

DEMOCRACY AND STATES' COMPLIANCE
WITH REGIONAL AND SUB-REGIONAL
ELECTION BENCHMARKS IN AFRICA
*The 28 November 2011 elections in the
Democratic Republic of Congo in retrospect¹*

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ABSTRACT

Since the beginning of the century elections have been held regularly in several African countries. Unfortunately, these elections have generally failed to comply with regional and sub-regional electoral norms adopted to promote credible and transparent elections and contribute to democratic consolidation. The Democratic Republic of Congo (DRC) is a representative and dramatic case of the region's experience with democracy and multiparty elections. This article reflects on democracy and the 28 November 2011 presidential and parliamentary elections in the DRC. It revisits the concepts of democracy, elections and the rule of law, which are at the heart of this reflection, and the relationship among them. It examines the electoral laws and processes, the social-political and social environment as well as national and international reactions to these elections in the DRC, which is a representative but dramatic case study of Africa's experience with democracy and elections. It then assesses the DRC's compliance with the regional and sub-regional norms and principles governing democratic elections. It concludes that the DRC unfortunately failed to comply and draws some lessons about democratic consolidation in Africa.

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INTRODUCTION

Since the beginning of the 21st century several African countries have gone to the polls. In 2011 alone, general elections were held in Cameroon, Chad, the Central African Republic, the Democratic Republic of Congo (DRC), Seychelles, São Tomé and Príncipe and Zambia. Angola, Egypt, Ghana, Senegal, Sierra Leone and Somalia held presidential elections in 2012. Kenya's election took place in March 2013 and Madagascar and Zimbabwe are also expected to vote in 2013, while Malawi and South Africa will go to the polls in 2014.

The 2011 elections in the DRC were probably the most controversial in Africa's history. Were they credible or were they a fiasco? How was the electoral process conducted? Did the elections comply with regional, sub-regional and even national norms and principles governing democratic elections? What were the national and international responses to the results of the elections? Did they advance and consolidate democracy in the DRC? What lessons can African people learn from these elections as they go to the polls regularly but still struggle to consolidate democracy on the continent?

This article reflects on democracy and elections with reference to the 2011 presidential and parliamentary elections in the DRC, which are a representative but dramatic case of Africa's experience with democracy and multiparty elections. This case is already well documented (MNO 2011; *Ligue des Electeurs* 2012 and the websites www.afriquejet.com/election-rd-2011120128598.html, www.cartercenter.org and eeas.europa.eu/eucom/missions/2011/Congo; <http://blog.liguedeslecteurs/net>).

It revisits briefly the three key concepts of democracy, elections and the rule of law and the relationship among them. It deals with the electoral law and the institutions responsible for the 2011 elections in the DRC, the pre-electoral period and surrounding controversies, the electoral period and proclamation of the results and national and international reactions to these elections.

It then examines the regional and sub-regional benchmarks and applies them to the 2011 DRC elections, finding that the elections did not comply with the benchmarks, as they were marked by several irregularities and were not credible, democratic or free and fair. The conclusion summarises the findings and recommendations.

DEMOCRACY, ELECTIONS AND THE RULE OF LAW IN AFRICA

Democracy, elections, and the rule of law are distinct but interrelated concepts (Mangu & Budeli 2008, pp 103-109, 112-113). Nwabueze (1973, p 1) points out that '[n]o word is more susceptible of a variety of tendentious interpretations than

democracy'. There is widespread agreement that democracy is 'a good thing'. The adjective 'democratic' almost inevitably connotes praise, while 'undemocratic' implies censure (Wiseman 1990, p 4; Mangu 2002, p 173).

According to Schochet (1979, p 1), the 'veneration' of democracy is among the enduring and probably justified vanities of liberal political theory. Ronen (1986, p 1) contends that '[d]efining democracy is a challenge'. Depending on the scope of democracy, two major conceptions of the term may be identified, namely the minimalist and maximalist conceptions (Nyang'oro 1996, p x; Wiseman 1996, pp 7-14; Sklar 1996, p 166; Shivji 1991a, pp 27-69). The clue to understanding democracy is based on this vital distinction (Hinden 1963, pp 6-8; Mangu 2002, p 175).

Minimalist conceptions are based on institutions of government and related institutions such as political parties and pressure groups, elections and the rule of law. Democracy is defined as a specific political machinery of institutions, processes and roles (Ronen 1986, p 200). The notion of procedural or institutional democracy is found in Robert Dahl's concept of polyarchy (Dahl 1971; Dahl 1989, pp 220-24; Sorensen 1996, p 42; Wiseman 1996, p 8).

In minimalist terms, democracy is synonymous with competitive, multiparty democracy and elections. It is representative democracy, also labelled 'Western' or 'liberal' democracy. According to Sandbrook (1996, pp 137-38), it is

a political system characterized by regular and free elections in which politicians organized into political parties compete to form the government, by the right of virtually all adult citizens to vote, and by guarantees of a range of familiar political and civil rights.

Amin (1996, pp 64-70) argues that, in minimalist terms, democracy privileges individual and political rights over collective and socio-economic rights and the rights of the minority (bourgeois) over those of the people.

Glaser (1996, p 270) also blames Western 'formal democracy' for being 'irretrievably associated with individualism, formalism and reformism'. As for Shivji (1991b, pp 254-255; 1992, p 2), he regretted that democracy was frequently, if unconsciously, conflated with its liberal form – a parliamentary or multiparty system – and with constitutionalism and individual rights and freedoms rather than interrogated as a form of struggle and the mode of politics of the large majority of the working people.

While minimalist scholars define democracy as a process and a set of institutions and focus on political democracy, emphasising individual and political rights, maximalist conceptions concentrate on the substance and values of democracy, the most prominent among them being social equality, and on

collective and socio-economic rights (Glaser 1996, p 251). Maximalist scholars such as Ake (1996, pp 132-134) advocate social democracy that places greater emphasis on concrete political, social, collective and economic rights rather than liberal democracy, which emphasises abstract individual and political rights. Social democracy is popular, participative and substantive democracy (Ake 1996, pp 137, 139; Shivji 1991b, pp 254-255; Shivji 1992, p 2).

Glaser criticises the maximalist conception of democracy for its emphasis on social equality, substantive democracy and collective rights, to the detriment of formal, legal equality, formal democracy and individual rights. According to Glaser (1996, p 251), civil liberties and political pluralism are indispensable to any social order claiming to be democratic and should not be judged or jettisoned on the basis of instrumental criteria.

Therefore, democracy as a system of government includes the institutions, principles, individual, civil and political rights championed by minimalist scholars as well as the values and the collective and socio-economic rights defended by maximalists.

Elections and democracy have become virtually synonymous in Western political thought and analysis (Joseph 1999, pp 9-11; Bratton & Posner 1999, p 378; Haberson 1999, p 39; Mangu 2002, p 196). In the liberal conception, 'elections are the defining institution of democracy' (Bratton & Posner 1999, p 378).

Ake (1996, p 130), remarks that in the race to globalise democracy after the Cold War it was reduced to the crude simplicity of multiparty elections to the benefit of some of the world's most notorious autocrats, who were able to parade democratic credentials without reforming their repressive regimes.

According to Olukoshi (1999, p 456), the embrace of dubious electoral and political arrangements on the grounds that at this stage of Africa's development it is the only outcome that can realistically be expected, is very problematic. Bratton & Posner (1999, pp 378-79) argue that formal procedures for elections do not create a democracy.

In Africa, as in Asia and South America, for instance, experience has shown that elections can co-exist with systematic abuses of human rights and disenfranchisement of large segments of the population and that authoritarianism may tie the knot with elections and multipartyism and frequently does (Conac 1993b, p 492). However, it would be wrong to suggest that elections and multipartyism do not matter for democracy. In our modern era one can have elections or multipartyism without democracy, but it is difficult, if not impossible, to consider that modern democracy can do without elections and multipartyism (Bratton & Posner 1999, pp 379; Conac 1993a, p 5; Conac 1993b, p 492; Glaser 1996, pp 249-250; Mangu 2002, p 199; Nzongola-Ntalaja 1997, p 15; Pelletier 1993, p 477). African people are not interested merely in elections but in free and fair

or democratic elections. However, these can only be held within the parameters of the rule of law.

On the initiative of United Nations (UN) Secretary-General Ban Ki-moon, the rule of law was the theme of the debate at the UN General Assembly in September 2012. According to Lakhdar Brahimi, the rule of law 'was originally a narrow, legalistic concept, meaning that no man is punishable except for a distinct breach of the law, established in the ordinary courts of the land'. The concept has now acquired a much wider meaning, requiring the existence of just laws and respect for human rights (Brahimi 2002, p 10; Melber 2012, p 1). In its modern sense, the doctrine of the rule of law has come to include principles such as the independence of the judiciary, legal certainty, control over legislatures and over the exercise by state organs of discretionary powers, limitation of governmental powers by way of checks and balances and effective judicial remedies for the enforcement of fundamental rights (Carpenter 1997, pp 959-60; Mangu 2002, p 115). The modern concept of the rule of law promotes human rights and democratic values such as formal and substantive equality, human dignity, popular sovereignty, human and peoples' rights, justice and popular accountability.

According to Conac (1993b, p 485), there is a close relationship between democracy and the rule of law or the French concept of *état de droit*. Democracy is the political transposition of the *état de droit* and the rule of law its legal transposition. *Etat de droit* does not necessarily mean the *democratic* rule of law. Badinter (1993, p 9) argues that the emphasis should be on democratic *état de droit* or rule of law, since the adjective is important.

The rule of law does not merely mean that laws should rule, but, as Badinter (1993, p 9) and Brahimi (2002, p 14) point out, such laws should be just and the rule of law should have a strong human rights component. Unjust laws and laws which do not promote and protect human rights should not be allowed to rule, but should be combated and this, unfortunately, cannot be done by using the same laws.

A distinction needs to be drawn between domestic rule of law and regional or international rule of law. The international rule of law is based on legal instruments adopted within the UN and regional organisations such as the European Union (EU) and the African Union (AU). National rule of law is based on a constitution, which is the supreme law of the land, and on other pieces of legislation. It should comply with enshrined norms that constitute the international rule of law. The two are interrelated – the credibility of national rule of law depends on its compliance with international rule of law.

Elections are a political game and, like any other game, are subject to the rule of law. It is unlikely that there will be credible, democratic, free and fair elections if the state that holds them fails to abide by the rule of law. An inquiry into the 2011

elections in the DRC may help revisit the electoral process and examine whether it complied with the norms and principles of the rule of law.

THE 2011 ELECTIONS: ELECTORAL LAW, OPERATIONS, RESULTS AND REACTIONS

On Sunday 28 November 2011, for the second time under the current Constitution, which was adopted by a referendum held on 18 and 19 December 2005 and promulgated on 18 February 2006, the DRC organised a presidential election and the election of the members of the National Assembly, which is the second house of Parliament (DRC Constitution 2006, Article 100).

Electoral law, establishment of the National Independent Electoral Commission and pre-electoral operations

A number of steps were taken in preparation for the elections. According to the principles of the rule of law, legislation had to be adopted to govern the electoral process, starting with voter registration and ending with the proclamation of the results and the judicial settlement of electoral disputes.

Electoral law consisted of two major instruments, namely the Constitution (Arts 1, 5, 7, 8, 64, 69-71, 101, 193, 104, 160-163, 197-198, 211-212, 223),² the Act relating to the organisation and functioning of the National Independent Electoral Commission (NIEC) and the Electoral Act. On 20 January 2011 Parliament amended the 2006 Constitution to provide for the election of the president by a simple majority vote (DRC Constitution 2006, Art 71).

Earlier, Parliament passed legislation on the NIEC (DRC Act 2010, No 10/013), which is an independent body established by the Constitution (Article 212) to

² Art 1 provides that the DRC is a 'democratic' state. In terms of Arts 6, 7, and 8, political pluralism or multipartyism is recognised. According to Art 5, sovereignty belongs to the people who exercise it directly through a referendum or elections and indirectly through their representatives. The conditions for organising elections and referendum are determined by law. Art 7 prevents anyone from establishing a single party on all or part of the national territory. Art 8 relates to the recognition of the opposition. In line with Art 4(p) of the AU Constitutive Act, Art 64 outlaws *coups d'état* and any change of government, while enshrining the 'right to revolution' or 'rebellion' against anyone who would seize power and rule the country in violation of the Constitution. Any attempt to overthrow a constitutional regime would constitute high treason. Arts 69-71 deal with the election of the president. Arts 103 deals with the election of the members of the National Assembly and Art 104 with the election of the Senate. Arts 160-163 refer to the Constitutional Court, which is also the judge in disputes related to presidential and parliamentary elections. Arts 197 and 198 refer to the election of the members of provincial assemblies ('provincial deputies'), the governor and the vice-governor. Arts 211 and 212 provide for the establishment of two supporting democratic institutions, namely the National Independent Electoral Commission (Art 211) and the High Authority of the Media (Art 212). As for Art 223, it provides that pending the establishment of the Constitutional Court its powers are vested in the Supreme Court of Justice.

conduct and preside over the electoral process. Finally, an Electoral Act (DRC Act 2011, No 11/003) was enacted.

The NIEC, which replaced the Electoral Independent Commission (EIC), which had organised the first elections under the current DRC Constitution, in July 2006, was mandated to manage the electoral process from voter registration to the proclamation of the provisional results. It was to be organised at national, provincial, municipal and local levels and to be presided over by a bureau consisting of seven members (four from the majority and three from the opposition) elected for six years by the National Assembly (DRC Act 10/013 of 2010).

The first step towards the elections was the adoption by Parliament of Act 10/013. The process was delayed by disagreement over the composition of the NIEC bureau, with the majority rejecting the nomination of Senator Jacques Djoli, a member of the Mouvement de Libération du Congo (MLC), the leading opposition party, as they thought he would be an obstacle to the re-election of their leader, President Joseph Kabila.

For their part, the opposition rejected the nomination of Revd Daniel Ngoy Mulunda, who was likely to lead the NIEC, on the grounds that he came from the same province (Katanga) as President Kabila and was a founding and influential member of the presidential party, the Parti pour le Progrès, la Reconstruction et la Démocratie (PPRD). The opposition believed the election would be rigged in favour of the president and the majority and the NIEC would lose its autonomy and impartiality if Revd Mulunda were to preside over the bureau. Finally, after weeks of stalemate, the two sides agreed to adopt each other's lists and the bureau was inaugurated. It was able to start work once the Electoral Act (Act 11/003 of 2011) was passed, enabling it to adopt its guidelines, appoint its personnel at provincial and local levels, register voters and candidates and publish the provisional lists of candidates for the presidential and, later, National Assembly elections.

It ordered the electoral material, including ballot papers, and supervised its distribution to voting stations. In terms of the Constitution and the Electoral Act, the Supreme Court of Justice, acting as the Constitutional Court pending the court's inauguration, was competent to deal with disputes related to the provisional lists of candidates published by the NIEC.

Campaigning took place over a 30-day period, ending one day before election day on 28 November. The campaign period was marked by a number of problems and controversies, with the first relating to the presidential election and the constitutional amendment of 20 January 2011.

The 2006 Constitution provided that the president would be elected by an absolute majority (more than 50%) of the total number of votes. If no candidate

obtained such a majority a second round would be organised, with the candidates being the two who obtained the highest number of votes in the first round (DRC Constitution 2006, Art 71).

President Kabila's party and supporters anticipated that their candidate would hardly get through the first round and was likely to lose to a common opposition candidate, as had happened to President Laurent Gbagbo, who lost to Allasane Dramane Ouattara in Côte d'Ivoire. To play it safe, the possibility of a second round had to be ruled out by an amendment to Art 71. The amendment, which the opposition contended was undemocratic, was adopted by Parliament, where President Kabila had a strong majority, paving the way for his re-election since an absolute majority was no longer required and the opposition failed to unite behind a single candidate.

The second controversy related to voter registration and the publication of the voters' roll. According to Articles 6 and 8 of the Electoral Act, the NIEC had to publish the national voters' roll and the list of registered voters by province and constituency at least 30 days before the electoral campaign began. In each voting station the lists of registered voters, including their names, places and dates of birth, sex, domicile or habitual residence had also to be published at least 30 days before election day. This never happened.

There were also complaints during the voter registration period that the corrupt voters' roll that had been used for the 2006 elections had not been cleaned up. The names of several hundred thousand people who had died or been displaced since then still inflated the number of voters, particularly in the five provinces (Eastern Province, Katanga, Maniema, North Kivu and South Kivu) which were biased in favour of President Kabila. There were innumerable cases of multiple registrations as one voter could register in many places without this being discovered. Moreover, members of the police and the Congolese army, who were excluded by the Electoral Act from voting but favoured Kabila, were allowed to register. The NIEC and President Kabila's political coalition rejected all attempts by the opposition to audit the voters' roll.

Controversy also surrounded the logistics and the equipment (laptops and computers) used to save the data. Despite the fact that the the equipment was supplied by impartial providers such as the Chinese, Belgians and South Africans, these countries were accused of backing President Kabila's re-election, as was the United Nations Stabilisation Mission in the DRC (MONUSCO), which secured the transport of electoral personnel and material around the DRC. The equipment was said to have been corrupted in advance to produce figures that would contribute to President Kabila's re-election.

The NIEC and the government refused to allow the opposition access to the equipment or to audit the data recorded. The printing of the ballot papers

was another source of controversy. The total number of voters was classified information for the incumbent president and his supporters in the NIEC. Nobody apart from them knew the exact quantity and cost of the electoral material or who was providing it. The suppliers were based in countries that supported the incumbent president. In exchange for lucrative commissions to be paid to the members of the NIEC, a private Johannesburg-based company was contracted to produce ballot papers. Millions of these ballot papers were dispatched to the DRC in private planes and trucks that first landed or arrived in the Eastern DRC, especially in President Kabila's native province of Katanga.

Disputes during the pre-electoral period also related to the timing of electoral operations and to election day, both of which were unilaterally determined by the NIEC and the ruling coalition in violation of the Constitution. According to Article 73 of the Constitution, the presidential election should be held at least 90 days (three months) before the end of the term of the incumbent president. The opposition complained that this provision was violated by the NIEC's decision to hold the elections on 28 November, which was only seven days before the end of the president's five-year term, which had started on 6 December 2006. The opposition also complained that, in violation of Arts 149 and 161 of the Constitution, an independent Constitutional Court had not been inaugurated to serve as the final judge of the electoral process to ensure that the elections were credible, transparent, free and fair. The president had not promulgated the relevant legislation despite the fact that it had long been adopted by Parliament, and retained in office the Supreme Court of Justice, whose members he appointed and could dismiss at will. The opposition, therefore, held that it was imperative to establish the Constitutional Court if the elections were to be credible, transparent, free and fair.

All the opposition's challenges to these violations failed. Meanwhile, several human rights violations, most of them aimed at securing Kabila's re-election by weakening his opposition, were reported around the country, as were incidents of violence and murder perpetrated by the armed forces and security services.

The police, the armed forces and the administration, which, in terms of the Constitution, were expected to be apolitical and impartial (Constitution 2006, Arts 183, 188, and 193) were biased in favour of Kabila and the ruling party and, among the rights that were violated were the constitutional right to freedom of thought and conscience, the right to freedom of expression, the right to information, the right to assemble and the right to demonstrate peacefully and unarmed (Constitution 2006, Arts 22- 26). Despite the establishment of the High Authority of the Media, which was constitutionally mandated to guarantee their impartiality (Constitution 2006, Art 212) and the constitutional obligation for the public media to be accessible equally to all political parties and social forces, public radio and television were hijacked by the ruling coalition.

As a minority, the opposition was unable to prevent the electoral process being run by the NIEC and the Supreme Court of Justice in the service of Kabila and his ruling coalition. In September 2011 the NIEC published the provisional list of candidates for the presidency and the National Assembly. The Supreme Court of Justice confirmed the lists, retaining all 11 presidential candidates proclaimed by the NIEC.

Some of these were independent candidates, but the overwhelming majority represented political parties. Attempts by the opposition to rally around a single presidential candidate to oppose the president failed.

Table 1
Presidential candidates

| Candidate No | Name | Political affiliation |
|--------------|---|--|
| 01 | Andeka Djamba, Jean | ANCC (Alliance des Nationalistes Croyants Congolais) |
| 02 | Bombole Intole, Adam | Independent |
| 03 | Kabila, Joseph | Independent (but leader of presidential majority) |
| 04 | Kakese Malela, François Nicefort | URDC (Union pour le Réveil et le Développement du Congo) |
| 05 | Kamerhe Lwa Kanyinginyi, Vital | UNC (Union Nationale Congolaise) |
| 06 | Kashala Lukumwena, Oscar | URC (Union pour la Reconstruction du Congo) |
| 07 | Kengo wa Dondo, Léon | UFC (Union des Forces du Changement) |
| 08 | Mbusa Nyamuisi, Antipas | Independent |
| 09 | Mobutu Nzanga Ngbagawe, François Joseph | UDEMO (Union des Démocrates Mobutistes) |
| 10 | Mukendi Kamana, Josué Alex | Independent |
| 11 | Tshisekedi wa Mulumba, Etienne | UDPS/Tshisekedi (Union pour la Démocratie et le Progrès Social/Tshisekedi) |

Source: www.ceni.gouv.cd

The number of candidates registered for the National Assembly elections totalled 18 478 (only 2 244 of them women) (www.ceni.gouv.cd). Most of the candidates were nominated by the 423 political parties then registered in the DRC.

Election day and the proclamation of the results

The political climate remained tense on election day and during the wait for results to be proclaimed and tensions escalated after the proclamation. While both the presidential and National Assembly elections were held on 28 November they neither started nor ended at the same time. In some constituencies, where the electoral material was received early and voting stations opened as required, they were peaceful, but, in others, there were incidents of violence or intimidation of voters, insufficient ballot papers and officers and material arrived late or not at all. In some of these stations voters were allowed to cast their votes after polling was due to close and some even voted the next day.

According to the Electoral Act, voting stations must transform into counting stations immediately after voting ends and counting must take place in the presence of all the electoral officers and the candidates' witnesses. No other person is allowed to participate in the counting. No provision is made for the presence in the counting stations of members of the police, the army, the security services, the administration, the government or the parties.

Once counting is over minutes of the results must be signed by all parties to the count and posted for the public, the candidates and the political parties to see, to allow for contestation before the competent authorities, namely the NIEC and the Supreme Court of Justice. The candidates and their parties are entitled to receive copies of the results. In many cases, candidates or party witnesses, generally those from the opposition, were intimidated and prevented from participating in the counting.

The original documents must be secured and sent immediately to the compilation centre of the constituency in which the count is done and the winners proclaimed according to the number of the seats allocated by the Electoral Act to the constituency. Communication problems in the DRC are so huge that it generally took several days, sometimes even weeks, for the results to reach the compilation centres. Some parcels did not arrive at all. In other cases, when they arrived they had been opened and the results falsified. In still others, they arrived after the centres had announced the results.

It was not possible for the ballots to be recounted because innumerable ballot papers were missing or had been destroyed. Despite all the irregularities, the compilation centres published the results and communicated them directly to the NIEC bureau, which announced them, subject to confirmation by the Supreme

Court of Justice. The court proclaimed the final results after dealing with the disputes emanating from candidates and parties contesting the provisional results.

As the NIEC had planned, the presidential election results were announced before those of the parliamentary elections to avoid any crisis of legitimacy in the highest office in the republic. The day after the election many opposition leaders and independent observers proclaimed that opposition leader Etienne Tshisekedi had won. The battle had begun. Despite several reports of massive electoral irregularities in many areas, the NIEC provisionally announced the results on Friday 9 December. It came as no surprise to most that Kabila was declared the winner, with 48.95% of the vote. He was followed by opposition candidates Tshisekedi (32.33%), Vital Kamerhe (7.74%), and Léon Kengo wa Dondo (4.95%). The remaining candidates won less than 2% of the vote.

Table 2
Provisional results of the presidential election

| No | Name | Votes | Percentage |
|----|---|-----------|------------|
| 01 | Kabila, Joseph | 8 880 944 | 48.95% |
| 02 | Tshisekedi wa Mulumba, Etienne | 5 864 775 | 32.33% |
| 03 | Kamerhe Lwa Kanyinginyi, Vital | 1 403 372 | 7.74% |
| 04 | Kengo wa Dondo, Léon | 898 362 | 4.95% |
| 05 | Mbusa Nyamuisi, Antipas | 311 787 | 1.72% |
| 06 | Mobutu Nzanga Ngbagawe, François Joseph | 285 273 | 1.57% |
| 07 | Andeka Djamba, Jean | 128 820 | 0.71% |
| 08 | Bombole Intole, Adam | 126 623 | 0.70% |
| 09 | Kakese Malela, François Nicefort | 92 737 | 0.51% |
| 10 | Mukendi Kamana, Josué Alex | 78 151 | 0.43% |
| 11 | Kashala Lukumwena, Oscar | 72 260 | 0.40% |

Source: www.ceni.gouv.cd

The NIEC's decision was referred to the Supreme Court for confirmation and candidates who objected were urged to lodge their complaints with the highest court. On the basis of reports from his party's witnesses and several independent observers, including those of the Catholic Church, Tshisekedi rejected the results and declared himself president. He declined to challenge the results in the Supreme

Court of Justice, which the opposition accused of lacking independence and being subject to President Kabila.

The only legal challenge came from Vital Kamerhe, who also rejected Kabila's election and congratulated Tshisekedi on his victory. Kamerhe's party, the UNC, launched the challenge in terms of the Electoral Act on 12 December. The Supreme Court of Justice unanimously and unreservedly dismissed the application on 16 December (*UNC v Kabila Kabange*) and confirmed the NIEC's decision, proclaiming Joseph Kabila the winner. Kabila was sworn in on 19 December.

A week later Tshisekedi addressed the people from his residence in Kinshasa-Limete during his own official swearing in as the 'DRC's legitimate president'. Since then, the DRC has had two presidents.

Accusations of vote rigging, corruption among the members of the NIEC, subornation of witnesses, falsification of results, violence, destruction of ballot papers in areas favourable to the opposition and their multiplication in those favourable to Kabila, his party and his coalition, which were aired before the announcement of the results of the presidential election, intensified while the nation awaited the results of the National Assembly election. These fraud allegations were confirmed by the overwhelming majority of independent observers, including those from the Carter Center and the European Union (EU), and contributed to discrediting further the electoral process and the NIEC. At one point President Kabila himself acknowledged that there had been a number of irregularities but said these would have no impact on his election. The situation worsened when the NIEC delayed the announcement of the results in violation of the Electoral Act and its own guidelines.

A team of American and British independent observers was invited to help the NIEC retain some credibility but they quickly left the country. The NIEC, fearing that the findings of the group might reinforce or corroborate the accusations of fraud, denied having invited them. (Self-proclaimed) President Tshisekedi then decided to 'nullify' the parliamentary elections.

Despite Tshisekedi's decree the NIEC went on to announce the provisional results. The PPRD (President Kabila's party) and the Presidential Majority (MP, Kabila's coalition) were proclaimed winners of the parliamentary elections, with a more than two-thirds majority in the National Assembly. UDPS, Tshisekedi's party, came second.

Tshisekedi ordered the elected members of his party to resign from the National Assembly or face expulsion. The majority of them decided to keep their seats and were expelled from the UDPS for participating in an 'illegitimate parliament' dissolved by the 'president'. This crisis continues to have negative consequences on Congolese politics. 'M 23', a rebellion movement launched in the Eastern DRC with backing from Rwanda, which is accused of invading the DRC,

justified its rebellion on the ground that the DRC elections were rigged by President Kabila and his coalition. The question that arises is whether the November 2011 elections complied with regional and domestic norms and principles governing democratic elections and whether they were free, fair and credible.

National and international reaction

There were different responses to the irregularities from the Congolese, the international community, the AU, and from African sub-regional organisations that had sent observers to monitor the elections.

The Congolese responses mainly came from political leaders, independent observers, the NIEC and the Supreme Court of Justice. The winners, President Joseph Kabila, his party (PPRD) and his coalition (MP), accepted the results, while their opponents rejected them on the grounds that the election was not free and fair. Despite the fact that both sides agreed that the elections had been fraudulent and Kabila was among the first to concede that there were irregularities, he was quick to add that they were not of such magnitude as to render the elections, particularly the presidential election, non-credible. In September 2012 his government requested Parliament to adopt new legislation amending the composition and functioning of the NIEC.

Among the political leaders and parties supporting the president there were mutual accusations of fraud, which were brought to the Supreme Court of Justice. The majority of disputes emanated from the members of the ruling coalition. They, too, admitted that the elections had not been free and fair and had failed to comply with norms and principles governing democratic elections.

Opposition parties, too, despite their participation in Parliament, contested the legitimacy of the elections. Even before the NIEC proclaimed the results national and international independent observers had started ringing warning bells about massive irregularities that affected the credibility of the elections.

Among the national observation missions were observers from the Conférence épiscopale nationale de l'église catholique au Congo (CENCO), representing the powerful Catholic Church, and from non-governmental organisations, especially the four that formed the Mission nationale d'observation (MNO), namely, Réseau national pour l'observation et la surveillance des élections au Congo (RENOSEC), Réseau d'observation des confessions religieuses (ROC), Cadre permanent de concertation de la femme congolaise (CAFECO) and the Conseil national de la jeunesse (CNJ). The MNO deployed 12 688 observers in 9 074 voting stations across the country (MNO 2011, p 2). ROC deployed an additional 17 000 observers.

The MNO published four documents relating to the elections. These included a statement on 7 November, assessing the pre-electoral situation; a report on

27 November on the political environment during the elections; an interim report on 16 December and a final report on 15 January 2012.

The overwhelming majority of observers concurred that the electoral process had not been credible and that the elections had been marred by numerous irregularities and could hardly be considered free and fair according to international and domestic standards. Despite all these reports the NIEC went on to announce the results.

Responding to a question from a reporter for Radio France International a few days after the announcement of the provisional results of the presidential election, NIEC deputy-president Jacques Djoli came close to admitting the irregularities when he confessed that he had been forced to agree with his colleagues within the bureau to avoid a political crisis.

Many people were disappointed that this constitutional law professor, who had appeared to be a man of integrity during his term as a senator, finally endorsed fraudulent electoral results, and believed the widespread rumour that he and his colleagues had taken millions of US dollars as a bribe to proclaim the incumbent president the winner. They found his statement irresponsible for a man of his calibre and he did not repeat it.

The NIEC bureau again indirectly acknowledged its wrongdoing in running the elections when it presented its annual report to the National Assembly on 14 June 2012. Responding to critics on behalf of the bureau Djoli maintained that the quality of the elections reflected that of the political leadership. He added that no elections were perfect and the NIEC was not the only institution to be blamed for the failure. He also accused the National Assembly of passing the Electoral Act and inaugurating the NIEC late and of not providing the commission with adequate financial resources. This response was typical of that of political leaders in Africa in general and in the DRC in particular, where mistakes are rarely acknowledged and are generally justified.

More than 500 disputes were brought before the Supreme Court of Justice in relation to the parliamentary elections. In April 2012 the court invalidated 32 members of the National Assembly, fuelling further criticism of the NIEC.

The court aggravated an already problematic situation by proclaiming as winners some members of the presidential coalition who had neither been named by the NIEC nor had appealed against the NIEC's decision. The Supreme Court of Justice was also blamed for corruption and unconfirmed reports alleged that it had been ordered to dismiss as many applications from the opposition as possible and to ensure that the president received a majority in the National Assembly to enable his government to apply his programme of action.

The NIEC bureau also criticised the court for affirming candidates in constituencies where the commission had proposed that elections be nullified

because of irregularities. This resulted in a conflict between the two institutions and confirmed that the elections had not been democratic. The NIEC had nevertheless to accept the court's decisions because, in terms of the electoral legislation, they were final and binding.

On 2 October 2012, almost 11 months after the elections and following the judgement of the Supreme Court of Justice, the NIEC announced the results of the parliamentary elections in the Masisi constituency, where it had had to organise a new election due to gross irregularities. The attitude of the Supreme Court of Justice gives rise to the question whether and why the rule of law requires respect for unjust decisions made by the highest court in the land.

After a false moment of suspense, instead of condemning the DRC's non-compliance with international norms and principles governing democratic elections, the international community, led by some Western 'democratic' leaders and governments, welcomed the results and congratulated President Kabila and his government on successful and exemplary elections, disappointing millions of democrats worldwide.

Despite having about 20 000 'Blue Helmets' in MONUSCO, which is the UN's largest peace-keeping force in Africa since the Cold War, the UN declined to play an important role in preventing and combating election fraud. The Security Council, which established MONUSCO and determined its mandate, did not even bother to listen to opposition leaders who wanted MONUSCO to be mandated to authenticate the results published by the NIEC, as they did in Côte d'Ivoire. President Kabila was not Laurent Gbagbo and there was no Security Council permanent member like France to push for such an extended mandate for MONUSCO.

For his part, Kabila had learnt from experience that an extension of MONUSCO's mandate could amount to political suicide, with possible deferment to the International Criminal Court (ICC), as happened to Laurent Gbagbo. He therefore opposed MONUSCO and succeeded in keeping it out of the process. Unlike Gbagbo, he could count on the assistance and understanding of all Security Council members, including permanent members such as the US, France, and China and non-permanent members like South Africa and Gabon, all of whom were interested in having him in power despite the fact that the elections had been denounced as irregular by non-African international observers and by the observer missions of both the Carter Center and the EU (www.cartercenter.org/news/pr/drc-121011.html).

Although they were not represented at the highest level during his inauguration, the world's major powers did not want Kabila replaced by a nationalist leader who might not preserve their interests.

The Belgian government was the first Western government to visit the DRC and to congratulate Kabila on his re-election. China, which had concluded lucrative deals with the DRC government, was interested in the continuation of the Kabila regime as was the Obama administration, which jettisoned the Carter Center's report.

French President François Hollande, after some suspense about the relationship between his government and that of President Kabila in response to several confirmed reports of human rights abuses in the DRC, including the assassination of Floribert Chebeya Bahizire, a leading Congolese human rights activist, finally announced in August 2012 that he would participate in the 14th Summit of Francophone countries to be hosted by Kabila in October of that year. It would have been surprising if he hadn't. After all, it was former French President Charles de Gaulle who is reported to have said that states have no friends, only interests.

In a globalised world where the French language is losing out to English and other major foreign languages, it was naïve to believe that the French president would not participate in a summit aimed at preserving or reinforcing the leadership of his country.

The recognition by major powers like the US, France, China and Belgium, DRC's former colonial power, of Joseph Kabila as the 'legitimate' DRC president paved the way for the recognition of his government by the UN, the EU, and the rest of the international community, notwithstanding the fact that the elections had failed to meet international and domestic standards.

The observers from the AU and sub-regional organisations such as the Southern African Development Community (SADC), the Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern Africa (COMESA) and the International Conference on the Great Lakes Region (ICGLR) disagreed with both national and other international observers. In a joint declaration they held that the elections had been successful, while regretting isolated acts of violence (www.afriquejet.com/election-rd-2011120128598.html).

Notwithstanding the irregularities, they confirmed Joseph Kabila as the winner of the presidential election. Their joint declaration was published two days after the elections, a week before the announcement by the NIEC of the provisional results of the presidential election (6 December 2011) and their confirmation by the Supreme Court of Justice (10 December 2011) and several months before the proclamation of the results of the parliamentary elections. The statement contradicted the findings of all other national and international electoral observers and was not credible.

Did the 2011 elections comply with regional and sub-regional benchmarks?

THE 2011 ELECTIONS AND THE DRC'S COMPLIANCE WITH REGIONAL AND SUB-REGIONAL BENCHMARKS

The DRC is a member state of the AU and several sub-regional organisations, namely ECCAS, COMESA, ICGLR, and SADC. The 2011 elections had therefore to comply with the norms and principles governing democratic elections adopted by these organisations.

Regional and sub-regional election benchmarks

The major regional instruments containing these norms and principles are the African Charter on Human and Peoples' Rights (ACHPR), adopted on 27 June 1981 in Nairobi, Kenya, which came into force on 21 October 1986; the AU Constitutive Act, adopted on 11 July 2000, which came into operation on 26 May 2001; the African Convention on Preventing and Combating Corruption in Africa (ACPCC), adopted on 11 July 2003, which came into force on 5 August 2007 and, particularly, the African Charter on Democracy, Elections and Governance (ACDEG), adopted on 30 January 2007 and which came into force on 15 February 2012.

The ACHPR is the founding instrument of the African human rights system. It enshrines human and peoples' rights, which are critical if democracy is to prosper on the continent. These rights must be protected if people are to participate in elections and if those elections are to be democratic, free and fair.

Particularly important is the right of every citizen to participate freely in the government of his or her country, either directly or through freely chosen representatives, in accordance with the provisions of the law (ACHPR 1981, Art 13.1). Arguably, 'law' here should be construed to include regional or international law and domestic law that would be consistent with internationally agreed norms and principles. The ACHPR is probably the most important instrument the AU inherited from the Organisation of African Unity (OAU).

The Constitutive Act of the AU also contains objectives and principles aimed at promoting democratic elections in Africa. These include the promotion of democratic principles and institutions, popular participation, human rights, the rule of law, gender equality, good governance, the union's right to intervene in a member state pursuant to a decision of the assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity, and condemnation and rejection of unconstitutional changes of governments (AU Constitutive Act 2001, Arts 3(g)-(h) and 4(h), (l), (m), (p)).

Despite the fact that its primary objective is to prevent and combat corruption, the ACPCC, which is based on the AU Constitutive Act, contains

provisions aimed at promoting democratic elections. The ACPCC principles include respect for democratic principles and institutions, popular participation, the rule of law, good governance, respect for human rights, transparency and accountability in the management of public affairs and condemnation and rejection of acts of corruption, related offences and impunity (ACPCC 2003, Art 3).

Democratic elections are to be promoted through the exclusion and condemnation of electoral manipulation, corruption and vote-rigging by ensuring transparency, equity, and efficiency in the management of tendering and hiring procedures in the public service (ACPCC 2003, Art 7.4).

The ACPCC also provides for the confiscation of proceeds or property derived from corruption or related offences (ACPCC 2003, Art 16(1)(b)) and the incorporation of the principle of transparency in the funding of political parties (ACPCC 2003, Art 10(b)). It proscribes the use of funds acquired through illegal and corrupt practices to finance political parties (ACPCC 2003, Art 10(a)) and promotes the right of access to any information required to assist in the fight against corruption and related offences (ACPCC 2000, Art 9.5).

As for the ACDEG, it is the most important regional instrument containing norms, principles and standards governing democratic elections. States parties commit to promoting democratic elections based on respect for the rule of law, human rights and good political, economic and social governance.

At the continental level there have been discussions about merging the African Court of Justice provided for by the AU Constitutive Act (Arts 5.1(d) and 18) and the African Court on Human Rights established by the Protocol to the African Charter into a single court, to be known as the African Court of Justice and Human Rights. This court will be competent, *inter alia*, to prosecute and judge the perpetrators of unconstitutional changes of government. When the amended protocol merging the two courts comes into operation it will further contribute to the promotion of democracy and to the organisation of democratic elections in Africa.

All the above AU instruments are treaties that bind states parties only. Although other instruments are not legally binding, *per se*, and may be considered 'soft law', they cannot be ignored. They include the OAU / AU Durban Declaration on the Principles Governing Democratic Elections in Africa, adopted by the Assembly of the African Union in July 2002 (AHG/Decl.1 (XXXVIII)) as well as the New Partnership for Africa's Development (NEPAD) Declaration, adopted in Abuja, Nigeria, in October 2001, at the first meeting of the Heads of States and Government Implementation Committee of NEPAD, and the Declaration on Democracy, Good Political, Economic and Corporate Governance (DDGPECG), adopted by the AU Assembly of Heads of State and Government in Durban, South

Africa, in July 2002 to govern the work of the African Peer-Review Mechanism (APRM)³ (Heyns & Killander 2006, pp 299-306).⁴

As sub-regional organisations, ECCAS, COMESA, ICGLR and SADC also adopted norms, principles, standards and guidelines in order to promote democratic elections. These regional economic communities (RECs) generally send observers to monitor elections held in their member states, including the DRC.

ECCAS, which was established in October 1983 and is among the oldest RECs within the AU, adopted a declaration on electoral support to be provided to member states but the Human Rights and Democracy Centre, inaugurated in 2001, is still to become operational. ECCAS has shown some interest in the organisation of free, fair, democratic and peaceful elections since its 2005 summit, at which the organisation decided to establish a Unit of Electoral Support to member states within the secretariat (ECCAS 2005). Accordingly, the council of ministers requested the secretariat-general to convene an urgent meeting of the ministers of home affairs in order to adopt a strategy for the organisation of free, fair, democratic and peaceful elections (www.ceeac-eccas.org/index.php).

Starting with the 2006 elections in the DRC, ECCAS has sent several observer missions and has provided technical assistance to national electoral commissions in some member states. Nevertheless, its contribution to the promotion of democratic elections has been limited compared to that of other African RECs. This is mainly due to the fact that ECCAS faces many challenges, including understaffing and a lack of sufficient resources.

The political will and commitment to democracy in Central Africa is among the lowest on the continent. Elections are generally rigged. There is little respect for human rights and the rule of law. Constitutions are regularly amended or violated to suit the needs of incumbent leaders. São Tomé and Príncipe seems to be the notable exception to the rule of undemocratic and bad governance in the region – it finished 11th of all African countries in the 2010 Ibrahim Index of African Governance.

Apart from São Tomé and Príncipe, in no ECCAS member state since the start of the 21st century has an incumbent leader respected the constitutional limitation on the number of terms of office or conceded defeat in the sub-region.

3 The APRM was established as a voluntary mechanism to assess and make recommendations to improve governance among AU member states participating in NEPAD. AU member states that participate in NEPAD and adhere to the APRM are also required to comply with the recommendations. In support of good political governance they agreed to ensure the effective functioning of parliaments and other accountability institutions, including parliamentary committees and anti-corruption bodies, and the organisation of regular, free and fair elections. Regional guidelines were also developed to govern elections.

4 The NEPAD Base Document was adopted at the 6th summit of the NEPAD Heads of State and Government Implementation Committee in March 2003 in Abuja, Nigeria.

Most ECCAS leaders have come to power by unconstitutional means (wars, coups d'état, rebellions or constitutional and electoral manipulation). There has been almost no attempt on the part of the ECCAS countries to promote constitutionalism and democracy. ECCAS has also failed to adopt norms, principles and guidelines to govern democratic elections in its member states, as has COMESA.

Even when these RECs are requested to send observation missions, the missions rely on the norms, principles and guidelines or standards adopted by the AU, whereas ICGLR and SADC have added their own in line with those of the AU.

ICGLR's principal instrument for the promotion of democratic governance is the Protocol on Democracy and Good Governance adopted on 1 December 2006. This protocol endorsed the Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes, which was adopted on 20 November 2004. The principles contained in the ICGLR's protocol include the separation of powers; accession to power through regular, free, fair and transparent elections; the prohibition of unconstitutional change and any other undemocratic means of acceding to or maintaining power; popular participation in decision-making; decentralisation; non-partisan defence and security forces; equality and non-discrimination; political pluralism; freedom of association and assembly and peaceful demonstration; freedom of expression; freedom of movement and prohibition of forced exile (ICGLR Protocol 2006, Art 2).

Electoral institutions should be independent and should reflect the principle of gender parity (Art 7). They should maintain transparent and credible voters' registers, which should be open to all stakeholders for inspection from time to time (ICGLR Protocol 2006, Art 9). The organisation and conduct of elections and the declaration of results should be done in a transparent manner (Art 10).

Since the collapse of the Mobutu regime the DRC has developed stronger links with SADC than with other sub-regional organisations. The SADC Principles and Guidelines Governing Democratic Elections are more elaborate with regard to member states' obligations to promote democratic elections. They were not only informed by SADC's legal and policy instruments but by the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (AU Doc AHG/DECL/1(XXXVIII)) and the AU Guidelines for Electoral Observation and Monitoring Missions (AU Doc EX/CL/35 (III) Annex II).

In terms of the SADC Principles, SADC member states must adhere to the following principles in the conduct of democratic elections:

- Full participation of all citizens in the political process;
- Freedom of association;
- Political tolerance;

- Regular intervals for elections as provided for by their respective national constitutions;
- Equal opportunity for all political parties to access the state media;
- Equal opportunity to exercise the right to vote and be voted for;
- Independence of the judiciary and impartiality of the electoral institutions;
- Voter education;
- Acceptance of and respect by political parties for election results proclaimed to have been free and fair by the competent national electoral authority in accordance with the law of the land; and
- The ability to challenge election results as provided for in the law of the land.

(SADC Principles 2004, 2.1-2.10)

There are a number of guidelines to be used by SADC member states in determining the nature and scope of election observation. In terms of these guidelines they should provide for constitutional and legal guarantees of freedom and the rights of citizens; a conducive environment for free, fair and peaceful elections; non-discrimination in voter registration; updated and accessible voters' rolls; polling in neutral places and vote counting at polling stations (SADC Principles 2004, 4.1.1.-4.1.8).

SADC member states are required, *inter alia*, to:

- Take necessary measures to ensure the scrupulous implementation of the principles;
- Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
- Safeguard the human and civil liberties of all citizens, including freedom of movement, assembly, association, expression and campaigning as well as access to the media during electoral processes, in order to maintain peace and security;
- Take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;
- Ensure the availability of adequate logistics and resources for carrying out democratic elections;
- Ensure that adequate security is provided to all parties participating in elections;

- Ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and / other observers / monitors;
- Encourage the participation of women, the disabled and the youth in all aspects of the electoral process in accordance with the national laws.

(SADC Principles 2004, 7.1-7.9)

Findings on the DRC's compliance with regional and sub-regional election benchmarks

For a variety of reasons the 2011 elections were chaotic and characterised by many irregularities (MNO 2011; Ligue des Electeurs 2012; Carter Center; EUEOM 2011). Among these were:

- The lack of independence of the Supreme Court of Justice and the NIEC despite the fact that the Constitution proclaims that they are 'independent'. These institutions remained subject to the incumbent president and to the ruling coalition. The majority of the members of the NIEC bureau were nominated by the president, who also appointed the judges of the Supreme Court of Justice from among his supporters in the judiciary, without any proper consultation with the High Council of the Magistracy (Judicial Commission), as set down in the Constitution.⁵ This appointment also took place *in tempore suspecto*, just before the electoral campaign, and the judges were sworn in by a president who was no longer entitled to do so, as he was, at that point, one of several presidential candidates. Such judges were aware that they owed him a debt and were therefore accountable to the president and to the ruling majority. They could not afford to 'betray' them and the only way to pay them back was to announce their victory.
- The NIEC violated Articles 6 and 8 of the Electoral Act by failing to publish the lists of registered voters by province and by constituency at least 30 days before the beginning of the electoral campaign. In each voting station the lists of registered voters, including their names,

⁵ According to Art 82 of the 2006 Constitution judges must be appointed and dismissed by the president on the initiative of the High Council of the Magistracy (*Conseil superieur de la magistrature*).

places and dates of birth, sex, domiciles or habitual residences had to be published at least 30 days before the election day;

- Intimidation of voters and electoral officers as well as destruction of electoral material by some candidates and their parties;
- Late opening of the voting stations on election day;
- Unavailability of some voting stations where voters were expected to cast their votes and unannounced changes of venue of some voting stations. As a result, many registered voters were disoriented and could not cast their votes despite the fact that Article 47 of the Electoral Act provided that the NIEC had to publish the list of voting stations and their addresses 30 days before the election. This did not allow candidates and parties to accredit their witnesses in all the voting stations and in time;
- Insufficient ballot papers for the number of registered voters in many voting stations favourable to opposition candidates, in violation of Art 56 of the Electoral Act. However, in areas favourable to Joseph Kabila, the number of ballot papers largely exceeded that of registered voters;
- Possession by some candidates and unauthorised persons of unregistered ballot papers. These papers were later introduced into the system and benefited some candidates and their parties, especially those of the ruling coalition;
- At a number of voting stations thousands of ballot papers were already marked in favour of presidential candidate no 3 (Kabila) and candidates for his party or the majority;
- In some voting stations in his province of origin (Katanga), Kabila obtained 100% of the vote while the 10 other candidates won 0%. In *UNC v Kabila Kabange*, the Supreme Court of Justice, acting as the Constitutional Court, dismissed Vital Kamerhe's complaint on the ground that the Constitution did not prevent any candidate from winning 100% of the vote;
- Some candidates were allowed to campaign after the deadline and around the voting stations, in violation of the Electoral Act;
- The minutes of the vote counting in some areas were not signed by competent electoral officers and by the witnesses of the candidates or parties, in violation of Article 38 of the Electoral Act;
- Witnesses of the candidates and parties were prevented from entering some voting and counting stations. The aim was to facilitate fraud;
- Falsification of ballot papers and election results in many areas;
- Reception of many parcels containing the ballot papers and the results

several days after the election and manipulation or falsification of the results during their transfer to the counting stations, in violation of the Electoral Act;

- Non-publication of the results in the voting stations, as provided by law;
- Lack of independence and professionalism of public servants in the administration and security services (army, police, and intelligence services), who felt duty bound to work for the re-election of the outgoing president, the ruling party or the majority;
- Lack of independence and impartiality of the state media, which campaigned for the outgoing president, his party and coalition while closing their doors to the opposition, in violation of the Constitution and the Electoral Act;
- Utilisation of state material, financial resources and personnel in the campaign of the outgoing president and the candidates of his party or coalition, in violation of the Constitution and Article 36 of the Electoral Act. This could lead to their invalidation by the NIEC, which it did not;
- Posting of campaign messages on public buildings, in violation of Article 30 of the Electoral Act;
- Destruction of many ballot papers, especially in areas suspected of favouring the opposition;
- Discordance between the results published by the NIEC and confirmed by the Supreme Court of Justice and those published at the voting stations in order to favour the outgoing president, the ruling party or coalition and their candidates;
- The presence in the voting stations of non-authorized persons such as local heads of the administration and members of the security services;
- Corruption of electoral officers or their collusion with some candidates, particularly those of the ruling party or coalition.

Against this backdrop, the 2011 elections in the DRC were neither credible nor democratic. Some members of the National Assembly were democratically elected but the majority seem to have been elected by the NIEC, the Supreme Court of Justice, or both.

On 2 October 2012 the Supreme Court of Justice ordered the NIEC to announce the results of an election it had nullified several months earlier because of fraud. The Party of Nationalists for Integral Development (PANADI) issued a statement in which it deplored the fact that for the first time in the history of

elections parliamentary representatives had been elected in a poll that had been nullified for gross irregularities (www.ceeac-eccas.org/index.php).

Not only did the elections not comply with regional and sub-regional principles, norms, standards and guidelines, they also failed to comply fully with domestic electoral norms, principles, and guidelines.

CONCLUSION

Since the winds of change brought the one-party state to an end in the late 1980s multiparty elections have been held regularly in Africa. If peaceful power transfer from one president or ruling majority to another as a result of an election is not a *sine qua non* for democratic consolidation it nevertheless testifies to the fairness of elections (Bratton & Posner 1999, p 378; Joseph 1999, p 11). Africa offers some good examples of democracy and free and fair elections, among them Benin, Botswana, Ghana, Namibia, Senegal, South Africa and Zambia.

Accordingly, not everything everywhere conforms to Conrad's image of Africa as the 'heart of darkness'. Unfortunately, on balance, good is rare. Authoritarian rule and vote rigging or electoral manipulation prevail in many African countries.

This article reflected on democracy, elections and the rule of law in Africa, especially in the DRC, which is a member of the AU, COMESA, ECCAS, ICGLR and SADC. It assessed the DRC's compliance with regional and sub-regional election benchmarks to establish whether the elections held on 28 November 2011 were democratic, transparent, free and fair.

It concludes that, contrary to the unanimous and joint findings of AU, COMESA, ECCAS, ICGLR and SADC observers, according to all regional and sub-regional election benchmarks the elections did not qualify as credible, transparent, free and fair despite the fact that Joseph Kabila was recognised by all these regional organisations as the 'legitimate' DRC president. African organisations and their leaders were not alone in accepting the results of the elections. Several world leaders within the UN, the European Union and other organisations, forgetting about the findings of observers from the Carter Center and the EU, joined in praising the Congolese authorities on 'successful' elections.

They chose to condone the flagrant irregularities of the elections and recognised President Kabila and his government as the 'legitimate' president and government of the DRC. Yet even Congolese leaders, institutions and electoral observers did not believe the results were credible. The fact that leaders of both the majority and the opposition agreed to amend the Act of Parliament governing the NIEC and establish a new bureau to replace the one that ran the contested elections was a unanimous recognition that the elections were not credible.

The conclusion reached within the AU, COMESA, ECCAS, ICGLR and SADC was hardly surprising since these organisations continue to function as 'clubs' of African leaders, supporting one another even against their peoples, just as the OAU did before the AU replaced it at the beginning of the century. In fact, it would have been surprising if they had not done so since they are still dominated by authoritarian leaders, many of whom came or cling to power by unconstitutional means and electoral manipulation, while the few who were democratically elected tend to keep quiet and compromise.

As Africa commemorates the 50th anniversary of the founding of the OAU it must, unfortunately, be stressed that despite the number of instruments adopted and statements generally made for popular and Western consumption, many African leaders and organisations have provided little evidence of their commitment to democratic governance through the organisation of credible, transparent, free and fair elections.

The findings of this article tend to confirm some assumptions made earlier and adopted by other observers and analysts of African politics. Despite being interrelated, democracy, elections and the rule of law should not be considered synonymous. Like the rule of law, elections are not necessarily democratic. Democracy in Africa should not be reduced simply to multiparty elections. African people need genuine democratic change and elections instead of a 'cosmetic' and 'choiceless' democracy (Ake 1996, pp 130, 132, 137; Mkandawire 1999, pp 119-135). They are fed up with 'voting without choosing' (Mkandawire 1999, pp 119-135). They are not interested in simply having elections but want elections that are credible and bring about positive change in their living conditions and in the governance of their countries. They are interested in truly democratic, transparent, free and fair elections that allow them to elect legitimate leaders who serve their interests and also remain accountable to them.

The post-colonial experience has shown that authoritarianism is not sustainable. Nor does it favour the peace and development that Africa needs to achieve an African renaissance in the 21st century. The question is not whether or not elections matter, but what to do to make them democratic, credible, free and fair and ensure that they contribute to change. This is probably one of the greatest challenges confronting many African states since the demise of one-party rule.

Elections without change, or fraudulent elections, have resulted in some components of the people resolving to vote with their feet, with AK47s and with machetes in countries such as Burundi, Côte d'Ivoire, Egypt, Liberia, Libya, Kenya, Mali, Rwanda, Sierra Leone, Sudan, Tunisia, and Uganda, to name but a few. The DRC is one of the countries whose people tend to resort to rebellions and wars to make political change happen since violence seems to be the language that most African authoritarian leaders and even some prominent members of the international community understand.

The 2011 elections constituted a terrible setback, a fiasco, compared to elections organised in several other African countries and even to the first elections held in the DRC under the current Constitution in July 2006 (Mangu & Budeli 2008, pp 93-103, 109-112). There are eight lessons to be learnt by African people from the DRC elections as they head for their own elections:

- The major one is that bad practice should never be emulated. The 2011 elections have taken the DRC backwards and failed to advance democracy in a country that has gone through authoritarian rule since it gained its independence from Belgium on 30 June 1960.
- While modern democracy cannot prosper without credible, transparent, free and fair elections, these require respect for the rule of law and for human rights. Non-credible elections, electoral fraud, vote rigging and corruption cannot lead to democratic consolidation in Africa or elsewhere.
- Voter education and a democratic culture among the electorate and mainly among political leaders, who should be prepared to win or lose an election and accept the results peacefully, are also needed for democratic consolidation.
- Democratic elections require the existence of credible, apolitical and non-partisan institutions such as public media, the police, the army, the security services, the electoral commission, and the judiciary.
- Democratic elections are costly, but each country should be able to fund its own instead of relying on foreign governments and institutions. If this is not possible countries should not be surprised that those who fund their elections also decide who should govern.
- Elections, which were considered to be a solution to the problem of legitimacy of political institutions and leaders in a number of African countries, including the DRC, have turned out to be a major political problem which has a negative impact on development, peace and security. Instead of resolving problems, rigged elections may end up creating more, as has happened in the DRC, which has been confronted by a multifaceted rebellion since the 2011 elections.
- Elections are not a panacea for Africa's problems of insecurity, wars, armed conflict, poverty, diseases and underdevelopment. However, after several decades of 'dictatorships of underdevelopment', sponsored by Western leaders and international financial institutions like the World Bank and the International Monetary Fund, democratic elections are the most probable means of bringing about peace, security and economic development in Africa. There is no alternative.

Africa's peoples should therefore continue to struggle for democracy as one of their fundamental rights. Once democratic institutions have been established, the struggle should continue for their consolidation.

- In his famous Gettysburg Address, delivered in 1863, then US President Abraham Lincoln described democracy as the government 'of the people, by the people for the people'. Therefore, no one will ever champion and be interested in democracy, free and fair elections, and respect for human rights and the rule of law more than the people themselves.
- The AU and the African sub-regional organisations that have already adopted several benchmarks for democratic elections should ensure that member states actually and fully comply with these benchmarks or face sanctions, instead of condoning or encouraging electoral fraud and applauding leaders who use elections to impose themselves on their people or allow themselves to be imposed or tolerated by external political, economic, social, or religious forces to serve their own interests.

The 2011 elections in the DRC have, unfortunately, gone down in history as a dramatic case of failure that can be attributed to the people of the DRC, their political elite and institutions, African leaders and regional and sub-regional organisations as well as to the international community, especially those influential governments that are expected to promote democracy, good governance and respect for the rule of law and human rights not only in their own countries, but in the rest of the world, including Africa.

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