

Regional and continental responses to the DRC election crisis

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The recent Democratic Republic of the Congo (DRC) elections are a useful measure of the willingness of continental and regional bodies to address contested election outcomes in Africa. They also show the extent to which international players are willing to use leverage to influence the behaviour of a government. Finally, the DRC election crisis demonstrates how divergent positions among regional and continental stakeholders can ultimately lead to a non-response.

Key findings

- ▶ If regional and continental bodies are willing to reject proof of electoral fraud from credible organisations and rigorous processes, it means that African civil society, opposition groups and populations effectively have no means to challenge governments that have coopted key national institutions.
- ▶ The outcome of the contestation of the election results demonstrates clearly what happens when coordination and unity among regional and international actors is absent.
- ▶ In the DRC case, the different responses ranged from the traditional divide between western and African positions to divisions between Regional Economic Communities (RECs) and the African Union (AU) and divisions between often-rival branches of the AU's own peace and security structures.
- ▶ Disharmony among regional and continental bodies played into the hands of Kabila and Tshisekedi. It helped them impose their political agreement, even in the face of rigorous and substantial evidence that the official result did not reflect the actual vote of the Congolese people.

Recommendations

To the government of the DRC:

- ▶ Reform the Constitutional Court to make it an independent, apolitical body.
- ▶ Reform the Commission Électorale Nationale Indépendante (CENI) to make it an independent, apolitical institution that can deliver credible elections.

To the RECs and the AU:

- ▶ Clarify the issue of subsidiarity when a country is a member of more than one REC. In such instances, it could be the AU that becomes the primary decision-making body.
- ▶ Favour the Peace and Security Council (PSC) as the decision-making body in the case of electoral questions. This is especially important in light of the fact that the merger of the Political and Social Affairs Department (PSD) and the Department of Political Affairs (DPA) will increase the interactions between the PSC and the Election Unit. This could include having the AU act as a certifying body for electoral disputes.
- ▶ RECs and the AU should set benchmarks when it comes to the independence of constitutional courts and national electoral bodies. This will enhance the legitimacy of the electoral processes on the continent.

Introduction

The Constitution of the Democratic Republic of the Congo (DRC) of 2005 stipulates that elections are held every five years and that presidential mandates are limited to two consecutive five-year terms. The origin of the extended political crisis in the DRC between 2015 and 2018 was the government's disrespect for these time frames. The desire to find a way around the limits of the presidential term caused the delay in holding the election.

This report will not go into detail about the two-year period leading up to the December 2018 elections, but it will provide some context within which to analyse the international response after the December polls. The emphasis will be on the role of civil society and the Congolese population as well as the politicisation of key institutions. These institutions include the Independent National Electoral Commission (CENI) and the Congolese Constitutional Court, which both played a deciding role before and after the polls.

Presidential and legislative elections took place in the DRC on 30 December 2018 after being delayed for a week for logistical reasons. For the first time since the end of the war in 2003, the Congolese government organised elections without any external financial, logistical or technical assistance. In 2006 and in 2011, the electoral process had been heavily financed by international donors, while the United Nations Organisation Stabilisation Mission in the DRC (MONUSCO) had provided key transport and logistical help.

International observers were concerned about the government's ability to manage such a massive undertaking on its own for the first time. They also expressed concern that their lack of involvement meant there was less transparency and also less insight into the process than there had been in previous years.

Prior to the elections, the CENI was unwilling to address key concerns such as the electronic voting technology and six million potentially fictional voters on the voter's roll.¹ This unwillingness coupled with the repressive political environment in the country ahead of the elections created an atmosphere of heightened tension and suspicion.

Confidence in the process and the CENI as an institution had already been steadily eroded since the 2011 election. The outcome of the 2011 polls was contested by the

Union for Democracy and Social Progress (UDPS) then still led by Étienne Tshisekedi. After the 2011 election and especially between 2015 and 2018, popular opposition to Kabila standing for a third term grew into a sustained movement. The CENI was widely seen as biased and a key ally in Kabila's attempts to stay in office.

By the time the elections were held in December 2018, the CENI had lost substantial credibility. The perception was that while the CENI might organise the elections, it was insufficiently independent to stand up to Kabila and his government and would not allow the real outcome of the vote to be reflected. The CENI did little to try and improve its image or to create an atmosphere of confidence ahead of the vote.^{2, 3}

Similarly, the Constitutional Court in the DRC is a highly politicised body whose judges have been hand-picked by Kabila. Past court rulings related to the election delay allow some insight into how this politicisation has influenced its judgements.

The political crisis originated in government's disrespect for the constitution's election timetable

In October 2016, the Constitutional Court ruled in favour of the CENI's request for a postponement of the elections on the grounds that the review of the voter's roll had not been completed.⁴ The legality of that ruling is questionable as, on that occasion, the court ruled with only five of its nine judges present. The rule at the time was that a quorum is only reached when seven of the nine sitting judges are present in court. In 2017, Kabila introduced new legislation dropping the Constitutional Court's quorum requirement to five of the nine judges.⁵

The Court's interpretation of the legal status of Kabila's presidency in December 2016 is one of the most notable and critical elements in how it helped Kabila maintain legitimacy beyond the expiration of his mandate. In May 2016, the Constitutional Court responded to a case introduced deliberately by Kabila's ruling coalition on the question of the legitimacy of his mandate after December 2016. The Constitutional Court invoked Clause 70, of the constitution, which states, 'At the end of his mandate, the

president remains in office until the effective installation of the new president.⁶

This clause was seemingly written to describe the method of transfer of power between the outgoing and the incoming head of state once an election has taken place. It was not intended to provide legal cover for a president who overstates the period of his mandate.

Article 75 of the constitution prescribes that the president of the senate takes over in the case of a leadership void. The expiration of Kabila's presidential mandate would have created such a leadership void. Many – including the political opposition – argued that the legitimate way to handle this leadership void in December 2016 would have been to implement Article 75 and allow the president of the senate to take over. But the court responded that Article 75 did not apply in the event that elections are not held.⁷

In fact, the 2005 constitution – backed by the ruling party and adopted by national referendum – is very clear about the chain of command. Article 75 states that 'in the event of a vacancy due to death or for any other reason of being prevented definitively, the functions of the President of the Republic are temporarily exercised by the President of the Senate.'⁸

The only international election observers in DRC were 80 from the African Union and 93 from SADC

That arrangement would not have suited Kabila, as it would have meant leaving office and ceding power to Senate President Léon Kengo wa Dondo. Kengo was a former prime minister under Mobutu and a tenuous political ally of Kabila. Fortunately for Kabila, the court responded that Article 75 did not apply as elections had not been held.⁹

The Constitutional Court's ruling provided the government with the critical legal ruling that Kabila needed, both domestically and internationally. He wanted to extend his time in office without being vulnerable to accusations that he was violating Congolese laws. This legal cover did not satisfy his domestic critics but it was sufficient to convince many African and international actors. Notable examples of these actors are the Southern African

Development Community (SADC) – which has a strong tendency to invoke the primacy of the domestic laws of a sovereign state – and the United Nations (UN).

The Congolese Constitutional Court also plays a decisive role in elections being the court that arbitrates electoral disputes in the presidential contest. Presidential candidates seeking to contest the official outcomes are required to appeal to the court for judgement on the merits of their case. Following the contested outcome of the December 2018 elections, opposition coalition leader Martin Fayulu submitted his contestation to the court. Ten days later the Constitutional Court rejected the case. Felix Tshisekedi was inaugurated as president of the DRC on 24 January 2019.

In addition to rejecting external financial and logistical assistance for the elections, the Congolese government also turned down requests from international organisations to monitor and observe the election. On 30 December the only international observers in the DRC were 80 from the African Union (AU) and 93 from SADC. The AU observers were deployed to 13 provinces¹⁰ and the SADC observers to 16 provinces.¹¹ Most observers from both delegations were deployed in urban areas and left shortly after the polls were conducted.

The preliminary reports from both missions cited a range of irregularities including delayed opening of polling stations, absence of voting materials and problems with electronic voting machines. Both reports also concluded that the elections had been conducted in a peaceful, free and fair environment. They urged the Congolese government to publish the results that reflected the choice of the Congolese population. Neither mission was involved in monitoring or observing the compilation of the election results, as this is not common practice with either AU or SADC observer missions.

Domestic observers significantly outnumbered international ones. The Catholic Church's National Episcopal Conference of the DRC (CENCO) deployed 40 000 observers to the 21 784 polling stations.¹² It was financially supported by international donors. Like the international observers, it noted numerous irregularities at the polls but concluded that these did not prevent voters from exercising their right to vote. 'It is equally important to emphasise that the irregularities ... did not considerably impact the choice which the Congolese people clearly expressed.'¹³

In addition to observing elections on 30 December, CENCO ran a parallel compilation process. This entailed selecting a proportional number of polling stations per circumscription from which to include results and to use these to build a stratified statistical sample. Legally, each polling station must publicly display aggregate votes per candidate outside the polling station. These aggregate results – called *procès-verbaux* – are signed by all observers and the CENI staff present in the polling station.

Using this publicly available information from 7 886 (10.2%) randomly selected polling stations, the CENCO was able to accurately determine the winner of the election. According to the CENCO, Martin Fayulu, of the Lamuka coalition, won the election with 62,8% of the vote. Leaked CENI data put Fayulu's victory at 59.4%.

After the polls

The battle over the legitimacy of the results began 24 hours after the polls closed when both the CENI and the CENCO were able to see the emergence of clear trends in the votes.

On 6 January, the CENCO released a public statement saying that it had completed its parallel counting process and knew who the winner of the presidential election was. This statement was followed by briefings to key international actors represented in Kinshasa, the aim of which was to provide them with information that could galvanise an early response to the anticipated official outcome.¹⁴

At this point, the CENCO had already been in contact with the key political figures, including Tshisekedi, Fayulu and representatives for Kabila. The CENCO had opened discussions with them about the results of the parallel counting process.¹⁵ Its statement was also intended to put pressure on the CENI and send the message that fraudulent results would not go untested. Prior to 6 January, they had urged the CENI leadership to publish the real results.

On 9 January, at 10 pm Kinshasa time, the CENI began to read out the results of the provincial elections. At 3 am Kinshasa time, the CENI president, Corneille Nangaa, announced that Felix Tshisekedi had won the presidential election. The following morning, Fayulu announced that he had won the election with 61% of the vote and declared his intention to contest the official results at the Constitutional Court.

The announcement that Tshisekedi had won followed days of speculation that the Kabila and Tshisekedi camps had cut a political deal according to which Tshisekedi would become president. In return, Kabila would be allowed to continue to run his businesses and would not be pursued on charges of corruption. The details of such an arrangement are not public knowledge.

However, whatever the details of the alleged deal, there is little doubt that Tshisekedi is not the legitimate winner of the presidential election. This is proven by the results that were collected by the CENCO.¹⁶ To this day, the CENI has never released the results of the presidential election by polling station and by province, as they are constitutionally required to do. The CENI has also not released a breakdown for the legislative elections as they are required to do.

CENI has never released breakdowns of the presidential or legislative election results

International reaction to the official results was muted. France had announced, days before the results were publicly announced, that it was sceptical about their credibility. It repeated a slightly modified message after the results were released. The European Union (EU) and the United States (US) qualified their responses, as did other key countries like Belgium, indicating that they were uncomfortable with the official result.

The EU made the most constructive statement, asking that the CENI publish the aggregated results from each polling station. Congolese civil society organisations made the same demand of the CENI. This publication of results from and at each polling station, signed by the CENI staff and witnesses present, is a requirement under Congolese electoral law. It is a key step in the process.

The rationale of the request was that going back to this early stage of the documentation process would have been an effective way in which to establish the real results. It would also test the veracity of the results presented by the CENI.

Both the CENCO and the Synergie des Missions d'Observation Citoyenne des Elections (SYMOCEL)

judged that to a large extent the publication of results had been done unsatisfactorily.¹⁷ The CENI did not respond to requests from civil society or the EU to publish the aggregated results in full, nor did it explain its refusal to do so.

Contesting the CENCO's legitimacy

The CENCO is not the first non-governmental organisation to have conducted a parallel vote-counting process. This has also been done in several other African countries including Ghana. However, the scale of CENCO's efforts, its ability to accurately determine the real outcome of the election, its credibility and its legitimacy make it arguably the most rigorous and legitimate domestic electoral observer in the region and on the continent. In the DRC, where the institutions responsible for managing and adjudicating the elections are heavily politicised and manipulated, the only peaceful defence available against electoral fraud is rigorous electoral observation.

CENCO is arguably the most rigorous and legitimate domestic electoral observer in the region and on the continent

Similar dynamics prevail in other countries. For example, in Zimbabwe, civil society and the political opposition have frequently alleged electoral fraud and appealed for interventions to address this fraud but proof has always been missing. In the 2018 presidential DRC elections, this proof was provided by the CENCO, but the AU, SADC and the international community chose to ignore it. They accepted the officially proclaimed results released by the biased and politicised institutions that the Kabila elite control. Their argument was that these were the mechanisms designated by the Congolese constitution.

If regional and continental bodies are willing to reject proof of electoral fraud from credible and rigorous organisations and processes, it means that African civil society, opposition groups and populations effectively have no means to challenge governments that have coopted key national institutions.



REGIONAL AND CONTINENTAL
BODIES REJECTED PROOF OF
ELECTORAL FRAUD

UN Security Council meeting

In early January, the UN Security Council held a meeting at which the DRC was discussed. Some member states called for a strong statement asking the Congolese government to:

- Restore internet access which had been cut on 2 January 2019
- Refrain from using violence against the population
- Publish results that reflected the true will of the people

Publication of this statement, which was drafted by France, the penholder on the DRC, was blocked by South Africa, China and Russia. Cote d'Ivoire was

in favour of the statement. South Africa's argument at the time was that the CENI should be given the opportunity to first publish the results before the UN Security Council criticised or pressured it.¹⁸

Opposing views argued that once the CENI had made its results public it would be too late and that the Congolese government would never submit to pressure and reverse a decision the CENI had already made public. It was felt that applying pressure ahead of the CENI's publication was therefore essential if a fraudulent outcome was to be avoided. CENCO officials have also explained that this was a key reason they stated so openly, and so early on, that they knew the real outcome of the vote.

South Africa's position at that time is certainly in line with its usual diplomatic approach – to avoid public or megaphone diplomacy and to start from the position that domestic institutions are functional. But it failed – or refused – to recognise that the timing of the pressure was the key issue, more so than the exact content of the message. This undermined the approach, which might have been effective.

SADC

Ultimately, Kabila did not manage to come up with a viable solution to the question of term limits and SADC played an important role in pushing him to respect the DRC's constitution and not stand for an illegal third term. But as much as Kabila appears to have understood this, he would also have been well aware of their reluctance to wade into electoral disputes or argue with decisions taken by relevant domestic institutions of a sovereign nation.

SADC's responses to the contested election in the DRC reveal the extent to which the organisation was divided over how to handle the contestation. SADC's responses initially mirrored those of the AU, calling for the results to reflect the will of the people. At the same time, statements made by certain members of the SADC electoral observation mission indicated a bias in favour of the CENI, and a reluctance to criticise it.¹⁹ Various SADC officials were contacted for comment for this paper but no response was received.

This is where the pro-Kabila Constitutional Court has been most valuable to him. As mentioned earlier, the Constitutional Court delivered Kabila with several

decisions that provided him with the necessary legal cover. The nuances and legality of those decisions were often questioned by domestic legal experts and civil society. But they were always sufficient to convince SADC, and South Africa in particular, and were the basis of their unwillingness to question or push the Congolese government on the elections.

On 13 January 2019, three days after the CENI announced that Tshisekedi had won the election, Zambian President Edgar Lungu, the then chair of the SADC organ on politics, defence and security issued a statement. It was on his own letterhead and he called for a recount in the vote and the formation of a government of national unity.

The statement initially caused confusion as it was not on an official SADC letterhead. However, when it was distributed by South Africa's Department for International Relations and Cooperation (DIRCO) hours later, it was deemed to be an official SADC statement. Its strong message was surprising because the body had never before called for such strong action in an electoral dispute.

SADC's responses reveal how divided it was over how to handle the contested election results

Adding to the sense that the statement reflected an official SADC position was the fact that at the same time that the statement from Lungu came out, South Africa's minister of international relations and cooperation, Lindiwe Sisulu, was giving a press conference. Sisulu mooted for the first time the idea that a government of national unity would be a good resolution of the DRC's electoral crisis.²⁰

However, it soon became clear that Lungu had been acting on his own and did not have the support of all SADC member states and stakeholders. The next day SADC executive secretary Stergomena Tax distanced herself from Lungu's statement in a Tweet²¹ and the statement was never put up on SADC's official website. DIRCO has never explained why it distributed the statement.

Several days later SADC announced the holding of a double troika meeting in Addis Ababa on 17 January

2019. This meeting would happen hours before a special AU high-level consultation on the elections in the DRC, also in Addis Ababa. The SADC double troika includes:

- The incoming, present and outgoing chair of SADC (in this case, Tanzania, Namibia and South Africa)
- The incoming, present and outgoing chair of the organ on politics, defense and security (currently, Angola, Zambia and Zimbabwe)

Leonard She Okitundu, the DRC's foreign minister also attended and briefed the meeting about the situation in the DRC.

Following the meeting, SADC issued a statement that reflected its traditional stance on elections in member states: 'The Summit congratulates his Excellency President Joseph Kabila for his demonstrated leadership in the holding of elections ... The summit has taken note of the case brought to the Constitutional Court contesting the provisional results of the presidential election: it invited the people and all political actors to remain calm, to act in a manner to consolidate democracy, preserve peace and to treat any grievance in conformity with the relevant electoral laws of the DRC.'²²

The AU statement is one of the boldest it has ever made about contested election results

The statement also addressed the international community: 'The summit recognises and underlines the role played by the Constitutional Court and called the international community to respect the Constitution of the DRC, the national political and legal procedures that are being followed to finalise the electoral process.'²³

In an indication that this statement was widely interpreted as pro-government, Congolese government officials sent a draft version to numerous media outlets before it had been finalised.²⁴

It is also significant that this strong statement was made just hours before the members of the double troika would participate in the AU summit on the same subject. It is clear that SADC wanted to send a very strong message to the AU that it was not willing to put additional pressure on the DRC government or the CENI regarding the

election contestation. The timing of the statement also made it quite clear that SADC considered this a matter for SADC and not the AU.

The African Union

The AU high-level consultative meeting which started several hours after the SADC double troika meeting was chaired by Moussa Faki Mahamat, Chairperson of the AU Commission. It was attended by a number of heads of state and government, most of them acting in their capacities as chairs of regional economic communities:

- Chadian President Idris Deby Itno – a member of the AU troika
- Ethiopian Prime Minister Abi Abye – 2018 chair of Intergovernmental Authority on Development (IGAD)
- Ambassador Bankole Adeoye – representing Nigerian President Muhamadu Buhari, the 2018 chair of the Economic Community of West African States (ECOWAS)
- Ugandan President Yoweri Museveni – 2018 chair of the East African Community (EAC)
- Denis Sassou-Nguesso – chair of the International Conference of the Great Lakes Region (ICGLR)
- The African members of the UN Security Council – Ivory Coast, Equatorial Guinea and South Africa
- The AU troika
- Rwandan President Paul Kagame, the outgoing chair of the AU Commission.

Like the SADC meeting, this meeting was briefed by Léonard Okitundu (Congolese vice prime minister), Hage Geingob (SADC chair), Denis Sassou-Nguesso (ICGLR chair) and Moussa Faki.

The AU statement that was issued hours later, following the meeting, took a dramatically different position to the one taken by SADC: 'The Heads of State and Government attending the meeting concluded that there were serious doubts on the conformity of the provisional results, as proclaimed by the National Independent Electoral Commission, with the votes cast. Accordingly, the Heads of State and Government called for the suspension of the proclamation of the final results of the elections.'²⁵

The AU announced that as a follow-up, a high-level delegation from the AU and regional heads of state would be traveling to Kinshasa on Monday 21 January to 'interact with all Congolese stakeholders, with the view to reaching a consensus on a way out of the post-electoral crisis in the country.'²⁶ The Congolese government responded that the delegation was welcome, but that it would not suspend the announcement of the election results. Barnabe Kikaya bin Karubi, Kabila's special advisor on international affairs called the AU's request an insult to the Congolese people and to the Constitutional Court.²⁷

Ultimately, the African Union's official bold stance did not have any impact

The statement from the AU's high-level consultative meeting calling for the CENI to halt its proclamation of the election results is one of the boldest it has ever made in the context of a contested election. Never before has the AU asked a national electoral commission to suspend the proclamation of results. The strength of the statement came as a surprise to many.

AU officials familiar with the proceedings indicated that the final statement was not reflective of a consensus that had been reached in the meeting. Rather it reflected the views of Kagame, Sassou-Nguesso, Deby and Museveni. They were all present in their capacities as chairpersons of regional economic communities.²⁸

The EU had been the first organisation to push for greater transparency regarding the results, suggesting that the contestation could be addressed by having the CENI produce the results from each polling station. It also supported the AU initiative to suspend the publication of the final results, reportedly a position that was strongly encouraged by France and Belgium.²⁹

Those not convinced to take a harder line included Nigeria – also a long-standing member of the AU Peace and Security Council (PSC). Nigerian Ambassador to the AU, Bankole Adeoye said that there were no grounds to push for a suspension of the result proclamation or for further intervention because the DRC had not violated its own constitution.³⁰ Sources close to South African

President Cyril Ramaphosa indicate that he held the same view of the circumstances in the DRC. He believed that as long as the Congolese constitution was not being violated, there were no grounds for an interventionist approach.

The meeting itself was convened and organised by Kagame in his capacity as the outgoing AU Chair, bypassing the Commission. The manner in which the meeting was organised, and the absence of the participation of the key AU organ on the matter (the PSC) later became key issues.

Several senior AU officials and African ambassadors later raised these concerns and distanced themselves from the legitimacy of the AU statement that came out of consultative talks. They did this on the grounds that the meeting was consultative, non-binding and had blurred AU procedural rules.³¹ The lack of clarity regarding the legal value of this meeting allowed those uncomfortable with the interventionist nature of the statement to reject its recommendations.

There is no clarity on what motivated Kagame to take this initiative. Some analysts have suggested that he took the initiative to please France, with whom Kagame has been rebuilding a key relationship. France being the driving factor could also explain the support of Sassou-Nguesso and Deby for the final statement as both of them are close to and depend on the French government.

Another theory is that Kagame was trying to showcase his credentials as a defender of democracy and good governance, and a constructive player in the Great Lakes region. He would be keen to play this role especially for an element of the international business and finance audience with which he has built a significant relationship.

Ultimately, the AU's official bold stance did not have any impact. During the night of 19–20 January 2019, the Constitutional Court ruled that Fayulu's challenge to the CENI results was unfounded and proclaimed that Felix Tshisekedi was the confirmed winner of the presidential election.³²

The AU delegation, reportedly already partially assembled in Kigali,³³ subsequently announced that it was postponing its visit to Kinshasa, saying that the matter

would be referred to the February 2019 AU summit of heads of state:

The African Union Commission takes note of the decision of the Constitutional Court of the Democratic Republic of the Congo proclaiming the final results of the presidential and national and provincial and legislative elections of 30 December 2018. The Commission calls on all concerned to work for the preservation of peace and stability and the promotion of national harmony in their country.

The Commission reiterates the continued availability of the African Union to accompany the Democratic Republic of the Congo in this critical phase of its history, as well as its solidarity with the Congolese people.

It should be noted that the visit of the high-level delegation to Kinshasa on 21 January 2019 has been postponed.

The February 2019 Summit of the Union will receive a report on the efforts made, in solidarity with, and support to, the people of the Democratic Republic of the Congo.³⁴

After the AU summit, any considerations of further questioning Tshisekedi's legitimacy were shelved

The follow-up AU visit never took place. In response to Tshisekedi's inauguration on 22 January 2019, the AU said it was ready to work with him. At the February 2019 summit, the DRC's new president received a very warm welcome from his peers, and any considerations of further questioning his legitimacy as the DRC's head of state were shelved.³⁵

The problem with constitutionalism

South Africa (and Nigeria) chose to base their policy responses to the DRC election contestation on the principle of constitutionalism, arguing firmly that as long as the Congolese constitution was not violated, external actors had no right or grounds upon which to interfere in the election contestation.³⁶ This interpretation takes a very narrow view of the role played by domestic institutions in

the electoral crisis, as well as ignoring essential clauses of the Congolese constitution and Congolese electoral law.

In the first instance, many Congolese actors and members of civil society argue that the Congolese constitution was violated when presidential and legislative elections that should be held every five years were delayed by two years. This delay was approved by the Congolese Constitutional Court, a problematic and highly politicised institution.

In 2018, Congolese electoral law was violated when the CENI introduced new voting technology in the form of the electronic voting machines. In the context of the December elections, the electoral law was violated during the proclamation process, as well as in the compilation phase of the legislative elections. The manner in which the results were proclaimed was also not in line with the electoral law. To date, the CENI has still not made the full results of the presidential election public. Legally these results should be published polling station by polling station.

Regarding the presidential results, the CENI has only published the aggregate national results per candidate. The results of the legislative elections were also proclaimed without a supporting breakdown per polling station and circumscription. To date, the CENI has yet to release the results per polling station for both the presidential and the legislative elections – a requirement of the Congolese electoral law and the Congolese constitution.

Specifically, with regards to the cases of contestation heard by the Constitutional Court, there were also numerous irregularities. The Court called the CENI as a witness in the case but did not call the CENCO or ask for its data. It also did not call on the SYMOCEL to testify. According to a Congolese legal expert, the Court could have called the CENI as a witness, but the burden of proof in Congolese law lies with the person bringing the case, in this instance Fayulu.

In his testimony, Ronsard Malonda, the executive national secretary of the CENI, rebuffed Fayulu's accusation that the provisional results were released before counting had been completed:

All local compilation centers were allowed to publish a results compilation sheet for the presidential election. The constituency being the

national territory, in fact the local center of compilation of the results, it is [actually] the seat of the plenary office of the CENI. CLCRs are only advanced processing posts to facilitate the CENI plenary in receiving, centralizing, and verifying compliance. They cannot replace the plenary of the CENI.³⁷

Malonda also rejected the possibility that the Court could evaluate the CENI results by conducting a recount: 'The Court cannot do the work of 72 000 polling stations in the period of one week [the period for the adjudication of the contestation]. The Court does not have the technical capacity to do this.'³⁸

Considering that the court had the means, the mandate and even the duty to go beyond these cursory investigations, it has to be acknowledged that, based on the evidence it received from the Fayulu legal team, the Court did not render an illegitimate verdict.

Fayulu's legal team made a number of errors in protocol in terms of the way in which the court documents were submitted. Notably, the person who first submitted the documents, Professor Kalele, was not judged to legally represent the party, and the court clerk rejected the first submission. It accepted the subsequent submission which was made by Fayulu. The UDPS challenged Fayulu's second submission, arguing that it fell outside the deadline for electoral contestations, but the Court ruled in favour of Fayulu and accepted the request.

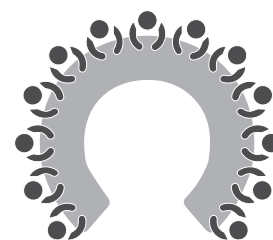
South Africa and Nigeria based their policy responses to the DRC election contestation on the principle of constitutionalism

However, Fayulu did not at that point provide the requisite evidence of his victory or of electoral fraud. It is required that: 'You...attach all...elements of proof to give them to the court at the same time that you introduce the request.'³⁹

What the court needed was sufficient evidence that the results announced by the CENI were not accurate. In order to do this, Fayulu would have had to provide a critical number of procès-verbaux or voting lists. But his team did not submit them on the day they introduced the objection. They only submitted them several days later when the Court held the actual hearing. In addition to flouting procedure by failing to bring them on the day Fayulu lodged the objection, the procès-verbaux his team did bring had not been certified by the CENI, as required.

The final blow to the case was that Fayulu's team didn't have sufficient procès-verbaux to demonstrate that the process and the outcome had been tampered with. The Constitutional Court threw the case out.

A Congolese legal expert, who was also involved in monitoring the election, said that the Fayulu team had made a fatal error by not preparing its own election monitoring and observation operation. That would have



DRC'S NEW PRESIDENT WAS
WARMLY WELCOMED AT THE 2019
AU SUMMIT

provided the evidence needed for a legal challenge. The Fayulu team did not collect the *procès-verbaux* or focus on the observation stage. They did not prepare to monitor the elections. Clearly, it would have been hypocritical to do so, given that Lamuka was until a late stage in proceedings calling for a boycott of the electronic voting machines.⁴⁰

Southern African diplomacy

South Africa has a long history of engagement in the DRC, dating back to the days when former president Nelson Mandela attempted to mediate between then-president Mobutu Sese Seko and rebel leader Laurent Desire Kabila in 1996. During the transition years, between 2003 and 2006, former president Thabo Mbeki played a significant role in keeping the 2006 electoral process on track and making sure there were no disruptions in the first post-conflict elections.

While Jacob Zuma was president of South Africa, the relationship between South Africa and the DRC was strongly driven by the personal relationship between Kabila and Zuma, with Zuma taking a largely pro-Kabila approach to the electoral crisis in the DRC. When Cyril Ramaphosa became president of South Africa in early 2018, South Africa's policy towards the DRC changed. South African policy on DRC became more closely aligned with that of the other significant regional country, Angola. Ramaphosa met with Kabila in 2018 and made it clear that South Africa did not approve of a third term of office.⁴¹

Both SA and Angola took a hands-off approach to the electoral contestation in the DRC

Angola had been pushing since 2016 for an end to the widespread instability and protests sparked by the uncertainty over whether or not Kabila was going to attempt to stand for a third term.⁴² It was instrumental in urging Kabila back to the negotiating table after the AU-led mediation, under Edem Kodjo, brokered an unsatisfactory and exclusionary political deal in October 2016.⁴³

Angola maintained pressure on Kabila for the next two years, making it clear that it felt that another term for him

meant greater instability. It did this not just behind the scenes in bilateral talks but also using its seat on the UN Security Council from 2015–2016 and its chairmanship of the ICGLR from 2014–2017.⁴⁴

Angola has not been open about its motivation in pushing Kabila to respect the Congolese constitution. However, it is clear that the scale of the political instability in the DRC and Angola's fears of a spillover from this instability were substantial drivers of Angola's pressure on the Congolese president to stand down. Angola shares a border that is over 2 000 km long with the DRC. Stability in neighbouring DRC, rather than a normative drive for improved democracy and governance in the DRC, are what underpinned Angolan pressure.

In the end, Angola and South Africa's positions on a third term for Kabila prevailed within SADC, which publicly said goodbye to the Congolese leader during its October 2018 summit in Namibia. This was two months after Kabila had finally designated a successor for the presidential elections in the DRC.

Both countries then took a much more hands-off approach to the electoral contestation in the DRC and an openly conciliatory approach to the proclamation of Felix Tshisekedi as the new Congolese president. It is possible that Angola, in particular, would have acted differently if the CENI had declared Ramazani Shadary president and if this had sparked widespread violence and popular protests.

This scenario of large-scale protests, a harsh crackdown from the Congolese security services and subsequent large-scale violence was what many in the international community were bracing themselves for. When it became clear that Tshisekedi would be proclaimed the winner instead and the Congolese population did not come out and protest, there was surprise, followed by relief, followed by acceptance.

As a result, neither South Africa, Angola nor SADC joined the push for a suspension of the proclamation of the election results.

The international community

This paper is primarily about the African response to the DRC's elections. However, it is also concerned with how the final outcome was shaped and how this will impact

on future elections and electoral contestations on the continent. Therefore, a brief discussion of other international responses is relevant.

By the time elections were held in the DRC in December 2018, key western countries had made it clear that they were not happy about key issues, such as Kabila's desire to seek a third term and the delay in holding elections. The increasingly critical nature of their public statements led to a deterioration in their relationship with the Congolese government. The US, Belgium, the UK, France and the EU were among the most outspoken. Western opinions were however out of step with prevailing views in the region and on the continent.

There was a point in mid-2018, however, when key international, continental and regional opinions were aligned. There was consensus that Kabila must not stand for a third term. This unity was exemplified by the attempted joint visit to Kinshasa in late-June by UN Secretary-General Antonio Guterres and AU Commission Chairperson Moussa Faki. The visit did not take place because Kabila refused to agree to it.

This common position was also supported by key countries Angola and South Africa. It was adopted by SADC which formally bade farewell to Kabila at its October 2018 summit. Following two years of sustained political protest and contestation, the key players had understood that Kabila insisting on a third term had the potential to stoke even greater instability in the DRC.

When Kabila finally announced his party's successor candidate in mid-August, the political victory belonged to the Congolese population, supported by a coordinated international community. They spoke with one voice on the third-term question. This unity meant Kabila had no one left to appeal to and could likely count on widespread condemnation and isolation if he chose to flout his own constitution and stand again. That Kabila did not proceed with his plan shows how essential it is for international policy to be coordinated if it is to effectively bring about positive conflict prevention outcomes.

The outcome of the contestation of the election results, on the other hand clearly demonstrates what happens when coordination and unity are absent. In this case, the divergence of responses ranged from the traditional divide between western and African

positions, to splits between RECs and the AU, to divisions between often rival branches of the AU's own peace and security structures.

This disharmony played into the hands of Kabila and Tshisekedi. They knew it was to be their greatest ally in imposing their political agreement, even in the face of rigorous and substantial evidence that the official result did not reflect the actual vote of the Congolese people.

The international community was sceptical about the election result. But once SADC, followed by the AU, had essentially acquiesced, one-by-one individual western countries stopped exerting pressure. Many said that if the Congolese people were not going out into the streets to protest and African bodies were accepting the official result, then they could not champion the issue. This left Congolese civil society and Fayulu's Lamuka coalition alone to argue their case while the rest of the world accepted Tshisekedi's presidency and moved on. The international community's capitulation on this is a particular disappointment to Congolese civil society and some political opposition parties.

The international community was sceptical about the result but eventually stopped exerting pressure

Throughout the three-year electoral crisis, international actors have been in constant contact with civil society groups and the political opposition and have repeatedly emphasised the importance of non-violent activism. At different moments, some international actors have gone further, discouraging public protests, essentially because they wanted to prevent situations in which the Congolese security services might kill or injure civilians.

This discourse always implied that international actors 'had the back' of civil society and the opposition. It implied that they would use their leverage to defend transparency and accountability in the electoral process provided their advice was taken. Many Congolese actors counted on this and now feel betrayed. One of the questions this raises is how this will influence the kind of leverage that international actors can have in the future when it comes to dissuading actors from possibly taking political action through non-peaceful means.⁴⁵

Conclusion

If regional and continental bodies are willing to reject proof of electoral fraud from credible and rigorous organisations and processes, it means that African civil society, opposition groups and populations effectively have no means to challenge governments that have coopted key national institutions.

This has significant implications for the legitimacy of the AU and RECs. In the case of the DRC, these organisations became actively involved in the electoral crisis. This was because it had become clear that the uncertainty about Kabila seeking a third term and the delays in holding elections had sparked sustained and increasing instability throughout the country. Key countries like Angola and South Africa (once Ramaphosa became president in early 2018) led SADC's pressure on Kabila to leave.

It is worth asking what the AU and SADC would have done had the CENI proclaimed Ramazani the winner of the election and this had resulted in widespread protests and violence. Would those organisations then have considered the CENCO's data a useful tool to stabilise the situation?

In the end, the political arrangement between Kabila and Tshisekedi was judged acceptable. It did not immediately spark violence, and it brought a measure of change. But it also exposed the extent to which regional and continental bodies are guided by short-

term considerations and short-sighted interpretations of what creates stability. Equally problematic is the selective application of existing continental texts on democracy, such as the African Charter on Democracy Elections and Governance (ACDEG) to African situations.

Recommendations

To the government of the DRC:

- Reform the Constitutional Court to make it an independent, apolitical body.
- Reform the CENI to make it an independent, apolitical institution that can deliver credible elections.

To the RECs and the AU:

- Clarify the issue of subsidiarity when a country is a member of more than one REC. In such instances, it could then be the AU that becomes the primary decision-making body.
- Favor the PSC as the decision-making body in the case of electoral questions. This is especially important in light of the fact that the merger of the PSD and the DPA will increase the interactions between the PSC and the election unit.
- RECs and the AU should set benchmarks when it comes to the independence of constitutional courts and national electoral bodies. This will enhance the legitimacy of electoral processes on the continent.

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