PD-ABY-918
91226

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

THE PROPOSED MALAWI INDUSTRIAL RELATIONS COURT

FINAL REPORT

Submitted to:

U.S. Agency for International Development/Malawi
Under Contract #: AEP-5451-1-00-2049-00

Prepared by:

Samuel Rugege, Ph.D.
Associates in Rural Development, Inc.
110 Main Street, Fourth Floor
P.O. Box 1397
Burlington, Vermont 05402 USA

March 1996

ACKNOWLEDGMENTS

The consultant would like to express his gratitude to the many people who have been of assistance in providing the information or other kinds of assistance that made the preparation of the report possible. The consultant is particularly grateful to Mr. Andrew Sisson and Ms. Kathryn English at USAID, Lilongwe. Ms. English was indispensable in making contacts with key persons in Malawi and arranging meetings with them. Mr. Justice Mwaungulu and the Registrar of the High Court, Mr. Twea, were generous with their time, allowing me to have several very useful discussions with them. Mr. Peter LaRosa and Mr. David Green at Associates in Rural Development, Inc. (ARD) were very helpful in making the preparations for the visits to Malawi and in providing constant support in carrying out the study. The consultant would also like to acknowledge the assistance of Professor Michael Gold of the School of Industrial and Labor Relations, Cornell University.

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

THE PROPOSED MALAWI INDUSTRIAL RELATIONS COURT 1

A. Introduction 1

B. Background to the IRC 1

C. The Status of the Court 2
1. Introduction 2
2. The Constitutional Problem 3
3. Views of Interviewees 3
4. Comparison with Other Countries 6
5. Summary of Arguments For and Against the IRC as a Division of the High Court 7
6. The Number and Siting of the Court(s) 8
7. Summary on Status of the Court 9
8. Recommendations 9

D. Composition of the IRC 9
1. Introduction 9
2. Views of Interviewees 10
3. Comparison with Other Countries 11
4. Summary on Composition of the IRC 13
5. Recommendation 14

E. Jurisdiction 15
1. Under the Constitution: "original jurisdiction over labour disputes..." 15
2. Under the Draft Industrial Relations Bill: "exclusive jurisdiction over all labour disputes..." 15
3. Ousting the Jurisdiction of the High Court? 16
4. Jurisdiction of IRCs in Other Countries 16
5. Summary on Jurisdiction 19
6. Recommendation 19

F. Appeals and Finality of Decisions 19
1. Introduction 19
2. Views of Interviewees Regarding Appeals 20
3. Comparison with Other Countries 21
4. Summary on Finality and Appeals 21
5. Recommendation 22

G. Legal Representation 22
1. Introduction 22
2. Views of Interviewees 22
3. Legal Representation in Labor Courts in Other Countries 23
4. Summary on Legal Representation 24
5. Recommendations 24

H. Reducing the Load of the IRC Through Internal Procedures, Mediation and Arbitration 24
1. Background 24
2. Non-Court Dispute Resolution Under the Bill 25
3. Alternative Dispute Resolution 26
4. Recommendations 27

I. Identification of Needs of the IRC 27
1. Infrastructure 27
2. Personnel and Training 27
3. Equipment 29

J. Preparing the Social Partners for the IRC 30
1. Training 30
2. Dissemination of Information 30
3. Law Reporting 30

K. Initial Budget 32

L. Conclusion 33

REFERENCES

APPENDICES

Appendix 1: List of Persons Interviewed
Appendix 2: Terms of Reference

d

EXECUTIVE SUMMARY

Background

This Consultancy was commissioned by USAID under a contract to Associates in Rural Development, Inc. (ARD) of Burlington, Vermont. This was at the request of the Judiciary for a study of the issues surrounding the setting up of an industrial relations court for Malawi. The study was to address the status, composition and jurisdiction of such a court and other relevant matters, drawing on the experience of other countries and the specific conditions of Malawi. The report is based partly on interviews conducted with government officials, members of the Judiciary and representatives of worker and employer organizations as well as some members of the University of Malawi. It also discusses the draft Industrial Relations Bill and other relevant documents.

Main Findings and Recommendations of the Study

Need for the Court

The Industrial Relations Court (or IRC) is welcomed by all the people who were interviewed. It will ensure speedy resolution of disputes in an atmosphere that promotes joint dispute management between employers and their employees. The Court is seen as a way of not only resolving disputes but also of solidifying new democratic rights as applied to the workplace. There is no definite view of how many courts there should be or where they should be sited. However, considering the cost and the estimated volume of work for the new court, it is suggested that there be one court in the major commercial center of Blantyre, which can also sit as a circuit court in the other regional centers as need arises.

Nature and Status/Level of the Court

The nature and status of the Court emerged as the most controversial aspect of the Court. On the one hand, the Constitution of Malawi authorizes the establishment of the Court as a court subordinate to the High Court. This has been interpreted by many to mean that the IRC will be at the level of a magistrate's court which, in their view, would not give it the power and prestige necessary for a special court handling labor matters. It is also argued that it would unduly limit the jurisdiction of the IRC and that it would not attract judicial officers of the required caliber. Thus it has been strongly argued that the Court should be at the level of the High Court. Since this cannot be done without going through a referendum to amend the Constitution, the solution suggested in the draft Industrial Relations Bill is to make the Court not a fully independent court, but rather a branch of the High Court.

On the other hand, this position is not favored by others. It is felt that there is no real need to make the IRC part of the High Court, nor is there justification for a labor court being elevated to the status of a superior court with all the powers of the High Court. Instead it is suggested that, recognizing the importance of industrial peace to the economy and to the

nation, the IRC should be a special court subordinate to the High Court, but a tier above the Chief Magistrate's Court. This would give it enough prestige to make it attractive both to litigants and those who are to run it. In the view of the consultant, this is the better option considering the cost, the spirit of the constitutional limitations and other reasons discussed in Section 3 of the report.

Composition of IRC and Decision Process

Composition will depend on the option chosen for the Court's status. If it is a division of the High Court, then a judge of the High Court would preside. If it is to be a special court subordinate to the High Court but above the Chief Magistrate's Court, as suggested above, then it would be presided over by a President of the Court who should be a senior lawyer, although not necessarily from the Judiciary. However, he/she could still be a person qualified to be a judge. Preferably, he should have post-graduate training in industrial relations (see below under training). The Presiding Officer should sit with ordinary members of the Court appointed from a panel nominated from the employers' organization and the employees' organization.

The decision of the Court is supposed to be a majority decision. Arguments were made for and against decision by majority. On the one hand, it would be difficult for nominated members to arrive at an objective decision. It was suggested, however, that the "representative members" should act only in the capacity of assessors or advisors whose opinion would not be binding. In line with the tri-partite spirit of dispute resolution in industrial relations, it is suggested that the position in the draft be retained, but that majority decisions should only be with respect to matters of fact. Questions of law should be left to the decision of the Presiding Officer.

Jurisdiction

The draft Industrial Relations Bill provides that the IRC shall have exclusive jurisdiction over all labor matters and other employment-related issues. There seems to be little controversy over this, although the Constitution only talks of "original" as opposed to exclusive jurisdiction. The problem here might be litigants who want to by-pass the IRC and go to the High Court which has unlimited jurisdiction. This has been a problem in some countries. To ensure uniformity and fairness, as well as speed, and to maintain the integrity of the IRC, it should have exclusive jurisdiction. However, there are cases where the High Court may have to intervene and exercise its unlimited jurisdiction. These cases should be rare and, in the majority of cases, the High Court should decline jurisdiction and defer to the IRC as a specialized and competent court.

Appeals

If the Court remains subordinate to the High Court, then appeals should lie with the High Court. The question is whether such appeals should be on all issues or limited to

questions of law and jurisdiction only, as stated in the draft Bill, leaving the IRC as the final arbiter on matters of fact. This would be advantageous in promoting reconciliation and disposing of disputes quickly if issues of fact are not appealable. However, it has been argued that the right of appeal on all issues is important in that it gives an aggrieved party a chance to challenge the decision as a whole and to allow an independent body to reexamine the case. Given the nature of industrial disputes and the need to normalize working relations as soon as possible, it is recommended that appeals from the Labor Court be only allowed on matters of law but not those of fact.

Legal Representation

Legal representation in the IRC is another controversial issue. The original draft stated that parties could either represent themselves or be represented by a member of their organization or, *with the leave of court*, by a legal practitioner. The idea behind this restriction was to discourage over-legalizing the procedures with consequent delays and to make the proceedings as straightforward as possible so that matters could be settled quickly. There is also concern that lawyers are expensive and few workers or trade unions would be able to afford legal representation. Others, however, argue that the right to be represented by a lawyer of one's choice is a fundamental right which should not be undermined. Further, they argue that lawyers often clarify issues which litigants are not able to appreciate without the assistance of lawyers. It is recommended that unrestricted access to legal representation be permitted. However, paralegals should be trained to represent those who cannot afford legal counsel.

Reducing the Case Load of the IRC

The report discusses the advantages of exhausting non-court dispute settlement procedures to reduce the potential case load of the IRC. It is noted that the proposed legislation provides avenues for amicable resolution of labor disputes, such as state-sponsored mediation and conciliation through the Department of Labor, which parties should be strongly encouraged to use. In addition, it is suggested that parties who are financially able should be permitted and encouraged to engage private mediators and arbitrators. This alternative dispute resolution (ADR) ensures privacy to the parties, saves time, is flexible in terms of scheduling compared to the Court's rigid schedules, and is cheaper than court proceedings, although it is more costly than the state-sponsored conciliation through the Department of Labor. In countries where it is used, it has considerably eased the load of labor courts. It is recommended that labor officers be trained in techniques of mediation and conciliation to inspire disputing parties to trust them with their disputes rather than taking them to court.

Identification of Needs of the IRC

Infrastructure

It appears that a new building for the Court, however desirable, would be costly. The IRC should be accommodated with either the High Court or the Magistrate's Court in Blantyre.

Personnel and Training

A Registrar of the IRC will be needed to act as manager of the court to ensure smooth operation of the Court, keep proper records and schedule dispute hearings. There might be an advantage in having a lawyer as Registrar, although he need not have extensive experience as this position could be used as training ground for other positions in the Judiciary. Reporters will be needed to record and produce proceedings of the Court. These reporters need to be trained in modern methods of recording to be efficient and reliable. Ancillary staff will also be needed.

Lastly, but most importantly, the Court will need a Presiding Officer. The recommendation is that the person who presides over the Court should be a senior lawyer with specialist training in industrial relations. There are a number of training institutions for industrial relations. Donors should be approached about the possibility of funding training of the President and Deputy President.

Equipment

The new Court will need to be equipped with basic but modern equipment to set it on sound operational basis. This includes computers and appropriate software, a printer, a CD-Rom recorder, tape recording system, a photo-copier and a vehicle (see budget).

Preparing the Social Partners for the Court

The report ends with a section on the need for training employers and more especially employees in the work of the Court, in industrial relations in general, and in the dissemination of information on industrial relations through mass media and pamphlets. This training will prepare them for constructive participation in the work of the Court. In particular, it is recommended that paralegals be trained to serve on the Court and represent litigants who cannot afford their own lawyers or otherwise advise their organizations on good industrial relations.

Budget

The budget for the initial expenditure on salaries for the first year and the equipment necessary for the Court to become operational, is estimated at approximately K1.35 million, or US $90,000.

THE PROPOSED MALAWI INDUSTRIAL RELATIONS COURT

A. Introduction

The consultancy was commissioned by USAID in response to a request by the High Court of Malawi for assistance in carrying out a study on the proposed Industrial Relations Court (herein after referred to as IRC or the Court) created under the new Constitution of Malawi as to its nature, composition, jurisdiction and other related matters. The task was contracted by USAID to Associates in Rural Development, Inc. (ARD), a consulting firm based in Burlington, Vermont, under Contract Number AEP-5451-1-00-2049-00. This report is largely based on interviews with key persons involved with setting up the Court or otherwise interested in the Court's operation. The interviews were carried out in Malawi during the period December 2-22, 1995. The interviewees included officials of the Department of Labor, trade unions, the Employers' Consultative Association of Malawi (ECAM), Ministry of Justice, the Judiciary and some members of the University of Malawi. A list of those interviewed appears at the end of the report as Appendix 1.

In addition to the interviews, the report is also based on the study of the proposed Industrial Relations Act (two drafts); the Malawi Constitution, 1995; labor legislation from a number of countries, particularly in Southern Africa; and other background reading for comparative purposes.

B. Background to the IRC

Malawi is in the process of democratizing all institutions of society which started with the democratic elections of 1994 after a period of 30 years of the authoritarian, non-democratic regime of Kamuzu Banda. Under that regime, many civil society institutions or organizations were suppressed and could not operate normally or effectively. One of these institutions was the trade union movement. Trade unions, although allowed to exist, were ineffective largely because of the general fear of being seen to be against government policy for national development and partly because of the ideology of "unity." As one government official put it:

> Trade unions were active just before independence but after that they died a natural death. The political atmosphere in the country was not conducive to organization. The Government preached the ideology of obedience, loyalty, unity and discipline--the so-called four pillars of the Malawi Congress Party through which the Government controlled and silenced the population. (Interview with official who asked to remain anonymous, 20 December 1995).

Thus, although there was a law allowing trade unions to operate and presumably engage in collective bargaining, no collective bargaining took place. In the wake of the freedom of association that came with the elections and the new Constitution, trade unions,

like other organizations, were able to operate freely. At the same time, the newly acquired freedom sparked off a spate of strikes in support of better terms and conditions of service. This made clear the need for orderly, regulated exercise of the right to freedom of association. The employers also needed to be guaranteed the right to freely negotiate the terms on which they will spend their capital without being intimidated by trade unions.

Sound industrial relations are based on that delicate balance between labor and management which primarily must be managed by the parties through negotiation, mediation, conciliation and arbitration, but which ultimately is guaranteed by law through the courts. It is with this background in mind that Malawians in general welcome the new Industrial Relations Bill and the Industrial Relations Court.

The IRC is seen as bound to improve industrial relations in the country since aggrieved parties to an employment situation will be able to get redress from the Court without having to wait for a long time, as happened when cases went to regular courts and had to compete with criminal and other types of civil cases. Now labor matters will have their own court. As far as labor-management relations are concerned, again the concerned parties are happy that there will be a special court that can resolve their disputes and thus minimize the need to resort to economic weapons of strike or lock-out. If industrial peace is established in this way, the new law and the new court should prove a good investment and good for the economy.

C. The Status of the Court

1. Introduction

The question of the Constitution and status of the proposed IRC, that is whether it should be a court subordinate to the High Court as proposed in section 110 (2) of the new Constitution of Malawi or a division of the High Court as proposed in the draft Industrial Relations Bill, is a crucial one. It emerged as the most contentious issue during discussions with a number of key figures in Malawi.

At the "Workshop on Labor Law Reform" in July 1995, it was recommended that "The status of the Court should remain subordinate to the High Court as it is provided for under the Constitution if only to allow the litigants the opportunity to appeal <u>but</u> appeals to the High Court to be limited to matters of law and not matters of fact in the interests of speedy and substantial justice" (REC A3.1). The recommendation, however, was said to be tentative and subject to a later workshop devoted to the IRC.

Subsequent to the above workshop, a delegation including representatives from the Ministry of Labor, the Judiciary, the Faculty of Law at Chancellor College as well as representatives of employer and employee organizations visited the neighboring countries of Zambia, Zimbabwe and South Africa that have experience with IRCs to find out how the courts were working. The observations of the delegations were discussed at another workshop

in November 1995 at which it was agreed among representatives of various interested parties to recommend that the Court be a division of the High Court rather than a court subordinate to the High Court. It is partly due to this recommendation and others adopted at the workshop that the draft Industrial Relations Bill was revised to provide for the new proposed status of the Court and other matters consequential to that change.

2. *The Constitutional Problem*

The first question that arises is whether the proposed Industrial Relations Act can vary what is spelled out in the Constitution without a constitutional amendment necessitating a referendum. Section 103 (3) states:

> There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or the High Court.

This is one of those sections which may not be amended without a national referendum (section 196 and the Schedule). Thus the IRC could not be set up as an independent court with powers equal to those of the High Court without a referendum. However, since section 110, which creates the IRC, is not an entrenched section in terms of section 196, it could be amended to upgrade the IRC from a subordinate court to a division of the High Court without going through a referendum.

Making the IRC a division of the High Court with specific jurisdiction exclusive to that division, when there are currently no divisions of the High Court, could be seen as creating a court with concurrent jurisdiction with the High Court, but giving it a different designation in order to circumvent section 103 (3) whose amendment would require approval of the electorate through a referendum under section 196. The move could be seen by some as subverting the spirit of the Constitution.

On the other hand, it could be argued that the framers of the Constitution did not have the opportunity to investigate all the implications of making the IRC a subordinate court and that meeting the real needs of the labor market by upgrading the IRC without the inconvenience and expense of a referendum would not be contrary to the purposes of the Constitution and would not be seriously objected to.

3. *Views of Interviewees*

A number of reasons were offered for the proposed change.

Avoidance of Special Courts: The people did not want a new system of courts parallel to regular courts and similar to the traditional courts which had apparently accumulated too much power and usurped functions that would normally have been performed by the regular courts, including the High Court. (This argument would seem

to support making the Court a subordinate court just as making it a division of the High Court.)

Respect for the Court: The IRC will be an important institution which should command sufficient respect from all the parties concerned if its decisions are to be effective. This can only be achieved, some argued, if the IRC were at the level of the High Court. Experience elsewhere, they said, had shown that industrial courts that had the status of subordinate courts did not command such respect, particularly from employers. (Examples, however, are hard to find in the sub-region. Only Lesotho has a labor court which is clearly an inferior court, although it is not a subordinate court but rather a special court, and it is having no problems of this kind. Zambia is not a good example since there the Industrial Court is presided over by a judge of the High Court, but its powers are too restrictive and its powerlessness results in people's lack of confidence in it.) A number of interviewees believed that making the IRC a division of the High Court would inspire confidence and encourage disputants to use it and respect its decisions.

Expertise and Career Development: If the Court is to be a subordinate court, it will most likely be presided over by a senior magistrate. Such a magistrate would be looking forward to promotion and therefore the mobility of presiding officers in the IRC could be high. Yet the objective should be to encourage permanence in the job so that whoever is the Presiding Officer should develop a specialization in the area of industrial relations. On the other hand, if the Court was at the level of the High Court, the judge appointed or redeployed to the IRC would most likely be happy in his or her position, would have no career development problem and could even retire in the job. In this way, expertise in industrial relations would be assured as far as the judge is concerned.

Specialized Nature of the IRC: The IRC is intended to be a special court specializing in industrial relations disputes and other employment-related matters. If it is at the level of the subordinate court, some people argue, it would mean that appeals would lie to the High Court on all kinds of issues including questions of fact and further appeals could lie to the Supreme Court. This would devalue the IRC as a specialized court since the High Court would not itself be specialized. (This argument is difficult to justify in light of the fact that there are other specialized courts such as family, juvenile, tax, and bankruptcy courts, but no serious arguments are ever made that higher courts should not take appeals from these courts because they are not specialized. One of the most specialized courts in industrial relations anywhere is the American National Labor Relations Board. However, its decisions are reviewable by the Court of Appeals and from there, appeals lie to the Supreme Court. No argument is made that those courts, not being specialized, should not have the power to reverse the decisions of the Board.)

Avoidance of Delays: Two-tier appeals to the High Court and the Supreme Court would cause undue delays and thus defeat the very purpose of creating this special court with jurisdiction to hear all labor cases and dispose of them as quickly as possible. It is thus better to make the Court a division of the High Court so that there would be only one level of appeal.

Monetary Jurisdiction: An IRC at the subordinate court level would be hampered by the monetary ceiling on their jurisdiction imposed on magistrate courts, while many employment disputes would involve high amounts.

An influential number of interviewees, however, thought that the IRC should remain a court subordinate to the High Court. Their arguments were that:

Amending the Constitution Not Warranted: The provision in the Constitution authorizing the creation of an IRC as a court subordinate to the High Court was all right. There was no need to change the Constitution in order to make the IRC a division of the High Court. A Chief Resident Magistrate should be able to handle an IRC. The Court as envisaged by the Constitution had not been tried. Once it had been tried and failed to meet the needs for which it was created, then a different form could be devised.

Specialization Not Compromised: There were already other specialized courts which were subordinate to the High Court and which were operating well. There was no reason why the situation would be different with the IRC.

Minor Cases Not for High Court: If the IRC was made a division of the High Court presided over by a judge, the judge would be bogged down with minor disputes which ought not and would not ordinarily go to the High Court. Both the Constitution and the draft Bill give the IRC original jurisdiction over all labor disputes and other issues relating to employment. Thus it is bound to hear even small claims and minor disputes, for instance, relating to individual contractual relations between an employer and his worker; claims that would be appropriately dealt with in a subordinate court. The High Court is a superior court of the land and should only handle complex cases or other cases which for a good reason cannot be handled at a lower level. Most industrial disputes are not likely to be in that category.

Cost: Making the IRC a division of the High Court would also mean higher costs for the parties since costs would be taxed at the High Court rate. The cost of High Court process to the litigants should be taken into account. Institutionally, it was also not worth spending the limited resources available to the High Court on minor litigation.

Accessibility: Making the Industrial Court a division of the High Court would compromise the objective of easy accessibility of an industrial court which it would

have if it remained a subordinate court, especially with respect to petty cases or simple claims.

No Challenge for High Court Judges in IRC: The judge assigned to a division of the High Court dealing only with industrial relations cases would be frustrated by being confined to one type of case for years. There would be no scope for intellectual development.

Rules and Procedures: The IRC is intended to have simplified procedures and is not to be bound by rules of evidence. It would cause confusion if it was to be part of the High Court as procedures and rules of the High Court should be uniform and consistent.

4. Comparison with Other Countries

Elevating the IRC to a division of the High Court finds *apparent* support in some neighboring countries in that most of the industrial relations courts or tribunals are presided over by High Court judges or persons qualified to be such judges.

The Namibian position comes closest to what is proposed by the Malawi draft Bill in making the Court an integral part of the High Court. The presiding judge of the Namibian Labor Court is drawn from regular judges of the High Court and is designated for the purpose by the Judge President on an ad hoc basis for the duration of a hearing or for a number of cases, as determined by the Judge President. The difference is that, in Malawi, what is intended is full-time rather than ad hoc assignment of judges of the High Court as President and Deputy President of the IRC.

Under the new South African Labor Relations Act (1995), the Labor Court is equivalent to a division of the Supreme Court, although it is not an integrated part of the Supreme Court.

Zambia, as indicated above, has a system whereby the Industrial Relations Court is presided over by a judge of the High Court or a person qualified to be a judge of the High Court with appeals going straight to the Supreme Court. However, it has limited powers regarding remedies, and the High Court has declared itself competent to hear and provide remedies in areas where the Industrial Court should be exercising jurisdiction.

In Swaziland and Botswana, the Presiding Officer must be a person qualified to be, and is appointed in the same way as, a judge of the High Court. However, the decisions of the Industrial Court in both countries are appealable to the High Court.

Similarly, the Zimbabwe Industrial Tribunal, although supposedly at the level of the High Court, does not have the powers of enforcement of its decisions that the High Court possesses. It has to register its decisions with the High Court or Magistrate's Court depending

on the nature of the remedy sought to be enforced. Thus, it is really a special court similar to an administrative agency rather than part of the High Court system.

Within the Southern African sub-region, Lesotho's Labor Court is a unique, special court more associated with the Ministry of Labor than the Judiciary. The members of the Court, from the President to the labor and management panels, are appointed by the Minister. Its decisions are final and not appealable, but reviewable by the High Court. It differs from an administrative agency in that it has powers to enforce its own decisions similar to a court of law including the power to punish for contempt of court.

In the United Kingdom, the industrial tribunals are not at the level of the High Court and are not presided over by judges of the higher courts. It may be argued that it is the Employment Appeal Tribunal which is at the same level as the High Court. Industrial tribunals in the United Kingdom are specialized courts staffed by solicitors or advocates of seven years' standing and which can be regarded as inferior or subordinate courts.

In the USA, the National Labor Relations Board (NLRB), which has as part of its functions the adjudication of industrial disputes, is a specialized administrative agency. Decisions from the Board are reviewable by the United States Court of Appeals. The NLRB does not have its own enforcement powers, but must go through the federal district court of the area in which the claim arose to enforce its judgments. Thus, although it enjoys enormous prestige, in a sense it may be equated to an inferior court.

5. *Summary of Arguments For and Against the IRC as a Division of the High Court*

Arguments for:

- Greater stature and public confidence.
- Shorter appeal process (to the Supreme Court) and hence, faster disposition of cases instead of two-tier appeals to the High Court and Supreme Court.
- Attraction of high-caliber personnel with discernible career prospects.
- Avoidance of confusion over which forum handles which labor/employment-related case: Industrial Court or High Court as in South Africa under the old system and in Zambia.

Arguments against:

- It would be against the letter and spirit of the Constitution and cumbersome as well as costly to amend the Constitution to make the IRC a division of the High Court.

- It would be unnecessarily costly to have a labor court that has the status and personnel of a superior court in a poor country with a small industrial base. A lessor court would be easier to set up and less costly to run in terms of salaries, benefits and facilities.

- Being a subordinate court would not detract from the specialized nature of the court. On the contrary, it would be suitable for the simple claims that form the bulk of labor cases.

- It would be difficult to find enough judges of the High Court to staff IRC as proposed, while it would be easier to find qualified personnel for running the lesser court.

- A division of the High Court would be less accessible than a special court subordinate to it, especially in terms of court fees and lawyers' fees.

- As a court just below the High Court, the IRC would be a training ground for potential judges of the High Court who could then use their acquired specialized knowledge in handling appeals to the High Court.

6. The Number and Siting of the Court(s)

It was noted that if the IRC is to remain a court subordinate to the High Court, it should have four branches, one for each region: northern, central, eastern and southern. Whatever the merits of the above suggestion, section 110 of the Constitution says "There shall be an Industrial Relations Court...." It does not refer to "courts" as in the case of subordinate courts properly so-called.

Although the suggestion of four courts has the merit of bringing the Court closer to the people, it does not seem to be justified in terms of volume of work and cost involved. Estimates based on the population and size of the economy would suggest a case load that is not heavy enough to justify four courts, at least to start with. It is estimated that not more than 200 cases would be filed with the Court and that about half would either be settled out of court, be referred for conciliation or arbitration, or be withdrawn before any hearing took place.

One court with a President and a deputy President should therefore be sufficient. At a later date, a substantially increased case load could justify the increase in the number of courts. In the meantime, branch operational offices could be established in the regional centers in the north, central and eastern regions, with the main office in Blantyre serving the Southern region. Whereas the main office would be headed by the Registrar of the IRC, the branch offices would be staffed by an assistant registrar or senior clerk responsible for receiving complaints filed, putting documents together and transmitting them to the IRC registry in Blantyre.

7. *Summary on Status of the Court*

There appear to be more compelling reasons for keeping the status of the IRC as it is under the Constitution than for changing as proposed in the Bill. The reasons most in favor of the current constitutional position are cost, accessibility and the ease of identifying personnel capable of staffing the Court but who, with experience, could be promoted to the High Court bench and thus provide expertise at the appeal level. Moreover, the participation of ordinary members in decision-making is more suited to a special court totally separated from the regular courts than as a division of the High Court. On monetary limitation on jurisdiction, the IRC will be a creature of statute, and the relevant statute should set out the monetary jurisdiction of the IRC as a special court without being constrained by the limitations on subordinate courts properly so-called. Although the issue of delays on appeal is a valid one, one possible solution to the problem could be to allow appeals to go straight to the Supreme Court on questions of law only. Alternatively, appeals could go to the High Court while further appeals to the Supreme Court could only be permissable with leave either of the High Court or the Supreme Court itself.

8. *Recommendations*

It is recommended that:

- The IRC should be a court subordinate to the High Court, but not directly part of the hierarchy of courts. It should be treated as a special court with special jurisdiction and powers. For purposes of appointment and remuneration of personnel, it should be regarded as being above the Chief Magistrate's Court but below the High Court.

- The IRC should be one court based in the main commercial center of Blantyre, but with the capacity to move around the country on a circuit basis when the parties and their witnesses are based in places far away from the Court.

D. Composition of the IRC

1. *Introduction*

The draft Bill provides that the IRC shall be composed of a President, who shall be a judge of the High Court, and a Deputy President, who shall also be a judge of the High Court--both designated by the Chief Justice and other judges of the High Court as may be appointed by the Chief Justice as he thinks fit. In addition, five or more persons are to be nominated by the most representative organization of workers and another five or more nominated by the most representative organization of employers and appointed by the Minister responsible for Labor.

In light of the recommendation on the nature of the IRC above, the question of the Court being staffed by High Court judges need not be discussed further except to note how costly it would have been to appoint two more new judges for the IRC as it is unlikely that the High Court could afford to designate current High Court judges for the IRC.

As far as the provision on non-judicial members of the court are concerned, the intention here seems to be to extend the joint decision-making or tri-partite spirit of industrial relations espoused and promoted by the International Labor Organization (ILO), to the dispute settlement process including the Court.

The question to be asked is whether this set-up does not, in fact, undermine the objectivity and impartiality of the Court. The answer to the question may be that, once appointed, the "representative" nominees consider themselves as independent members of the Court rather than as representatives of their organizations and make their decisions objectively.

Section 57 of the original draft of the Bill provided for a "chairman's panel" whereby the President of the Court was to appoint a number of lawyers to the Court on the basis of their knowledge or experience of labor relations. These appointees could have had the effect of moderating the possible hard-line positions of the labor and management nominees. With this "third force", the 'representative' appointees would not cause a deadlock to be broken by the Presiding Officer. However, the "chairman's panel" was dropped from the revised draft apparently on the grounds that it would be difficult if not impossible to find lawyers willing to sit on the IRC, especially knowing that they would not be paid their usual hourly rate.

2. *Views of Interviewees*

Views on the composition of the IRC followed the pattern of those on the nature and status of the Court. Those who favored the IRC as a division of the High Court of course expected that the Court should be presided over by a High Court judge, while those who wanted to uphold the position in the Constitution thought that the Court should be presided over by a senior magistrate, preferably of the rank of Chief Magistrate.

There was less divergence on the rest of the membership of the IRC. Most people interviewed either enthusiastically supported the inclusion of ordinary members on the Court or had no objection to their inclusion. Trade union leaders in particular were satisfied about their anticipated participation in the work of the Court.

The women interviewed welcomed the inclusion in the revised draft of a requirement that at least one woman should be included on each panel. These women had argued for this minimum gender sensitivity in the Constitution of the Court. If each panel is to be five or more persons, it may be a good idea to raise the minimum representation of women on these panels to two in order to give the Presiding Officer more choice in including women on the Court.

The only difference of opinion seems to be on the decision-making process: whether the ordinary members should be full voting members or assessors. Both employer and employee representatives and some of the officials interviewed favored the position as it is in the Bill, that the "representative" members have an equal vote with the Presiding Officer so that the decision of the majority is the decision of the Court.

Most of the lawyers talked to, on the other hand, were of the view that the decision of the Court should be that of the Presiding Officer and the other members should only act as assessors. They could not imagine a court of law where laymen (outside of the jury system) made decisions. The ordinary members did not have the expertise and could give disastrous decisions. A decision made by a judicial officer would carry more weight than that of a group of lay representatives. It was suggested by one lawyer that the promoters of the position in the Bill were trying to get the best of all worlds by having a court with the status and respect of a superior court, but to have it operate like a tribunal. Further, these "representative" members were likely to be partisan in their positions and would not assist the Court in arriving at fair decisions, but rather would be disagreeing most of the time. It was better, they argued, if representative members gave their opinions of a case, but with the stipulation that these opinions not be binding on the Presiding Officer.

3. Comparison with Other Countries

In the United Kingdom, the composition of the industrial tribunals are somewhat similar to what is proposed for Malawi in the revised draft. The Chairman must be a barrister or a solicitor of at least seven years' standing, although he need not be a judge of the High Court or any other court. He or she sits with two ordinary members, who have industrial relations experience, drawn from panels appointed by the Secretary of State for Labor--one after consultation with employers' organizations and the other after consultation with trade unions. The non-lawyer members, although ad hoc rather than permanent, have full voting powers with the Chairman, as is proposed in the Malawi Bill, the decision of the Court being a majority decision.

In the United States, the situation is totally different in that all five members of the National Labor Relations Board who are appointed by the President are lawyers.

Equally, in South Africa, the new Labor Court will consist of only lawyers made up of a Judge President, a Deputy Judge President and judges of the court appointed by the President of the country acting on the advice of the National Economic Development and Labor Council (NEDLAC). To qualify for appointment, the person must be either a judge of the Supreme Court of South Africa or a legal practitioner with at least 10 years of experience as an attorney, advocate, or a University teacher and a person with expertise or experience in labor relations. There will be no ordinary members of the Court, whether full members or assessors. However, the South African Labor Court is supplemented by a very effective dispute settlement system in which employers, employees and their organizations have ample opportunity to participate.

In Zimbabwe, the President of the country appoints the Chairman of the Industrial Tribunal who must be a person qualified to be a judge of the High Court and a Deputy who must be a legal practitioner. He also appoints independent members of the Court on the basis of their being legal practitioners or having experience in industrial relations without the unions or the employers being involved in the appointment process.

As indicated earlier, Namibia's Labor Court is presided over by a judge or acting judge of the High Court designated for the purpose by the Judge President of the Namibia High Court for the duration of a particular hearing or series of cases. The presiding judge has discretion to appoint two or more *assessors* to sit with him from a list compiled by the Minister after consultation with registered, representative unions and employers' organizations. The judge makes the appointment either on his or her own initiative or at the request of one of the parties. Thus, not only are ordinary members non-voting, but they are not bound to be there in every case. The presiding judge may also appoint other assessors on the basis of their knowledge or experience in the field related to the matter to be adjudicated.

Zambia has another variation. The Court consists of a Chairman and Deputy Chairman who must be judges or persons qualified for appointment as judges of the High Court, appointed by the President on advice of the Judicial Service Commission. In addition, not more than 10 members are appointed by the Minister of Labor as full members of the Court and an even number of persons, not exceeding 14, are nominated by the Minister--one-half representing employees and another half representing employers to act as *assessors*. The lists of these potential assessors are submitted to the Chairman of the Court so that he or she can select one person from each list to sit as assessors with the Court for a particular hearing. The ordinary members of the court, apart from the assessors, are appointed on the basis of their expertise or experience in industrial relations and not on their affiliation to either the employer or employee organizations and are therefore more likely to assist the Court in arriving at a fair and sound decision, perhaps to neutralize the possible hard-line positions of the partisan representatives.

In Lesotho, the Labor Court consists of a President and two or more ordinary members selected from the employee and employer panels nominated by the Minister after consultation with the respective representative organizations. The decision of a majority of the members of the Court present is the decision of the Court.

Botswana and Swaziland have similar provisions on the composition of their IRCs. The Court in each country consists of a person qualified to be a judge of the High Court, appointed in the same manner as the judges of the High Court, together with two other members appointed by the President of the Court--one from a panel of six persons nominated by the employers' federation and one from a panel of six nominated by the federation of trade unions. The majority decision is the decision of the Court except on matters of law or on whether a matter is a question of law or fact which are decided by the President of the Court.

4. Summary on Composition of the IRC

Since it has been recommended to keep the IRC subordinate to the High Court, it will not be necessary to have the Court presided over by a judge of the High Court or a person qualified to be a judge of the High Court. However, to meet the strong arguments in favor of a high status for the Court and to attract high-caliber personnel, Malawi could follow those countries where the labor courts are not equated to the High Court, but are presided over by persons qualified to be judges of the High Court. This would not be contrary to the Constitution, since in section 110 (2), it leaves the composition of the IRC open for Parliament to determine, whereas it clearly states that subordinate courts created under sub-section (1) shall be presided over by professional and lay magistrates.

More examples and sound arguments exist in favor of including ordinary persons on the Court and, in particular, people nominated from the social partners--employers and employees. The question is whether they should be full decision-making members or merely assessors whose opinions are taken into consideration, but are not binding on the Court. The fear expressed is that such representatives are likely to be partisan in their opinions and view of the case before them, thus undermining the essential objectivity of the Court. The judge or chairman would then appear to side with one or the other of the opposing sides in order to get a majority decision. Seen in this light, the credibility of the Presiding Officer could be undermined.

On the other hand, it has been argued that a labor court is different in nature from an ordinary court and should be seen as an extension of the negotiating process between employers and employees. For this reason, there is nothing wrong with making the nominees of these interest groups full participants in the resolution of disputes.

Further, labor courts in which representatives of labor and management made the decisions have been found to be more popular with those interest groups than the ordinary courts where the judge tries very hard to be impersonal and detached from the dispute. At the same time, it has been observed that once the representatives are appointed as members of the Court, they progressively cease to regard themselves as representatives of their constituencies, but rather as agents of justice bound to think and decide according to the law and principles of fairness and justice. Decisions will normally be arrived at by consensus rather than by voting. This in fact appears to be the position in the United Kingdom where, in the 1980s, 96 percent of decisions of industrial tribunals were arrived at unanimously with labor and management nominees fully participating (Hepple and Fredman 1987).

The question remains, however, whether the environment in Malawi is comparable. From all accounts, industrial relations practice in Malawi is in its infancy, given the many years of repression and consequent absence of a culture of collective bargaining and joint dispute resolution. Under the circumstances, it may be preferable for the persons nominated to the Court from among employers and employees to act as assessors leaving it to the lawyer-President to make the decision.

It may be argued, however, that ordinary members of the Court will learn from experience on the Court as well as from special training designed for them (see Section 9 below). On the question of partisanship, the statistics quoted above from the United Kingdom on unanimity would tend to suggest that there is no danger in "representative" members having an equal vote with the Presiding Officer. In addition, reports on the Botswana, Lesotho and Swaziland courts suggest that the majority of cases decided so far have been decided unanimously.

5. Recommendation

A number of alternatives can be considered. The Court could be composed as follows:

Alternative 1: (a) The President, who must be a person qualified to be a judge of the High Court appointed by the Chief Justice; (b) the Deputy President, who shall be a lawyer of at least seven years' standing appointed by the Chief Justice; (c) persons nominated by the President of the Court for their experience or expertise in industrial relations (they need not be lawyers); and (d) equal numbers of representatives nominated by the most representative organizations of workers and employers and appointed by the Minister as full members of the Court. The quorum for any hearing should consist of the President or Deputy President, at least one member from the President's panel, and one member each from the employee and employer panels.

Alternative 2: As in 1 above except that the President shall be a lawyer of at least seven years' standing and a Deputy similarly qualified.

Alternative 3: As in 1 or 2 above except that the representative appointees should be assessors rather than full members of the Court (as is the case in Zambia).

Alternative 4: The President and Deputy President as in 1 or 2 above, together with equal numbers of Ministerial appointees from those nominated by representative employee and employer organizations as full members of the Court. Decisions of the Court should be those of a *majority on questions of fact while questions of law should be determined by the President or Deputy President* (as in Botswana and Swaziland).

Alternative 4, with the President being a person qualified to be a judge of the High Court, would appear to be the most attractive as it is a fair compromise on the two aspects of the composition of the Court. It would take care of the stature of the Court in terms of the Presiding Officer without changing the nature of the Court. It would also retain the tri-partite spirit of an industrial relations dispute resolution forum while allaying the fears of lawyers about the risk of distorting or diluting the law. Further, it addresses the point that the IRC should not just be concerned with the fairness to the parties, but should be equally concerned that decisions are in accordance with the law and enhance the development of a labor law jurisprudence.

E. Jurisdiction

1. Under the Constitution : "original jurisdiction over labour disputes..."

The Constitution of Malawi states in S.110 (2) that:

> There shall be an Industrial Relations Court, subordinate to the High Court, which shall have *original jurisdiction over labour disputes and such other issues relating to employment....* (emphasis added).

The section thus gives the IRC a very broad jurisdiction over virtually all employment-related matters covering both rights disputes arising out of individual employment contracts, collective agreements and statutory rights as well as interest disputes related to attempts by trade unions and employers to establish the parameters of new rights, privileges and duties. The Court should also have jurisdiction over unfair labor practices alleged against employers or trade unions under Part II of the draft Industrial Relations Act and over disputes relating to the conduct of industrial action or reorganization of business. This is a good provision in that if a special court is set up for labor and employment matters, it should reduce the burden of ordinary courts by being able to hear all employment-related matters.

The jurisdiction granted by the Constitution does not seem to cover prosecution hearings of offenses committed in relation to the employment relationship. Such offenses will presumably continue to be handled by the regular courts, while workmen's compensation claims will continue to be handled by the Workmen's Compensation Board or, if there is an allegation of negligence, then the case can go to the ordinary court as a tortious claim.

There might be a case, however, for transferring to the IRC even prosecutions arising out of breaches of statutory duties related to employment, given that such prosecutions are part and parcel of measures aimed at creating a safe and healthy working environment and improving work conditions. Indeed dangerous or poor working conditions often give rise to industrial disputes and strikes. Another point to keep in mind is that conditions giving rise to prosecution of employers for non-compliance with the employment law need to be put right as soon as possible, since they might be a risk to life or health or likely to lead to confrontation between employers and employees, and again need to be attended to at the earliest opportunity. It might therefore be advisable to give the IRC special and limited criminal jurisdiction to handle statutory offenses under the Employment Act and other labor-related legislation. That jurisdiction need not be spelled out in the Industrial Relations Act. It could be provided for under the various statutes dealing with these issues.

2. Under the Draft Industrial Relations Bill: "exclusive jurisdiction over all labour disputes..."

The revised draft Industrial Relations Bill makes the IRC potentially even more powerful than under the Constitution. Section 54 states that "(1) The Industrial Relations

Court shall have exclusive jurisdiction to hear and determine all labour disputes and disputes assigned to it under this or any other Act." The purpose here, it is assumed, is to ensure that no other court assumes jurisdiction over any labor or employment-related matter.

The change seems to have been prompted by the discovery by those who were involved in revising the draft Act that, in some countries where the labor court is only given original jurisdiction, a higher court, such as the High Court, may assume concurrent jurisdiction with the labor court or claim exclusive jurisdiction on some issues--especially on individual employment. This has been observed in Zambia, the United Kingdom and South Africa (under the old Act).

3. Ousting the Jurisdiction of the High Court?

The question that arises is whether the Act can oust the unlimited jurisdiction of the High Court. Section 108 (1) of the Constitution which establishes (or recognizes the continuation of) the High Court of Malawi, gives that court "unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law." This section makes the revised section 54, discussed above, which by implication ousts the jurisdiction of the High Court, *ultra vires*. On the other hand, since the Industrial Relation Act proceeds on the premise that the IRC shall be a division of the High Court, then the issue of *ultra vires* would not arise if indeed it became possible to establish the IRC as a division of the High Court. A similar provision in the Lesotho Labor Code giving the Labor Court exclusive jurisdiction has recently been tested in the Court of Appeal of Lesotho (discussed below).

4. Jurisdiction of IRCs in Other Countries

The jurisdiction of labor courts or industrial tribunals in developed countries tends to be considerably circumscribed. Typically, the law setting up these courts has excluded individual employment disputes as belonging to the law of contract and therefore justifiable in ordinary courts; or has treated interest disputes as more properly in the realm of collective bargaining, conciliation or arbitration and not suitable for judicial resolution; or excluded both. On the other hand, in many African countries, the practice is to give the labor court jurisdiction over all employment-related matters, both individual and collective.

In the United States, the National Labor Relations Board (NLRB) adjudicates on two types of cases: (i) unfair labor practice cases, including interference with trade union activities, dominating or assisting unions in order to influence them, discrimination based on involvement in trade union activities, refusal to bargain in good faith, etc.; and (ii) representation cases--that is, cases involving the question of whether a union is entitled to represent a group of workers or continues to enjoy representativeness if previously recognized as such. The NLRB does not entertain interest disputes or the enforcement of individual or collective agreements unconnected with unfair labor practice. These have to go to arbitration or to the regular courts.

In the United Kingdom, the jurisdiction of the industrial tribunals is not as clear-cut. They have jurisdiction over almost all statutory, individual employment rights including unfair dismissal, compensation for redundancy and questions of unequal treatment based on race, sex, etc. They avoid collective disputes, leaving them to be handled by the Advisory, Conciliation and Arbitration Service (ACAS) and other voluntary mechanisms for resolving labor disputes as well as to economic pressure through strikes and lock-outs. However, purely contractual issues such as actions for damages or other remedies for breach of the employment contract as well as actions in tort and the issue of interdicts for the same and actions for personal injury or death arising out of employment are handled by the ordinary civil courts. It is observed that because of the problem of demarcation between what is individual and what is collective, what is a labor and what is a contractual issue, "An awkward separation of jurisdiction between tribunals and the ordinary civil courts remains" (Hepple and Fredman, 1986, p. 59). For instance, an unfair dismissal victim may bring his/her action to the industrial tribunal, but cannot ask the tribunal to deal with his or her claim for arrears for holiday pay because that is a breach of contract issue which must be dealt with by the ordinary courts. This is one reason why Malawi should avoid such problems by giving the IRC extensive and all-inclusive jurisdiction over labor and employment matters.

In Zambia, the Industrial Court has power to hear and determine all industrial relations disputes and employment matters, including matters arising out of breaches of individual employment contracts and collective agreements. In addition, the Court has power to hear cases of unfair labor practice, in particular those related to unfair or discriminatory treatment by an employer. Dokali, in his report has shown the problems related to the Zambian jurisdictional provisions in that according to the interpretation given by the Supreme Court, the powers of the Industrial Court to hear all labor and employment-related matters are worthless as no remedies are specifically spelled out in that regard. The only remedies it can provide are in relation to unfair treatment based on sex, race, tribal extraction, religion, etc., for which the remedies of damages or reinstatement are specifically mentioned. Fortunately, the Malawi draft avoids the problem by clearly stating the jurisdiction of the IRC to be over all labor and employment-related matters as well as spelling out in various parts of the Act the remedies which the court, in its discretion, may provide (for instance sections 7, 22).

In Lesotho, the Labor Code provides that the Labor Court (which is a special court subordinate to the High Court) has "exclusive jurisdiction" regarding any matters provided for under the Code including, but not limited to, trade disputes. This has been interpreted to mean all industrial relations issues as well as individual contract claims. However, the exclusiveness of jurisdiction has been challenged. Section 25 states that "No ordinary or subordinate court shall exercise its civil jurisdiction in regard to any matter provided for under the Code." Initially this was thought to oust the jurisdiction of all courts, including the High Court, as far as labor matters were concerned. However, in the recent case of Makhutla v. Lesotho Agricultural Development Bank Court of Appeal (CIV) No. 1 of 1995, Browde J.A. stated that the High Court was not an ordinary court and could exercise its unlimited jurisdiction over all matters. This position was reaffirmed in another Court of Appeal case of Attorney General v. Lesotho Teachers Trade Union (C.A. ((CIV) No. 29/1995; Unreported). In a

judgment delivered on 19 January 1996, Steyn J.A. said the use of words "exclusive jurisdiction" were not effective to oust the jurisdiction of the High Court to issue an interdict where striking workers engaged in unlawful conduct purported to be picketing. He said if Parliament wished to oust the unlimited jurisdiction of the High Court, it would have to do so directly, leaving no room for ambiguity.

The Namibian Labor Court has probably the most comprehensive jurisdiction. It has "exclusive jurisdiction" over a host of matters, including hearing and determining appeals from a district labor court, applications made in terms of the Act, to review and set aside or correct decisions taken by the Minister or the Permanent Secretary or Labor Commissioner in relation to provisions of the Act, and to grant urgent interim relief until a final order has been made. Section 18 of the Code clearly avoids the problems of the Zambian situation by giving the court jurisdiction to:

- issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;

- make any order which it is authorized to make under the provisions of this Act or which the circumstances may require in order to give effect to the objects of this Act; and

- generally deal with all matters, necessary or incidental to its functions under this Act, including any labor matter, whether or not governed by the provisions of this Act, any other law or the common law.

This section clearly ousts the jurisdiction of other courts in all labor matters. Fortunately for Namibia there is no constitutional conflict similar to the one that could arise in Malawi. Moreover, as seen above, the Namibian Labor Court has the enforcement powers of the High Court in labor matters.

The new South African Labor Relations Act (1995) also provides for a Labor Court with extensive *exclusive* jurisdiction. It has power to issue orders, interim relief pending finalization of actions, declaratory orders, award of compensation or damages and "any other relief that the court deems just and equitable in the circumstances." Despite the extensive powers of the South African Labor Court, the Act throughout emphasizes the primacy of voluntary resolution of disputes through conciliation, mediation or arbitration. The Labor Court has power to refer a matter to arbitration where compulsory arbitration is required by law, for instance, in relation to essential services. Though attractive, it would be difficult to emulate the South African situation.

Botswana and Swaziland have similar provisions giving the Industrial Court exclusive jurisdiction over all matters arising under their industrial relations statutes, including the determinations of collective disputes, issuing of injunctions against industrial action as well as resolving individual grievances such as dismissals and retrenchments.

5. Summary on Jurisdiction

The IRC should have extensive and comprehensive jurisdiction over all labor-related matters to ensure its efficacy, respect and full utilization. However, the use of the term "exclusive jurisdiction" may cause problems as challenging the constitutionally mandated, unlimited jurisdiction of the High Court. At the same time, the High Court should not usurp the jurisdiction properly belonging to the IRC, given the latter's specialist nature. The High Court should only accept jurisdiction in exceptional circumstances.

6. Recommendation

In line with the earlier recommendations on the status of the Court and its composition, it is recommended that section 54 of the Bill reverts to its original wording in accordance with section 110 (2) of the Constitution. The IRC should have original (not exclusive) jurisdiction over all labor and employment-related matters. The High Court should recognize the IRC as a specialized court and decline jurisdiction in all those matters over which the IRC has jurisdiction unless exceptional circumstances require the intervention of the High Court.

F. Appeals and Finality of Decisions

1. Introduction

According to section 56 of the revised draft Bill, the decisions of the IRC are final and binding, but appealable to the Supreme Court on questions of law or jurisdiction only. This would leave the IRC as the final arbiter on questions of fact. If the proposed wide jurisdiction of the IRC is maintained, then there should be few cases where an appeal is on the question of jurisdiction. The controversial issue therefore is whether an appeal should be limited to questions of law as in the draft or whether appellants should be allowed to challenge the decision of the IRC as a whole.

A related matter is that of whether enforcement of the decision of the IRC should go ahead despite the noting of an appeal. Section 58 (3) states that:

> The lodging of an appeal under sub-section (2) shall not stay the execution of an order or award of the Industrial Relations Court, unless the Industrial Relations Court directs otherwise.

This provision is reasonable and commendable given the nature and purpose of industrial relations courts to process disputes in a speedy and equitable manner and to promote the resumption of normal working relations at the earliest opportunity. The provision will discourage those who may want to appeal to delay implementation of the Court order. This is particularly important in labor disputes where postponement of implementation of an order could lead to the rising or flaring up of emotions and possible confrontation or other damaging consequences on the part of one or both of the parties involved in the dispute.

The problem that might arise if execution of judgement goes ahead despite the appeal is that, once the remedy is made effective, it may not be easy to reverse the situation if the appeal succeeds. For instance, where money damages are awarded for unfair dismissal and the money is paid out to the worker but subsequently (maybe six months later), the appeal court decides that the dismissal was justified, it may be impossible to recover the money paid as damages. This is why in countries like the United States, execution of judgment is delayed until the appeal is disposed of.

It might be worthwhile rethinking this execution provision and at least make an exception where the payment of money is concerned. On the other hand, the position may be left as it is in section 56(3) on the understanding that the IRC has discretion to stay execution where prospects for success on appeal are not hopeless. In any case, it appears that the practice in the courts of Malawi is to go ahead with execution, but in the case of an appeal being lodged, the money in question is deposited into court pending appeal, in which case, both parties are protected. A similar approach could be adopted for the IRC.

2. *Views of Interviewees Regarding Appeals*

In discussions with key persons, two opposing views emerged with respect to the question of whether appeals should be only on questions of law as in section 56(1) or should be on both law and fact.

On the one hand, it was argued that:

- The IRC as a specialized court with the participation of the ordinary nominated members who have practical knowledge of industrial relations and being the court that hears evidence from the parties and their witnesses, is in a better position than any other court to make fair and just decisions on points of fact. It would therefore not be proper to allow appeals on facts especially as the appeal court would not have the benefit of the opinion of the non-judicial members of the Court.

- Appeals on questions of fact would cause undue delays and would defeat the objective of a speedy and equitable resolution of labor disputes.

On the other hand, arguing against the restriction on appeals on matters of fact, it was contended that:

- The restriction deprives the losing party of the opportunity of having another court reexamine the facts. It is possible that, like any other trial court, the IRC could misinterpret the facts and if there is no opportunity for a second look, there could be a miscarriage of justice.

- It is always difficult to determine what is a question of fact and what is a question of law. There are also mixed questions of law and fact which could complicate the task of the courts in deciding whether the party should be allowed to appeal or not.

3. Comparison with Other Countries

None of the labor laws of the countries of Southern Africa studied permits appeals on pure questions of fact. Apart from the Zambian Act, which permits appeals to the Supreme Court on questions of law and mixed questions of law and fact, the others permit appeals on questions of law only. The Lesotho Labor Code denies litigants in the Labor Court any right of appeal from decisions of the Labor Court, whereas the Namibia Act provides for appeals on questions of law and, even then, only with leave of the Labor Court and where that is refused, with the leave of the Supreme Court of Namibia.

In the United Kingdom, according to the Trade Union and Labor Relations (Consolidation) Act (1992), appeals may be taken to the Employment Appeal Tribunal (EAT) on questions of law only, except, curiously, in matters relating to the right not to be excluded or expelled from a trade union. No other appeals lie from decisions of the industrial tribunal under the Act (section 291). This means that in industrial relations cases, parties will no longer be permitted to appeal to the Court of Appeal or the House of Lords. This was previously permitted with leave of EAT.

In the United States, as indicated earlier, the decisions and orders of the NLRB are reviewable by the United States Court of Appeals (and thereafter the case may go to the Supreme Court) as the Board is an administrative agency. In exercising the powers of review, the courts normally accept the findings of the Board on questions of fact, although occasionally they do examine the facts.

4. Summary on Finality and Appeals

It is apparent that the general practice in many countries is that appeals from labor courts are invariably only permissible on questions of law. The predominant reason, as stated above, is that labor courts are specialized courts with a certain level of expertise or special knowledge of industrial relations and should be allowed as much as possible to be the final

arbiters on labor disputes. At the same time, appeal courts should have an opportunity to clarify and develop the law when the need arises.

In addition, it is recognized that appeals can take an inordinately long time to finalize, while labor disputes, by their nature, need speedy resolution. In addition, unlike in criminal prosecutions or non-labor civil litigation, it may not be absolutely crucial who is right and who is wrong on the facts in a labor dispute as the purpose is essentially to reconcile the parties so that working relations can resume if at all possible.

5. Recommendation

In light of the above, it is recommended to retain the provision in the revised draft that appeals should only be on questions of law. Whether an issue is a question of law or fact should also be appealable, but in the spirit of discouraging appeals, the higher court should be more inclined to decide that issues are questions of fact rather than law, as is the tendency in the EAT in England.

G. Legal Representation

1. Introduction

The revised draft Bill states that a party to proceedings before the IRC is free to represent himself or herself or a member or officer of his or her organization, or by a Labor Officer or any other person he or she may appoint, or he/she may be represented by a legal practitioner. In the original draft, however, a party could only be represented by a legal practitioner with the permission of the Court. The motivation behind this latter may have been to discourage the legalization of proceedings before the Court given the nature and objectives of an industrial court--that is, simple and speedy resolution of labor disputes. In addition, it is argued that lawyers are costly and some litigants may not be able to afford a lawyer. Thus, giving the Court the discretion to allow legal representation would ensure that lawyers appeared only in complicated cases and would probably ensure that both parties were represented, if necessary, by securing legal aid assistance for the party who could not afford his own lawyer.

2. Views of Interviewees

In discussions with key persons, however, there was a difference of opinion with more people in favor of unrestricted access to a lawyer. The different positions were as follows.

Opponents of legal representation argued that:

- Lawyers prolong proceedings by indulging in long arguments over technical matters, which would defeat the main objective of an IRC to dispose of

disputes speedily but fairly without paying much attention to the technicalities of the rules of evidence and procedure.

- Lawyers are expensive and few workers could afford to engage private practitioners. At the same time, Legal Aid is over-stretched and cannot take on an additional load.

Proponents of legal representation argued that:

- Lawyers do not deliberately cause undue delays and, in the majority of cases, do not complicate cases as is the popular image. On the contrary, they clarify issues that non-lawyers are normally not able to appreciate and, in the process, help the judge or other Presiding Officer to come to informed and just decisions.

- The right of legal representation is a constitutional right and should not be derogated from even in labor cases. (However, a perusal of the Malawi Constitution does not show such a right. The right of representation by a legal practitioner in the Constitution appears to be only directly given to accused persons in criminal cases. See Chapter IV, particularly section 42 [1] [c] and [2] [f] [v]).

- Those who cannot afford lawyers can always appeal to Legal Aid to help them out. Although Legal Aid did not have sufficient resources at the moment, ways can be found to improve Legal Aid funding with initial support from donors so that those who wish to be assisted by lawyers but cannot afford them can be assisted.

- In the particular circumstances of Malawi, prohibition of legal representation, for whatever reason, is bound to be regarded suspiciously given the history of repression over the last 30 years, which was supported by a system of traditional courts in which legal representation was denied.

3. Legal Representation in Labor Courts in Other Countries

The right to be represented by a legal practitioner of one's choice in labor courts is unconditionally recognized in virtually all the countries examined. These include, the United Kingdom, the United States and the Southern African countries of Botswana, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

Lesotho stands alone in partially barring legal practitioners from the Labor Court in a way similar to what was originally proposed for Malawi. The Lesotho Labor Code allows representation by a legal practitioner "but only where all parties, other than the Government are represented by legal practitioners." As a matter of fact, this limitation has been invoked

several times by the Labor Court as many workers and unions claim that they cannot afford a lawyer. According to the Registrar of the Labor Court, the majority of cases have been heard without the assistance of counsel. However, in the view of the Registrar, this has made the work of the Court all the more difficult in that the President is not assisted and the papers to be presented before the court are usually not in order.

4. Summary on Legal Representation

Strong arguments exist for and against giving audience to lawyers in the IRC. However, there is a preponderance of opinion in favor of unrestricted legal representation. This view is augmented by the almost universal recognition of the right to legal representation in neighboring countries. On the other hand, in light of the real possibility that many litigants, especially on the worker side, will not be able to afford a lawyer, means of ensuring equal access to representation need to be urgently found. The inadequacy of resources by Legal Aid services makes it an impractical and unreliable option. One alternative that should be tried is the training of paralegals, especially from the trade unions, to represent litigants before the IRC. This has been tried in South Africa in the last few years with considerable success. (Refer also to Recommendations under J.1 below).

5. Recommendations

- The provision on representation in the current draft Bill, including legal representation, should be retained.

- Steps should be taken as soon as possible to train paralegals who should have audience before the IRC to represent litigants unable to afford lawyers.

H. Reducing the Load of the IRC Through Internal Procedures, Mediation and Arbitration

1. Background

Although the introduction of the IRC is welcomed by all interested parties in Malawi, it should not be assumed that it is desirable to take all labor and employment disputes to the Court. The objective should be that, as in the case of all other disputes, aggrieved parties should only go to court as a last resort; that is, when all amicable methods of resolving the dispute have failed to yield a solution.

In well-established systems of industrial relations, attempts at resolving disputes start at the lowest (or the domestic) level in direct contacts between the employer and the employee or employees, or their collective representatives. This is usually provided for under a recognition agreement or a code of conduct governing both parties. If the dispute cannot be resolved at that level, then the services of a third party--a mediator, conciliator or arbitrator--are sought. Since the conciliator or mediator can only facilitate and advise without having the

power of compelling the parties to agree, that stage may be followed by use of an arbitrator who is empowered by the parties to make a decision on the dispute binding on both parties. In a number of systems, particularly in African countries, the mediation, or conciliation and arbitration are conducted by or through the state's Department of Labor. This latter is because employees and their unions are usually not in a position to hire persons of their choice to perform those functions. It is only after these attempts at resolving the dispute amicably and informally have failed that the dissatisfied party can go to court for a determination of the dispute.

Although the legal machinery appears to have been in place in Malawi, advantage was apparently not taken to utilize it in the past. There was machinery for conciliation and arbitration through the Ministry of Labor, but disputes did not go far. They were "resolved" by labor officers. The Arbitration Tribunal was never set up, let alone functioning. The government pursued the policy of "wage restraint" which, in practice, meant discouraging collective bargaining which could lead to higher wages. It was a low-cost labor policy which translated into cheap labor for employers. Unions were seen as an obstruction to economic development.

The only disputes that came to the Ministry of Labor for conciliation, etc., were individual employment disputes which were dealt with by labor officers. A semblance of collective bargaining took place at the tri-partite level through the Wages Advisory Board and Wages Advisory Councils. However, these were only concerned with setting minimum wages for the lowest paid workers and could not be regarded as collective bargaining envisaged under international labor standards. In any case, the Board took many years without sitting. Occasionally there were strikes, but these were always unorganized and illegal as they never went through the channels set out in the Trade Disputes (Arbitration and Settlement) Act of 1952. Often they ended on the intervention of the Minister. At the same time, hardly any labor disputes were brought to the courts over the past 30 years.

After the democratization process started, disputes came to the fore. Again, the tendency was not to try peaceful resolution of disputes, but rather to resort to industrial action. A few cases went to court. These include the wood workers dispute with their employer, WICO, regarding anticipated retrenchments that would result from the selling off of WICO, a para-statal. Although initially an injunction was made suspending the sale, the workers ultimately lost the case and many workers were laid off. A dispute between the University of Malawi and its senior staff over salaries has been going on for over a year and is pending in the High Court. In neither case was conciliation or arbitration attempted. Yet these (interest disputes) were perfect cases for mediation and/or arbitration upon reaching deadlock in negotiations, not for the courts.

2. *Non-Court Dispute Resolution Under the Bill*

Under Part V of the proposed Industrial Relations Bill, there is again provision for dispute settlement through conciliation. According to section 42 (of the original draft), a

dispute which has not been resolved in accordance with an internal mechanism agreed to by the parties must be reported to the Secretary for Labor with a view to conciliation. There is, however, also provision for waiver of having to go through the internal process with the consent of both parties. Under section 43, the Commissioner of Labor is empowered to conciliate those disputes referred unless they involve government or a para-statal body, in which case the disputes are referred to an independent conciliator agreed to by both parties. In short, the parties are obliged to try these avenues of amicably resolving disputes before going to the IRC. These provisions, if effectively utilized, are bound to reduce the case load of the IRC and ease possible unnecessary congestion in that court. It might well be that most labor disputes, especially disputes of interest involving the employers and employees, would be resolved amicably and cheaply without having to go to court.

In discussions with the Department of Labor, however, it transpired that the Department wished to minimize its involvement in industrial disputes and to leave them to self-management by the social partners through collective agreements, internal dispute resolution mechanisms and mediation or voluntary arbitration. This is probably not surprising, given the view of some interviewees that workers had long lost confidence in the impartiality of the Ministry of Labor and its ability to resolve their disputes with employers or otherwise to promote their interest. Nevertheless, under the new political circumstances, it seems possible to forge a new form of cooperation between the Department of Labor, employers and employees that could encourage amicable, time-saving and cheap dispute resolution through conciliation and, where necessary, arbitration, reserving only complex cases (mainly disputes of right, cases of unfair labor practice and unfair dismissals) to the IRC.

Effectiveness of the Department in this respect, however, requires personnel trained not only in industrial relations, but also in methods and techniques of mediation and conciliation. Although the Department apparently has such expertise at the higher levels, there is need to provide such training to the lower-level cadres in the Department to handle the bulk of the disputes.

3. Alternative Dispute Resolution

Concurrently with efforts to equip the Department of Labor to handle disputes, other forms of amicable dispute resolution should be promoted. Those parties who are able, financially, and who value the flexibility and independence of being in control or who still have doubts about the impartiality of the Department, should be encouraged to engage their own mediators, conciliators or arbitrators to resolve their disputes. This is particularly valuable in interest disputes when negotiations between unions and employers have failed to yield agreement. In other words, the option of using private mediators or arbitrators agreed upon by the parties should not be restricted to disputes where the government or para-statal enterprises are involved, as appears to be the case under section 43. Besides being advantageous to the parties, it saves costs on the part of the state. This approach, called 'alternative dispute resolution' or 'ADR', has become increasingly popular in the United Kingdom, United States and, in the last few years, South Africa. This is because it ensures

privacy to the parties (especially valued by the employers), it saves time, it is flexible in terms of scheduling compared to the Court's rigid schedules and it is cheaper than court proceedings, although it is more costly than the state-sponsored conciliation through the Department of Labor. In countries where it is practiced, it has considerably eased the load of labor courts.

4. Recommendations

- Use of the conciliation mechanisms under the Industrial Relations Act (when it becomes operative), should remain a pre-condition for access to the IRC as a means of limiting the load of the Court.

- Labor officers, including lower-rank officers, should be trained in industrial relations and conciliation/mediation techniques to be able to dispose of as many labor disputes as possible.

- The use of alternative dispute resolution through privately arranged mediation or arbitration should be encouraged.

I. Identification of Needs of the IRC

1. Infrastructure

Some of the people interviewed pointed to a need to have a separate building for the new IRC with its own furniture, equipment and, of course, personnel. On the other hand, it may be difficult to find the necessary funds to construct a new structure immediately, assuming that it was necessary. It was suggested by others that it may be possible to accommodate the new Court either within the High Court complex or in the Chief Magistrate's Court in Blantyre. It is preferable to accommodate the Court in existing structures if possible, given the country's limited resources and the many other priorities to be met. However, if a willing donor can be found to fund a building while others attend to the more pressing needs of training for personnel and provision of basic equipment, then there is no reason why plans for a new building would not go ahead.

2. Personnel and Training

This is the most important aspect of the introduction of a new institution. The Registrar's office of the IRC will need to ensure smooth operation of the Court, keep proper records and schedule dispute hearings. The Registrar should have a more meaningful role than administrative and clerical tasks outlined above. He or she should be able to sift through the complaints and see those that could be more appropriate for mediation or arbitration and advise the parties about the options. In addition, a pre-hearing conference with the opposing parties could diffuse the tension and, on occasion, lead to a settlement and hence save the court and the parties valuable time and expense.

The Registrar need not be a lawyer, although he or she needs to be a University graduate. A person with industrial relations experience could do the job. However, there might be an advantage in having a lawyer, as the Registrar's position could be used as training ground for the positions of President or Deputy President of the Court.

A court needs reporters to record the proceedings of the court. They need to be trained in modern methods of recording to be efficient and reliable. This is important if the Court is to produce judgments that are suitable for publication. The reporters would have to be trained outside the country, with assistance from the donor community, as there are no facilities for such training in the country. Apparently, there are such facilities in neighboring Zambia and more advanced ones in Australia and other developed countries. Ancillary staff will also be needed, such as a clerk of the Court, secretaries/typists and an accounts clerk. All of the above should be appointments in the civil service under the auspices of the Public Service Commission.

Lastly, but most importantly, there will need to be a Presiding Officer of the Court and his Deputy. As discussed earlier, the recommendation is that the person who presides over the Court need not be a judge of the High Court, but rather a senior lawyer of at least seven years of experience, with post-graduate specialist training in industrial relations.

At the moment, there seems to be no senior lawyers with this specialization. Since there are a number of training institutions for industrial relations in the United States, USAID may want to investigate the possibility of funding such training. There are six-month and nine-month courses which should be suitable depending on basic training. It might be a good idea to send somebody with a basic law degree for a nine-month Master's degree whereas, if the candidate already has a Master's degree with labor law as one of the courses, he or she might need only six months of additional training in industrial relations. Attachments to labor courts for a few weeks would also be of great value to a prospective Presiding Officer of the IRC.

In the meantime, while the prospective President is undergoing training, a temporary appointment could be made of an experienced labor law practitioner or judge of an industrial court/tribunal from another country to start off the Court. Thus, for instance, the current President of the Industrial Court in Botswana is a former President of the Industrial Court in South Africa who, reportedly, has set the Court on a sound basis. Britain maintains a pool of industrial court judges from which one could be borrowed to put the Court on its feet while the Malawian appointee goes for training.

3. *Equipment*

It will be necessary to have the following:

- 2 voice recorders for recording proceedings instead of the antiquated short-hand method.

- 2 transcribers--machines that assist a typist in transcribing from the tapes.

- 2 computers.

- 1 laser-printer.

- 1 photo-copier. The copier is necessary not only for internal use but also to make copies of judgments for the litigants and other interested parties. Dissemination of decisions of the Court will be important to furthering the knowledge of the law and hence good industrial relations.

- 1 CD-Rom recorder. This is a very useful machine which will enable the Court to store all the judgements in one data-base. One CD-Rom disk can store between 5,000 and 10,000 cases.

- An office management software such as XY or Enmagic should be used together with the CD-Rom recorder. The most useful aspect of the software is that it automatically indexes every word in the document so that, in the case of a Presiding Officer seeking a precedent on a particular point, the relevant cases can be located and retrieved in a matter of seconds.

- A word processing package and other appropriate software, preferably those already being used in the Judiciary, such as WordPerfect for word processing and Lotus 1-2-3 for accounts. Novell for access to the internet and e-mail facilities would also be required. Access to the internet would be a good idea as it would enable this new institution to start on a good technological basis and keep up-to-date with the fast-growing area of labor law and industrial relations.

- Electronic typewriters, especially for use by regional offices.

- A motor vehicle.

J. Preparing the Social Partners for the IRC

1. Training

Representatives of employers and employees interviewed expressed satisfaction over the proposed composition of the Court. However, they were concerned at the fact that panelists would not have the necessary knowledge to be able to follow proceedings and to make constructive contributions to the deliberations of the Court. They urged that ways and means need to be found to build the capacity of the unions and the employers through appropriate training to enable them to participate in the work of the IRC. At a minimum, they need to have basic knowledge and understanding of the law relating to employment, industrial relations and other laws that closely affect the employment relationship.

It was observed that the type of workshops like the one recently held on the proposed Court were too narrowly focused and of short duration. They would not equip potential panelists with adequate knowledge of the kind of issues they would be asked to advise on.

Recommendations:

- A number of employee and employer representatives should be given intensive training inside or outside Malawi where they would be trained as paralegals in industrial relations, particularly in the preparation of cases for presentation to the IRC. Once trained, they would then act as resource persons in the training of other employees and employers besides appearing as representatives before the IRC. Eventually, a pool of potential employee and employer panelists would be created from which the IRC could be supplied. Those not chosen for the panels could still help their colleagues either in preparing cases or in negotiating settlements out of court.

- It is important to continue with the workshops on specific issues such as collective bargaining, safety and health, etc., to equip the social partners to deal with various situations in the workplace without resorting to the Court or other outside dispute resolution mechanisms. An industrial relations culture needs to be nurtured, given the history of authoritarian methods not only in government, but also in the workplace.

2. Dissemination of Information

Greater dissemination of information about the proposed legislation is needed, not just about the Court, but about the whole industrial relations regime that would be set in motion by the introduction of the new Industrial Relations Act. Workshops were very useful, but they could be supplemented by radio broadcasts of lectures on aspects of the new Industrial Relations Act (once it came into force) and on when and how to approach the IRC.

Pamphlets on various aspects of industrial relations would also be a good way to educate the public and especially the social partners, thereby promoting good industrial relations. In this connection, much could be borrowed from the educational work of the Advisory, Conciliation and Arbitration Service (ACAS) in the United Kingdom as well as from the ILO. Collaboration between the Faculty of Law at Chancellor College, the Ministry of Labor and interested individuals should be encouraged with a view to the production and distribution of the pamphlets referred to above. It will be necessary for the donors to offer some financial support for the purpose.

3. Law Reporting

Another way to make the work of the Court known and to promote knowledge of the law relating to industrial relations is to produce industrial law reports. These would not only be available to the members of the Court, but could be sold to legal practitioners and industrial relations practitioners for reference.

The problem in many African countries, as far as law reporting is concerned, has been one of resources, both financial and human. Cases have to be edited to make them concise and economical for purposes of printing as well as putting them in a form that makes them easily accessible. Thus, they have to be indexed and summaries (head-notes) included at the beginning of the judgments to guide readers. There is therefore a need for a trained editor for industrial law reports. The editor would need little additional financial support and equipment since the cases would already have been put on disk. There would only be need for the extra desktop publishing software to be used with the computers and other equipment allocated for the Court.

Recommendation:

- It is recommended that if there is going to be law reporting of the IRC cases, a full-time editor should be identified, trained and given the necessary support. A law-reporting project for the IRC could act as a catalyst for the revival and modernization of law reporting in the country in general.

K. Initial Budget

This proposed budget assumes that there will be one court based in Blantyre, but with regional centers where the Court can sit from time to time as necessitated by the volume of work.

Personnel

Title	Grade	Salary (Annual)	
President	P3	K48,000	US 3,200
Deputy President	P3	K48,000	US 3,200
Registrar of IRC	P8	K35,000	US 2,333
Regional Assistant Registrars	CEO	K22,000 x 3	US 4,400
Personal Secretary	D1	K22,000	US 1,467
Chief Interpreter	CEO	K22,000	US1,467
Recorders	EO	K16,000	US 1,067
Senior Clerk	SCO	K14,000	US 933
Clerk	CO	K8,000	US 533
Regional Clerks	CO	K8,000 x 3	US 1,600
Senior Copy Typist	DS	K14,000	US 933
Copy Typists	D6	K12,000 x 4	US 3,200
Messenger	SCII	K9,000 x 4	US 2,400
TOTAL ON PERSONNEL		K401,000	US 26,733

Equipment

Computers	K100,000 x 2	US 13,333
Electronic Typewriters	K30,000 x 4	US 8,000
Printer (HP Laser Jet 4M)	K45,000	US 3,000
Software (WP+ XY Office software)	K30,000	US 2,000
CD-ROM Recorder	K42,000	US 2,800
2 Recording systems	K48,000 x 2	US 6,400
1 Photo-copier	K37,500	US 2,500
Motor vehicle	K375,000	US 25,000
TOTAL ON EQUIPMENT	K945,495	US 63033

Other

Travel, allowances & operating costs	K150,000	US 10,000
GRAND TOTAL	K1,496,495	US 99,766

L. Conclusion

This report has discussed a number of issues relating to the setting up and operation of the proposed Industrial Relations Court for Malawi. The main issues dealt with are the nature and status of the court, its composition, jurisdiction, appeals and legal representation. The report also deals with the question of training personnel of the Court as well as preparing workers and employers for participation in the work of the Court. The report considers the draft legislation setting up the Court, the views of various interested parties and attempts to reconcile them where possible. It also describes the experience of other countries, particularly in the Southern Africa sub-region, for different perspectives on the nature and role of an industrial court. Thus, various factors were taken into account in making recommendations which may assist policy makers in making final decisions regarding the Court.

The main recommendations made may be summarized as follows:

- The Industrial Relations Court (IRC) should be a special court subordinate to the High Court as originally envisaged in the Constitution.

- The IRC should be presided over by a President (or Deputy President) who should be a senior lawyer of 7 to 10 years of experience and with expertise in industrial relations, sitting with ordinary members drawn from panels appointed by the Minister after nomination by the most representative employer and employee organizations.

- Decisions of the Court should be by majority of the members of the Court present on questions of fact (matters of substance) and by the President/Deputy President on questions of law.

- Decisions of the Court should only be appealable to the High Court on questions of law.

- Legal practitioners should be allowed to represent parties before the IRC. However, paralegals, especially from the trade unions, should be trained to assist those who cannot afford legal practitioners.

- The government, assisted by external donors, should facilitate training of members of the court as well as others closely associated with the Court in industrial relations.

- There should be a systematic public awareness program including use of the mass media and pamphlets to disseminate information on the Industrial Relations Act (when operational) to promote good industrial relations.

REFERENCES

Books and articles

Benjamin, Jacobus & Albertyn (eds.), *Strikes Lock-outs & Arbitration in Southern African Labour Law*. Juta & Co., Cape Town, 1989.
Cox, Bok & Gorman, *Cases on Labour Law*, Foundation Press Inc., Mineola, New York, 1989.
Dokali, E., "Blocks for Labour Court?" *The Nation*, 23 Nov. 1995.
Dokali, E.; "Report of a tour of Neighbouring Countries", Faculty of Law, Chancellor College, Zomba, Nov. 1995.
Faculty of Law, Chancellor College & Friedrich Ebert Foundation, "Report on Workshop on Labour Law Reform", Nkopola Lodge, 17-18 June,1995.
Gold, M.E., *An Introduction to Labour Law*, ILR Press, Cornell University, 1989.
Hepple, B.A., Fredman, S., *Labour Law and Industrial Relations in Great Britain*, Kluwer, Deventer, The Netherlands, 1986.
Khabo, F.M., "Resolving Labour Disputes in Southern Africa : The Case of Lesotho. Paper presented at Workshop on Resolution of Labour Disputes, Harare, Sept. 1995.
Ng'ong'ola, C., "Employment and Industrial Relations Law in Malawi", in Kalula & Woolfrey (eds.), *Southern African Labour Legislation: Commentaries and Selected Statutes*, Labour Law Unit, UCT., Cape Town, 1995.
Rycroft, A., (ed.) *The Private Regulation of Industrial Conflict*, Juta & Co., Cape Town, 1990.
Rycroft, A., & Jordaan, B., *A Guide to South African Labour Law*, 2nd Edition, Juta & Co., 1992.
Takirambudde, P.N., & Molokomme, A.L., *The New Labour Law in Botswana*, Labour Law Unit, UCT., 1994

Legislation

Swaziland, *The Industrial Relations Act*, 1980.
Namibia, *Labour Act*, 1992.
Zambia, *Industrial and Labour Relations Act*, (No. 27 of 1993).
United Kingdom, *Trade Unions and Labour Relations (Consolidation) Act*, 1992.
Botswana, *Trade Disputes (Amendment) Act*, 1992.
Republic of South Africa, *Labour Relations Bill*, 1995.
Lesotho, *Labour Code Order No. 24*, 1992.

APPENDICES

APPENDIX 1

List of Persons Interviewed

Mr. Justice B. Banda	Chief Justice of Malawi,
Mr. Justice D. Mwaungulu,	Puisne Judge
Mr. E. Twea,	Registrar of the High Court
Dr. G. Mgomezulu,	Secretary for Labor
Mr. C. Manda,	Labor Commissioner
Mr. Chazama,	Principal Labor Officer
Mr. G. Kantsemo,	Principal Labor Officer
Mr. Chinangwa,	Chief Resident Magistrate (Lilongwe)
Mr. J. Naphambo,	President, Law Society of Malawi
Mr. F. Antonio,	General Secretary, Malawi Congress of Trade Unions
Mr. Chibwana,	Executive Secretary, Employers' Consultative Association of Malawi (ECAM)
Mr. Thomas Banda,	President, Civil Service Union
Mr. Samuel Banda,	General Secretary, Civil Service Union
Mrs. Veronica Sembereka,	President, Teacher's Union
Mr. Emillias Dokali,	Dean, Faculty of Law, Chancellor College
Ms. Ngeyi Kanyongolo,	Assistant Registrar (Legal Affairs) Chancellor College
Ms. Miriam Maluwa	Parliamentary Draftsman, Ministry of Justice

APPENDIX 2

Terms of Reference

Background

Establishment of an Industrial Relations Court is stipulated under Malawi's new Constitution. It will be subordinate to the High Court and have original jurisdiction over labor disputes and other issues relating to employment. Malawi has no experience with such a court and the High Court has requested assistance from USAID in helping them determine how to establish it.

Objective

To provide a comprehensive consultancy to the High Court of Malawi to assist it in determining how to establish an Industrial Relations Court for the country.

Areas of Examination

-- Legislative mechanisms and framework for setting up the court and for regulating its proceedings.

-- Composition and level of the court, for example: where in the hierarchy of courts it should be located; gender balance of the court.

-- Need for the court: areas of jurisdiction (including assessment of which labor issues and disputes should be covered, and the role of gender in types of disputes and awards made), how many such courts throughout Malawi, the quantity of work which will be generated.

-- Organizational and operational considerations: recruitment of what kinds and number of personnel, by whom, procedures for recruitment, training needed immediately to start-up the court and then after start-up, data management, types of software and computers, development of precedents, case management, case reporting.

-- Financial implications of different options.

-- Strategies for public involvement in establishing an Industrial Relations Court and for letting people know it exists and how to use it once established.

-- Other important areas that may be identified during the consultancy.

Prior to departure to Malawi, the contractor shall, with assistance of G/DG, identify outstanding issues related to re-engineering and USAID DG Policy Guidelines and their implications for this field work.

Product

A 30-40 page report which, considering the above factors, discusses different options for establishing an Industrial Relations Court. The report will present pros and cons of alternate strategies given the Malawian context and will include recommendations with justification for those recommendations.

A draft report will be left with the High Court (3 copies) and USAID (3 copies) prior to departure. A pre-departure briefing with both parties will be conducted. Comments will be received from those parties within three weeks of departure and a final report (10 copies) will be delivered to those two parties within two weeks after comments have been received.

Level of Effort and Duration

48 days of an industrial relations/legal specialist, including six weeks in Malawi during the December-February period.

Qualifications

The contractor should have knowledge of different options for industrial relations courts, from the U.S., Europe, other developing countries and especially Africa. Experience in Africa, working closely with senior African jurists, would be extremely beneficial.