



Situation in the Gabonese Republic

Article 5 Report

21 September 2018

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List of Abbreviations

AFP	<i>Agence France Presse</i>
AU	African Union
CENAP	<i>Commission électorale nationale autonome et permanente</i> (Autonomous and Permanent National Electoral Commission)
DGDI	<i>Direction générale de la documentation et de l'immigration</i>
DGR	<i>Direction générale de la recherche</i>
ECCAS	Economic Community of Central African States
EEAS	European External Action Service
EU	European Union
EU EOM	European Union Election Observation Mission in Gabon
HQ	Headquarters
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-Governmental Organisation
OTP	Office of the Prosecutor
PDG	<i>Parti démocratique gabonais</i> (Gabonese Democratic Party)
PK	<i>Points kilométriques</i>
PNSG	<i>Plateforme nationale de la société civile gabonaise</i>
PTC	Pre-Trial Chamber
RFI	<i>Radio France Internationale</i>
ROLBG	<i>Réseau des organisations libres de la société civile pour la bonne gouvernance au Gabon</i>
RTN	<i>Radio Télévision Nazareth</i>
TC	Trial Chamber
UN	United Nations
UN CED	United Nations Committee on Enforced Disappearances
UNHRC	United Nations Human Rights Council
UNOCA	United Nations Regional Office for Central Africa
UNSG	United Nations Secretary-General
US	United States of America

EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. The Office of the Prosecutor (“Office” or “OTP”) of the International Criminal Court (“Court” or “ICC”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of situations that come to its attention based on statutory criteria and the information available
2. The present report summarises the assessment conducted by the Office in the context of the preliminary examination of the situation in the Gabonese Republic (“Gabon”). This report is focussed on the question of whether any of the crimes listed under article 5 of the Statute have been committed in the territory of Gabon since May 2016, in particular during the post-election period of 31 August - 4 September 2016. Following a thorough analysis, the Office has concluded that the information available does not provide a reasonable basis to believe that the crimes allegedly committed in this situation fall within the Court’s jurisdiction.

Procedural History

3. On 21 September 2016, the Office received a referral on behalf of the Government of Gabon with respect to alleged crimes potentially falling within the ICC’s jurisdiction committed in its territory since May 2016, with no end-date. On 28 September 2016, the Office received a supplementary note from the Gabonese authorities’ legal representatives clarifying the scope of the referral and providing additional details on alleged crimes.
4. On 29 September 2016, the Prosecutor announced the opening of a preliminary examination into the situation in Gabon since May 2016. As part of its preliminary examination activities, the Office conducted a mission to Libreville in June 2017 to inform the relevant stakeholders and the general public of the preliminary examination process; seek clarification on a number of incidents disputed by the Government and the opposition; and gather and verify further information available on the alleged crimes. During the period of September 2016 to August 2018, the Office has received 18 communications pursuant to article 15 of the Statute in relation to this situation.

Contextual Background

5. On 27 August 2016, a presidential election was held in Gabon. Incumbent President Ali Bongo Ondimba, elected for the first time in 2009 after the death of his father who served as President for 42 years, ran for a second term against the main opposition candidate, former Minister of Foreign Affairs, Jean Ping. In spite of

growing reported tensions between the supporters of both candidates in the previous months, the election was generally held in a peaceful climate and with a relatively high voter turnout. A joint mission from the African Union (“AU”) and the Economic Community of Central African States (“ECCAS”) and an election observation mission from the European Union (“EU”) were deployed to monitor the process.

6. Prior to the publication of the official results, both camps declared victory and accused each other of attempting to commit fraud. According to the official results, Ali Bongo Ondimba won 49.8% of the vote against 48.2% for Jean Ping with a voter turnout of 59.5%. The opposition contested the results and resigned from the Autonomous and Permanent National Electoral Commission (*Commission électorale nationale autonome et permanente*, “CENAP”) denouncing widespread irregularities, in particular in Ali Bongo Ondimba’s home province Haut-Ogooué. According to the electoral commission, President Ali Bongo Ondimba won 95.46% of the votes in the province with a turnout of 99.93%. The EU Election Observation Mission in Gabon flagged “evident anomalies” in the results registered in Haut-Ogooué.
7. Immediately after the announcement of the provisional results on 31 August 2016, thousands of Jean Ping’s supporters held public demonstrations in Libreville and other cities claiming the rigging of the election and calling on Ali Bongo Ondimba to step down. In this context, violent clashes between opposition supporters and security forces broke out in the Gabonese capital and other cities resulting, according to some reports, in hundreds of arrests. A more limited number of deaths and injuries on both sides were also initially reported, although there are significant discrepancies between the number of victims confirmed by the Government and those claimed by the opposition. During violent riots in Libreville, the Gabonese National Assembly and other government buildings, as well as various private residences and businesses, were reportedly looted and set ablaze by demonstrators.
8. On the night of 31 August and in the early hours of 1 September 2016, the Gabonese security forces reportedly raided the opposition’s headquarters (“HQ”) and conducted hundreds of arrests. While the opposition claims that civilians in the HQ premises were brutally assaulted, the Gabonese authorities argue that the raid was conducted to arrest armed criminals for their alleged implication in riots and various acts of violence in Libreville. On the same night, the premises of Christian media outlet *Radio Télévision Nazareth* (“RTN”), in the commune of Arkanda near Libreville, were reportedly attacked by armed and masked men.

9. On 27 September 2016, President Ali Bongo Ondimba was sworn in for his new term, after the Constitutional Court, rejecting an appeal by Jean Ping who had called for a recount over widespread allegations of fraud, upheld his election.

Examination of the Information Available

10. In the course of the preliminary examination process, the Office has conducted a thorough factual and legal assessment of all the information available from various sources, including article 15 communications, media reports and the supporting materials and documentation accompanying the Gabonese referral. Consistent with standard practice, the Office has subjected the information available to a rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. In this regard, the Office has taken steps to verify and seek clarification on a number of relevant factual issues, including by requesting additional information from, and holding meetings in The Hague and in Libreville with relevant stakeholders. The Office however notes that the events in question have not been the subject of any independent fact-finding mission or international inquiry. Overall, the information available to the Office appears nonetheless sufficient in volume and quality to enable a determination on the reasonable basis standard.

Preconditions to Jurisdiction

11. The Gabonese Republic deposited its instrument of ratification to the Statute on 20 September 2000. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Gabonese Republic or by its nationals from 1 July 2002 onwards.

Subject-Matter Jurisdiction

12. The preliminary examination has focused on alleged crimes committed in the Gabonese Republic since May 2016, in the context of the 2016 presidential election. In its referral, the Gabonese Government alleges that opposition leader and former presidential candidate, Jean Ping, incited his supporters to commit genocide during his 2016 presidential campaign. It is further alleged that, following the announcement of the presidential election's provisional results on 31 August 2016, hundreds of opposition supporters committed various acts of violence amounting to crimes against humanity. These include alleged acts of destruction, arson and looting against government buildings, and against private businesses and properties, including property belonging to government officials. Additionally, one individual is alleged to have been detained and subjected to ill-treatment by Jean Ping's supporters at the opposition's HQ.

13. As thousands of Jean Ping's supporters rallied across the country against the provisional results, the information available indicates that violent clashes between State security forces and anti-government demonstrators broke out in Libreville and in various cities of Gabon. In this context, State security forces allegedly resorted to the use of excessive and at times, deadly, force against demonstrators, as well as during a violent raid on the opposition's HQ on the night between 31 August 2016 and 1 September 2016.
14. Based on the information available, it appears that between 3 and 8 civilians were killed and up to 41 injured by State security forces during the post electoral crisis. Up until 28 September 2016, the opposition had further reported 47 alleged instances of enforced disappearances although no names or further details have been made available since then. In addition, between 800 and 1,100 individuals were allegedly deprived of their liberty, with claims that some were allegedly subjected to ill-treatment and at least three to acts of torture while in detention. Two alleged victims further claim that an unclear number of women were raped; however no specific details on any individual case or any estimation of the number of alleged victims is available. Finally, the opposition and civil society organisations contend that since the above-mentioned crimes were allegedly committed against persons based upon their perceived political affiliation, the Gabonese Government committed the crime of persecution.
15. Overall, the information available does not provide a reasonable basis to believe that crimes under the Statute have been committed in Gabon in the context of the 2016 post-election violence, either by members of the opposition or by the Gabonese security forces.
16. In particular, there is no reasonable basis to believe that the acts allegedly committed by the opposition during the post-election violence, which include a number of violent acts against properties and one instance of deprivation of liberty and ill-treatment, constituted an "attack against a civilian population", as required under article 7 of the Statute. Specifically, the information available does not provide a reasonable basis to believe that, except for one isolated case of deprivation of liberty, the alleged acts attributed to Jean Ping and other opposition leaders, constitute any of the relevant offences under article 7(1), nor evince a certain pattern of behaviour which could qualify as an "attack" within the meaning of article 7 of the Statute.
17. Furthermore, the information available does not provide a reasonable basis to believe that the leader of the opposition, Jean Ping, directly incited his supporters to commit the crime of genocide during his presidential election campaign. In particular, the information available does not suggest that the incriminated public

statement, which constitutes the core of the Government's allegation, constituted *direct* incitement to commit genocide. Notably, the statement in question does not appear to have communicated to the addressees the need for them to target any specific national, ethnic, racial or religious group, let alone to commit genocide in the sense of article 25(3)(e).

18. Additionally, based on the information available, there is no reasonable basis to believe that the acts allegedly committed by the Gabonese security forces in the aftermath of the announcement of the electoral results formed part of an "attack against a civilian population", under article 7 of the Statute. In particular, although the use of force may have resulted in a limited number of killings and injuries, three cases of unlawful imprisonment and three cases of ill-treatment, the acts committed fall short of the definition of an attack as a "campaign" or "operation" targeted against a civilian population.
19. In the case of the raid on Jean Ping's HQ, although the operation entailed the use of significant force and necessarily required a certain degree of planning and organisation which could be consistent with the definition of "a campaign or operation", the information available does not establish a reasonable basis to believe that a "quantitative threshold" requiring "more than a few", "several" or "many" acts listed under article 7(1) of the Statute has been met.
20. In any event, should a different conclusion be reached regarding the existence of an attack in the sense of article 7(2), the information available does not provide a reasonable basis to believe that such attack would be "widespread or systematic", especially considering the limited geographic area where the alleged crimes reportedly took place, the brief duration of the post-election crisis and the relatively low number of victims. The same would apply to the raid on Jean Ping's HQ, if it was to be considered as a distinct incident or attack.

Conclusion

21. Following the analysis of all information available regarding incidents of violence committed in Gabon since May 2016, the Office has concluded that there is no reasonable basis to believe that the acts considered in this report, while of concern, constitute crimes over which the Court may exercise jurisdiction. Accordingly, there is no reasonable basis to proceed with an investigation and this preliminary examination has been brought to a close. This conclusion does not diminish the seriousness of the human rights violations that appear to have occurred in Gabon in the course of the post-election crisis and that should be addressed at the national level. Should further information become available in the future which would lead

the Office to reconsider these conclusions in the light of new facts or relevant information, the preliminary examination could be re-opened.

22. The Office notes that the referring State, Gabon, may request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with an investigation, pursuant to article 53(3)(a).

I. INTRODUCTION

23. The Office of the Prosecutor (“OTP” or “Office”) of the International Criminal Court (“ICC” or “Court”) is responsible for determining whether a situation meets the legal criteria established by the Rome Statute (“Statute”) to warrant investigation by the Court. For this purpose, the Office conducts a preliminary examination of situations that come to its attention based on statutory criteria and the information available. Once a situation is thus identified, article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.
24. This report summarises the analysis conducted and presents the findings of the Office with respect to issues of subject-matter jurisdiction. Since the Office has concluded that there is no reasonable basis to believe that the crimes allegedly committed in the situation in Gabon fall within the Court’s jurisdiction, no further analysis of the other statutory criteria is required.
25. The Gabonese Republic (“Gabon”) is a State Party to the ICC since 1 July 2002. On 29 September 2016, the Office of the Prosecutor announced the opening of a preliminary examination into the situation in Gabon, based on a referral submitted by the Gabonese authorities with respect to alleged crimes committed in its territory since May 2016, in the context of the presidential election held on 27 August 2016.
26. This report is based on open and other reliable sources, which the Office has subjected to an independent, impartial and thorough analysis. The Office has analysed the supporting materials and documentation accompanying the referral along with, *inter alia*, article 15 communications, media outlet reports and other open sources available.
27. The goal of this process is to reach a fully informed threshold determination of whether there is a reasonable basis to proceed with an investigation. The “reasonable basis” standard has been interpreted by Pre-Trial Chamber (“PTC”) II to require that “there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.¹ It should be recalled, however, that the Office does not enjoy investigative powers

¹ Situation in the Republic of Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09-19-Corr, (“Kenya Article 15 Decision”), para. 35.

at the preliminary examination stage. Its findings are therefore preliminary in nature and may be reconsidered in the light of new facts or relevant information.

II. PROCEDURAL HISTORY

28. On 21 September 2016, the Office received a referral on behalf of the Government of Gabon with respect to alleged crimes potentially falling within the ICC's jurisdiction committed in its territory since May 2016, with no end-date.² In reference to article 14 of the Rome Statute, Rule 45 of the Rules of Procedure and Evidence and Regulation 25(1)(b) of the Regulations of the Office of the Prosecutor, the Government of the Gabonese Republic requested the Prosecutor "to open an investigation without delay".³
29. On 28 September 2016, the Office received a supplementary note from the Gabonese authorities' legal representatives clarifying the territorial and temporal scope of the referred situation.⁴ The note also provided additional details relating to the alleged crimes.
30. On 28 September 2016, in accordance with the provisions of Regulation 45 of the Regulations of the Court, the Office formally notified the Presidency of the ICC of the referral submitted by the Government of the Gabonese Republic.
31. On 29 September 2016, the Prosecutor issued a statement informing the public of the referral and announcing the opening of a preliminary examination into the situation in the Gabonese Republic since May 2016.⁵
32. On 4 October 2016, in accordance with regulation 46(2) of the Regulations of the Court, the Presidency of the ICC assigned the situation to PTC II.⁶ On 16 March 2018, the situation was reassigned to PTC I.⁷
33. As part of its preliminary examination activities, the Office conducted a mission to Libreville in June 2017, to inform the relevant stakeholders and the general public of the preliminary examination process; seek clarification on a number of incidents

² Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016; Gabonese Republic, [Power of Attorney](#), 20 September 2016.

³ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 2 and 8.

⁴ Gabonese Republic, *Note complémentaire sur les éléments de clarification de la situation déferée par la République Gabonaise auprès du Procureur de la Cour Pénale Internationale*. See [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 10-14.

⁵ ICC Prosecutor, [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic](#), 29 September 2016.

⁶ ICC Presidency, [Decision Assigning the Situation in the Gabonese Republic to Pre-Trial Chamber II](#), ICC-01/16-1, 4 October 2016.

⁷ ICC Presidency, [Decision assigning judges to divisions and recomposing Chambers](#), ICC-Pres-01/18, 16 March 2018.

disputed by the Government and the opposition; and gather and verify further information available on the alleged crimes.

34. During the period of September 2016 to August 2018, the Office has received 18 communications pursuant to article 15 of the Statute in relation to this situation. In December 2016, the Office met at the seat of the Court with Jean Ping's legal counsel, who submitted an article 15 communication on behalf of his client, various victims and Gabonese civil society organisations. In April 2017, the Office met with a delegation of representatives of Gabonese civil society organisations, who provided additional information on crimes allegedly committed against the civilian population in the context of the situation.

III. CONTEXTUAL BACKGROUND

A. Historical Background

35. The Gabonese republic is located in the Gulf of Guinea, in Central Africa, with approximately 1.8 million inhabitants.⁸ Its territory is administratively divided into nine provinces,⁹ which are subdivided into 50 departments, each with a capital (*chef-lieu*).¹⁰ Libreville, Gabon's capital and the seat of government, is located in the north-western province of Estuaire and concentrates nearly half of the country's population.¹¹ The Gabonese capital is divided into 6 *arrondissements* comprised of 117 neighbourhoods (*quartiers*).¹² The areas located in the suburbs, along the National 1 highway, are referred to as PK (*points kilométriques*) and are numbered from PK 5 to PK 13 by their distance from Libreville.
36. Since its independence from France in 1960, the Gabonese Republic experienced a series of successive changes in its system of government and political participation. While the first constitution of Gabon as an independent republic, adopted in November 1960, established a parliamentary regime, a new constitution instated in February 1961 the current presidential system of government.¹³ Following former President León M'ba's death in 1967, the then vice-president Albert-Bernard Bongo, later known as El Hadj Omar Bongo Ondimba after his conversion to Islam, became president and, in 1968, abolished all political parties but his own newly-

⁸ Gabonese Republic, *Direction générale de la statistique*, [Résultats Globaux du Recensement Général de la Population et des Logements de 2013 du Gabon \(RGPL-2013\)](#), December 2015, p. xxii.

⁹ The nine provinces are: Estuaire, Haut-Ogooué, Moyen-Ogooué, Ngounie, Nyanga, Ogooué-Ivindo, Ogooué-Lolo, Ogooué-Maritime, Woleu-Ntem.

¹⁰ Gabonese Republic, *Direction générale de la statistique*, [Découpage administratif](#).

¹¹ US Central Intelligence Agency, *The World Factbook*, [Gabon](#), p. 3.

¹² The six *arrondissements* of Libreville are: Haut de Gué Gué, Nkembo, Nombakélé, Plaine Niger, Sogatol and Nzeng Ayong. See *Mairie de Libreville*, [Les arrondissements de la commune](#).

¹³ Yates, Douglas A. *Historical Dictionary of Gabon*, (2018) Fourth edition, Scarecrow Press, p. 126.

created Gabonese Democratic Party (*Parti démocratique gabonais*, “PDG”).¹⁴ Omar Bongo was re-elected President for three consecutive terms.

37. After over 20 years of single-party rule, growing political tensions and social discontent, fuelled by an economic crisis that plagued Gabon in the 1980s and early 1990s, prompted the reinstatement of a multi-party system, while preserving most of the presidential powers.¹⁵ In March 1991, a new constitution re-established the multi-party system (*démocratie multipartidiste*) and incorporated a bill of rights.¹⁶ Omar Bongo was subsequently re-elected under the multi-party system in 1993, 1998 and 2005. Omar Bongo died on 7 May 2009, after 42 years in power.
38. Following President Bongo's death, the PDG nominated Ali Bongo Ondimba, the late president's son, as its candidate for the upcoming presidential election. On 30 August 2009, Ali Bongo Ondimba was elected President with 41.73% of votes, sparking violent protests in various cities. As other candidates claimed victory prematurely and denounced fraud in the election, violence broke out particularly in Libreville and Port-Gentil.¹⁷ In the aftermath of the election, prominent figures of the government, including three former Prime Ministers, founded a new opposition party, the National Union (*Union nationale*).¹⁸ Amidst an opposition boycott, the ruling PDG party obtained 114 seats out of 120 in parliament in the legislative election of December 2011.¹⁹

B. Events Leading Up to and Following the 2016 Presidential Election

39. On 27 August 2016, a presidential election was held in Gabon. Incumbent President Ali Bongo Ondimba ran for a second term against the main opposition candidate, former Minister of Foreign Affairs, Jean Ping. In spite of growing reported tensions between the supporters of both candidates in the previous months, the election was generally held in a peaceful climate and with a relatively high voter turnout.²⁰ A joint mission from the African Union (“AU”) and the Economic Community of

¹⁴ Yates, Douglas A. *Historical Dictionary of Gabon*, (2018) Fourth edition, Scarecrow Press, p. 127.

¹⁵ Africa Research Institute, [Gabon – Expert Briefing](#). Oxford Business Group, The Report: Gabon 2013, p. 19.

¹⁶ [Gabonese Constitution](#), 26 Mars 1991, *Préambule* and *Article premier*.

¹⁷ CNN, [“Violence erupts in wake of Gabon election result”](#), 3 September 2009; Al Jazeera, [“Ali Bongo wins Gabon election”](#), 3 September 2009.

¹⁸ RFI, [“Création de l’Union nationale, grand parti d’opposition”](#), 11 February 2010.

¹⁹ BBC News, [“Gabon’s coalition wins landslide victory”](#), 22 December 2011.

²⁰ EU Election Observation Mission to Gabon (EU EOM), [Final Report](#), published on 12 December 2016, p. 4 (“(...) la campagne s’est déroulée dans le calme et sans incidents majeurs. (...) Le calme a perduré tout au long du jour du vote, y compris lors des opérations de dépouillement, observées par de nombreux gabonais. Dans la majorité des cas observés, les conditions du vote et la conduite du dépouillement ont été jugées satisfaisantes”); UN News, [“UN chief congratulates Gabon for peaceful presidential poll, urges acceptance of results”](#), 29 August 2016.

Central African States (“ECCAS”) and an election observation mission from the European Union (“EU”) were deployed to monitor the process.²¹

40. Prior to the publication of the official results, both camps declared victory and accused each other of attempting to commit fraud.²² On 31 August 2016, the Minister of Interior, Decentralization, Security and Public Hygiene, Pacôme Moubelet Boubeya, announced Ali Bongo Ondimba’s victory by a slender margin. According to the official results, Ali Bongo Ondimba won 49.8% of the vote against 48.2% for Jean Ping with a voter turnout of 59.5%.²³ The opposition contested the results and resigned from the Autonomous and Permanent National Electoral Commission (*Commission électorale nationale autonome et permanente*, “CENAP”) denouncing widespread irregularities, in particular in Ali Bongo Ondimba’s home province Haut-Ogooué. According to the electoral commission, President Ali Bongo Ondimba won 95.46% of the votes in the province with a turnout of 99.93%.²⁴ The EU Election Observation Mission in Gabon (“EU EOM”) flagged “evident anomalies” in the results registered in Haut-Ogooué.²⁵ In its Final Report, the EU EOM further confirmed a number of flaws in the electoral process compromising its integrity and the final results.²⁶
41. Immediately after the announcement of the provisional results, which was repeatedly delayed, thousands of Jean Ping’s supporters held public demonstrations in Libreville and other cities claiming the rigging of the election and calling on Ali Bongo Ondimba to step down.²⁷
42. In this context, violent clashes between opposition supporters and security forces broke out in at least nine neighbourhoods of the Gabonese capital and other cities resulting, according to some reports, in hundreds of arrests. A more limited number of deaths and injuries on both sides were also initially reported, although there are significant discrepancies between the number of victims confirmed by the Government and those claimed by the opposition. During violent riots in Libreville, the Gabonese National Assembly and other government buildings, as

²¹ AU, [“The Joint AU-ECCAS Election Observation Mission held a successful observer orientation programme and met with key stakeholders in Libreville, Gabon”](#), 25 August 2016; EEAS, [“The European Union launches its election observation mission in Gabon”](#), 28 July 2016.

²² *Le Monde Afrique*, [“Présidentielle au Gabon : les deux camps revendiquent la Victoire”](#), 29 August 2016; BBC News Afrique, [“Gabon : Jean Ping se proclame vainqueur”](#), 28 August 2016; Gabon Review, [“Présidentielle : Bilie-By-Nzé proclame Ali Bongo vainqueur, l’équipe de Ping déclare celui-ci élu avec 68%”](#), 28 August 2016.

²³ aLibrevilleTV, Youtube, [“Présidentielle 2016: proclamation des résultats”](#), 31 August 2016; *Jeune Afrique*, [“Gabon : Ali Bongo Ondimba réélu avec 49,80% des voix”](#), 31 August 2016.

²⁴ Gabonese Ministry of Interior, [Résultats officiels de l’élection présidentielle du 27 août 2016 – Haut-Ogooué](#), 31 August 2016.

²⁵ EU EOM, [“La Mission continue à observer la poursuite du processus électoral”](#), 6 September 2016.

²⁶ EU EOM, [Final Report](#), published on 12 December 2016, p. 5.

²⁷ L’Obs, [“Présidentielle au Gabon : émeutes, incendie... la situation dégenère”](#), 31 August 2016.

well as various private residences and businesses, were reportedly looted and set ablaze by demonstrators.²⁸

43. On the night of 31 August and in the early hours of 1 September 2016, the Gabonese security forces reportedly raided the opposition's headquarters ("HQ") and conducted hundreds of arrests. While the opposition claimed that civilians in the HQ were brutally assaulted, the Gabonese authorities argued that the raid was conducted to arrest armed criminals for their alleged implication in riots and various acts of violence in Libreville.²⁹ On the same night, the premises of Christian media outlet *Radio Télévision Nazareth* ("RTN") were reportedly attacked by a group of armed and masked men.³⁰
44. On 27 September 2016, President Ali Bongo Ondimba was sworn in for his new term, after the Constitutional Court, rejecting an appeal by Jean Ping who had called for a recount over widespread allegations of fraud, upheld his election.³¹

IV. EXAMINATION OF THE INFORMATION AVAILABLE

Volume of information

45. The information laid out and analysed in this report was gathered mainly from the referral submitted by the Gabonese authorities, article 15 communications received by the Office - including one communication submitted on behalf of the political opposition and a number of civil society organisations - and multiple international and local media articles. Although the situation was referred to the OTP by the Gabonese Government, most of the alleged crimes were reported by the opposition and civil society organisations as having been committed by State security forces.
46. The information submitted by the Government of Gabon contains a limited set of allegations relating to potential Rome Statute crimes, namely: one instance of deprivation of liberty and torture as crimes against humanity, and one instance of incitement to commit genocide. In addition, according to the Gabonese authorities, the various acts of violence attributed to the opposition supporters amount to persecution under the Statute. In support of these allegations, various media

²⁸ The Guardian, "[Violence erupts after Gabon election as incumbent Ali Bongo named victor](#)", 29 August 2016.

²⁹ RFI, "[Violences post-électorales au Gabon: un millier d'arrestations en une journée](#)", 1 September 2016 (updated on 22 September 2016).

³⁰ Jeune Afrique, "[Personnes disparues, médias muets : le Gabon en manque d'informations](#)", 4 September 2016; Le Point Afrique, "[Gabon : diète médiatique, rumeurs, l'incertitude persiste](#)", 5 September 2016.

³¹ France 24, "[La Cour constitutionnelle du Gabon valide la réélection du président Ali Bongo](#)", 24 September 2016.

articles, police reports and complaints filed to the police by the owners of private businesses affected by the riots were annexed to the referral.³²

47. By contrast, the communications received by the Office allege numerous instances of killings, injuries, deprivation of liberty, torture and other forms of ill-treatment, and rape and other forms of sexual violence. The supporting materials include victim and witness claims, media articles, photos and video recordings. Almost a third of the supporting documents, however, are not related to any alleged crime but rather concern the unfolding of the campaign and the election (including campaign material, videos of Jean Ping's political rallies and transcriptions of his speeches), as well as alleged fraud during the 2016 and previous elections. Furthermore, the vast majority of communications received by the Office provide an overview of the situation of violence that erupted on 31 August 2016, but fail to include specific and detailed information on alleged crimes.
48. Despite the broad coverage of the post-election violence by national and international media, no prominent international human rights organisation published any report or documented specific incidents relating to the situation in Gabon. Various international actors, including the United Nations ("UN") Secretary-General, the United States ("US") and France condemned or referred publicly to the situation of general violence that sparked on 31 August 2016,³³ however without reporting on any alleged crimes or on specific incidents. It should be noted, in particular, that the UN Regional Office for Central Africa ("UNOCA"), located in Libreville, has no mandate to document human rights violations.³⁴
49. In October 2017, arguing that no complaint had been lodged before the competent authorities, the Gabonese Government failed to provide specific information relating to domestic investigations into allegations of enforced disappearances following the post-election crisis to the UN Committee on Enforced Disappearances ("UN CED").³⁵

Quality of information

50. Considering the highly polarised context in Gabon, the information provided by all sources was treated with caution. After violence erupted on 31 August 2016, the

³² Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 9 (*Liste des Pièces communiquées au soutien de la requête de la République Gabonaise*).

³³ France Diplomatie, "[Gabon - Déclaration de Jean-Marc Ayrault](#)", 2 September 2016; US Embassy in Gabon, "[Security Message for U.S. Citizens: Gabonese Election](#)", 31 August 2016; UNSG, "[Statement attributable to the Spokesman for the Secretary-General following the announcement of the provisional electoral results in the Gabonese Republic](#)", 31 August 2016.

³⁴ UNOCA, [Mandate and Missions](#).

³⁵ UN Committee on Enforced Disappearances, "[Concluding observations on the report submitted by Gabon under article 29, paragraph 1, of the Conventions*](#)", 10 October 2017, para. 25.

Gabonese authorities issued regular press releases informing the public of the scale of violence, the nature of the crimes allegedly committed by rioters, and the opposition's alleged plan to spread chaos and violence to destabilise the government and seize power by force.³⁶ On the other hand, Jean Ping and other senior opposition members resorted to social network platforms and international media outlets to denounce widespread abuses and human rights violations allegedly committed by State security forces to secure Ali Bongo Ondimba's re-election through the use of force. In this context, allegations made by both camps differ significantly, in particular with respect to the number of alleged victims and the level of intensity of confrontations between security forces and Jean Ping supporters. For example, one of the most striking controversies concerns the number of civilians killed recorded by the national authorities (4) and those recorded by the opposition and civil society (up to 300).

51. In the absence of public reports from renowned NGOs and inter-governmental organisations relating to the situation at hand, the Office reviewed multiple media articles to verify the information submitted by the Gabonese Government and by the opposition. International media agencies, including *Agence France Presse* ("AFP"), *Le Monde*, *Radio France Internationale* ("RFI") and *Jeune Afrique*, all of which have extensive experience and recognised expertise in covering incidents of post-election violence in Africa, are considered as reliable sources.
52. However, since the events in question have not been the subject of any independent fact-finding mission or international inquiry, media outlets relied mainly on the information provided by the Gabonese Government, the political opposition, civil society as well as alleged victims and witnesses. Generally, media articles provide relevant information on acts of violence, the alleged perpetrators and victims, but these findings remain highly speculative.
53. Furthermore, considering the relatively young democracy in Gabon, domestic civil society seems closely linked to the political opposition. Leaders and members of networks and platforms of civil society organisations, mainly composed of human rights NGOs and labour unions, had openly supported Jean Ping's presidential candidature. Some of them have reportedly been the victims of some of the crimes attributed to State security forces. Additionally, the capacity of Gabonese civil society organisations in reporting and documenting mass crimes appears limited.
54. Overall, the information available to the Office is nonetheless considered sufficient in volume and quality to enable a determination on the reasonable basis standard.

³⁶ The Gabonese authorities issued five press releases on [1](#), [2](#), [3](#), [6](#) and [16](#) September 2016.

V. PRECONDITIONS TO JURISDICTION

55. The Gabonese Republic deposited its instrument of ratification to the Statute on 20 September 2000.³⁷ The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of the Gabonese Republic or by its nationals from 1 July 2002 onwards.³⁸
56. On 28 September 2016, in a supplementary note to its referral, the Gabonese Government clarified that the situation referred began in May 2016, with no end-date (“*la situation faisant l’objet du renvoi débute au mois de mai 2016 et se poursuit dans la durée (periode ouverte)*”) and that it encompasses the totality of the Gabonese territory, with no limitations on the scope of territorial jurisdiction of the Court (“*la situation déferée couvre la totalité du territoire Gabonais*”).³⁹

VI. SUBJECT-MATTER JURISDICTION

57. The preliminary examination has focused on crimes allegedly committed in the Gabonese Republic since May 2016, in the context of the 2016 presidential election. For a crime to fall within the Court’s jurisdiction, it must constitute one of the crimes set out in article 5 of the Statute. There is no information suggesting the existence of an armed conflict in Gabon since May 2016. Accordingly, the present analysis has focused on whether the crimes allegedly committed by opposition leaders or supporters and by State security forces, in the context of the post-election violence, may amount to crimes against humanity under article 7 of the Statute. Additionally, this report also examines the Government’s allegation that opposition leader, Jean Ping, publicly incited his supporters to commit genocide during his electoral campaign.
58. Following a thorough analysis, the Office has concluded that the information available does not provide a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in Gabon since May 2016, including in the context of the post-election violence, either by the opposition leaders or supporters or by State security forces. In addition, the information available does not provide a reasonable basis to believe that the crime of incitement to commit genocide has been committed in the context of the 2016 Gabonese presidential election campaign.

³⁷ ICC-ASP, [Gabon](#).

³⁸ Rome Statute, article 12(1).

³⁹ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 10.

A. Alleged Crimes

59. As noted previously, both the Gabonese Government and the Gabonese opposition have alleged the commission of crimes during the post-election period.
60. In its referral, the Gabonese Government alleges that opposition leader and former presidential candidate, Jean Ping, incited his supporters to commit genocide during his 2016 presidential campaign, months before the holding of the election on 27 August 2016. Namely, during a public meeting, Mr Ping reportedly called on his supporters to “go to war” and to take part in an expedition “to get rid of cockroaches”.
61. It is further alleged that, following the announcement of the presidential election’s provisional results on 31 August 2016, hundreds of opposition supporters committed various acts of violence amounting to crimes against humanity. These include, according to the Government, several acts of destruction, arson and looting against government buildings, and against private businesses and properties, including property belonging to government officials.
62. As thousands of Jean Ping’s supporters rallied across the country against the provisional results, violent clashes between State security forces and anti-government demonstrators broke out in Libreville and various cities of Gabon. In this context, security operations were conducted across the country during which, according to the opposition and civil society organisations, the security forces resorted to the excessive and at times, deadly, force against demonstrators.
63. In particular, on the night of 31 August and in the early hours of 1 September 2016, the Gabonese security forces reportedly conducted hundreds of arrests during a violent raid on the opposition’s HQ. While the opposition claims that civilians in the HQ premises were brutally assaulted, the Gabonese authorities argue that the raid was conducted to arrest armed criminals for their alleged implication in riots and various acts of violence in Libreville.
64. Overall, the opposition’s account on the level of intensity of confrontations between security forces and Jean Ping supporters, especially during the raid on the opposition’s HQ, differ significantly from the Gabonese Government’s narrative of the events. In particular, while there is a general consistency in the number of arrests recorded by both sides during the post-election crisis, there are important discrepancies in the number of killings confirmed by the Government and those claimed by the opposition. Based on the information available, the alleged crimes and number of victims can be summarised as follows:

65. *Killings and injuries*: estimations of the number of civilians allegedly killed in the period from 31 August to 4 September 2016 range from four according to the Government up to 300 according to the opposition. However, sufficiently credible information is available only with respect to 3 to 8 killings during the post-election period, including two persons killed during the alleged attack on the opposition's HQ. Additionally, between 38 and 41 civilians were reportedly injured during the same period.
66. The Government further alleges that one police officer was killed, and that between 67 and 70 members of the Gabonese security forces were injured during the events. No casualties among the State forces were reported during the alleged attack on the opposition's HQ.
67. *Enforced disappearances*: the opposition has alleged 47 instances of enforced disappearances related to the post-election unrest, without however providing further details since the allegation was made in September 2016.
68. *Deprivation of liberty*: the information available suggests that between 800 and 1,100 individuals were arrested in Gabon in the period from 31 August to 4 September 2016, in particular on the first two days. On 1 September 2016, the Minister of Interior reported that State security forces had arrested between 600 and 800 individuals in Libreville, including during the alleged attack on Jean Ping's HQ, and conducted between 200 and 300 arrests in other cities. International media outlets generally reported over a thousand arrests during the same five-day period.
69. *Torture and other forms of ill-treatment*: the opposition alleges that a large number of opposition supporters were subjected to ill-treatment during their detention, including acts of torture, without however providing further detailed information. It is also alleged that one civilian was forcibly detained and tortured by members of the opposition due to his perceived affiliation with the Government.
70. *Rape and other forms of sexual violence*: the opposition alleges that incidents of rape and other forms of sexual violence reportedly occurred in the context of post-election unrest, without however providing any information in support of this allegation.
71. *Persecution*: both the Government in its referral and the political opposition allege that the violent acts they attribute to the opposition and the State security forces respectively, were committed on a discriminatory basis as to constitute persecution.

B. Legal Analysis

72. The information presently available does not provide a reasonable basis to believe that crimes against humanity under article 7 of the Statute have been committed in Gabon since May 2016, including in the context of the post-election violence, either by members of the opposition or by the Gabonese security forces. In addition, the information available does not provide a reasonable basis to believe that direct and public incitement to commit genocide occurred in the context of the 2016 election campaign.

1. Contextual elements of crimes against humanity

73. The contextual elements of crimes against humanity require: (i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act and the attack; and (v) knowledge of the attack.⁴⁰ Pre-Trial Chambers have indicated that at stages prior to an investigation, it is not possible to adequately address the contextual element of the knowledge of the attack.⁴¹ Therefore during the preliminary examination stage, this element does not come under analysis.

An attack against a civilian population

74. Article 7(2)(a) defines an attack directed against any civilian population as a course of conduct involving the multiple commission of the acts referred to in article 7(1) of the Statute against a civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.⁴² The term is not restricted to a military attack,⁴³ but instead refers to a campaign or operation carried out against the civilian population.⁴⁴

75. In accordance with article 7(2)(a), a course of conduct entails the “multiple commission of acts”, which means “more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred.”⁴⁵ Trial Chamber III (“TC III”) has observed that “the terms of the Statute and the Elements of Crimes are clear in providing that the multiple commission of acts can only include acts referred to in Article 7(1),” thus “only those acts enumerated in Article 7(1)(a) to

⁴⁰ Côte D’Ivoire Article 15 Decision, para. 29. See also *Gbagbo* Article 58 Decision, para. 29.

⁴¹ Côte D’Ivoire Article 15 Decision, para. 29; Kenya Article 15 Decision, para. 79.

⁴² Rome Statute, article 7(2)(a). See also, e.g., *Blé Goudé* Confirmation of Charges Decision, para. 125; *Gbagbo* Confirmation of Charges Decision, para. 208; *Ntaganda* Confirmation of Charges Decision, para. 23; Côte D’Ivoire Article 15 Decision, para. 28; *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 393.

⁴³ See Elements of Crimes, Article 7, Introduction, para. 3. See also *Katanga* Trial Judgment, para. 1101.

⁴⁴ *Katanga* Trial Judgment, paras. 1097, 1101; *Gbagbo* Confirmation of Charges Decision, para. 209; Kenya Article 15 Decision, para. 80; *Bemba* Confirmation of Charges Decision, para. 75; *Ruto et al.* Confirmation of Charges Decision, para. 164.

⁴⁵ *Katanga* Trial Judgment, para. 1101; *Bemba* Confirmation of Charges Decision, para. 81.

(k) may be relied upon to demonstrate the ‘multiple commission of acts’ for the purposes of Article 7.”⁴⁶ As explained by PTC I, the expression “course of conduct” describes “a series or overall flow of events as opposed to a mere aggregate of random acts.”⁴⁷

76. The multiple acts committed must be directed against a civilian population. The attack must be directed against the civilian population as a whole and not merely against a limited and randomly selected group of individuals.⁴⁸ Nevertheless, the target of the attack does not have to be the *entire* civilian population of the geographical area in question.⁴⁹

Pursuant to or in furtherance of a State or organisational policy

77. According to article 7(2)(a) of the Statute, the course of conduct involving the multiple commission of acts under article 7(1) must be carried out “pursuant to or in furtherance of a State or organisational policy to commit such attack”.⁵⁰
78. The Elements of Crimes for article 7 provide that a “policy to commit such attack” requires that the State or organisation actively promote or encourage the attack against a civilian population.⁵¹ However, the policy need not be explicitly defined or formalised by the State or organisational group.⁵² Trial Chamber II (“TC II”) has expressed that the existence of a State or organisational policy may, in most cases, be inferred from the repetition of acts performed according to the same logic, the existence of preparatory activities or collective mobilization orchestrated or coordinated by the State or organisation.⁵³

⁴⁶ *Bemba* Trial Judgment, para. 151 (while also further noting that that “this is without prejudice to acts not listed in Article 7(1) being considered for other purposes, such as, for example, in determining whether the attack was directed against a civilian population or was pursuant to or in furtherance of a State or organizational policy.”).

⁴⁷ *Gbagbo* Confirmation of Charges Decision, para. 209; See also *Bemba* Trial Judgment, para. 149.

⁴⁸ *Katanga* Trial Judgment, para. 1105; Côte D’Ivoire Article 15 Decision, para. 32; *Bemba* Confirmation of Charges Decision, para. 77.

⁴⁹ *Katanga* Trial Judgment, para. 1105; Côte D’Ivoire Article 15 Decision, para. 33; *Bemba* Confirmation of Charges Decision, para. 77.

⁵⁰ The policy to carry out the attack against a civilian population must be attributed to a State or organisation. PTC III, agreeing with PTC II, found that the term “State” is “self-explanatory” and that a State policy “does not necessarily need to have been conceived ‘at the highest level of the State machinery’” but could also include “a policy adopted by regional or even local organs of the State.” Côte d’Ivoire Article 15 Decision, para. 45. See also Kenya Article 15 Decision, para. 89.

⁵¹ Elements of Crimes, article 7, Introduction, para. 3. See also *Gbagbo* Confirmation of Charges Decision, para. 214.

⁵² *Mbarushimana* Confirmation of Charges Decision, para. 263; *Gbagbo* Article 58 Decision, para. 37; Côte D’Ivoire Article 15 Decision, para. 43; Kenya Article 15 Decision, paras. 85-86; *Bemba* Confirmation of Charges Decision, para. 81. See also *Katanga* Trial Judgment, para. 1108. See also *Gbagbo* Confirmation of Charges Decision, para. 215 (“there is no requirement that the policy be formally adopted”).

⁵³ *Katanga* Trial Judgment, para. 1109. See also *Blé Goudé* Confirmation of Charges Decision, para. 128.

Widespread or systematic nature of the attack

79. In order to fall within the scope of article 7 of the Statute, the attack against the civilian population must be widespread or systematic in character.⁵⁴ The reference to a widespread or systematic attack excludes isolated or random acts of violence from the concept of crimes against humanity.⁵⁵ Only the attack itself, and not the alleged individual acts, are required to be “widespread” or “systematic”.⁵⁶
80. The term “widespread” refers both to the large-scale nature of the attack and the number of targeted persons,⁵⁷ including “an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians.”⁵⁸ However, the assessment of whether an attack is widespread is not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts.⁵⁹
81. The term “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence” and can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis.”⁶⁰ The existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred.⁶¹ However, as stressed by TC II, the terms “policy” and “systematic” should not be considered synonyms. The adjective “systematic” qualifies the attack and illustrates a pattern of repetitive behaviours and violent acts linked with each

⁵⁴ See also *Katanga* Trial Judgment, para. 1111 (noting that the widespread or systematic nature of the attack distinguishes, and is the hallmark of, crimes against humanity).

⁵⁵ *Katanga* Trial Judgment, para. 1123; *Katanga and Ngudjolo* Decision on Confirmation of Charges, para. 394. See also *Harun and Kushayb* Article 58 Decision, para. 62.

⁵⁶ Kenya Article 15 Decision, para. 94. *Bemba* Confirmation of Charges Decision, para. 151. See also *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 395.

⁵⁷ *Gbagbo* Confirmation of Charges Decision, para. 222; *Katanga* Trial Judgment, paras. 1098, 1123; Côte d’Ivoire Article 15 Decision, para. 53, quoting Kenya Article Decision, para. 95; *Gbagbo* Article 58 Decision, para. 49. See also *Blé Goudé* Confirmation of Charges Decision, para. 131; *Bemba* Confirmation of Charges Decision, para. 83; *Harun and Kushayb* Article 58 Decision, para. 62; *Hussein* Article 58 Decision, para. 19. See also *Ntaganda* Confirmation of Charges Decision, para. 24.

⁵⁸ *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 395; *Bemba* Confirmation of Charges Decision, para. 83.

⁵⁹ *Gbagbo* Confirmation of Charges Decision, para. 222; Côte d’Ivoire Article 15 Decision, para. 53.

⁶⁰ *Gbagbo* Confirmation of Charges Decision, para. 223; *Katanga* Trial Judgment, para. 1123; Côte d’Ivoire Article 15 Decision, para. 54, quoting from the Kenya Article 15 Decision, para. 96; *Gbagbo* Article 58 Decision, para. 49. See also *Katanga* Trial Judgment, para. 1113 (referring to the existence of a repeated pattern of conduct or the reoccurring or continuous perpetration of interlinked, non-random acts of violence).

⁶¹ *Bemba* Article 58 Decision, para. 33; *Hussein* Article 58 Decision, para. 19.

other, while “policy” demonstrates that the State or the organisation aims to conduct an attack against the civilian population.⁶²

2. Alleged crimes against humanity attributed to the opposition

82. The information available does not provide a reasonable basis to believe that the crimes allegedly committed since May 2016 by the opposition in the context of the 2016 post-election violence were part of “an attack directed against any civilian population”, a required contextual element for crimes against humanity under the Statute.
83. The information available suggests that anti-government demonstrators committed various acts of violence during the protests that followed the announcement of the presidential election’s provisional results on 31 August 2016. These include several acts of destruction, arson and looting against government buildings, and against private businesses and properties, including property belonging to government officials.⁶³
84. In particular, the information available indicates that violent clashes between demonstrators and State security forces occurred in various cities of Gabon, including Libreville, Port-Gentil, Bitam, Oyem, Lambaréné and Mouila. In the Gabonese capital, where most of the episodes of violence reportedly took place, numerous instances of looting and destruction of property were reported in all six arrondissements, in particular, in the quartier des Charbonnages, Hauts de Gué-Gué, Cocotiers, Nzeng-Ayong, Akebes, near the *Institut Africain d’Informatique* and around the PK areas.⁶⁴
85. According to the information available, demonstrators blocked roads with debris and burnt cars,⁶⁵ and committed several acts of arson and looting against government buildings and private businesses. On 31 August 2016, in Libreville, anti-government demonstrators reportedly looted and set ablaze the National Assembly in the *Boulevard Triomphal*, where the Senate, the City Hall, the seat of the national television network as well as ministries and various embassies are

⁶² *Katanga* Trial Judgement, para. 1113. See also *Gbagbo* Confirmation of Charges Decision, para. 216 (noting that “the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7(1) and (2)(a) of the Statute”).

⁶³ US Embassy in Libreville, “[Security Message for U.S. Citizens: Post-Election Civil Disturbance in Gabon](#)”, 21 September 2016; Gabonese Ministry of Interior, “[Communiqué de presse du Ministère de l’Intérieur, de la Décentralisation, de la Sécurité et de l’Hygiène Publiques](#)”, 1 September 2016.

⁶⁴ US Embassy in Libreville, “[Security Message for U.S. Citizens: Post-Election Civil Disturbance in Gabon](#)”, 21 September 2016; Gabonese Ministry of Interior, “[Communiqué de presse du Ministère de l’Intérieur, de la Décentralisation, de la Sécurité et de l’Hygiène Publiques](#)”, 1 September 2016.

⁶⁵ US Embassy in Libreville, “[Security Message for U.S. Citizens: Gabonese election](#)”, 1 September 2016.

located.⁶⁶ On the same date, the *Conseil national de la démocratie* was also reportedly looted and vandalised and the Central Prison severely damaged, allowing a number of detainees to escape.⁶⁷

86. According to the Gabonese Government, Jean Ping and other political leaders of the opposition planned and instigated their supporters to engage in such conduct. In particular, the Gabonese Government alleges that “Gabon has been the scene of riots and serious abuses committed against the civilian population, designed to stir up trouble and ignite a climate of fear and violence with the aim of destabilising the country in the context of the presidential election”.⁶⁸ The Government further alleges that these acts are the result of “a plan, prepared for several months by the partisans of Jean Ping (...) and intended to create a climate of terror among the supporters of Ali Bongo, and more broadly of the civilian population”.⁶⁹ However, apart from some reports elusively linking associates of Jean Ping to certain acts of violence, there appears to be little supporting information available to substantiate this claim.
87. In addition, one individual is alleged to have been detained by Jean Ping supporters before he was found by security forces on 1 September 2016 during the raid conducted on Jean Ping’s HQ. According to information submitted by the Gabonese Government in support of the referral, the victim reportedly showed signs of having been subjected to physical and psychological abuse, including by being severely wounded with a nail by Jean Ping supporters.⁷⁰ The victim’s account of the event suggests that he was detained for one or two days.⁷¹
88. The Government’s referral places specific emphasis on this alleged incident of deprivation of liberty and ensuing ill-treatment, and contends that the various acts of violence committed by anti-government protesters amount to the crime against humanity of persecution.⁷²
89. While the Government’s referral emphasises a number of incidents of violence against property, including various acts of arson, destruction and looting, which

⁶⁶ *Ouest France*, “[Gabon. Réélection contestée d’Ali Bongo, l’Assemblée nationale en feu](#)”, 1 September 2016; Paris Match, “[Gabon : l’Assemblée nationale en flammes après la réélection d’Ali Bongo](#)”, 31 August 2016.

⁶⁷ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 7.

⁶⁸ « [L]e Gabon a été le théâtre d’émeutes et d’exactions graves commises à l’encontre de la population civile, destinées à semer le trouble et à faire régner un climat de peur et de violence au sein du pays afin de le déstabiliser dans le contexte des élections présidentielles organisées. » Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 2 (OTP translation).

⁶⁹ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 8. (OTP translation).

⁷⁰ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 6.

⁷¹ VoaAfrique, “[La société civile demande une enquête internationale sur les “massacres” post-électoraux au Gabon](#)”, 12 September 2016.

⁷² Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 6-8 and 12-14.

occurred in the context of protests and riots, these alleged offences do not constitute any of the underlying acts listed under article 7(1)(a-k) of the Statute.

90. In addition, the information available does not support the conclusion reached by the Government that the acts committed by protesters during the post-election violence could amount to persecution.
91. First, even if property destruction of significant gravity could meet the threshold of article 7(1)(k) under certain circumstances, in this case the looting of a limited number of private businesses, stores and supermarkets, and several acts of arson and looting against government buildings are seemingly not of a character similar to other offences under article 7(1), such as to cause great suffering, or serious injury to body or to mental or physical health. Therefore the acts of destruction committed in this situation cannot be considered to amount to “other inhumane acts” under article 7(1)(k) of the Statute.
92. Second, it must be recalled that while international jurisprudence has recognised that certain acts against property could, in certain circumstances,⁷³ constitute persecution as a crime against humanity, under the Statute persecution requires a link to another act enumerated in article 7(1) or another crime under the Statute.⁷⁴ This does not appear to be the case in the present situation.
93. In addition, neither the referral nor the information available from other sources suggest a distinct discriminatory ground for the alleged persecution. The information available does not suggest that such acts of arson, destruction and looting, for instance, were carried out with discriminatory intent. On the contrary, it appears that most of the businesses and properties were targeted at random during the riots. For instance, in Libreville, businesses targeted have included the ABC shopping mall in the quartier des Charbonnages, a gas station in the quartier of Plein Ciel, an agency of the telecommunications company Airtel and a CKDO

⁷³ In *Kupreskic*, the ICTY Chamber explained that “the comprehensive destruction of homes and property” if committed on discriminatory grounds, may constitute persecution as “[s]uch an attack on property in fact constitutes a destruction of the livelihood of a certain population” and “may have the same inhumane consequences as a forced transfer or deportation”. It also noted, however, that “[t]here may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds”. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgement, Trial Chamber, 14 January 2000, para. 631.

⁷⁴ Article 7(1)(h) of the Statute.

supermarket store,⁷⁵ and a number of Mauritanian, French, Lebanese and Chinese stores that were reportedly looted.⁷⁶

94. As described previously, it has been reported that in some instances, demonstrators also reportedly attacked governmental buildings and private property belonging to government officials.⁷⁷ For instance, in Nzeng Ayong, a building owned by the First Vice-Prime Minister, Paul Biyoghe-Mba, and a house owned by the CENAP's President, René Aboghé Ella, were allegedly set ablaze during the unrest, and the textile company MVG, property of the Bongo family, was reportedly looted.⁷⁸ However, the information available does not indicate that these buildings were targeted on discriminatory grounds, but rather that protestors targeted such property to express their dissatisfaction with the government in place and the allegedly rigged electoral results.
95. As noted above, the Government's referral also mentions an incident during which an individual was detained by opposition supporters at Jean Ping's HQ and subjected to psychological and physical abuse, including the use of a nail to inflict pain.⁷⁹ After his liberation by State security forces on 1 September 2016, the victim reportedly filed a complaint for premeditated assault and battery (*coups et blessures volontaires*).⁸⁰ The alleged victim claims that one of Mr Ping's close associates ordered his detention, accusing him of espionage for Ali Bongo Ondimba's regime, and threatened to kill him.⁸¹ There is however no information available suggesting the occurrence of any other incident of deprivation of liberty or ill-treatment allegedly committed by individuals affiliated with the opposition.
96. The allegation that crimes against humanity were committed by Jean Ping and other leaders of the opposition is therefore based on a number of allegedly violent acts against properties, which do not constitute any of the underlying acts listed under article 7 of the Statute, and on one instance of deprivation of liberty with ill-treatment, which appears to have been an isolated incident. Therefore, and bearing in mind that "only those acts enumerated in Article 7(1)(a) to (k) may be relied upon to demonstrate the 'multiple commission of acts' for the purposes of Article

⁷⁵ Gabonéco, "[Présidentielle 2016 : Lourd bilan économique suite aux violences post-électorales!](#)", 6 September 2016; *Le 360 Afrique*, "[Mauritanie-Gabon : Pillage de commerces de résidents mauritaniens à Libreville](#)", 5 September 2016; and *Le Monde Afrique*, "[Au Gabon, les entreprises françaises sur le qui-vive](#)", 2 September 2016.

⁷⁶ RFI, "[Gabon: Ali Bongo réélu président, affrontements à Libreville](#)", 31 August 2016 (updated on 1 September 2016).

⁷⁷ RFI, "[Gabon: 27 personnes encore retenues au OG de Jean Ping](#)", 2 September 2016.

⁷⁸ RFI, "[Gabon: 27 personnes encore retenues au OG de Jean Ping](#)", 2 September 2016.

⁷⁹ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 6.

⁸⁰ *Afrique Télévision*, "[Gabon: La Société Civile Demande une Enquête Internationale sur les « Massacres » Post-Électorales](#)", 12 September 2016. Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 6.

⁸¹ *Afrique Télévision*, "[Gabon: La Société Civile Demande une Enquête Internationale sur les « Massacres » Post-Électorales](#)", 12 September 2016. Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 6.

7”,⁸² the information available does not provide a reasonable basis to believe the acts attributed to the leaders or supporters of the opposition constituted a “course of conduct” involving the multiple commission of acts in the sense of article 7.

97. Consequently, the information available does not provide a reasonable basis to believe that, except for one isolated case of deprivation of liberty, the alleged acts attributed to Jean Ping and other opposition leaders constitute any of the relevant offences under article 7(1), nor amount to a “campaign or operation” to qualify as an “attack” within the meaning of article 7 of the Statute.⁸³
98. Because the requirement of an attack directed against a civilian population is not met in this situation, it is unnecessary to further analyse whether the other contextual elements of crimes against humanity are met.

3. Alleged crimes against humanity attributed to the Gabonese security forces

99. The information available does not provide a reasonable basis to believe that the alleged crimes attributed to the Gabonese security forces, in the context of the 2016 post-election violence, were committed as part of “an attack directed against any civilian population,” a required contextual element of any crime against humanity under the Statute.
100. As described previously, on 31 August 2016, a number of anti-government protests took place in various cities in Gabon following the release of the presidential election’s provisional results. In the hours and days that followed, the information available suggests that State security forces sought to repress these demonstrations and riots. Reportedly, measures employed included the use of excessive and at times, deadly, force against demonstrators, as well as the organisation of a violent raid on the HQ of the leader of the opposition, Jean Ping, on the night from 31 August 2016 to 1 September 2016, where hundreds of anti-government protesters and members of the opposition had allegedly gathered.⁸⁴ On the same night, the premises of Christian media outlet *Radio Télévision Nazareth* (“RTN”), in the commune of Arkanda near Libreville, were reportedly attacked by a group of armed and masked men.⁸⁵ This “anti-media” commando, allegedly composed of State security forces and pro-government militias, is reported to have destroyed

⁸² *Bemba* Trial Judgment, para. 151 (while also further noting that that “this is without prejudice to acts not listed in Article 7(1) being considered for other purposes, such as, for example, in determining whether the attack was directed against a civilian population or was pursuant to or in furtherance of a State or organizational policy.”).

⁸³ See *Gbagbo* Confirmation of Charges Decision, paras. 209-210.

⁸⁴ See for example *Le Point*, “[Gabon : une semaine après, le traumatisme de l’assaut du QG de Jean Ping reste profond](#)”, 8 September 2016.

⁸⁵ See for example *Jeune Afrique*, “[Personnes disparues, médias muets : le Gabon en manque d’informations](#)”, 4 September 2016; *Le Point Afrique*, “[Gabon : diète médiatique, rumeurs, l’incertitude persiste](#)”, 5 September 2016.

most of the radio's equipment and violently handled the employees present that night to broadcast a special show on the election results.⁸⁶

101. Although civil society organisations and the opposition allege that the security forces committed acts of violence until at least 21 September 2016, the information available mostly concerns the peak of violence which reportedly occurred in Libreville between 31 August and 2 September 2016. There is also limited information presently available on episodes of violence outside of Libreville.
102. Overall, while security forces may have used excessive and/or unnecessary force to suppress some of the demonstrations, and in particular, during the raid on Jean Ping's HQ, the information available does not provide a reasonable basis to believe that these actions amounted to a "campaign or operation carried out against the civilian population", as to qualify as an "attack" within the meaning of article 7 of the Statute.

a) *Underlying acts*

103. In the context of the post-election crisis, the information available provides a reasonable basis to believe that the governmental security forces have committed a limited number of acts which could constitute offences under article 7(1) of the Statute, such as murder (article 7(1)(a)), imprisonment in violation of fundamental rules of international law (article 7(1)(e)), torture (article 7(1)(f)), and other inhumane acts (article 7(1)(k)), provided they were committed as part of an attack against a civilian population, and pursuant to, or in furtherance of a State policy to commit such attack. Some of these acts of torture in particular could also amount to persecution on political grounds, under article 7(1)(h) of the Statute, to the extent they were apparently committed by reason of the victims' political affiliation with the opposition, provided that the contextual elements of article 7 are met.
104. The information available, however, does not provide a reasonable basis to believe that acts amounting to enforced disappearances (article 7(1)(i)), or rape and other forms of sexual violence (article 7(1)(g)) have been committed by the Gabonese security forces in the context of the post-election crisis.

- *Murder (article 7(1)(a))*

105. The crime against humanity of murder occurs "when the perpetrator kills or causes the death of one or more persons" as part of a widespread or systematic attack against a civilian population.⁸⁷

⁸⁶ *Ibid.*

⁸⁷ *Katanga and Ngudjolo Confirmation of Charges Decision*, para. 421; *Elements of Crimes*, article 7(1)(a).

106. According to the opposition, up to 300 civilians were killed or forcibly disappeared by the State security forces and pro-government militias between 31 August and 4 September 2016.⁸⁸
107. On the other hand, according to former Interior Minister, Pacôme Moubelet-Boubeya, only three civilians were reportedly killed during the same five-day period in the entire territory of Gabon.⁸⁹ The Minister asserted that any additional killings recorded by other sources resulted from skirmishes among demonstrators and from 'natural causes'.⁹⁰ Other governmental officials further accused the opposition of disseminating false information on the level of violence attributed to State security forces, in particular by inflating the number of civilian casualties, with the intent of spreading chaos among the population to destabilize the regime.⁹¹
108. Despite the large number of victims alleged by the opposition, these estimations are neither backed by relevant supporting materials nor corroborated by other reliable sources, including by previous estimations announced by Jean Ping. On 31 August 2016, Jean Ping initially denounced that 3 demonstrators had been shot dead by the State forces.⁹² On 1 September 2016, he condemned the killing of 2 additional people during the alleged attack on his HQ.⁹³ Then, on 7 September 2016, Mr Ping announced before the international media a death toll of between 50 and 100 civilians,⁹⁴ 17 of which would have occurred at his HQ.⁹⁵
109. Having reviewed and cross-checked different sources, the Office has concluded that the information available provides a reasonable basis to believe that up to eight killings occurred in Gabon, between 31 August and 4 September 2016, in the context of the post-election violence. As part of its assessment of the alleged

⁸⁸ L'Obs, "[Jean Ping, opposant numéro un au Gabon : "Ali Bongo est dans une logique paranoïaque"](#)", 10 September 2017; Jeune Afrique, "[Gabon - Jean Ping : « Je me battraï jusqu'à la mort »](#)", 31 July 2017.

⁸⁹ RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électoraux](#)", 7 September 2016 (updated 22 September 2016); Gabon Review, "[Troubles post-électoraux : L'état des lieux selon Pacôme Moubelet-Boubeya](#)", 6 September 2016.

⁹⁰ RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électoraux](#)", 7 September 2016 (updated 22 September 2016); Europe1, "[Gabon : 3 morts et 105 blessés](#)", 5 September 2016.

⁹¹ See for example the statement of the Gabonese Government spokesperson, Alain-Claude Bilie-By-Nsze, in Jeune Afrique, "[Gabon : Ali Bongo Ondimba réélu, des heurts éclatent à Libreville et Port-Gentil](#)", 31 August 2016 (updated on 1 September 2016), and in his Twitter account, Bilie-By-Nsze (@BilieByNze), "[Il s'agit de fausses informations visant à mettre en péril l'Etat de Droit au Gabon portées par des membres de l'opposition](#)", 31 August 2016.

⁹² Jean Ping's Twitter account (@pingjean), "[Ali Bongo tire sur le peuple à balles réelles. Nous déplorons lors de la manifestation de ce jour 3 morts et plusieurs blessés. #Gabon](#)", 31 August 2016.

⁹³ France 24, "[Gabon : le QG de l'opposant Jean Ping attaqué, deux morts selon son camp](#)", 1 September 2016.

⁹⁴ France 24, "[Gabon : Ping déplore entre '50 et 100 morts', le camp Bongo dément](#)", 7 September 2016.

⁹⁵ Le Parisien, "[Gabon : une semaine après, le traumatisme de l'assaut du QG de Jean Ping reste profond](#)", 8 September 2016; RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électoraux](#)", 7 September 2016 (updated 22 September 2016).

killings committed in the situation at hand, the Office has carefully examined the internal consistency of the information submitted by the opposition and verified it against the information provided by the Gabonese authorities, civil society reports and media articles.

110. The Office received a communication with a list of 22 alleged victims, albeit with very limited information on the circumstances of these alleged killings. For instance, the date of the alleged crime is not specified in nine cases and the cause of the death is unknown in 16 cases. Furthermore, while victim claims annexed to a communication allege several killings, only eight alleged victims are identified by names or as being relatives of the person giving the statement (a death certificate is provided for three of them). Out of these eight alleged victims, six appear to have been killed in the context of the post-election crisis.
111. On 21 September 2016, the Gabonese civil society coalition *Tournons La Page* published a report, documenting eight alleged killings committed between 31 August and 4 September 2016, in the context of the post-election violence.⁹⁶ The report identifies by name seven of eight alleged victims and provides pictures of the victims' bodies found in different morgues of Libreville. Nevertheless, with the exception of one alleged victim reportedly killed by members of the judicial police and one alleged killing outside the Moroccan Embassy in Libreville, there is no information on the specific circumstances of each individual case, including on the exact date, the location or the identity of the alleged perpetrator(s). The seven alleged victims identified in this report were also reported by other sources.
112. On 13 October 2016, a group of Gabonese civil society organisations published a non-exhaustive list of 27 identified victims allegedly killed in the context of post-election violence, which include the 22 alleged victims listed in the above-mentioned communication received by the Office.⁹⁷ However, no specific details on the reported killings were provided, and in three instances the identity of the alleged victims was not disclosed.
113. International media outlets have generally reported seven killings during the post-election crisis. On 3 September 2016, AFP found that, between 31 August and 2 September 2016, seven individuals were allegedly killed across Gabon.⁹⁸ Thereafter, several media outlets, including *Jeune Afrique*, France 24 and *Le Point*, echoed AFP's

⁹⁶ *Tournons La Page*, "[Rapport Préliminaire : Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 août au 02 septembre 2016](#)", 21 Septembre 2016.

⁹⁷ Gabon Media Time, "[Crise post-électorale : la société civile publie son bilan préliminaire](#)", 13 October 2016.

⁹⁸ *Le Monde*, "[Les violences continuent au Gabon, toujours dans l'impasse politique](#)", 3 September 2016.

estimations on the number of civilians killed during the post-election crisis.⁹⁹ Various media outlets further confirmed two alleged killings, also documented in the above-mentioned communication,¹⁰⁰ and one alleged killing included in the non-exhaustive list published by civil society. In relation to the latter, media reports suggest that the victim was allegedly shot dead by security forces in Port-Gentil, on the night between 2 and 3 September 2016.¹⁰¹

114. The Office takes note of the fact that some opposition and civil society representatives have suggested that the total number of civilians killed could exceed initial estimations, as members of the security forces and pro-government militias transported an unclear number of bodies to unknown locations.¹⁰² There are also allegations made by Gabonese civil society regarding the existence of mass graves.¹⁰³ However these allegations are not supported by other reliable sources.
115. Based on the information available, there is a reasonable basis to believe that 3 to 8 civilians were killed during the period between 31 August and 4 September 2016, in the context of the post-election violence. These cases could, if committed as part of an attack against the civilian population, amount to murder under article 7(1)(a) of the Statute.

- *Enforced disappearances (article 7(1)(i))*

116. Under the Statute, the crime of enforced disappearance of persons means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or

⁹⁹ While AFP’s findings are not publicly available, other media outlets often cite AFP in their respective articles. See for example France 24, “[Gabon : Ping deplore entre “50 et 100 morts”, le camp Bongo dément](#)”, 7 September 2016; and *Le Point*, “[Gabon : encore des violences, toujours l’impasse politique](#)”, 3 September 2016.

¹⁰⁰ See for example *Jeune Afrique*, “[Gabon : cinq morts dans des heurts, les opposants retenus au QG de Jean Ping autorisés à rentrer chez eux](#)”, 2 September 2016; AFP, Youtube, “[Gabon: tensions à Libreville, procession pour un civil tué](#)”, 2 September 2016; Paris Match, “[Gabon : deux nouveaux morts à Libreville lors d’affrontements](#)” 2 September 2016.

¹⁰¹ See for example Gabon Review, “[Crise postélectorale : Le PGP en campagne d’explication](#)”, 13 September 2016; *Jeune Afrique*, “[Gabon : encore des violences, toujours l’impasse politique](#)”, 4 September 2016; *Le Point*, “[Gabon : encore des violences, toujours l’impasse politique](#)”, 3 September 2016.

¹⁰² RFI, “[Gabon: «journée de recueillement» pour les victimes à l’appel de Jean Ping](#)”, 6 October 2016; *Tournons La Page*, “[Rapport préliminaire: Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 août au 02 septembre 2016](#)”, 21 September 2016.

¹⁰³ In February 2017, a number of unverified blogs published pictures of a mass grave reportedly located in Mindoubé but their authenticity or connection with the 2016 post-election events has not been confirmed by any credible source. See for example the information provided and the pictures published by *Peuples Observateurs Avant Garde Togolaise et Africaine*, “[Le charnier du quartier Mindoué à Libreville](#)”, 1 February 2017.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”¹⁰⁴

117. As noted by PTC III, “the crime consists of two inseparably interrelated components: (i) the victim’s deprivation of liberty; and (ii) the ensuing denial or suppression of information.”¹⁰⁵ Regarding the first component, PTC III explained that the terms ‘arrest, detention or abduction’ “cover comprehensively any form of deprivation of liberty of a person against his or her will”, and that this may also include a situation in which “a victim, initially arrested and detained lawfully, may be ‘disappeared’ in custody”.¹⁰⁶ On the second component, PTC III further held that “the refusal to acknowledge or give information encompasses outright denial or the giving of false information about the fate or whereabouts of the victim.”¹⁰⁷
118. There have been reports of missing persons and disappearances in the context of the post-election crisis.¹⁰⁸ The opposition alleges that some of these cases could constitute instances of enforced disappearances.¹⁰⁹ In this respect, it was reported that up until 28 September 2016, the opposition had registered 47 cases of missing persons related to the post-election unrest, although no names or further details have been made available.¹¹⁰ It is also alleged that access to hospitals and morgues was restricted to the public and that their staff were instructed not to disclose information on the number or the identity of the victims received.¹¹¹
119. The Gabonese authorities claim having received no complaint related to alleged cases of enforced disappearances recorded during the post-election unrest, including from the alleged victims’ relatives. In September 2017, the Gabonese Government indicated before the UN Committee on Enforced Disappearances (“UN CED”) that neither the judicial authorities nor the police have received a complaint for this crime in connection with the 2016 post-election violence, and that no judicial proceedings had thus been initiated.¹¹² According to the person in charge of the opposition’s log of enforced disappearances, the absence of formal complaints by the victims’ relatives stems from distrust in national authorities.¹¹³

¹⁰⁴ Article 7(2)(i).

¹⁰⁵ Burundi Article 15 Decision, para. 118.

¹⁰⁶ Burundi Article 15 Decision, para. 118.

¹⁰⁷ Burundi Article 15 Decision, para. 118.

¹⁰⁸ See for example RFI, “[Gabon: que sont devenues les centaines de personnes arrêtées?](#)”, 4 September 2016.

¹⁰⁹ Deutsche Welle, “[Gabon: où sont les personnes disparues?](#)”, 19 September 2019.

¹¹⁰ *Le Monde Afrique*, “[A Libreville : « Tant qu’on ne voit pas de corps, on ne peut rien dire »](#)”, 30 September 2016 (updated 4 October 2016).

¹¹¹ RFI, “[Gabon: «journée de recueillement» pour les victimes à l’appel de Jean Ping](#)”, 6 October 2016.

¹¹² Gabonese Government, “[Statement of H.E. Marianne Odette BIBALOU BOUNDA, Ambassador, Permanent Representative of the Gabonese Republic to the UN in Geneva](#)”, 5-6 September 2017, p. 3.

¹¹³ *Le Monde Afrique*, “[A Libreville : « Tant qu’on ne voit pas de corps, on ne peut rien dire »](#)”, 30 September 2016 (updated 4 October 2016).

Nevertheless, it must be noted that according to PTC III “[w]hether or not the victim’s family lodges a formal complaint, the State authorities are duty-bound to commence an impartial and thorough investigation *ex officio* without delay into the disappearance of the victim.”¹¹⁴

120. In the situation at hand, there is, however, no information available regarding the identity of any of the alleged missing individuals, as well as the circumstances of their alleged disappearances, including whether these individuals were deprived of their liberty by official authorities in any manner whatsoever. There is also no information available regarding any potential follow-up after 28 September 2016 regarding the list of 47 cases mentioned previously. Furthermore, six Franco-Gabonese nationals who were initially thought to have disappeared at the outset of the episodes of post-election violence were later reportedly located.¹¹⁵ In general, it must be noted that the Office has not received additional information regarding any alleged cases of enforced disappearances reportedly committed in the context of the 2016 post-election violence.

121. In this respect, the information available regarding missing individuals does not provide a reasonable basis to believe that the Gabonese authorities forcibly disappeared civilians in Gabon in the context of the 2016 post-election crisis.

- *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (article 7(1)(k))*

122. The crime against humanity of other inhumane acts prohibits acts “causing great suffering, or serious injury to body or to mental or physical health.”¹¹⁶ PTC I has stressed that great suffering, or serious injury to body or to mental or physical

¹¹⁴ Burundi Article 15 Decision, para. 118 (internal citations omitted), also referring to Human Rights Committee, *Sarma v. Sri Lanka*, Communication No. 950/2000, 16 July 2003, para. 11; *Quinteros v. Uruguay*, Communication No. 107/1981, 21 July 1983, para. 15; *Celis Laureano v. Peru*, Communication No. 540/1993, 25 March 1996, para. 10; Inter-American Court of Human Rights (“IACtHR”), *Case of García and Family Members v. Guatemala*, Judgment of 29 November 2012, para. 138; *Case of Heliodoro Portugal v. Panama*, Judgment of 12 August 2008, para. 144; criticizing inadequate investigative activities into the disappearance of the victim, ECtHR, *Case of Timurtaş v. Turkey*, Application No. 23531/94, Judgment, 13 June 2000, paras. 89-90 and 104-105; *Case of Bazorkina v. Russia*, Application No. 69481/01, Judgment, 27 July 2006, paras. 118-125, 148.

¹¹⁵ RFI, “[Gabon: la France s’inquiète de la situation de plusieurs de ses ressortissants](#)”, 6 September 2016; French Ministry of Europe and Foreign Affairs, “[Déclaration de M. Jean-Marc Ayrault, Ministre des Affaires étrangères et du développement international au sujet de la situation au Gabon \(5 septembre 2016\)](#)”, 5 September 2016. Although French authorities indicated at first not having received information on the whereabouts of approximately a dozen of Franco-Gabonese nationals it was later reported that the French Embassy in Libreville had transmitted to the Gabonese authorities a list of 6 missing individual with dual nationalities, all of whom were reportedly identified among the people arrested during the post-election unrest. See for example France 24, “[Gabon : Ping déplore entre “50 et 100 morts”, le camp Bongo dément](#)”, 7 September 2016; RTL, “[Gabon : Ali Bongo met en cause des Français arrêtés pour avoir “cassé et pillé”](#)”, 7 September 2016.

¹¹⁶ Rome Statute, article 7(1)(k).

health have to occur *by means of* an inhumane act.¹¹⁷ In this respect, PTC I referred to the ICTY's jurisprudence regarding bodily injury that: "(a) the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances; (b) the suffering must be the result of an act or omission of the accused or his subordinate; and (c) when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim."¹¹⁸

123. In considering whether certain conduct amounts to "other inhumane acts", PTC I has also taken into account the modalities in which the alleged criminal acts were performed, including the kinds of weaponry used, as well as the nature of the injuries suffered by the victims of the alleged crimes.¹¹⁹
124. The information available indicates that between 38 and 41 civilians were reportedly injured in the context of the post-election violence.¹²⁰ Estimates provided by the Gabonese authorities and by the opposition are broadly similar: the former Interior Minister claims that 38 civilians were injured during the events in question,¹²¹ and the opposition recorded 41 casualties, of which at least 8 were seriously harmed.¹²² Furthermore, civil society organisations identified 35 civilians injured in the context of demonstrations held in Libreville, between 31 August and 4 September 2016.¹²³
125. It is unclear from the information presently available, however, which of these injuries occurred in the context of protests and which occurred during the raid conducted on Jean Ping's HQ. Witnesses claim that State security forces employed tear gas, fragmentation and explosive grenades, and fired live ammunition indiscriminately in both contexts.¹²⁴ According to the information available, in five instances it was clearly specified that the alleged injuries were reportedly inflicted in the HQ at the time of the raid. A number of media articles further confirmed that

¹¹⁷ *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 453.

¹¹⁸ *Katanga and Ngudjolo* Confirmation of Charges Decision, paras. 453-454.

¹¹⁹ *Blé Goudé* Confirmation of Charges Decision, para. 120; *Gbagbo* Confirmation of Charges Decision, para. 198.

¹²⁰ RFI, "[Gabon: «journée de recueillement» pour les victimes à l'appel de Jean Ping](#)", 6 October 2016.

¹²¹ RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électorales](#)", 7 September 2016 (updated 22 September 2016).

¹²² RFI, "[Gabon: «journée de recueillement» pour les victimes à l'appel de Jean Ping](#)", 6 October 2016.

¹²³ *Tournons La Page*, "[Rapport préliminaire: Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 août au 02 septembre 2016](#)", 21 September 2016.

¹²⁴ See for example RFI, "[Violences post-électorales au Gabon: un millier d'arrestations en une journée](#)", 1 September 2016 (updated 22 September 2016).

security forces employed tear gas and stun grenades to repress demonstrations held in Libreville.¹²⁵

126. According to civil society coalition *Tournons La Page*, alleged victims were reportedly injured by fire arms, explosive devices, beatings with blunt objects, inhalation of tear gas, first degree burnings and other physical abuses attributed to the Gabonese security forces.¹²⁶ In 24 instances, victims were reportedly injured by bullets, pellets or fragmentation grenades, causing serious injuries to 12 of them, including one victim who had a hand amputated. In two cases, victims were reportedly impacted by up to 7 pellets or grenade fragments; although pictures included in the report suggest that the inflicted injuries were of a lesser gravity. One victim reportedly suffered first degree gasoline burns to the face and arms allegedly caused by red berets; and eight were hospitalised for medium and minor injuries, as a results of contusions and other superficial injuries.¹²⁷
127. In addition, victim claims annexed to a communication received by the Office further indicate that 13 civilians, two of which were included in the *Tournons La Page's* report, suffered a range of injuries during their participation in anti-government demonstrations staged between 31 August and 3 September 2016, and during the alleged attack on Jean Ping's HQ. In only four instances, however, security forces were identified as perpetrators of the alleged injuries. As opposed to the *Tournons La Page's* report, victim claims submitted by the opposition are not documented by any supporting material and they generally lack a clear description of the context in which the injuries were allegedly inflicted.
128. To conclude, not all reported injuries sustained in the context of the post-election violence appear to be sufficiently serious to amount to the commission of "other inhumane acts" under article 7(1)(k) of the Statute.¹²⁸ However, the information available provides a reasonable basis to believe that this threshold was met in up to 12 cases, considering the serious nature of the injuries suffered by the victims and the means employed to inflict such injuries. Consequently, there is a reasonable basis to believe that these 12 cases could, if committed as part of an attack against the civilian population, amount to the crime of other inhumane acts under 7(1)(k) of the Statute.

¹²⁵ See for example *Jeune Afrique*, "[Gabon : Ali Bongo Ondimba réélu, des heurts éclatent à Libreville et Port-Gentil](#)", 31 August 2016; and The Guardian, "[Violence erupts after Gabon elections as incumbent Ali Bongo named victor](#)", 31 August 2016.

¹²⁶ *Tournons La Page*, "[Rapport préliminaire: Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 aout au 02 septembre 2016](#)", 21 September 2016.

¹²⁷ *Tournons La Page*, "[Rapport préliminaire: Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 aout au 02 septembre 2016](#)", 21 September 2016, pp. 1-12.

¹²⁸ See, e.g., *Katanga and Ngudjolo Confirmation of Charges Decision*, paras. 447-449, 451-454, 461-465; *Gbagbo Confirmation of Charges Decision*, para. 198.

- *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (article 7(1)(e))*

129. For allegations of illegal detention to amount to the crime of imprisonment or other severe deprivation of physical liberty under article 7(1)(e) of the Statute, the perpetrator must have imprisoned or otherwise severely deprived one or more persons of physical liberty and the gravity of the conduct must have been such that its occurrence would amount to a violation of fundamental rules of international law.¹²⁹ The term “fundamental rules of international law” is said to include not only treaties and customary international human rights law and international humanitarian law, but also general principles of law.¹³⁰
130. The information available suggests that between 800 and 1,100 individuals were arrested in Gabon in the period of 31 August to 4 September 2016, in particular on the first two days of acute tensions. Similarly, international media outlets have generally reported over a thousand arrests during the same five-day period.¹³¹
131. On 1 September 2016, the Interior Minister reported that State security forces had arrested between 600 and 800 individuals in Libreville, including during the alleged attack on Jean Ping’s HQ, and conducted between 200 and 300 arrests in other cities.¹³² On 16 September 2016, the Public Prosecutor published an overview of the number of detentions conducted following the events of 31 August 2016, and on the judicial authorities’ response to some of these cases.¹³³ According to the information provided, approximately 800 individuals were arrested, of which 407 initially placed under police custody were reportedly released after appearing before a judge, and 393 were referred to the Public Prosecutor of the Court of First Instance of Libreville. Of these 393, it was reported that 31 were imprisoned and sent to trial before a *tribunal correctionnel* for acts of violence, unauthorised gathering, looting and destruction of private and public property, and 39 were

¹²⁹ Elements of Crimes, Article 7(1)(e). In the International Law Commissions 1996 Draft Code of Crimes against the Peace and Security of Mankind, “arbitrary imprisonment” would cover “systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention”: Commentary on ILC Draft Statute Article 18, para. 14.

¹³⁰ Hall, Christopher K., “Imprisonment or other severe deprivation of physical liberty” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (München: Verlag C.H. Beck oHG, 2008), p. 203, MN 38. Relevant instruments concerning the rights of detainees could include the UN Standard Minimum Rules for the Treatment of Prisoners of 1955 and the 1969 American Convention for Human Rights, the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the 1990 UN Basic Principles on the independence of the Judiciary, the 1990 UN Guidelines on the Role of the Prosecutors and the 1990 UN Basic Principles on the Role of Lawyers.

¹³¹ RFI, “[Gabon: que sont devenues les centaines de personnes arrêtées?](#)”, 4 September 2016; Reuters, “[Over 1,000 arrested as post-election riots rage in Gabon](#)”, 1 September 2016.

¹³² Gabonese Ministry of Interior, [Press Release](#), 1 September 2016; RFI, “[Violences post-électorales au Gabon: un millier d’arrestations en une journée](#)”, 1 September 2016 (updated on 22 September 2016); Deutsche Welle, “[“Soulèvement général” et “carnage” au Gabon](#)”, 1 September 2016.

¹³³ Gabonese Republic, *Procureur de la République*, [Press Release](#), 16 September 2016.

placed under pre-trial detention and subjected to a criminal investigation for the alleged crimes of voluntary arson, destruction of public and private property and looting.¹³⁴

132. In September 2017, the Gabonese authorities broadly confirmed the above-mentioned figures relating to the number of detentions before the UN Committee on Enforced Disappearances (CED), as part of Gabon's periodic review before this body.¹³⁵ According to national authorities, only three individuals remained in pre-trial detention, which can last up to 18 months, renewable for one year, under the Gabonese law.
133. Specifically, the information available suggests that between 400 and 500 individuals were initially detained at the military camp of *Gros-Bouquet*. According to an alleged victim, at least 123 clearly identified detainees were subsequently transferred to the seat of the *Direction générale de la documentation et de l'immigration* ("DGDI", formerly known as CEDOC). Other locations where detainees were reportedly transferred to include the second bureau of the *Services de renseignements militaires* (a.k.a. "B2") and the *Direction générale de la recherche* ("DGR"). In addition, 27 opposition members, including 6 political leaders present during the raid on Jean Ping's HQ were allegedly detained in the HQ by security forces after they took control of the premises.¹³⁶
134. The opposition and civil society representatives denounced the wave of arrests as arbitrary, alleging widespread due process violations. Speaking shortly after the arrests, the President of the Gabon's Bar Association, Jean-Pierre Akumbu M'Oluna, indicated that detainees were not informed of the charges brought against them and that most of them were deprived of legal representation, in violation of the Gabonese law.¹³⁷ Concerned about the long period of time that could be necessary for all detainees to appear before a judicial authority, Me Akumbu further condemned the "degrading detention conditions" to which the detainees were allegedly subjected to in Libreville.¹³⁸ No specific details supporting these allegations were, however, provided.
135. On the other hand, the Gabonese authorities claim that the arrests were conducted lawfully, as part of security operations conducted across the country to halt civil

¹³⁴ Gabonese Republic, *Procureur de la République*, [Press Release](#), 16 September 2016.

¹³⁵ Gabonese Government, [List of issues in relation to the report submitted by Gabon under article 29, paragraph 1, of the Convention – Addendum, Replies of Gabon to the list of issues](#) (CED/C/GAB/Q/1/Add.1), 7 August 2017, paras. 20-24, 13th session of the Committee on Enforced Disappearances, 4-15 September 2017.

¹³⁶ RFI, "[Gabon: 27 personnes encore retenues au QG de Jean Ping](#)", 2 September 2016. On 1 September 2016, Jean Ping published a list of 24 alleged detainees, See RFI, "[Violences post-électorales au Gabon: un millier d'arrestations en une journée](#)", 1 September 2016 (updated on 22 September 2016).

¹³⁷ RFI, "[Gabon: que sont devenues les centaines de personnes arrêtées?](#)", 4 September 2016.

¹³⁸ RFI, "[Gabon: que sont devenues les centaines de personnes arrêtées?](#)", 4 September 2016.

unrest and repress crimes committed during anti-government protests.¹³⁹ In the case of the alleged attack on Jean Ping's HQ, the government spokesperson, Alain Claude Bilie-By-Nze, contends that security forces raided the HQ to arrest and remove a number of armed criminals for their alleged implication in riots and various acts of violence in Libreville.¹⁴⁰ As a result of this security operation, 200 alleged criminals were reportedly arrested in connection with the post-election violence.¹⁴¹

136. The information available does not provide a reasonable basis to believe that these detentions would amount to the crime of imprisonment or other severe deprivation of physical liberty under article 7(1)(e) of the Statute. This should not be equated with arbitrary arrests as provided under human rights law. For the conduct to constitute deprivation of liberty under the Statute, the crime must contain an additional element of severity.¹⁴²
137. Despite the apparent large-scale nature of the detentions, and even if they were considered to be arbitrary, which is not necessarily established, their brevity and the conditions of such detentions suggests that most of them could not be considered as falling within the ambit of article 7(1)(e).¹⁴³
138. Regarding the duration of the detentions, it is noted that, according to the information available, most of the protesters and opposition leaders were released shortly after being apprehended. In this respect, witness claims provided to the Office suggest detention durations of two days to a week. For instance, it was reported that most of the individuals detained at the CEDOC, including the 123

¹³⁹ RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électoraux](#)", 7 September 2016 (updated 22 September 2016); *Jeune Afrique*, "[Gabon : démission du ministre de la Justice, colère des proches des disparus](#)", 5 September 2016.

¹⁴⁰ France 24, "[Gabon : au quartier général de Jean Ping, 'on a dormi auprès des morts'](#)", 1 September 2016.

¹⁴¹ RFI, "[Violences post-électorales au Gabon: un millier d'arrestations en une journée](#)", 1 September 2016 (updated on 22 September 2016).

¹⁴² Discussions leading to the Rome Statute offered a number of factors that could be considered to assess the severity of the crime; including the duration, the extent and the condition of the deprivation. Proposal submitted by Canada and Germany on article 7 (1)(e), U.N. Doc. PCNICC/1999/WGEC/DP.36, at 4 (23 November 1999). See also K. Ambos and S. Wirth, "The Current Law of Crimes Against Humanity," *Criminal Law Forum* 13: 1-90 (2002), p. 65. Commentators have also suggested as additional factors "whether the detainee was subjected to torture or other inhuman or degrading treatment or punishment, including crimes of sexual violence, or other intimidation". Hall, C., "Imprisonment", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, p. 203, para. 38. The ICTR found that "the deprivation of liberty must be of a similar gravity and seriousness as the other crimes against humanity enumerated in [the ICTR Statute]." *Prosecutor v. Ntagerura et al.*, Trial Judgment 1 September 2009, ICTR-99-46-T, para. 702. In the International Law Commission 1996 Draft Code of Crimes against the Peace and Security of Mankind, "arbitrary imprisonment" would cover "systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention": *Commentary on ILC Draft Statute Article 18*, para. 14.

¹⁴³ *Elements of Crimes*, Article 7(1)(e). See for instance Office of the Prosecutor, *Situation in Honduras, Article 5 Report*, October 2015, para. 99.

clearly identified individuals previously mentioned, were brought to a competent judicial authority and acquitted after six days in detention. This also appears consistent with figures provided by the Gabonese Government, according to which 300 of the 800 individuals initially detained were immediately released for lack of evidence, and the other 500 detainees were promptly referred to Libreville's Public Prosecutor.

139. In relation to the detention conditions, it appears that varying levels of ill-treatment may have occurred. The information available in this respect, which includes pictures of Libreville's central prison, suggests poor detention conditions including unsanitary facilities, lack of food and water, limited access to medical care, overcrowding of detention facilities, and no separation between untried and convicted detainees and between men and women. Other allegations include being forced to sing pro-Ali Bongo Onbimba songs and being slapped by security guards. While potentially amounting to various human rights violations, it does not appear that these conditions would amount to torture or other inhuman or degrading treatment or punishment as to present a similar gravity and seriousness as other crimes against humanity under the Statute.¹⁴⁴
140. In conclusion, apart from the fact that most of the arrests may not have been arbitrary, the information available also does not provide a reasonable basis to believe that the duration and conditions of the subsequent detentions were severe enough to amount to the crime of imprisonment or other severe deprivation of liberty under article 7(1)(e) of the Statute.
141. With respect to three specific cases,¹⁴⁵ however, the infliction of acts of torture to detainees in custody would have rendered their imprisonment unlawful in any event. Therefore, based on the information available, there is a reasonable basis to believe that these three cases could, if committed in the context of an attack against the civilian population, amount to the crime of imprisonment or other severe deprivation of physical liberty under article 7(1)(e) of the Statute.
- *Torture (article 7(1)(f))*
142. The crime against humanity of torture is defined in the Rome Statute as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused."¹⁴⁶ The relevant elements of torture are that: (i) the perpetrator inflicted severe physical or mental

¹⁴⁴ Hall, C., "Imprisonment", in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, p. 203, para. 38.

¹⁴⁵ See para. 145, 146 and 148.

¹⁴⁶ Rome Statute, article 7(2)(e).

pain or suffering upon one or more persons; (ii) such person(s) were in the custody or under the control of the perpetrator; (iii) the pain or suffering inflicted did not arise only from, and was not inherent in or incidental to, lawful sanctions.¹⁴⁷

143. In *Prosecutor v. Bemba*, the PTC clarified that “although there is no definition of the severity threshold,” there must be “an important degree of pain and suffering [...] to be reached in order for a criminal act to amount to an act of torture.”¹⁴⁸
144. The Gabonese opposition and civil society organisations claim that detainees arrested in the context of post-election civilian unrest and during the alleged attack on Jean Ping’s HQ, were often subjected to acts of torture while in custody, although no estimation of the total number of alleged victims has been provided.¹⁴⁹ In general, the information available does not provide any details or supporting evidence on the methods or means of torture reportedly employed by State agents. As explained above, the information available with respect to the conditions of detention, while potentially suggestive of various human rights violations, does not provide a reasonable basis to believe that these conditions generally amounted to torture or other inhuman or degrading treatment or punishment as to present a similar gravity and seriousness as other crimes against humanity under the Statute.¹⁵⁰
145. In three instances, however, the information available is more specific and indicates that individuals deprived of their liberty were allegedly subjected to severe physical punishments. These include claims by an individual that detainees in Gros-Bouquet, including himself, were subjected to shocks with an electroshock weapon (Taser). The total number of individuals who were subjected to this treatment is unspecified.
146. In one case, it was reported that a group of red berets had severely beaten a demonstrator, who was subsequently tortured by police officers, although no specific details on the means employed were provided. The victim alleges that he was forced to self-incriminate for various crimes, including looting and destruction of property. After six days in detention, he was reportedly brought in front of a

¹⁴⁷ In contrast to the definition of torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the elements of the crime under the Rome Statute do not require a showing of a “specific purpose” nor that it was committed by a “public official or other person acting in an official capacity.” *Compare* Elements of Crimes, article 7(1)(f), paras. 1-5, fn. 14 *with* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1.

¹⁴⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para. 193.

¹⁴⁹ See for example Reuters, “[Gabon doctor who catalogued post-electoral violence detained](#)”, 11 October 2016.

¹⁵⁰ See para. 140 above.

prosecutor who ordered his release, noting that he presented signs of torture and may have signed his confession under duress.

147. In a severe case of ill-treatment, an alleged witness claims to have been detained at the seat of the former CEDOC with a member of Jean Ping's security arrested during a protest held on 31 August 2016. According to this witness, the latter was punched, kicked and beaten with wooden and metal objects for a number of days, in order to obtain information on Jean Ping's whereabouts.
148. Finally, another alleged victim reported the use of a burning machete by members of the military to engrave a pro-Ali Bongo slogan on his chest. The incident allegedly occurred at a check-point in the Haut-Ogooué province in unclear circumstances, which may not necessarily be related to the other incidents considered in this report.
149. It appears that those acts may have resulted in severe physical pain for the victims. Therefore, based on the information available, there is a reasonable basis to believe that these four cases could, if committed in the context of an attack against the civilian population, amount to acts of torture under articles 7(1)(f) of the Statute.
- *Rape and other forms of sexual violence of comparable gravity (article 7(1)(g))*
150. The crime against humanity of rape is defined in the Elements of Crimes as an "invasion" of a person's body by "conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."¹⁵¹ Additionally, the crime against humanity of sexual violence requires the perpetrator to have committed or caused a person to engage in an "act of a sexual nature [...] by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention psychological oppression or abuse of power [...] or by taking advantage of a coercive environment or [...] incapacity to give genuine consent."¹⁵² The conduct constituting sexual violence must be "of a gravity comparable to other offences in article 7, paragraph 1(g), of the Statute."¹⁵³
151. According to an alleged witness, in the course of the post-election violence, six armed men allegedly gang raped his wife and sexually assaulted him. This incident reportedly happened at the victims' residence located in Libreville's Derrière la Prison neighbourhood on an unspecified date after 31 August 2016. According to the victim, the perpetrators appeared to be foreigners and made a reference to the

¹⁵¹ Elements of Crimes, article 7(1)(g)-1, fn. 15. See also *Bemba* Trial Judgment, para. 100.

¹⁵² Elements of Crimes, article 7(1)(g)-6.

¹⁵³ *Ibid.*

victims being supporters of Jean Ping. However, the information available on the date of the incident and the affiliation of the perpetrators is insufficient to link this alleged incident to acts of violence allegedly committed by State security forces in the context of the post-election crisis.

152. In addition, according to an alleged witness present at Jean Ping's HQ during the raid, foreign military "raped women" during this operation, although there are no specific details available on individual cases or any estimate of the number of alleged victims. Another witness claims that the hooded armed men that intervened at the HQ on the night of 31 August 2016 raped and killed a woman who had initially tried to hide in a car in the HQ premises, although it is unclear whether the witness was a direct witness or only had second-hand knowledge of this incident.
153. Overall, the Office notes that while 24 alleged witnesses provide a generally consistent account of the circumstances of the raid on the HQ, including on the type of crimes allegedly committed by the security forces, other than these two witness claims, there is no other information suggesting the commission of sexual violence. There is also no reference to incidents of rape or other forms of sexual violence allegedly committed in the context of the post-election violence in reports by open sources.
154. For these reasons, the information available does not provide a reasonable basis to believe that governmental security forces may have committed the crime of "rape and other forms of sexual violence of comparable gravity" in the context of the post-election violence.
 - *Persecution (article 7(1)(h))*
155. Finally, the opposition and civil society organisations claim that the crimes reportedly committed during the post-election period were allegedly committed against persons based upon their perceived identity as supporters and members of the political opposition.
156. The crime of persecution under article 7(1)(h) of the Statute requires that: (i) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (ii) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (iii) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; and (iv) the conduct was committed in connection with any of the act referred to in

article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.¹⁵⁴ With respect to the latter, in the Burundi situation, PTC III noted that “[t]he conduct constituting persecution must have been committed in connection with any other crime within the jurisdiction of the Court (connection requirement), thus filtering out discriminatory measures that would not fall within the Court’s jurisdiction if committed without such connection”.¹⁵⁵

157. PTC III has recognised that persecutory acts can take many forms.¹⁵⁶ The Chamber however recalled that not every infringement of human rights is relevant but only a ‘severe deprivation’ of a person’s ‘*fundamental* rights contrary to international law’.¹⁵⁷ According to the Chamber, “this may include ¹⁵⁸ a variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.”
158. In this situation, the acts of violence reportedly committed by the security forces occurred in an intrinsically political context – a post-election crisis – characterised by riotous and spontaneous demonstrations which have entailed looting, arson and property destruction.¹⁵⁹ The limited information available concerning the alleged killings and injuries suggest that many of these incidents resulted from the security forces’ resort to excessive force. However, such resort may have been dictated by the circumstances, rather than driven by a persecutory intent. In the alleged four cases amounting to torture, however, it is possible that the victims were “targeted [...] *by reason* of the identity of a group or collectivity” and that the “targeting was based on political [...] grounds” since at least one of them was reportedly ill-treated in order to obtain information on Jean Ping’s whereabouts. Such alleged cases of torture could therefore also amount to persecution on political grounds, under article 7(1)(h) of the Statute, provided that the contextual elements of article 7 are met.

¹⁵⁴ Elements of Crimes, article 7(1)(h), paras. 1-4. See also Burundi Article 15 Decision, para. 130.

¹⁵⁵ Burundi Article 15 Decision, para. 131.

¹⁵⁶ Burundi Article 15 Decision, para. 132.

¹⁵⁷ Burundi Article 15 Decision, para. 132.

¹⁵⁸ Burundi Article 15 Decision, para. 132 (internal citations omitted), referring in this regard to 1948 Universal Declaration of Human Rights; 1966 International Covenant on Civil and Political Rights; 1966 International Covenant of Economic, Social and Cultural Rights (UNTS, vol. 993, p. 3); African Charter on Human and Peoples’ Rights; American Convention on Human Rights; (European) Convention for the Protection of Human Rights and Fundamental Freedoms; Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Decision Pursuant to Article 61(7(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 58.

¹⁵⁹ See para. 85.

b) *A ‘course of conduct’ involving multiple commission of acts referred to in article 7(1) of the Statute against any civilian population*

159. As specified in the Statute and the Elements of Crimes, the “course of conduct” constitutive of an attack against a civilian population must involve the “multiple commission of acts” referred to in article 7(1). In the view of TC III, this indicates a “quantitative threshold” requiring “more than a few”, “several” or “many” acts.¹⁶⁰

160. Overall, the number of alleged crimes attributed to the governmental security forces which could constitute offences under article 7 of the Statute is relatively low. These would include three to eight killings due to the excessive and disproportionate use of force, up to 12 instances of other inhumane acts (resulting from serious injuries inflicted to some protesters), up to three instances of imprisonment and up to four instances of torture (possibly involving more than four victims) which could also amount to cases of persecution. Taken at their highest, these acts could together meet the quantitative threshold and provide a reasonable basis for finding that there was a “course of conduct” involving the multiple commission of acts referred to in article 7(1) (murder, unlawful deprivation of liberty, torture, other inhumane acts and persecution) and committed against civilians during the episodes of post-election violence.

161. However, it is questionable whether, when considered together, these individual acts would constitute a series or overall flow of events, as opposed to a mere aggregate of random acts.¹⁶¹ Nor do they demonstrate a campaign or operation against a civilian population in the sense of an “attack” under article 7.¹⁶²

- *The acts committed by the security forces following the election results did not constitute an attack against the civilian population*

162. Based on the information presently available, it does not appear that the pattern and level of violence employed by security forces in the context of the post-election violence, including during the raid on Jean Ping’s HQ, can be characterised as a “campaign or operation carried out against the civilian population”, as to qualify as an “attack” within the meaning of article 7 of the Statute.¹⁶³

¹⁶⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, para. 150.

¹⁶¹ *Bemba* Trial Judgment, para. 149; *Gbagbo* Confirmation of Charges Decision, para. 209.

¹⁶² *Prosecutor v. Laurent Gbagbo*, “Decision on the confirmation of charges against Laurent Gbagbo”, ICC-02/11-01/11-656-Red, 12 June 2014, paras. 209-210.

¹⁶³ *Katanga* Trial Judgment, paras. 1097, 1101; *Gbagbo* Confirmation of Charges Decision, para. 209; Kenya Article 15 Decision, para. 80. See also *Gbagbo* Article 58 Decision, para. 30; *Bemba* Confirmation of Charges Decision, para. 75; *Ruto et al.* Confirmation of Charges Decision, para. 164.

163. First, according to the information available at this stage, these acts were committed primarily in the context of protests that erupted immediately after the announcement of the election results and during one police operation on the night of 31 August 2016, the raid on Jean Ping's HQ. Although civil society organisations and the opposition appear to link the post-election crisis to a wider context of violence, alleging that the security forces committed acts of violence before the election and in the weeks that followed, the information available at this stage mostly concerns the peak of violence which reportedly occurred in Libreville between 31 August and 2 September 2016. There is also limited information presently available on episodes of violence outside of Libreville.¹⁶⁴
164. Furthermore, although Jean Ping and other opposition leaders claim that anti-government protests were held peacefully,¹⁶⁵ the information available suggests that violent clashes between demonstrators and State security forces did erupt in the context of these protests.¹⁶⁶
165. For instance, the Gabonese authorities allege that between 67 and 70 members of State security forces were injured as a result of confrontations with anti-government demonstrators and during security operations in areas affected by riots.¹⁶⁷ Outside Libreville, the Gabonese authorities claim that over 220 gendarmes were attacked by demonstrators in the Estuaire province, resulting in three officers injured by bullets and nine vehicles damaged. Additionally, one police officer was reportedly killed with a 12 mm calibre rifle during a night patrol in the city of Oyem, on the night between 1 and 2 September 2016.¹⁶⁸ In this respect, if the protesters displayed violence during the protest and riots, the use of force in some instances may have been justified for the purpose of maintaining public order.
166. While members of the security forces allegedly carried out a series of violent acts against participants in protest and riots, including the use of lethal force, these acts of violence often appear to be more adequately described as reactive in nature, rather than illustrating deliberate targeting of the civilian population. For these reasons, while the use of force may have been excessive and, at times indiscriminate, and could have resulted in serious human rights violations, the

¹⁶⁴ The Office received information on some individual incidents of civilians being injured by firearms, or police dispersing protest in Port-Gentil, Oyem, Lambaréné, Mvengué and Monila, but few details are available at this stage.

¹⁶⁵ *Le Monde Afrique*, "[Jean Ping : « Qu'Ali Bongo cesse de tuer le peuple gabonais ! »](#)", 1 September 2016.

¹⁶⁶ US Embassy in Gabon, [Security Message for U.S. Citizens: Gabonese Election](#), 1 September 2016.

¹⁶⁷ RFI, "[Gabon: «journée de recueillement» pour les victimes à l'appel de Jean Ping](#)", 6 October 2016; RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électoraux](#)", 7 September 2016 (updated 22 September 2016); *Jeune Afrique*, "[Gabon : démission du ministre de la Justice, colère des proches des disparus](#)", 5 September 2016.

¹⁶⁸ Gabon Review, "[Crise postélectorale : L'hommage de la République au Brigadier Biteghé-Bi-Mba](#)", 21 September 2016; Africanews, "[Gabon : un policier tué à Oyem, à la frontière avec la Guinée équatoriale](#)", 4 September 2016.

conduct of the security forces does not appear to embody a pattern consistent with the definition of an attack as a “campaign” or “operation” directed against a civilian population.¹⁶⁹

- *The raid on Jean Ping’s HQ did not constitute an “attack” under the Statute*

167. The raid conducted on Jean Ping’s HQ appears to require a distinct assessment in the overall context of the post-election violence as this event was, by all accounts, characterised by the unwarranted use of force on the part of the security forces involved. This is further supported by the fact that the raid appeared to have lasted for approximately five hours and that the civilians present at the HQ did not appear to be armed or to resist the intervention in any violent way. In this regard, the raid conducted on Jean Ping’s HQ stands out as a particularly intense show of force.
168. As reported by most sources, on 1 September 2016, at around 01h00, reportedly helicopters of the *Garde républicaine* shelled the HQ, located in the quartier des Charbonnages in Libreville’s 1st *arrondissement*, and fired live ammunition against the civilians located in its premises.¹⁷⁰ The Gabonese authorities have acknowledged that the helicopter was indeed flying over the HQ for surveillance and coordination purposes in preparation for a ground intervention. Based on the information available, while it is not clear whether the helicopter shot explosive grenades from the air, stun and tear gas grenades appear to have been dropped inside the HQ.¹⁷¹
169. According to the information available, members of the *Garde républicaine* then made their way towards the HQ, using grenades and live ammunition against civilians located in the vicinity of the building and reportedly blasted the gate open using explosives. They also reportedly employed tear gas grenades and shot live ammunition against civilians gathered inside the premises.¹⁷² After forcing their entrance into the main building of the HQ, at around 06h00, security forces allegedly cleared the building floor by floor, ultimately gathering up the people who had sought refuge inside in the courtyard.¹⁷³ Approximately 1,500 individuals

¹⁶⁹ See *Katanga* Trial Judgment, paras. 1097, 1101; *Gbagbo* Confirmation of Charges Decision, para. 209; Kenya Article 15 Decision, para. 80; *Bemba* Confirmation of Charges Decision, para. 75; *Ruto et al.* Confirmation of Charges Decision, para. 164.

¹⁷⁰ France 24, “[Gabon : le QG de l’opposant Jean Ping attaqué, deux morts selon son camp](#)”, 1 September 2016.

¹⁷¹ *Le Parisien*, “[Gabon : une semaine après, le traumatisme de l’assaut du QG de Jean Ping reste profond](#)”, 8 September 2016.

¹⁷² RFI, “[Violences post-électorales au Gabon : un millier d’arrestations en une journée](#)”, 1 September 2016 (updated 22 September 2016); France 24, “[Gabon : le QG de l’opposant Jean Ping attaqué, deux morts selon son camp](#)”, 1 September 2016.

¹⁷³ RFI, “[Violences post-électorales au Gabon : un millier d’arrestations en une journée](#)”, 1 September 2016 (updated 22 September 2016).

were reportedly present at the HQ at the time of the alleged attack, including dozens of injured civilians previously evacuated to its premises after confrontations with the security forces during the protests earlier that day.¹⁷⁴

170. The presence of the helicopter, the unfolding of events between 01h00 and 06h00, with a number of security forces allegedly converging towards and eventually encircling the HQ, the use of explosives to enter the compound, the methodical search of the different floors and the round-up of civilians outside the building and ensuing arrests, indicate a certain level of planning and organisation on the part of the security forces. In this respect, the raid on the HQ appears to reflect the type of deliberate and concerted approach consistent with the existence of a “campaign or operation” envisaged under the Statute.¹⁷⁵ As mentioned above, the Gabonese Government itself acknowledged a degree of planning and organisation and the deliberate use of force, which it claims was necessary as the objective of the raid, was to arrest ‘armed criminals’ for their alleged implication in riots and other acts of violence that erupted in Libreville on the night of 31 August 2016, including setting ablaze the National Assembly.¹⁷⁶
171. However, the information available does not provide a reasonable basis to believe that this violent police operation constituted an attack against a civilian population as envisaged under the Rome Statute. In particular, it does not appear that the raid in itself, as well as the detentions and alleged incidents of ill-treatment/torture in detention that may have followed, could constitute a “course of conduct” involving the multiple commission of acts listed under article 7(1).
172. Indeed, while serious human rights violations might have been committed during the raid, there is very limited corroborated information supporting the conclusion that “more than a few”, “several” or “many” acts listed under article 7(1) of the Statute may have been committed during this particular operation.¹⁷⁷
173. As a result of the raid, opposition leaders, including Jean Ping, allege that up to 200 victims were killed at the HQ. These estimates are however neither substantiated by any supporting materials nor corroborated by other available sources. Jean Ping himself initially claimed that only 2 individuals were killed and another 19 were

¹⁷⁴ Info241.com, “[Arrivée de la CPI au Gabon : création d’un collectif de victimes des répressions post-électorales](#)”, 13 June 2017.

¹⁷⁵ See *Katanga* Trial Judgment, paras. 1097, 1101; *Gbagbo* Confirmation of Charges Decision, para. 209; Kenya Article 15 Decision, para. 80; *Bemba* Confirmation of Charges Decision, para. 75; *Ruto et al.* Confirmation of Charges Decision, para. 164.

¹⁷⁶ France 24, “[Gabon : le QG de l’opposant Jean Ping attaqué, deux morts selon son camp](#)”, 1 September 2016.

¹⁷⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgement pursuant to Article 74 of the Statute, ICC-01/05-01/08, 21 March 2016, para. 150.

injured during the first hours of the alleged attack,¹⁷⁸ and he subsequently reported a total of 17 fatal casualties at the HQ.¹⁷⁹ The information available however suggests that only two individuals were killed during the alleged raid on the HQ, of which one has been clearly identified.¹⁸⁰

174. Regarding instances of deprivation of liberty following the arrest of civilians present at the HQ during the raid, the analysis above has shown that most of them do not appear to constitute crimes under the Statute.¹⁸¹ The same reasoning applies with regard to the 27 opposition members, including six leaders, allegedly detained at the HQ after the raid, especially in view of the brevity of their detention. In particular, the information available indicates that, on 2 September 2016, the then Special Representative of the UN Secretary-General and Head of UNOCA, Abdoulaye Bathily, facilitated their release less than 48 hours after their arrest.¹⁸²
175. While one of these opposition leaders claims that they were deprived of food and medicines during this time,¹⁸³ there is no information suggesting that they were subjected to any specific acts of violence or ill-treatment. In these circumstances, even considering the high-level profile of the detainees which may denote a political, and possibly arbitrary, motivation for the initial arrest, the limited duration and the conditions of these deprivations of liberty do not provide a reasonable basis to believe that these detentions entailed the necessary element of severity to constitute a crime under article 7(1)(e) of the Statute.
176. Overall, the information available does not provide a reasonable basis to believe that the raid on Jean Ping's HQ entailed the commission of acts amounting to crimes against humanity under the Statute and thus constitutive of an attack against the opposition or any other particular civilian population in the sense of article 7.

¹⁷⁸ *Le Monde Afrique*, "[Au Gabon, la victoire d'Ali Bongo déclenche de violentes manifestations](#)", 31 August 2016 (updated 1 September 2016); France 24, "[Gabon : le QG de l'opposant Jean Ping attaqué, deux morts selon son camp](#)", 1 September 2016.

¹⁷⁹ RFI, "[Gabon: bras de fer autour du nombre de victimes lors des heurts post-électorales](#)", 7 September 2016 (updated 22 September 2016).

¹⁸⁰ See *Le Point Afrique*, "[Le Gabon bientôt dans le viseur de la CPI](#)", 23 September 2016 (updated on 25 September 2016). Both alleged killings were also reported by civil society in the non-exhaustive list of 27 published in October 2016 (see for example Gabon Media Time, "[Crise post-électorale : la société civile publie son bilan préliminaire](#)", 13 October 2016); and by *Tournons La Page* ("[Rapport Préliminaire : Les violences du pouvoir gabonais contre les populations civiles lors des manifestations post-électorales du 31 août au 02 septembre 2016](#)", 21 September 2016, pp. 26 and 25).

¹⁸¹ See paras. 136-140 above.

¹⁸² *UNOCA Magazine*, 6th edition, May 2017, p. 16; RFI, "[\[Reportage\] Gabon: 36 heures de calvaire au QG de campagne de Jean Ping](#)", 3 September 2016; Centre d'actualité de l'ONU, "[Gabon : l'ONU appelle à la fin immédiate de tous les actes de violences](#)", 4 September 2017.

¹⁸³ RFI, "[Gabon: 27 personnes encore retenues au QG de Jean Ping](#)", 2 September 2016.

177. Therefore, based on the foregoing analysis, it does not appear that the acts allegedly committed by the Gabonese security forces during the post-election period formed part of “an attack against the civilian population” within the meaning of article 7 of the Statute.
- *In any event the alleged attack would not be characterised as “widespread or systematic”*
178. The conclusion on the absence of an attack against a civilian population in the sense of article 7(2) of the Statute is based on the information available at this stage, which, as explained before, reflects the highly polarised political context in Gabon and is characterised by limited reliability and credibility, especially given the absence of any independent fact-finding inquiry.¹⁸⁴ In any case, should a different conclusion be reached regarding the existence of an attack, it does not appear that such attack could be characterised as “widespread or systematic” within the meaning of the Statute, especially considering that most of the violence occurred over the course of one or two days in Libreville and given the relatively low number of victims.
179. In particular, the information available indicates that the alleged crimes were committed almost exclusively in the context of a limited number of clashes between security forces and protesters on 31 August 2016 and during a single, albeit forceful, operation (the raid on the HQ). Similarly, were the existence of an attack established, the information available suggests that it was not carried out over a large geographic area. Additionally, given the relatively low number of victims (up to 8 civilians killed, 3 individuals unlawfully imprisoned, 4 victims of torture, and 12 victims of injuries possibly amounting to other inhumane acts) and of incidents (namely the protests that erupted immediately following the announcement of the election results and the raid on Jean Ping’s HQ), the information available does not suggest a pattern of repetitive behaviours and violent acts linked with each other as to make them part of a “systematic” or “widespread” attack.
180. Finally, the information available also does not provide a reasonable basis to believe that the raid on the HQ could, in itself, constitute a “widespread or systematic attack”. As mentioned above, The Pre-Trial Chambers have found that “an attack in a small geographical area, but directed against a large number of civilians”, could, based on the circumstances, be considered “widespread”.¹⁸⁵ However, while approximately 1,500 civilians were present at the HQ at the time of

¹⁸⁴ See paras. 50-52 above.

¹⁸⁵ *Katanga and Ngudjolo* Confirmation of Charges Decision, para. 395; *Bemba* Confirmation of Charges Decision, para. 83.

the raid, the number of alleged victims appears to be limited to two persons killed and 41 injured. In this respect, the raid on the HQ was not only limited in terms of its geographic scope, but its outcome does not suggest that it constituted an attack of a large-scale nature.¹⁸⁶

181. Based on the foregoing analysis, there is no reasonable basis to believe that the acts of violence committed by the Gabonese security forces in the context of the post-election unrest formed part of a “widespread or systematic attack directed against any civilian population”, a required contextual element under article 7 of the Statute.

4. Alleged incitement to commit genocide

182. The Gabonese Government alleges that a public statement made by Jean Ping during the presidential campaign would amount to the crime of inciting to commit genocide.¹⁸⁷ However, although the information available confirms that Jean Ping publicly referred to an “expedition to get rid of cockroaches” while addressing a village audience during his 2016 presidential campaign, it does not provide a reasonable basis to believe that such speech constituted direct incitement to commit genocide.
183. According to article 25(3)(e) of the Statute, “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (...) [i]n respect of the crime of genocide, directly and publicly incites others to commit genocide”.¹⁸⁸ While Part 2 of the Statute on Jurisdiction, and especially article 6, does not deal specifically with the crime of *incitement* to commit genocide,¹⁸⁹ it is evident from the language of article 25 that the Rome Statute criminalises direct and public incitement to commit genocide. It is also clear that the criminalisation of incitement only applies with regard to the crime of genocide, and not with regard to war crimes, crimes against humanity or the crime of aggression.¹⁹⁰
184. Incitement to commit genocide is considered an inchoate offence: to be constituted, the incitement does not require that the substantive crime itself be committed or

¹⁸⁶ See para. 80 above.

¹⁸⁷ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 2, 4-5.

¹⁸⁸ Article 25(3)(e) of the Statute.

¹⁸⁹ This differs from the ICTR statute for instance which includes public incitement to commit genocide as a punishable act under the specific provision on the crime of genocide (article 2).

¹⁹⁰ During the Diplomatic Conference in Rome the drafters rejected the suggestion that the incitement provision be extended to apply also to crimes against humanity, war crimes and aggression. See Wibke Timmermann, *Incitement in International Criminal Law*, *International Review of the Red Cross*, vol. 88, number 864, December 2006, p. 843.

even attempted.¹⁹¹ This is in recognition of genocide's "special place in the hierarchy among the 'most serious crimes of concern to the international community as a whole.'"¹⁹² In *Akayesu*, the ICTR Trial Chamber found that "genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator".¹⁹³

185. With regard to the required material elements, incitement to commit genocide has to be both direct and public.¹⁹⁴ In addition, the mental element of incitement to commit genocide requires *dolus specialis*, meaning that "the person who incites to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."¹⁹⁵ The inciter must also have the intent to "directly create a particular state of mind in his audience necessary to lead to the destruction" of a group.¹⁹⁶
186. Regarding the requirement that the incitement be *public*, the International Law Commission has stated that the "indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technical means of mass communication, such as by radio or television."¹⁹⁷ In this respect, the ICTR has considered the place where the incitement occurred and the scope of the assistance as particularly important factors.¹⁹⁸
187. The requirement that the incitement be *direct* means that, as a result of the inciting act, another person is concretely urged or specifically provoked to engage in

¹⁹¹ Ambos, K "Individual criminal responsibility" in Triffterer, pp. 760-762, paras. 31-35. See also Wibke Timmermann, Incitement in International Criminal Law, *International Review of the Red Cross*, vol. 88, number 864, December 2006, p. 825. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 562; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T (3 December 2003), Judgement and Sentence, para. 1017; *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T (2 December 2008), Judgement, para. 419.

¹⁹² William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford: Oxford University Press, 2010) p. 438.

¹⁹³ *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 562.

¹⁹⁴ Article 25(3)(e) of the Statute.

¹⁹⁵ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgement, Case No. ICTR-96-4-T, para. 560; *Prosecutor v. Ruggiu*, ICTR-97-32-I (1 June 2000), Judgement, Trial Chamber, para. 14; *Prosecutor v. Nahimana et al.*, ICTR-99-52-A (28 November 2007), Judgement, Appeal Chamber, para. 677; *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T (2 December 2008), Judgement, para. 419.

¹⁹⁶ ICTR, *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgement, Case No. ICTR-96-4-T, paras. 560, 674; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T (3 December 2003), Judgement and Sentence, para. 1017.

¹⁹⁷ Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3)(f); Report of the International Law Commission to the General Assembly, 51 U.N. ORGA Supp. (No. 10), at 26, U.N. Doc. A/51/10(1996).

¹⁹⁸ "The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited". *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 556.

criminal conduct. In this respect, a vague or indirect suggestion is not sufficient.¹⁹⁹ In *Akayesu*, the Trial Chamber specified the importance of taking into account the cultural and linguistic context when considering the direct element of incitement to commit genocide, emphasising that “a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience.”²⁰⁰

188. In its referral, the Gabonese Government alleges that a public statement made by Jean Ping during the 2016 presidential campaign would amount to directly and publicly inciting to commit genocide.²⁰¹ During a public meeting held in the Woleu Ntem province as part of his political campaign, Mr Ping reportedly told his supporters: “At home, where I am from, when we enter a battle like this, we go to the cemetery. We say to the dead ‘we are going to war, get up, get up and accompany us’. This is a real expedition to get rid of cockroaches.”²⁰²
189. Specifically, the Gabonese Government alleges that Jean Ping’s speech on this occasion “exhorted people to participate in a war whose purpose is to eliminate a part of the Gabonese population presented under the derogatory traits of a pest”.²⁰³ In this regard, although the referral does not identify any specific targeted population, some media outlets have reported that Jean Ping referred to the community of foreign Muslims living in Gabon.²⁰⁴
190. While the exact date of the statement remains unclear, the video footage surfaced online in March 2016 and has since been widely disseminated on national TV and social media. *TéléAfrica*, a private TV network reputed to be pro-government, broadcasted an edited video-footage of Jean Ping’s speech presenting a narrative drawing comparison to the Rwandan context and accusing Jean Ping of aspiring to create a similar situation in Gabon.²⁰⁵ After the dissemination of the video-footage, the Minister of Communication, Alain-Claude Bilie-By-Nzé, further compared Mr

¹⁹⁹ ILC Draft code, p. 26; and *Akayesu*, para. 557. See also *Nahimana*, Appeal Judgement, para. 692; *Bikindi*, Trial Judgment, para. 387.

²⁰⁰ *Akayesu*, para. 557; See also *Bikindi*, Trial Judgment, para. 387.

²⁰¹ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 2, 4-5.

²⁰² « Chez moi, là-bas (inaudible) quand on s’en va dans une bataille comme celle-là, on va au cimetière. On dit aux morts « on s’en va à la guerre, levez-vous, levez-vous et accompagnez nous ». Il s’agit d’une véritable expédition pour nous débarrasser des cafards » in Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 4 (OTP translation).

²⁰³ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 4-5 (OTP translation).

²⁰⁴ Koaci, “[Gabon : Les «cafards» de Jean Ping créent la polémique](#)”, 25 March 2015; Africahotnews, “[Gabon, Jean Ping traite les étrangers de ‘Cafards’ et fait jaser](#)”, 26 March 2016.

²⁰⁵ See for example Youtube, “[Jean Ping : la guerre civile à tout prix!](#)”, 16 August 2016.

Ping's expressions to those previously employed by Adolf Hitler to refer to the Jewish population.²⁰⁶

191. According to Jean Ping, the Gabonese Government's allegations are ill-founded and the video that circulated in the media was edited and disseminated by the Government to undermine his candidacy.²⁰⁷ Specifically on the use of the term "cockroaches", Mr Ping further argued that he did not intend to target anyone, but he was actually referring to the need of "cleaning up the country" of corruption ("*nettoyer la maison*").²⁰⁸ In June 2016, the *Procureur de la République* of Libreville opened a preliminary investigation against Jean Ping over the crimes of threat to public order and public security (*atteinte à l'ordre et à la sécurité publique*) and defamation.²⁰⁹ However, the information available suggests that proceedings have been suspended for lack of payment by the plaintiffs of the financial provision requested by the competent tribunal.²¹⁰
192. The Gabonese Government further contends that the opposition leader and his supporters used social networks to spread false information about alleged massacres committed by the Gabonese security forces in the context of the election. In particular, the Gabonese Government refers to two instances where private individuals, whose affiliation with the opposition is unclear, published pictures of 'massacres' on their social media accounts, attributing the responsibility to the Government, when, in fact these pictures were taken in unrelated contexts, *i.e.* in Côte d'Ivoire and Congo-Brazzaville.²¹¹ According to the Government, this spreading of false information constitutes "an incitement to revenge, and therefore to commit violent acts as part of [Jean] Ping's call to eliminate those he calls 'cockroaches'".²¹²
193. The information available indicates that the meeting during which the alleged inflammatory words were uttered took place in a village of Woleu Ntem as part of Jean Ping's 2016 presidential campaign. Since the speech in question was delivered in person, by the presidential candidate, to a number of individuals gathered in a public place, it can be argued that the requirement that the incitement be *public* is met.

²⁰⁶ VoaAfrique, "[Jean Ping menacé de poursuites pour avoir parlé de "cafards" dans le contexte de la présidentielle au Gabon](#)", 13 May 2016.

²⁰⁷ RFI, "[Gabon: L'opposant Jean Ping se défend et accuse ses détracteurs](#)", 21 May 2016; Gabon Review, "[Présidentielle 2016 : Jean Ping et les « cafards » du tollé](#)", 13 May 2016.

²⁰⁸ Info241.com, "[Le Cafardgate et les « machinations » du gouvernement gabonais passés au crible](#)", 31 May 2016.

²⁰⁹ Jeune Afrique, "[Gabon : Jean Ping sommé de se présenter devant la justice](#)", 23 June 2016.

²¹⁰ Info241.com, "[L'affaire dite des « cafards » suspendue au paiement des frais de procédure](#)", 18 June 2016.

²¹¹ Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, p. 5 (elements 6, 7, 8 and 9).

²¹² Gabonese Republic, [Referral under Article 14 of the Rome Statute](#), 20 September 2016, pp. 4-5 (OTP translation).

194. However, the information available does not suggest that Jean Ping's declaration constituted *direct* incitement to commit genocide. In its analysis, the Office considered the speech in its entirety, which is available online.²¹³ It appears that the controversial sentences were pronounced towards the end of an 8-minutes speech which was mostly devoted to the socio-economic development of the Woleu Ntem province and related electoral promises. The general tone of the speech was geared towards gaining the support of the local population for the forthcoming presidential election. In particular, the end of the speech explicitly details Jean Ping's intention in holding the public meeting, namely to call his supporters to register and vote. In this respect, the video indicates that he concluded his speech by saying: "I think you understand the meaning of us coming here, we are here to solicit your massive support. And for this, you must register, you must vote".²¹⁴
195. The ICTR has held that one factor to assess whether an act of incitement can be viewed as direct is "whether the persons for whom the message was intended immediately grasped the implication thereof."²¹⁵ The crime of genocide is defined in the Statute as a number of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.²¹⁶ An act inciting to commit genocide should therefore be a direct call from which members of the intended audience understand they are concretely urged to take action and commit certain acts, such as killing or causing serious bodily or mental harm, with the intent to destroy, in whole or in part a specific national, ethnical, racial or religious group.
196. In the present case, the incriminated excerpt of Jean Ping's speech does not appear to communicate to the addressees the need for them to violently target any specific national, ethnical, racial or religious group, let alone to commit genocide. Similarly, the speech taken in its entirety cannot be said to concretely urge the assistance to take any form of specific action against an explicitly identified group. Instead, the speech is geared towards laying out electoral promises and gaining support for the forthcoming presidential election and no other part than the excerpt in question may be considered inflammatory in tone or content.
197. In accordance with ICTR jurisprudence on the issue,²¹⁷ due regard should be given to the cultural context in which the speech was delivered – that of a Central African

²¹³ Youtube, "[\[Gabon\] Jean Ping affaire cafards version non trafiquée](#)", 15 May 2016.

²¹⁴ "Je ne vais pas être plus long. Je pense que vous comprenez le sens de notre arrivée ici. Nous venons solliciter votre appui massif. Pour cela, il faut vous inscrire, il faut voter. Les jeunes qui ne sont pas inscrits, doivent aller s'inscrire et prendre leur carte ». See Youtube, "[\[Gabon\] Jean Ping affaire cafards version non trafiquée](#)", 15 May 2016 at 8'00 (OTP translation).

²¹⁵ *Akayesu*, para. 558. See also *Nahimana*, Trial Judgement, para. 1011; *Bikindi*, Trial Judgment, para. 387.

²¹⁶ Article 6 of the Statute.

²¹⁷ *Akayesu*, para. 557; See also *Nahimana*, Trial Judgement, para. 1011; *Nahimana*, Appeal Judgement, paras 700-701; *Bikindi*, Trial Judgment, para. 387.

nation. In this respect, the use of the term ‘cockroaches’ appears questionable, especially because of its resonance with the use of the term in the context of the Rwandan genocide. However, in the context of the 2016 presidential election in Gabon, the information available suggests that the use of such terms only occurred on this single occasion, at the end of a speech intended to garner support, and not as part of a hate speech campaign, in contrast to the Rwandan situation. Most importantly, the information fails to establish how Jean Ping’s declaration, or any other acts allegedly committed to foster hatred and violence, such as the spreading of false information online, constituted a direct call to his supporters to commit genocide.

198. In addition, for his speech to constitute public and direct incitement to genocide under the Rome Statute, it would be necessary to show that Jean Ping had the specific intent to destroy the targeted group, in whole or in part. Nothing in the information available suggests that the requirement of specific intent, including the intent to directly create a state of mind in the audience to commit genocide, is met in the present situation. In this respect, a public, yet vague reference to the term “cockroaches” is not sufficient to establish a specific intention to destroy a targeted group – which remains unidentified in the speech itself as well as in the Government’s referral – or to create a state of mind that would lead the audience to commit genocide.
199. In conclusion, the information available does not provide a reasonable basis to believe that the leader of the opposition, Jean Ping, incited genocide during his 2016 presidential campaign.

C. Conclusion on Subject-Matter Jurisdiction

200. The information available does not provide a reasonable basis to believe that crimes under the Statute have been committed in Gabon since May 2016. Specifically, there is no reasonable basis to believe that the acts allegedly committed by the opposition during the post-election violence constituted an “attack against a civilian population”, a required contextual element under article 7 of the Statute. In particular, the information available does not provide a reasonable basis to believe that, except for one isolated case of deprivation of liberty, the alleged acts attributed to Jean Ping and other opposition leaders, namely various acts of arson, looting and destruction, constitute any of the relevant offences under article 7(1), nor evince a certain pattern of behaviour which could qualify as an “attack” within the meaning of article 7 of the Statute.
201. Additionally, the information available also does not provide a reasonable basis to believe that the acts allegedly committed by the security forces in the aftermath of

the announcement of the electoral results formed part of an “attack against a civilian population”, under article 7 of the Statute. While the use of force may have been excessive and, at times indiscriminate, and could have resulted in serious human rights violations, the conduct of the security forces does not appear to embody a pattern consistent with the definition of an attack as a “campaign” or “operation” targeted against a civilian population. In the case of the raid on Jean Ping’s HQ, although the operation entailed the use of significant force and necessarily required a certain degree of planning and organisation, the information available does not provide a reasonable basis to believe that a “quantitative threshold” requiring “more than a few”, “several” or “many” acts listed under article 7(1) of the Statute has been met. The information available therefore does not provide a reasonable basis to believe that the raid on Jean Ping’s HQ entailed the commission of acts constitutive of an attack against the opposition or any other particular civilian population in the sense of article 7.

202. In any event, should a different conclusion be reached regarding the existence of an attack in the sense of article 7(2), it does not appear that such attack could be characterised as “widespread or systematic”, considering the limited geographic and temporal scope of the violence committed during the post-election crisis and the relatively low number of victims.
203. Finally, as regards the Government’s allegation related to direct and public incitement to commit genocide, the information available does not provide a reasonable basis to believe that the leader of the opposition directly incited his supporters to commit the crime of genocide. In particular, the incriminated declaration does not appear to have communicated to the addressees the need for them to violently target any specific national, ethnical, racial or religious group, let alone to commit genocide in the sense of article 25(3)(e).
204. Therefore, following an analysis of all information available regarding incidents of violence committed in Gabon since May 2016, the Office has concluded that there is no reasonable basis to believe that the acts considered in this report, while of concern, constitute crimes over which the Court may exercise jurisdiction. This conclusion does not diminish the seriousness of the human rights violations that appear to have occurred in Gabon in the course of the post-election crisis and that should be addressed at the national level.

VII. CONCLUSION

205. The information available does not provide a reasonable basis to believe that any crimes falling within the jurisdiction of the Court have been committed in the situation in Gabon. Accordingly, there is no reasonable basis to proceed with an

investigation and this preliminary examination has been brought to a close. Should further information become available in the future which would lead the Office to reconsider these conclusions in the light of new facts or evidence, the preliminary examination could be re-opened.

206. The Office notes that the referring State, Gabon, may request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with an investigation, pursuant to article 53(3)(a).²¹⁸

²¹⁸ See also rules 105, 107, 108 of the ICC Rules of Procedure and Evidence.