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March 5, 2013

H.E. Mwai Kibaki President of the Republic of Kenya State House Kileleshwa Estate Nairobi, Kenya

H.E. Raila Odinga Prime Minister of the Republic of Kenya P.O. Box 74434-00200 Parliament Road Nairobi, Kenya

Your Excellencies:

I am writing on behalf of the New York City Bar Association (the "Association") to respectfully urge the Government of Kenya to support an independent and impartial judiciary in the Republic of Kenya. The independence of the judiciary is particularly important in the context of elections. The Constitution of Kenya recognizes the Supreme Court as the impartial arbiter of any challenges with respect to the election of the country's president.¹ The Association calls on the Government to take all necessary steps to ensure that judges are able to discharge their constitutional duties with the independence and integrity that is guaranteed under domestic and international laws.²

The Association is an independent, non-governmental organization of 23,000 lawyers, judges, law professors and government officials from the United States and 50 other countries.

See, e.g., Constitution of Kenya, Arts. 140 ("Questions as to Validity of Presidential Election"), 160 ("Independence of the Judiciary"), <u>http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf</u>; International Covenant on Civil and Political Rights (ICCPR), Art. 14.1 (1966), <u>http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf</u>; Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* (Geneva: UN High Comm'r for Hum. Rts. 1985), <u>http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx</u>.

¹ Constitution of Kenya, Art. 140 ("Questions as to Validity of Presidential Election"), http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.

Throughout its 143-year history, the Association has consistently maintained that an independent judiciary and an independent legal profession are essential to the rule of law in all jurisdictions.

The Association is concerned by the public statement recently made by the Honorable Dr. Willy Mutunga, Chief Justice and President of the Supreme Court of Kenya, with respect to a letter he received on February 18, 2013 threatening harm to himself, other judges and ambassadors in connection with their role in determining the eligibility of certain candidates to run for political office.³ Chief Justice Mutunga characterized the incident as part of a "pattern of emerging harassment" against himself, the "Office of the Chief Justice, and the Judiciary" and noted that five judges had been attacked in the period leading up to the elections.

The need for an impartial and independent judiciary in Kenya has never been more pressing. At a time when several prominent Kenyan national political figures stand accused of grave violations of human rights in connection with the violence following the 2007-2008 general elections,⁴ an independent judiciary is essential to ensuring that any potential electoral disputes are resolved peacefully, and that Kenya complies with its domestic and international obligations to uphold the rule of law. Under the United Nations' Basic Principles on the Independence of the Judiciary, Kenya has an obligation to respect and observe the independence of the judiciary, and to protect judges from "improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."⁵ Moreover, the Constitution of Kenya enshrines independence of the judiciary as a binding obligation, requiring that, "[i]n the exercise of judicial authority, the Judiciary . . . shall be subject only to th[e] Constitution and the law and shall not be subject to the control or direction of any person or authority."⁶ Based on the reported threats against Chief Justice Mutunga and other Kenyan judges, the Association believes that it is imperative that the Government of Kenya redouble its efforts to protect Kenya's judiciary from threats and intimidation.

The importance of an independent and impartial judiciary in the preservation of a free and democratic society governed by the rule of law cannot be overstated. The Association urges the

cpi.int/iccdocs/doc/doc1314535.pdf; Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges (Jan. 23, 2012), <u>http://www.icc-</u>

⁶ Constitution of Kenya, Art. 160(1) ("Independence of the Judiciary"), http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.

³ See "Chief Justice's Statement on Judge's Security and Elections" (Feb. 20, 2013), <u>http://www.judiciary.go.ke/portal/chief-justices-statement-on-judges-security-and-elections-february-20-2013.html</u>; see also Jason Straziuso, Kenyan Chief Justice Reveals Threats Ahead of Vote (Feb. 20, 2013), <u>http://bigstory.ap.org/article/kenyan-chief-justice-reveals-threats-ahead-vote</u>; Financial Times, Odinga Warns of Potential Unrest if Poll is Not Fair (Mar. 1, 2013), <u>http://www.ft.com/intl/cms/s/0/2f2f735a-828b-11e2-a3e3-00144feabdc0.html</u>.

⁴ See <u>Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang</u>, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges (Jan. 23, 2012), <u>http://www.icc-</u>

<u>cpi.int/iccdocs/doc/doc1314543.pdf</u>; *see also* Marlise Simons, *4 Kenyans to Stand Trial at Hague Court in 2008 Violence*, N.Y. Times (Jan. 23, 2012), <u>http://www.nytimes.com/2012/01/24/world/europe/international-court-orders-</u> <u>4-kenyans-tried-for-election-violence.html</u>.

⁵ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles* on the Independence of the Judiciary, Principle No. 2 (Geneva: UN High Comm'r for Hum. Rts. 1985), <u>http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx</u>; see also G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985),

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/40/146&Lang=E&Area=RESOLUTION.

Government of Kenya to take all necessary steps to ensure that the rule of law is preserved and protected, including by preventing threats to the judiciary, robustly investigating allegations of judicial interference, and ensuring that responsible parties are prosecuted.

Respectfully,

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Carey R. Dunne

cc: The Hon. Dr. Willy Mutunga Chief Justice and President Supreme Court of the Republic of Kenya City Hall Way P.O. Box 30041-00100 Nairobi, Kenya

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