

From: Murry, Roger
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Subject: DRC Update - "He will do as told, gun to his head"
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All,

Earlier today, Kabila's Republican Guard entered Martin Fayulu's property seeking to prevent him from filing his Constitutional Court challenge to the electoral results. Anticipating this, Mr. Fayulu's lawyers filed the challenge yesterday. The regime has attacked protestors in cities through the DRC, but until now has not threatened Mr. Fayulu. As the regime's options shrink, it may make Mr. Fayulu the target.

Mr. Fayulu will continue to follow the official appeals process, although he will not get a fair hearing. The next step is the Constitutional Court, which Kabila tightly controls (see attached Jason Stearns report). Our ask: the international community must continue to join the Congolese in pressing for a public recount of polling station data (certified and signed) in front of the Chiefs of Mission of the electoral observation groups (SADC, AU, SYMOCEL, CENCO) to resolve the discrepancies. It cannot be run by CENI.

We cannot stress this enough: as long as international scrutiny, especially that of the United States, remains focused and cohesive, Kabila faces long odds to stay in power. We welcome the many statements from State and Congress this past week (including [here](#), [here](#), [here](#), and [here](#)). The Congolese need your support all the way until they have established a clear, credible democratic transition. We have some road ahead.

How we got here:

On Thursday, Congo's electoral commission (CENI) announced results of Congo's presidential election, widely derided as a fabrication. The Financial Times and New York Times are two of many outlets with strong reports, while noted Congo expert Pierre Englebert has the authoritative analysis on the improbability of CENI's figures (a probability of less than 0.0000). A U.N. official said "Tshisekedi has no capacity to rule, no way of controlling the army or ministerial appointments. He will do as told, gun to his head." Today, the regime revealed one term of the deal, announcing it won a laughable 60 percent majority in the National Assembly. ([Reuters](#), and [Reuters](#))

Per Jason Stearns, the Congolese's "patient, courageous actions [over many years] hemmed in Mr. Kabila at every turn and pushed him to this current compromise. In the end, however, these protesters did not risk their lives, nor did 19 million voters trek to the polls for a small group of politicians to concoct fake results and share power among themselves." Your support can hem in Kabila once again, moving the Congolese one step closer to a peaceful, credible transition.

The U.S., France, Belgium, the EU, and UK have used similar language to call for "clarity on these results, which are the opposite to what we expected...The Catholic Church of Congo did its tally and announced completely different results." (French Foreign Minister Jean-Yves Le Drian). Martin

Fayulu won by a wide margin. He has called CENI's announcement "an unacceptable electoral fraud," and asked CENI to "reveal to the Congolese people the name of the person who truly incarnated the choice of our people."

Many thanks for reading. I'd be happy to discuss further.

Roger P. Murry | Senior Policy Advisor

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This information is being disseminated by Akin Gump Strauss Hauer & Feld on behalf of Moise Katumbi and Martin Fayulu. Additional information is on file with the Department of Justice, Washington, DC.

DRC: A Dangerous Path to the Polls

Report 1: Politicization of the institutions responsible for the electoral process



The Congo Research Group (CRG) is an independent, non-profit research project dedicated to understanding the violence that affects millions of Congolese. We carry out rigorous research on different aspects of the conflict in the Democratic Republic of the Congo.

All of our research is informed by deep historical and social knowledge of the problem at hand. We are based at the Center on International Cooperation at New York University.

All of our publications, blogs and podcasts are available at:
www.congoresearchgroup.org and www.gecongo.org

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Summary

On December 23, 2018, the Democratic Republic of Congo is expected to see the first democratic changeover in its history. The stakes are high. This third electoral cycle should be the culmination of a peace process that began on April 19, 2002. The Sun City Agreement ended a decade of war and enabled the adoption of a new constitution. It led to the establishment of legitimate institutions at the provincial and national levels. The 2018 elections, which should have been held two years earlier, are meant to secure democracy in the country with the transfer of power between an outgoing president and a new democratically elected president for the first time since independence. After 17 years in power, including two constitutional terms, President Joseph Kabila is obliged by the constitution to give way to a successor.

This Congo Research Group (GEC) report, the first in a series of studies on the 2018 electoral process, highlights the politicization of two institutions with a key role in running the elections. The legitimacy of the National Independent Election Commission (CENI) and of the Constitutional Court is contested and their members accused of bias. These accusations of political manipulation, the lack of consensus within the political community, and the disputes that may well ensue are liable to plunge the DRC into a new cycle of conflict.

The two institutions owe much of their weakness to the President's ability to control, co-opt or divide the various political and social forces that should serve as a counterweight to the presidency: the opposition,

civil society, and professional organizations such as the High Council of the Judiciary. This stranglehold on the institutions tasked with ensuring the transparency of the electoral process renders the safeguards provided in the legislation governing them all but ineffective.

Most members of the CENI and the Constitutional Court have shown an affinity with President Kabila's coalition. This presents the Congolese political community and civil society, as well as foreign partners, with a dilemma. They can support the current electoral process, hoping that the flaws in the institutions that oversee the process will not prevent the will of the voters from being expressed. Or they can urge a further postponement of the elections, with no guarantee that the institutions' independence can be strengthened and at the risk of being accused by the government of obstructing the electoral process. In any case, counterbalances must be allowed to exist outside the official institutions. National and international observation missions should be deployed, witnesses should be called upon from political parties, and journalists must be allowed to do their job. It is also important that the United Nations Mission in the Congo and the international community monitor these elections closely, even if they risk being accused of interference or of obstructing the conduct of the polls.

DRC: A Dangerous Path to the Polls

Introduction

The elections on December 23, 2018 should lead to the resolution of an acute institutional crisis and crisis of confidence. These elections were initially scheduled for 2016 but have been postponed twice. The political dialogues held in the run-up to each of the previous poll dates failed to prevent a breakdown of trust between Congolese political stakeholders. Almost all attempts at protest have been put down. Armed violence has spread beyond the traditional conflict zone in the east of the country. The Congolese head of state named his chosen candidate on August 8, and although the international community welcomed this announcement, it has not helped to free up political space. Several opposition leaders have been barred from running for the presidency. Demonstrations are often repressed. The ruling coalition has far greater financial resources and control over the media—especially the state media—than the opposition.

The electoral process is made all the more risky by a context of tension between the Congolese authorities and their traditional partners. Kinshasa has opposed the establishment of an international group of electoral experts and has so far refused logistical assistance from the international community to organize the presidential, legislative and provincial elections scheduled for December 23. Organizing elections in the Democratic Republic of Congo has always been a logistical and financial challenge, given the poor infrastructure and size of the country. The choices imposed by the Congolese government and the election commission could delay these elections once again.

This report focuses on the two most important institutions in the electoral process: the CENI, which organizes and runs elections, and the Constitutional Court, which deals with disputes. Yet these institutions are influenced by the political context around them. Having started at the head of a coalition without an absolute majority in 2006, President Joseph Kabila has increased his control over the institutions to the point of forming a new electoral platform in September 2018, the Common Front for Congo, which brings together all members of the government, the presidents of both chambers of parliament, the governors, and even members of civil society and the media. This ruling elite has control over economic resources, administrative and military positions, and state institutions. Kabila's regime has focused on consolidating its power, delaying the adoption of legislation and the creation of institutions necessary to secure the balance of power and the proper functioning of the state.

The controversies that these two institutions will have to adjudicate are likely to be considerable. According to the latest CRG/BERC poll, the ruling coalition's candidate, Emmanuel Ramazani Shadary, would have a hard time being elected today, as he currently is around 20 percent behind the most popular candidate in the polls. However, Joseph Kabila's election platform has already announced his victory and the opposition denounces the existence in the file of 10 million fictitious voters, or 25 percent of the officially enlisted electorate.

A – The National Independent Election Commission

Primary responsibility for organizing elections in the Democratic Republic of Congo rests with the CENI. Above all, the CENI is “responsible for organizing the electoral process, including voter registration, maintenance of the electoral register, voting operations, vote counting, and any referendums”. In the legislation, the balance of power is respected. The independence of the CENI and of the courts of justice is established by law. But that’s theory. In practice, the various election observation missions since 2006 have pointed to widespread distrust of these institutions and their membersⁱ. This distrust remains one of the major obstacles to a credible election process and acceptance of the results.

Development of the legal framework has not guaranteed independence

In creating their first central election authority, the Independent Election Commission (CEI), Congolese political stakeholders opted to base its composition on a balance between the forces involved in the war. In accordance with the Sun City Peace Agreement, the CEI board was composed of one member from each of the eight parties represented in the Inter-Congolese Dialogueⁱⁱ. Decisions were to be taken by consensus or, failing that, by a simple majority of its members. But very quickly, the president was able to co-opt key members of the institution. The CEI presidency was officially assigned to the “Forces Vives” component. Yet before joining the CEI, its president, Father Apollinaire Malu Malu, had worked as an advisor in Joseph Kabila’s cabinet and he was known to be close to the president.

Without openly questioning the CEI’s independence and the decisions taken during the first electoral cycle, which the international community had validated, the EU observation mission stressed that

“special attention” should be paid to the composition of the future CENI board. It considered that the “poor communication” and “unconvincingly justified” modifications to the electoral lists of its precursor, the CEI, had already created “suspicions” within the political communityⁱⁱⁱ.

While the CENI’s establishment and main powers were provided for in the 2006 Constitution, it was not effectively put in place until nine months before the contested 2011 elections, with a new organic law adopted a year earlier, on February 28, 2010^{iv}. This time, the election commission’s board was wholly politicized. Four out of seven members were appointed by the presidential majority, the three others by the parliamentary opposition. The independence of its members was enshrined only in principle. CENI members were supposed not to seek or receive instructions from any outside authority in the performance of their duties. They were also supposed to enjoy complete independence from the political forces that appointed them. In fact, the political forces represented in parliament appointed their supporters or allies to the CENI.

The new composition excluded civil society, despite the latter’s demands, and this time unequivocally granted a predominant position to the presidential majority, which could impose its decisions by a simple majority. But above all, Joseph Kabila’s two main rivals in the presidential election, Etienne Tshisekedi of the UDPS and Vital Kamerhe of the UNC, had no delegates in the CENI; Tshisekedi because his group boycotted the 2006 elections, Kamerhe because he had just left the PPRD to create his own political party.

As in 2006, the CENI and its local branches were accused of bias right from the start of the 2011 electoral process. The distrust was compounded following the vote count and disputes arose.

i. In 2006 and especially 2011, several observation missions and institutions, such as the European Union and Carter Center election observation missions and the Ligue des électeurs, highlighted a feeling of distrust towards the election commission and the courts of justice in charge of electoral disputes, and suspicions that they lack independence.

ii. This was the forum that opened in 2001 and led to several agreements, including the Sun City Agreement.

iii. Excerpts from the final report of the European Union Election Observation Mission, February 23, 2007.

iv. The delay in its establishment was considered “excessive and unjustified” by the Ligue des électeurs, a Congolese NGO. This created friction within the political community.

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In Katanga province, Kabila scored between 96% and 100% in several districts. There were significant differences between the number of voters and the number of ballots used in both the presidential and legislative elections, which were held on the same day. According to the EU Observation Mission report, which was made public three months after the elections, these anomalies mainly benefited majority or PPRD candidates. The Carter Center and EU observation missions highlighted the CENI's lack of transparency and credibility and recommended a review of the board's composition to ensure its independence.

The law governing the CENI's functioning and organization was revised in April 2013 to restore the "Plenary Assembly" that had existed in the CEI, as well as "the effective involvement of civil society as a third component alongside the Majority and the Political Opposition".^v The Plenary Assembly is composed of thirteen members: six from the presidential majority, four from the political opposition, and three from civil society, nominated respectively by religious denominations, women's organizations, and civics and electoral education organizations. Though presented as "the design, decision-making, evaluation and control body", the Plenary Assembly plays only a minor role. It is involved in the adoption of the budget, the activity reports produced by the board and planning election operations. The presidential majority is over-represented. While consensus is officially preferred, decisions may also be taken by a simple majority of the members present during the meeting.

The CENI board remains the main authority in the conduct of elections since it takes "the decisions relating to pre-election, election, post-election, and referendum operations strictly speaking". It is made up of six members: three from the presidential majority, two from the political opposition in parliament, and the last—the CENI president—from civil society. Officially, its decisions are taken "collegially", even if the CENI president plays a predominant role and casts the deciding vote in

the event of a dispute. The presidential majority remains dominant on the board, with the positions of vice president, deputy rapporteur and "questeur" (administrative and financial officer).

Controversial appointments

The establishment of the new CENI in 2013 was not enough to depoliticize the election administration. The new law remains somewhat vague about how the members of the election commission are appointed^{vi}. Article 10 holds that they are "delegates" from three mutable groups: the presidential majority, the political opposition in parliament, and civil society. Article 12 says something else entirely. It specifies that they must be "chosen from among recognized independent figures." Both the presidential majority and the opposition have withdrawn their confidence in some of their delegates and demanded their replacement. This is an explicit acknowledgment of the control the original political groupings have over their delegates, whereas according to article 22, they were to enjoy "total independence from the forces that appointed them". Yet the major challenge is the cooptation of its members by the ruling coalition, which increases its influence through individual or political alliances..

Delegates from civil society

Since 2013, it falls to the country's eight recognized religious denominations to designate the CENI president. The Catholic Church is often critical of the government, while the seven other religious denominations have long been considered more favorable to the current regime. The Church of Christ in Congo, the largest network of Protestant churches in the country, was led for nineteen years by Bishop Marini Bodho, a senator close to the presidential majority and recognized as close to Joseph Kabila. The two main groups of revivalist churches received official recognition under Kabila's presidency.

When the reorganized CENI was created in 2013, Father Apollinaire Malu Malu, the controversial head

v. Organic law n°13/012 of April 19, 2013, amending and supplementing organic law n°10/013 of July 28, 2010, on the organization and functioning of the National Independent Electoral Commission.

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of the CEI, was called upon to serve as president, against the advice of the Catholic Church to which he belongs. The National Episcopal Conference of Congo (CENCO) opposed the nomination as contrary to its regulations. In addition, Father Malu Malu had just spent several years working for the president's office and no longer appeared to be an independent member of civil society. Yet the other seven religious denominations backed him. Father Malu Malu's resignation in October 2015 due to illness and the nomination of Corneille Nangaa, until then deputy executive secretary of the CENI, only reinforced this split.

CENCO refused to take part in the vote and condemned the lack of debate over Corneille Nangaa's candidacy, which had been proposed by the Church of Christ in Congo despite her not being an active member of this organization. Without openly criticizing the new head of the CENI, the general secretary of CENCO, Father Léonard Santedi, put out a statement highlighting, "a vote that was not a vote and seemed to have been settled beforehand."^{vii} It went on to say that the Catholic Church accepted "its responsibility before the Nation and before history" and prayed for the success of the electoral process.

The appointment of the other two civil society delegates to the CENI in 2013 was also the subject of some dispute. According to the legislation, one was to come from "women's rights organizations" and the other from a "civics and electoral education organization". Several civil society leaders and observers denounced the key role Father Malu Malu played in the appointment process. They also criticized the choice of organizations present during the negotiations: it first centered on national organizations represented in Kinshasa, then a larger share was left to representatives from the provinces, particularly from the East. This change in composition was seen as a strategy to counterbalance the organizations that, in Kinshasa, were considered more hostile to the head of state.

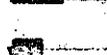
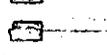
In 2013, Elodie Ntamuzinda, the women's organization delegate, was president of the Coordination Office of the Civil Society of South Kivu, probably one of the most structured provincial platforms in the country. Thanks to Father Malu Malu's support, she managed to have her candidacy backed by the permanent consultation framework for Congolese women (Cafco), a grouping of 70 women's and women's rights organizations. Five years later, some civil society leaders consider Elodie Ntamuzinda to be too close to the presidential majority, while others believe that she remains active in her field^{viii}.

Her colleague representing civics and electoral education organizations, Jean-Baptiste Ndundu, had his name proposed by the network of Christian-based human rights and civic education organizations (Redhoric). He too had Father Malu Malu's backing. Ndundu's place in the CENI is also disputed by some of his former supporters, but he has never come openly under attack. No one has asked for these two delegates to be replaced, though they have never openly dissented from the decisions taken within the CENI—decisions which have been challenged by the civil society organizations that were involved in their appointment.

vii. <https://7sur7.cd/new/designation-de-corneille-nangaa-a-la-ceni-leglise-catholique-dit-non-a-la-manipulation/>
viii. Interviews with six civil society representatives, September - October 2018.

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CENI

-  Role
-  Affiliation
-  Civil Society
-  FCC
-  Opposition

 **Corneille NANGAA YOBELUO**
*Cancelled

 **Norbert BASENGEZI KATINTIMA**

 **Jean-Pierre KALAMBA MULUMBA**

 **Onésime KUKATULA FALASH**

 **Gérardine KASONGO NGOY**

 **Nadine MISHIKA TSHISIMA**

Plénière

 **Augustin NGANGWELE**

 **Marie Desanges KETA LOKONDJO**

 **Benjamin BANGALA BASILA**

 **Gustave OMBIA BINDIMONO**

 **Noël KAPUTU NGOMBO**

 **Jean-Baptiste NDUNDO NSITUVILA**

 **Elodie NTAMUZINDA W'IGULU**
*Cancelled

* UDPS-Tshisekedi (opposition) requests the replacement of Jean-Pierre Kalamba, officially appointed on the opposition quota. It is now supported by the UDPS-Tshibala (FCC)

** Parliamentary Group of Christian and Socialist Liberal Democrats whose president José Makila joined the government in December 2016. Originally a member of the opposition, the GPLDS joined the majority in 2017. Noël Kaputu is officially on the opposition quota. But the leaders of his parliamentary group, members of the government, joined the FCC.

New alliances benefit the presidential majority

A reshuffling of alliances within the majority and the opposition should have led to changes in the CENI. In September 2015, seven parties of the presidential majority were "self-excluded" from the ruling coalition for requesting a debate on the nomination of a candidate to succeed the head of state. Among the rebel parties, the MSR and the ARC had enough deputies with their allies in the National Assembly to have a parliamentary group and a delegate on the election commission. The majority demanded that MSR delegate Chantal Ngoy resign and she complied. The ARC delegate, Benjamin Bangala Basila, had remained loyal to the majority coalition and was allowed to remain, despite his original political affiliation. Following these defections from the majority, the PPRD, the presidential party, found itself with two delegates to the CENI.

The dialogue launched in September 2016 under the auspices of the African Union allowed Joseph Kabila to pull a few figures from the opposition into his coalition, but the only headliner, Vital Kamerhe, remained in opposition. Among the majority's new recruits, the delegate of the Parliamentary Group of Christian Democratic and Socialist Liberals (GPLDS) to the CENI, Noël Kaputu Ngombo, remains nominally on the opposition quota, despite his party having joined the new enlarged majority of the FCC.

In 2016, the CENI's reorganization and the need to strengthen its independence were at the heart of the debate between political stakeholders during the two dialogues held in an attempt to resolve the institutional crisis^{ix}. The comprehensive and inclusive political agreement signed on December 31, 2016, under the aegis of the Catholic Church, and still officially in force, granted the right to the presidential majority, the political opposition and civil society "from which the current members of the CENI are appointed

and who so desire (...) to replace their delegates within 14 days of the signature of this Agreement, in accordance with the relevant legislation." The 14-day deadline provided for in the New Year's Eve agreement was not respected and in the end, only two delegates were replaced. In June 2017, the PPRD and the MLC appointed two new members to the CENI board, respectively questeur and deputy questeur, with the approval of the National Assembly. Only the UDPS, the historic opposition party, continued to ask unsuccessfully for its delegate's replacement. Jean-Pierre Kalamba Mulumba, elected deputy in 2011 in the Kananga constituency of Central Kasai, sat in the National Assembly against the instructions of his party's president, Etienne Tshisekedi. Kalamba Mulumba has been the CENI's rapporteur since 2013 and refuses to resign.

In September 2018, the Unified Lumumbist Party (PALU), and its allies decided to distance themselves from the presidential majority just after the CENI invalidated the candidacy of Antoine Gizenga, the former prime minister and secretary general of PALU. He was said to be seriously ill and to have had his candidacy signed by an "unauthorized" person. A month later, the party issued a new statement signed by Gizenga, claiming to be an independent and autonomous party while supporting the candidacy of Emmanuel Ramazani Shadary, Kabila's chosen contender. The apparent changeability of the alliance raises the question of PALU's delegate Onésime Kukatula Kalash remaining on the CENI board. The deputy rapporteur had supported the decision to remove Gizenga from the list of candidates.

In the end, a few weeks before the elections, five of the six members of the CENI board are perceived as supporting the FCC's extended presidential coalition.

ix. In order to "strengthen confidence among the stakeholders", the agreement of October 18, 2016, already provided for "a reorganization at the CENI regarding members appointed by the political opposition" and for "consensus to be sought before any major decisions are taken." The main opposition leaders boycotted this first dialogue and its mediator, former Togolese prime minister Edem Kodjo, was contested. CENCO suspended its participation in the dialogue.

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Decisions that reinforce suspicions

As with the previous election commissions, the CENI under the presidency of Corneille Nangaa has seen almost all its decisions challenged, from the definition of the legal framework to the establishment of the electoral register, and even the provisional list of candidates. The CENI's inability to hold the elections within the constitutional deadlines has substantiated this lack of confidence. The opposition, civil society, and even actors from the international community accuse the commission of having orchestrated the multiple delays in the electoral calendar itself. Distrust is palpable among the population. According to a BERCI/GEC survey in September 2018, only 24.3% of Congolese believe that the CENI will run fair and equitable elections. The commission has always referred to broad principles in its own defense, such as transparency in procurement, the importance of making the electoral register more reliable, and the cost and logistical constraints of running elections in the DRC.

An international call for tenders to procure electoral kits

In November 2015, the International Organization of La Francophonie (OIF) carried out an audit of the 2011 register, which had already been given a cleanup since the disputed elections. Enrollment of citizens newly of voting age and of Congolese abroad, removal of deceased persons... The head of the OIF delegation, former president of the Swiss Confederation Pascal Couchepin, considered at the time that with some adjustments, it was possible to hold credible, though not perfect, elections within the constitutional deadlines.

A few months earlier, the former CENI board headed by Father Malu Malu had asked the government to negotiate a contract urgently with the Belgian company Zetes, the DRC's traditional partner for voter registration operations. According to sources within the election commission, the contract needed to be signed no later than January 2016 for the elections to be held on time. Consequently, the CENI's decision on January 11, 2016, to back out of the draft contract when the prime minister had just given his approval raised many questions.

One month later, the CENI officially launched an open international tender to procure the electoral kits needed to overhaul the electoral register. To justify this decision, which delayed the organization of the elections by several months, CENI President Corneille Nangaa cited the commission's concern for transparency in awarding the public contract and its consideration of earlier claims by the opposition, which for a time had accused Zetes of involvement in the 2011 fraud.

However, the Congolese government's choice seemed to settle very quickly on the French company Gemalto, whose representatives were received at the CENI, governmental, and presidential levels^x. The choice was all the more strategic given that relations with the former colonial power, Belgium, were becoming increasingly tense at the time. Several opposition leaders denounced this tender as one of the technical measures that ensured the constitutional deadlines were not met.

The request to postpone the presidential election

On September 17, 2016, in the middle of political negotiations under the auspices of the African Union and two days before the constitutional deadline for issuing a writ for the presidential elections, election commission President Corneille Nangaa lodged an appeal with the Constitutional Court requesting that the elections be postponed. Nangaa said he was unable to organize the polls because of the efforts launched a month earlier to revise the electoral register. According to him, this would last more than sixteen months. This was the second time that the CENI had requested a delay. It had obtained the first postponement from the same Constitutional Court in September 2015. At the time, the CENI had put forward two arguments: the fact that the country was divided into 26 provinces and a lack of resources.

Under article 161 of the Constitution, only the president of the Republic, the government, the president of the Senate, the president of the National Assembly, a tenth of the members of each

x. Interviews with official sources, ministries and the CENI, March - April 2016.

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parliamentary chamber, the provincial governors, and the presidents of the provincial assemblies may petition the Constitutional Court. Several opposition parties and civil society organizations pointed out that the president of the CENI was not entitled to do so.

Beyond this legal consideration, the CENI had announced months previously that it would be unable to meet the deadlines provided for in the Constitution, pleading in turn a lack of funding or the political stakeholders' inability to agree on the various options for revising the electoral register. However, in May 2016, a confidential report by UN and Francophonie experts submitted to the UN Security Council considered that it was possible to meet the constitutional deadlines^{xi}. The report was based on three scenarios established by the CENI and the experts themselves: the first option was to further improve the register's reliability without integrating people newly of voting age; the second, to simply revise the register; and the third, to overhaul it completely.

The first option would allow the constitutional deadlines to be met provided that a political agreement was signed one month later, in June 2016. The other two options would result in the constitutional deadlines being exceeded. A complete overhaul of the register would mean a delay of more than a year. The report's findings remained secret until the Congolese government agreed in September 2016 to begin a political dialogue. At that point, option 1 was no longer politically acceptable, since it was no longer possible to correct the register.

The election calendar also came under debate when the CENI failed to publish the provisional voters lists. The CENI did not start publishing the lists until early September 2018, in Kinshasa. According to the election calendar, the final lists should be published no later than October 23, 2018. But publication has been delayed. In many constituencies across the country, the 30-day legal time period for appeals will

not be respected and it will be impossible for voters themselves or for civil society observation missions to verify the existence of the millions of voters whom the opposition already considers fictitious

Limited international scrutiny

Like the Congolese government, the CENI refuses to allow any international organizations to finance or monitor the process in the name of sovereignty, despite the fact that this could have allowed it to counterbalance the presidential majority's influence within the commission. The CENI's board members say in the press that, in doing so, they are following the government's "direction." However, under article 6 of the Organic Law of February 28, 2010, as amended in 2013, "the CENI enjoys administrative and financial independence. It has its own budget in the form of an endowment. This can be supplemented by external contributions." Article 43 of the same law is even more explicit: "the CENI's resources come from: the state budget; donations and legacies; assistance and support from bilateral, multilateral and other donors."

xii"

Tensions between the election commission and its partners center mainly on the conditions for external support. The international community had been asking the CENI since 2015 to publish a calendar and a comprehensive election budget before providing financial support for the electoral process. The calendar was only published on November 5, 2017, as a result of international pressure. No detailed budget has been published to date.

In September 2017, following pressure from its main partners, the Congolese government accepted the principle of an international group of electoral experts, to promote consensus within the political community. But the CENI and its partners could not agree on the terms. For the DRC's partners—the UN, AU, OIF, and EU—this international group of experts had to remain independent and maintain freedom of speech, which was the stumbling block in the

xi. The findings of the report of the joint UN-OIF mission were presented by experts from each organization during the dialogue conducted from September 1, 2016, under the auspices of the African Union. The two experts explained that option 1, which respected the constitutional deadlines, was still possible, but without revising the register, which excluded the 8 million people newly of voting age and still contained half a million duplicates.

xii. Organic law No.13/012 of April 19, 2013, amending and supplementing organic law No.10/013 of July 28, 2010, on the organization and functioning of the National Independent Electoral Commission.

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discussions.

In the end, the CENI accepted technical assistance from Monusco, which offered the services of 277 experts, including computer scientists, logisticians, and lawyers^{xiii}. However, on July 26, 2018, the Secretary General's Special Representative in the DRC informed the Security Council that, "on Wednesday, the first flight Monusco chartered to support the electoral process was denied access to Congolese soil." Zerrougui added that, "In the interests of responsible management of UN resources, we will need clarification very soon from the Council on what to do next."^{xiv} In June, the Security Council had granted an additional \$80 million to the UN mission when its budget was renewed, to finance not only technical assistance but also the rental of 24 aircraft to transport election equipment.

One of the CENI's main efforts at transparency in 2018 is to have accepted that an OIF mission led by Malian general Siaka Sangaré conduct an audit of the electoral register. The first findings were released in May 2018. The crux of OIF's communication was that the electoral register was "inclusive, exhaustive, and up-to-date, but perfectible", yet the details of the report contradict its official conclusion. 16.6% of voters are registered without fingerprints, and some 500,000 blank electoral cards and the voter registration kits that went with them are missing. The mission recommends investigations and legal proceedings against some of the heads of voter registration sites in the provinces of Tshuapa, "and particularly in Sankuru, where the number of registered voters has almost doubled." In the press, General Sangaré has called for a citizen's audit of the register. Having been unable to undertake a field visit to verify the "existence of these voters", General Sangaré admitted during an interview that he was unable to confirm or deny whether more than 25% of voters are in fact fictitious.

The CENI also refused an external audit and certification of the voting machine: After months of discussions, the commission conceded that

the Westminster Foundation for Democracy, an organization funded by the British government, should carry out a detailed study of the machine, without access to the software. According to the head of the CENI, this software is a "Congolese invention" and must be protected. The two institutions made the report's recommendations public jointly on September 17, 2018.

Among other things, the Westminster Foundation recommends disconnecting all of the machine's communication ports to make into a simple printer and reduce the risk of fraud. It also points out the risk of long queues on polling day since most of the Congolese population has never used a touch-screen machine before. In a response published on September 17, 2018, the CENI challenged some of these recommendations and promised to comply with others.

The voting machine forced through

In its calendar of November 5, 2017, the CENI seemed to be planning for the use of ballots. But earlier documents prove that by July 2017, the election commission had already made the choice to use a Korean-made voting machine^{xv}. This is undoubtedly the most controversial decision: the acquisition by mutual agreement of Miru's voting machine, a touch-screen device whose role is supposed to be limited to printing the ballots.

According to a GEC analysis, this machine could cause long queues and even prevent voting operations on December 23, 2018, which could have a negative impact on voter turnout. The CENI estimates that it will only take one minute per Congolese voter to vote in three polls. But the electorate has no experience with touch screens. In light of experiences with similar equipment in other countries, the measures provided for in case of failure or malfunction may not be sufficient.

The opposition and civil society have dubbed this machine a "cheating machine." They particularly

xiii. Effective as of August 15, 2018, source: Monusco.

xiv. Excerpt from the speech by Leila Zerrougui, Special Representative of the UN Secretary-General in the DRC, to the Security Council, July 26, 2018.

xv. The state budget adopted in November by the Council of Ministers already includes the purchase of the voting machine. The amount of exceptional expenses allocated to the CENI for running the elections in 2018 is based on a budget established by the election commission on July 12, 2017.

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criticize the fact that the machine can communicate with external devices. Despite the Westminster Foundation's recommendations, the CENI intends to keep the 3G SIM card so as to send a "control SMS". The Episcopal Conference, which has always called for the machine to be officially certified by national and international experts, continues to be concerned about the lack of consensus on its use. The OIF and the UN Security Council share these fears.

Opposition candidates invalidated

The publication of the provisional candidate lists, a key step in the process, has been the subject of much criticism, particularly because several opposition candidates have been invalidated, including former vice-president and ex-rebel leader Jean-Pierre Bemba and three former prime ministers, two of whom are from PALU. The main leaders of the opposition and civil society organizations have denounced a partisan application of the grounds for invalidation and inconsistencies between decisions taken at the presidential, legislative and provincial levels.

The Congolese press has reported other anomalies, such as Aimé Kilolo being retained on the provisional list of candidates for the provincial assemblies. Kibolo is the former lawyer of Jean-Pierre Bemba and MLC leader who recently became a member of the majority. He was accused before the International Criminal Court and convicted along with Bemba for the same acts. Yet while the CENI invalidated Bemba's candidacy for the presidency, Kibolo is allowed to stand. Several media reports note that, meanwhile, the election commission has added the name of former UDPS Tshibala deputy president, Tharcisse Loseke, to the final

list of candidates. Yet the Constitutional Court had invalidated him on September 11, 2018, for holding a foreign nationality. Loseke is aligned with the AFDC list and allies of Bahati Lukwebo, a member of Joseph Kabila's Common Front for Congo.

The Congolese government and the presidential majority for their part welcomed what they call a "strict application of the law."^{xvii} The citizen's election watchdog Symocel (Synergie des missions d'Observation citoyenne des élections) considers that the CENI has failed to remain neutral in its management of candidacies and has applied the law regarding nationality selectively. According to Symocel, which is one of the two most important civil society election observation missions, "the CENI's management of the operations of receiving and processing candidacies has further weakened trust between the CENI and stakeholders, thus casting a growing pall of unease over the current electoral process."^{xviii}

xvi. The invalidated candidates and former prime ministers Antoine Gizenga and Adolphe Muzito are both from PALU, the third largest party after the 2006 general elections, which were boycotted by the UDPS, the historic opposition party.

xvii. Interviews with four FCC members, August 2018.

xviii. Symocel press conference, September 22, 2018, Kinshasa.

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B – The Constitutional Court

The electoral legislation distinguishes between the courts and tribunals in charge of electoral disputes^{xix}. Concerning the validation of candidacies and the proclamation of the final results, the Constitutional Court has jurisdiction for the presidential and legislative elections, and the administrative courts of appeal for the provincial elections. The courts of appeal have been criticized in previous electoral processes, with the opposition and civil society accusing them of bias. The conditions and timeframes for processing appeals are not expected to improve, as the setup of courts of appeal in the new provinces may not be effective by December 23, 2018.

This report focuses on the Constitutional Court, which has only been operating since 2015. It is to assume its role as judge of electoral disputes for the first time. However, in an October 2018 GEC/BERCI survey, 73.6% of respondents did not have a good opinion of this court.

A decade-long wait for the country's highest court

The Constitutional Court is the court responsible for disputes related to presidential and legislative elections and referendums. It is one of the newest courts in the Congolese justice system^{xx}. Its establishment was provided for by article 157 of the 2006 Constitution and recommended many times since^{xxi}. The Constitutional Court is one of the key institutions in regulating the functioning of the state. Yet the organic law on the court's organization and functioning was not promulgated until October 15, 2013, more than two years after its adoption by both chambers of parliament. It took two more years for the court to become operational and hand down its first decisions.

A transitional article of the 2006 Constitution held that the Supreme Court of Justice would carry out the functions of the Council of State and the Court of Cassation as well as the Constitutional Court until they were established. In the absence of the Constitutional Court, the Supreme Court of Justice had become one of the key institutions in the electoral process, both as judge of electoral disputes and as the body responsible for proclaiming the final results of the presidential and legislative elections. Since the first elections in 2006, the Supreme Court's lack of independence had been highlighted not only by the opposition and civil society, but also by each of the electoral observation missions, both national and international.

In the first quarter of 2011, the Organic Law on the Organization and Functioning of the Constitutional Court was adopted by both chambers of parliament. The presidential majority did not oppose it, but President Kabila challenged its constitutionality and asked parliament to amend it to bring it into line with the constitution. This law was passed a second time, but was still not promulgated by President Kabila. This should not have prevented its entry into force, however, since the constitution stipulates that, "in the absence of the promulgation of the law by the President of the Republic within the constitutional time periods [fifteen days], promulgation occurs automatically." But neither was the text published in the Journal Officiel, whose services report to the president of the Republic. There is no doubt that it was the will of the Congolese head of state himself to delay the establishment of this court.

At the same time, according to the EU observation mission, Joseph Kabila promoted 17 new judges to

xix. Loi portant organisation des élections du 6 mars 2006, telle que modifiée en 2015 et décembre 2017

xx. The Council of State and the Court of Cassation were only established by presidential order in June 2018.

xxi. Under the 2006 Constitution, the Constitutional Court is responsible for monitoring the constitutionality of laws and acts having the force of law. Since 2006, all the organic laws and internal regulations of the country's main institutions should have been submitted to this court. Any Congolese should have been able to submit to it any case regarding a legislative or regulatory act that they consider contrary to the Constitution. It should have been the Constitutional Court that resolved jurisdictional conflicts between the executive and legislative branches of government and between the state and the provinces. It is also the criminal court for the president of the Republic and the prime minister. Finally, the Constitutional Court has jurisdiction in deciding disputes over the presidential and legislative elections and referendums.

higher ranks in the middle of the election campaign without observing the relevant rules, before appointing them to various posts on the Supreme Court of Justice. Kabila claimed this was intended to improve the handling of electoral disputes, but it substantiated the idea that the incumbent president had this court under his thumb. This distrust is evident in the historical opponent Etienne Tshisekedi's decision not to lodge an appeal with the Supreme Court of Justice, even as he declared himself the winner of the 2011 presidential election and despite the many irregularities observed. Tshisekedi refused to recognize the court as legitimate.

An appointment procedure incapable of guaranteeing the court's independence

The establishment of the Constitutional Court therefore raised some hope of improvement in both the functioning of institutions and the handling of electoral disputes. According to the Organic Law of October 15, 2013, the Constitutional Court is composed of nine members appointed by the president of the Republic, but only three on his own initiative. Three are nominated by the High Council of the Judiciary (Conseil supérieur de la magistrature), and the three others by the congress of both chambers of parliament.

This appointment procedure still affords considerable influence to the Congolese head of state, as he has a very strong influence on the members of the High Council of the Judiciary, who themselves appoint

three judges^{xxii}. Under article 82 of the constitution, "The President of the Republic appoints, suspends and, if necessary, dismisses, by ordinance, the judges and public prosecutors upon proposal by the High Council of the Judiciary." The independence of the judiciary and of its managing authority, the High Council of the Judiciary (article 152), is called all the more acutely into question given that the DRC has had the same head of state for almost eighteen years.

Judges must be appointed by the congress of both chambers. However, the presidential majority has largely dominated the National Assembly since the 2011 elections and the Senate in its current configuration since 2007. Nevertheless, the judges appointed under Parliament's quota remain those who, until recent appointments, have shown the most independence^{xxiii}.

The Constitutional Court is now composed of five former judges from the Supreme Court of Justice, which has already been criticized for its lack of independence, including two of its former presidents. Three other members have a known affiliation with the presidential majority. The last judge, Senator Polycarpe Mongulu, was elected to the Senate as an MLC candidate in 2007 but has since joined the Republican Opposition, the platform of Senate President Leon Kengo Wa Dondo, a member of Kabila's Common Front for Congo (FCC).

xxii. Article 82 of the Constitution: "The President of the Republic appoints, suspends and, if necessary, dismisses, by ordinance, the judges and public prosecutors upon proposal by the High Council of the Judiciary."

xxiii. Three of the four judges who have refused to sit on the bench or have issued a dissenting opinion were appointed by parliament. Judges Felix Vunduawe Te Pemako and Eugène Banyaku Luape Epotu have been replaced. Only Corneille Wasenda is still in office.

Composition of the current Constitutional Court

Name

Background

Method of appointment

Political Affiliation

-  Old member of the Supreme Court of Justice
-  Affiliated to the Majority and the FCC
-  New Judges

HCI: High Council of the Judiciary.

Benoit Lwamba BINDU

Also president of the High Council of the Judiciary, first president of the Supreme Court of Justice.

Appointed by the President

Norbert NKULU

The Kabila family's business lawyer, former ambassador to Rwanda. FCC Affiliate.

Appointed by the President

Jean-Pierre MAVUNGU

Professor at Unikin, former chief of staff of Aubin Minaku, president of the National Assembly and secretary general of the Majority. FCC Affiliate.

Appointed by the President

Evariste Prince Funga Molimo

Former president of the Supreme Court of Justice.

Appointed by the HCI

Jean Obulu PUNGU

Former advisor to the Supreme Court of Justice, former permanent secretary of the High Council of the Judiciary.

Appointed by the HCI

Noel Kilamba NGOZI NYALA

Former advisor to the Supreme Court of Justice.

Appointed by the HCI

Corneille Wasenda

Former lawyer at the Supreme Court of Justice. *Refused to sit for the pronouncement of the judgment on Const. Petition No. 338*

Appointed by the Parliament

François BOKONA

Député PPRD. Affilié au FCC.

Appointed by the Parliament

Polycarpe Mongulu T'APANGANE

Senator, former attorney general, former MLC member who joined the Republican Opposition platform of Senate President Kengo Wa Dondo. FCC Affiliate.

Appointed by the Parliament

Composition of the Constitutional Court before July 2018

-  Name
-  Background
-  Method of appointment
-  Status
-  Signed the judgment on Const. Petition No.338
-  Refused to sit for the pronouncement of the judgment on Const. Petition No.338

HCI: High Council of the Judiciary

Benoit Lwamba BINDU

Also president of the High Council of the Judiciary. First president of the Supreme Court of Justice.

Appointed by the President

Member since 2014

Kalonda KELE OMA

Senior judge born in Kinshasa, former president of the Supreme Court of Justice in 2006.

Appointed by the President

Deceased since April 2018

Jean-Pierre MAVUNGU

Professor at Unikin, former Chief of Staff of Aubin Minaku, president of the National Assembly and secretary general of the Majority. FCC Affiliate

Appointed by the President

Member since July 2014

Jean Louis ESAMBO

Professor of Public Law at the University of Paris 1. Former deputy Chief of Staff at the Ministry of the Interior. *Refused to sit for the pronouncement of Const. Petition No. 338.*

Appointed by the HCI

Resigned since April 2018

Noel Kilomba Ngozi Mala

Former advisor to the Supreme Court of Justice

Appointed by the HCI

Member since 2014

Evariste Prince FUNGA MOLIMA

Former president of the Supreme Court of Justice.

Appointed by the HCI

Member since 2014

Corneille Wasenda

Former lawyer at the Supreme Court of Justice. *Refused to sit for the pronouncement of the judgment on Const. Petition No.338*

Appointed by the Parliament

Member since 2014

Eugène Banyaku LUAPE EPOTU

Professor at Unikin, former presidential adviser and former minister under President Mobutu. *Refused to sit for the pronouncement of Const. Petition No. 338*

Appointed by the Parliament

Resigned since April 2018

Felix Vunduawe TE PEMAKO

PhD in public law from the University of Leuven. Deputy prime minister and minister of Territorial Administration under Mobutu, of whom he was the last Chief of Staff. *Refused to sit for the pronouncement of Const. Petition No. 338*

Appointed by the Parliament

Replaced in June 2018

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The term of office for members of the Constitutional Court is a maximum of nine years. The law provides for one-third of its members to be renewed every three years. The outgoing judges are to be selected by drawing lots for one member per group, to avoid any attempts at influencing the appointment process. The first renewal was scheduled for early April 2018.

The April draw did not take place. One of the nine judges, Judge Kalonda Kele Oma Yvon, died on April 8, 2018. Two of his colleagues, Jean-Louis Esambo and Eugène Banyaku Luape Epotu, resigned just afterward, on April 9, the day the draw was to take place. According to the Congolese Association for Access to Justice, ACAJ, these two judges were forced to resign to avoid the draw procedure being held. ACAJ maintains that not only should the three judges have been replaced, but three others should have been drawn by lot. Neither the constitution nor the organic law specifies the method of appointment when judges resign, die, or are prevented from continuing their term.

While these two judges have not claimed to have been put under pressure, the timing of their resignation has raised many questions and doubts. Judges Esambo and Banyaku Luape had refused to sit for the judgment on Constitutional Petition No. 338 authorizing the CENI to suspend the presidential election; informally those close to them had already protested against the Congolese government's interpretation of other judgments. The appointment of two new judges openly affiliated with the presidential majority or with Joseph Kabila—Norbert Nkulu, the Kabila family's business lawyer, and François Bokona, a majority deputy—reinforces the perception that this court is subservient to the Congolese regime.

Controversial precedents

In its three years of existence, the Constitutional Court has already handed down several judgments, most of them controversial. The opposition and civil society have denounced the bias of some decisions and even called for protests against the

Constitutional Court, accusing it of having condoned the delays in the electoral calendar and of violating the constitution. These demonstrations have been violently repressed.

On two occasions, the Constitutional Court accepted petitions from the CENI requesting the postponement of the elections. Yet as far as the opposition and civil society are concerned, the court is only competent to interpret the constitution "upon request from the president of the Republic, the government, the president of the Senate, the president of the National Assembly, a tenth of the members of each parliamentary chamber, the provincial governors, and the presidents of the provincial assemblies."

The dissension discernable among the court's judges since 2015 came to a head in September 2016, when three judges refused to sit for the decision to postpone the election. These three judges were replaced in the first half of 2018, less than six months before the date set for the presidential, legislative and provincial elections.

Judgment on Constitutional Petition No. 0089/2015 following the administrative boundary changes

In March 2015, ten months before the provincial elections, President Kabila suddenly promulgated the law ratifying the division of the DRC into 26 provinces. This division was enshrined in the 2006 Constitution and was to become effective within "36 months following the effective establishment of the political institutions provided for by this Constitution."^{xxiv}

On July 29, 2015, the CENI referred the matter to the Constitutional Court, seeking its interpretation of the planning law that lays out the procedures for setting up the new provinces and of the electoral law. The CENI said it was unable to organize the election of the new provinces' governors by the provincial assemblies because the state had not provided the necessary budget in time. It claimed to face a shortfall of US\$2 million for holding these elections

xxiv. Article 226 of the Constitution. Until then, the Democratic Republic of Congo is composed of the city of Kinshasa and the following ten provinces with legal personality: Bandundu, Bas-Congo, Equateur, Kasai occidental, Kasai oriental, Katanga, Maniema, Nord Kivu, Province Orientale, Sud-Kivu.

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in the country's 15 new provinces.

The Congolese government explained this shortfall as "an additional sum that the government has not been able to raise due, first, to it not being budgeted for and, second, to the state's cash flow constraints." According to the CENI, only 17% of the total funds allocated to it in the 2013, 2014, and 2015 budgets had actually been disbursed. The opposition accused the CENI and the presidential majority of having orchestrated this first delay in a calendar published in February 2015. The calendar provided for all the polls from local to presidential elections to be held between October 25, 2015 and November 27, 2016.

On September 8, 2015, the Constitutional Court pronounced its ruling on the CENI's petition. Seven judges were sitting; the quorum was met^{xxv}. The court directed the government to provide the CENI with "the means necessary for the essential organization of governor elections." The court also ordered the CENI to revise the excessively packed election calendar, without giving more precise instructions. On October 29, 2015, President Kabila used this ruling as justification to appoint special commissioners by order in the new provinces resulting from the boundary changes.

What most aggrieved the opposition and civil society in this decision is that, in addition to allowing the elections to be postponed, the Constitutional Court authorized the government to "take exceptional transitional measures forthwith in the provinces concerned," without setting any limits. Following the announcement that the government was appointing special commissioners, opposition leader Martin Fayulu spoke of a "constitutional coup d'état," during a political rally on November 5, 2015.

Judgment on Constitutional Petition No. 262 on the interpretation of article 70

On April 14, 2016, 276 deputies from the presidential majority filed an application with the Constitutional Court requesting the interpretation of article 70 of the constitution. The first signatory was none other than Emmanuel Ramazani Shadary, then president

of the PPRD parliamentary group and now the presidential candidate proposed by the Common Front for Congo (FCC), Kabila's new coalition. Article 70 stipulates that, "The President of the Republic is elected by direct universal suffrage for a term of five years which is renewable only once. At the end of his term, the President stays in office until the President-Elect effectively assumes his functions."

The presidential majority considers that this gives the president of the Republic the right to remain in office until power is transferred to the president-elect, even if the election is postponed. For the opposition and civil society, however, the moment at which the president-elect "effectively assumes his functions" is subject to article 73 of the Constitution, which sets a deadline for holding the presidential elections: "The ballot for the election of the President of the Republic is scheduled by the National Election Commission ninety days before the end of term of the incumbent President."

In its judgment on May 11, 2016, the Constitutional Court contented itself with reiterating that, "paragraph 2 of article 70 allows the President of the Republic, once he reaches the end of his term, to remain in office, in accordance with the principle of State continuity, until the President-Elect effectively assumes his functions."^{xxvi} The Congolese government and the presidential majority publicly presented this judgment as authorization from the Constitutional Court to maintain institutions beyond the constitutional time periods, given the reference to "State continuity."

The opposition and citizen movements held protests against this ruling, all of which were repressed in the name of article 168 of the constitution, which states: "The judgments of the Constitutional Court cannot be appealed and are enforceable immediately. They are binding and have to be observed by the public institutions, by all administrative, jurisdictional, civil and military authorities and by individuals." This repression further strengthened suspicions among

xxv. Lwamba Bindu Benoit, Banyaku Luape Epotu Eugène, Esambo Kangashe Jean-Louis, Funga Molima Evariste-Prince, Kalonda Kela Oma Yvon, Kilomba Ngozi Maia Noël, and Mavungu-di-Ngoma Jean-Pierre were noted as present.

xxvi. Of the court's nine judges, only Judge Corneille Wasenda, who was appointed by the members of Parliament, refused to sit in protest, as he has done regularly since the court was established.

the opposition and civil society of collusion between the executive and the judiciary.

Judgment on Constitutional Petition No. 338 which sanctions the second delay in the calendar

This is undoubtedly one of the Constitutional Court's most controversial decisions. First, because it was CENI President Corneille Nangaa who filed an application to the Constitutional Court for permission to postpone the election, in the middle of a political dialogue between the presidential majority and part of the opposition. The opposition and civil society consider this referral irregular.

Next, this judgment was pronounced by only five of the court's nine judges. At first, the reading of the judgment had to be delayed due to the absence of several judges. However, article 90 of the organic law on the court's organization and functioning and article 30 of its internal regulations state that the court "may only validly sit and deliberate in the presence of all its (nine) members, unless two of them have a temporary impediment," i.e., seven judges. The opposition and civil society considered that with five judges, the quorum was not met. In the judgment itself, the five sitting judges considered themselves authorized to rule since the hearing had already been postponed. They referred to article 92, paragraph 4, of the organic law, which specifies that the decisions of the court are "taken by majority vote of its members." What has become of the four judges who did not sit? Kalonda Kela Oma Yvon died a few months later, on April 8, 2018. Jean-Louis Esambo and Eugène Banyaku Luape Epotu resigned on April 9, 2018. Judge Félix Vunduawe has also left the Constitutional Court; he was appointed president of the Council of State in June 2018. The five judges who chose to sit are former judges of the Supreme Court of Justice and one judge openly affiliated with the presidential majority.

In the substance of judgment, having been called upon to interpret the Constitution, the five judges who sat on the bench said they recognized "the CENI's inability to organize the elections provided for in the calendar of February 12, 2015, due to all the constraints it has mentioned." They authorized the

election commission, "consequently, to draw up a new election calendar adapted to the objective and reasonable time period required for the technical operations involved in revising the electoral register, in order to ensure the regularity of the scheduled elections". Again, the Court did not give a time limit for organizing voter registration and the only restriction it made regarding the request for postponement was an "objective and reasonable" time period. This decision has served as justification for Kabila's regime to arrange postponement after postponement and remain in power beyond the time limits provided for in the Constitution and the law.

Settlement of electoral disputes

In 2006 and 2011, it was the Supreme Court that ruled on electoral disputes instead of the Constitutional Court, as the latter had not yet been established. The 2018 electoral process is therefore the Constitutional Court's first experience with electoral disputes.

The CEPPS expert mission funded by USAID has expressed concern about the two-month timeframe granted for ruling on provincial and national assembly results appeals. These experts point out that in 2011, more than 115 appeals were filed against parliamentary results, and it took almost a year for the Supreme Court to adjudicate them.

According to CEPPS, the seven-day deliberation period for presidential election appeals is also "patently insufficient" for the Constitutional Court to examine, if necessary, the more than 75,000 polling station results sheets. This problem also arises for the election commission, which will have only seven days to publish the provisional results of the presidential elections.

Several national and international experts question the election commission's capacity not just to deploy electoral equipment, but also to bring back the results sheets and ballot papers required for the publication of provisional and final results within the time limits set by the calendar. According to the election calendar, presidential, legislative and provincial elections will be held on December 23.

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The CENI is supposed to publish the list of provisional results for the presidential elections on December 30. Publication of the final results is scheduled for January 9, 2019, which does not allow time for a recount in the event of a dispute.

Invalidation of candidacies

Despite accusations of bias against the Constitutional Court, the six presidential candidates whom the CENI rejected all filed appeals with the court. Opponents Jean-Pierre Bemba and Adolphe Muzito explained this decision by their will to respect the law, even if they were convinced of the court's bias. Two of the six invalidated candidates were reinstated by the court: Samy Badibanga, former prime minister, and Marie-Thérèse Ikofo, the only female candidate. They had both been rejected by the CENI for falling short of nationality requirements. On the other hand, the court upheld the election commission's decisions to invalidate the candidacies of two opponents, former vice-president Jean-Pierre Bemba and former prime minister Adolphe Muzito, as well as former prime minister and secretary general of PALU Antoine Gizenga, and Jean-Paul Moka.

Bemba's party, the MLC, pointed out that the electoral law could exclude a candidate convicted of "corruption". It added that the Congolese Penal

Code and article 22 of the Rome Statute distinguish "corruption" from "witness tampering." Yet it was for "witness tampering" that Bemba was definitively convicted by the International Criminal Court. The Constitutional Court also upheld most of the election commission's decisions regarding candidates for the National Assembly. It rejected 85% of the some 200 appeals filed. Among the most noteworthy decisions, two former governors close to the majority, respectively of Équateur and Kasai Central, were reinstated as candidates. Henriette Wamu Atamina, candidate for Félix Tshisekedi's UDPS, the historical opposition party, was also reinstated. On the other hand, the Court definitively invalidated the candidacy of Fidèle Babala, deputy secretary general of the MLC, on the same grounds as its president Jean-Pierre Bemba.

Conclusions

Since the 2006 elections, the main opposition parties, civil society, and election observation missions have raised questions about the independence of the institutions responsible for the electoral process. However, changes to the legal framework of the CENI and the courts in charge of electoral disputes have not been enough to secure their members' freedom of action vis-à-vis the ruling coalition. Today, five of the CENI's six members are considered close to the electoral platform of the incumbent head of state, Joseph Kabila. The president also retains a major influence on the process of appointing judges to the Constitutional Court.

With two months to go before the elections, it is unlikely that a consensus can be reached on any changes liable to restore confidence in these institutions. In 2016, four months of negotiations and two political dialogues failed to resolve this issue. Opening new discussions on the replacement of all members of the CENI board and of the Constitutional Court would mean postponing these elections once again. It was already difficult in 2016 for political stakeholders to agree on a consensual facilitator and the terms for discussions. If this option is chosen, it will require increased attention from the international community, not least for monitoring the implementation of any agreements reached.

If the election date of December 23, 2018 is maintained, it is clear that the institutional controls in place will not be enough to ensure the integrity and credibility of the process. Consequently, it is crucial that civil society and political parties be able to

deploy witnesses and observers to all voting centers, even if covering the 75,568 planned polling stations is unfeasible^{xxvii}. To bolster confidence in the results of December 23, 2018, the Kinshasa authorities should invite the various expert or observer missions to monitor all stages of the electoral process, without any access restrictions and beginning as soon as possible.

In the long term, the appointment processes within these institutions must be reformed to secure the independence proclaimed in the Constitution and laws. For the Constitutional Court, this means first and foremost a reform of the High Council of the Judiciary.

As regards the CENI, political stakeholders must decide whether CENI members should be representatives of political parties and civil society organizations or independent figures. If the independence of this institution is to be ensured through a balanced composition of representative Congolese stakeholders, it seems crucial to define more clearly the way in which civil society members are appointed. An arithmetical balance should also be maintained on the commission between the majority and the opposition in the National Assembly. Without appropriate, consensual reforms, the crisis of confidence in these institutions can only continue. Yet trust in institutions is an essential condition for holding peaceful elections.

xxvii. The identification of polling stations is still in progress. This figure, which would bring the number of voters down to an average of 530 per polling station, is the CENI's working figure.

CONGO RESEARCH
GROUP



GROUPE D'ÉTUDE
SUR LE CONGO

Le Groupe d'étude sur le Congo (GEC) est un projet de recherche indépendant, à but non lucratif, dédié à la compréhension de la violence qui affecte des millions de Congolais. Nous effectuons des recherches rigoureuses sur les différents aspects du conflit en RD Congo. Toutes nos recherches se nourrissent d'une connaissance historique et sociale approfondie du problème en question. Nous sommes basés au Centre de coopération internationale de l'Université de New York (Center on International Cooperation, New York University) et nous travaillons en collaboration avec le Centre d'études politiques de l'Université de Kinshasa.

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From: Murry, Roger
To: Murry, Roger
Subject: DRC Elections - Big Announcement Possible Today
Date: Wednesday, January 9, 2019 1:57:24 PM

All,

CENI plans to announce some form of preliminary results tonight at 2300 Kinshasa time (GMT +1). Per the Financial Times and others, troops and riot police have been deployed around the country. The internet is still shut down throughout the country, but reporters are using international SIM cards (Kin is a border town) and the three hotels that have wifi.

Congolese civil society observers are unequivocal, calling CENI to publish only true results: *"The Congolese people already have possession of the results posted in front of the polling stations."* Indeed, the "Congo's voters have earned the world's support" (linked through Twitter). Per Reuters, "Any widespread perception the election has been stolen could set off a destabilizing cycle of unrest, repeating violence that followed elections in 2006 and 2011, many Congolese fear."

The Kabila regime's intentions are usually opaque, by design. What do we know?

- **Kabila actions (voter suppression, increased military presence in major cities, turning off the internet) clearly demonstrate he wants to remain in power, and is willing to use force to do so.**
- **Tonight's announcement will directly reflect how much pressure Kabila feels to release accurate results.** Kabila has been probing since election day how much cheating he can get away with. Not even SADC will accept a Shadary victory, so that option seems off the table for now. The United States has provided strong leadership since the vote, with very practical support from Congress (thank you), while South Africa, the giant of SADC, has not.
- **Kabila and Tshisekedi have been in intense negotiations over the past few days.** A power-sharing arrangement with Tshisekedi as President is a likely outcome, but with Kabila controlling the security forces and parliament. This action would nullify the courageous action of the Congolese to vote peacefully for a new, Kabila regime-free government. Kabila could use the Constitutional Court, which he quite literally owns, to later annul the power sharing agreement, allowing him to return to President.
- **Any result that deny the Congolese people their rightful voice will not be accepted by the vast majority of the country.** Civil unrest and retaliatory violence from the government will be the likely outcome. Time is running out.

Thank you for your engagement on this through the holidays and during the start of a busy new Congress. Please stand by for upcoming developments.

Best,

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