

14<sup>th</sup> September, 2017

TO;

**The Secretary  
Judicial Service Commission  
Supreme Court Building  
NAIROBI**

Dear Madam,

**RE: PETITION AGAINST JUSTICE DAVID MARAGA  
Chief Justice & President of Supreme Court**

**A. COMPLAINTS & FACTS THEREOF**

**1.0 Violation of Regulation 12 of The Judicial Code of Conduct & Ethics**

The Chief Justice has invited, encouraged and permitted entry into the core of the Judiciary by Non-Governmental Organizations (NGOs) who are known protagonists of the President and Deputy President and who propagated the prosecution of the President and Deputy President at the International Criminal Court (ICC). These elements have now captured the Judiciary with the intent of procuring a regime change through judicial radicalism. The Chief Justice has, *inter alia*;

- a) Invited, facilitated and supported the embedding of technical support and financing by the International Development Law Organization (IDLO) to entities within the Judiciary including the Judicial Training Institute, National Council for Administration of Justice and Judicial Election Committee, with full knowledge that the IDLO organization is associated with the known anti-government partisan protagonists, including Makau Mutua who is a Board Member thereof; with full knowledge that the entity collaborates with local non-state actors that participated in prosecuting the President and Deputy President at the I.C.C; with full knowledge that the entity is further associated with local non-governmental organizations and individuals who petitioned against the election of the President and Deputy President in the election of 4<sup>th</sup> March 2013; and with full knowledge of the intent of IDLO to subvert and/or alter judicial independence.

- b) Deliberately created an obtuse accountability framework within the Judiciary vide the Judicial Training Institute that reports directly and solely to himself as Chief Justice and President of the Supreme Court outside the constitutional oversight mechanisms and financial accountability framework established under the Judicial Service Act and Public Finance Management Acts;
- c) Influenced through intimidation, persuasion and undue influence the Judges of the Supreme Court of Kenya to deliver a judgment in the case of ***Raila Amolo Odinga & another –Vs- Independent Electoral and Boundaries Commission & 2 others [2017] eklr*** in total disregard of the basic tenets of the law and the evidence before the court, and in a pre-disposed intention set out to invalidate the Presidential Election of 8<sup>th</sup> August 2017. The Chief Justice assembled the Judges and stated that he was for “**invalidating the election**” notwithstanding that no appraisal of evidence or law had been made and persisted in that pre-determined and illegal scheme;
- d) Despite the public interest and anxiety over the delivery of the Supreme Court judgment in the ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eklr***, the Chief Justice;
- i. Failed to fulfil his verbal commitment to deliver a considered and comprehensive reasoning of the majority decision of the Supreme Court of Kenya;
  - ii. In a clear admission of professional negligence, personally indicated that the majority decision was not based on a review of the documentation, pleadings or evidence presented by the parties. The Chief Justice is specifically quoted as stating as follows:  
  

***"Given the tonnes of materials placed before us it was not humanly possible to go through and prepare a reasoned and well considered judgement"***
- e) Notwithstanding the urgent need to have the judgment delivered in good time so as to facilitate the Independent Electoral and Boundaries Commission’s (**the IEBC**) effective and efficient conduct of a fresh presidential election in line with the court’s orders, the Chief Justice departed from the country to Lithuania, a country with no known links with our Judiciary, no diplomatic relations with the Republic of Kenya, and no known capacity building linkages between the Judiciary structures of the two states.

This trip was with the knowledge that the reasons for the judgement ought to be delivered within 21 days as set out in the Supreme Court Act and Regulations. Consequently, the Chief Justice would be taken to have been preparing the reasons for the judgement while in Lithuania without the benefit of conference with peer judges of the Court and the judicial infrastructure established to support judicial officers.

The Chief Justice must therefore be made to explain the circumstances of his visit to Lithuania and his interactions thereof, especially considering that Lithuania is known as a crossroads for regime change activists and their intelligence handlers.

- f) In the alternative to the foregoing, the Chief Justice notwithstanding that to his knowledge the reasons for the judgement would be critical in preparing for the fresh presidential election, opted for an overseas trip, thereby deliberately delaying the delivery of the reasons, which to his knowledge would negatively impact on the preparedness of the Independent Electoral and Boundaries Commission (IEBC) and the consequential conduct of the subsequent fresh presidential election. This would mean that the Chief Justice deliberately means to sabotage and debilitate the **IEBC's** capacity and render it impossible to hold the fresh presidential election, so as to necessitate a national crisis that will ignite the next stage of the regime change agenda – organized civil unrest, chaos and violence.

## **2.0 Gross Misconduct & Abuse of Office**

- a) The Chief Justice in furtherance of the conspirator plan, and in abusing his office and position thereof, illegally and irregularly restrained the participation of Justice Mohammed Ibrahim in the evaluation and determination of the Supreme Court Presidential Petition in ***Raila Amolo Odinga & another –Vs- Independent Electoral and Boundaries Commission & 2 others [2017] eklr***

The Chief Justice deliberately, unilaterally and illegally prevented the participation of Justice Mohammed Ibrahim in the determination of the presidential petition in ***Raila Amolo Odinga & another –Vs- Independent Electoral and Boundaries Commission & 2 others [2017] eklr*** despite the fact that though Justice Ibrahim was indisposed and absent from the Court for a day, the Judge upon recovery was able and willing to execute his duties which he could be able to do by a review of the pleadings, written submissions, evidence, video coverage of the petition hearings, and render his decision thereof.

The Chief Justice obstructed Justice Ibrahim and prevented him from discharging his duty to the Court and to the people of Kenya.

- b) That the Chief Justice's action was motivated by malice, sabotage, and intention to minimise resistance to the pre-determined position in pursuit of the conspirator strategy outlined hereinbelow;
- i. The Chief Justice knowingly became part of a hidden network directed by non-state actor organisations and individuals determined to defraud the will of the Kenyan people, through a process of obstruction and subversion of the Constitution, the law, and the administration of justice and thereby orchestrate, through the obviating of the people's vote, a regime change through judicial radicalism. The said scheme has as one of its objects to deprive voters of the Republic of Kenya, of their sovereign and constitutional right to elect a President and Government of their choice.
  - ii. The scheme to orchestrate regime change through judicial intervention was designed to controvert the judicial authority as vested by the people in Article 159 (1) of the Constitution, and thereby subvert the democratic will of the people to elect a President and Government of their choice. The strategy, adopted in similar part in various countries around the world, has seen the use of an international network of donors who fund democracy manipulation and regime change revolutions around the world. These include the Rose Revolution in Georgia, the Orange Revolution in Ukraine, the Cedar Revolution in Lebanon, the Olive Tree Revolution in Palestine (that saw the listed terrorist group Hamas come to power), the Tulip Revolution in Kyrgyzstan, the Purple Revolution in Iraq (that saw a Shi'a-dominated government friendly to Iran come to power), and the Saffron Revolution in Burma (one that was crushed by the military).

Common characteristics of these artificial and externally-driven revolutions include:

- Disputed elections
- Foreign-funded NGOs with a bone to pick against an incumbent president
- A recalcitrant opposition with an appetite for confrontation and violence
- Street pressure in the form of demonstration and strikes to drive an atmosphere of crisis
- Funding by the Open Society Institute and its affiliates
- A media that is hostile to the incumbent

- Powerful states with an interest in regime change
  - The subverting of the established order and the constitutional dispensation through the manipulative and deliberate exploitation of legal tools, precedents and actions that covertly combine to extra-constitutional effect to gain power without winning the ballot
- iii. In similar strategy thereof, the judicial arm of government was manipulated and influenced to overturn the democratic will of the people through a judicial action that upset the manifestly evident outcome of a presidential election processes that did not favour local civil society actors or preferences that were central actors thereof. These interventions were buttressed by localised civil unrest actions by the designate organisations; individuals and political outfits; targeted judicial activism; legal reform interventions construed as **“progressive and transformational”**; and targeted indoctrination strategies.
- c) The conspiracy as described above was implemented with the active participation of the Chief Justice in clear and manifest contravention of Article 1, Article 10, Article 159(1) and 2(d), and Article 160(1) of the Constitution; and the Judicial Code of Conduct & Ethics.

To assist in carrying out the aforesaid conspiracy, the Chief Justice employed, assisted and designated non-state actors, influencers and individuals disaffected with the leadership of the current administration, to infiltrate select Judiciary sub-entities and to implement a deliberate strategy of subversion of justice towards the nefarious object outlined herein above through the following synchronized conspirator actions of omission and commission:

- 1.1 It was part of Chief Justice’s plan and conspiracy with key non-state agencies and individuals, disaffected with the leadership of the current administration, to infiltrate key Judiciary programmes and initiatives, including the Judicial Training Institute (JTI), National Council for Administration of Justice (NCAJ) and Judicial Committee on Elections (JCE) through purported technical support and financing programmes with a view to deliberately influencing the independence of Judicial Officers and thereby manipulating the outcome of various judicial contests – more so the jurisprudence and legal philosophy regarding presidential election petitions.

- 1.2 Through the alleged technical support and financing programmes; the Chief Justice facilitated the embedding of foreign technical support experts from non-state actor agencies and organizations disaffected with the leadership of the current administration within the Office of the Chief Justice, who were responsible for articulating a judicial policy and viewpoint deliberately critical of the prevailing legal philosophy on electoral dispute management as established by the Supreme Court in **Petition No. 5 of 2013 (Raila Odinga vs. Independent Electoral and Boundaries Commission & Others)** with a view to its overhaul;
- 1.3 In furtherance thereof, the production of publications, guidelines, manuals and other educational training material delivered through the Judicial Training Institute (JTI) that shaped judicial doctrine and reference material for judges and magistrates making critical decisions around electoral dispute resolution – more so Judges of the Superior Court. The materials released include publications supported by the International Development Law Organization such as:

***“Lessons Learnt Brief: Avoiding Violence and Enhancing Legitimacy: Judicial Preparedness for Handling Electoral Disputes in Kenya and Beyond Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence.***

***“Friend of the Court & the 2010 Constitution: the Kenyan Experience and Comparative State Practice on Amicus Curiae – a publication in the words of IDLO “to provide the Kenyan Judiciary with a tool that they can use, when determining when to admit amicus petitioners and when to seek out amicus participation on their own initiative”***

***“ Bench Book on Electoral Disputes Resolution “***

A quick analysis of these publications points to a deliberate strategy of disparaging the judicial philosophy, integrity and jurisprudence of the Supreme Court in **Petition No. 5 of 2013 (Raila Odinga vs. IEBC)**; a push towards a qualitative rather than a quantitative approach to electoral dispute resolution determination; a disregard of the holistic interpretation of the Constitution of Kenya, the prescriptions of the electoral laws and Commonwealth judicial precedence on electoral dispute resolution; and consequently, a move towards pre-determining

the Supreme Court's parameters in deciding the 2017 presidential petition.

- d) The Chief Justice in furtherance of the conspirator plan, personally ascribed to the philosophy canvassed herein, and as part of the chapter in the publication entitled ***"Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective": Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence"***, questioned the Supreme Court's wisdom in not addressing the objective and result of court supervised scrutiny.

In his opinion the Chief Justice was categorical that qualitative infractions, irrespective of quantitative correctness of the result should **"automatically affect the result of an election"**. By this statement, the Chief Justice shows beyond any argument that he was fully assimilated in the conspiracy.

At page 271, the Chief Justice states a follows;

***"There are two aspects of infractions of qualitative factors that should automatically affect the result of an election. The first one is commission by a candidate of the election offences of treating; undue influence; and bribery...In the author's view, proof of any of these offences to the requisite standard of beyond reasonable doubt, is a substantial violation of the Constitution and the Elections Act, which should automatically void an election. The second aspect of infraction of qualitative factors that can void an election relates to violation of the principles of due process. Election goes "beyond simple arithmetic." As stated above, the qualitative test is the major determinant of a free and fair election. The qualitative principles have their grounding in due process. Due process, which is concerned with the quality of the ballot, is the hallmark of any democratic electoral process.***

### **3.0 Further Acts of Misconduct & Misbehaviour**

A review of the International Development Law Organization (IDLO) publications referenced herein reveal a pattern of engagement of institutions and individual actors that have had a more than cursory interest in pursuing the unsuccessful prosecution of the current President and Deputy President of the Republic of Kenya on trumped up charges at the International Criminal Court. The failed prosecution attempts, and the international, regional and local embarrassment caused thereof provide singular motive for the engagement of these actors in conspiring to disenfranchise the Kenyan citizens sovereign right to elect his/her president.

As an illustration:

- i. The International Development Law Organization (IDLO) is an intergovernmental organisation supporting development programmes in the legal sector. IDLO has been contributing towards human capacity and resourcing of the Kenyan Judiciary, and more specifically the Judiciary Committee on Elections (JCE), the Judiciary Training Institute (JTI) and the National Council on Administration of Justice (NCAJ). Since 2013, the IDLO has been shaping judicial doctrine by building a knowledge base that would serve as a reference point for judges and magistrates in making critical decision around electoral dispute resolution.
- ii. Prof. Makau Mutua is the chairperson of the IDLO Board of Advisors. As the IDLO Chair, Prof. Makau has tremendous influence on direction, programming and funding priorities, while his other role as Chairperson of the Kenya Human Rights Commission (KHRC), explains the inclusion into the judiciary ecosystem, institutions that have made no secret of their disdain for the current president's regime.
- iii. Indeed, following the ruling at the Supreme Court on 1<sup>st</sup> September 2017, Prof. Makau Mutua posed in a photograph with the NASA Co-principals and tweeted "The journey to the proverbial land of Canaan continues. There's no stopping us now. – From Garden of Eden"<sup>1</sup>



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<sup>1</sup><https://twitter.com/makaumutua/status/903746954085232640>



Again, on 13th September 2017, Prof. Makau Mutua tweeted “I APPLAUD Kenya's Supreme Court for BOYCOTTING @UKenyatta address to "first" sitting of Parliament. DESPERATE attempt to HANG on to power<sup>2</sup>.”

- iv. In addition to providing publication support to the Judiciary, IDLO provided communication consultant support to the Chief Justice and Deputy Chief Justice in the person of Mburugu Gikunda formerly of Media Focus on Africa who did a lot of work on post election violence (PEV). Mburugu is closely connected with Ms. Fleur Van Dissel of Dutch origin, the documentarist for Rt. Hon. Raila Odinga. The two worked very closely on PEV at Media Focus.
- v. IDLO’s funding in Kenya for the judiciary support programme is mainly from the US Agency for International Development (USAID) and DANIDA. At USAID, IDLO’s contract is managed by Zeph Aura, a close confidant of Raila Odinga, who sought to be IEBC CEO and lost to Ezra Chiloba.
- vi. IDLOs publications have been undertaken in concert with a plethora of impugned institutions and individuals who have deliberately shown their hand in the prosecution of the serving president and deputy president at the International Criminal Court (ICC) including:
  - Judiciary Training Institute – an amorphous establishment without requisite accountability and transparency framework reporting directly to the Chief Justice and President of the Supreme Court. Designed in an unstructured manner for the purpose of receiving manifest sums of untraceable donor financing and technical support from designated non-state actors, influencers and individuals disaffected with the leadership of the current administration. So far the JTI, operating without a governing council, accounting or authorized officer, or approved curricula has received upwards of Kshs. 250 million in technical and financial support from donors and the exchequer. The JTI has utilised the proceeds of these funds to pay for technical support, publication of judicial policy and guidebooks towards operationalisation of the conspirator plan;

JTI’s current director is Dr. Otieno Odek, Judge of Appeal who recently authored an authoritative paper, *Elections Technology*

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<sup>2</sup> <https://twitter.com/makaumutua/status/907645339821379585>

***Law and the Concept of “Did the Irregularity Affect the Results of the Election”?*** The previous Director of the Centre, Judge Joel Ngugi, a close confidant of former CJ Willy Mutunga, and one of the judges in Judge Mutunga’s War Council)(East African Standard, 27th September, 2013) (the other War Council members being Duncan Okello, Kwamchetsi Makokha & Denis Kabaara).

- National Council on the Administration of Justice – an unincorporated body established under section 34 of the Judicial Service Act to ensure a co-ordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system. Despite the fact that the Chief Registrar is Secretary to the Council, and is responsible for the effective and efficient administrative operations and reporting of the Council, the Chief Justice and President of the Supreme Court has unilaterally, irregularly and illegally appointed Duncan Okello, as Executive Director – a position unknown in law. The said Duncan Okello has gravitated from the position of Chief of Staff to the Chief Justice and Executive Director of the NCAJ under unclear circumstances.
- Public International Law & Policy Group - PILPG is a non-profit organisation that operates as a global pro bono law firm providing free assistance to transitioning states and governments. PILPG’s Kenya programme seeks to build the capacity of civil society organisations to provide domestic accountability for election-related violence and politically-motivated human rights abuses. PILPG’s Kenya office is made possible with funding from USAID Kenya. Among its Chief of Party alumni (head of institution) include Atieno Odhiambo who was a Law Clerk to the Chief Justice for the Supreme Court of Kenya, and advised the Chief Justice on cases filed at the Supreme Court. PILPG was an active civil society player in the Kenya ICC cases in partnership with the Kenya Human Rights Commission
- The periodic presence in Kenya of Ivan Marovic of OTPOR! a prominent Serbian group that has been responsible for the training of covert activist elements committed to regime change as happened in Egypt during the Tahrir Square uprising that led, eventually, to widespread violence. Ivan Marovic has associated with parties engaged in the drive to undermine Judicial independence and utilise activism to undermine the will of the

Kenyan people as expressed in their elected representatives as articulated hereunder;

- Individuals within the Kenyans for Peace with Truth and Justice - a coalition of organizations<sup>3</sup> convened under the auspices of AFRICOG in the immediate aftermath of 2007's presidential election debacle<sup>4</sup>. According to their website ([www.kptj.africog.org](http://www.kptj.africog.org)), KPTJ maintains that there can be no peace without truth and justice. During the post-election crisis, KPTJ generated biased analysis, in perceived but unsubstantiated claims of electoral fraud and consequently, the ensuing incidences of violence that were robustly exaggerated as "country-wide" and "pre-planned".

The KPTJ coalition comprises of the institutional heads who championed the ICC cases against the current President and Deputy President, including Gladwell Otieno; Harun Ndubi; Betty Murungi; George Kegoro, Ndungu Wainaina, Ben Sihanya etc

Amongst the KPTJ institutions are entities and individuals that thereafter deliberately petitioned against the election of the current president and deputy president of the Republic of Kenya through the consolidated petition no. 5 of 2013

- The Technical Committee that developed the *Bench Book on Electoral Disputes Resolution* included Dr. Steve Ouma (former deputy executive director Kenya Human Rights Commission), Dr. Linda Musumba (a board member of Kituo Cha Sheria, an organization involved in witness procurement at ICC), Moses Owuor (Law society of Kenya), Dr. Collins Odote (Judiciary Committee on Elections Legal Advisor and co-founder of Institute for Law and Environmental Governance together with current Head of Ford Foundation, Odhiambo Makoloo) and Justice (Rtd)

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<sup>3</sup> Organizations include: Africa Centre for Open Governance (AfricOG); Constitution and Reform Education Consortium (CRECO); Gay And Lesbian Coalition of Kenya (GALCK); Haki Focus; Independent Medico-Legal Unit (IMLU); Innovative Lawyering; International Commission of Jurists (ICJ-Kenya); International Centre for Policy and Conflict (ICPC); Kenya Human Rights Commission(KHRC); Katiba Institute; Muslim Human Rights Forum; Society for International Development (SID); Urgent Action Fund (UAF)-Africa etc

<sup>4</sup> <http://kptj.africog.org/who-is-kptj/>

Violet Mavisi (a former Commissioner at the KNCHR during the time of Maina Kiai.

- An interest mapping of individuals and organizations would show that we are dealing with the same players influencing JTI who were involved in the ICC process, and who have therefore taken judicial thinking on electoral management captive (see annexed influence map marked as Appendix 1).
- The non-state actors and individuals cited herein above coalesced around the *Kura Yangu Sauti Yangu* election observer group for the 2017 presidential election. Remarkably, this is the only observer group that returned a negative report on the conduct of the 2017 general election. Coincidentally, the Chief Justice equally turned a negative verdict on the 2017 General Election.

#### **4.0 Further Breach of Regulation 12 of the Judicial Code of Conduct & Ethics**

During the hearing and determination of the Presidential Petition, the Chief Justice was influenced by the NASA political utterances which were made prior to the filing of the Petition. In particular;

- i. The Chief Justice's clear influence by the political statements of the NASA opposition leaders not to issue a **"short ruling"** as acknowledged in his preamble to the reading of the majority decision;
- ii. The Chief Justices' chapter in the *"Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective": Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence"* that categorically seeks to depart from the Supreme Court 2013 presidential petition failures as a result of the public criticism of the decision;
- iii. The Chief Justice's encouragement of the judicial philosophy and jurisprudence advanced by IDLO through its embedded technical advisors and partners to depart from consideration of the court in Supreme Court 2013 presidential petition in deliberate disregard of the established legal principles on Standard of Proof; Burden of Proof and the Law of Evidence;

## 5.0 Unprofessional Interaction

Between the date of the 2017 general election, running through to the date of determination of the presidential election petition, the Chief Justice had numerous telephone interactions with lawyers who were acting for the petitioners; associates and/or privies of the petitioners; political supporters of the National Super Alliance (NASA) coalition, and other persons whose connection with the petition is unknown as at present.

Those contacts were unprofessional. The Chief Justice also concealed those conversations from the other parties in that presidential petition in breach of The Judicial Code of Conduct & Ethics. It behooves upon the Judicial Service Commission (JSC) to seek from the relevant telecommunication operators, a complete call log of the Chief Justice's telephone numbers and a breakdown analysis of the calls made to and from the said numbers during that period outlining the frequency and duration of the calls. It was grossly unfair for the Chief Justice to have such telephone conversations relating to the contest before the Supreme Court and never disclose the content of the communication. The failure to disclose the content of these conversations leads to an inference that the communication was intended to influence the outcome of the electoral contest.

In consequence thereof, and as part of the Chief Justice's plan and conspiracy as above, and despite the manifest conflict of interest situation in which the Chief Justice found himself in this regard, in a 4:2 majority decision of the Supreme Court, participated in subverting the democratic will of the Kenyan people and unconstitutionally and illegally invalidating the election of the President of the Republic of Kenya following the general election of 8<sup>th</sup> August 2017.

The introduction of partisan and/or subversive technical support; the production of the above publications and guideline documents; the deliberate indoctrination programmes delivered to members of the bench, and the personal role of the Chief Justice and President of the Supreme Court in the operationalization of the conspirator plan are instructive in the Supreme Courts departure from its own rulings and decisions post 2013 on almost identical cases, and consequently an operationalization of the conspirator plan resulting in a compromising of judicial independence and the overall subversion of justice, through the invalidation of the presidential election result.

The Chief Justice's boycott of the State Opening of the 12th Parliament, upset 50-years of precedence, and demonstrated to the other arms of government, the citizens of Kenya, and the International Community, that he was partisan and opposed to the proceedings. Such partisan action, outside the bounds of tradition and law, is a clear indication of the compromising of his role.

