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*His Excellency Peter Mutharika
Office of the President and Cabinet
Capital Hill Circle
Private Bag 301
Capital City
Lilongwe 3
Malawi*

1 March 2020

Open letter to the President of Malawi concerning the persecution of judges of the Constitutional Court

Your Excellency,

We are writing to you on behalf of the International Bar Association's Human Rights Institute (IBAHRI) to express our concern regarding the decline in the rule of law in Malawi, following the May 2019 election and the Democratic Progressive Party's (DPP) counter-attack against the Constitutional Court's decision to annul the election.

The International Bar Association, established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. It has a membership of more than 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The IBAHRI, an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

The IBAHRI previously published a report on the rule of law in Malawi, which observed the significant progress made in respect of the rule of law since the change of presidency in April 2012. As such, the IBAHRI is committed to defending the legal profession in Malawi to protect the rule of law. IBAHRI Co-Chair, the Hon Michael Kirby AC CMG, acted as one of the co-chairs of the Malawi Constitutional Conference in 1994. That conference facilitated the amendments to the Malawi Constitution that provided for multiparty democracy in place of one-party rule and presidency for life. The reforms that were introduced at that time, by consensus and by peaceful process, and broadcast throughout the length and breadth of Malawi, became an example and inspiration to other countries in Africa.

Through all the vicissitudes of the intervening years, Malawi has held firm to the principles of democracy and the rule of law enshrined in the amended Constitution. It is essential that these principles should be observed now, and that the provisions of the Constitution for judicial review and peaceful settlement of differences according to law in independent courts should not be

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disturbed or interrupted. This is not only important for judges, lawyers and the political process, but vital for upholding the fundamental human rights of citizens and the economic welfare of the people of Malawi.

The IBAHRI has received reports that since the Constitutional Court ruled that the integrity of the May 2019 election was compromised by widespread reports of ballots being reused, and ordered for a new election to take place within 150 days, there have been ongoing protests led by Malawi's ruling party, the DPP. Consequently, the IBAHRI has received reports that the DPP has openly attacked the Constitutional Court judges, and in particular, spread false accusations of bribery in order to undermine their ruling. This challenges the fundamental rights of lawyers to protect them from bullying, harassment and intimidation, and also the principle of an independent judiciary to which Malawi has shown previous commitment. We expect the DPP to observe and respect the rule of law, and challenge this decision through their pending appeal with the Supreme Court of Appeal, rather than through the intimidation of the judges of their Constitutional Court.

The IBAHRI is deeply concerned that the current climate of threat to judicial independence in Malawi represents a clear contravention to its essential international human rights law obligations:

1. Malawi is a party to the African Charter of Human and Peoples' Rights, Article 26 of which guarantees judicial independence: *'State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'*
2. Malawi is bound by the Universal Declaration of Human Rights, Article 10, which enshrines the importance of an independence and impartial tribunal: *'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'*
3. Furthermore, the United Nations Basic Principles on the Independence of the Judiciary provide that the principles have been developed to assist Member States with securing and promoting the independence of the judiciary and should be taken into account and respected by members within their national legislation.

Malawi is also bound by constitutional obligations on the matter. Section 103 of the Constitution of Malawi clearly lays down the following notions of judicial integrity:

'(1) All courts and all persons presiding over those courts shall exercise their functions, powers and duties independent of the influence and direction of any other person or authority. (2) The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence. (3) There shall be no courts established of superior or concurrent jurisdiction with the Supreme Court of Appeal or High Court.'

We express our support of the Malawi Law Society, which recently published a statement condemning the attacks on judges of the Constitutional Court by the DPP, and urges them to

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withdraw all complaints against the judiciary with respect to the judges' decision. Furthermore, express our support of the Commonwealth Magistrates' and Judges' Association and Association for Magistrates, which jointly issued a statement urging the DPP to cease attacks on judges.

The IBAHRI urges everyone in Malawi, from the President to the humblest citizen, to remember the achievements of the past and to abide by due process of law and constitutional government according to law. This requires respect for the judiciary and obedience to the rule of law. We urge the President of Malawi to respect the judiciary and the courts and allow the legal process to take its course without hindrance and without delay.

We would be grateful to receive your assurances that you have received our letter and that our concerns will be addressed as a matter of urgency.

Yours sincerely,

The Hon Michael Kirby AC CMG
IBAHRI Co-Chair

Anne Ramberg Dr jur hc
IBAHRI Co-Chair

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4th Floor, 10 St Bride Street, London EC4A 4AD, United Kingdom Tel: +44 (0)20 7842 0090 Fax: +44 (0)20 7842 0091 www.ibanet.org

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