



Original: **French**

No. : ICC-01/16

Date: **15 January 2020**

PRE-TRIAL CHAMBER I

Before:

**Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou**

SITUATION IN THE GABONESE REPUBLIC

Public

Decision on the Prosecutor's Notice

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

States' Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations Other
Section**

Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) issues the following decision subsequent to the Prosecutor’s notice inviting it to terminate the record on the situation in the Gabonese Republic¹ (the “Prosecutor’s Notice”).

1. On 28 September 2016, in accordance with article 14 of the Rome Statute (“Statute”) and regulation 45 of the Regulations of the Court, the Prosecutor informed the Presidency in writing that the Government of the Gabonese Republic (“Gabonese Republic” or “Gabon”) had referred to her the situation relating to crimes potentially falling within the jurisdiction of the Court allegedly committed on Gabonese territory since May 2016 in the context of the presidential election held that year.²

2. On 29 September 2016, the Prosecutor announced that she would be conducting a preliminary examination of the situation in Gabon since May 2016 in order to establish whether the criteria for opening an investigation had been met.³

3. On 4 October 2016, the Presidency assigned the situation in the Gabonese Republic to Pre-Trial Chamber II in accordance with regulation 46 of the Regulations of the Court.⁴ Subsequently, on 16 March 2018, the Presidency re-assigned the situation in the Gabonese Republic to this Chamber.⁵

4. On 21 September 2018, the Prosecutor concluded that the legal criteria that would warrant opening an investigation into the situation in the Gabonese Republic had not been met at that stage and, accordingly, decided not to open an investigation

¹ “Prosecutor’s notice of her decision under article 15(6) of the Statute”, dated 11 September 2019 and registered on 12 September 2019, ICC-01/16-5.

² [Referral under Article 14 of the Rome Statute submitted by the Gabonese Republic; Power of attorney; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic.](#)

³ [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic.](#)

⁴ ICC-01/16-1.

⁵ ICC-01/16-2.

under article 53(1) of the Statute⁶ (“Prosecutor’s Decision of 21 September 2018”). In the light of the information available, the Prosecutor concluded that there was no reasonable basis to believe that the acts allegedly committed in Gabon in the context of the 2016 post-election violence, either by members of the opposition or by the Gabonese security forces, constituted crimes against humanity under article 7 of the Statute.⁷ The Prosecutor also concluded that the information available did not afford a reasonable basis to believe that the leader of the opposition, Jean Ping, had incited his supporters to commit genocide within the meaning of article 25(3)(e) of the Statute during the presidential campaign conducted in 2016.⁸

5. On 12 September 2019, the Chamber received the Prosecutor’s Notice inviting it to formally “terminate” the record relating to the situation in the Gabonese Republic in view of the fact that no further judicial proceedings were envisaged to arise from the situation.⁹

6. The Chamber notes articles 53 and 29 of the Statute, rules 15 and 107 of the Rules of Procedure and Evidence (“Rules”), regulation 46 of the Regulations of the Court and regulation 20 of the Regulations of the Registry.

7. The Chamber notes that under article 53(3)(a) of the Statute, the referring State, in this case the Gabonese Republic, may request the Pre-Trial Chamber seized of the situation to review the Prosecutor’s decision not to proceed with an investigation.¹⁰ The Chamber, in common with the Prosecutor,¹¹ notes that the Gabonese Republic did not exercise that right within 90 days following the notification of the Prosecutor’s Decision of 21 September 2018, as laid down in rule 107(1) of the Rules.

⁶ The Prosecutor’s decision to close the preliminary examination of the Situation in the Gabonese Republic, [Article 5 Report](#), 21 September 2018, paras. 200-205; Statement by the Prosecutor, [International Criminal Court Prosecutor on Gabon: “The legal criteria for this Court to investigate have not been met”](#), 21 September 2018.

⁷ [Prosecutor’s Decision of 21 September 2018](#), paras. 200-205.

⁸ [Prosecutor’s Decision of 21 September 2018](#), paras. 200-205.

⁹ Prosecutor’s Notice, para. 6.

¹⁰ See also [Prosecutor’s Decision of 21 September 2018](#), para. 206.

¹¹ Prosecutor’s Notice, para. 5.

8. The Chamber notes, nevertheless, as pointed out in the Decision of 21 September 2018, that, under article 53(4) of the Statute, new facts or information can be submitted to the Prosecutor at any time so that he or she may reconsider the decision not to open an investigation. The Chamber also recalls in that respect that, under article 29 of the Statute, the crimes falling within the jurisdiction of the Court are not subject to limitation.

9. The Prosecutor, albeit stating that there is no procedure in the law applicable before the Court for the termination of proceedings in such circumstances, invites the Chamber to “terminate” the situation record, although without explaining what she understands that term to mean.¹²

10. The Chamber is of the view that the provisions of article 53(4) of the Statute, under which the Prosecutor may reconsider his or her decision at any time, conflict with the Prosecutor’s invitation to the Chamber. Indeed, the very fact that such an open-ended possibility for reconsideration exists means that decisions by the Prosecutor not to proceed with an investigation, unlike decisions of the Chambers of the Court, cannot acquire the authority of *res judicata* and may be reopened by the Prosecutor at any time. It is therefore impossible to envisage at this stage that no proceedings will arise from the situation in the Gabonese Republic in the future.

11. Furthermore, regulation 20 of the Regulations of the Registry states that the Registrar must open a situation record once the Presidency has assigned a situation to a Pre-Trial Chamber pursuant to regulation 46, paragraph 2 of the Regulations of the Court, which it did for the situation in the Gabonese Republic on 4 October 2016, as indicated above. The texts applicable by the Court, as they currently stand, contain no provision under which a situation record can be “terminated”. On the contrary, rule 15 of the Rules establishes that the Registrar must keep the records up to date and make them available to the public, subject to any protective measures taken by a judge or Chamber of this Court. The Chamber is therefore bound to dismiss the Prosecutor’s invitation.

¹² Prosecutor’s Notice, para. 6.

FOR THESE REASONS, the Chamber

DISMISSES the Prosecutor's invitation; and

NOTES the Prosecutor's Decision of 21 September 2018.

Done in both English and French, the French version being authoritative.

[signed]

Judge Péter Kovács

Presiding Judge

Judge Marc Perrin de Brichambaut

Judge Reine Adélaïde Sophie

Alapini-Gansou

Dated this 15 January 2020

At The Hague, Netherlands