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PRE-TRIAL CHAMBER I

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
 Judge Hans-Peter Kaul
 Judge Christine Van den Wyngaert

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR V. LAURENT GBAGBO**

Public redacted version

**Decision on the fitness of Laurent Gbagbo to take part in the proceedings
before this Court**

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the fitness of Laurent Gbagbo to take part in the proceedings against him.

I. Procedural history

1. On 5 June 2012, the Defence filed the “*Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012*”, in which it argued that the confirmation hearing should be postponed, *inter alia*, because Mr Gbagbo’s state of health made him unfit to stand trial.¹
2. On 12 June 2012, the Single Judge issued the “Decision on the ‘*Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012*’”, finding, *inter alia*, that the allegations of Mr Gbagbo’s unfitness had not been sufficiently substantiated. However, the Single Judge added that since the suspect’s ability to participate in the confirmation hearing was crucial to the fairness of the proceedings, she was prepared to entertain a request for a medical, psychiatric or psychological examination of Mr Gbagbo pursuant to rule 135 of the Rules of Procedure and Evidence (the “Rules”).²
3. On 19 June 2012, the Defence submitted its “Defence application for additional medical and psychological evaluation of President Gbagbo”.³
4. On 26 June 2012, the Single Judge issued the “Order to conduct a medical examination”, whereby she appointed, with a view to determining whether Mr Gbagbo is fit to take part in the proceedings against him: (i) Dr An Chuc to conduct a medical examination; (ii) Dr Bruno Daunizeau to undertake a psychological examination; and (iii) Dr Pierre Lamothe to

¹ ICC-02/11-01/11-140-Conf, paras 21-60. A public redacted version is also available, see ICC-02/11-01/11-140-Red2.

² ICC-02/11-01/11-152-Conf, paras 36-37. A public redacted version is also available, see ICC-02/11-01/11-152-Red.

³ ICC-02/11-01/11-158-Conf-Exp-tENG and annexes. Confidential redacted version is also available, see ICC-02/11-01/11-158-Conf-Red2.

undertake a psychiatric examination (the “experts”).⁴ It was indicated in the order that the examinations were not aimed at merely recording the existence of pathologies, disorders or syndromes but at assessing Mr Gbagbo’s relevant fitness as regards the proceedings against him before the Court.⁵ Accordingly, the experts were requested to assist the Chamber in determining whether Mr Gbagbo was capable of meaningfully exercising his rights as enshrined by article 67 of the Rome Statute (the “Statute”) in the proceedings instituted against him before the Court.

5. On 19 July 2012, the Registry filed in the record of the case, “*ex parte*, Registry and Defence only”, the medical reports of the three experts appointed by the Single Judge (the “Expert Reports”).⁶

6. On 2 August 2012, the Single Judge issued the “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing”, whereby: (i) access was given to the Prosecutor to the report of Dr Daunizeau and to redacted versions of the reports of Dr Chuc and Dr Lamothe; (ii) the parties were granted an opportunity to present written observations on the Expert Reports and on the subsequent procedure to be followed; and (iii) the commencement of the confirmation of charges hearing was postponed until the resolution of the issue of Mr Gbagbo’s fitness to take part in the proceedings against him.⁷

⁴ ICC-02/11-01/11-164-Conf-tENG.

⁵ *Ibid.*, para. 39.

⁶ ICC-02/11-01/11-190-Conf-Exp-Anx1 (confidential redacted version, ICC-02/11-01/11-190-Conf-Anx1), ICC-02/11-01/11-190-Conf-Exp-Anx2, (reclassified on 2 August 2012 as “confidential”), ICC-02/11-01/11-190-Conf-Exp-Anx3 (confidential redacted version, ICC-02/11-01/11-190-Conf-Anx3). Official English translations of the Expert Reports are also available, see ICC-02/11-01/11-190-Conf-Exp-Anx1-tENG (“Report of Dr Chuc”), ICC-02/11-01/11-190-Conf-Anx2-tENG (“Report of Dr Daunizeau”), ICC-02/11-01/11-190-Conf-Exp-Anx3-tENG (“Report of Dr Lamothe”).

⁷ ICC-02/11-01/11-201.

7. On 10 August 2012, the Defence filed the “*Demande d'autorisation d'interjeter appel de la décision de la Juge unique portant sur la question de la communication des rapports médicaux (Décision ICC-02/11-01/11-201 sur les questions relatives à la procédure à suivre en fonction de l'état de santé du Président Gbagbo et du report de l'audience de confirmation des charges)*”.⁸ The Prosecutor responded on 16 August 2012.⁹ The request will be dealt with in a separate decision.

8. On 15 August 2012, the Single Judge, following a request from the Office of Public Counsel for victims (the “OPCV”) for access to the Expert Reports and authorisation to submit observations thereon,¹⁰ authorised the OPCV to submit observations on the legal principles applicable to the determination on a suspect’s fitness to stand trial and the procedure to be adopted following the submission of the Expert Reports.¹¹

9. On 16 August 2012, the Prosecutor filed the “Prosecution’s observations on the Expert Reports”.¹² A corrigendum thereof was filed on 17 August 2012 (the “Prosecutor’s Observations”).¹³

10. On 21 August 2012, the Prosecutor filed the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s request pursuant to Regulation 35 for an extension of time to submit its observations on the Expert Reports and request for the disclosure of additional medical reports’”.¹⁴ The

⁸ ICC-02/11-01/11-207-Conf.

⁹ ICC-02/11-01/11-213-Conf.

¹⁰ ICC-02/11-01/11-203.

¹¹ ICC-02/11-01/11-211.

¹² ICC-02/11-01/11-214-Conf and annex.

¹³ ICC-02/11-01/11-214-Conf-Corr and annex.

¹⁴ ICC-02/11-01/11-224-Conf and annex.

Defence responded on 27 August 2012.¹⁵ The request will be dealt with in a separate decision.

11. On 23 August 2012, the OPCV filed its “Observations on the legal principles applicable to the determination of a suspect’s fitness”.¹⁶ A corrigendum thereof was filed on 24 August 2012 (the “OPCV Observations”).¹⁷

12. On 27 August 2012, the Defence filed the “*Observations de la Défense sur les rapports médicaux préparés par les experts nommés par la Chambre et sur la procédure à suivre*”.¹⁸ A corrigendum thereof was filed on 29 August 2012.¹⁹ On 3 September 2012, the Single Judge held that the observations as filed did not comply with the applicable page limit and ordered the Defence to re-file its observations by 4 September 2012.²⁰ On 4 September 2012, the Defence filed the “*Observations de la Défense portant sur les rapports déposés par les experts médicaux nommés par la Chambre et sur la procédure à suivre déposées à la suite de l’ordonnance de la Chambre du 3 septembre 2012 (ICC-02/11-01/11-238)*” (the “Defence Observations”).²¹

13. On 24 and 25 September 2012, a hearing was held in closed session before the Chamber, in the presence of Mr Gbagbo, his Defence, the Prosecutor, representatives of the Registry and the experts appointed by the Chamber.²²

¹⁵ ICC-02/11-01/11-232-Conf.

¹⁶ ICC-02/11-01/11-228.

¹⁷ ICC-02/11-01/11-228-Corr.

¹⁸ ICC-02/11-01/11-233-Conf.

¹⁹ ICC-02/11-01/11-233-Conf-Corr.

²⁰ ICC-02/11-01/11-238.

²¹ ICC-02/11-01/11-239-Conf.

²² ICC-02/11-01/11-T-6-CONF-ENG, ICC-02/11-01/11-T-7-CONF-ENG. See also “Order scheduling a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings against him”, ICC-02/11-01/11-241, and “Decision on issues related to the hearing on Mr Gbagbo’s fitness to take part in the proceedings against him”, ICC-02/11-01/11-249 and annex.

14. On 8 October 2012, following an oral order of the Chamber,²³ the Registrar filed the “Report of the Registry on the detention conditions of Mr. Laurent Gbagbo”.²⁴

15. Also on 8 October 2012, the Prosecutor filed the “Prosecution’s request pursuant to Article 69(3), Rule 135 and Regulation 35 to submit additional information regarding the conditions of detention of Mr Laurent Gbagbo in Korhogo”.²⁵

16. On 10 October 2012, the Defence filed the “*Requête aux fins de fixation d’un délai pour permettre à la défense de répondre à la demande du Procureur du 8 octobre 2012 visant à pouvoir déposer trente et un documents et dix vidéos en provenance de Côte d’Ivoire*”²⁶ and the “*Requête aux fins de fixation d’un délai pour permettre à la défense de déposer les observations portant sur le rapport du Greffe du 5 octobre 2012 concernant les conditions (sic) du Président Gbagbo*”.²⁷

17. On 11 October 2012, the Prosecutor filed the “Prosecution’s Submission following the Prosecution request pursuant to article 69(3), Rule 135 and Regulation 35 to submit additional information regarding the conditions of detention of Mr Laurent Gbagbo in Korhogo (ICC-02/11-01/11-260-Conf)”.²⁸

18. On 29 October 2012, the Defence filed the “*Observations de la défense sur le rapport du Greffe du 5 octobre 2012 portant sur les conditions de détention du Président Gbagbo (ICC-02/11-01/11-257-Conf)*”²⁹

²³ ICC-02/11-01/11-T-7-CONF-ENG, p. 77, lines 5-14.

²⁴ ICC-02/11-01/11-257-Conf and annex.

²⁵ ICC-02/11-01/11-260-Conf and annexes. A public redacted version is also available, see ICC-02/11-01/11-260-Red.

²⁶ ICC-02/11-01/11-262-Conf.

²⁷ ICC-02/11-01/11-263-Conf.

²⁸ ICC-02/11-01/11-264-Conf and annex.

²⁹ ICC-02/11-01/11-282-Conf-Exp and annex.

19. On 30 October 2012, the Defence filed the “*Réponse de la défense du Président Gbagbo à la demande du Procureur en date du 8 octobre 2012 visant à pouvoir déposer trente et un documents et dix vidéos en provenance de Côte d'Ivoire*”.³⁰

II. Submissions of the parties and participants

A. *The Prosecutor*

20. The Prosecutor argues that an accused bears the burden of proving that he is unfit to stand trial on the balance of probabilities.³¹

21. The Prosecutor further submits that a determination of fitness to stand trial is a discretionary legal determination which must be made by the Chamber and that medical findings may be of guidance but do not suffice for an assessment of whether Mr Gbagbo is fit to take part in the confirmation of charges hearing. The Prosecutor contends that, in addition to the three Expert Reports, the Chamber should take into account all relevant information such as previous medical findings and reports, the statements and demeanour of Mr Gbagbo during his initial appearance before the Court on 5 December 2011, as well as public statements from his counsel and persons who visited him in detention.³²

22. The Prosecutor contends that none of the physical pathologies or psychological disorders described in the Expert Reports demonstrate Mr Gbagbo's unfitness to stand trial or incapacity to assist in his defence.³³ Regarding Mr Gbagbo's psychological health, the Prosecutor considers that the report of Dr Lamothe should be heavily relied upon, given his specific

³⁰ ICC-02/11-01/11-283-Conf.

³¹ Prosecutor's Observations, para. 20.

³² *Ibid.*, para. 21-27.

³³ *Ibid.*, paras 36 and 37.

background and experience, while the conclusions of Dr Chuc and Dr Daunizeau should be viewed with more circumspection.³⁴

23. The Prosecutor submits that the Expert Reports should be read in light of the questions asked by the Single Judge. The Prosecutor argues that Dr Chuc gives negative, but unsupported answers to all of them, while Dr Daunizeau's answers are ambiguous, sometimes irrelevant and often contradictory. On the other hand, the Prosecutor contends that Dr Lamothe's answers are integrated in a global response which is clear, supported and indicates that Mr Gbagbo's ability to meaningfully exercise his rights under article 67 of the Statute is not impaired.³⁵

24. Regarding Mr Gbagbo's capacity to understand the nature, cause and content of the charges as well as the conduct and the consequences of the proceedings against him, the Prosecutor contends that both the conclusions of Dr Daunizeau and Dr Lamothe contain a number of specific findings indicating that this ability is not impaired, including the fact that Mr Gbagbo has been able to sustain three hour examination sessions over four days with two experts.³⁶

25. Regarding the ability to instruct counsel, the Prosecutor reiterates that this does not require that Mr Gbagbo possess all the legal and strategic capabilities of a trained lawyer or a judicial officer and submits that the enquiry is limited to the question of whether he is able to recount the necessary facts so that counsel can properly present a defence. The Prosecutor adds that the report of Dr Lamothe clearly indicates the fitness of Mr Gbagbo to give instructions to his lawyer while the other experts' conclusions should

³⁴ *Ibid.*, para. 38.

³⁵ *Ibid.*, paras 49-66.

³⁶ *Ibid.*, paras 50-51, 53-54 and 60-61.

be disregarded due to their ambiguous, contradictory and unsupported nature.³⁷

26. With regard to Mr Gbagbo's ability to make a statement, the Prosecutor submits that despite his tendency to tire, this ability is not impaired. In particular, the Prosecutor underlines that Mr Gbagbo provided lengthy and detailed statements to the experts during the examination sessions.³⁸

27. The Prosecutor also highlights Mr Gbagbo's conduct and demeanour during his initial appearance before the Court on 5 December 2011, and contends that there is no justification for a conclusion that Mr Gbagbo is unable to address the Court and make statements absent any indication from the experts that his capacity is declining over time.³⁹

28. The Prosecutor argues that Mr Gbagbo suffers, at most, from a post-traumatic stress disorder ("PTSD") of low intensity that is not debilitating, a mild form of depression and moderate cognitive troubles that do not compromise his competency to stand trial.⁴⁰

29. The Prosecutor further contends that, in the event that Mr Gbagbo is found to be suffering from minor physical and/or psychological pathologies, the confirmation hearing can be adapted accordingly including by adjusting the length of court sessions, allowing for breaks during the hearings or providing Mr Gbagbo with assistance in case he wishes to stand up.⁴¹

30. Finally, if Mr Gbagbo is found unfit to participate in the confirmation hearing, the Prosecutor submits that he should not be released but, instead,

³⁷ *Ibid.*, paras 55-58.

³⁸ *Ibid.*, paras 63-65.

³⁹ *Ibid.*, para. 66.

⁴⁰ *Ibid.*, paras 40, 44 and 46.

⁴¹ *Ibid.*, paras 4 and 70.

that the confirmation hearing be postponed and the issue reviewed every 120 days in accordance with rule 135 of the Rules.⁴²

31. In its oral submission of 25 September 2012, the Prosecutor adds that it is rather normal for people in Mr Gbagbo's situation – accused of serious crimes and finding themselves in long-term detention – to experience stress, depression and physical weakness. On the basis of Dr Lamothe's conclusions and earlier reports from the medical staff of the detention facility, the Prosecutor further contends that Mr Gbagbo's state of health is normal and compatible with international standards of detention.⁴³

B. The OPCV

32. The OPCV submits that "the victims demand that the hearing on the confirmation of charges be held as soon as possible".⁴⁴

33. In addition, the OPCV states that "should the suspect consider that his health condition is not compatible with his attendance at the confirmation of charges hearing, he has the possibility to waive his right to be present pursuant to article 61(1) of the Rome Statute". The OPCV cautions, however, that "the presence of the suspect at the confirmation of charges hearing constitutes an essential element of the proceedings for the victims".⁴⁵

C. The Defence

34. The Defence considers that the observations submitted by the Prosecutor are irrelevant, sometimes inaccurate and seek to discredit the Expert Reports, their conclusions and their recommendations.⁴⁶

⁴² *Ibid.*, para. 71.

⁴³ ICC-02/11-01/11-T-7-CONF-ENG, p. 68, lines 13-23.

⁴⁴ OPCV Observations, para. 15.

⁴⁵ *Ibid.*, paras 17 and 21.

⁴⁶ Defence Observations, paras 7-33.

35. The Defence further submits that the three Expert Reports demonstrate without ambiguity that Mr Gbagbo does not have capacity, at this stage, to understand the stages and the consequences of the procedure, to instruct his counsel, or to make a statement.⁴⁷

36. The Defence argues that the medical findings clearly demonstrate that Mr Gbagbo is suffering from PTSD, hospitalisation syndrome and depression provoking intense intellectual fatigue and an inability to focus.⁴⁸

37. In these conditions, the Defence contends that forcing him to stand trial would amount to a violation of his right to a fair trial, and considers the adjournment of proceedings an indispensable measure in order for Mr Gbagbo to recover and become able to participate.⁴⁹

38. In the meantime, the Defence submits that Mr Gbagbo should be granted interim release in order for him to recover in an adequate environment with regular contact with his family. The Defence further argues that this option – as opposed to maintaining his detention, adjusting his detention conditions or placing him in a non-penitentiary facility – is the only reasonable way to avoid any deterioration of his faculties and to allow him to stand trial.⁵⁰

39. The Defence reiterates its argument regarding Mr Gbagbo's release made in its previous application for interim release⁵¹ and submits that a discussion should be started between the parties, the Chamber and the [REDACTED] and to ensure compliance with any conditions set by the Pre-Trial Chamber.⁵² While recognising that neither rule 135 of the Rules nor regulation 103 of the Regulations of the Court provide for interim release, the

⁴⁷ *Ibid.*, para. 24.

⁴⁸ *Ibid.*, para. 71-82.

⁴⁹ *Ibid.*, paras 103-104.

⁵⁰ *Ibid.*, para. 106-119.

⁵¹ ICC-02/11-01/11-105-Conf-tENG.

⁵² Defence Observations, para. 120-121.

Defence submits that the Chamber should exercise its inherent power to authorise Mr Gbagbo's interim release and, as such, ensure a fair and efficient trial.⁵³

40. In its oral submissions of 25 September 2012, the Defence adds that the burden of proof should not be borne by the Defence. It argues that the procedure at this Court differs from that of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") and regular common law procedures. The Defence contends that the procedure under rule 135 of the Rules applies in situations where the appearance "*extrêmement affaiblie*" of an accused triggers the Chamber's duty to ensure that he or she understands the nature of the charges against him or her.⁵⁴

41. Finally, the Defence also emphasises that it is not sufficient to determine that Mr Gbagbo understands his situation in general. He must also understand the specifics of the procedure and the charges against him. To support its claim, the Defence refers to the ICTY case of *Erdemović*, where a judgement was quashed on the basis that the accused did not fully understand the nature of the charges against him, including the notions of war crimes and crimes against humanity.⁵⁵

III. Analysis and conclusions of the Chamber

A. *Applicable law and legal standards*

42. For the purposes of the present decision, the Chamber has considered articles 21, 61 and 67 of the Statute, rules 113, 121 and 135 of the Rules, and regulation 103 of the Regulations of the Court.

⁵³ *Ibid.*, para. 123-125.

⁵⁴ ICC-02/11-01/11-T-7-CONF-FRA, p. 76, line 22 to p. 77, line 13.

⁵⁵ ICC-02/11-01/11-T-7-CONF-ENG, p. 75, line 25 to p. 76, line 6.

43. Neither the Statute nor the Rules contain any provision specifically addressing fitness to stand trial. However, the concept of fitness to stand trial must be viewed as an aspect of the broader notion of fair trial. It is rooted in the idea that whenever the accused is, for reasons of ill health, unable to meaningfully exercise his or her procedural rights, the trial cannot be fair and criminal proceedings must be adjourned until the obstacle ceases to exist. In this sense, fitness to stand trial can be defined as absence of such medical conditions which would prevent the accused from being able to meaningfully exercise his or her fair trial rights.

44. With respect to proceedings before the Court, article 67(1) of the Statute enumerates the fair trial rights, which by virtue of rule 121(1) of the Rules are applicable from the first appearance of the suspect before the Pre-Trial Chamber.

45. In accordance with article 21(3) of the Statute, the application and interpretation of the applicable law must be consistent with internationally recognised human rights. In this regard, the Appeals Chamber has ruled that human rights underpin every aspect of the Statute and that the provisions of the Statute “must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”⁵⁶

46. In this regard, the Chamber notes the findings of the European Court of Human Rights (the “ECtHR”) that the fair trial rights contained in article 6 of the European Convention on Human Rights (the “ECHR”) guarantee “the

⁵⁶ Appeals Chamber, *“Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”*, 14 December 2006, ICC-01/04-01/06-772, para. 37.

right of an accused to participate effectively in a criminal trial".⁵⁷ The ECtHR found that, in general, the right of effective participation includes, *inter alia*, not only the right to be present, but also to hear and follow the proceedings, such rights being implicit in the very notion of an adversarial procedure and also capable of being derived from the rights contained in article 6(3)(c), (d) and (e) of the ECHR.⁵⁸

47. The ECtHR has further held:

"[E]ffective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.⁵⁹

48. In this context, the ECtHR has held that special procedural guarantees may be necessary to protect the interests of accused persons, who, by reason of mental disabilities, are not fully capable of acting for themselves.⁶⁰

49. The Chamber also notes the finding of the ICTY in the case of *Strugar*, where it was held that the accused must have the capacity "to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, *i.e.* to make his or her defence".⁶¹ On appeal, this finding was

⁵⁷ ECtHR, *Stanford v. The United Kingdom*, Appl. no. 16757/90, Judgment, 23 February 1994, para. 26.

⁵⁸ *Ibid.* Article 6(3)(c), (d) and (e) of the ECHR provides that everyone charged with a criminal offence shall have the rights to defend themselves in person, to examine or have examined witnesses and to have the free assistance of an interpreter, respectively.

⁵⁹ ECtHR, *S.C. v. The United Kingdom*, Appl. no. 60958/00, Judgment, 15 June 2004, para. 29. See also *Liebreich v. Germany*, Appl. no. 30443/03, Decision as to Admissibility, 8 January 2008; *Timergaliyev v. Russia*, Appl. no. 40631/02, Judgment, 14 January 2009, para. 51; *G. v. France*, Appl. no. 27244/09, Judgment, 23 May 2012, para. 52.

⁶⁰ ECtHR, *G. v. France*, Appl. no. 27244/09, Judgment, 23 May 2012, para. 53.

⁶¹ ICTY, Trial Chamber II, *Prosecutor v. Strugar*, IT-01-42-A, "Decision re the Defence Motion to Terminate Proceedings", 26 May 2004, para. 37 (the "Strugar Trial Decision").

confirmed and the Appeals Chamber of the ICTY specifically held that “the applicable standard is that of meaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings”.⁶² The same approach has been adopted by the International Criminal Tribunal for Rwanda⁶³ and the Extraordinary Chambers in the Courts of Cambodia.⁶⁴

50. The Chamber considers that from the catalogue of fair trial rights, contained in article 67(1) of the Statute, a number of relevant capacities can be discerned which are necessary for the meaningful exercise of these rights. As indicated in the “Order to conduct a medical examination”, they include the capacities: (i) to understand in detail the nature, cause and content of the charges; (ii) to understand the conduct of the proceedings; (iii) to instruct counsel; (iv) to understand the consequences of the proceedings; and (v) to make a statement.⁶⁵

51. In the Chamber’s view, the focus on article 67(1) of the Statute makes it clear that the question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but primarily whether these medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights.⁶⁶ In reaching its overall

⁶² ICTY, Appeals Chamber, *Prosecutor v. Strugar*, IT-01-42-A, “Judgement”, 17 July 2008, para. 55 (the “Strugar Appeal Judgment”).

⁶³ ICTR, Trial Chamber III, *Prosecutor v. Karemara et al.*, ICTR-98-44-T, “Decision on Remand Regarding Continuation of Trial”, 10 September 2009, para. 18.

⁶⁴ ECCC, Trial Chamber, 002/19-09-2007/ECCC/TC, “Decision on Ieng Thirith’s Fitness to Stand Trial”, 17 November 2011, para. 27 (the “Thirith Decision”).

⁶⁵ See ICC-02/11-01/11-164-Conf-tENG, para. 39.

⁶⁶ ICC-02/11-01/11-164-Conf-tENG, para. 39. See also Strugar Trial Decision, para. 35; Strugar Appeal Judgment, para. 61; ECtHR, *S.C. v. The United Kingdom*, Appl. no. 60958/00, Judgment, 15 June 2004; *Liebreich v. Germany*, Appl. no. 30443/03, Decision as to Admissibility, 8 January 2008; *Timergaliyev v. Russia*, Appl. no. 40631/02, Judgment, 14 January 2009; *G. v. France*, Appl. no. 27244/09, 23 May 2012.

determination of fitness to stand trial, the Chamber must take into account all the relevant circumstances of each individual case. The Chamber must also examine whether the negative impact of particular medical conditions can be mitigated by putting in place certain practical arrangements.⁶⁷

52. The Chamber also recalls that the meaningful exercise of one's fair trial rights does not require that the person be able to exercise them as "if he or she were trained as a lawyer or judicial officer."⁶⁸ In this respect, the Chamber notes that the ECtHR has considered it "an important factor in determining whether the applicant was capable of defending himself effectively in person that he was also represented by a lawyer whom he could freely consult during the trial and whom he could provide with the necessary information".⁶⁹

53. The Chamber thus agrees with the position expressed by the Appeals Chamber of the ICTY in *Strugar*:

An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer. Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal (footnotes omitted).⁷⁰

⁶⁷ See ECtHR, *T. v. the United Kingdom*, Appl. no. 24724/94, "Judgment", 16 December 1999, paras 84-88, *S.C. v. The United Kingdom*, Appl. no. 60958/00, "Judgment", 15 June 2004, paras 28-30; *Liebreich v. Germany*, Appl. no. 30443/03, "Decision as to Admissibility", 8 January 2008; *Timergaliyev v. Russia*, Appl. no. 40631/02, "Judgment", 14 January 2009, para. 58.

⁶⁸ ICC-02/11-01/11-164-Conf-tENG, para. 40; Appeals Chamber, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", 27 May 2008, ICC-01/04-01/07-522, para. 61.

⁶⁹ ECtHR, *Liebreich v. Germany*, Appl. no. 30443/03, Decision on admissibility, 8 January 2008. See also *Stanford v. the United Kingdom*, Appl. no. 16757/90, "Judgment", 23 February 1994, para. 30; *Timergaliyev v. Russia*, Appl. no. 40631/02, "Judgment", 14 October 2008, para. 59.

⁷⁰ *Strugar* Appeal Judgment, para. 60; see also ECtHR, *S.C. v. The United Kingdom*, Appl. no. 60958/00, "Judgment", 15 June 2004, para. 29 ("Given the sophistication of modern legal systems, many adults of normal intelligence are unable fully to comprehend all the intricacies and all the exchanges which take place in the courtroom: this is why the Convention, in article 6(3)(c), emphasizes the importance of the right to legal representation.")

54. The Chamber is of the view that the overall capacity required for fitness to stand trial is the same irrespective of the stage of proceedings. Indeed, article 67(1) of the Statute applies equally at pre-trial and trial stages,⁷¹ as clearly stated in rule 121(1) of the Rules. The importance of the ability of the suspect to participate meaningfully in the confirmation of charges proceedings is evident as the suspect has the right, in accordance with article 61(6) of the Statute, to object to the charges, challenge the evidence presented by the Prosecutor and present evidence.

55. The Chamber is of the view that rule 135 of the Rules also applies to the pre-trial phase and has considered the appointment of experts to conduct a medical, psychiatric and psychological examination under this rule to be indispensable in the case at hand. These experts were engaged in order to provide specialised information and medical opinion, based on specific expertise which the Judges do not possess. However, the Chamber considers that it remains exclusively competent to make the determination of the suspect's fitness to stand trial.

56. The Chamber notes the Prosecutor's argument that the party alleging that the suspect is unfit to stand trial should bear the burden of proof, and that the applicable evidentiary threshold should be "balance of probabilities".⁷² However, in the view of the Chamber, the primary purpose of rule 135 of the Rules is to enable the Chamber to "discharg[e] its obligations" in relation to ensuring that the accused understands the charges and ultimately that proceedings are fair.⁷³ Even in the absence of a request from one of the parties, the Chamber must ensure, as spelled out in rule 135 of the Rules, that proceedings do not take place against an unfit suspect. Therefore,

⁷¹ See ICC-02/11-01/11-152-Conf, para. 26; ICC-02/11-01/11-164-Conf-tENG, para. 24.

⁷² Prosecutor's Observations, para. 20.

⁷³ See rule 135(1) of the Rules and article 64(8)(a) of the Statute.

the role of the parties is better seen as assisting the Chamber in the exercise of its obligation. In the case at hand, while the medical examination of Mr Gbagbo was ordered following a Defence request, it was the Chamber that appointed the experts, who conducted their examinations independently in accordance with the instructions given by the Chamber.⁷⁴ Similarly, the procedure followed at the hearing – *i.e.* the manner and order in which the experts were questioned by the Chamber and the parties – was decided taking into account the fact that the experts had been appointed by the Chamber for the purpose of discharging its obligations pursuant to rule 135(1) of the Rules.⁷⁵ As to the evidentiary standard, the Chamber considers it sufficient to refer in this respect to the text of rule 135 of the Rules, which states that where the Chamber is “satisfied that the accused is unfit to stand trial” further proceedings must be adjourned.

B. Material assessed by the Chamber

57. In addition to the information provided by the experts, the Chamber has reviewed additional material as it considers that there is nothing in the applicable law which would prevent it from also relying on other relevant information contained in the record of the case, or on its own observation of the suspect during the proceedings.⁷⁶ However, for the reasons given below, the additional material is of very limited value for the present purposes, and the Expert Reports, together with the clarifications provided at the hearing, constitute the primary basis for the determination of the Chamber.

58. The Prosecutor suggests that the Chamber rely on public statements by Mr Gbagbo’s counsel and by persons visiting him in detention, who have

⁷⁴ See ICC-02/11-01/11-164-Conf-tENG.

⁷⁵ ICC-02/11-01/11-249, para. 37.

⁷⁶ Strugar Trial Decision, para. 51; Thirth Decision, para. 29.

stated that Mr Gbagbo is in good health.⁷⁷ However, the Chamber does not consider that such statements can be taken into account for the purposes of its determination as they may have been made in the absence of specific information on the medical condition of Mr Gbagbo or for other purposes, such as reassuring his supporters.

59. The Prosecutor also suggests that the Chamber take into consideration those reports of the Registry which are relevant to the issue of Mr Gbagbo's health and "all documents that were consulted by the experts".⁷⁸ Similarly, the Defence refers to previous filings in the case related to Mr Gbagbo's state of health in support of its argument.⁷⁹

60. The Chamber takes note of the fact that there are documents in the record of the case which relate to the state of Mr Gbagbo's health. However, in the "Decision on the '*Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012*'", the Single Judge held, specifically in relation to a report of a general practitioner presented by the Defence, that "such a report could not *per se* guide the conclusions of the Chamber as to the fitness of the suspect to take part in judicial proceedings", as it was chosen by the Defence and not appointed by the Chamber under rule 135 of the Rules.⁸⁰ Therefore, such documents in the record of the case must be distinguished from an analysis conducted by the experts, who were appointed by the Chamber in consultation with the parties and who conducted their work under supervision of the Chamber and the parties.⁸¹ Moreover, the experts were also given access to all other medical records and related documents in order for them to make their assessment in the

⁷⁷ Prosecutor's Observations, paras 26-27.

⁷⁸ *Ibid.*, paras 23-24.

⁷⁹ See Defence Observations, paras 36-70; ICC-02/11-01/11-T-7-CONF-ENG, p. 73, lines 21-23.

⁸⁰ ICC-02/11-01/11-152-Conf, para. 28. See also ICC-02/11-01/11-164-Conf-t-ENG, para. 27.

⁸¹ ICC-02/11-01/11-164-Conf-tENG, paras 22-41.

knowledge of previous reports. For these reasons, the Chamber finds it appropriate to focus on the conclusions reached by the experts.

61. Furthermore, the Prosecutor has called on the Chamber to rely on the "demeanor and the statement of Mr Gbagbo during his initial appearance on 5 December 2011".⁸² The Prosecutor has also presented at the hearing a video of Mr Gbagbo's initial appearance.⁸³ However, the initial appearance of Mr Gbagbo took place almost a year ago and the Chamber cannot therefore draw inferences from it in order to assess the capacities of Mr Gbagbo to date.

62. The Prosecutor also argues that the Chamber should consider as a factor militating in favour of Mr Gbagbo's fitness to stand trial the [REDACTED],⁸⁴ stating that:

On that occasion, the Defence did not object to [REDACTED] because he would be of ill health. To the contrary, they suggested that he might [REDACTED] subject to some preparations being made to accommodate Mr Gbagbo in view of his state of health.⁸⁵

63. The Chamber is not persuaded by the Prosecutor's argument, as the submissions of the Defence related to a different matter, namely the [REDACTED]. The Prosecutor does not put forward a clear argument that the capacities required for this limited purpose are essentially the same as those required to take part in proceedings before the Court. Consequently, no inference can be made from the submissions of Mr Gbagbo's defence with respect to the [REDACTED].

64. After the hearing, the Prosecutor filed in the record of the case new material (videos and photographs), which she alleges came into her

⁸² Prosecutor's Observations, para. 25.

⁸³ ICC-02/11-01/11-252-Conf-Anx1.

⁸⁴ [REDACTED]

⁸⁵ ICC-02/11-01/11-T-7-CONF-ENG, p. 65, line 24 to p. 66, line 2.

possession on 2 October 2012 and could not, therefore, be brought before the Chamber earlier.⁸⁶

65. The Prosecutor alleges that this new material is of relevance to the determination of the conditions of detention of Mr Gbagbo at Korhogo, Côte d'Ivoire, prior to his surrender to the Court, and, in turn, to the determination of Mr Gbagbo's fitness to take part in proceedings against him, as "the Defence argued that the conditions under which Mr Gbagbo was held in Korhogo constitute a key contributing factor to his present alleged unfitness".⁸⁷

66. The material recently provided by the Prosecutor goes to establishing, as a question of fact, the conditions of Mr Gbagbo's detention in Côte d'Ivoire prior to his surrender to the Court. The events experienced by Mr Gbagbo at that time, which include but are not limited to his detention in Korhogo, were indeed considered by the experts as a factor at the origin of this current PTSD and hospitalisation syndrome.⁸⁸ However, as already indicated, the question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but primarily whether such medical conditions affect the overall ability of Mr Gbagbo to meaningfully exercise his fair trial rights.⁸⁹ Therefore, the Chamber does not consider it necessary to analyse the conditions of detention in Côte d'Ivoire, as purportedly revealed by the material provided by the Prosecutor, for the purpose of its determination.

⁸⁶ ICC-02/11-01/11-260-Conf, para. 8.

⁸⁷ *Ibid.*, para. 16.

⁸⁸ See Report of Dr Chuc, pp. 31-32; Report of Dr Daunizeau, pp. 13-15; Report of Dr Lamothe, pp. 20-21.

⁸⁹ See above para. 51.

C. Mr Gbagbo's fitness to take part in the proceedings against him

General considerations

67. The experts have referred in their respective reports and at the hearing to the existence of PTSD and hospitalisation syndrome.⁹⁰ There does not appear to be disagreement between the three experts in relation to the existence of these medical conditions. The conclusions of the experts diverge, however, as to the extent that such syndromes affect his cognitive and communication abilities and, most importantly, as to how they affect the capacities of Mr Gbagbo to participate meaningfully in the proceedings before this Court. As developed below, while Dr Chuc and Dr Daunizeau concluded in their written reports that Mr Gbagbo was not fit to participate in the proceedings, Dr Lamothe reached a different conclusion. The hearing allowed the Chamber to seek and obtain useful clarification from the experts on issues raised by their reports and to better understand the nature and extent of their discrepancies.

68. At the outset the Chamber recalls that the experts were appointed to provide different types of expertise in light of their specific areas of competence, in the expectation that they would complement each other.⁹¹ The Chamber notes that there are discrepancies and nuances between the conclusions of the experts regarding the physical and mental conditions of Mr Gbagbo, which should be taken into account given the specific areas of competence of each expert.

⁹⁰ See e.g. Report of Dr Chuc, pp. 32-33; Report of Dr Daunizeau, para. 48; Report of Dr Lamothe, pp. 20-22.

⁹¹ See ICC-02/11-01/11-164-Conf-tENG, paras 29-38.

Physical condition

69. Dr Chuc, who was appointed to undertake a medical examination of Mr Gbagbo, states in her written report that Mr Gbagbo is suffering from several physical pathologies,⁹² and concludes:

Currently, Mr Gbagbo lacks the physical and mental capacities to:

- understand and assimilate in detail the nature, causes and content of the charges against him
- understand and assimilate the conduct of the proceedings against him
- instruct a lawyer in a regular, sustained, relevant and consistent manner
- understand and assimilate the consequences of the proceedings against him
- make a clear, consistent and comprehensible statement.⁹³

70. At the hearing, however, in response to questions by the Chamber, Dr Chuc gave a more nuanced conclusion as to the physical incapacity of Mr Gbagbo. When asked to specify which pathologies would affect his capacity to effectively take part in the proceedings against him, she stressed the functional deficit due to [REDACTED], that makes it painful for him to walk.⁹⁴ She also clarified that Mr Gbagbo would have the physical capacity to follow the proceedings against him “if he takes breaks that make it possible for him to recover his locomotor functions.⁹⁵

71. On this basis, the Chamber considers that Mr Gbagbo is not physically unfit to take part in proceedings against him, but that practical adjustments will need to be made for the confirmation of charges hearing. The Chamber will return to this matter in the following section.⁹⁶

⁹² Report of Dr Chuc, pp. 30-31.

⁹³ *Ibid.*, p. 34.

⁹⁴ ICC-02/11-01/11-T-6-CONF-ENG, p. 6, lines 3-12.

⁹⁵ ICC-02/11-01/11-T-6-CONF-ENG, p. 6, lines 13-17.

⁹⁶ See below para. 102.

Mental condition

72. Dr Chuc, as already indicated, also states in her written report that Mr Gbagbo suffers from PTSD and hospitalisation syndrome.⁹⁷ She concludes that he does not have the mental capacity to participate in the hearing without, however, elaborating on the reasons for this conclusion.⁹⁸

73. At the hearing, when asked by the Chamber to expand on her conclusion, Dr Chuc noted the absence of a major cognitive deficit, although she found "*une grand[e] fatigabilité, et des troubles de concentration et de mémorisation*".⁹⁹ She added that during her examination, [REDACTED].¹⁰⁰ She expressed the view that his difficulties were related to concentration and attention disorders which are a consequence of PTSD.¹⁰¹

74. At the hearing she confirmed, however, that Mr Gbagbo can follow discourse, considering that there has not been any "*altération des fonctions supérieures*".¹⁰² In addition, Dr Chuc stated that Mr Gbagbo "is able to give an account of his experiences", albeit one which is "[REDACTED]".¹⁰³

75. The Prosecutor suggested at the hearing that Dr Chuc may not, in light of her area of expertise, be in a position to deal with the details of PTSD.¹⁰⁴ Dr Chuc explained that it was not possible to exclude entirely the psychological element from a general medical examination,¹⁰⁵ and that identifying major psychological consequences was part of her training in the context of forensic

⁹⁷ Report of Dr Chuc, pp. 31-33.

⁹⁸ *Ibid.*, p. 34.

⁹⁹ ICC-02/11-01/11-T-6-CONF-FRA, p. 8, lines 9-20; p. 9, lines 7 and 8.

¹⁰⁰ *Id.* See also ICC-02/11-01/11-T-6-CONF-ENG, p. 13, lines 5-17; p. 24, line 24 to p. 25, line 1.

¹⁰¹ ICC-02/11-01/11-T-6-CONF-ENG, p. 22, lines 14-17.

¹⁰² ICC-02/11-01/11-T-6-CONF-FRA, p. 8, lines 17-20.

¹⁰³ ICC-02/11-01/11-T-6-CONF-ENG, p. 8, lines 3-4.

¹⁰⁴ ICC-02/11-01/11-T-6-CONF-ENG, p. 12, lines 10-24.

¹⁰⁵ ICC-02/11-01/11-T-6-CONF-ENG, p. 12, lines 15-19.

medicine.¹⁰⁶ However, she also conceded, both in her written report and at the hearing, that the psychiatric expert would be better placed to provide more detailed information on PTSD and its consequences.¹⁰⁷

76. Therefore, in relation to the mental capacity of Mr Gbagbo, the Chamber considers it more appropriate to be guided by the results of the psychological and psychiatric examinations, conducted by Dr Daunizeau and Dr Lamothe respectively.

77. In his report, Dr Daunizeau, appointed to conduct the psychological expertise, summarises his conclusions as follows:

Response to the Court's questions

53... Mr Laurent Gbagbo's current psychological health, as assessed here, indicates that he [is] averagely capable of understanding in detail the nature, cause and content of the charges against him (article 67 (1)(a) of the Statute).

54... Mr Gbagbo does not appear to [have] assimilated in any way the conduct of the proceedings against him (article 67(1)(a), (e) and (f) of the Statute). He should in theory not have any difficulty in grasping the conduct of the proceedings against him, even if he does not fully understand their consequences.

55... The content of the tests appears to indicate that Mr Laurent Gbagbo has no real capacity to issue to counsel clear, precise and strategically-meaningful instructions (article 67(1)(a) and (1)(b) of the Statute).

56... Mr Gbagbo does not seem to have grasped the full extent of the proceedings against him (article 67 (1)(h) of the Statute),

57... The reality of Mr Laurent Gbagbo's physical and psychological state, make clear that PTSD and a major depressive syndrome are present. He is very much diminished despite his attempts to prove the contrary. Accordingly, I doubt his ability to make a statement (article 67 (1)(h) of the Statute).

Overall conclusions

58... I find that he is unfit to prepare his defence and cope with the conduct and consequences of the proceedings against him. He is physically and psychologically weak. Despite feigning otherwise, his functioning is substandard. He has concentration difficulties, is unable to grasp everything that is said and is the mere shadow of his former self.¹⁰⁸

¹⁰⁶ ICC-02/11-01/11-T-6-CONF-ENG, p. 22, lines 2-5.

¹⁰⁷ Report of Dr Chuc, p. 32; ICC-02/11-01/11-T-6-CONF-ENG, p. 15, lines 18-23; p. 16, lines 6-8; p. 23, lines 5-6.

¹⁰⁸ Report of Dr Daunizeau, paras 53-58.

78. To make his findings, Dr Daunizeau conducted extensive interviews of Mr Gbagbo, consisting of four sessions of three hours.¹⁰⁹ At the hearing, in response to a specific question from the Chamber on whether Mr Gbagbo had had any difficulties concentrating during these long sessions, Dr Daunizeau indicated that Mr Gbagbo did everything to answer his questions exhaustively and always declined to suspend indicating that "he was perfectly capable of going through the entire three-hour period".¹¹⁰

79. During these sessions, Dr Daunizeau conducted a number of psychological tests,¹¹¹ whose relevance and results were the subject of extensive discussion at the hearing.

80. In relation to Mr Gbagbo's concentration and memory the Chamber sought clarification from Dr Daunizeau with regard to apparent contradictions between the results of these tests, some of them referring to difficulties while another one leading to his conclusion that "[m]emory is well within average, no standard deviation".¹¹² Dr Daunizeau stressed that these results were not contradictory at all as they had to be understood against the academic background of Mr Gbagbo: "[A] moderate response, given his intellectual past, seems to me to be an indicator of a deficit".¹¹³

81. With respect to the abilities of Mr Gbagbo to understand the charges and proceedings, Dr Daunizeau concluded in his report that Mr Gbagbo is "averagely capable of understanding in detail the nature, cause and content of the charges against him" and "should in theory not have any difficulty in grasping the conduct of the proceedings against him".¹¹⁴ However, at the

¹⁰⁹ *Ibid.*, para. 5.

¹¹⁰ ICC-02/11-01/11-T-6-CONF-ENG, p. 31, lines 8-20.

¹¹¹ Report of Dr Daunizeau, para. 6.

¹¹² *Ibid.*, para. 35.

¹¹³ ICC-02/11-01/11-T-6-CONF-ENG, p. 33, lines 12-18.

¹¹⁴ Report of Dr Daunizeau, paras 53-54.

same time he also affirmed that "Mr Gbagbo does not seem to have grasped the full extent of the proceedings against him".¹¹⁵ Similarly at the hearing, Dr Daunizeau explained that at times Mr Gbagbo appeared to understand the charges against him whilst at other times he seemed completely unaware of them, diverting the discussion to other topics.¹¹⁶ Dr Daunizeau nonetheless recognised that Mr Gbagbo was aware that there were proceedings against him, although he was not able to say whether Mr Gbagbo understood that such proceedings were criminal.¹¹⁷

82. The Chamber notes that when it sought further clarifications on Mr Gbagbo's understanding of proceedings, Dr Daunizeau indicated that he had not discussed at all the proceedings with Mr Gbagbo,¹¹⁸ and that he had not discussed either, not even in general terms, the possible consequences of the proceedings against him.¹¹⁹

83. The Chamber also notes that Dr Daunizeau relied extensively for his conclusions on Mr Gbagbo's capacity to understand in detail the charges against him on the "California Personality Inventory", which is a test designed, according to the information provided at the hearing, to assess personality traits.¹²⁰ This test showed, according to Dr Daunizeau, "[REDACTED]", and that in light of the requirements that are necessary for a Head of State, there was "[REDACTED]" and "deficit".¹²¹

84. According to Dr Daunizeau, the deficit shown by the tests affects not only Mr Gbagbo's capacity to understand the charges but also his capacity to instruct counsel. With relation to the latter, Dr Daunizeau concluded in his

¹¹⁵ *Ibid.*, para. 56.

¹¹⁶ ICC-02/11-01/11-T-6-CONF-ENG, p. 35, lines 10-18.

¹¹⁷ ICC-02/11-01/11-T-6-CONF-ENG, p. 67, lines 5-6.

¹¹⁸ ICC-02/11-01/11-T-6-CONF-ENG, p. 35, lines 19-24.

¹¹⁹ ICC-02/11-01/11-T-6-CONF-ENG, p. 36, lines 1-3.

¹²⁰ ICC-02/11-01/11-T-6-CONF-ENG, p. 34, lines 2-16.

¹²¹ ICC-02/11-01/11-T-6-CONF-ENG, p. 34, lines 17 to p. 35, line 18.

report that “the presence of these various factors [is] not indicative of a real capacity to issue to counsel *clear, precise and strategically meaningful instructions, as part of a line of defence or attack*”.¹²² At the hearing he clarified that his conclusion that Mr Gbagbo was not fully able to do so was also premised on the tests showing an “[REDACTED]”.¹²³

85. The Chamber notes that the conclusions of Dr Daunizeau with respect to Mr Gbagbo’s relevant competences, as identified by the Chamber, rest on a diagnosis of an intellectual deficit by way of comparing Mr Gbagbo’s current condition with what Dr Daunizeau considers Mr Gbagbo’s capacities must have been in the past, taking into account the latter’s educational background and his former position as President. At the hearing, Dr Daunizeau summarised that: “[T]he health condition does not correspond to his age, nor does it correspond to his level of culture, nor to what one would expect from someone in his professional situation.”¹²⁴ In his report he concludes that Mr Gbagbo “is the mere shadow of his former self”.¹²⁵

86. The Chamber considers that this diagnosis, even if it were to be considered accurate, does not assist the Chamber for the purposes of the current determination as these alleged changes in the personality of Mr Gbagbo are not at issue. The question is not whether Mr Gbagbo is at present in full possession of the higher or better faculties he may have had in the past but whether his current capacities are sufficient for him to take part in proceedings against him, taking into account the applicable law and the legal standards developed above.¹²⁶ For these reasons, the Chamber does not consider that the report of Dr Daunizeau and his oral answers at the hearing

¹²² Report of Dr Daunizeau, para. 50 (emphasis added).

¹²³ ICC-02/11-01/11-T-6-CONF-ENG, p. 67, lines 20-23.

¹²⁴ ICC-02/11-01/11-T-6-CONF-ENG, p. 73, lines 6-8. See also p. 33, lines 12-18; ICC-02/11-01/11-T-7-CONF-ENG, p. 3, lines 19-22.

¹²⁵ Report of Dr Daunizeau, para. 58.

¹²⁶ See above, in particular paras 50-51.

provide a sufficient basis to find Mr Gbagbo mentally unfit to take part in proceedings against him.

87. The third expert, Dr Lamothe, who was appointed to conduct a psychiatric examination, concluded as follows in his written report:

2. Laurent Gbagbo does not present any difficulty in engaging with reality, major cognitive difficulties, or marked changes of mood, but his faculties appear to [REDACTED], with some mnemonic and concentration difficulties which considerably reduce his ability to keep abreast of the complexity of his situation. However, it would be incorrect to say that he is not fit to sustain the International Criminal Court hearings currently planned, particularly the 10 August confirmation hearing, which he rather appears to look forward to as the opportunity to advance his point of view on the acts with which he has been charged. He remains easily fatigued but capable, as reported, of performing complex intellectual reasoning and of expressing himself at a scholarly level.
3. He remains slightly out of sync in respect of the pragmatism required to define and follow his defence strategy, inasmuch as he appears far more concerned with salvaging his image and the principles he espoused before his actions with a view to how he will be judged by history than he is with tactics or techniques to provide specific evidence of his actions which are more likely to enlighten the Court as to the appropriateness of the prosecution or the motivation for his decisions. But this does not constitute behaviour which might unconsciously run counter to his interests, and it would not be appropriate to argue from a clinical perspective that he is unable to defend himself.¹²⁷

88. Dr Lamothe concurs with his colleagues that Mr Gbagbo suffers from PTSD and from hospitalisation syndrome,¹²⁸ but stated at the hearing that the hospitalisation syndrome suffered by Mr Gbagbo was "minimal",¹²⁹ and, in relation to PTSD:

These elements are present, but in the case of Laurent Gbagbo I did not observe any reduction of reaction capacities to such an extent that it would affect his faculty of expression, understanding and other functional mechanisms, so I believe that the PTSD also is minimal and it cannot be a justification to put an end to his detention, or it cannot undermine his capacity to attend Court.¹³⁰

¹²⁷ Report of Dr Lamothe, p. 24.

¹²⁸ *Ibid.*, pp. 21-22.

¹²⁹ ICC-02/11-01/11-T-7-CONF-ENG, p. 21, lines 13-15.

¹³⁰ ICC-02/11-01/11-T-7-CONF-ENG, p. 22, line 24 to p. 23, line 3. See also p. 47, lines 17-19; Report of Dr Lamothe, pp. 24-25.

89. At the hearing, Dr Lamothe also explicitly confirmed that Mr Gbagbo possessed the capacities to understand the charges against him, as well as the conduct and the possible consequences of proceedings against him.¹³¹

90. In relation to the capacity to understand the proceedings, Dr Lamothe stated that Mr Gbagbo "understand[s] fully what was awaiting him".¹³² In addition, Dr Lamothe stated that he did not believe Mr Gbagbo presently had "full mastery of the entire set of charges" but that this did not mean that he would not be able to respond if precise matters in this regard are put to him.¹³³ Dr Lamothe also distinguished between Mr Gbagbo's capacity to understand the charges against him, which he described as present, and actual memorisation of all the facts of the case, which Mr Gbagbo does not possess.¹³⁴

91. The Chamber also notes that Dr Lamothe stated that Mr Gbagbo does not appear to distinguish between crimes against humanity and war crimes.¹³⁵ The Chamber refers in this regard to its general view expressed above¹³⁶ and considers that Mr Gbagbo's actual understanding of these technical aspects is not required under the applicable legal standard, in particular in light of the fact that he is represented by qualified counsel.

92. Dr Lamothe also stated that he noted in Mr Gbagbo a "desire" to participate in the proceedings against him,¹³⁷ which was, in his view, motivated more by conveying his political message than by the proper

¹³¹ ICC-02/11-01/11-T-7-CONF-ENG, p. 45, lines 18-23.

¹³² ICC-02/11-01/11-T-7-CONF-ENG, p. 13, lines 19-22.

¹³³ ICC-02/11-01/11-T-7-CONF-ENG, p. 39, lines 5-10.

¹³⁴ ICC-02/11-01/11-T-7-CONF-ENG, p. 42, lines 17-19.

¹³⁵ Report of Dr Lamothe, p. 15; ICC-02/11-01/11-T-7-CONF-ENG, p. 41, lines 7-10.

¹³⁶ See above paras 52-53.

¹³⁷ ICC-02/11-01/11-T-7-CONF-ENG, p. 14, line 25 to p. 15, line 4.

conduct of his defence in criminal proceedings.¹³⁸ In relation to this distortion in Mr Gbagbo's perception of the proceedings, Dr Lamothe continued:

[Mr Gbagbo] totally ignored the four charges [and] didn't really defend himself in a concrete fashion by trying to refute this or that charge [...], yet he wasn't completely unaware of the reasons why he is here. So he said I, indeed, hope to be acquitted in the long term. I believe that means he understands the logical series of events which brought him here before this Court and that he is willing to play the game, so to speak, and allow his situation to be examined. Therefore, I did not conclude that he was unfit to organise his Defence [...].¹³⁹

93. Dr Lamothe also noted that Mr Gbagbo was "clearly [...] not fully in control of his strategy" but that he was capable of giving instructions to counsel to make a defence on his behalf.¹⁴⁰

94. Furthermore, Dr Lamothe stated that while Mr Gbagbo has experienced "a slight drop in cognitive faculties", there was "virtually no alteration" of long-term memory, and that Mr Gbagbo was able to "learn new things".¹⁴¹

95. As concerns Mr Gbagbo's communication abilities, Dr Lamothe confirmed explicitly that Mr Gbagbo is in possession of the capacities to instruct counsel and to make a statement.¹⁴²

96. In his written report, Dr Lamothe states that Mr Gbagbo "remains easily fatigued but capable [...] of performing complex intellectual reasoning and of expressing himself at a scholarly level."¹⁴³ He opined at the hearing that Mr Gbagbo is "fully able to respond to a question put to him from the Prosecutor, or from the Presiding Judge, regarding this or that detail

¹³⁸ ICC-02/11-01/11-T-7-CONF-ENG, p. 15, lines 10-25.

¹³⁹ ICC-02/11-01/11-T-7-CONF-ENG, p. 16, lines 11-21.

¹⁴⁰ ICC-02/11-01/11-T-7-CONF-ENG, p. 16, line 21 to p. 17, line 2.

¹⁴¹ ICC-02/11-01/11-T-7-CONF-ENG, p. 17, lines 14-20.

¹⁴² ICC-02/11-01/11-T-7-CONF-ENG, p. 45, lines 18-23.

¹⁴³ Report of Dr Lamothe, p. 24.

regarding a set of events or a situation that occurred, if only for him to say whether or not he had knowledge of said events.”¹⁴⁴

97. Furthermore, according to the report of Dr Lamothe:

[Mr Gbagbo] exhibits a desire to defend himself, but is vague about the nature of his defence strategy and the arguments he would like his lawyer to advance [...]. His ability to impose his will is questionable, inasmuch as he exhibits a passivity which risks leading him to defer to his counsel.¹⁴⁵

However, Dr Lamothe took the view that Mr Gbagbo remains capable of “instructing on the basic approach and the broad lines of his defence case”.¹⁴⁶

98. Dr Lamothe noticed that Mr Gbagbo could get tired or have to look for words when engaged in a conversation, and that he was “somewhat obsessed” by his political and social rehabilitation, but insisted that “in no way were there any signs of incapacity, he was totally able to speak, to express himself in situation and to describe what he wanted.”¹⁴⁷

99. The Chamber considers it relevant that Dr Lamothe, similarly to the other experts, indicated that he had conducted with Mr Gbagbo a lengthy interview of several hours, thus confirming that Mr Gbagbo was able to maintain sufficient focus and concentration and that appropriate communication with him was possible.¹⁴⁸

Conclusion

100. As indicated above, the Chamber considers that Mr Gbagbo is not physically unfit to take part in the proceedings against him.¹⁴⁹ As for Mr Gbagbo’s mental capacities, the Chamber, as explained above, attached only

¹⁴⁴ ICC-02/11-01/11-T-7-CONF-ENG, p. 41, lines 22-25.

¹⁴⁵ Report of Dr Lamothe, p. 24.

¹⁴⁶ *Ibid.*, p. 25. See also ICC-02/11-01/11-T-7-CONF-ENG, p. 16, line 21 to p. 17, line 4.

¹⁴⁷ ICC-02/11-01/11-T-7-CONF-ENG, p. 17, line 11 to p. 18, line 10.

¹⁴⁸ Report of Dr Lamothe, p. 23. See also ICC-02/11-01/11-T-6-CONF-ENG, p. 11, lines 16-20; p. 31, lines 12-20.

¹⁴⁹ See above para. 71.

limited weight to the findings of Dr Chuc and Dr Daunizeau in this regard.¹⁵⁰ The Chamber therefore bases its conclusions on Mr Gbagbo's mental fitness mainly on the written report and testimony of Dr Lamothe, which establish that Mr Gbagbo possesses the capacities to understand the charges against him, as well as the conduct and the possible consequences of proceedings against him, and is capable of giving instructions to counsel as well as of making a statement.¹⁵¹

101. In light of the above, the Chamber is satisfied that Mr Gbagbo is able to meaningfully exercise his fair trial rights. Accordingly, the Chamber finds that Mr Gbagbo is fit to take part in the proceedings against him. A date for the confirmation of charges hearing will be set shortly, in a separate decision.

D. Practical arrangements for the confirmation of charges hearing and other measures

102. As noted above,¹⁵² adjustments will need to be made in order to enable Mr Gbagbo to participate fully at the confirmation of charges hearing. These adjustments may include, *inter alia*, shorter court sessions, the provision of appropriate facilities for Mr Gbagbo to rest during breaks, the possibility for Mr Gbagbo to excuse himself from all or part of the proceedings and to follow them via video-link if he so wishes. As suggested by Dr Lamothe,¹⁵³ the Chamber is of the view that Mr Gbagbo, together with his counsel, should be given the opportunity to provide views on appropriate arrangements. Accordingly, the Chamber shall, in due course, determine the appropriate practical arrangements for the conduct of the hearings in consultation with the Defence and the Registry.

¹⁵⁰ See above paras 75-76, 86.

¹⁵¹ See above paras 87-99.

¹⁵² See above para. 71.

¹⁵³ ICC-02/11-01/11-T-7-CONF-ENG, p. 59, lines 14-22.

103. Furthermore, the Chamber notes that, regardless of the finding that Mr Gbagbo is fit to take part in the proceedings against him, his health requires heightened attention as all three experts concluded at the hearing that Mr Gbagbo needed appropriate treatment.¹⁵⁴ For this reason, and taking into account the responsibilities of the Registry under regulation 103 of the Regulations of the Court, the Chamber instructed the Registry to submit a report and to explore "any measures that can be taken to help physical recovery" of Mr Gbagbo.¹⁵⁵ The Chamber will follow up on the Registry report in a separate order.

104. Finally, the Chamber notes that in their written reports and at the hearing, the experts have discussed the possible placement of Mr Gbagbo outside detention for the purpose of his recovery,¹⁵⁶ and that the Defence links the state of health of Mr Gbagbo to the question of interim release.¹⁵⁷ The submissions of the parties, and the information provided by the experts may be addressed as part of the upcoming review of the ruling on the detention of Mr Gbagbo.

¹⁵⁴ See e.g. ICC-02/11-01/11-T-6-CONF-ENG, p. 9, lines 10-24; p. 22, lines 17-21; p. 38, line 22 to p. 39, line 3; p. 39, lines 14-15; p. 65, lines 5-18; ICC-02/11-01/11-T-7-CONF-ENG, p. 23, line 22 to p. 25, line 9.

¹⁵⁵ ICC-02/11-01/11-T-7-CONF-ENG, p. 77, lines 10-12.

¹⁵⁶ Report of Dr Daunizeau, para. 61; Report of Dr Lamothe, p. 23; ICC-02/11-01/11-T-6-CONF-ENG, p. 26, lines 7-18; p. 38, lines 1-17.

¹⁵⁷ Defence Observations, paras 106-133.

FOR THESE REASONS, THE CHAMBER

FINDS that Mr Gbagbo is fit to take part in the proceedings before this Court.

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


Judge Silvia Fernández de Gurmendi
Presiding Judge


Judge Hans-Peter Kaul


Judge Christine Van den Wyngaert

Dated this 2 November 2012

At The Hague, The Netherlands