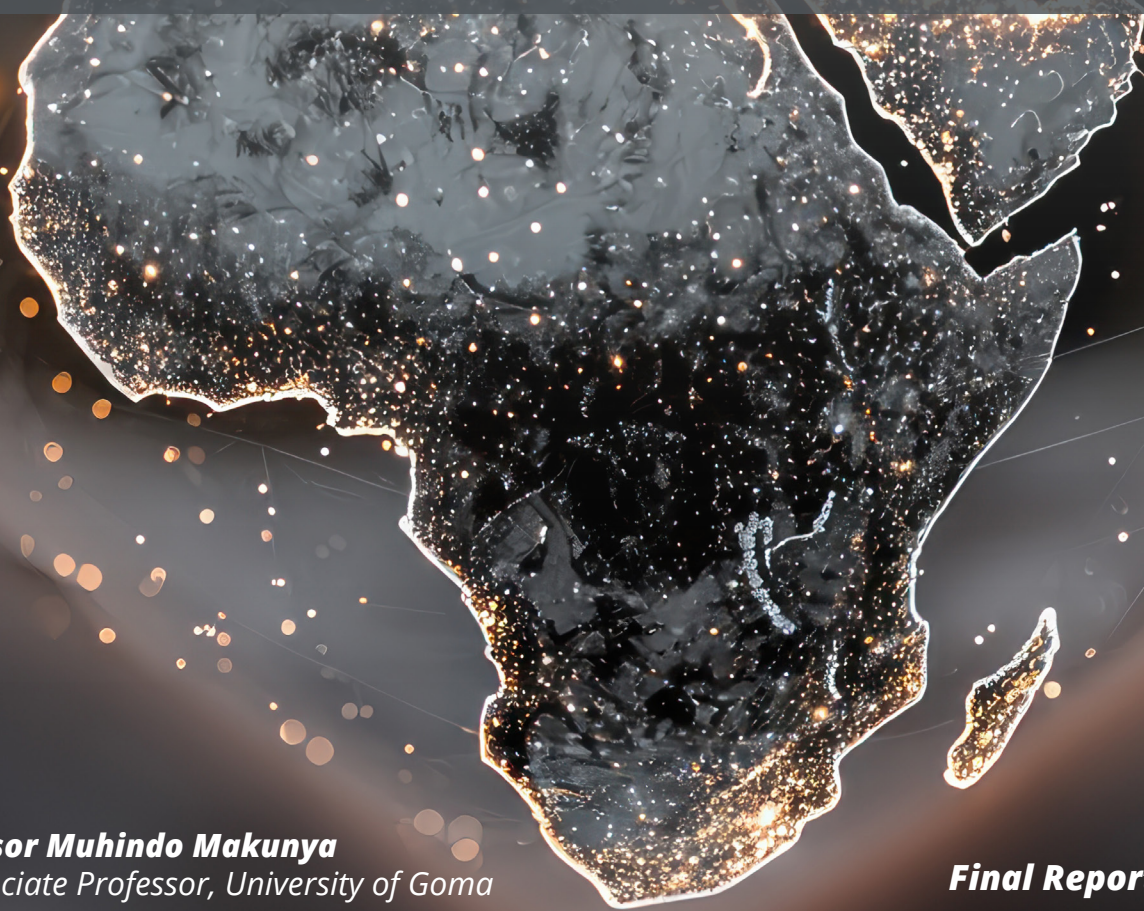




PROACTIVE DISCLOSURE OF INFORMATION DURING ELECTIONS:
AN ASSESSMENT OF THE DRC'S COMPLIANCE WITH THE GUIDELINES
ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA, ISSUED BY
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS



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EXECUTIVE SUMMARY



The Democratic Republic of Congo (DRC) held its fourth general elections on 20 December 2024. These elections followed those of 2018, which saw the country experience a peaceful transfer of presidential power between Joseph Kabila, who had ruled the country for 18 years, and Félix Tshisekedi. It was the first time that the DRC had organised local municipal elections. It also organised presidential elections in five diaspora polling centers (South Africa, USA, France, Canada and Belgium). Some observers described these elections as chaotic and shambolic, given the number of irregularities that marred them, such as delays in opening polling stations, the extension of voting days beyond the time allowed by law, and the cancellation of votes for nearly 80 candidates in the national legislative elections.

This report assesses the information ecosystem during the 2023 general elections in the DRC, using the African Union's normative framework on freedom of expression and access to information. In particular, it examines the implementation of the African Commission on Human and Peoples' Rights (African Commission) Guidelines on Access to Information and Elections in Africa (the Guidelines) by relevant stakeholders during the 2023 general elections in the DRC. The Guidelines impose a duty on relevant stakeholders to 'publish key information of public interest on their structure, functions, powers, decision-making processes, decisions, revenues and expenditures in relation to the electoral process'.

This report combines the doctrinal and non-doctrinal socio-legal methods of legal research. It uses four sets of data to analyse the implementation of the duty to proactively disclose relevant information: a) national and international legal instruments; b) documentary sources which include election observation reports, media reports, press statements; c) information obtained through semi-structured interviews and informal discussions with key informants; d) information obtained through active observation of the electoral process.

The main finding of the report is the existence of a widespread culture of non-disclosure of information of public interest during the 2023 elections by relevant stakeholders. This culture is compounded by poor legal frameworks for access to information and the persistence of administrative and other practices that work against proactive disclosure of information in general. Although the country's constitution explicitly recognises the right to freedom of expression and requires the adoption of implementing legislation, the right of access to information has no explicit constitutional basis. This shortcoming is exacerbated by the absence of a specific law on access to information and by the failure of existing laws, with the exception of the Environment Act, to impose a clear obligation on key stakeholders to proactively disclose information of public interest. The Electoral Commission, among other stakeholders, did not systematically disclose relevant information before, during and after the elections, as stated in the guidelines, which undermined civic education and public awareness of steps and requirements of the electoral process or the accountability and transparency of the process. The lack of proactive disclosure of information of public interest also affected the quality of meaningful engagement between stakeholders.

Discussion of each guideline resulted in a series of recommendations aimed at improving the information ecosystem during elections and enabling citizens and the general public to access information without undue effort.



PREFACE



I welcome this report evaluating the information ecosystem during the 2023 general elections in the Democratic Republic of Congo (DRC), based on the 2017 Guidelines on Access to Information and Elections in Africa, adopted by the African Commission on Human and Peoples' Rights (the African Commission), as a benchmark. The report examines the extent to which the right to access information, enshrined in Article 9 of the African Charter on Human and Peoples' Rights (the African Charter), was upheld during the elections. The right of access to information is fundamental to democratic participation and enables citizens to actively engage in public affairs. It is intrinsically linked to the right to participate in government directly or through freely chosen representatives, as guaranteed by Article 13 of the African Charter. The assessment considers the Guidelines, the national legal and policy framework on access to information, and other relevant regional and international human rights laws and standards.

This study focuses primarily on the proactive disclosure of information related to the election process by electoral stakeholders. The Guidelines set out the obligation for these actors to proactively disclose categories of information to enable the electorate to exercise the right to vote from an informed perspective. Electoral stakeholders identified in the Guidelines include: the appointing authority of the electoral management body, the election management body (EMB), law enforcement agencies, political parties and candidates, media and regulatory bodies, election observers and monitors, and civil society organisations (CSOs). By assessing their adherence to the Guidelines, this study highlights the levels of transparency, information disclosure and accessibility throughout the electoral process

Since the adoption of the 2006 Constitution, which marked a shift toward regular, free, and fair elections as the legitimate path to political power, the DRC has experienced a recurring pattern of contested elections, particularly over the past decade. These disputes, often driven by allegations of electoral fraud, voter intimidation, and lack of transparency, have deepened political tensions and undermined democratic progress.

Despite ongoing efforts to reform the electoral process, systemic issues in the political landscape continue to undermine good governance and the integrity of elections. These challenges have weakened state institutions tasked with managing elections and have exacerbated conflict and ethnic tensions, especially in the eastern regions. Nonetheless, the 2006 Constitution remains a significant milestone, as it enshrines transparency, accountability, and public participation as foundational principles of democracy. Significantly, it also integrates international treaties ratified by the DRC into the national legal framework, affirming the country's obligation to uphold international standards and enabling the judiciary to rely on them as a primary source of law.

The DRC has consistently reaffirmed its commitment to the values enshrined in the Universal Declaration of Human Rights (UDHR) and is a signatory to several key international and regional instruments. These include the African Charter, the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention Against Corruption (UNCAC), signed on September 23, 2003, and ratified on September 23, 2010, and the African Union Convention on Preventing and Combating Corruption (AUCPCC), signed on March 31, 2006, and ratified on March 15, 2011. As a party to these instruments, the DRC bears the responsibility to implement provisions related to the right of access to information.

In the DRC, treaties duly ratified form part of the domestic law, as affirmed by Articles 215 and 153(4) of the Constitution. As a monist state, international legal norms take precedence over conflicting domestic laws, except those of constitutional rank. While this framework is progressive, its practical application has faced challenges. For instance, some judges and other actors have been reluctant to apply international law norms under the assumption that the legislature must, as in dualist countries, adopt domestic legislation for implementation. In practice, courts have at times directly applied international instruments, such as the Rome Statute and the Maputo Protocol, even in the absence of enabling legislation.

The right to access information is enshrined in Article 24 of the Constitution, which underscores the country's commitment to openness and active citizen engagement in governance. The nexus between access to information and election integrity in the DRC

cannot be overstated, particularly given the recurrent challenges the country faces in its electoral process. These elections have often been marked by concerns over credibility, transparency, accountability, and inadequacies of a robust information infrastructure. State actors have also persistently resisted providing access to information, hindering accountability efforts. Since the adoption of the 2006 Constitution, the country has held several elections, including the 2018 general elections, which were marred by significant legal disputes and allegations of irregularities. These challenges have exacerbated public mistrust and unrest, highlighting the critical role of transparency and the right to information in ensuring peace, security, and stability in the electoral context.

I commend the Government of the Democratic Republic of Congo for its efforts to promote the free flow of some aspects of information during the recent elections. The government's initiatives, including the establishment of legislative frameworks to improve access to information, have been crucial in enabling citizens to engage with election-related content. I also commend the Independent National Electoral Commission (CENI) for its proactive measures, such as the publication of polling locations and the implementation of voter verification systems, which allowed voters to independently confirm their details. The incorporation of technology, including biometric voter registration and identification systems, has further enhanced the electoral process. Furthermore, efforts to make election-related data accessible to the public have played a role in fostering transparency and building public trust during the elections.

I also commend the media and other stakeholders that have worked closely with the Independent National Electoral Commission to promote access to information throughout the electoral process, ensuring transparency and accountability. Civil society organisations in the Democratic Republic of Congo have also been instrumental in advocating for the right to access information during the elections. Their efforts, guided by frameworks such as those provided by the African Commission, have been significant in strengthening the implementation of access to information principles during the electoral process.

This current evaluation of information disclosure practices reveals a significant gap in awareness among stakeholders regarding the Guidelines on Access to Information and Elections in Africa. To bridge this gap, a collaborative approach is crucial. The Independent National Electoral Commission, the government, and other relevant institutions must work alongside media outlets and civil society organisations to effectively implement the Guidelines. This could include training and capacity-building initiatives, as well as introducing measures to ensure compliance with national and international access to information frameworks, including the Guidelines. As observed in the report, DRC currently lacks a robust legislative framework for access to information. There is therefore a pressing need to adopt the requisite legislative frameworks and ensure their effective application. For instance, parliament should prioritise the adoption of access to information regulations to enhance transparency and accountability.

On the other hand, this study highlights the pivotal role of technology in the DRC's elections, while also exposing significant challenges. Social media, for example, has amplified freedom of expression, but it has also enabled the spread of hate speech, disinformation, misinformation, and mal-information. These issues should be scrutinised and addressed from a human rights perspective by relevant stakeholders, including online media platform providers. The regulatory framework governing social media must be reviewed to ensure alignment with international human rights laws and standards. As public discourse increasingly shifts to online platforms during elections, social media companies must implement robust content moderation practices to safeguard the integrity of information while respecting international laws on freedom of expression.

While the Guidelines emphasise the importance of proactive information disclosure, it is equally important to acknowledge that some information may need to be withheld for legitimate reasons. In this regard, I urge the authorities to take proactive steps to protect personal information. Electoral stakeholders should align their practices with the Constitution, the ICT Act, and the Digital Code.

Finally, I wish to extend my heartfelt gratitude to Prof Trésor Makunya for drafting this comprehensive report. I also commend the Centre for Human Rights at the University of Pretoria and express sincere appreciation to the Open Society Foundations for generously funding this important initiative, which highlights the critical role of proactive disclosure of access to information during elections, in alignment with the Guidelines on Access to Information and Election in Africa. Their support has been instrumental in advancing this cause and strengthening the mechanism of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, which relies on such partnerships to effectively fulfill its mandate as established by the African Commission on Human and Peoples' Rights. The implementation of the recommendations in this report will be crucial in ensuring meaningful public participation and enhancing electoral transparency and integrity. I urge all key electoral stakeholders in the DRC to carefully consider its findings and recommendations and collaborate actively to promote access to information, both generally and within the context of elections.

Honourable Commissioner Ourveena Geereesha Topsy-Sonoo

*Special Rapporteur on Freedom of Expression and Access to Information in Africa, African
Commission on Human and Peoples' Rights*



CHAPTER ONE

Introduction

CHAPTER ONE: Introduction

1.1 Background: The long march to the consolidation of electoral democracy

Following a protracted moment of uncertainties, general elections (presidential, national, and provincial legislative and partial local elections) took place on 20 December 2023 in the Democratic Republic of Congo (DRC)¹ including in the five diaspora polling stations.² Only 18 million (43%) voters showed up out of 43 million expected voters.³ This low turnout was due to technical problems, the late arrival of electoral materials and the slow running of some polling stations, among others.⁴ The presidential election involved 24 candidates. By contrast, there were 25 candidates in the 2018 presidential elections, 11 in 2011 and 33 in 2006.⁵ For national legislative elections, 23 653 individuals competed for the 500 seats, of which 3 955 were female. Additionally, 155 of the candidates were independent candidates, 3 785 candidates were affiliated with political parties and 19 713 were

1 As discussed later, elections did not take place in Rutshuru, Masisi and Kwamouth territories. For the first two entities, the decision not to hold elections was justified by the persisting occupation of most parts of the two territories by the coalition of the Rwandan Defence Force (RDF) and the *Mouvement du 23 Mars* (M23) armed group. On its part, Kwamouth has been the epicentre of ethnic violence which has led to deadly skirmishes. This environment prevented the organisation of elections therein.

2 South Africa, France, Canada, Belgium and the United States. The electoral commission's choice of these five countries was disputed. The Constitutional Court ruled the selection of these five countries did not violate the right to equality among Congolese but was justified by the technical readiness to hold elections in these countries.

3 'Elections 2023 : 43% de taux de participation' 31 December 2023
<https://www.radiookapi.net/2023/12/31/actualite/politique/elections-2023-43-de-taux-de-participation#:~:text=Tableau%20des%20r%C3%A9sultats%20partiels%20publi%C3%A9s%20par%20la%20CENI%20le%2028%20d%C3%A9cembre%202023.&text=Sur%20les%2041%20738%20628,moins%2043%25%20ont%20effectivement%20vot%C3%A9> (accessed 12 March 2024).

4 'Elections 2023 : 43% de taux de participation' 31 December 2023
<https://www.radiookapi.net/2023/12/31/actualite/politique/elections-2023-43-de-taux-de-participation> (accessed 9 November 2024).

5 JOM Yahisule Elections et changement politique en République démocratique du Congo: Six décennies perdues pour le développement (2021) 245 and subsequent pages.

registered with political groupings.⁶ At the provincial level, there were a total of 49 209 candidates for over 650 seats in the 26 provincial assemblies, among which 13 943 (28%) were female. Regarding local elections, 31 231 candidates were registered, 43.4% of which were female.

Women's participation in the country's presidential race, as compared to local elections, and the participation of other marginalised groups remains shockingly low. It stood at a rate of 4.16% in 2023 (one female candidate) against 4% in 2018, 0% in 2011 and 12.12% in 2006. Importantly, the increased participation of female candidates in local elections could be attributed to an amendment to the electoral law in 2022 through which lists of political parties with 50% of women's candidates were exempted from paying the deposit fees.⁷ It could also derive from an increased awareness among young female candidates of their potential to contribute to the appropriate management of local entities. As it was the first time the National Independent and Electoral Commission (CENI or the Electoral Commission) organised local elections, the stakes were not as high as for other types of elections as positions in local assemblies are not as lucrative and members of these assemblies are not politically influential as compared to provincial and national members of parliaments (MPs).⁸ The required number of votes needed for success and the required threshold for the admissibility of electoral lists and representation were equally low thus favouring greater participation for political beginners. The youth represented the majority of individuals who ran for local elections.⁹ This notwithstanding, the progressive constitutional framework for the political participation of women under Article 14 which guarantees parity between

6 A political grouping (regroupement politique), is a temporary association or coalition of political parties formed at the whim of the political situation, sometimes on the basis of a simple memorandum of understanding.

7 Article 13 of Act 06/006 of 9 March 2006 on General Elections as amended up to 29 June 2022.

8 To confirm this, as of November 2024, no single member of local assembly has ever been paid. See 'Des conseillers communaux à la Primature pour réclamer 8 mois d'émoluments' 4 September 2024 in Radio Okapi <https://www.radiookapi.net/2024/09/04/actualite/politique/des-conseillers-communaux-la-primature-pour-reclamer-8-mois> (accessed 9 November 2024).

9 J-N Ba-Mweze 'Faire de la politique pour tenter de gagner sa vie en RDC' 6 November 2023 in DW <https://www.dw.com/fr/faire-de-la-politique-pour-tenter-de-gagner-sa-vie-en-rdc/a-67313708> (accessed 9 November 2024).

women and men,¹⁰ has been met with strong political and institutional resistance from a male-dominated political scene and society that has done little for the emergence of an independent female political class.¹¹ The lack of a coherent inclusivity policy manifested also in the poor participation of persons with disability (PWDs). Furthermore, CENI turned a blind eye to the special needs of PWDs to ensure reasonable accommodation measures are adopted to facilitate their voting process.¹²

Despite the dawn of electoral democracy in 2006, elections remain characterised by endless irregularities and malpractices resulting in a series of institutional legitimacy crises.¹³ Since the enactment of the Constitution, elections have become a means to tame political authoritarianism that had bedevilled the country for over four decades, to ensure inclusive participation of both minority and majority ethnic and political groups and to renew the social contract.¹⁴ Some of this progress was not possible after independence and during the Cold War era, as President Mobutu suppressed all dissent and turned electoral competition into a mere sham.¹⁵ The first free and fair elections were held in 2006, followed by those that took place in 2011 and 2018. While the 2006 elections were lauded for many a democratic virtue, including facilitating political competition among former belligerent and

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- 10 On parity, see TM Makunya 'Beyond legal measures: A review of the DRC's initial report under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2023) 67(2) *Journal of African Law* 233-235; TT Mkali & A Rudman 'Article 9: Right to participation in the political and decision-making process' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 211-212.
- 11 TM Makunya, EK Bayongi & OB Baraka 'The impact of the Maputo Protocol in the Democratic Republic of Congo' in S Mutambasere, A Budoo-Scholtz & D Murden (eds) *The impact of the Maputo Protocol in selected African states* (2023) 66-67; AETA 'Point sur les premières tendances qui se sont dégagées des travaux de l'atelier d'analyse et d'évaluation mi-parcours des élections présidentielle, législatives nationales et provinciales ainsi que des conseillers communaux' 7 March 2024, 3.9
- 12 The Carter Center 'Déclaration préliminaire du Centre Carter sur les élections générales en République démocratique du Congo' (22 décembre 2023) 9 https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-122223-preliminary-statement-fr.pdf (accessed 28 April 2024).
- 13 Ebuteli Elections en RDC : *Comment sauver la crédibilité du processus électoral* (December 2023) 3.
- 14 J-LE Kangashe *Traité de droit constitutionnel congolais* (2017) 63-66.
- 15 Yahisule (n 4) 150-152.

warring factions, and ending a power-sharing arrangement infamously known as the 1+4 (which saw the emergence of one president and four vice-presidents), the run-off was marred with violence which culminated in the runner-up fleeing the country and several human rights violations recorded in Kinshasa and Bas-Congo, among other provinces.¹⁶ The 2011 and 2018 elections were organised in a context which did not allow them to gather the legitimacy the 2006 elections had amassed. After a constitutional amendment in January 2011, it became clear the incumbent's political coalition did not want to take a chance of losing the presidency as they repealed the run-off.¹⁷ The National Episcopal Conference of Catholic Bishops (CENCO) believed these were 'elections of shame' while the main opponent argued there was an 'electoral holdup'.¹⁸ Similar lamentations were made in subsequent elections. The 2018 elections were organised on the heels of a two-year de facto elongation of the term of the incumbent President as presidential elections slated for 2016 could not take place for mainly financial reasons.¹⁹ They too were chaotic and ended up bequeathing on the country a President and parliament whose political and popular legitimacy were contested throughout their term.²⁰

While a fourth electoral cycle is a major test for the country's democratic consolidation process,²¹ the 2023 elections are an example of the country's lack of electoral maturity. The technical and logistical problems discouraged many voters from voting on election day and indirectly disfranchised them. This was coupled with a poor or non-existent voter education campaign. On the latter

16 Human Rights Watch « *On va vous écraser* »: *La restriction de l'espace politique en République démocratique* (2008) 2.

17 P Bouvier & JO Tshonda 'Les élections de 2011 en République démocratique du Congo' 31
<https://www.eca-creac.eu/sites/default/files/pdf/2011-02-bouvier-tshonda.pdf>
(accessed 28 April 2024).

18 PM Mantuba-Ngoma *Les élections dans l'histoire politique de la République démocratique du Congo (1957-2011)* (2013) 129.

19 TM Makunya & K Appiagyei-Atua 'Soldiers in civilian uniforms: The role of the military in the pursuit of third-termism' in A Adeola & M wa Mutua (eds) *The Palgrave handbook of democracy, governance and justice in Africa* (2022) 80-81.

20 P Englebert & GK Kalumba 'La politique au Congo au-delà des élections de 2018' in S Alidou, AN Bisoka & S Geenen (eds) *Conjonctures de l'Afrique Centrale* (2020) 21.

21 B Armstrong 'Ne touche pas ma constitution: pressures and presidential term limits', (2011) Honors thesis, Northwestern University, 13.

aspect, similar to the African Union election observation mission,²² the Southern African Development Community's election observation mission (SADC mission) noted that 'it was observed that some voters struggled to use voting machines, which may suggest inadequate voter education'.²³ Other irregularities included the keeping of electronic voting machines (DEV) by candidates, the lack of coordinated efforts to meaningfully engage electoral stakeholders, the CENI's annulment of the votes of close to 82 candidates for parliamentary elections²⁴ as a sanction for illegally detaining DEV while the CENI lacked an attributed legal power to do so,²⁵ the selective treatment of candidates' appeals,²⁶ and the extension of voting operations for over five days. The SYMOCEL report further indicate cases of refusal to publish legislative results at the precinct level, the refusal by CENI to deliver minutes/records to candidates, encryption, encoding and codification of documents digitised by CENI, making them difficult to access and impossible to download for candidates or the fact that CENI, at the level of the Constitutional Court, did not provide detailed results for each candidate appearing on party lists.²⁷

Elections are just one of many ways of testing a country's democratic progress. But the seriousness with which they are held determines a country's commitment

22 African Union 'Mission d'observation électorale de l'Union africaine aux élections générales du 20 décembre 2023 en République démocratique du Congo' (22 décembre 2023) <https://www.peaceau.org/uploads/preliminary-statement-drc-2023-general-election.pdf> (accessed 28 April 2024) 6.

23 'Allocution de S.E.M Enoch Kavindele, ancien Vice-Président de la République de Zambie et Chef de la Mission d'observation électorale de la SADC (SEOM) à l'occasion du lancement officiel de la SEOM aux élections présidentielles, législatives et provinciales en République démocratique du Congo' 14 December 2023 <https://www.sadc.int/sites/default/files/2023-12/FR-DRC-SEOM%202023%20Presidential%20Elections-HoM%20Launch%20Speech-16%20December%202023.pdf> (accessed 14 April 2024) 5.

24 CENI 'Communiqué de presse N° 002/CENI/2024' 5 January 2024 <https://zoom-eco.net/wp-content/uploads/2024/01/COMMUNIQUE-DE-PRESSE-n%C2%B0-002-ANNEXE-1.pdf> (accessed 28 April 2024).

25 See generally AETA (n 8) 3.

26 *Décision N° 003/CENI/AP/2023 du 13 janvier 2024 portant réhabilitation des suffrages du candidat Kalumba Mwana Ngongo Justin dans la circonscription électorale de Kasongo, province du Maniema.*

27 SYMOCEL *Déclaration globale de la Symocel sur le respect du cadre normatif en rapport avec les opérations électorales du mois de février 2024* (2024) 11-13.

to its democratic promises and the extent to which it intends to cure electoral malpractices of the past to increase the institutional legitimacy of those in power. The many adjectives that have been attached to these elections, 'complex', 'chaotic', 'failure', 'joke',²⁸ and 'shambolic'²⁹ are a reminder of a country that failed to learn from past electoral mistakes.

These flaws, notwithstanding, the 2023 elections are specific in several other ways. For the first time, the electoral commission organised elections of municipal councils in the main city of each of the 26 provinces while Congolese living in five pilot countries (France, the United States, South Africa, Canada and Belgium) had the opportunity to vote for the president.³⁰ Like the 2018 elections, however, ongoing insecurity in the North-Kivu province due to the armed conflict between the DRC National Army and the coalition between the Rwanda Defence Force and the M23 terrorist group disenfranchised, temporarily, individuals living in Masisi and Rutshuru as they could not be registered to vote and logically, elections could not take place in the two territories.³¹ The armed conflict between tribal factions in the Kwamouth district, Maindombe province also made it difficult for elections to be held. These situations qualify for 'force majeure'³² and prompted the electoral commission to reschedule elections in the areas for October 2024 in the hope that the situation will be amenable for elections to take place. The Chairperson of

28 Informal discussions with a Professor at the University of Goma (January 2024) and a Congolese doctoral researcher at the University of Pretoria (March 2024).

29 T Mhaka 'DR Congo's shambolic election should be a wake-up call for the SADC' 18 January 2024 <https://www.aljazeera.com/opinions/2024/1/18/dr-congos-shambolic-election-should-be-a-wake-up-call-for-the-sadc> (accessed 28 April 2024).

30 CENI *Rapport annuel: Avril 2023-Mars 2024* (2024) 244.

31 Decision RCE 001/PRCR of 19 January 2019 (DRC Constitutional Court). On the conflict, see 'Final report of the Group of Experts on the Democratic Republic of the Congo: Letter dated 13 June 2023 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council' (June 2023), <https://documents.un.org/doc/undoc/gen/n23/123/80/pdf/n2312380.pdf> (accessed 9 November 2024); 'Final report of the Group of Experts on the Democratic Republic of the Congo: Letter dated 31 May 2024 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council' (June 2024), <https://documents.un.org/doc/undoc/gen/n24/118/80/pdf/n2411880.pdf> (accessed 9 November 2024).

32 *Decision RCE 001/PRCR* of 19 January 2019 (DRC Constitutional Court).

the CENI communicated the decision.³³ However, like in 2018, Congolese living in these regions had no other opportunity to vote for the president thus leading to a de facto derogation of their constitutional right to vote for their president without engaging meaningfully with them. As regards their representation in parliament pending elections in their districts, the Constitutional Court exceptionally allowed previously elected MPs from regions where elections were not held in 2023 to continue representing the regions until elections are held.³⁴ This judgment was the subject of much criticism but can be seen as the application of the Court's previous ruling on the continuity of public function by the departing officer pending the assumption of the office by the newly elected officials.³⁵

However, the very same Court adopted an interpretive approach that failed to enhance women's political participation as well as that of minority political parties or groups when it was called to review the electoral law.³⁶ The amendment to the electoral code in 2022 instituted an electoral threshold³⁷ for the admissibility of party lists for legislative and local elections. The amendment has been interpreted as a setback for the electoral democracy as small political parties or groupings could thus be forced to link up with major political parties hoping to meet the required threshold.³⁸ Similar standards were instituted during the 2018 elections but their intended goals were paradoxically not met.³⁹ Poorly designed electoral

33 'Kwamouth: la CENI reporte l'opération d'enrôlement et d'identification des électeurs' 25 June 2023 in *Radio Okapi* <https://www.radiookapi.net/2023/06/25/actualite/politique/kwamouth-la-ceni-reporte-loperation-denrolement-et-didentification> (accessed 10 November 2024).

34 P Ligodi 'RDC: les mandats des députés des provinces en grande insécurité prolongés de plusieurs mois' 7 March 2024 <https://www.rfi.fr/fr/afrique/20240307-rdc-mandats-d%C3%A9put%C3%A9s-provinces-en-grande-ins%C3%A9curit%C3%A9-prolong%C3%A9s-kwamouth-masisi-rutshuru> (accessed 29 April 2024).

35 *Decision R.Const* 262 of 11 May 2016 (DRC Constitutional Court).

36 *Decision R.Const* 1826 of 29 December 2022.

37 T Baskaran & ML da Fonseca 'Electoral thresholds and political representation' (2016) 169(1/2) *Public Choice* 117-136.

38 Art 22(3) of Act 06/006 of 9 March 2006 on General Elections as amended up to 29 June 2022.

39 *Decision R.Const*. 624/630/631 of 30 March 2018. According to the Court, 'the various electoral thresholds instituted by the contested law within the limits set for the

thresholds may lead to the violation of the right to freedom of association and political participation especially of minority groups and parties. The Constitutional Court of South Africa ascertained that being forced to associate with someone, as these thresholds do at least indirectly, violates one's human dignity.⁴⁰ Individuals and political parties should be left with the choice to decide whether to enter into a coalition or not.⁴¹ Similarly, the amendment did not cure female representation problems. Instead of enjoining political parties to ensure a parity representation of female candidates on their electoral lists, the Court in 2018 found the absence of an equal number of men and women on the electoral lists complied with Article 14 of the Constitution.⁴² The Court thus agreed with the incentive parliament introduced to ensure women's political participation: that the list of political parties or groupings which meet 50% of female representation is exempted from paying the deposit fees.

The 2023 electoral process was marred by misinformation, mal-information and disinformation. However, more efforts were made, particularly by fact-checkers, to verify false information, leaving mal-information and false news to reign supreme. In the run-up to the elections, members of the ruling coalition including the head of state branded opposition candidates who did not openly condemn Rwanda's military activities in North-Kivu province and its support for the M23 terrorist group as candidates fabricated by Rwanda to destabilise the country.⁴³ Moise Katumbi, a mixed-race presidential candidate, was subjected to a campaign to denigrate his citizenship, with supporters of the ruling coalition calling him a 'foreigner'

legislator by the Constitution contribute to achieving this general objective of cleaning up the Congolese political landscape (...). Surprisingly, the number of political parties and groupings skyrocketed from 450 to close to 1000 in 2023.

40 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* (CCT110/19) (2020), para 60. For the Court '[w]ho one associates with or whether one associates at all are so close to the inner self that it is an affront to who one truly is and, indeed, an assault on one's dignity, to be told who to associate with or to associate when you do not want to.'

41 See also African Commission on Human and Peoples' Rights *Guidelines on Freedom of Association and Assembly in Africa* (21 September 2017), Rule 8.

42 *Decision R.Const. 624/630/631* of 30 March 2018.

43 E Beraud 'RDC : comment discréditer un candidat à la présidentielle ? L'accuser d'être "étranger" sur les réseaux sociaux' 15 December 2023 <https://factuel.afp.com/doc.afp.com.347R7RL> (accessed 28 April 2024).

who should run in his 'own country', although his candidacy had been approved and confirmed by the Constitutional Court.⁴⁴ Misinformation and disinformation against Moise Katumbi informed the ruling coalition's campaign strategy and won the support of many voters. Generally, the Congolese population despise the Rwandan aggression and its supporters.⁴⁵ The ruling coalition referred to another presidential hopeful as a candidate of the West. This was apparently because he has accumulated several international accolades, including the 2018 Nobel Peace Prize, and has, over the years, received the support of Western governments.⁴⁶

False news was widely disseminated on social media. Specialised fact-checking organisations provided verified information on some of the false reports. Balobaki and Congo Check verified several reports and published the correct information on their websites and social media platforms.⁴⁷ Radio Okapi developed a radio program entitled 'les faits sont sacrés' to verify information.⁴⁸ The media law requires journalists who have misinformed the audience to correct the information or people who have been wronged by certain information to provide their side of the story.⁴⁹ Media regulatory bodies can also punish journalists and others involved in misinformation and disinformation by, for instance, suspending them for a determined period. Broadcasting false news constitutes a criminal offence and the person who does so may be convicted up to three years in jail.⁵⁰

44 'Élections en RDC 2023: la Cour constitutionnelle retient 26 candidats' 20 October 2023 <https://www.bbc.com/afrique/articles/c907j0d32yjo> (accessed 28 April 2024).

45 Beraud (n 37).

46 'Mukwege réagit aux piques de Tshisekedi: « Je suis au Congo depuis 40 ans aux côtés de la population congolaise, j'ai construit des écoles en fabriquant des briques avec cette population »' 9 October 2023 <https://actualite.cd/2023/10/09/mukwege-reagit-aux-piques-de-tshisekedi-je-suis-au-congo-depuis-40-ans-aux-cotes-de-la> (accessed 28 April 2024).

47 <https://congocheck.net/category/actus/fact-check/elections/> (accessed 28 April 2024).

48 'Comment se comporter face à une information dont on doute de l'authenticité ?' 5 April 2024 <https://www.radiookapi.net/2024/04/06/emissions/les-faits-sont-sacres/comment-se-comporter-face-une-information-dont-doute-de> (accessed 24 April 2024)

49 Articles 104-112 of the 2023 Media Law.

50 Articles 199*bis* & 199*ter* of the 1940 Penal Code.

1.2 Aims and relevance of the report

This report assesses the information ecosystem during DRC's 2023 general elections using the African Union normative framework on freedom of expression and access to information. It reviews in particular the implementation of the African Commission on Human and Peoples' Rights (African Commission) Guidelines on Access to Information and Elections in Africa (the Guidelines) by relevant stakeholders during the 2023 General elections in the DRC.⁵¹ The Guidelines are emphatic that 'relevant electoral stakeholders are obliged to publish key information of public interest about their structure, functions, powers, decision-making processes, decisions, revenue and expenditure in relation to the electoral process'.⁵² This report thus examines how the following key stakeholders proactively disclosed relevant information:

1. Authorities responsible for appointing the Election Management Bodies;
2. Election Management Bodies;
3. Political Parties and Candidates;
4. Law Enforcement Agencies;
5. Election Observers and Monitors;
6. Media and Online Media Platform Providers;
7. Media Regulatory Bodies; and
8. Civil Society Organisations.

It reveals in particular, the information on the electoral process that was proactively disclosed (and how) and the information that was not disclosed. Where stakeholders did not meet their obligation to proactively disclose relevant information, the report makes several recommendations to either improve the quality of proactive disclosure of relevant information or for them to meet their obligations.

51 This is not the first report of its kind as several reports commissioned by the Centre for Human Rights have been developed on other countries. See 'Expression, Information and Digital Rights Unit: Resources' <https://www.chr.up.ac.za/expression-information-and-digital-rights-unit-resources> (accessed 28 April 2024).

52 African Commission *Guidelines on access to information and elections in Africa* (2017), Guideline 3, 13.

The relevance of the obligation to proactively disclose relevant information and examine how these stakeholders realised it during the 2023 general elections stems from the ability to foster ‘accountability and transparency of key election stakeholders and [guarantee] the credibility and integrity of the electoral process.’⁵³ As elections in the DRC have not always been peaceful.⁵⁴ Proactive disclosure of relevant information can pre-empt tension that could potentially escalate into violence and lead to deadly skirmishes. It can foster the inclusivity of the electoral process and dispel accusations among stakeholders. For example, there were allegations that the electoral process has been hijacked by the ruling coalition or that the electoral management body (EMB) is controlled by the head of state and their political parties or again that the latter are driving the electoral commission’s agenda both in terms of planning elections, determining the number of and allocating polling stations. Proactively disclosing relevant information helps the ‘demos’ to exercise its constitutional sovereignty as this power cannot be exercised when citizens and the public in general are ignorant of key electoral information and steps. Article 5 of the DRC Constitution⁵⁵ vests national sovereignty in the people and clarifies that power emanates from them and can be exercised directly or indirectly.

1.3 Methodology

This report combines doctrinal and non-doctrinal socio-legal methods of legal research. The doctrinal or positivistic method allowed the report to examine, review and understand the normative content of constitutional, treaty and legal provisions relevant to the right to access information and freedom of expression during elections including the nature of the guarantee provided, its scope and limitations as well as the way it can be improved to align with the dictate of the Guidelines. The method enables this study to comprehend the content of key jurisprudence of the African Commission on Human and Peoples’ Rights (African Commission)

53 LM Mute ‘Preface’ in African Commission (n 44) 6.

54 MP Dizolele & P Kambale ‘Congo’s least bad elections: How a fragile democracy inched forward - and how it can consolidate the gains’ 19 January 2024 *Foreign Affairs* 9.

55 18 February 2006 Constitution as amended in 2011
<https://www.leganet.cd/Legislation/JO/2011/JOS.05.02.2011.pdf>
(accessed 10 November 2024).

and the African Court on Human and Peoples' Rights (African Court) and their relationship with the right to access to information and freedom of expression. The doctrinal method is the point of departure for every analysis in this report as relevant stakeholders must know what the law expects of them before they are held accountable. The positivistic method is complemented by the non-doctrinal method through which the report placed the doctrinal materials into their political, socio-economic, and cultural context by reviewing events that shaped several considerations that affect the right and providing non-legal/institutional insights to understand the country's information ecosystem. This method allows the report to approach issues arising during the 2023 general elections at a lower level of abstraction and generality.

The report used four sets of data to analyse the implementation of the duty to proactively disclose relevant information. It first relied on national and international legal instruments, whether binding or not. It analysed the Constitution, international treaties duly ratified by the DRC within the meaning of Article 215 of the Constitution and laws, both organic and ordinary laws. The report further analysed non-binding legal instruments from the African Commission in addition to, where necessary, the jurisprudence of the Constitutional Court of the DRC, the African Commission, and the African Court. It further relied on documentary sources, which include election observation reports, media reports, press statements published by the electoral commission and other stakeholders, as well as a broad range of institutions. Subsequently, the report relies on information obtained through semi-structured interviews and informal discussions with key informants selected based on their familiarity with the subject. These included the staff of the electoral commission, members of the press, the academia, civil society organisations involved in the 2023 general elections and election observers. Finally, the report relies on information obtained through active observation of the electoral process and insights gained from the previous three electoral processes. The report's author was actively involved as a journalist, political campaign trainer and democracy and human rights scholar and trainer during these electoral periods. A mix of information obtained from the various approaches provides a broader picture of the implementation of the guidelines during elections.

Compliance with the Guidelines is assessed using four variables:

Complied:	Over 75%
Mostly complied:	50-75%
Partly complied:	25-50%
Not complied:	Below 25%

1.4 Outline of the study

The report is divided into 11 chapters, including this introduction which is its chapter 1. Chapter 2 discusses the legal framework for access to information and freedom of expression in the DRC. Chapters 3 to 10 assess the compliance of the various electoral stakeholders with the Guidelines during the 2023 general elections. Chapter 11 concludes this report.



CHAPTER TWO
**Legal framework for Access to
Information and Freedom of
Expression in the Democratic
Republic Of Congo**

CHAPTER TWO:

Legal framework for Access to Information and Freedom of Expression in the Democratic Republic of Congo

2.1 Introduction

Domestic and international legal instruments always recognise and protect the right of access to information and freedom of expression. The DRC does not constitute an exception. In what follows, the report reviews the constitutional, international, and legal protection of the right to access information and freedom of expression during elections and assesses the quality of such protection.

2.2 The Constitution

The right of access to information is not explicitly provided for under the Constitution while Article 23 clearly guarantees the right to freedom of expression.⁵⁶ Since the country's independence, it has not been recognised as a stand-alone constitutional right.⁵⁷ Article 24 of the 2006 Constitution guarantees everyone's right to information. However, it is unclear whether this right includes the right of every person to access information, including, for example, information held by state organs and non-state actors, and which may be relevant to the exercise of other rights. The right is coined along the lines of the freedom of the press. Article 24(2) guarantees media freedom, freedom of information and the freedom of emission

56 Article 23 reads : 'Everyone has the right to freedom of expression. This right implies the freedom to express one's opinions or convictions, notably through speech, writing and images, subject to respect for the law, public order and morality.'

57 See for example Sec 35 of the 2010 Constitution of Kenya <https://kenyalaw.org/kl/fileadmin/pdfdownloads/TheConstitutionOfKenya.pdf>; Sec 32 of the 1996 Constitution of South Africa <https://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>. For a historical review, see Art 15 of the 1960 Fundamental Law on Public Liberties <https://www.presidence.cd/uploads/files/Loi%20fondamentale%2017%20Juin%201960.pdf>; Art 10 of the 1994 Interim Constitution <https://www.droitcongolais.info/files/1.06.1.-Acte-constitutionnel-de-la-transition.pdf>; Art 16 & 29 of the 2003 Interim Constitution <https://www.droitcongolais.info/files/1.06.1.-Acte-constitutionnel-de-la-transition.pdf>.

through radio, television, and newspapers. The provision distinguishes between the right to information and the freedom of information. A restrictive reading of the right to information limits it to the right to inform and to be informed⁵⁸ while a broader reading extends it to the right to access relevant administrative and other information.

However, due to its poor wording, Article 24 fails to directly impose an obligation on the state, its organs and other relevant non-state actors to proactively disclose public interest information.⁵⁹ There is also no implementing legislation on the right of access to information thus granting wider discretion to those who hold important information to decide when to disclose such information. Journalists have lamented the difficulty they face in accessing information held by public officials.⁶⁰

Article 27 of the Constitution empowers ‘every Congolese’ to address ‘individually or collectively a petition to a public authority that should respond in three months’ and guarantees that persons who petition public authorities should not be discriminated against. This provision does not entrench an obligation to proactively disclose relevant information. It is also restricted to nationals. The provision permits, however, those seeking information to use the possibility to petition public authorities to obtain relevant information including during elections.

58 H Maler ‘Le droit à l’information, ses conditions et ses conséquences’ (2014) 30(4) *Savoir/Agir* 113.

59 Article 24 reads : ‘Everyone has the right to information. Freedom of the press, information and broadcasting by radio and television, the written press or any other means of communication are guaranteed subject to respect for public order, morality and the rights of others. The law lays down the procedures for exercising these freedoms. State-owned audiovisual and written media are public services whose access is guaranteed on an equitable basis to all political and social currents. The status of state media is established by law, which guarantees objectivity, impartiality and pluralism of opinion in the processing and dissemination of information.’

60 AM Ngoy ‘RDC : L’accès à l’information publique, un véritable casse-tête pour les citoyens, (Témoignages)’ 8 September 2020 <https://7sur7.cd/2020/09/08/rdc-laccès-linformation-publique-un-veritable-casse-tete-pour-les-citoyens-temoignages> (accessed 28 April 2024).

2.3 Can the shortcomings of the Constitution be cured by international law?

If the Constitution poorly guarantees the right of access to information and fails to ensure the state and its organs proactively disclose publicly relevant information, not least during elections, it is clear that they can, normatively, be complemented by international human rights standards.⁶¹ The International Bill of Rights⁶² remains a great source of political, normative and historical inspiration for many African bills of rights. Together, the International Bill of Rights form a corpus of norms aimed at dignifying the lives of individuals in societies and moralising politics.⁶³ International law ensures that those governing the city abide by moral and legal accountability, responsiveness and inclusive participation principles. Bills of rights cannot be read without due consideration to international human rights law,⁶⁴ lest they become a-contextual, even in an era of fragmented international legal orders.⁶⁵ Chaskalson insisted that '[international agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood'.⁶⁶ In what follows, this report first locates the right to freedom of access to information and freedom of expression under international human rights instruments, including the African human rights system before it discusses how the latter can enhance the domestic protection of the right.

61 M Killander 'How international human rights law influences domestic law in Africa' (2013) 17 *Law, Democracy and Development* 378.

62 Made up of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

63 T Ondo 'La jurisprudence de la Cour africaine des droits de l'homme et des peuples: entre particularisme et universalité' (2017) 1 *Annuaire Africain des Droits de l'Homme* 255.

64 P Alston 'A framework for the comparative analysis of Bills of Rights' in P Alston (ed) *Promoting human rights through bills of rights: Comparative perspectives* (2000) 12.

65 M Ajevski *Fragmentation in International Human Rights Law: Beyond Conflict of Laws* (2017). See also AM Plan 'Judicial convergence and fragmentation in international human rights law: the regional systems and the United Nations human rights committee' (2024) 24(2) *Human Rights Law Review*

66 *S v Makwanyane and Another* (CCT3/94) [1995], para 35.

2.3.1 The duty to proactively disclose information and the right of access to information and freedom of expression under international law

Proactive disclosure of information 'refers to a regular flow of information by routinely providing information to the public without the need to make a request'.⁶⁷ Although no international treaty mentions it explicitly, it finds its normative consecration in the right to access information provided for under the Universal Declaration of Human Rights,⁶⁸ the International Covenant on Civil and Political Rights,⁶⁹ and the African Charter on Human and Peoples' Rights (African Charter)⁷⁰ among others.⁷¹ Access to information is a component of the right to freedom of expression, under certain treaties and constitutions.⁷² It is in the General Comment on the right to freedom of expression and opinion⁷³ where the UN Human Rights Committee clarifies the normative content of the right of access to information.⁷⁴ If the right to freedom of expression is guaranteed without an explicit provision on the right of access to information, the latter right is purposively implied in the right to freedom of expression.⁷⁵ Section 35 of the Constitution of Kenya and section 32 of the Constitution of South Africa guarantee a fully-fledged right of access to information while also providing for the right to freedom of expression which entails the 'freedom to seek, receive or impart information or ideas'.⁷⁶ Such additional protection of the right to access to information is made out of an abundance of caution. A systemic reading of various constitutional rights thus reinforces the duty to proactively disclose information given that the right to access information on which it rests is both instrumental for the realisation of

67 Guideline 1.

68 1948 Universal Declaration of Human Rights, Article 19(2).

69 Article 19.

70 Article 9.

71 See CEDAW, Art 10(h); CRPD, Art 9(1).

72 See Sec 33(1)a) of the 2010 Constitution of Kenya.

73 In the context of African elections, see MA Simiyu "Freedom of expression and African elections: Mitigating the insidious effect of emerging approaches to addressing the false news threat" (2022) 22 *African Human Rights Law Journal* 76-107.

74 General Comment No. 34 'Article 19: Freedoms of opinion and expression', CCPR/C/GC/34 of 11-29 July 2011, paras 18-19.

75 Simiyu (n 61) 84-85.

76 Sec 16(1)(b) Constitution of South Africa.

other rights, including the right to political participation and vote, and dependent on the latter for its effectiveness. The UN Human Rights Committee clarifies the following state's obligations:⁷⁷

States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.

States must thus take appropriate steps to give effect to their duty to proactively disclose important information because doing so will be a way to recognise and realise its prerequisite rights. Further, such state action is consistent with their general obligation 'to undertake to adopt legislative or other measures to give effect to them'.⁷⁸ As the African Court ruled,⁷⁹

It is the responsibility of the Respondent State to ensure publication of the debates in the National Assembly relating to a proposal or draft law and its promulgation in the official gazette. Thus, in this circumstance, the burden of proof on whether or not citizens have enjoyed their right to information lies with the State.

The African Court cemented the protection of the right of access to information by affirming in *XYZ v Benin* that:⁸⁰

Every citizen in a democratic country has the right to access information held by the State. This right is considered necessary to ensure the respect for the principle of transparent government, which requires that the public has access to information to engage productive public debate on the conduct of government business.

77 General Comment 34, para 19.

78 Article 1 of the African Charter on Human and Peoples' Rights.

79 *XYZ v Benin* (judgment) (2020) 4 AfCLR 83, para 118.

80 *XYZ v Benin* (judgment) (2020) 4 AfCLR 83, para 113.

For the African Court and the African Commission, the effective implementation of the right would enable people to ‘form an opinion and participate in the debate’ about something important or obtain the realisation of other rights.⁸¹ In *Kenneth Good v Botswana*, the African Commission reiterated the relevance of accessing information pertaining to one’s trial as it goes a long way to realising the right that the litigant vindicates.⁸² The importance of this right in the African regional law cannot thus be gainsaid.⁸³

The African Commission’s Guidelines on Access to Information and Elections in Africa (Guidelines), adopted in 2017, articulate the notion and scope of proactive disclosure of information during elections.⁸⁴ It defines the general principles applicable and clarifies the obligations imposed on relevant stakeholders. The Guidelines are built on the understanding that proactive disclosure of information during elections is the cornerstone of electoral democracy. Proactive information disclosure enables voters to make meaningful choices, understand the electoral process, hold leaders and relevant electoral stakeholders to account and defend the electoral process by making sure it is not hijacked by a ruling majority that tries to impose its whims on the rest of the citizenry. To prevent violence, deadly skirmishes, and voters’ disenfranchisement, full disclosure of important information is imperative unless it is objectively demonstrated that non-disclosure serves a legitimate purpose. The Guidelines foster the following principles:⁸⁵

- a) Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively.

81 *XYZ v Benin*, para 119.

82 R Murray *The African Charter on Human and Peoples’ Rights: A commentary* (2019) 269. See also *Communication 297/05, Scanlen & Holderness v Zimbabwe*, 3 April 2009, para 108.

83 See arts 2(10) & 19(2) of the 2007 African Charter on Democracy, Elections and Governance & arts 23 & 24 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa.

84 For its historical development, see *Proactive disclosure of information during elections in Kenya (2021 General elections): An assessment of the Kenya’s compliance with the Guidelines on access to information and elections in Africa, issued by the African Commission on Human and Peoples’ Rights* (2023) 22-24.

85 Guideline 2.

- b) Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.
- c) Any policy or practice creating a right of access to information shall be interpreted and applied on the basis of a duty to disclose. Non-disclosure shall be permitted only in exceptionally justifiable circumstances.
- d) No one shall be subject to any sanction for releasing information in good faith.

It further provides for the principle of proactive disclosure, which rests on the assumption that the state and its organs must, as a matter of principle, disclose information they hold.⁸⁶ It is not the first African Commission's soft-law instrument to guarantee the proactive disclosure of public interest information, as two other previous documents have expanded on the content of this duty, linking it with the right to access information. It is, however, the first time the Commission comprehensively links it to elections, thus highlighting the intrinsic connection between access to information and electoral democracy. Access to information during elections must thus be taken seriously. In fact, during elections, 'relevant electoral stakeholders are obliged to publish key information of public interest about their structure, functions, powers, decision making processes, decisions, revenue and expenditure in relation to the electoral process'.⁸⁷ The following are the relevant stakeholders who should primarily disclose information during elections:

- Authorities responsible for appointing the Election Management Bodies;
- Election Management Bodies;
- Political Parties and Candidates;
- Law Enforcement Agencies;
- Election Observers and Monitors;
- Media and Online Media Platform Providers;
- Media Regulatory Bodies; and
- Civil Society Organisations.

86 Guideline 3, 7 & 8.

87 Guideline 3.

The stakeholders can be grouped into three: state entities, non-state actors and independent institutions. Each has its obligations under the Guidelines even though they all are obligated:

To create, keep, organise, maintain, and manage information about the electoral process in machine-readable formats and in a manner that facilitates the right of access to information. This requires that electoral stakeholders keep and record information for a reasonable period of time on electoral cycle activities, and arrange this information in a manner that allows prompt and easy identification and also safeguards the integrity of its content.

The Guidelines make proactive disclosure and access to information on the electoral process the principle, while non-disclosure is the exception.⁸⁸ This level of protection speaks to the nature of democratic governance itself. Power emanates from and belongs to the people who exercise and control it directly or through its representatives, courts or pro-democracy groups.⁸⁹ Direct representation is legitimised through elections. If elections are thus to be taken seriously, those from whom power emanates must access important information to make a meaningful and informed electoral choice and adequately participate in the process.

Democracy 'presupposes the electorate is mature and knows what it wants'.⁹⁰ The point of departure should thus be to provide them with all the necessary information to make informed decisions. This information will help in giving 'more and more people a say over more and more issues' and help them fashion their democracies according to their 'particular conditions'.⁹¹ For this reason, relevant stakeholders must establish simple procedures to ensure individuals can access

88 Guideline 3.

89 Article 5 of the 2006 DRC Constitution.

90 PLO Lumumba 'Magufulification of Africa Part two Prof. PLO Lumumba' 26 December 2023, Youtube Video https://www.youtube.com/watch?v=pNI_M-wXlqU (accessed 28 April 2024).

91 S Friedman 'The claim that democracy fares better in the West than in Africa is a fallacy' 25 January 2019 in *The Conversation* <https://theconversation.com/the-claim-that-democracy-fares-better-in-the-west-than-in-africa-is-a-fallacy-110408> (accessed 29 March 2024).

important information effortlessly.⁹² Where they deny access to such information, this should be 'well-reasoned' and consistent with international norms and standards.⁹³ As such, exemptions to the principle should conform to the legality, necessity, proportionality and legitimate aim test.⁹⁴ They also can be justified in instances when the harm that could potentially derive from the disclosure of information outweighs the gain of disclosing it.⁹⁵ Importantly, '[p]ersons who, in good faith and in the public interest, disclose information about wrongdoing in the electoral process by a relevant electoral stakeholder or its employees, shall be protected from administrative, social, legal and employment-related sanctions or other sanctions of a similar nature'.⁹⁶ This speaks to the protection of whistleblowers as they contribute to democratic accountability and make societies more and more open.⁹⁷

Proactive disclosure of important information is reiterated in two significant instruments the African Commission adopted: the 2013 Model Law on Access to Information in Africa⁹⁸ and the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa.⁹⁹ Together with the Guidelines, they constitute the African Commission's normative efforts to improve, per Article 45 of the African Charter,¹⁰⁰ the information ecosystem in Africa at all times and, in particular, during elections. Further, healthy information ecosystems are vital in the rapidly changing continent where new technologies are appearing with the costs

92 Guideline 5.

93 Guideline 6.

94 Guidelines 7-8. See also *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 338, paras 130-166.

95 Guideline 9.

96 Guideline 11.

97 PB Majiga 'Whistleblowers: the role of citizens in fighting corruption' in D Kuwali (ed) *Corruption proofing in Africa: A system thinking approach* (2024) 275.

98 <https://achpr.au.int/en/node/873> (accessed 12 November 2024).

99 <https://achpr.au.int/en/node/902> (accessed 12 November 2024).

100 R Adeola, F Viljoen & TM Makunya 'A Commentary on the African Commission's General Comment on the Right to Freedom of Movement and Residence under Article 12(1) of the African Charter on Human and Peoples' Rights' (2021) 65(1) *Journal of African Law* 150.

and benefits, they imply, where democracy backsliding is a real phenomenon¹⁰¹ and where the challenges to human rights, which had not been envisaged when the African Charter was drafted,¹⁰² are numerous.¹⁰³

The value and legitimacy of these three instruments lie not so much in their form (as non-binding texts) as in their substance. They should be considered as relevant documents clarifying the normative content of binding treaty provisions and which are helpful in specific contexts. For example, during elections when human rights risk being sacrificed on the altar of consolidating personal political power. It is this substance-oriented approach to non-binding instruments that can enable the Guidelines to transform the negative practices of the stakeholders concerned and influence the approach of national courts/tribunals.

2.3.2 The relevance of a complementarity reading of constitutional and international norms in the DRC context

The preceding development leads to one conclusion - International law norms contain innovative and progressive interpretations of the right of access to information and proactive disclosure of public interest information during elections, which can fill the normative lacuna at the domestic level. This is more so in countries such as the DRC where the right is not explicitly provided for under the Constitution but simply implied; leaving it to be based on shaky legal protection. The persuasive normative power of the Guidelines in the Congolese legal system derives from the following legal considerations.

The Constitution provides for the direct application of 'duly ratified' international treaties, thus creating a unified and not a bifurcated legal order combining norms of domestic and international origin.¹⁰⁴ As such, subsequent legal instruments emanating from legally empowered monitoring bodies such as the African Commission provide relevant context to understanding a state's obligations under

101 T Biti and others 'Introduction' in T Binti and others (eds) *In the name of the people: How populism is rewiring the world* (2022) 1-22.

102 F Viljoen *International human rights law in Africa* (2012) 169.

103 S Dersso 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2021) 21 *African Human Rights Law Journal* 649-668.

104 Article 215 of the 2006 DRC Constitution

a treaty. Additionally, for human rights treaties, the normative content of specific rights, including the right to information, freedom of expression and opinion and political participation, is clarified. The inclusive process which leads to the adoption of Guidelines at the African Commission, such as the wider participation of states, national human rights institutions and non-state actors¹⁰⁵ in the adoption of soft-law instruments, can illustrate the emergence of a 'subsequent practice' within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. As Dörr aptly points out, the practice goes beyond what emanates from central government authorities of States and can include what emerges from a 'public body acting in an official capacity'¹⁰⁶ especially when states participate in the formation of those views.¹⁰⁷

International treaties are, in addition, a primary source of law in the Congolese system. Article 153(4) of the Constitution thus reads: 'Civil and military Courts and Tribunals apply duly ratified international treaties, laws, regulatory acts insofar as they are in conformity with the law, and custom insofar as it is not contrary to public order or morality'.¹⁰⁸ The African Commission interprets and monitors the application of the African Charter in addition to developing 'principles and rules aimed at solving legal problems relating to human and peoples' rights'.¹⁰⁹ As such, the Guidelines adopted to further the protection of rights during elections are an interpretive material of the Charter. It clarifies Article 9 of the African Charter and may be resorted to by domestic authorities.

Beyond clarifying the Charter, the Guidelines elaborate on the State's obligations to advance constitutionalism both locally and regionally as an African Union

105 Adeola, Viljoen & Makunya (n 100) 139.

106 O Dörr 'Article 31: General rule of interpretation' in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of treaties* (2018) 597.

107 See also TM Makunya 'The application of the African Charter on Human and Peoples' Rights in constitutional litigation in Benin' in F Viljoen and others (eds) *A Life Interrupted: Essays in honour of the lives and legacies of Christof Heyns* (2023) 474.

108 Art 154(4) of the 2006 DRC Constitution.

109 Article 45 of the African Charter.

member state.¹¹⁰ Unlike its predecessor, the African Union, through its Constitutive Act and subsequent binding and non-binding standards,¹¹¹ embodies values of constitutionalism and calls on states to recognise and apply them as a means to increase popular participation in the management of public affairs, enhance accountability through regular checks and balances, and foster a culture of human rights promotion.¹¹² The African Union constitutionalism framework applies at all times, including during elections.¹¹³ The electoral assistance provided to member states and the deployment of electoral observers during elections, including in the DRC¹¹⁴ are some of the illustrations of the transformative nature of regional constitutionalism and the development of a new continental social contract based on respect for constitutionalism between the AU and its members. Access to information during elections is central to these instruments and must be upheld.¹¹⁵ Sub-regional organisations to which the country is a member equally value access to information. Article 41 of the International Conference for the Great Lakes Region's Protocol on Democracy and Governance is to be viewed as a supplement to the AU constitutionalism framework.¹¹⁶ Therefore, the DRC must give effect to its commitment by enacting domestic laws that facilitate access to information.

2.4 Access to information without the duty to proactive disclosure in other legal instruments

2.4.1 The lack of an Access to Information Act

DRC lacks a specific legislative act on access to information. The absence of this legislation summarises the persistence of 'a secretive and unresponsive culture

110 TM Makunya 'The nexus between constitutionalism, peace and security in the law and practice of the African Union' (2022) 25(1) *Recht in Afrika = Law in Africa = Droit en Afrique* 67.

111 African Youth Charter (2006), African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (2014).

112 Article 4 of the African Union Constitutive Act.

113 MA Simiyu 'African Union support to elections in Africa: Rethinking the preventive role' (2022) 25(1) *Recht in Afrika = Law in Africa = Droit en Afrique* 179-216.

114 African Union (n 19).

115 Principle IV(5) of the Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

116 It provides : '*Les Etats membres s'engagent à promouvoir une presse indépendante, responsable, professionnelle et libéralisée, et à garantir l'accès à l'information.*'

in public and private bodies which often [leads] to an abuse of power and human rights violations.¹¹⁷ This state of affairs is detrimental to people's active participation in the management of public affairs, including elections. The Chief Executive Officer of the *Observatoire de la Dépense Publique* lamented how crucial reports take longer to be released because of the lack of accurate information and the absence of a duty from state entities to provide such information. This prompts them to resort to unofficial means to obtain relevant information.¹¹⁸ The existence of this Act would have dispelled the belief that only public entities must proactively disclose information they hold. The right to access information extends to information held by 'another person' and 'that is required for the exercise or protection of any rights.'¹¹⁹ The Guidelines go further by imposing obligations on election observers and monitors, media and online media platform providers and civil society organisations, among others, in matters of proactive disclosure of information during elections. Some of these stakeholders are private entities. Article 60 of the DRC Constitution indicates that the Bill of Rights applies to public authorities and 'every person'. They must respect the Bill of Rights. An access to information law would also have determined the legal regime and reasonable limitation on accessing information at all times, including during elections. Further, the law would establish the relevant enforcement agency.¹²⁰

However, the 2020 Bill on Access to Information submitted to the National Assembly contains several principles governing the conservation, publication, and proactive disclosure of information by its holders.¹²¹ The Bill proposes the establishment of an Information Regulator. Pending its effective establishment, its functions would

117 See Preamble SA Access Act.

118 J Mayenikini 'RDC : "la loi sur l'accès à l'information tarde à cause de manque d'intérêt et la mauvaise foi des députés" (Florimond Muteba)' 10 September 2020 in *DESK ECO* <https://deskeco.com/2020/09/10/rdc-la-loi-sur-lacces-linformation-tarde-cause-de-manque-dinteret-et-la-mauvaise-foi-des-deputes> (accessed 30 March 2024).

119 See Preamble to Promotion of Access to Information Act 2 of 2000 of South Africa.

120 V Bronstein 'Prioritising command-and-control over collaborative governance : The role of the Information Regulator under the Protection of Personal Information Act' (2022) 25 *PER/PELJ* 2.

121 'Proposition de loi relative à l'accès à l'information' 27 September 2021 in Talatala <https://talatala.cd/panorama-des-lois/121/> (accessed 30 March 2024).

be exercised by the National Human Rights Commission.¹²² The following principles are enshrined in the bill:

- Access to information is a universal right and a fundamental human right;
- Access to information is the rule, secrecy the exception;
- The public interest supersedes secrecy;
- The right applies to all public and private entities of public utility;
- The request procedure must be simple, rapid, and free of charge;
- Holders or providers of information are obliged to help applicants;
- Denials of access to information must be justified;
- Everyone has the right to appeal a negative decision;
- Public or private organisations must systematically publish basic information; and
- The right of access to information must be guaranteed by an independent body.

While most principles mimic those enshrined in the general principles of the Model Law, principles such as (judicial) review of denial of access to information or the prohibition of sanctions against persons who release information in good faith are lacking. The Bill also lacks an explicit provision for maximum and proactive disclosure of information. These areas may be improved by drawing heavily on the Model Law. Until recently, the process to adopt the Bill had stalled.¹²³ At the end of October 2024, a Member of Parliament reintroduced the Bill.¹²⁴ The process for adopting this Bill has been ongoing since 2009.¹²⁵

122 Loi organique n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme.

123 The Member of Parliament, Moise Nyarugabo, who championed the Bill was not reelected.

124 'RDC : Une proposition de loi pour garantir l'accès à l'information et la transparence publique déposée à l'Assemblée nationale' 31 October 2024 in *Actualité.cd* <https://actualite.cd/2024/10/31/rdc-une-proposition-de-loi-pour-garantir-lacces-linformation-et-la-transparence-publique> (accessed 12 November 2024).

125 'RDC : Le collectif 24 plaide en faveur de la loi d'accès à l'information publique en RDC.' 14 September 2023 <https://internews.cd/actualites/rdc-le-collectif-24-plaide-en-faveur-de-la-loi-dacces-a-linformation-publique-en-rdc/> (accessed 28 April 2024).

There is equally no explicit provision for maximum and proactive disclosure of information during elections in the Electoral Commission Act¹²⁶ and the General Electoral Code,¹²⁷ different laws try to guarantee the right of access to information.

2.4.2 Access to information under other laws

Organic Act 11/001 of 10 January 2011 on the Composition, Powers and Functioning of the Superior Council of the Audio-Visual and Communication (CSAC Act)

The Superior Council of the Audio-Visual and Communication (CSAC) is a democracy-supporting institution, on a par with the National Independent Electoral Commission,¹²⁸ the National Human Rights Commission¹²⁹ and the National Council for Monitoring the Agreement and the Electoral Process.¹³⁰ Its mission is to guarantee and ensure the freedom and protection of the press, as well as all means of mass communication, in compliance with the law. It also ensures compliance with information ethics and fair access for political parties, associations and citizens to official information and communication media.¹³¹ Its media regulating role is crucial during elections as it adopts policies on fair and equitable access to public media, prevents hate and other forms of harmful speeches and suspends journalists, politicians and media houses that violate the law. This is done to ensure the public receives pluralist, reliable and objective information.¹³² The CSAC is not the country's information regulator as its mission is restricted to media affairs.

Article 5 of the CSAC Act replicates part of Article 24 of the Constitution by guaranteeing the right to information for everyone (national and non-national,

126 Organic Law 21/012 of 3 July 2021 Amending and Supplementing Organic Law 10/013 of 28 July 2010 on the Organisation and Operation of the Independent National Electoral Commission, as Amended and Supplemented by Organic Law 13/012 of 19 April 2013.

127 Act 06/006 of 9 March 2006 on General Elections as amended up to 29 June 2022.

128 Arts 211-212 of the 2006 DRC Constitution.

129 Art 1 Loi organique n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme.

130 Art 2 la Loi Organique N°18/023 du 13 Novembre 2018 portant institution, organisation et fonctionnement du Conseil National de Suivi et de l'Accord du processus électoral.

131 Art 212 of the 2006 DRC Constitution. See also Art 8 of the CSAC Act

132 Article 9(2) of the CSAC Act.

juristic and non-juristic persons).¹³³ It also guarantees the freedom of the press, of information and of broadcasting by radio and television, the newspapers or any other means of mass communication subject to respect for public order, good morals and the rights of others.¹³⁴ Importantly, Article 5(3) of CSAC Act guarantees the right of access to information as follows: 'No journalist or media professional may be harassed in any way whatsoever in the regular exercise of his or her profession, *nor be denied access to sources of information*.'¹³⁵ The Media Act¹³⁶ defines information as 'all proven facts, verified data or true or authentic messages of any kind made available to the public via the written press, audio-visual communication or online public service.'¹³⁷

The following observations can be made. First, Article 5 of the CSAC Act ensures the right of access to information only to journalists in the conduct of their activities. This right extends to all information including those held by relevant electoral stakeholders during elections. The wording of Article 5(3) also provides for access to 'sources of information', which can mean information held by public or private bodies. It is not restricted to 'official sources of information'. However, the provision neither guarantees a general right to access public interest information held by public and private bodies nor does it confer a subjective right to individuals other than journalists to access information. This is understandable given that the CSAC Act, as subsidiary legislation envisaged under Article 212(4) of the Constitution to define the composition, powers and functioning of the CSAC, cannot go beyond the constitutional mandate bequeathed on the CSAC. Second, the notion of information is conceived along media lenses. It does not capture the broader notion of information as 'all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production',¹³⁸

133 <https://www.leganet.cd/Legislation/JO/2011/JOS.16.01.2011.Loi.11.001.pdf> (accessed 13 November 2024).

134 Art 5(2) of Organic Act 11/001 of 10 January 2011 on the Composition, Powers and Functioning of the Superior Council of the Audio-Visual and Communication

135 Emphasis added.

136 https://www.radiokapi.net/sites/default/files/2023-05/nouvelle_loi_sur_la_presse.pdf (accessed 13 November 2024).

137 Art 3(7) of Ordinance Act 23/009 of 13 March 2023 on the Modalities of the Freedom of the Press.

138 Section 2 of Act 31 of 2016 (Access to Information Act of Kenya).

which is closer to the spirit of the right of access to information. Third, Article 5 of the CSAC Act does not clarify the regime of limitation so that journalists know from the outset the conditions under which access to information can be denied to them and what possible remedies are available for them to appeal against such a decision. Refusal to access information can be overt and covert. Obstacles to accessing 'official information' have been said to derive, among others, from the obligation to professional secrecy and discretion and protection of national defence or security.¹³⁹ The Act should have clarified whether these are reasonable and justifiable limitations to reduce the discretionary powers of those who hold information.

Act 11/009 of 9 July 2011 Relating to Fundamental Principles on the Protection of the Environment

Access to and proactive disclosure of environmental information is one of the fundamental principles of Congolese environmental law. The Act¹⁴⁰ guarantees to every person the right to access available, complete and accurate environmental information 'including those related to dangerous substance and activities and measures adopted for their prevention, treatment and elimination'.¹⁴¹ The Act further clarifies the duty bearer of this obligation. The central level of the state, provinces¹⁴² and decentralised territorial entities (ETD)¹⁴³ must proactively disclose 'any information' related to the state of the environment.¹⁴⁴ The Act thus does not impose on non-state actors such an obligation. However, it is a general principle

139 TM Makunya 'De la réticence des sources officielles d'information face au droit du public à l'information: cas de la ville de Bukavu en RDC' (2011), Dissertation.

140 TM Makunya 'De la réticence des sources officielles d'information face au droit du public à l'information: cas de la ville de Bukavu en RDC' (2011), Dissertation.

<https://www.leganet.cd/Legislation/Droit%20administratif/Environnement/JOS.16.07.2011.pdf> (accessed 13 November 2024).

141 Article 8 of Act 11/009 of 9 July 2011 Relating to Fundamental Principles on the Protection of the Environment.

142 Loi n° 13/008 du 22 janvier 2013 modifiant et complétant la Loi n° 08/012 du 31 juillet 2008 portant principes fondamentaux relatifs à la libre administration des provinces.

143 Loi organique n° 08/016 du 07 octobre 2008 portant composition, organisation et fonctionnement des Entités Territoriales Décentralisées et leurs rapports avec l'Etat et les Provinces.

144 Article 8(2) of the Act.

of law that private entities that assume public utility function must be considered, within the scope of their mandate, as state entities thus liable for any violation of the right to proactively disclose information they hold. Article 8 facilitates the exercise of other rights in environmental matters. Article 9 guarantees the right of everyone to participate in the environment and natural resources management-related decision-making process, accessing environmental information facilitates meaningful participation in the said process.¹⁴⁵ Both participation and access to information are recognised for everyone. This implies the right can be enjoyed by nationals and non-nationals, by state and non-state actors, and by natural and juristic persons.

Organic Act 22/003 of 3 May 2022 Protecting and Promoting the Rights of Persons with Disability

Several provisions of the Act¹⁴⁶ reiterate the obligation to adopt ‘reasonable accommodation’¹⁴⁷ measures to ensure Persons With Disabilities (PWDs) have access to information. Article 10(1) of the Act provides for the right of access to ‘public information’ as follows: ‘persons with disabilities have the right to personal mobility, adapted communication and access to public information’. The notion of public information applies to both public and private entities that hold the information. Article 11 provides for the right to freedom of expression and enjoins the state to adopt ‘necessary measures’ to ensure the right to freedom of expression and opinion is recognised for every person with a disability.¹⁴⁸ As discussed earlier, the latter right is an umbrella right for access to information

145 See also Communication 276 / 2003, African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, para 289.

146 https://legalrdc.com/wp-content/uploads/2023/08/Loi-organique-22_003_protection-et-promotion-des-droits-de-la-personne-avec-handicap.pdf (accessed 13 November 2024).

147 On reasonable accommodation, see JE Lord & R Brown ‘The Role of Reasonable Accommodation In Securing Substantive Equality For Persons With Disabilities: The UN Convention On The Rights Of Persons With Disabilities’ in MH Rioux, LA Bassier & M Jones (eds) *Critical perspectives on human rights and disability law* (2010) 273-307.

148 https://legalrdc.com/wp-content/uploads/2023/08/Loi-organique-22_003_protection-et-promotion-des-droits-de-la-personne-avec-handicap.pdf (accessed 13 November 2024).

as certain legal instruments incorporate aspects of access to information under the freedom of expression.¹⁴⁹ As such, both Articles 10 and 11 are relevant for the protection of the rights of PWDs.

Based on the obligation to adopt reasonable accommodation measures, Article 40 of the Act encourages various ministries to ‘implement mechanisms adapted to each type of disability in the dissemination of information.’ While simply targeting ministries, a broader reading of the concepts does not exclude instances where this obligation could be imposed on other state entities, including the electoral commission. Article 44 is illustrative of efforts that should be made to ensure access to information for PWDs. It provides:

The State or the individual shall put in place measures to promote access to information and communication for people with disabilities (...). This access is ensured in particular by the compulsory construction of ramps and other reasonable accommodations, the production of audio or Braille documents, the use of simplified language and the recognition of sign language as a national language.

These provisions merely implement the protection of persons with disabilities provided for under the Constitution and the UN Convention on the Rights of Persons with Disabilities (CRPD), which the DRC acceded to in September 2015.¹⁵⁰ Article 49 of the Constitution provides that PWDs are entitled to specific protection measures in line with their physical, intellectual, and moral needs. Article 9 of the CRPD devoted to accessibility clarifies the duty of states to ensure that PWDs have access to information and communication and new systems of information and telecommunication technology as well as providing sign language support. As Lawson rightly puts it, accessibility is context-dependent and must be analysed on a case-by-case basis as what allows certain PWDs to access information might not

149 See 3.3.1 above.

150 DRC also accepted the CRPD Optional Protocol on individual complaints procedure. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=48&Lang=en

work for others.¹⁵¹ The CRPD is unequivocal that political participation of PWDs is key and must not be hampered. Measures to facilitate it should be established by countries, lest they are found in violation of their obligations.¹⁵² Considering that the right to access information is an enabler of the right to political participation, not realising it simultaneously violates the two rights.

The reasonable accommodation provision can be seen to impose on relevant electoral stakeholders the obligation to develop necessary materials including those in Braille to ensure that PWDs have access to electoral information.¹⁵³ This is hardly the case in the DRC.

Ordinance Act 23/009 of 13 March 2023 on the Modalities of the Freedom of the Press

Article 95 of the Act¹⁵⁴ guarantees journalists the right to access information as follows: 'Media professionals have the right to access all public and private sources of information of public interest.' Unlike the CSAC Act, this provision clarifies that journalists should have access to both public and private sources of information. Article 4 of the Act reiterates the general right to information recognised to every person which can be said to contain aspects of the right to information. It provides that '[e]veryone has the right to inform and to be informed, to hold their own opinions, to express their ideas and to communicate them without hindrance, whatever the medium used, subject to respect for public order and morality.' One cannot have the right to be informed if they are not allowed to access information detained by public and private bodies.

151 A Lawson 'Article 9: Accessibility' in Ilias Bantekas, MA Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (2018) 276.

152 UNCRPD, Article 29.

153 K Pillay 'Braille and large font ballot template to assist visually impaired to vote' 29 October 2021 <https://www.iol.co.za/news/politics/braille-and-large-font-ballot-template-to-assist-visually-impaired-to-vote-3430e29c-55f1-41b4-a693-cb6d390b2523> (accessed 29 April 2024).

154 https://www.radiookapi.net/sites/default/files/2023-05/nouvelle_loi_sur_la_presse.pdf (accessed 13 November 2024).

Act 23/027 of 15 June 2023 Relating to the Protection and the Responsibility of a Human Rights Defender

The newly adopted Act¹⁵⁵ on the Rights of Human Rights Defenders guarantees the right to access information. Article 3(4) of the Act provides that human rights defenders, while being allowed to exercise their activities throughout the national territory, have the right to access freely, information related to human rights and fundamental freedoms and to store them in a confidential way.¹⁵⁶ This right is crucial as the investigation, documentation, and reporting, among others, of human rights violations rest on the ability of HRDs to access adequate information. Article 10 strengthens the confidentiality principle by enjoining HRDs to respect the confidentiality of their sources ‘in the interest of victims and witnesses’. The state must equally respect the principle as the Act obligates it to guarantee HRDs the confidentiality of their source of information.¹⁵⁷ Crucially, the state must not impede the HRD’s right to inform the public on cases related to human rights violations.¹⁵⁸

Given the wider and inclusive nature of the definition of HRDs under the Act and relevant international instruments,¹⁵⁹ several categories of individuals can be said to benefit, through the Act, from the right to access relevant information during elections. One simply needs to demonstrate they are an HRD.¹⁶⁰ The nature of the information they may request is also wide. Article 3(4) guarantees access to ‘information related to human rights and fundamental freedoms. During elections, many types of information held by relevant stakeholders can be construed as related to human rights or their exercise.

155 <https://agir-ensemble-droits-humains.org/wp-content/uploads/2024/04/LOI-DDH-N%C2%B0-23.027-DU-15-JUIN-2023.pdf> (accessed 13 November 2024).

156 The Act sanctions violations of rights provided for under Article 3 to a prison sentence of six to 12 months and the payment of a fine.

157 Article 13(1) of the Act.

158 Art 13(2) of the Act.

159 A/RES/53/144, 8 March 1999, 53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Article 1; International Service for Human Rights Model Law for Human Rights Defenders (2017), sec 2.

160 Article 2(4) of the Act.

2.5 Conclusion

Existing laws do not explicitly provide for the obligation to proactively disclose relevant information, including during elections. The right to access information is implied in the constitutional right to information. There exist other national laws which contain the right to access information in specific domains, but which lack an explicit obligation for proactive disclosure of information, except in environmental issues. The recently adopted HRD Act contains provisions which can be construed broadly to encompass the right of large categories of individuals to access relevant information during elections as it is worded in liberal terms. Notwithstanding some shortcomings deriving from national instruments, international law norms and standards can be complemented to fill, where needed, the normative lacuna. The normative power of international law owes to its normative power under the country's legal system.

2.6 Recommendations

In view of the foregoing, there is urgent need to strengthen the normative framework on the right to access to information by ensuring that the Bill on Access to Information is tabled, adopted and promulgated to cement a culture for maximum proactive disclosure of public interest information.

In particular:

- Parliament must amend the Electoral Commission and Electoral Code to incorporate the obligation to disclose proactively information to the public; and
- Parliament must bring other laws discussed above in line with the relevant instruments of the African Commission on access to information and freedom of information.



CHAPTER THREE
**Assessing compliance of the
appointing authority to the Guidelines
on Access to Information and Elections
in Africa**

CHAPTER THREE:

Assessing Compliance of the appointing authority to the Guidelines on Access to Information and Elections in Africa

3.1 Introduction

To increase the independence and accountability of members of Election Management Bodies (EMB), and the openness and transparency of the process leading to their appointment, the Guidelines provide for a series of conditions the DRC must meet for the process to accord with what it dictates.¹⁶¹ Per Article 211 of the Constitution, the National Independent Electoral Commission (CENI) is the country's electoral management body. It is responsible for organising and overseeing the electoral process, including registering voters, maintaining the electoral register, voting, and counting operations, and all referendums. It further ensures the regularity of the electoral and referendum processes. The Constitution simply sets the framework establishing CENI and a subsidiary legislation determines its organisation and functioning. Parliament passed the Organic Act 10/013 of 28 July 2010 for this purpose. It was amended in 2013 and 2021.¹⁶²

Compliance with Guideline 12 (Appointment)		
	Description	Status
a)	The process for the selection and appointment of members of the Election Management Body is clearly stipulated in law, and that it is transparent, widely publicised and allows for public participation	Partly complied
b)	It proactively discloses the following categories of information in relation to the Election Management Body.	

161 Guideline 12.

162 Organic Law 21/012 of 3 July 2021 Amending and Supplementing Organic Law 10/013 of 28 July 2010 on the Organisation and Operation of the Independent National Electoral Commission, as Amended and Supplemented by Organic Law 13/012 of 19 April 2013.

b.i)	Mode, criteria and process of appointment of members, including any requisite considerations such as gender balance, qualifications and experience	Complied
b.ii)	Appointment process of members	Complied
b.iii)	Remuneration and conditions of service of members	Partly complied
b.iv)	Procedure for the termination of appointed members of the Election Management Body	Complied

Per Article 9 of the CENI Act, the CENI has 14 missions:

- a. organise and manage pre-electoral, electoral and referendum operations identifying and registering voters, drawing up and publishing electoral lists, voting, counting, centralisation and announcement of provisional results;
- b. transmit the provisional results to the competent court for proclamation of the final results. Competent courts vary with the nature of elections: the Constitutional Court for presidential and national legislative elections, Courts of Appeal for provincial legislative elections and Administrative Tribunals for local elections;¹⁶³
- c. award contracts relating to pre-electoral, electoral and referendum operations in accordance with the Public Procurement Act;¹⁶⁴
- d. contribute to the development of the legal framework relating to the electoral and referendum processes;
- e. develop budget forecasts and the calendar for the organisation of electoral and referendum processes;
- f. publicise the laws relating to the electoral and referendum process in French and the national languages;
- g. coordinate the civic education campaign on electoral matters, in particular by carrying out a voter information and awareness programme in French and the national language;
- h. provide training for national, provincial and local officials responsible for preparing and organising electoral and referendum polls;
- i. draw up and disseminate a code of good conduct and rules of electoral ethics;
- j. divide up electoral constituencies in proportion to updated demographic data;

¹⁶³ See Art 74 of the Electoral Act.

¹⁶⁴ See in general the 2010 Act on Public Procurement.

- k. determine and publish the number and locations of polling and tallying centres as well as those of the local centres for the compilation of results by electoral district;
- l. ensure the regularity of electoral campaigns and referendums;
- m. examine and publish the lists of candidates; and
- n. accredit witnesses, national and international and international observers.

The Act clarifies the nature of members of CENI and the modality of their appointment. Article 10 provides that CENI is composed of 15 members designated by political forces represented in the National Assembly and civil society. While the ruling coalition nominates six members (40%), the opposition nominates four members (26,6%), and civil society nominates five members (33,3%). Out of the five members nominated by civil society, religious groups must designate two, including the President. Civil Society Organisations (CSOs) specialised in electoral matters designate two members and one is nominated by women's rights organisations.¹⁶⁵ The composition of the Commission must be gender sensitive. Currently, four (26,6%) out of 15 members are female thus falling short of the constitutional requirement of gender parity.¹⁶⁶

Article 12 of the CENI Act determines the procedure for appointing members of the CENI. They are independent personalities known for their competence, integrity, morality, probity, and intellectual honesty. Ninety (90) days pending the expiration of the mandate of members, the President of the National Assembly must approach the designating authorities for them to submit names of individuals they have designated.¹⁶⁷ The role of the National Assembly is merely to confirm what has been presented to them and to establish a parity commission (ruling coalition and the opposition) to inquire whether the candidates meet the requirements set out under the law.¹⁶⁸ If a candidate does not meet the requirement, the designated

165 Art 10(3) of the CENI Act.

166 'RDC : Joséphine Ngalula et trois autres femmes investies comme membres de la CENI' 23 Octobre 2021 <https://actualite.cd/2021/10/23/rdc-josephine-ngalula-et-trois-autres-femmes-investies-comme-membres-de-la-ceni> (accessed 30 March 2024).

167 Art 12(2) of the CENI Act.

168 Art 12(3) of the CENI Act.

authority concerned may submit another name. All the members are officially appointed through an ordinance of the Head of State.

While three types of institutions are involved in the nomination of members of the electoral commission, which are the designating authority, the National Assembly, and the Head of State, only the designating authority decides who should be appointed on their behalf. No authority is thus allowed to influence the choice of another, at least on paper. The practice, however, shows that the President has a say on who gets to be appointed as a member, especially when it comes to the designation of the President of the Electoral Commission. In July 2020, the head of state refrained from appointing Ronsard Malonda, a former staff of the Commission, as its president after his application was approved by the National Assembly alleging the lack of consensus among religious groups which nominated him.¹⁶⁹ This reason was, however, seen as an excuse not to appoint a candidate who was close to the country's former President, Joseph Kabila.¹⁷⁰ A year later, the President went on to appoint the current President of the Commission despite a similar lack of consensus among religious groups.¹⁷¹ Once they are appointed for a non-renewable term of six years,¹⁷² the members do not represent the designating authorities but act in their own capacity.

Article 14 of the CENI Act clarifies nine conditions under which a member of the Electoral Commission may lose their seat: term expiry, death, resignation, definitive inability to perform their duties, permanent disability, unjustified absence from more than a quarter of meetings during a trimester, acceptance of an incompatible position, irrevocable criminal conviction for an intentional offence,

169 'RDC: polémique autour de la confirmation de Ronsard Malonda par l'Assemblée nationale' 4 July 2020 <https://www.rfi.fr/fr/afrique/20200703-rdc-ronsard-malonda-nouveau-president-ceni-polemique-eglises> (accessed 28 April 2024).

170 As above.

171 R Gras 'RDC : Denis Kadima désigné pour prendre la tête d'une Ceni déjà controversée' 16 October 2021 <https://www.jeuneafrique.com/1252208/politique/rdc-denis-kadima-prend-la-tete-dune-ceni-deja-controversee/> (accessed 28 April 2024).

172 Art 13 of the CENI Act.

and disqualification.¹⁷³ The Constitutional Court must confirm the definitive inability to perform their duties at the behest of the President of the Electoral Commission after a stamp of approval of the National Assembly.¹⁷⁴ These guarantees prevent the process from being manipulated to replace an ‘annoying’ member. Similarly, the disqualification must be confirmed by the Council of State at the behest of the National Assembly. No member of the Commission can initiate the procedure for the disqualification of another. The preceding prompts the following question: can the recall of a member by their designating authorities be used to terminate the term of a sitting member? Article 14 of the CENI Act protects appointed members from the abusive use of power by the component that designated them. It provides that ‘no member (...) may be removed or changed by the component that appointed him or be forced to resign by it or by any public authority’. A rapporteur and vice-president of the electoral commission who fell into disgrace with their political parties in 2016 and 2021 respectively were able to maintain their position within the Commission.¹⁷⁵

Three observations can be made on this framework. First, the appointment of members of the electoral commission remains secretive and a matter of the only components involved in their designation. No public consultation is envisaged by the law. The public is not aware of the candidates being appointed, their profile, background, their contribution to the management of the electoral commission and the available remedies to challenge the appointment of certain members.

The appointment of the President of the Electoral Commission tends to be known as it attracts significant controversies. Even then, the public has no say. In general, the country lacks a culture of information-sharing and consultation with the public. Yet, consultation, access to information and participation are the manifestations of the right to participate in the management of public affairs strongly and

173 In October 2015, the then President of the Electoral Commission resigned while its Vice-President resigned in 2019.

174 Art 14(2) of the CENI Act.

175 C Muamba ‘RDC - CENI: pour manquement grave, le député Didi Manara perd son poste de vice-président à la Cellule de crise du FCC’ 14 December 2021 <https://actualite.cd/2021/12/14/rdc-ceni-pour-manquement-grave-le-depute-didi-manara-perd-son-poste-de-vice-president-la> (accessed 28 April 2024).

unequivocally protected under the African Charter on Human and Peoples' Rights (African Charter)¹⁷⁶ and the International Covenant on Civil and Political Rights (ICCPR) to which the DRC is a party.¹⁷⁷

Second, despite a constitutional and treaty-law obligation to strive for the representation of persons with disabilities, the CENI Act is silent on the need to ensure their appointment. It is simply explicit for women. While the presence of PWDs does not necessarily guarantee CENI will adopt disability-friendly policies, their representation is the starting point to ensuring the CENI has, within its ranks, a person who understands the plight of PWDs and who can influence policy dynamics. It is also a matter of equity and fairness to have PWDs.

Third, the remuneration of members of the electoral commission is kept as a secret.

3.2 Recommendations

Appointing authorities:

- Should ensure that the process for the selection and appointment of members of the National Independent Electoral Commission is transparent, widely publicised and allows for public participation; and
- Should ensure the remuneration of members of the electoral commission is made public.

176 Art 13(1) of the African Charter on Human and Peoples' Rights.

177 Art 25 of the ICCPR.



CHAPTER FOUR
**Assessing compliance of the National
Independent Electoral Commission to
the Guidelines**

CHAPTER FOUR:

Assessing Compliance of the National Independent Electoral Commission to the Guidelines

4.1 Compliance with obligations imposed on the electoral management body

While other countries may have more than one electoral management body,¹⁷⁸ the 2006 DRC Constitution institutes one: the National Independent Electoral Commission (CENI). Historically,¹⁷⁹ the country has also not had more than one EMB. Although at the peak of the Cold War-induced authoritarianism, the powers of an election management body were once exercised by the Central Committee of the *Mouvement Populaire de la Révolution* (party state).¹⁸⁰

Guideline 13 imposes obligations on the electoral management body.¹⁸¹ It can be said to be essentially procedural as it indicates the behaviour the EMB should adopt to ensure those who need to access important information have such information. It thus forms the basis for the implementation of the other five guidelines imposing obligations on the EMB. Guideline 13 defines, on the one hand, conditions for the easy access of information and, on the other, poses the basis for integrity-based access to information as the EMB is obligated to disclose this information whether a request has been made or not.

178 See *Proactive disclosure of information during elections in Kenya (2021 General elections): An assessment of Kenya's compliance with the Guidelines on access to information and elections in Africa, issued by the African Commission on Human and Peoples' Rights (2023)* 42.

179 Loi organique n° 10/013 du 28 juillet 2010 portant organisation et fonctionnement de la Commission Électorale Nationale Indépendante telle que modifiée et complétée par la Loi organique n° 13/012 du 19 avril 2013 et la Loi organique n° 21/012 du 03 juillet 2021.

180 Yahishule (n 4) 245.

181 Obligations on the EMB derive from Guideline 13 to 18.

4.2 Compliance with Guideline 13

Compliance with Guideline 13		
	Description	Compliance status
a)	Create, keep, organise and maintain records in a manner that facilitates access to information, including for vulnerable and marginalised groups	Partly complied
b)	Adopt and implement flexible proactive disclosure arrangements that enable access to information without the need for individual applications	Partly complied
c)	Establish clear and effective processes and procedures to deal with requests for information	Not complied
d)	Formulate clear procedures for making requests for information, which must include the required format of requests, costs for reproduction, timeframes and formats for providing requested information	Not complied

A provincial head of the electoral commission acknowledged that information is adequately stored. The provincial representation of the Electoral Commission has archives in addition to the central archive based in Kinshasa (the headquarters of the Electoral Commission).¹⁸² This is solely made for CENI's administrative and personal use. It can also serve for electoral adjudication as CENI may use available documents under the Electoral Act, the CENI Act and procedural laws applicable before various electoral courts to adduce evidence when the integrity of elections is disputed.¹⁸³ The provincial head of CENI added that it is difficult for the public to seek and obtain some detailed information, let alone candidates who would like to access information for electoral adjudication purposes. Candidates that have personal contact with the electoral commission stand the chance of getting some information.

From the perspectives of Guidelines 13, and the right to equal arms in a trial, this is problematic. As the accuser in courts has the onus to prove the basis of their

¹⁸² Interview with the Secretary of CENI in Nord-Kivu, Goma, January 2024.

¹⁸³ On electoral adjudication, see Arts 74 and subsequent provisions of the Electoral Act.

claim but cannot paradoxically obtain them from the electoral commission, their constitutional petition is doomed not to succeed. When several candidates for national legislative elections approached the Constitutional Court to challenge published results, the Court rejected the claims as baseless.¹⁸⁴ A legal advisor to the Constitutional Court indicated most candidates lacked evidence for their claims.¹⁸⁵ In electoral adjudication, it is assumed that candidates and their political party or grouping had deployed their agents in different polling stations to collect vote records (*procès-verbaux*) that they can use in court.¹⁸⁶ It is also assumed there will be no impediment to them getting the necessary records after voting operations close, as provided by the law.¹⁸⁷ These assumptions are faulty. Not only do candidates and their political parties face multifaceted problems in deploying their agents, but reports of observers also revealed instances where members of polling stations denied access to some vote records or simply chased party agents away.¹⁸⁸ The Electoral Commission as the body holding all this information was responsible for providing information to those willing to obtain it but hardly did so. The failure to access information was also mentioned by several electoral observation missions. The Synergie des Missions d'Observation Citoyenne des Elections (SYMOCEL) went further to suggest that in instances where information was available, this was encrypted in a manner difficult for a layperson to use.¹⁸⁹ Yet, the Guidelines obligate that information be provided in formats that are easy to access.¹⁹⁰ At some points, courts also did not force the Commission to provide these PVs.¹⁹¹

184 Informal discussion with a staff member of the DRC Constitutional Court, Kinshasa, March 2024.

185 Informal discussion with a staff member of the DRC Constitutional Court, Kinshasa, March 2024.

186 Art 37 and subsequent provisions of the Electoral Act grants them the possibility to seek and obtain accreditation for their agents before they are deployed as 'witnesses'.

187 Art 41 of the Electoral Act.

188 SYMOCEL *Rapport préliminaire sur les scrutins combinés du 20 décembre 2023* (2023) 14-15.

189 SYMOCEL *Déclaration de la SYMOCEL sur le déroulement de contentieux des résultats né des scrutins combinés de décembre 2023 et leurs possibles conséquences sur l'égalité entre candidats* (2024) 5-6.

190 Guideline 4.

191 SYMOCEL (n 159) 5-6.

There is lack of a policy and coordinated efforts to avail information in a format accessible to vulnerable and marginalised groups throughout the electoral process. Marginalised groups can be understood as groups of persons (such as indigenous populations, persons with disabilities, older persons or persons living with HIV/AIDS)¹⁹² most likely to suffer or experience harm due to, among others, their social status and economic and historical condition.¹⁹³ PWDs and older persons among other vulnerable groups have priority access to polling centres but information to facilitate their access is generally not accessible. The Electoral Commission has not designed materials to facilitate access by PWDs. The provincial head of the Electoral Commission, however, indicated they visited some schools designed for visually impaired persons or the deaf to explain the process in Goma, North-Kivu.¹⁹⁴ He did not confirm whether this was done countrywide. Also, voting materials, including machines, do not cater for their needs. PWDs are thus left to fend for themselves or be accompanied by someone else, jeopardising the secrecy of the ballot. Generally, the DRC lacks a clear policy of access to information for persons with disabilities. At times, the National Congolese Radio and Television (RTNC) would provide a sign language interpreter during news sessions, but this is not done across all the radio and television shows. Private media organisations do not have such obligations, and at the provincial level, there is no such practice. International and national obligations on reasonable accommodation of PWDs do not match the reality. The National Human Rights Commission (CNDH) rightly recommended the Electoral Commission ‘to provide assistance to people living with disabilities and older persons, as well as those who do not master the use of the electronic voting device’.¹⁹⁵

During the 2023 elections, the CENI made efforts to publish its decisions and other relevant information via its social media accounts, mainly X (formerly Twitter), the

192 I Nifosi-Sutton *The Protection of Vulnerable Groups under International Human Rights Law* (2017) 5.

193 TM Makunya ‘Beyond Legal Measures: A Review of the DRC’s Initial Report under the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa’ (2023) 67(2) *Journal of African Law* 226.

194 Interview with the Secretary of CENI in Nord-Kivu, Goma, January 2024.

195 CNDH ‘Communiqué de presse N° 021/PRES, PNM/01/2023. Elections du 20 décembre 2023: Premières observations de la Commission nationale des droits de l’homme’ 20 December 2023.

national radio and television, press conferences, open-day events and its website but the impact was all too weak.¹⁹⁶ These efforts enable key electoral stakeholders to know how the process evolves and access key decisions. The Commission also developed two mobile applications for Android and IOS (iPhone users) for voters in the country and abroad to check in advance their polling centres and confirm whether they have been considered for voting operation, and possibly lay claims ahead of the polls as well as for the pre-registration of voters.¹⁹⁷

The mobile app also contained a list of candidates for presidential, national, and provincial legislative elections. Such efforts were instrumental in speeding up the process for several voters who used the app. They did not have to stand in long queues to check their polling station. Nonetheless, providing information via a mobile application rests on the following assumptions, some of which are flawed and do not match reality. Assumptions of adequate internet penetration rate in the country, stable internet, universal access and widespread ownership of smartphones among voters through which they can access the App are incorrect. Statistics show that Twitter has 248 700 active users in the DRC, Instagram 503 700, Facebook 4.7 million and LinkedIn 490 000.¹⁹⁸ These numbers show that an internet-based outreach on electoral matters is doomed not to reach as many people as possible, considering that the country was expecting close to 43 million voters.¹⁹⁹ In addition, not everyone on social media is a registered voter. The general numbers on mobile phone usage and internet penetration, though encouraging, also remain low. In the last quarter of 2023, it was estimated that internet mobile subscriptions were 28.9 million, but the internet penetration rate was 30.4 per cent, the bulk of which was in Kinshasa (understandably because this is the most

196 'RDC : l'accès à l'information électorale, un défi à relever' 5 October 2023 in *ZoomEco* <https://zoom-eco.net/a-la-une/rdc-lacces-a-linformation-electorale-un-defi-a-relever-2/> (accessed 10 April 2024).

197 'Elections 2023 : la CENI met en ligne l'application « CENI RDC Mobile »' 1 December 2023 <https://www.radiookapi.net/2023/12/01/actualite/societe/elections-2023-la-ceni-met-en-ligne-lapplication-ceni-rdc-mobile> (accessed 28 April 2024).

198 C Kamdem 'Chiffres Internet et Réseaux sociaux pour la RD Congo (2023)' 13 February 2023 <https://chedjoukamdem.com/2023/02/13/chiffres-internet-reseaux-sociaux-rd-congo-2023/> (accessed 7 April 2024).

199 'RDC : près de 44 millions d'électeurs attendus pour 4 scrutins combinés ce 20 décembre 2023' 20 December 2023 in *Zoom-Eco* <https://zoom-eco.net/a-la-une/rdc-pres-de-44-millions-delecteurs-attendus-pour-4-scrutins-combines-ce-20-decembre-2023/> (accessed 13 November 2024).

populated province).²⁰⁰ Only 30% of Congolese own smartphones.²⁰¹ For these reasons, the *Autorité de Régulation de la Poste et des Télécommunications du Congo* (ARPTIC) concluded that most people during the electoral campaign resorted to voice calls and SMS for campaigning as the rate of mobile penetration stood at 59 per cent, largely from urban areas.²⁰²

All in all, there is no established process to regularly provide information to the public nor procedures individuals can use to request relevant information. However, when one needs information, these requests are dealt with on a case-by-case basis depending on the nature of the individual requesting the information, their status and interest, the information requested and the purpose for which the information is sought.²⁰³ The complex nature of the Congolese administration and its inaccessibility to average citizens render the accessibility to documents and other information difficult. One needs to be influential or to have connections with individuals working within the Commission to access certain information. As the collection of information related to this report has demonstrated, only a handful of key CENI officials are likely to respond to any request, and even then, making themselves available for a discussion becomes a hazardous journey. If clear procedures existed or a culture of proactively disclosing information, people would not suffer much to enjoy the benefit of their right to access information. Another obstacle has been the commodification of public information in general, which certainly affects access to some electoral information as public officials are accustomed to people bribing them to access documents, whether court judgments or others.²⁰⁴ The information ecosystem thus becomes one of a poor legal framework for accessing information, lacking administrative policies and an endless culture of corruption that contradicts the country's international human rights obligations.

200 SS Kinyamba and others *Monographie de la ville de Kinshasa* (2015) 39.

201 *Autorité de Régulation de la Poste et des Télécommunications du Congo Observatoire du marché de la téléphonie mobile: Rapport du 3e Trimestre 2023* (2024) 6-7.

202 As above.

203 Interview with the Secretary of CENI in Nord-Kivu, Goma, January 2024.

204 On corruption practices, see B Kahombo 'Corruption in the Democratic Republic of the Congo and its Impact on Constitutionalism and Respect for the Rule of Law' in CM Fombad & N Steytler (eds) *Corruption and constitutionalism in Africa: Revisiting control measures and strategies* (2020) 288-290.

4.2.1 Recommendation

The Electoral Commission must:

- Ensure that information is recorded in a manner that facilitates access to information for everyone and, in particular for vulnerable or marginalised groups;
- Devise adequate policies to ensure that appropriate mechanisms are in place to facilitate access to information for persons with disabilities such as sign language and Braille and for marginalised groups like older persons and indigenous groups, some of whom cannot read properly;
- Ensure whatever flexible proactive disclosure arrangements it has adopted are made public to ensure access to information without the need for individual applications.
- Establish clear and effective processes and procedures to deal with requests for information; and
- Formulate clear procedures for making requests for information, which must include the required format of requests, costs for reproduction, timeframes and formats for providing requested information.

4.3 Compliance with Guidelines 14 (Annual publication)

Compliance with Guideline 14		
	Description	Compliance status
a)	Organisational structure	Complied
b)	Strategic Plan	Partly complied
c)	Decision-making process	Complied
d)	Procedure for the recruitment of both permanent and temporary staff and their conditions of service	Partly complied
e)	Training policies	Partly complied
f)	Code of conduct for employees, including declaration of assets	Partly complied
g)	Budget and sources of funding, including donor funding, which shall be disaggregated accordingly	Partly complied

Guideline 14 seeks to increase both internal and external transparency of the electoral management body by ensuring that individuals can access relevant

h)	Mechanisms for voter identification	Complied
i)	Procurement policy, processes and award of contracts	Partly complied
j)	Annual Report, including audited accounts	Partly complied

information on the way it operates. This is crucial as independent institutions vested with powers to promote and protect constitutionalism must themselves be accountable and operate in a way that dispels doubts of favouritism, mismanagement, and incompetence. Some of the obligations provided under this Guideline are clarified in the law establishing the electoral commission while the electoral commission must implement the other obligations. In both instances, Guideline 14 is mainly complied with.

The CENI Act is the legal basis for the determination of CENI’s organisational structure and its Standing Rules of Procedure, all of which are available either in the Official Gazette or on CENI’s website.²⁰⁵ This information is in the official domain. All enacted laws must be published in the official gazette for them to be accessible to the public, including the CENI Act. Article 8 of the CENI Act provides for the adoption of the Standing Rules of Procedure, which, in addition, must be declared consistent with the Constitution by the Constitutional Court before it is implemented.²⁰⁶ Chapter IV of the CENI Act is devoted to its organisational structure. CENI is made up of a Plenary Assembly and a Board. The Plenary Assembly is CENI’s design, steering, decision-making, evaluation and supervisory body. It comprises all the 15 members of CENI.²⁰⁷ On the contrary, the Board is the management and coordinating body of CENI. It ensures that the decisions of the Plenary Assembly are implemented. It ensures compliance with electoral and referendum laws by political and administrative authorities, political parties and groupings, candidates, national and international observers, voters and witnesses.²⁰⁸ The Board is made up of seven members, including at least two women, proposed by the ruling coalition, the opposition and civil society organisations. It comprises:

205 <https://www.ceni.cd/cadre-legal> (accessed 28 April 2024).

206 See also Art 160(2) of the 2006 DRC Constitution and Art 45 of the 2013 Constitutional Court Act.

207 Art 23ter of the CENI Act.

208 Art 24 of the CENI Act.

- The President of CENI, nominated by civil society and religious groups.
- The Vice-President, appointed by the ruling coalition, and the second Vice-President, appointed by the opposition.
- The 2nd Vice-President, appointed by the opposition.
- The Rapporteur, appointed by the ruling coalition.
- The deputy Rapporteur, appointed by the ruling coalition.
- The Chief of Finances, appointed by the opposition.
- The deputy Chief of Finances, designated by the ruling coalition.

The CENI Act and its Standing Rules of Procedures determine the modalities of adopting decisions both by the Plenary Assembly and the Board. They also clarify provincial and local level representation of CENI. CENI's Decisions on Measures Implementing the Electoral Code also elaborate on its organisational structure and clarify local entities involved in voting operations, including the tally and each other's role.²⁰⁹ It is publicly available. As a regionalised state, the DRC has, in addition to the central level, sub-national entities which have their own politically and financially autonomous institutions.²¹⁰ These are the provinces on the one hand, the city, the communes, the chiefdoms and sectors on the other.²¹¹ The latter four are known as decentralised territorial entities. Therefore, CENI has representation at the provincial level and city or territorial levels. To facilitate its administrative and financial management:

- CENI has a National Executive Secretariat, a Provincial Executive Secretariat in the provincial capital and a Branch Office in each city and the capital of the territory.
- Kinshasa city has many branches, the number of which is determined by a decision of the President of CENI deliberated at the Plenary Assembly.
- The National Executive Secretary, the Provincial Executive Secretaries and the Branch Heads are appointed and, if necessary, relieved of their duties by the decision of the President deliberated in the Plenary Assembly.

209 Adopted in 2022 https://www.ceni.cd/manuel-electoral/decision-ndeg36_ceniap2022-du-25-aout-2022-portant-mesures-dapplication-de-la-loi (accessed 28 April 2024).

210 Article 3 of the Constitution.

211 Article 3 of the Constitution.

CENI's strategic plan and other key information required under Guideline 14 are not publicly accessible. Through its partnership with the International Foundation for Electoral System (IFES), CENI started to develop a strategic plan that would guide its operations for the upcoming electoral process and determine how critical activities would be carried out in early 2022.²¹² Some key informants confirmed some of the following documents do exist, but they are not publicly available.²¹³ They include procedures for the recruitment of both permanent and temporary staff and their conditions of service, training policies, and the code of conduct for employees and the annual report. Under Article 28 of the CENI Act, the Electoral Commission is obligated to submit its annual report to the National Assembly but this report is not available on its website.²¹⁴ In May 2023, CENI published its 2022 financial report describing the use and allocation of funds to its operations and activities, as well as staff salaries.²¹⁵ The report describes the funds it has received from the government as the country's national budget contains an item on CENI. As for the declaration of assets, only the 15 members have the legal obligation to declare their assets. The declaration, made before the Constitutional Court, is not made public.²¹⁶

Furthermore, the procurement policy, processes and award of contracts are not available online. However, CENI is bound by the country's 2010 Public Procurement Act as well as its Operating Manual because it is a contracting authority within the meaning of Article 5(4) of the Act. Its procurement procedures must align with the Act. The latter provides for the establishment of every contracting part of a Procurement Management Unit (CGPMP). The Public Procurement General Directorate (DGCMP) is tasked with controlling compliance with public procurement rules by providing

212 'Le Plan stratégique de la CENI pour une vision commune des actions à réaliser' 22 January 2022 <https://www.ceni.cd/depeches/2022/01/22/le-plan-strategique-de-la-ceni-pour-une-vision-commune-des-actions-realiser> (accessed 7 April 2024).

213 Interview with the Secretary of CENI in Nord-Kivu, Goma, January 2024.

214 'RDC : la CENI dépose son rapport annuel à l'Assemblée nationale' 27 April 2023 <https://actualite.cd/2023/04/27/rdc-la-ceni-depose-son-rapport-annuel-lassemblee-nationale> (accessed 28 April 2024).

215 'Rapport financier Année 2022' 16 May 2023 <https://www.ceni.cd/rapports-dactivites/rapport-financier-annee-2022> (accessed 28 April 2024).

216 See the discussion under Guideline 15 below.

non-objections and special authorisations.²¹⁷ The DGCMP is located within the Ministry of Budget. The control after the approval of the procurement is assured by the Public Procurement Board (ARMP) established by the Prime Minister.²¹⁸ Public procurement procedures of the Electoral Commission follow, in principle, this channel. While the law is well equipped to regulate it, it is the practice that generally goes against the standards. A 2020 study produced by the Methodology for Assessing Public Procurement Systems (MAPS) on behalf of the World Bank noted the discrepancy, in the DRC procurement system, between the law and the practice in public procurement spheres, the inexistence of some CGPMP, the lack of efficient control and the failure to obtain required approvals when procuring goods and services.²¹⁹ The Electoral Commission's public procurement processes are not available online. It has been suggested that it tends to resort to the Direct Selection Single Source system to bypass existing procurement controls, for example, when purchasing voting machines.²²⁰ This mode of procurement is generally opaque and is the gateway for corrupt practices and hampers citizens' control.

The identification of voters is separately regulated by the Voter Registration Act available online in French.²²¹ It defines criteria for identifying voters,²²² allows

217 Art 13(2) of the 2010 Public Procurement Act.

218 Art 14 of the 2010 Public Procurement Act.

219 Groupe de la Banque Mondiale *Evaluation du système de passation des marchés publics de la République démocratique du Congo - MAPS II. Rapport d'évaluation* (2020) 9-16.

220 C Muamba 'RDC : La gestion des marchés publics de la CENI critiquée pour sa budgétisation jugée forfaitaire (CREFDL)' 16 January 2024 <https://actualite.cd/2024/01/16/rdc-la-gestion-des-marches-publics-de-la-ceni-critiquee-pour-sa-budgetisation-jugee> (accessed 28 April 2024). The CENI responded to these accusations; see CENI *Analyse du rapport du CREFDL sur la "crédibilité budgétaire et transparence des marchés publics de la CENI"* <https://www.ceni.cd/sites/default/files/2024-02/ANALYSE%20DU%20RAPPORT%20DU%20CREFDL%20SUR%20LA%20%20C2%AB%20CR%3%89DIBILIT%3%89%20BUDG%3%89TAIRE%20ET%20TRANSPARENCE%20DES%20MARCH%3%89S%20PUBLICS%20DE%20LA%20CENI%20.pdf> (accessed 28 April 2024).

221 See Act 04/028 of 24 December 2004 on the identification and registration of voters in the Democratic Republic of the Congo as amended and supplemented by Law 16/007 of 29 June 2016 https://www.droitcongolais.info/files/111.12.04-Loi-du-24-decembre-2004_-portant-identification-et-enrolement-des-electeurs-en-RDC--2004.pdf (accessed 13 November 2024).

222 Arts 4 & 7, 8 & 9 of Act 04/028 of 24 December 2004 on the identification and

electoral observers and party agents to participate in registration operations,²²³ and indicates necessary documentation for proving citizenship and age.²²⁴ It has no provision for the situation of PWDs, women and other vulnerable groups during voting operations.

4.3.1 Recommendations

The Electoral Commission must:

- Fully disclose the code of conduct for employees;
- Publish a disaggregated budget and sources of funding;
- Publish all the procurement agreements entered into for transparency purposes; and
- Publish its strategic plan

4.4 Compliance with Guideline 15 (membership)

Compliance with Guideline 15 (membership)		
	Description	Status
a)	Details of the professional background of its members	Not complied
b)	Policy on declaration of assets and interests by its members	Complied
c)	Its code of conduct and ethics	Partly Complied

The Electoral Commission is composed of 15 members. Its website does not provide relevant information concerning its members. As the process leading to their appointment is equally secretive, it is difficult to know the professional background of every member although a quick search online can provide hints on positions every member occupied before their appointment. However, this is not the kind of access to information envisaged under the Guideline.

registration of voters.

223 Art 6 of Act 04/028 of 24 December 2004 on the identification and registration of voters.

224 Art 9 of Act 04/028 of 24 December 2004 on the identification and registration of voters.

Nonetheless, the CENI Act imposes on every member the obligation to declare their assets.²²⁵ Article 21 of the CENI Act provides the modalities for implementing this obligation. The declaration is made before they assume their positions at the Electoral Commission and the expiration of their term of office. The two declarations system serves to provide a comparative basis to ensure the individuals did not unfairly enrich themselves through their positions. The declaration is made before the Constitutional Court. It is not the first time the Constitutional Court has been made the repository of all the declarations of assets.²²⁶ The declaration must contain their family assets including their movable property, shares, bonds, other securities and bank accounts; their immovable property, including undeveloped land, forests, plantations and farmland, mines and all other immovable property, with an indication of the relevant titles.²²⁷ The law sanctions the failure to make such a declaration within the 30 days following their appointment by considering the defaulting member as having resigned. In addition, if the declaration is fraudulent or there are suspicions of unjust enrichment, the member concerned may be brought before the Court of Cassation.²²⁸

Two observations are worth making at this stage. The law is silent on how such declarations should be dealt with and the role of the Constitutional Court. Does its role extend to ensuring the accuracy of the declaration? Is the role of the declaration simply to be used to compare it with the other declaration after the person has left the position? Can it be used as an instrument to police the members as the information could be used against them when they fall in disgrace with the established regime? Since the new dawn of constitutionalism in the DRC, ministers and members of the electoral commissions have been appointed and left their positions without any information as to what happens in relation to their declarations, for example, whether the two declarations showed evidence of unjust enrichment. Former President Kabila left office in January 2019 without any

225 Art 21 of the CENI Act. See also Article 10 of the Standing Rules of Procedure.

226 According to Article 99 of the Constitution the President of the Republic and ministers must make a similar declaration before the Constitutional Court. The latter shares the declaration with the fiscal administration.

227 Art 21 of the CENI Act.

228 Art 21 of the CENI Act.

information regarding his assets being provided.²²⁹ However, the Constitutional Court invited in July 2023 a former Minister of Transportation to ‘complement’ his declaration of assets after the Court realised the declaration lacked some details.²³⁰ This is the only known attempt to use this anti-corruption tool. Furthermore, both the law and institutional practices are silent on the need to make those declarations public or make them accessible to individuals upon request. It thus remains doubtful whether the declaration serves the purpose for which it was instituted.

The Code of Ethics is not publicly available. However, Article 104 of the Standing Rules of Procedure obligates members of the electoral commission to respect their oath and the ‘Code of Conduct’. The existence of this provision indicates there exists a code of conduct applicable to members. It prevents them from using influence peddling, making public statements that may affect the image and operations of the electoral commission and to divulge the secrecy of deliberations during and after their term of office.²³¹ They must attend all the meetings.²³²

4.4.1 Recommendations

- The Electoral Commission should proactively disclose details of the professional background of its members;
- The Electoral Commission must make public its Code of Ethics and Conduct.;
- Appointing authorities must ensure professional details of candidates to the membership of the electoral commission are made public before the members are designated and appointed by the head of state to increase public scrutiny;
- The Electoral Commission should work with the Constitutional Court to ensure the declaration of assets are publicly accessible. They should clarify what the declarations are used for and how previous members have been held accountable; and

229 There have been several accusations on unjust enrichment on his part. See for example ‘Congo hold-up: Joseph Kabila accusé d’avoir détourné 138 millions de dollars en RDC’ 19 November 2021 <https://www.france24.com/fr/afrique/20211119-congo-hold-up-joseph-kabila-accus%C3%A9-d-avoir-d%C3%A9tourn%C3%A9-138-millions-de-dollars-en-rdc> (accessed 28 April 2024).

230 ‘Présence de Chérubin Okende à la Cour constitutionnelle : l’appel à témoins lancé’ 13 July 2023 <https://www.radiokapi.net/2023/07/13/actualite/justice/presence-de-cherubin-okende-la-cour-constitutionnelle-lappel-temoins#:~:text=Ch%C3%A9rubin%20Okende%2C%20retrouv%C3%A9%20mort%20ce,certains%20t%C3%A9moins%20ce%20jeudi%20matin>. (accessed 8 April 2024).

231 Art 104 of the Standing Rules of Procedure.

232 Art 105 of Standing Rules of Procedure.

- As the Constitutional Court verifies the two declarations (the pre- and post-office declarations) after a member has vacated from office, the Court should make public its report on post-office evaluations of the declarations of assets and accompanying measures.

4.5 Compliance with Guideline 17 (pre-election day)

Compliance with Guideline 17 (Pre-election day)		
	Description	Status
a)	Detailed electoral calendar	Complied
b)	Criteria, process and results for the delimitation of electoral boundaries in a simplified manner	Complied
c)	List of constituencies or voting districts, if applicable	Complied
d)	Full details of the voter registration process including criteria, qualifications, requirements and location of voter registration centres	Comment?
e)	Voters roll containing information allowing the unique identification of each voter, including the full name, identity number, photograph (where it exists), gender and age of each voter, and any subsequent amendments to this information	Not complied
f)	Information on arrangements for the inspection of the voters roll by the public to allow for any necessary corrections to be made	Partly complied
g)	Operational plan for special or advance voting and diaspora voting (where applicable) relating to dates, time and method, including storage and security of ballot boxes until the general count	Mostly complied
h)	Criteria for identification of the location of voting stations	Partly complied
i)	Location and number of voting stations	Partly complied
j)	Criteria and requirements for registration of political parties	Complied

k)	Details of applications made by political parties for registration as participants in the electoral process, specifying the number of applications made, the number of applications granted, the number denied and reason(s) for each denial	Not complied
l)	Details of political parties registered as participants in the electoral process, specifying their number and names	Complied
m)	Qualification, rules, and procedure for nomination of candidates by political parties	Not complied
n)	Code of conduct applicable to political parties and candidates during the electoral campaign period	Complied
o)	Number and nature of complaints or petitions received by the Election Management Body and how they have been addressed	Not complied
p)	Mediation and conflict resolution mechanisms in place for addressing election related complaints or petitions;	Partly complied
q)	Policy on voter education	Partly complied
r)	List of service providers, the criteria for their selection and the content of their service contracts and details of the procurement process	Partly complied
s)	The criteria for accreditation of election observers and monitors;	Complied
t)	Timelines for registration of international and domestic election observer missions	Complied
u)	Details of applications for accreditation by election observers and monitors, including the number of applications rejected and reasons for the rejection;	Not complied
v)	Criteria for accreditation of media during the electoral process (if Applicable)	Complied
w)	Details of application for accreditation by the media, including the number of applications received, number rejected and the reasons for the rejection	Not complied
x)	Code of conduct for media (if any);	Complied

y)	Number of complaints or petitions received and how they were addressed, if applicable	Not complied
z)	Categories of observers admitted	Partly complied
aa)	Register of the different categories of observers and deployment areas.	Not complied

Guideline 17 is one of the important guidelines for several reasons. Firstly, full compliance with it can increase the active participation of everyone (voters, political parties and candidates, and civil society organisations) in the electoral process. The guideline aims to prevent the exclusion of a segment of people or political party activists from elections. In the African context, this generally leads to endless electoral crises and violence.²³³ This guideline also strengthens the integrity of the electoral process and pre-empts baseless contestations in the sense that citizens may know in advance political parties that are eligible to contest, the number and nature of the electorate including their locations and the number of polling centres. This latter aspect is crucial as certain expected polling stations may not operate on election day.

This guideline imposes obligations on five sets of entities: the electoral commission bears the heavy duty to ensure its activities comply with the guideline but political parties, the Ministry of Interior, the media regulating authority and civil society organisations are equally responsible to ensure guideline 17 is implemented. With regard to the modalities of complying with the guideline, one can discern two ways for doing it: the adoption of specific laws including the Electoral Act by parliament and of regulations and other policies by targeted entities. The actions of the electoral management body are not self-sufficient as they need to be strengthened by those from other state and non-state entities. In other words, the success of pre-electoral preparations is incumbent on many relevant electoral stakeholders.

CENI published a detailed five-year (2022-2027) electoral calendar at the end of November 2022 and scheduled general elections for December 2023.²³⁴ The

233 SA Konaté 'The politics of identity and violence in Côte d'Ivoire' (2004) 5 *West Africa Review* 5-6.

234 See also COMMUNIQUE DE PRESSE N° 020/CENI/2024 Relatif à la publication du calendrier réaménagé du processus électoral 2022-2027 <https://www.ceni.cd/communique-de-presse/2024/04/06/communique-de->

guideline and the law do not determine whether the process leading to the publication of the electoral calendar should be inclusive to prevent contestations. Consultations over the development of the electoral calendar have generally been problematic. Following the publication of the electoral calendar and throughout the pre-election period, several electoral stakeholders believed the calendar was unrealistic and blamed the electoral commission for its adamant quest to organise elections while material, security and financial conditions were unmet.²³⁵

The electoral calendar pertains to six types of elections, the last two being indirect elections: presidential, national, and provincial legislative and local elections; gubernatorial and senatorial elections. While voters located on the territory voted in all the direct elections, diaspora voters were involved in presidential elections alone. The choice of the five countries selected as pilot countries for the diaspora raised questions related to the right to equality among Congolese and equal protection by the law as Congolese living in the diaspora are scattered the world over not just in five countries.²³⁶ Article 5 of the DRC Constitution proclaims sovereignty emanates from people who exercise it directly and indirectly and does not distinguish between voters in and outside the country. The electoral calendar seems to suggest the notion of people is limited to voters located in the country and in the diaspora where material conditions to organise elections are met.²³⁷ Two other problems emerged from the calendar. While Article 52 of the Electoral Act provides for the organisation of elections on a Sunday or a public holiday, elections took place during the week.²³⁸ The Ministry of Labour nonetheless declared the

[presse-ndeg-020ceni2024-relatif-la-publication-du](#) (accessed 29 April 2024).

235 'RD Congo : "La Ceni n'était pas prête à organiser les élections dans les délais"' 21 December 2023 <https://www.france24.com/fr/vid%C3%A9o/20231221-rd-congo-la-ceni-n-%C3%A9tait-pas-pr%C3%AAt-e-%C3%A0-organiser-les-%C3%A9lections-dans-les-d%C3%A9lais> (accessed 29 April 2024).

236 The Constitutional Court ruled the decision to hold elections in five pilot countries did not violate the right to equality.

237 For the electoral commission, these five diaspora polling centres offer logistical possibilities to organise elections outside the national territory.

238 IB Mihigo 'Cinq choses à savoir sur le calendrier du processus électoral 2021-2027 en RDC' 8 December 2022 in TalaTala <https://talatala.cd/eclairage/60/> (accessed 9 April 2024).

election day a paid day off.²³⁹ Further, due to delays in opening polling centres, elections were organised in several districts for over one day in contradistinction to what the law and the calendar envisage.

Unlike in other countries,²⁴⁰ the CENI does not have the power to delimit or review electoral boundaries as parliament does so through the Electoral Act. It provides that the national territory is the constituency for presidential elections,²⁴¹ but the territory, the city, and the grouping of communes for Kinshasa are the constituencies for national legislative elections.²⁴² The province and Kinshasa city are the constituencies for senatorial elections,²⁴³ and the city, the territory and communes in Kinshasa are the constituencies for provincial elections.²⁴⁴ Voters thus know in advance the boundaries between constituencies because the limits among provinces are determined by an organic law.²⁴⁵ The capital of a province is a city, and major entities of 100 000 inhabitants can be made cities.²⁴⁶

The Electoral Commission and civil society organisations run civic education campaigns to explain to voters how the registration process is organised. Voter registration centres are generally located in nearby schools. At the close of every registration day, the voter registration centre publishes the complete identities of voters who were registered that day and their photographs. This allows them to

239 'RDC : La journée du 20 décembre, déclarée chômée et payée, en raison de la tenue des élections' 15 December 2023 <https://infosdirect.net/2023/12/15/rdc-la-journee-du-20-decembre-declaree-chomee-et-payee-en-raison-de-la-tenue-des-elections/> (accessed 10 April 2024).

240 Sec 89(2) of the 2010 Constitution of Kenya states 'The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.'

241 Article 100 of the Electoral Act.

242 Article 115 of the Electoral Act.

243 Article 128 of the Electoral Act.

244 Article 143 of the Electoral Act.

245 Article 2(5) of the Constitution.

246 Art 6 of the ETD Loi organique n° 08/016 du 07 octobre 2008 portant composition, organisation et fonctionnement des Entités Territoriales Décentralisées et leurs rapports avec l'Etat et les Provinces.

correct erroneous information and material errors. The process helps individuals to flag voters who were registered more than once. However, the Electoral Commission did not publish the voter roll before the elections.

Article 8 of the Electoral Act obligates the Commission to publish the roll 30 days before the electoral campaign by centre and polling stations. The voter roll must be posted at local representations of the Electoral Commission for consultation 15 days before elections.²⁴⁷ The roll should also be published on the Electoral Commission's website.²⁴⁸ None of this was done on time. Even the main electoral stakeholders contested the audit of the voter roll as the process for selecting the auditors was not inclusive, despite the Electoral Commission recruiting them following a call for applications.²⁴⁹ Further, the opposition kept alleging the existence of ghost voters on the roll. Yet, the audit report of the voter roll recommended the Electoral Commission to provide 'a limited set of information on electoral lists to presidential candidates.'²⁵⁰ The name, profile and audit report that the five expert auditors produced were published six months before the elections.²⁵¹

A few days before elections, the Electoral Commission launched a Mobile App that allowed voters to check polling stations allocated to them.²⁵² Although the launch of the App fell short of the requirement to make public the voter roll, the App enabled voters who had internet access and owned a smartphone to identify their polling stations. In general, the identification of polling stations was sometimes

247 Art 8 of the Electoral Act.

248 As above.

249 'Audit externe du fichier électoral : Les 5 experts sélectionnés par la CENI à pied d'œuvre' 16 May 2023 <https://www.ceni.cd/depeches/2023/05/16/audit-externe-du-fichier-electoral-les-5-experts-selectionnes-par-la-ceni-pied> (accessed 13 April 2024).

250 Rapport final de l'audit externe du fichier électoral de la CENI. Rép. Dém. du Congo (May 2023) <https://www.ceni.cd/sites/default/files/2023-06/AUDIT%20EXTERNE%20FICHIER%20ELECTORAL%20RDC%20-%20RAPPORT%20DE%20MISSION%20-%20Mai%202023.pdf> (accessed 13 April 2024) 10.

251 As above.

252 See Press release 070/CENI/2023 on the launch of the CENI DRC Mobile application for voters and candidates to consult electoral lists by polling station <https://www.ceni.cd/communique-de-presse/2023/11/30/communique-de-presse-ndeg070ceni2023-lancant-officiellement> (accessed 13 November 2024).

a cumbersome process. Normally, former voting centres are turned into polling centres on election day. A day before elections, the Electoral Commission called on voters to check at their registration place the polling station allocated to them. Furthermore, the vote of the diaspora and on the national territory was slated for the same day but no information on the storage and security of ballot boxes was provided. In the diaspora, elections took place at DRC embassies. The embassies had thus the obligation to secure the ballot. Polling stations in embassies operated like normal polling stations in the country and published results at the end of the voting day.

In June 2023, the Minister of Interior submitted to the Electoral Commission a list of 910 political parties eligible to partake in elections.²⁵³ The last provision of Article 12 of the Electoral Act obligates the Ministry to submit and publish the list 12 months before the Electoral Commission commences the process of receiving applications to various elective positions. The list contains the name and acronyms of the party, its founder, and the decision by which it was accepted to operate.²⁵⁴ This is the basis on which CENI made its decision to admit or not lists of candidates presented to it for elections. Political parties not registered with the Ministry of Interior could not compete in elections.²⁵⁵ While the content of an application by a political party is known in advance,²⁵⁶ the public is not made aware of the number of applications submitted, those rejected and the reasons behind rejections. Similarly, there is no information disclosed by political parties on the nomination of their candidates. The process is obscure and non-transparent.

253 'Peter Kazadi transmet à la CENI la liste des 910 partis politiques éligibles aux scrutins en cours' 24 June 2023 in *Mediacongo* https://www.mediacongo.net/article-actualite-123656_peter_kazadi_transmet_a_la_ceni_la_liste_des_910_partis_politiques_eligibles_aux_scrutins_en_cours.html (accessed 10 April 2024).

254 <https://7sur7.cd/sites/default/files/2023-06/Transmission%20de%20la%20Liste%20des%20partis%20politiques%20%C3%83%C2%A9%EF%B8%8Feligibles%20-%20MININTERSEC.pdf> (accessed 29 April 2024).

255 'RDC-Élections : « Non reprise sur la liste des partis », Alliance pour le Changement de Kabund dénonce une main noire du régime Tshisekedi' 5 July 2023 <https://7sur7.cd/2023/07/05/rdc-elections-non-reprise-sur-la-liste-des-partis-alliance-pour-le-changement-de-kabund> (accessed 29 April 2024).

256 Art 12 of the 2004 Act on Political Parties.

Several other categories of information were not made public before the elections. The number and nature of complaints the CENI received and the way it dealt with them; the policy on voter education; details of applications for accreditation by election observers and media;²⁵⁷ the number of complaints and the register of the different categories of observers and deployment areas. Concerning observers, the Electoral Commission does not publish the number and list of observers it has accredited. In general, people were aware of observers through notices by accredited civil society organisations or intergovernmental bodies.

Nonetheless, there is information that could be accessed. Aside from courts that deal with electoral disputes (related to the list of candidates and election results), there exists a religious group-led mediation initiative.²⁵⁸ The group contributes to the prevention and resolution of electoral disputes and encourages parties to resort to judicial and non-judicial existing mechanisms.²⁵⁹ The Electoral Commission also publishes criteria for accrediting observers, both national and international, members of the press and the period within which they must register. The Commission works closely with media organisations to develop a code of conduct, but the CSAC also develops and enforces a code of conduct for media during elections.²⁶⁰ The code is made up of 70 provisions but is not rendered public. Journalists, media houses and political activists using media could be sanctioned when violating the code.²⁶¹

257 Arts 42 & 43 of the Electoral Act.

258 'Processus électoral : la Cime en appelle à l'organisation des élections apaisées en 2023' 21 July 2022 <https://lepotentiel.cd/2022/07/21/processus-electoral-la-cime-en-appelle-a-lorganisation-des-elections-apaisees-en-2023/> (accessed 29 April 2024).

259 <https://slideplayer.fr/slide/10259052/> (accessed 10 April 2024)

260 C Insiwe 'Élections : Le CSAC adopte la directive de réglementation de la campagne électorale dans les médias' June 2023 <https://7sur7.cd/2023/06/22/elections-le-csac-adopte-la-directive-de-reglementation-de-la-campagne-electorale-dans> (accessed 13 April 2024).

261 'Le CSAC a exhorté les médias et les politiques à être responsables pendant les élections' 21 December 2023 <https://www.studiohirondellerdc.org/le-csac-a-exhorte-les-medias-et-les-politiques-a-etre-responsables-pendant-les-elections> (accessed 13 April 2024).

4.5.1 Recommendations

The Electoral Commission must:

- Publish the voters roll containing information allowing the unique identification of each voter, including the full name, identity number, photograph (where it exists), gender and age of each voter, and any subsequent amendments to this information before elections;
- Proactively disclose the process leading to the adoption of the electoral calendar by indicating the extent of its inclusivity;
- Proactively disclose information on arrangements for the inspection of the voters roll by the public to allow for any necessary corrections to be made not just at the time of the voter registration process;
- Disclose information related to the storage and security of ballot boxes until the general count;
- Disclose on time, location and number of voting stations, details of applications for accreditation by election observers and monitors, details of application for accreditation by the media, the number of complaints or petitions received, and the categories of observers admitted;
- Disclose the number and nature of complaints received and how it dealt with them
- Proactively disclose information on its policy on voter education;
- Disclose the full list of service providers, the criteria for their selection and the content of their service contracts, and details of the procurement process; and
- Proactively disclose the register of the different categories of observers and deployment areas.

The Ministry of Interior must:

- Provide details of applications made by political parties for registration as participants in the electoral process, specifying the number of applications made, the number of applications granted, the number of applications denied and reasons for each denial.

Political parties must:

- Indicate proactively the qualifications, rules and procedure for the nomination of candidates.

4.6 Compliance with Guideline 18 (election day)

Compliance with Guideline 18 (election day)		
	Description	Status
a)	Location, as well as opening and closing times of voting stations	Complied
b)	Support mechanisms for voters and election officials through the provision of episodic and periodic reports of election day activities	Partly complied
c)	Information on the closing of voting and vote reconciliation, counting and results management system starting from vote counts at the voting station up to the announcement of final results	Mostly complied
d)	Details of special votes cast including the counting and collation process	Not complied
e)	Information on the occurrence of any technical glitches and how these have been addressed	Partly complied
f)	Information on all complaints or petitions received and how these have been addressed	Not complied
g)	Election results by polling station, which shall be conspicuously posted at each voting station and in publicly accessible electronic and online formats	Partly complied

The 2023 general elections are partly, by media and some observers, termed ‘chaotic’ or ‘shambolic’ because of logistical problems and the high level of irregularities that occurred on election day.²⁶² While the law is clear about the opening and closing time for voting operations, some polling stations opened after significant delays, causing the vote to be extended for over one day in some constituencies.²⁶³ As stated earlier, the location of the polling centres is known in

262 T Mhaka ‘DR Congo’s shambolic election should be a wake-up call for the SADC’ 18 January 2024 <https://www.aljazeera.com/opinions/2024/1/18/dr-congos-shambolic-election-should-be-a-wake-up-call-for-the-sadc> (accessed 28 April 2024).

263 Communiqué de Presse 083/CENI/2023 of 20 December 2023 <https://www.ceni.cd/communiqué-de-presse/2023/12/20/communiqué-de-presse-ndeg-083ceni2023-relatif-la-mesure> (accessed 13 November 2024); Allocution de S.E.M Enoch Kavindele (n 20) 6.

advance as the information is contained on the voter registration card per Article 6 of the Electoral Code. This is also possible because voter registration centres were converted into polling stations (so voters should know where they registered) A day before elections, voters were invited to verify their names and polling stations. In addition, the Mobile App launched by the Electoral Commission helped locate one's polling station.²⁶⁴ Article 52 of the Electoral Code determines that direct elections take place from 06:00 am to 05:00 pm, but voters in the queue are given a token that allows them to vote after the closing time. It was unclear whether the Electoral Commission could, however, extend to the other day voting operations for polling centres where the vote was delayed. While it had no explicit power to do so, it was suggested that CENI had the inherent power to extend voting operations over a few more days based on its constitutional and legal mandate to organise the electoral process and ensure its regularity.²⁶⁵ Further, the citizen's right to vote and to participate in the management of public affairs provided for by both domestic and international norms are in favour of such an extension.²⁶⁶ The Southern African Development Community (SADC) Mission observed

[O]nly 2% of the observed polling stations opened on time, while 98% did not, mainly due to the delay of delivery of voting materials, unavailability of presiding officers and delayed setting up of the voting stations. [...] CENI authorised polling stations that opened late to continue allowing voters to exercise their constitutional rights up to 11 hours following the actual opening time. CENI also issued a press release on the evening of 20 December 2023 authorising the voting to continue on 21 December 2023.²⁶⁷

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- 264 Communiqué de Presse No. 070/CENI/2023 of 30 November 2023 <https://www.ceni.cd/sites/default/files/2023-11/CENI%20RDC%20-%20Communiqu%C3%A9%20de%20Presse%20No.%2070%20-%20Application%20CENI%20RDC%20Mobile.pdf> (accessed 29 April 2024).
- 265 'RDC : Denis Kadima justifie la poursuite du vote par la nécessité de faire participer tout le monde' 26 December 2023 <https://www.radiokapi.net/2023/12/26/actualite/politique/rdc-denis-kadima-justifie-la-poursuite-du-vote-par-la-necessite-de> (accessed 29 April 2024).
- 266 Art 25 of the ICCPR & Art 13 of the African Charter. See also Submissions by Advocate Ivon Mingashang at the Constitutional Court of the DRC as part of presidential election adjudication, 8 January 2024.
- 267 Allocution de S.E.M Enoch Kavindele (n 20) 6.

In this perspective, the National Human Rights Commission (CNDH) reminded the Commission of the obligation to observe the right to equality and dignity of voters and their right to vote and to be elected in accordance with national and international laws.²⁶⁸ Article 47 provides that the mapping of polling stations must be published 30 days before the election campaign. The Electoral Commission published it seven days late.²⁶⁹ It was subsequently posted on the Commission's website.²⁷⁰

As the vote was underway, CENI published several communiqués on its website and its various X(formerly Twitter) accounts among other social media accounts. It informed the public about technical glitches and measures to counter them, the continuation of voting operations in places where significant delays occurred or elections did not take place, and responded to false news. As is the practice, each polling station, including those in the diaspora posted election results at the closing of voting operations. The Electoral Act provides easy access to information related to election results. Article 61 of the Electoral Act indicates the Chair of the polling bureau should draw up a signed record of results copies of which should be handed over to party agents. The local representation of the Electoral Commission must deliver these records upon 'simple request'.²⁷¹ Article 68 provides that the results be posted at the polling bureau and copies handed over to party agents. Interestingly, Article 69 indicates that records of the compilation of votes must be published on CENI's website (no period indicated). This was not done. In addition, the publication of the results of the general elections by the polling bureau must be done at local representations of the Electoral Commission and on its website. No timeline is provided by the law. Hence, a week after the announcement of temporary results for presidential elections, the Electoral Commission posted on

268 CNDH 'Communiqué de presse N° 021/PRES, PNM/01/2023. Elections du 20 décembre 2023 : Premières observations de la Commission nationale des droits de l'homme' 20 December 2023.

269 MOE CENCO-ECC *Observation des élections présidentielle, législatives nationales et provinciales du 20 décembre 2023 en République démocratique du Congo : Déclaration préliminaire* (December 2023) 4.

270 <https://www.ceni.cd/cartographie-et-listes-provisoires> (accessed 13 November 2024).

271 Art 61 of the Electoral Act.

its website the results for the presidential election.²⁷² It has not done so for national and provincial legislative elections and local elections.

The Commission did not provide details of special votes, and information on complaints received and whether they were dealt with. This was crucial for several reasons. Firstly, proactive disclosure of information on special votes would have dispelled the accusations of vote rigging in the polling bureau where the votes cast outnumbered the expected votes.²⁷³ In its interim report, the African Union recommended the Electoral Commission adopt necessary measures to deal with special votes.²⁷⁴ Furthermore, as CENI annulled the vote of 82 candidates for fraudulent electoral practices after an *ad hoc* commission of inquiry it established concluded the candidates were involved in such practices, it was unclear how the Commission reached this outcome. It was also uncertain whether CENI had the power to annul the votes or whether the implicated candidates exercised their right to be heard before adverse decisions against them were adopted. Remedies against such measures exist because the Electoral Commission reinstated one candidate after he had appealed before the Commission.²⁷⁵ None of these procedures were made public. Judging by the surprise some candidates demonstrated when the decision invalidating them was published, one can conclude that they were not informed of adverse proceedings against them.

4.6.1 Recommendations

The Electoral Commission must

- Proactively provide episodic and periodic reports of election day activities and information on vote reconciliation, counting and results management system

272 'Présidentielle : la CENI publie les résultats détaillés par bureau de vote (cartographie)' 8 January 2024 <https://infos.cd/actualite/elections/presidentielle-la-ceni-publie-les-resultats-detaillés-par-bureau-de-vote-cartographie/37854/> (accessed 13 April 2024).

273 Some *PVs* (records) indicated the number of those who voted was higher than expected voters in the said polling bureau.

274 African Union (n 19) 15.

275 See *Décision N° 003/CENI/AP/2023 du 13 janvier 2024 portant réhabilitation des suffrages du candidat Kalumba Mwana Ngongo Justin dans la circonscription électorale de Kasongo, province du Maniema*.

starting from vote counts at the voting station up to the announcement of final results;

- Proactively disclose details of special votes cast including the counting and collation process;
- Inform the public on the way it addressed technical glitches which occurred during elections, on all complaints or petitions received and the way it addressed them;
- Publish results of all types of elections by polling station in publicly accessible electronic and online formats in the timeline set out under the Electoral Act; and
- Inform the public of the basis of its decision to extend voting operations beyond the timeline provided for under the Electoral Act and to annul the results, as well as the due process measures established to that effect, of candidates accused of fraudulent electoral practices and violence at polling stations.

4.7 Compliance with Guideline 19 (post-election day)

Compliance with Guideline 19 (post-election day)		
	Description	Status
a)	Progress in achieving timelines for the declaration of collated results which shall be within a reasonable time or as stipulated by law	Mostly complied
b)	Declaration and publication of final election results, down to the polling station level	Partly complied
c)	Details of all objections, complaints or petitions received and how they were addressed	Not complied
d)	Calculations or allocations of seats and timeframes and processes for the adjustment of political party lists, where applicable	Complied
e)	Evaluation reports on the elections produced by the Election Management Body as well as by election observers and monitors	Mostly complied

The Electoral Act does not determine the timeframe for the publication of the results of general elections nor determine the period beyond which the Electoral Commission should not publish them. It simply clarifies the modalities for such publications. Candidates, political parties, and groupings can, however, tally their votes through the records obtained from various polling stations, local compilation centres and results posted at polling stations. These results are also accessible to the public who may consult them at the polling stations once they are displayed. The Commission provided indications of progress made in compiling the results of presidential elections. A day before elections, it established a monitoring centre that was progressively publishing the results of presidential elections.²⁷⁶ The Centre was equipped with offices, giant screens and a conference room and aimed to guarantee the transparency of the electoral process.

CENI's president gave daily interviews to journalists to report on developments.²⁷⁷ Presidential elections' results were published 12 days after elections.²⁷⁸ However, the Electoral Commission took a reasonable time to publish the results of national,²⁷⁹ provincial legislative²⁸⁰ and local elections.²⁸¹ When it was done, the results of legislative elections were not published down to the polling station level, but the Commission did so for presidential elections. It has not done the same for the rest of the elections. The Electoral Commission could not clearly explain how and why some individual candidates had voting machines and whether the votes made through these machines impacted the outcome of the presidential

276 'Elections 2023 : La CENI met en place un centre de publication progressive des résultats' 20 December 2023 https://www.mediacongo.net/article-actualite-130961_elections_2023_la_ceni_met_en_place_un_centre_de_publication_progressive_des_resultats.html (accessed 1 April 2024).

277 P Lorgerie 'RDC : "Nous essayons de bâtir une culture démocratique"' 29 December 2023 <https://www.dw.com/fr/denis-kadima-nous-essayons-de-b%C3%A2tir-une-culture-d%C3%A9mocratique/a-67854781> (accessed 28 April 2024).

278 Communiqué de presse 086/CENI/2023 on the publication of presidential elections' results <https://www.ceni.cd/communiqué-de-presse/2024/01/02/communiqué-de-presse-ndeg086ceni2023-portant-publication-des> (accessed 13 November 2024).

279 12 January 2024.

280 21 January 2024, close to one month after elections.

281 23 January 2024.

elections.²⁸² As is generally the practice, electoral observers did, in large part, publish their preliminary reports after the elections. These include the Synergy of Citizen Election Observation Missions (SYMOCEL), the African Union Election Observation Mission, the MOE CENCO-ECC and the Carter Centre.

4.7.1 Recommendations

The Electoral Commission must:

- publish final results down to the polling station level for all types of elections, not just presidential elections;
- provide details of all objections, complaints and petitions it received and how it addressed them; and
- publish the evaluation reports on the elections.

282 P Zidi 'Elections en RDC: des opposants rejettent les résultats avant même l'annonce officielle' 31 December 2023 <https://www.rfi.fr/fr/afrique/20231231-elections-en-rdc-des-opposants-rejettent-les-r%C3%A9sultats-avant-m%C3%Aame-l-annonce-officielle> (accessed 30 April 2024).



CHAPTER FIVE
**Assessing compliance of political
parties to the Guidelines on
Access to Information and
Elections in Africa**

CHAPTER FIVE

Assessing Compliance of Political Parties to the Guidelines on Access to Information and Elections in Africa

5.1 Introduction

Rules of modern African constitutionalism create rights and obligations for non-state entities. In its classical negative sense, constitutionalism is generally conceived as a political theory aimed at ensuring political powers are exercised within the limits of the Constitution.²⁸³ Constitutionalism also aims to ensure that non-state actors operate in a manner compliant with its ideals.²⁸⁴ Sadly, political parties fail to abide by the basic rules for the proactive disclosure of relevant information. This symbolises the lack of internal democracy within the country's political parties as the decision-making process remains top-down.²⁸⁵ Political parties are mainly the machines used by those yearning for political power to reach their goals rather than being appropriate tools available for citizens to raise their political awareness and lead them to greater political consciousness.²⁸⁶

5.2 Compliance with Guideline 20 (internal information)

Compliance with Guideline 20 (internal information)		
	Description	Status
a)	Constitution, names of office bearers as well as the policies of the political party	Partly complied

283 W Waluchow 'Constitutionalism' (2023) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/constitutionalism/> (accessed 30 April 2024).

284 On its empowering strength, M Hailbronner 'Transformative constitutionalism: Not only in the Global South' (2017) 65(3) *American Journal of Comparative Law* 527.

285 'RDC: les partis politiques manquent de démocratie interne, selon une enquête de l'Unikin' 15 November 2013 <https://www.radiookapi.net/actualite/2013/11/15/rdc-les-partis-politiques-manquent-de-democratie-interne-selon-une-enquete-de-lunikin> (accessed 30 April 2024).

286 Article 2(2) of Act 04/002 of 15 March 2004 on the Organisation and Functioning of Political Parties.

b)	Symbols, logos or trademarks associated with the political party	Partly complied
c)	Number of registered members	Not complied
d)	Criteria and procedure for nomination and election of candidates for internal and external office	Not complied
e)	Process for dispute resolution and the relevant appeal mechanisms;	Not complied
f)	Mechanisms for public participation, including any special mechanisms for persons with disabilities	Not complied
g)	Mechanisms for monitoring of the nomination process and proceedings	Not complied
h)	Names of party agents or representatives responsible for or on duty at various stages of the electoral process	Not complied
i)	Assets, investments, membership subscriptions, subventions and donations	Not complied
j)	Financial schemes initiated	Not complied

The public has little to no access to information about the organisation and functioning of political parties mainly because there are no internal structures within several political parties tasked with proactively disclosing such information. If they exist, they are not effective.²⁸⁷ The Ministry of Interior, on which the regulatory power over political parties is conferred,²⁸⁸ has no publicly known plan to hold political parties accountable for failing to meet this requirement. The website of the Ministry of Interior does not contain a specific tag on political parties.²⁸⁹ Both the Ministry and political parties fail to meet their obligations under the Guidelines. If the Ministry proactively disclosed information obtained from political parties, for example, at the registration stage,²⁹⁰ the public would have been aware of several aspects of the operations of political parties. Political parties do not have well-functioning websites. The website of the *Alliance des Forces Démocratiques du*

287 Interview with political analyst, Musa Nzamu, Kinshasa, April 2024.

288 See arts 11 & 12 of the 2004 Act on Political Parties.

289 <https://interieur.gouv.cd/> (accessed 30 April 2024).

290 Under article 12 of the Act, founding members of political parties are enjoined to provide the following details: a written letter of registration; certified copies of the part constitution and a record of the constitutive assembly; the party manifesto; declaration of assets of the party and origin of its income; as well as personal files of founding members. Article 13 clarifies the minimum content of the party constitution.

Congo (AFDC) that is a member of the ruling coalition is outdated but contains the party constitution, the Standing Rules of Procedure and the party logo.²⁹¹ There is no specific measure adopted to facilitate access to information by PWDs or those who do not have access to the internet. Not every political party has an operating website. The lack of websites impedes access to their basic documents in a continent-like country with poor infrastructure.

Drafters of the 2004 Act on Political Parties aimed to foster a culture of decentralised management of political parties to ensure individuals in provinces and local level participate effectively and access dispute mechanisms without the need to resort to central management bodies of political parties.²⁹² Therefore, one can assume that individuals who approach offices of parties in provinces or at the local level may access some of the information needed. However, the Guidelines speak to the obligation to proactively disclose the information, which is not complied with. The names of the main figures of large political parties may be widely known, but the names of the majority of founders and leaders of other political parties are found in the list of political parties submitted by the Ministry of Interior to CENI.²⁹³ Equally, political parties have not provided clear numbers of their members. Perhaps one of the reasons political parties do not proactively disclose these details, apart from a lack of such a culture, is the absence of an explicit legal obligation to do so under the 2004 Political Party Act. It is an obligation under the law, for example, to declare the party assets and investments and clarify conditions under which members can register, or the party can receive subventions and donations.²⁹⁴ It is, however, not an obligation to render this information public.

5.2.1 Recommendations

Political parties must

- Systematically publish their constitutions, names of office bearers as well as their policies;
- Provide the exact number of registered members;

291 <https://www.afdcrcd.cd/documents.php> (accessed 30 April 2024).

292 Preamble of the 2004 Act on Political Parties.

293 <https://7sur7.cd/sites/default/files/2023-06/Transmission%20de%20la%20Liste%20des%20partis%20politiques%20%C3%83%C2%A9%EF%B8%8F%20ligibles%20-%20MININTERSEC.pdf> (accessed 30 April 2024).

294 See Arts 13 & 20 of the 2004 Act on Political Parties.

- Provide the criteria and procedure for nomination and election of candidates for internal and external office;
- Publish information related to the process for dispute resolution within the party and the relevant appeal mechanisms;
- Publish information on mechanisms for public participation, including any special mechanisms for persons with disabilities;
- Provide detailed information on mechanisms for monitoring the nomination process and proceedings; and
- Publish the names of party agents or representatives responsible for or on duty at various stages of the electoral process, on assets, investments, membership subscriptions, subventions and donations as well as financial schemes initiated.

The Ministry of Interior must ensure political parties comply with the Guidelines.

5.3 Compliance with Guideline 21 (Legal framework)

Compliance with Guideline 21 (Legal framework)		
	Description	Status
a)	Receipt of campaign funding from both public and private sources	Not complied
b)	Campaign expenditure broken down into distinct line items and specifying the sources of funding and actual amounts	Not complied
c)	Number of registered members	Not complied
d)	Annual audited financial reports	Not complied
e)	All other information, proactively disclosed or available on request	Not complied

Existing legal texts do not entrench a culture of proactive disclosure of financial information by political parties. While they do contain provisions obligating political parties to maintain such information,²⁹⁵ they are mainly used for reporting purposes for political parties that have received state subventions or annual reporting to the Ministry of Interior pursuant to Article 21 of the Political Party Act.²⁹⁶ No provision indicates that the information should be disclosed to the

295 Article 6(5) of the Constitution; Article 21 of the Political Party Act and Articles 16-24 of the 2008 Public Financing of Political Parties Act.

296 https://zoom-eco.net/wp-content/uploads/2020/07/11511_loi_du_15_mars_2004_

public. The political reality does also not demonstrate there is a consistent practice for political parties to proactively disclose information on their spending. Upon receiving these reports, the Ministry of Interior does not make them public either. Since the enactment of the Public Financing of Political Parties Act in 2008,²⁹⁷ it has not been implemented.²⁹⁸ Its provisions on transparent management of public funds, although not requiring public disclosure of information, cannot therefore be implemented.

5.3.1 Recommendations

Parliament must amend relevant laws to ensure that there is an obligation:

- To publish receipt of campaign funding from both public and private sources;
- To publish information related to campaign expenditure broken down into distinct line items and specifying the sources of funding and the amounts;
- To publish the number of registered members; and
- To publish annual audited financial reports.

5.4 Compliance with Guideline 22 (Use of state resources)

Compliance with Guideline 22 (use of state resources)		
	Description	Status
a)	Financial resources, covering the period starting one year before and ending six months after elections, including Government or central bank contracts with currency printers, Central Bank or Monetary Policy Committee reports, and Central Bank reports on Government issued bonds	Not complied

[partis_politiques.pdf](#) (accessed 13 November 2024).

297 <https://www.leganet.cd/Legislation/Droit%20Public/Divers/L.08.005.10.06.2008.htm> (accessed 13 November 2024).

298 SKK Nkashama 'Financement des partis politiques en République démocratique du Congo: Entre consolidation et la perversion de la démocratie' (2014) 1 *KAS African Law Study Library – Librairie Africaine d'Etudes Juridiques* 296.

b)	Institutional resources, covering the period starting six months before and ending three months after elections, including advertising rates and the allocation of airtime and space to all political parties in State-supported media coverage, vehicle or flight logs and fuel allocations to Government departments, and service agreements, contracts and tenders awarded, their amounts and budgets	Not complied
c)	Regulatory resources, covering the period starting one year before and ending six months after elections, including documentary justification for requests for approval of supplementary budgets by Parliament, supplementary budgets passed by Parliament and political party finance legislation	Not complied
d)	Enforcement resources, covering the period starting six months before and ending three months after elections, including details of records of the elections deployment strategy for the police, military, paramilitary and other law enforcement agents involved in ensuring security throughout the electoral process	Not complied

The 2008 Public Financing for Political Parties Act and other relevant laws do not contain provisions for the proactive disclosure of information on use of state resources. However, the Act enjoins political parties to submit their financial report and their electoral expenditure three months after elections for evaluation by the Interinstitutional Commission.²⁹⁹ The information is not disclosed.

5.4.1 Recommendations

- Parliament must amend the 2008 Public Financing for Political Parties Act to require the proactive disclosure of information on the use by all political parties of all state resources; and
- The government must implement the 2008 Public Financing for Political Parties Act.

²⁹⁹ Arts 18-22 of the 2008 Public Financing for Political Parties Act.



CHAPTER SIX
**Assessing compliance by election
observers and monitors to the
Guidelines on Access to Information
and Elections in Africa**

CHAPTER SIX: Assessing Compliance by Election observers and monitors to the Guidelines on Access to Information and Elections in Africa

6.1 Compliance with Guideline 23 (Election observers and monitors)

The openness of an EMB to election observers and monitors can increase the transparency of elections and dissipate frivolous accusations of fraud and electoral malpractices. However, election observers remain accountable in various respects. Guideline 23 aims to ensure the public knows about the activities of observers, their source of funding and their ability to conduct their activities without interference. Guideline 23 is an effort to ‘observe observers’ and enhance the legitimacy of their work.

6.2 Compliance with Guideline 23

Compliance with Guideline 23 (Election observers and monitors)		
	Description	Status
a)	Names and details of key office bearers in the observer or monitoring mission	Complied
b)	Code of conduct for observers and monitors	Partially complied
c)	Financial or non-financial assistance received from any donor or any political party or candidate, including the incumbent government	Not complied
d)	The Election Observation Mission Report, specifying the methodology, deployment plan as well as the assessment of the conduct and outcome of the elections. This shall be published widely and timeously, with preliminary reports issued within 30 days and final reports issued within 90 days	Mostly complied

e)	Conflict of interest or political affiliations of local observers or monitors, if any	Not complied
f)	Sources of funding for any organisations conducting opinion and exit polls and parallel voter tabulation	Not complied

Intergovernmental electoral observation missions (the African Union and the Southern African Development Community-SADC) and national and international non-governmental organisations observed the 2023 general elections. The Electoral Commission published a *communiqué* to announce the beginning of the accreditation process.³⁰⁰ The process spanned from 25 October to 5 December 2023, with international missions being requested to get an invitation from the government through the Ministry of Foreign Affairs before the CENI could accredit them.³⁰¹ The process was made relatively simple. Observers could download the application form from CENI’s website or obtain it at its National Secretariat (for international observers) and provincial or local secretariats (for national observers).³⁰²

The East African Community (EAC) and the European Union (EU), while with the mandate to observe elections in their member states (for the former) or partner states (for the latter), did not actively observe the DRC general elections. The EAC noted, in an official communiqué, that the DRC authorities did not approve its request for observing the elections.³⁰³ The European Union did not deploy its long-term observers countrywide but maintained a small team of electoral experts in Kinshasa. It justified the decision on technical constraints which would not allow the mission to be deployed countrywide. The country’s security services seized the EU

300 Communiqué de Presse No. 056/CENI/2023 <https://www.ceni.cd/communiquede-presse/2023/10/24/communiquede-presse-ndeg056iceni2023-relatif-laccreditation-des> (accessed 30 April 2024).

301 ‘Début du processus d’accréditation des observateurs et témoins électoraux’ 26 October 2023 <https://acp.cd/nation/debut-du-processus-daccreditation-des-observateurs-et-temoins-electoraux/> (accessed 14 April 2024).

302 Communiqué de Presse No. 056/CENI/2023 (n 263).

303 ‘EAC Election observer mission to the 2023 DRC general elections’ 18 December 2023 <https://www.eac.int/press-releases/2992-eac-election-observer-mission-to-the-2023-drc-general-elections#:~:text=East%20African%20Community%20Headquarters%2C%20Arusha,the%20East%20African%20Community%20and> (accessed 28 April 2024).

election experts' IT infrastructure, such as satellite phones and radio frequencies, as they could interfere with the electronic voting machines.³⁰⁴ In November 2023, the mission announced a team of 13 electoral experts would be deployed in the country followed by 42 long-term observers, and 12 short-term observers who would be joined by other short-term observers recruited locally.³⁰⁵ At the end of November, the EU announced it annulled its observations mission 'due to technical constraints'.³⁰⁶

Be that as it may, the African Union³⁰⁷ and SADC³⁰⁸ missions, as well as some non-governmental organisations, disclosed the names of those leading their election observation missions ahead of the polls.³⁰⁹ The AU Mission was made up of 65

304 'Congo Nouveau : « RDC-UE : bras de fer électoral annoncé ! »' 29 November 2023 <https://www.radiookapi.net/2023/11/29/actualite/revue-de-presse/congo-nouveau-rdc-ue-bras-de-fer-electoral-annonce> (accessed 28 April 2024).

305 'RDC : l'Union européenne déploie une mission d'observation électorale' 6 November 2023 https://www.eeas.europa.eu/eeas/rdc-l%E2%80%99union-europ%C3%A9enne-d%C3%A9ploie-une-mission-d%E2%80%99observation-%C3%A9lectorale_fr (accessed 28 April 2024).

306 'République démocratique du Congo : Déclaration de la porte-parole sur l'annulation de la mission d'observation électorale de l'UE' 29 November 2023 https://www.eeas.europa.eu/eeas/r%C3%A9publique-d%C3%A9mocratique-du-congo-d%C3%A9claration-de-la-porte-parole-sur-annulation-de-la-mission-d_und_fr (accessed 13 November 2024).

307 African Union 'Déclaration d'arrivée : Mission d'Observation Électorale de l'Union Africaine aux Élections Générales du 20 Décembre 2023 en République Démocratique du Congo' 17 December 2023 <https://www.peaceau.org/fr/article/declaration-d-arrivee-mission-d-observation-electorale-de-l-union-africaine-aux-elections-generales-du-20-decembre-2023-en-republique-democratique-du-congo> (accessed 14 April 2024).

308 SADC 'SADC launches the Electoral Observation Mission to the Presidential, Legislative and Provincial Elections of the Democratic Republic of Congo scheduled for the 20th of December 2023' 16 December 2023 <https://www.sadc.int/latest-news/sadc-launches-electoral-observation-mission-to-the-presidential-legislative-and> (accessed 14 April 2023).

309 The Carter Centre 'Le Centre Carter déploie une mission pour l'observation des élections générales en République Démocratique du Congo' 25 September 2023 <https://www.cartercenter.org/news/pr/2023/drc-092523.pdf> (accessed 14 April 2024).

members led by former President of Madagascar Hery Rajaonarimampianina.³¹⁰ He was supported by the AU Commissioner for Political, Peace and Security Affairs and the Chair of the Panel of the Wise.³¹¹ On its website, the African Union disclosed the category of individuals making up its mission including African ambassadors accredited to the African Union, pan-African parliamentarians, heads of electoral management bodies, members of civil society organisations, press and academics.³¹² It also indicated they came from 28 African countries.

The mission was tasked to observe DRC elections in accordance with principles laid down under the African Charter on Democracy, Elections and Governance, the AU Declaration on Principles on Elections in Africa and the AU Directives for election observation and monitoring missions as well as local laws.³¹³ The African Union further indicated the institutions the mission would meet in executing its mandate and that it would be deployed throughout the country.³¹⁴ These details were further clarified in its preliminary observation mission report.³¹⁵ The rest of the information required by Guideline 23 was not disclosed by the AU, the SADC or the other missions observing elections in the DRC.

The former Vice-President of Zambia, Enock Kavindele headed the SADC mission. The mission was guided by the Revised SADC Principles and Guidelines Governing Democratic Elections (2021) informed by relevant African Union instruments such as the African Charter on Democracy, Elections and Governance and other conventions of the United Nations.³¹⁶ The Mission held a press conference where it disclosed other details about its work such as the principles based on which they would observe elections, elements to be observed and the composition of the mission. The mission was made up of 71 individuals among which 52 were to be deployed. and their country of origin in the SADC region.³¹⁷ The Mission also disclosed regions of deployment of its observers.³¹⁸

310 African Union (n 19) 2.

311 As above.

312 African Union (n 269).

313 As above.

314 As above.

315 African Union (n 19) 2.

316 Allocution de S.E.M Enoch Kavindele (n 20) 3.

317 Allocution de S.E.M Enoch Kavindele (n 20) 6-7.

318 Allocution de S.E.M Enoch Kavindele (n 20) 7.

Among non-governmental organisations, the Carter Centre and SYMOCEL published *communiqués* on their upcoming election observation missions. The Carter Centre's mission was made up of five experts from France, Mali, Spain, and Switzerland,³¹⁹ who were later joined by 20 long-term observers and a high-level delegation led by Catherine Samba-Panza, the former President of the Central African Republic.³²⁰ SYMOCEL deployed a team of 15 legal, political and electoral analysts, five media analysts, nine pool supervisors, 275 long-term observers, 717 supervisors and close to 44 000 short-term observers.³²¹

The church-led collaboration between the National Episcopal Conference of Bishops (CENCO) and the Church of Christ in Congo (ECC), known as the Election Observation Mission (MOE) CENCO-ECC, was another key election observation mission. The MOE CENCO-ECC is a citizens' platform set up by the CENCO and ECC through their Justice and Peace commissions. Its goal was to contribute to the promotion of an inclusive, transparent, competitive and peaceful electoral process that enhances the legitimacy of state institutions and thus enshrines the preservation of peace, cohesion and stability in the country.³²² Its ability to publish election results alongside official results published by the electoral commission revealed significant irregularities during the 2018 general elections.³²³

319 The Carter Centre 'Le Centre Carter déploie une mission pour l'observation des élections générales en République Démocratique du Congo.' 25 September 2023

<https://www.cartercenter.org/news/pr/2023/drc-092523.pdf>

(accessed 30 April 2024).

320 'Catherine Samba-Panza dirigera la mission d'observation électorale du Centre Carter en République démocratique du Congo' 18 December 2023

<https://www.cartercenter.org/news/pr/2023/drc-121823-french.pdf>

(accessed 16 April 2024).

321 'Élections 2023 : la SYMOCEL déploiera 44.542 observateurs' 1 December 2022

<https://www.sudexpressmedia.com/societe/2022/12/01/elections-2023-la-symocel-deploiera-44542-observateurs> (accessed 16 April 2024).

322 MOE CENCO-ECC *Observation des élections présidentielle, législatives nationales et provinciales du 20 décembre 2023 en République démocratique du Congo : Déclaration préliminaire* (December 2023) 1.

323 'Pour la CENCO, les résultats de la présidentielle publiés par la CENI ne correspondent pas aux données collectées par ses observateurs' 10 January 2019

<https://www.radiookapi.net/2019/01/10/actualite/politique/pour-la-cenco-les-resultats-de-la-presidentielle-publies-par-la-ceni> (accessed 30 April 2024).

Following the 2023 general elections, it published its preliminary report in which it provided its election observation methodology.³²⁴ It conducted the classical observation through the deployment of close to 23 944 short-term observers and 500 long-term observers. It instituted a parallel vote-counting system for independent verification of results based on a representative random sample of 1 056 polling and counting stations in the 26 provinces and 176 towns/territories involved in the 20 December 2023 elections.³²⁵ It also conducted election observation with at least 11 000 election observers and 3 000 members of listening clubs.³²⁶ The preliminary report provided details of the nature of their observers and how observation teams were composed.

While the AU, SADC, Carter Centre, MOE ECC-CENCO and SYMOCEL published preliminary reports of their observation after elections, only final reports of the Carter Centre,³²⁷ MOE ECC-CENCO³²⁸ and SYMOCEL³²⁹ are available online.³³⁰ None of these final reports were published within the period of 90 days following election—as the Guidelines prescribe. In its final report, the Carter Centre notes that ‘The “PreRap” mobile application was among the innovations introduced by the CENI in this election to facilitate the pre-registration of voters and the identification of polling center locations by voters. This appeared to be a positive step to increase

324 https://cencordc.org/attachments/article/416/VF_D%C3%A9claration_MOE_CENCO-ECC_2023.pdf (accessed 13 November 2024).

325 MOE CENCO-ECC (n 284) 1-2.

326 As above.

327 Carter Center *Final Report: General elections in the Democratic Republic of the Congo December 2023* (July 2024) <https://www.cartercenter.org/news/pr/2024/drc-072424.html> (accessed 13 November 2024).

328 MOE CENCO-ECC *Rapport final d'observation électorale en République démocratique du Congo 2019-2023* (June 2024) <https://cejprdc.org/wp-content/uploads/2024/06/RAPPORT-FINAL-DOBSERVATION-ELECTORALE-EN-RDC-20192023-1.pdf> (accessed 13 November 2024).

329 SYMOCEL *Rapport final: Observation des scrutins combinés de décembre 2023 en République démocratique du Congo* (September 2024) <https://symocel.org/2024/09/03/rapport-final-observation-des-scrutins-combines-de-decembre-2023-en-republique-democratique-du-congo/> (accessed 13 November 2024).

330 No final report is available on the AU website. See <https://au.int/en/election-reports> (accessed 13 November 2024).

inclusiveness and access to information'.³³¹ Twenty days before the polls, the Carter Centre published a report sharing electoral trends and highlighting issues concerning the electoral agenda, voter registration, candidacy from political parties, electoral adjudication, women's participation and the electoral campaign, among others.³³² Importantly, the mission recommended that CENI enable access to information by publishing the list of political parties and groupings that presented an equal number of women and men as candidates. It also called on the Commission to publish final and verified statistics of candidates and parties that reached the threshold for receiving candidates' lists.³³³ The report clarifies the modalities of observations and the deployment plan. Two days after the elections, the Centre published its preliminary statement.³³⁴ This report published on its website covers the basic requirements highlighted under the Guidelines and came out within the timeline indicated.

The SYMOCEL published its preliminary report a day after the elections. The report highlights the central focus of observation, including the planning of election operations by the Electoral Commission, voter identification and registration, as well as the registration of candidates and adjudication of related disputes.³³⁵ It also disclosed the methodology and the composition/deployment of observers and their category. It highlighted that out of 20 000 applications for observers, it only obtained 12 000 accreditations.³³⁶ Some of its recommendations pertain to the need to disclose relevant information, for example, on observed irregularities such as the detention by private individuals of electoral voting machines.³³⁷

331 Carter Center (n 328) 47.

332 The Carter Centre 'Rapport préliminaire' 5 December 2023.

333 The Carter Centre (n 288) 3-4.

334 The Carter Center 'Preliminary Statement on the Democratic Republic of the Congo General Elections' 22 Dec. 2023 https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/drc-122223-preliminary-statement.pdf (accessed 30 April 2024).

335 SYMOCEL *Rapport préliminaire sur les scrutins combinés du 20 décembre 2023* 2 <https://www.radiokapi.net/sites/default/files/2023-12/symocel-declaration-preliminaire-scrutins-du-20-dec23.pdf> (accessed 30 April 2024).

336 SYMOCEL (n 291) 3.

337 SYMOCEL (n 291) 15.

The AU³³⁸ and the SADC mission³³⁹ also published their preliminary reports two days after the general elections. In its report, the SADC mission discloses the methodology followed and reveals some violations of the duty to proactively disclose information including the failure to display the voting list outside the polling station before the election day, the lack of sufficient indication on voting steps, among others.³⁴⁰ These issues are captured as recommendations.³⁴¹ Equally, the AU disclosed its methodology, deployment plans and preliminary recommendations to the electoral commission, the government and parliament, political parties and civil society.³⁴² No observer mission disclosed its funding sources.

6.2.1 Recommendations

Election observers, both national and international, must:

- Publish in advance the code of conduct for observers and monitors;
- Disclose information on any financial assistance received;
- For those that have not done so, including the African Union and the SADC Mission, publish their final reports of election observation within 90 days following the end of the elections they observed;
- Disclose information on conflict of interest or political affiliations of local observers or monitors; and
- Disclose information on the sources of funding for any organisations conducting opinion and exit polls and parallel voter tabulation.

338 African Union (n 22).

339 Allocution de S.E.M Enoch Kavindele (n 20) 6.

340 Allocution de S.E.M Enoch Kavindele (n 20) 6.

341 Allocution de S.E.M Enoch Kavindele (n 20) 8.

342 African Union (n 19) 14-16.



CHAPTER SEVEN
**Assessing compliance by
law-enforcement agencies to the
Guidelines on Access to Information
and Elections in Africa**

CHAPTER SEVEN: Assessing Compliance by law-enforcement agencies to the Guidelines on Access to Information and Elections in Africa

7.1 Compliance with guideline 24 (maintenance of law and order)

Compliance with Guideline 24 (Maintenance of law and order)		
	Description	Status
a)	Code of conduct and roles during the electoral period	Not complied
b)	Training and operational plan and manuals for the electoral period	Not complied
c)	Deployment plans from pre-election through to post-election period	Not complied
d)	Budgetary allocations and actual expenditure for the electoral period	Not complied
e)	Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases	Not complied
f)	Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period	Not complied

The need to guarantee adequate security during the electoral process is an important component of the organisation of free, fair and transparent elections.³⁴³ The main law enforcement entity that intervenes actively in the electoral process is the country's national police (PNC). Per Article 182 of the Constitution, the PNC 'is responsible for public safety, the security of people and their property, the maintenance and restoration of law and order, and the close protection of

³⁴³ M Hounkpe & AB Gueye *Rôle des forces de sécurité dans le processus électoral : cas de six pays de l'Afrique de l'Ouest* (2010) 27.

high-level authorities'. The PNC is managed by the central government, specifically by the Ministry of Interior.³⁴⁴ The latter has the mandate to ensure public safety throughout the national territory through the effective deployment of police forces to various polling stations to maintain law and order, secure voting materials, and protect election officials. It also allocates police officials to candidates in need, including presidential candidates. Exceptionally, and under conditions provided for by the law, the National Armed Forces of the DRC (FARDC) can be involved in the protection of people and their properties.³⁴⁵

None of the requirements provided for under guideline 24 were complied with by the PNC. There exists a general code of conduct for police officers in the PNC adopted in 2013.³⁴⁶ However, there is no publicly available instrument regarding the conduct of police officers during the electoral period. While relevant laws on the PNC such as the Constitution, the Organic Law on the Organisation and Functioning of the PNC,³⁴⁷ the 2013 Code of Conduct and relevant administrative measures adopted by the PNC, most of which are public, guide the conduct of police officers at all the time including during elections, adopting and/or rendering public a code of conduct during electoral period would align the behaviour of police officers to specific (security) issues arising during elections. The risk of insecurity and violence during elections and during other times vary in their manifestation and may thus require a different approach to resolving them because their root causes can be different.³⁴⁸ Some risks may require that key stakeholders adopt a code of conduct to be resolved while others can be solved when relevant laws governing the electoral process are in place.³⁴⁹ The following information is not

344 Article 184 of the Constitution.

345 Art 187(2) of the Constitution. See also Art 27 of the 2005 Decree on the Operational Plan for Securing the Electoral Process.

346 Décret 13/040 du 16 septembre 2013 portant Code de déontologie du Policier de la Police nationale congolaise <https://www.leganet.cd/Legislation/Droit%20Public/Divers/loi.13.013.01.06.2013.htm#:~:text=Le%20Policier%20est%20tenu%2C%20en,et%20R%C3%A8glements%20de%20la%20R%C3%A9publique> (accessed 13 November 2024).

347 Of 2011 <https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/113669/COD-113669.pdf> (accessed 13 November 2024).

348 Hounkpe & Gueye (n 297) 27.

349 As above.

publicly disclosed: the deployment of law enforcement forces before, during and after elections, or mechanisms in place to ensure the security of physical buildings and electoral materials, of voters, candidates, representatives of political parties and electoral commission or the IT infrastructure.

The PNC did not disclose budgetary allocations and training plans for police officers. The information on the budget for security services and defence remains secretive in general and the amount allocated to the national police in the budget is not disaggregated to understand what is devoted to elections security.³⁵⁰ The MOE CENCO-ECC, in its preliminary report, confirmed the opacity of budgetary allocations to the security of the electoral process when it noted that ‘the Decree on the Operational Plan for Securing the Electoral Process, published in 2005, has never been updated by the Congolese government.’³⁵¹ No information has been provided on the financing of securing the electoral process’.³⁵² This Decree is, however, public, and accessible. It vests in the PNC the mandate to secure the electoral process although the PNC can be supported by other security services³⁵³ and institutes a human rights-based approach to the security of elections. The security of elections is centred around seven pillars:³⁵⁴

1. Protection of public institutions;
2. Protection of people and their property;
3. The protection of electoral personnel, equipment and infrastructure;
4. Free expression at elections;
5. Police operational intelligence;
6. Operational coordination between all actors involved in security; and
7. Ongoing communication with the population in order to inform them of security measures taken.

350 Ministère du Budget *Budget citoyen 2024. Projet de loi des finances : Le guide pour mieux comprendre le budget de l'Etat* (2023) 34.

351 See the Decree on https://www.droitcongolais.info/files/111.05.05-Decret-du-6-mai-2005_Plan-operationnel-de-securisation-du-processus-electoral.pdf (accessed 13 November 2024).

352 MOE CENCO-ECC (n 284) 3.

353 Art 2(1) of the 2005 Decree on the Operational Plan for Securing the Electoral Process.

354 Art 3 of the 2005 Decree on the Operational Plan for Securing the Electoral Process.

As far as trainings are concerned, publicly available information relates to specific training police officers received in certain regions to secure the electoral process. For instance, a three-month training organised in Beni City successfully empowered over 1 700 police officers on topics like rally management, crowd psychology, securing elections and the use of weapons, maintaining and restoring order, mastering professional intervention gestures and techniques, assimilating the various defence and questioning techniques, intervening with discernment while preserving the physical integrity of the persons questioned, adopting professional behaviour that respects human rights and having self-control in all circumstances.³⁵⁵

Details of election-related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases, were not disclosed. Yet, several electoral crimes were allegedly committed. A synergy of eight CSOs indicated rapes were committed and the murder of one woman before calling on the government to elucidate these crimes and strengthen the security of the electoral process.³⁵⁶ When the Electoral Commission annulled the election of 82 candidates, it indicated that it reached this decision following investigations alleging acts of vandalism and detention of voting machines by individuals.³⁵⁷ No one has ever been prosecuted, although CENI promised to release a list of individuals who were involved in those crimes and necessary evidence.³⁵⁸

355 'RDC : au moins 500 policiers formés sur la sécurisation des élections à Beni' 3 December 2023 <https://www.digitalcongo.net/article/rdc-au-moins-500-policiers-formes-sur-la-securisation-des-elections-a-beni/> (accessed 18 April 2024) ; 'Beni : 1730 policiers congolais préparés à la sécurisation des élections' 12 September 2023 <https://peacekeeping.un.org/fr/beni-1730-policiers-congolais-prepares-la-securisation-des-elections> (accessed 18 April 2023).

356 G Kenye 'Fraude électorale : Des organisations de la société civile appellent la justice à identifier et arrêter les agents de la CENI, « complices de corruption »' 13 January 2024 <https://7sur7.cd/2024/01/13/fraude-electorale-des-organisations-de-la-societe-civile-appellent-la-justice-identifier> (accessed 22 April 2024).

357 CENI 'Communiqué de presse N° 002/CENI/2024' 5 January 2024 <https://zoom-eco.net/wp-content/uploads/2024/01/COMMUNIQUE-DE-PRESSE-n%C2%B0-002-ANNEXE-1.pdf> (accessed 28 April 2024).

358 As above.

Recently, the office of the prosecutor called on CENI to provide such a list and evidence so that prosecutions can be initiated. In a communiqué made public on 17 April 2024, the office of the prosecutor informed the public that it reached a consensus with the Electoral Commission, which promised to submit relevant information for prosecutions to be initiated.³⁵⁹ It was also reported that local militia provided security and maintained law and order during elections in some places where the national police were not present.³⁶⁰ There is no explicit agreement between the PNC and local militia which enables the latter to ensure the protection of the electoral process. But, regarding the 'Wazalendo', an armed group made up of voluntaries for the defence of the nation, one may deduce an implicit acquiescence from the government as they are currently fighting alongside the national army and some of them are officially funded by the government.³⁶¹

The preceding discussion shows the crystallization of the absence of a culture of proactive disclosure of information held by the security forces. Most of the information they hold is openly covered by the seal of security defence and cannot be disclosed. Only an explicit legal obligation to disclose such information could help to ensure that they comply with the obligation to disclose information.

359 Communiqué 1659/D.037/1991/PGCCAS/SEC/2024

360 'Dans l'Est de la RDC, des groupes d'autodéfense armés sécurisent les bureaux de vote' 20 December 2023 <https://www.voaafrique.com/a/dans-l-est-de-la-rdc-des-groupes-d-autod%C3%A9fense-arm%C3%A9s-s%C3%A9curisent-les-bureaux-de-vote/7406094.html> (accessed 28 April 2024).

361 'Chronique électorale (J20) : Les Wazalendo à la rescousse de Felix Tshisekedi' 11 December 2023 <https://actualite.cd/2023/12/11/chronique-electoral-j20-les-wazalendo-la-rescousse-de-felix-tshisekedi> (accessed 28 April 2024).

7.1.2 Recommendations

Law enforcement agencies must:

- Disclose the code of conduct and their roles during the electoral period;
- Publish the training and operational plan and manuals for the electoral period;
- Disclose the deployment plans from pre-election through to post-election period;
- Publish the budgetary allocations and actual expenditures for the electoral period;
- Render public details of any reported election-related crimes; and
- Publish any arrangements whereby any other persons or groups are authorised to perform specific security services during elections.



CHAPTER EIGHT
Assessing compliance by media and
internet regulatory bodies to the
Guidelines on Access to Information
and Elections in Africa

CHAPTER EIGHT:

Assessing compliance by media and internet regulatory bodies to the Guidelines on Access to Information and Elections in Africa

8.1 Compliance with guideline 25 (Regulation on media coverage during elections)

Guideline 25 encourages media and internet regulatory bodies to adopt necessary measures to ensure fair and balanced access of relevant stakeholders to media and adequate and independent coverage of the electoral process. Given that free expression and free media are essential for the existence and survival of open and democratic societies, especially during elections when the ‘demos’ renew the social contract, it is important to maintain a professional and ethical press that is also accountable for its actions. The rapid increase of online media is also in favour of updated regulations that target these ‘new’ media in the Congolese press ecosystem.³⁶²

Compliance with Guideline 25 (Media and internet regulation)

	Description	Status
a)	The complaints procedure against media organisations that violate the regulations	Complied
b)	The enforcement mechanism for ensuring compliance with the decisions taken and sanctions imposed	Not complied
c)	The code of conduct for online media	Not complied
c)	Details of all complaints or petitions received during the electoral period and how these were addressed.	Not complied

362 ‘Médias d’Information en Ligne en RDC (MILRDC): un nouveau-né bienvenu mais trop masculin’ <https://deboutcongolaises.org/medias-dinformation-ligne-rdc-milrdc-nouveau-ne-bienvenu-masculin/> (accessed 30 April 2024).

8.2 Compliance with Guidelines 26-28 (Internet or other media shutdowns)

Compliance with Guidelines 26-28 (internet or other media shutdowns)		
	Description	Status
a)	Media regulators and public or private providers of telecommunication services should refrain from shutting down the internet or other media during the electoral process.	Complied

The Constitution establishes the *Conseil Supérieur de l'Audiovisuel et de la Communication SAC RDC* (CSAC) to 'guarantee and ensure the freedom and protection of the press, as well as all means of mass communication, in compliance with the law'.³⁶³ CSAC also 'ensures compliance with information ethics and fair access for political parties, associations and citizens to official information and communication media'.³⁶⁴ CSAC regulates and sanctions online and offline media and is empowered to adopt regulations to that effect. Apart from CSAC, the National Union for the Congolese Press (UNPC), a private corporation of media and journalists in the DRC, also adopted critical instruments to guide journalists during the electoral process, in addition to documents that already existed.

The 2023 general elections coincided with the enactment of a relatively progressive media law in March 2023. The previous 1996 Press Freedom Act contained harsh media offences.³⁶⁵ Building on this legal framework,³⁶⁶ CSAC, UNPC and other media organisations such as Journalist in Danger (JED) established frameworks to support journalists and ensure they behave in a manner compliant with reporting

363 Art 212(2) of the Constitution. The CSAC replaced the *Haute autorité des médias* (OMEAC) instituted under the Interim Constitution of 2003.

364 Art 212(3) of the Constitution.

365 See Arts 73-88 of the 1996 Press Freedom Act https://swm-programme.info/documents/20142/1234670/COD_LE_OT_02_19960622.pdf/895326cd-4fa2-a231-d452-5f4096ac1eb1?version=1.0&t=1662131588458& (accessed 13 November 2024).

366 See also *Ordonnance-Loi 81-012 du 2 avril 1981 portant statuts des journalistes œuvrant en République du Zaïre* <https://www.leganet.cd/Legislation/Droit%20administratif/Media/OL.02.04.1981.htm> (accessed 13 November 2024).

standards and rules during elections. There is no separate Code of Ethics for online journalists and media. These regulations arguably concern all of them.³⁶⁷ In June 2023, CSAC adopted the Guideline on Electoral Campaigning through the media to avoid any slippage in the run-up to the elections slated for December 2023.³⁶⁸ The 70-article Guideline covers, among other things, rules of professional conduct, standards for the allocation of airtime to candidates, media responsibilities and sanctions to be applied in the event of a slip-up.³⁶⁹ This Guideline builds on another 2015 Guideline, which was adopted to regulate electoral campaigns during the 2015-2016 electoral cycle.³⁷⁰ The Guideline does not institute mechanisms to adjudicate its violations thus suggesting individuals aggrieved with the behaviours of journalists can approach already existing mechanisms within the UNPC (peer tribunal) and CSAC.

On its part, a coalition made up of the UNPC, CSAC, JED and other media organisations adopted and availed for signature a Charter of the Responsibility of Journalists for a Responsible Coverage of Elections and a Deed of Commitment building on the 2004 Code of Ethics and Deontology of Congolese Journalists.³⁷¹ Other documents journalists relied on are the Guidelines for Media Coverage during Elections and the Reporter Without Borders' Guide to the Safety of Journalists and the Integrity of Information during Elections.³⁷²

367 See for example *Directive du Conseil Supérieur de l'Audiovisuel et de la Communication n°CSAC/AP/001/2015 du 05 mars 2015 relative à la campagne électorale à travers les médias*.

368 'Élections : Le CSAC adopte la directive de réglementation de la campagne électorale dans les médias' 22 June 2023 <https://7sur7.cd/2023/06/22/elections-le-csac-adopte-la-directive-de-reglementation-de-la-campagne-electorale-dans>

369 As above.

370 Directive du Conseil Supérieur de l'Audiovisuel et de la Communication n°CSAC/AP/001/2015 du 05 mars 2015 relative à la campagne électorale à travers les médias <https://www.leganet.cd/Legislation/Droit%20administratif/Media/Directive%20CSA%20.05.03.2015.html> (accessed 14 November 2024).

371 Interview with Rosalie Zawadi, Provincial Head of UNPC in Nord-Kivu, Goma, April 2024.

372 RSF *Le guide sur la sécurité des journalistes et l'intégrité de l'information en période électorale* (2022) https://rsf.org/sites/default/files/medias/file/2022/06/BAT_Version_finale_Guide_Elections.pdf (accessed 14 November 2024).

In August 2023, the Association of Online Media and other platforms officially launched the Online Media Charter against Hate Speech.³⁷³ As Obul Okwess, the coordinator of this project, stated, ‘to combat hate speech in online media during election periods, it is imperative that all journalists and media professionals fully adopt this charter’.³⁷⁴ The Charter was made public. This document is the result of media efforts to curb harmful expressions. Its singular focus on combating hate speech can reduce its potential to fight against other harmful expressions online. However, it draws heavily on the 2004 Code of Deontology and Ethics for Congolese Journalists.³⁷⁵

The head of UNPC in North-Kivu believed this framework reduced unethical behaviours among journalists.³⁷⁶ Training for journalists was organised in some parts of the country to ensure they understood the content of these various documents. Complaints procedures against journalists and media are well known and have been used to approach either CSAC or UNPC against journalists and media that violated the law.³⁷⁷ Aggrieved individuals can approach CSAC, UNPC or regular courts and tribunals. Equally, the head of UNPC confirmed that journalists also approached similar mechanisms against those who violated the law including the *Tribunal de Paix*.³⁷⁸ However, it is not clear what enforcement mechanisms for ensuring compliance with the decisions taken and sanctions imposed exist. Equally, the details of all complaints or petitions received during the electoral period and how these were addressed have not been disclosed. In North-Kivu, the UNPC is documenting all the cases received for appropriate publication. Internet

373 <https://www.scribd.com/document/664261389/Charte-des-Medias-d-informations-en-ligne-de-la-RDC-contre-les-discours-de-haine> (accessed 14 November 2024).

374 ‘Elections en RDC : l’importance de la charte des médias en ligne contre le discours haineux’ 10 August 2023 <https://www.radiookapi.net/2023/08/10/emissions/parole-aux-auditeurs/elections-en-rdc-limportance-de-la-charte-des-medias-en> (accessed 19 April 2024).

375 https://intelcongo.com/wp-content/uploads/2019/02/DRC_CODE_DE_DEONTOLOGIE_DES_JOURNALISTES_.pdf (accessed 14 November 2024).

376 Interview with Rosalie Zawadi, Provincial Head of UNPC in Nord-Kivu, Goma, April 2024.

377 As above.

378 Interview with Rosalie Zawadi, Provincial Head of UNPC in Nord-Kivu, Goma, April 2024.

shutdown was not resorted to during this electoral process despite rumours that the government was planning to do so.³⁷⁹ Following the 2018 general elections, internet services were shut off for 20 days.³⁸⁰

8.3 Recommendations

Media regulatory bodies must:

- Disclose the enforcement mechanism for ensuring compliance with their decisions and sanctions imposed; and
- Publish details of all complaints received during the electoral period and how they dealt with them.

379 'Coupures Internet avant le 20 décembre : Une habitude à craindre en RDC?' 15 December 2023 <https://lepotentiel.cd/2023/12/15/coupures-internet-avant-le-20-decembre-une-habitude-a-craindre-en-rdc/> (accessed 14 November 2024).

380 'DR Congo internet restored after 20-day suspension over elections' 20 January 2019 Aljazeera <https://www.aljazeera.com/news/2019/1/20/dr-congo-internet-restored-after-20-day-suspension-over-elections> (accessed 14 November 2024).



CHAPTER NINE
**Assessing compliance by the media
and online media platform providers
to the Guidelines on Access to
Information and Elections in africa**

CHAPTER NINE:

Assessing Compliance by the media and online media platform providers to the Guidelines on Access to Information and Elections in Africa

9.1 Compliance with guideline 29 (Media and Online Media Platform Providers)

Compliance with Guideline 29 (Media and Online Media Platform Providers)		
	Description	Status
a)	Editorial and ethical codes or guidelines utilised in undertaking election coverage, including provisions prohibiting incitement to discrimination, hostility, or violence, if any	Complied
b)	Sanctions for transgressions of these codes or guidelines	Not complied
c)	Complaints procedures for handling breaches of these codes or guidelines	Not complied
d)	Number of complaints received and how these were addressed	Not complied
e)	Code of conduct for staff on procedural matters	Partly complied
f)	Criteria for the allocation of airtime or news coverage for political campaign advertisements and activities	Partly complied
g)	Polling methodologies and margins of error	Not complied
h)	Actual allocation of airtime or news coverage for political campaign advertisements and activities	Partly complied
i)	Plan for transparent repository of all political advertisements, including those targeted at individuals or specific groups on online media	Not complied

j)	Coverage plan for election day	Complied
k)	Criteria for the selection of election commentators, political analysts or other experts	Not complied
l)	Guidelines on responsible use of online media	Partly complied
m)	Conflict of interest media ownership information, political affiliations or party support arrangements, if any	Not complied

Classical media (radio, television and newspaper) and emerging online media constitute the country's media landscape. Radio and television are either commercial, religious, community-based, state-owned, or owned by the United Nations Mission for the Stabilisation of the DRC (Monusco) for the case of Radio Okapi. In 2022, Reporters Without Borders noted the existence of 540 newspapers, among which a dozen appear regularly, 177 televisions, several radio stations and 36 online media.³⁸¹ To this should be added several international media which are aired in the DRC including *Radio France Internationale* (RFI),³⁸² the British Broadcasting Corporation (BBC), Deutsche Welle (DW) and the Voice of America (VOA).

Journalists and media houses remain subjected to intimidation. The arrest of Stanislas Bujakera and his conviction for six-month jail for propagating false news, and fabricating documents demonstrated how journalists remained vulnerable to media freedom violations ahead of elections.³⁸³ This situation is compounded by the existence of several (criminal) laws that are unfriendly towards the exercise of the freedom of the press. Chief of this is the 1963 Ordinance-Law on Offenses Against the Head of State that allows prosecutions of individuals including journalists that

381 'République démocratique du Congo 2022 – FR'

https://rsf.org/fr/analyse_regionale/627 (accessed 23 April 2024).

382 M-S Frère 'RFI: une radio internationale de proximité ? Le phénomène « Appels sur l'actualité en RDC »' (2021)5/6 *Revue d'études radiophoniques et sonores* 1-17.

383 'Recul de la démocratie et des libertés avant les élections' 15 December 2023

<https://www.lapresse.ca/international/afrique/2023-12-15/republique-democratique-du-congo/recul-de-la-democratie-et-des-libertes-avant-les-elections.php> (accessed 28 April 2023).

have ‘publicly offended the head of state’.³⁸⁴ The ordinance contradicts Principle 21(1)(b) of the Declaration of Principles of Freedom of Expression and Access to Information in Africa³⁸⁵ and both the jurisprudence of the African Commission and the African Court enjoining public figures to ‘tolerate’ criticism.³⁸⁶ Prosecutors and security agencies have used this ordinance to arrest, detain or intimidate journalists.³⁸⁷ The Act has remained in force despite the enactment of the 2006 Constitution that guarantees the right to freedom of expression, information and the press³⁸⁸ and the progressive jurisprudence of the African Commission and Court on Human and Peoples’ Rights in relation to criticism made against those holding public power as they ruled that ‘people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether’.³⁸⁹

Only a few media, such as Radio Okapi and the state-owned Congolese National Radio and Television (RTNC), have national coverage. Newspapers are mainly concentrated in Kinshasa, and online media are rapidly emerging. While some media developed written editorial guidelines on elections applicable to journalists and guests, others simply had a ‘common understanding’³⁹⁰ of how they could better provide independent and inclusive media coverage during elections. Such an understanding was not made public. However, when the private media, Radio Le Messager du Peuple, offered airtime for each legislative candidate to discuss

384 *Ordonnance-Loi 300 du 16 décembre 1963 sur la répression des offenses envers le chef de l’État* <https://www.leganet.cd/Legislation/DroitPenal/ordrepUBLIC/OL.300.16.12.1963.htm#:~:text=CD%20LEGANET.CD-,ORDONNANCE%2DLOI%20300%20du%2016%20d%C3%A9cembre%201963%20sur%20la%20r%C3%A9pression,une%20de%20ces%20peines%20seulement>. (accessed 14 November 2024).

385 <https://achpr.au.int/en/node/902> (accessed 14 November 2024).

386 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 338-339, para 155.

387 O Diansosa ‘L’offence au Chef de l’Etat en RDC : Un crime anachronique’ (17 March 2017) <https://www.village-justice.com/articles/offense-chef-etat-crime-anachronique,24526.html#:~:text=D’autres%20opposants%20au%20pouvoir,au%20chef%20de%20l’%C3%89tat>. (accessed 28 April 2024).

388 Art 24 of the 2006 DRC Constitution.

389 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 338-339, para 155.

390 Interview with Clovis Kamoni, Head of Programs, Radio Le Messager du Peuple, Uvira, April 2024.

their projects, it made a public announcement calling on candidates to join and participate.³⁹¹ Top Congo radio channel also offered airtime for presidential candidates.

In other regions, the UNPC instituted networks of radio, television, and newspapers to cover the electoral process. The network linked journalists from all types of media to regularly produce media content and report on elections, with the content being broadcasted simultaneously by the various partner media. The network developed a plan for covering the election day. Other traditional media did the same. The head of the provincial branch of the UNPC in North-Kivu indicated this approach increased the participation of political actors in electoral debates and news beyond party lines and divisions. This statement should be placed in its context to be fully understood. The network of media during elections enabled politicians who could not easily get airtime from some media platforms to have their message aired given that no political or partisan considerations were included in the conditions for airtime.

RTNC, despite being a public media and obliged to ensure equitable access to all forces, be they the ruling majority, the opposition or civil society, has tended to give more airtime to members of the ruling coalition and prioritise information from public officials.³⁹² It has been seen as another branch of political propaganda of the ruling coalition. Its independence and its ability to receive candidates impartially have therefore been called into question. As the media landscape is full of media created by politicians to further their agenda, they have generally refrained from allowing politicians of other camps to obtain airtime. Radio Okapi and Top Congo FM set up a special program for the election campaign, giving all presidential candidates equal access time to discuss and talk about their plans. No information is available on the mechanisms put in place to ensure that rule violations, if any, are sanctioned, or to indicate the number of complaints received.

391 Interview with Clovis Kamoni, Head of Programs, Radio Le Messenger du Peuple, Uvira, April 2024.

392 'RDC : La MP et le FCC ont bénéficié de plus de temps d'antenne dans les médias en juin (rapport)' 12 July 2018 <https://actualite.cd/2018/07/12/rdc-la-mp-et-le-fcc-ont-beneficie-de-plus-de-temps-dantenne-dans-les-medias-en-juin> (accessed 14 November 2024).

The activism of online media such as Actualités.cd, Politico.cd or 7sur7.cd has helped to democratise the electoral debate and offer perspectives that traditional media might neglect. It also prompted traditional media to start offering online information to increase their audience. Individuals who could access information from both online media and the mainstream media thus had a variety of sources of information to learn about the political campaign and the electoral process. Plurality of information sources also facilitates democratic debate, as political actors or engaged citizens who do not have access to one form of media to express their concerns are likely to have access to the other.

9.1.2 Recommendations

Media and online media platform providers must:

- Clarify and disclose sanctions for transgressions of ethical codes and guidelines utilised in undertaking election coverage;
- Disclose the complaints procedures for handling breaches of the ethical codes and guidelines; Publish the number of complaints received and how they handled them;
- Publish the code of conduct for staff on procedural matters;
- Clarify and disclose criteria for the allocation of airtime or news coverage for political campaign advertisements and activities;
- If involved in reporting on results, disclose polling methodologies and margins of error;
- Clarify and publish criteria used for the allocation of airtime or news coverage for political campaigns
- Disclose plans for the transparent repository of all political advertisements, including those targeted at individuals or specific groups on online media;
- Disclose criteria for the selection of election commentators, political analysts or other experts; and
- Disclose conflict of interest media ownership information, political affiliations, or party support arrangements.



CHAPTER TEN
**Assessing compliance by civil society
organisations to the Guidelines on
Access to Information and Elections
in Africa**

CHAPTER TEN:

Assessing Compliance by civil society organisations to the Guidelines on Access To Information and Elections in Africa

10.1 Compliance with guideline 30 (Civil society organisations)

Civil society organisations play an important role in the electoral process as leaders of civic education campaigns and election observation. They also act as a bulwark against electoral authoritarianism by denouncing, throughout the electoral process, any behaviour on the part of the electoral stakeholder concerned that runs counter to electoral standards.³⁹³ The country's Bill of Rights is well equipped to ensure the effective participation of civil society organisations as it recognises numerous rights these organisations rely on to mobilise for or against electoral causes.

Compliance with Guideline 30 (Civil society organisations)		
	Description	Status
a)	Organisational aims and objectives	Partly complied
b)	Membership and composition	Not complied
c)	Details of key staff and office bearers	Not complied
d)	Sources of funding	Partly complied
e)	Operational plans, methodology, manuals and their implementation for civic and voter education	Partly complied

393 G Mulobo 'Observation Électorale en RDC : la société civile demande à la Justice de punir sévèrement les auteurs intellectuels et exécutants des attaques violentes perpétrées contre la communauté' 15 January 2024 <https://conafed.org/index.php/2024/01/15/observation-electorale-en-rdc-la-societe-civile-demande-a-la-justice-de-punir-severement-les-auteurs-intellectuels-et-executants-des-attaques-violentes-perpetrees-contre-la-communaute/> (accessed 22 April 2024).

f)	Possible conflict of interest, which may include the promotion of a particular religious, ethnic or political interest or bias or prejudice in cases where they participate in both voter education and election observation	Not complied
g)	Campaign funders	Partly complied

The landscape of civil society organisations encompasses both classical CSO and pro-democracy groups. The latter have been instrumental in moving the country's democratic ideals forward by leading protests against the third-term agendas and other human rights violations in war-torn zones.³⁹⁴ While registration remains the principle, several pro-democracy groups are not registered to avoid state control over their activities. They also have no clear structure but have participated in the electoral process including through election observation missions.

La Lutte pour le Changement (LUCHA), a notable prodemocracy movement, claims it does not accept funding for its activities as a matter of principle.³⁹⁵ CSOs involved in the electoral process build networks to raise funds and lead activities that would have a greater impact. Churches are legally categorised as confessional CSOs.³⁹⁶ They also lead civic education campaigns in addition to conducting election observation missions. One important example of church-led election observation is the MOE CENCO-ECC, which deployed observers in several polling stations across the country and published results at the precinct level.

Act 004/2001 of 20 July 2001 on Not-For-Profit Organisations³⁹⁷ allows legally constituted civil society organisations to undertake activities as defined in their constitutions. This law predates the enactment of the Constitution. Not all

394 FPolet 'L'émergence de la LUCHA et des mouvements citoyens: un nouvel usage militant de l'international en RDC', PhD Thesis, Université de Liège (2024).

395 'Spécial LUCHA : Qui finance le mouvement de la lutte pour le changement ?' 16 December 2016 <https://habarirdc.net/special-lucha-finance-mouvement-de-lutte-changement/> (accessed 14 November 2024).

396 Art 2(3) of the 2001 Not For Profit Association Act.

397 <https://www.leganet.cd/Legislation/Droit%20Public/loi0042001.20.07.2001.asbl.htm> (accessed 14 November 2024).

organisations maintain a functional website from which relevant information can be obtained. SYMOCEL is one of the major electoral networks. Its website provides relevant information in line with Guideline 30. This includes the aim and objectives of the organisations, membership and composition and details of key staff and office bearers. The rest of the information required under Guideline 30 is not visible on its website.³⁹⁸ Apart from SYMOCEL, another coalition made up of *Agir pour des élections transparentes et apaisées* (AETA), *le Comité national femme et développement* (CONAFED), *l'Association africaine de défense des droits de l'homme*, and *la Nouvelle société civile congolaise*, although involved in the electoral process, did not proactively disclose all the information required under the Guidelines. Through a press conference banner, it is clear, however, that their civic and electoral education campaign was supported by the National Centre for Development Cooperation (CNCD) 11.11.11.³⁹⁹ On its website, the CNCD 11.11.11 discloses the framework of cooperation with AETA, which is the large network of civic education activities.⁴⁰⁰ Nothing is provided in relation to the 2023 general elections. Some of the information is outdated. CONAFED maintains a well-functioning website which does not contain information relating to its involvement in the electoral process. However, it indicates it has experience in electoral matters and some blogs published pertain to its involvement in the CSO coalition. It also indicates its donors, but this information is not disaggregated for one to comprehend those who fund its elections-related activities.⁴⁰¹

398 <https://symocel.org/> (accessed 30 April 2024).

399 C Dimanyayi 'Élections: La synergie des organisations de la société civile déplore la campagne électorale précoce de certains candidats' 10 November 2023 <https://7sur7.cd/2023/11/10/elections-la-synergie-des-organisations-de-la-societe-civile-deploire-la-campagne> (last accessed 22 April 2024).

400 'Agir pour des élections transparentes et apaisées (AETA)' <https://www.cncd.be/+congo-aeta-agir-elections-transparentes-apaisees-+?lang=fr>

401 <https://conafed.org/> (accessed 30 April 2024).

10.2 Recommendations

Civil society organisations involved in the electoral process must:

- Disclose information related to their membership and composition as well as details of key staff and office bearers;
- Publish information on possible conflict of interest; and
- Create and operationalise properly functioning web sites or update those that have been already created



CHAPTER ELEVEN
Conclusion

CHAPTER ELEVEN:

Conclusion

11.1 Recommendations

There is a widespread culture of non-proactive disclosure of relevant information exacerbated by the lack of a robust and straightforward legal framework enjoining relevant state entities to proactively disclose information. During elections, the key stakeholders identified under the Guidelines, Authorities responsible for appointing the Election Management Bodies, Election Management Bodies, Political Parties and Candidates, Law Enforcement Agencies, Election Observers and Monitors, Media and Online Media Platform Providers, Media Regulatory Bodies; and Civil Society Organisations, seem to adopt an indifferent attitude towards information disclosure mainly because of the lack of legal obligations for doing so. However, in instances when they are enjoined to publicly disclose certain information, the experience of the 2023 general elections shows they hardly do so. In the instances of disclosure, the information is disclosed with significant delays.

The first casualty of this state of affairs is the level of civic education and the public's awareness of the relevant stages and requirements of the electoral process. As the Electoral Commission and the government invest less in civic education, this role is left to civil society organisations supported by foreign donors. Although some CSOs benefit from the technical expertise of the Commission Electorale Nationale Indépendante (CENI)/ the Independent National Electoral Commission, they have specific goals agreed upon with their donors. The context of the 2023 general elections can also be recalled here. As there were increasing uncertainties on whether elections would be held, civic education campaigns were minimised, thus influencing public disinterest towards the electoral process and the centralisation of information by the Electoral Commission. It is no surprise that the voter turnout was squarely low at 43%.

The second casualty is accountability and transparency. Proactive disclosure of information rests on the belief that the more relevant stakeholders disclose information, the more citizens and other interested actors are regularly informed about elections and empowered to initiate actions against those who contravene electoral standards. It is difficult to hold the Electoral Commission and key government entities involved in the preparation and facilitation of elections accountable when one lacks appropriate and accurate information on their conduct in exercising their mandates. Non-state entities also manifest a culture of non-disclosure of relevant information. Chief among them are political parties, civil society organisations most of which are involved in election observation and monitoring and the media. This comes as a surprise as these organisations are at the forefront of ensuring electoral norms are respected and that citizens are aware of the electoral process. They thus should, in the first place, ensure that relevant information they hold is proactively disclosed. The lack of an explicit legal obligation cannot be used as an excuse since proactive disclosure of relevant information is a best practice in open and democratic societies. As some reports indicate, the lack of transparency in relation to a number of procedures, for example the annulment of the votes of close to 80 national legislative elections' candidates affected the legitimacy of the electoral commission.

The third casualty is internal democracy within key relevant stakeholders. While democracy aims to legitimise political power and increase popular participation, its principles can be equally applicable to non-state actors such as political parties and civil society organisations to increase accountability and transparency through effective disclosure of information.

A series of 30 horizontal lines for writing.



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