial Intelligence Unit (FIU) and required financial institutions to report certain monetary and any suspicious transactions to the FIU. An intentional reporting violation by an officer of a financial institution was punishable by up to two years imprisonment, and for the institution a fine and loss of business authority.<sup>109</sup>

Although at most only fifty Suspicious Transaction Reports (STRs) were sent annually to the FIU, no bank was ever investigated for failure to generate such reports.<sup>110</sup> In fact, the anti-money laundering law was never used to prosecute anyone. By the time the Cashgate scandal broke, the ACB and the judiciary were faced with applying this complex law *de novo*,

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105. *Id.*

106. *See* Chirwa, *supra* note 97 (noting “the public’s desire to move more quickly on cases”).

107. Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, Cap. 8:07 (2006), Laws of Rep. of Malawi [hereinafter Money Laundering Act], <http://www.anti-moneylaundering.org/africa/Malawi.aspx> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

108. *Id.* § 35.

109. *Id.* § 28. To ensure compliance, every financial institution is obligated to appoint a dedicated compliance officer. *Id.* § 32.

110. U.S. DEP’T OF STATE, 2014 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: MALAWI (2014), <http://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/227916.htm> [hereinafter 2014 MALAWI REPORT] (last visited June 30, 2016) (on file with the Washington and Lee Law Review); Rex Chikoko, *Malawi Banks Left Scot-Free for Cashgate Roles*, NATION (Mar. 21, 2015), <http://mwnation.com/malawi-banks-left-scot-free-for-cashgate-roles/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

without precedent or guideline.<sup>111</sup> This lack of experience partially explains why the first plea bargain with the Tourism Principal Secretary dissolved into a public relations disaster. The ACB and judiciary simply did not recognize the power of the money laundering law.<sup>112</sup>

In his plea, Tourism Ministry Chief Officer Kalonga claimed that the Governor of the National Reserve Bank instructed managers at commercial banks to cash all government checks without question.<sup>113</sup> Whether that was true or not, it would appear that the banks violated the relevant rules by turning a blind eye and not raising any concerns at the large sums deposited and withdrawn.<sup>114</sup> On the rare occasions that banks did generate STRs, the manager of the FIU's Monitoring and Analysis Section allegedly suppressed the reports. If anything, his arrest illuminated the high-degree, nuance, and sophistication entailed in covering up the conspiracy.<sup>115</sup>

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111. 2014 MALAWI REPORT, *supra* note 110. As in other jurisdictions, in order to prove the offense of money laundering, there must be a predicate of the crime, namely that the property in question is criminal property. Initially it was thought that filing both the predicate crime and the money laundering crime would constitute double jeopardy. Jurisprudence then evolved to the concept of "merger," namely distinguishing where the underlying crime ended and the money laundering began. Appeals on this issue are expected. See Kayuni, *supra* note 87, at 12 (discussing the elements of money laundering).

112. See Kayuni, *supra* note 87, at 21 ("[T]here is no question that the prosecuting agencies and the judiciary made a huge stride in the cashgate scandal cases by having the Senzani Case as not only its first conviction but also a first every [sic] money laundering case in Malawi.").

113. Wanga Gwede, *Reserve Bank Governor Chuka Risks Arrest in Malawi Cashgate Crackdown*, NYASA TIMES (Aug. 28, 2015), <http://www.nyasatimes.com/2015/08/28/reserve-bank-governor-chuka-risks-arrest-in-malawi-cashgate-crackdown/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

114. Three banks received 76% of all Cashgate funds; seven other banks split the remainder. See BAKER TILLY, *supra* note 11, at 23 (listing the institutions that received Cashgate funds). Aware of the reporting requirements, the conspirators preferred issuing checks to construction companies, which regularly dealt with larger amounts of money. *Id.* The companies owned by Oswald Lutepo and another contractor received 54% of the total value of Cashgate checks. *Id.*

115. See *ACB Arrest Financial Intelligence Unit Boss in Cashgate Breakthrough*, NYASA TIMES (Aug. 7, 2015), <http://www.nyasatimes.com/acb-arrest-financial-intelligence-unit-boss-in-cashgate-breakthrough/> (last visited July 9, 2016) ("Investigators of the [ACB] told Nyasa Times that the arrest of [the FIU manager] is a 'breakthrough' in the ongoing Cashgate prosecutions.")

*D. Asset Forfeiture*

Including the six buses purchased by Kalonga for the Banda campaign, an estimated MK 1 billion (\$1.4 million) in cash and property has been recovered.<sup>116</sup> That amount represents, at best, a mere three percent of the stolen Cashgate funds. The following description of tracing the proceeds of globalized organized crime networks in the 1990s aptly describes the Cashgate predicament:

Money is the reason for the big crime syndicates' existence and, like Samson's hair, the source of their strength. Taking it away is the solution. Finding it is the problem. Many countries have by now passed seemingly stringent laws to trap criminal money as it flows through the laundry. With few exceptions, the United States and Australia most notably, the laws don't work. Even those that do are barely skimming the surface. Except for Italy—and this not until 1993—no country has managed so far to seize more than what these syndicates would consider petty cash.<sup>117</sup>

Both the Corrupt Practices Act and the Money Laundering Act empower the ACB at any stage during the investigation or court proceedings to seize and freeze assets, no matter under whose name found, that are the proceeds of serious crime.<sup>118</sup> At the inception of the Cashgate investigations, the ACB seized various properties, including houses, vehicles, office buildings, and other property belonging to suspects in the scandal.<sup>119</sup> The Money Laundering Act mandates that the seizing authority must take “reasonable care to ensure that the property is preserved.”<sup>120</sup> The Act, furthermore, imposes liability upon the State for deterioration of seized property should the defendant be acquitted.<sup>121</sup> Yet there is no government agency or mechanism to

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(on file with the Washington and Lee Law Review).

116. Khamula, *K1bn Cashgate Criminal Proceeds*, *supra* note 29.

117. CLAIRE STERLING, THIEVES WORLD: THE THREAT OF THE NEW GLOBAL NETWORK OF ORGANIZED CRIME 229 (1994).

118. Corrupt Practices Act § 23A; Money Laundering Act §§ 48, 72.

119. MEJN REPORT, *supra* note 56, at 20.

120. Money Laundering Act § 72.

121. *Id.* § 47. Kayuni, *supra* note 87, at 20–21, discusses the case of *Republic v. Greselder Jeffrey and others*, wherein the DPP/ACB, upon charging the defendants in 2001 under the Anti-Corruption Act, seized the defendants' houses and cars pending trial. Over the ten-year prosecution the cars and

manage the frozen bank accounts and seized properties and businesses.<sup>122</sup> Thus, fearing liability, the ACB had no choice but to retract, proclaiming that “due to the unknown duration of the Cashgate trials, the Bureau feels it better not to seize property despite the Forfeiture Act giving it mandate.”<sup>123</sup>

The six buses seized in connection with Kalonga’s arrest are an example of the pitfalls associated with not having an asset management framework in place. Had the buses been forfeited civilly in rem, lacking a proper claimant, they could have been promptly auctioned.<sup>124</sup> Because they were seized criminally, per the Money Laundering Act’s mandate that official confiscation could only be effected after conviction,<sup>125</sup> the buses remained parked, unused for two years, at a police lot.<sup>126</sup>

As noted, the convicted Cashgate defendants were mid-level officials or businessmen who distributed funds to Banda party officials. Finding those funds is indeed the problem.<sup>127</sup> Possibly,

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houses rapidly deteriorated. *Id.* The defendants were acquitted and are now suing the government for the value of their assets, approximately MK 900 million (\$1.5 million). *Id.*

122. See THEODORE GREENBERG ET AL., WORLD BANK, STOLEN ASSET RECOVERY 85 (2009), [http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen\\_Asset\\_Recovery.pdf](http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen_Asset_Recovery.pdf) (noting that an effective asset forfeiture system requires organizational infrastructure to cope with the myriad practical issues that occur when handling seized and forfeited property).

123. Paida Kadzakumanja, *ACB Says Won’t Seize Cashgate Suspects’ Property*, NATION (Dec. 2, 2014), <http://mwnation.com/acb-says-wont-seize-cashgate-suspects-property/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

124. Money Laundering Act § 73.

125. *Id.* § 48.

126. Wanga Gwede, *Cashgate Buses Given to Malawi Army, Police and Prison*, NYASA TIMES (June 29, 2016), <http://www.nyasatimes.com/cashgate-buses-given-malawi-army-police-prison/> (last visited July 9, 2016) (“[T]hey were deteriorating in condition and depreciating in value.”) (on file with the Washington and Lee Law Review). Similarly, to avoid disposal issues, the DPP rejected Kalonga’s offer to turn over personal vehicles, rather than cash, as part of his plea bargain. See Mphatso Nkhoma, *Court Defers Sentencing of Kalonga*, NYASA TIMES (Feb. 12, 2016), <http://www.nyasatimes.com/2016/02/12/court-defers-sentencing-of-kalonga-cashgate-convict-has-issues-to-sort-with-lawyer-theu/> (last visited July 9, 2016) (discussing Kalonga’s plea bargain) (on file with the Washington and Lee Law Review).

127. For two reports from 2011 that foretold methods by which Cashgate conspirators would hide proceeds, including externalizing cash through illegal foreign exchange traders, see FINANCIAL INTELLIGENCE UNIT MALAWI, MONEY

the ACB could collaborate with civil society organizations in tracing questionable assets and filing in rem civil forfeiture actions.<sup>128</sup> If proceeds are traced to neighboring countries, the ACB could pursue confiscation and repatriation remedies under the recovery provisions of various international anti-corruption conventions.<sup>129</sup> Pursuing aggressive asset recovery techniques, however, requires adequate financial resources and sophisticated investigative capabilities.<sup>130</sup> Ironically, it is the freeze in donor aid that today cripples the ACB's capacity to achieve the extensive level of asset recovery demanded by the donors as a precondition to the resumption of aid.<sup>131</sup>

#### IV. Final Observations

*It would seem that this time grand corruption in Africa has an enemy [ACB] worthy of the fight.*<sup>132</sup>

– International Centre for Asset Recovery

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LAUNDERING TYPOLOGIES IN MALAWI (2011), <http://www.fiumalawi.gov.mw/MalawiMLTypologies2011.pdf>; STUART YIKONA ET AL., WORLD BANK, ILL GOTTEN MONEY AND THE ECONOMY 25–49 (2011), [http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Ill\\_gotten\\_money\\_and\\_economy.pdf](http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Ill_gotten_money_and_economy.pdf).

128. See GREENBERG, *supra* note 122, at 14–15 (discussing situations in which non-conviction based asset forfeiture is useful); Ndiva Kofele-Kale, *Change or the Illusion of Change: The War against Official Corruption in Africa*, 38 GEO. WASH. INT'L. L. REV. 697, 739 (2006) (advocating for “African governments to make increasing use of non-traditional methods of assets recovery”).

129. See, e.g., African Union Convention on Preventing and Combating Corruption art. 16, July 11, 2003, <http://www.auinticorruption.org/resources/view/convention-on-preventing-and-combating-corruption> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

130. GREENBERG, *supra* note 122, at 7. Investigative methods should include (1) net worth analyses of suspects to determine whether legitimate income explains ownership and (2) questioning suspicious land and car registry records to determine nominee ownerships. See generally JOHN MADINGER, MONEY LAUNDERING: A GUIDE FOR CRIMINAL INVESTIGATORS (3d ed. 2012) (discussing these investigative methods).

131. See, e.g., Kasakura, *supra* note 16 (noting that the aid suspension has paralyzed government operations).

132. Bacarese, *supra* note 11.

*Graft in Malawi is worsening.*<sup>133</sup>

– Irish Aid Survey

The accounts assistant whose maid's revelations started the unraveling of the Cashgate scheme was convicted at trial and sentenced to nine years in prison, his vehicle and cash forfeited.<sup>134</sup> Studies of corruption cases in presidential regimes in Africa have shown that while limited corruption can always escape presidential scrutiny, large-scale systematic corruption normally requires, at least, the President's tacit acquiescence and, more likely, personal supervision.<sup>135</sup> Given the improbability of a corrupt regime investigating itself, prosecutions usually only are possible when there is a regime change. But then, naturally, the question of political motivation arises.<sup>136</sup>

Nonetheless, it is a government's ability and resolve to deal decisively with the corrupt that evidences its political will to tackle corruption.<sup>137</sup> Since the Malawian public already views Cashgate as a national disaster, the government could begin restoring confidence by declaring likewise.<sup>138</sup> But President Mutharika rejects the notion that corruption is endemic in

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133. Frank Namangle, *Corruption Worsens – Survey*, NATION (Aug. 2, 2015), <http://mw.nation.com/corruption-worsens-survey/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

134. Chancy Namadzunda, *Court Saves Cashgate Convicts Properties: Sithole Money Forfeited*, NYASA TIMES (Apr. 3, 2015), <http://www.nyasatimes.com/court-saves-cashgate-convicts-properties-sithole-money-forfeited/> (last visited July 9, 2016) (on file with the Washington and Lee Law Review).

135. Kofele-Kale, *supra* note 128, at 737.

136. *Id.* at 738; Safarao, *supra* note 41.

137. See Patrick Lumumba, *Corruption: The Bane of Africa*, in CORRUPTION IN AFRICA: A THREAT TO JUSTICE AND SUSTAINABLE PEACE 17, 37–42 (E. Nduku & J. Tenamwenye, eds., 2014),

[http://www.globethics.net/documents/4289936/13403252/GE\\_Focus\\_14\\_web.pdf](http://www.globethics.net/documents/4289936/13403252/GE_Focus_14_web.pdf) (commenting that a genuine zero-tolerance approach would necessitate transparent tendering of government contracts, reforming political party systems, increasing citizen activism, and strengthening ACB capacities).

138. *Id.*



Malawi, professing that Cashgate only arose due to “irresponsibility” and “laxity” in managing public monies.<sup>139</sup>

Even though several conspirators have detailed former President Banda’s involvement, she has not been charged in the Cashgate scandal.<sup>140</sup> There has been little progress in the pending theft and money laundering trials of her senior officials.<sup>141</sup> Instead, the DPP and ACB invested their limited resources in prosecuting Kasambara for Mphwiyo’s attempted assassination, a trial that critics came to view as a two-year diversion from the desired anti-corruption focus.<sup>142</sup> Still, the fifteen convictions to date and the ACB’s increasing use of plea bargaining, money laundering laws, and, to some degree, asset forfeiture provide cause for guarded optimism. Interestingly, the Cashgate cases follow the same pattern seen in the thousands of other cases filed in the Malawian criminal justice system: namely, a high proportion of those arrested are not prosecuted, but of those who are prosecuted, the conviction rate is high.<sup>143</sup>

Regardless, perceptions of corruption continue to increase.<sup>144</sup> With the ACB’s capacity drained by the human and financial resources needed to fully investigate and prosecute Cashgate, allegations of new corrupt schemes soon recede from the

139. Chiumia, *supra* note 17.

140. See Masina, *supra* note 23 (remarking that Lutepo, Kalonga, and Senzani claimed that President Banda was the mastermind behind Cashgate and had instructed cabinet ministers to “solicit” money for the 2014 election campaign, and that Kasambara told the High Court he wanted Banda to be a witness in his corruption trial); Serah Makondetsa, *Anti-Corruption Bureau Closing in on Joyce Banda*, TIMES GRP. (Dec. 9, 2015), <http://www.times.mw/anti-corruption-bureau-closing-in-on-joyce-banda/> (last visited August 9, 2016) (“[ACB] said more people, who it cannot name now for security reasons, have implicated the former president in the systematic plunder of public funds.”) (on file with the Washington and Lee Law Review).

141. Nkhoma, *supra* note 73.

142. See Chisamba, *supra* note 74 (“[A Mzuzu University Professor] blamed the government for putting much emphasis on the shooting of the former Budget Director Paul Mphwiyo, which has now began to look like a diversion from the big fish who are still at large.”).

143. See KANYONGOLO, *supra* note 70, at 101 (noting that “49,435 [arrests] were prosecuted, 43,062 of which were convicted”).

144. Namangle, *supra* note 133; TRANSPARENCY INT’L, TABLE OF RESULTS: CORRUPTION PERCEPTIONS INDEX (2015), <http://www.transparency.org/cpi2015#results-table>.

headlines.<sup>145</sup> Although donor-driven reforms over the past decade have had some positive, short-term results, the reforms never resulted in long-term changes in the behavior of government officials.<sup>146</sup> Given the low probability of punitive action, corrupt officials never ceased their illegal practices.<sup>147</sup> By the end of President Bingu wa Mutharika's administration, it appeared that his commitment to good democratic and economic governance had waned.<sup>148</sup> The Cashgate scandal revealed the same lack of commitment by Joyce Banda's administration.<sup>149</sup> And today, unless the ACB is provided with sufficient independence, authority, and resources to function efficiently, the avowed zero-tolerance of Peter Mutharika's administration will be problematical.<sup>150</sup>

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145. Chiumia, *supra* note 19.

146. See MILLENNIUM CHALLENGE CORPORATION, MALAWI THRESHOLD PROGRAM END TERM EVALUATION 43 (2010), [https://assets.mcc.gov/reports/content-121510-malawi\\_threshold\\_program\\_evaluation.pdf](https://assets.mcc.gov/reports/content-121510-malawi_threshold_program_evaluation.pdf) (“[T]here is no evidence that Threshold activities had any impact on the overall goal of combating public sector corruption.”).

147. OXFAM AMERICA, TO FIGHT CORRUPTION, LOCALIZE AID 14 (2015), [http://www.oxfamamerica.org/static/media/files/1502034\\_AidCorruption\\_3web.pdf](http://www.oxfamamerica.org/static/media/files/1502034_AidCorruption_3web.pdf).

148. *Id.* at 17.

149. The rationale is explained in George Ayittey, *Why Africa is Poor*, in SUSTAINABLE DEVELOPMENT: PROMOTING PROGRESS OR PERPETUATING POVERTY? 57, 62 (J. Morris, ed., 2002), [http://ieas.unideb.hu/admin/file\\_6845.pdf](http://ieas.unideb.hu/admin/file_6845.pdf):

Since politics constitutes the gateway to fabulous wealth in Africa, the competition for political power has always been ferocious. Political defeat could mean exile, jail or starvation. Those who win power take over key state institutions and proceed to plunder the treasury. Key positions in these institutions are handed over to the president's tribesmen, cronies and loyal supporters—to serve their interests and not those of the people or the nation. Meritocracy, rule of law, property rights, transparency and administrative capacity vanish.

150. Chiumia, *supra* note 19; see, e.g., *ACB Corruption Inaction on Malawi Army Deal Involving Ministers and Ashok Leyland of India*, NYASA TIMES (June 20, 2016), <http://www.nyasatimes.com/acb-corruption-inaction-malawi-army-deal-involving-ministers-ashok-leyland-india/> (last visited July 9, 2016) (“[S]ources within the [ACB] informed Nyasa Times of increased meddling by the Executive to suffocate the investigations.”) (on file with the Washington and Lee Law Review).

There has been progress in the Cashgate cases, and the endeavors of the DPP Director and the ACB should be recognized.<sup>151</sup> But given the aforementioned administrative and financial constraints, let alone the death threats and Njauju's murder, the quest to secure convictions in the more complex cases may become quixotic. The ACB may be "worthy of the fight," but the expectations imposed by the donors and public are unrealistic.<sup>152</sup> Given the donors' freeze of budgetary support, the lack of financial resources will be a continual problem hobbling the ACB's effectiveness.<sup>153</sup> Further, the historical lack of communication between investigators and prosecutors arguably may well handicap the prosecutors at trial.

But even if the senior-level officials are convicted, without the recovery of significant assets to make a meaningful dent in the \$45 million Cashgate loss, all prognostications indicate that it is unlikely that Western donors will resume direct budgetary aid to Malawi.<sup>154</sup> And wherever Western countries retract in Africa, China seizes the opportunity to extend its influence.<sup>155</sup> All the

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151. See, e.g., Thom Chiumia, *Mary Kachale Is Nyasa Times '2015 Person of the Year': Malawi Top Prosecutor*, NYASA TIMES (Dec. 31, 2015), <http://www.nyasatimes.com/mary-kachale-is-nyasa-times-2015-person-of-the-year-malawi-top-prosecutor/> (last visited July 9, 2016) (praising the DPP Director) (on file with the Washington and Lee Law Review).

152. See Ephraim Nyondo, *Donors Can Fund Malawi*, NATION (Jan. 13, 2016), <http://mwnation.com/donors-can-fund-malawi/> (last visited July 9, 2016) ("Mutharika is facing a situation where he has to negotiate for the resumption of aid whose conditionality is now not only the prosecution of Cashgate cases, but a whole spectrum of how Malawi should manage its political, economic, and social life.") (on file with the Washington and Lee Law Review).

153. See DOIG, *supra* note 15, at 5 ("ACCs will never achieve 'success' until they are consistently funded at the right times, for the appropriately specified tasks, and at levels commensurate with a realistic level of performance.").

154. *Misplaced Charity*, *supra* note 3 ("Donors seem disinclined to resume direct budget support to Malawi: one describes it as 'in the past.'").

155. See *id.* ("[China] mov[es] into a country when others are pulling out. Last month it promised Malawi more food aid and 100 police cars."); *An Opinion on the Chinese Windfall of Loans*, AFRIEM (Oct. 27, 2015), <http://www.afriem.org/2015/10/an-opinion-on-the-chinese-windfall-of-loans-from-a-malawi-congress-party-child/> ("[W]hat is worrisome is the departure of the Western countries that have always attached their loans and grants to promotion of democracies in Africa and Malawi in particular. This is creating a gap that China is taking advantage of and extending its influence in Africa including Malawi."); Charles Mpaka, *Malawi Under the Spell of China*, BNL TIMES (Feb. 7, 2015), <http://timesmediamw.com/malawi-under-the-spell-of-china>

while, Malawi may well continue its slide down the abyss, its treasury in deficit, teetering on the brink of bankruptcy.<sup>156</sup>

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(last visited July 9, 2016) (discussing “[Chinese] loans that raise the spectre of debt for the country to \$300 million.”) (on file with the Washington and Lee Law Review).

156. See *Malawi Sitting on Time Bomb – Analysts*, NYASA TIMES (Jan. 23, 2016), <http://www.nyasatimes.com/malawi-sitting-on-time-bomb-analysts/> (last visited July 9, 2016) (“The country's economic woes are unlikely to disappear soon since the backbone of the economy [is] under serious attack . . . . [T]he Kwacha continues to slump sharply against the major trading currencies, a situation worsened by the absence of donors' inflows that greatly act as a buffer to the Kwacha.”) (on file with the Washington and Lee Law Review).