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**THE APPEALS CHAMBER**

**SITUATION IN THE REPUBLIC OF SIRAX**

**IN THE CASE OF *THE PROSECUTOR* v. *LIONEL STRONG***

**PUBLIC**

**Common Legal Representative of the Victims' Submission in the Appeal from the Pre-Trial Chamber's Decision on Confirmation of Charges against Defendant Lionel Strong of the Republic of Sirax**

**Source: Common Legal Representative of the Victims**

## TABLE OF CONTENTS

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LIST OF ABBREVIATIONS.....	5
INDEX OF AUTHORITIES .....	7
STATEMENT OF FACTS .....	16
ISSUES .....	18
SUMMARY OF ARGUMENTS .....	19
WRITTEN ARGUMENTS .....	21
<b>I. THE PTC ERRED IN HOLDING THAT THE COURT LACKS JURISDICTION OVER STRONG .....</b>	<b>21</b>
<i>A. The Court has jurisdiction over Strong .....</i>	<i>21</i>
<i>B. The Court’s exercise of jurisdiction should not be restrained by Sirax’s withdrawal.....</i>	<i>22</i>
<i>(1) Article 127(2) concerns State obligations rather than the Court’s jurisdiction.....</i>	<i>22</i>
<i>(2) The Court may exercise its jurisdiction over crimes committed before withdrawal .....</i>	<i>23</i>
<i>(3) Such practice comports with the proper interpretation of Article 12 .....</i>	<i>24</i>
<i>C. In any event, the preliminary examination rendered the situation in Sirax a matter under consideration by the Court .....</i>	<i>26</i>
<b>II. THE PTC ERRED IN HOLDING THAT THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH SUBSTANTIAL GROUNDS TO BELIEVE THAT THE ALLEGED CRIMES WERE COMMITTED.....</b>	<b>28</b>
<b><i>A. THERE ARE SUBSTANTIAL GROUNDS TO BELIEVE THAT STRONG COMMITTED THE WAR CRIME OF ATTACKING PROTECTED OBJECTS UNDER ARTICLE 8(2)(e)(iv) .....</i></b>	<b><i>28</i></b>
<i>(1) The contextual elements are satisfied .....</i>	<i>28</i>
<i>(2) The objective elements are satisfied.....</i>	<i>32</i>
<b><i>B. THERE ARE SUBSTANTIAL GROUNDS TO BELIEVE THAT STRONG COMMITTED THE CRIME AGAINST HUMANITY OF PERSECUTION UNDER ARTICLE 7(1)(h).....</i></b>	<b><i>34</i></b>
<i>(1) The contextual elements are satisfied .....</i>	<i>34</i>
<i>(2) The objective elements are satisfied.....</i>	<i>36</i>
<i>(3) The mental elements are satisfied.....</i>	<i>37</i>

<b>C.</b>	<b><i>Strong is individually criminally responsible for ordering these crime</i></b> .....	<b>38</b>
<b>III.</b>	<b>THE PTC ERRED IN HOLDING THAT STRONG WAS NOT FIT TO STAND TRIAL</b>	<b>40</b>
<b>A.</b>	<b><i>The Expert Report is inadmissible</i></b> .....	<b>40</b>
	(1) <i>The Expert Report is unreliable due to deficiencies in Dr. Baleron’s methodology and the lack of details on such methodology</i> .....	40
	(2) <i>Dr. Baleron is not an expert on the subject matter of amnesia</i> .....	43
<b>B.</b>	<b><i>Even if the Expert Report is admissible, the Court should not terminate the proceedings at this stage</i></b> .....	<b>45</b>
	(1) <i>Strong can exercise his fair trial rights</i> .....	45
	(2) <i>In any event, Strong’s medical condition should continue to be monitored by the Court..</i>	47
	<b>SUBMISSIONS</b> .....	<b>49</b>

## LIST OF ABBREVIATIONS

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<b>Abbreviation</b>	<b>Full Text</b>
AC	Appeals Chamber
AP	The Additional Protocols to the Geneva Conventions
ECCC	Extraordinary Chambers in the Courts of Cambodia
ed / eds	Editor / Editors
edn	Edition
<i>et al.</i>	<i>et alia</i> ('and others')
<i>etc.</i>	<i>et cetera</i> ('and so forth')
GC	The 1949 Geneva Conventions
<i>ibid</i>	<i>ibidem</i> ('in the same place')
ICC / Court	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
<i>id</i>	<i>idem</i> ('the same')
IHL	International Humanitarian Law
ILC	International Law Commission
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
NIAC	Armed conflict not of an international character
OTP	Office of the Prosecutor
PhD	Doctor of Philosophy
PTC	Pre-Trial Chamber
RPE	ICC Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
Sirax	The Republic of Sirax
Site	The Tirosh archaeological site
Strong	Mr. Lionel Strong
TC	Trial Chamber

UNESCO Report	Report of the United Nations Educational, Scientific and Cultural Organization on the destruction of the archaeological ruins of Tirosh
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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- Prosecutor v Ahmad Al Faqi Al Mahdi*, TC VIII, ICC-01/12-01/15-171, Situation in the Republic of Mali, Judgment and Sentence (27 September 2016) (“*Al Mahdi*”) ..... 31
- Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-1197-Anx-Red, Situation in the Republic of Mali, Public Redacted Version of “Annex to Registry Transmission of the Report of the Experts” (9 December 2012) ..... 40
- Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, PTC I, ICC-01/12-01/18-461-Corr-Red, Situation in the Republic of Mali, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (13 November 2019) ..... 36
- Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, PTC II, ICC-02/05-01/20-302, Situation in the Darfur, Sudan, Decision on the Defence ‘Exception d’incompétence’ (17 May 2021) (“*Ali Kushayb*”) ..... 23
- Prosecutor v Bosco Ntaganda*, AC, ICC-01/04-02/06, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgement’ (30 March 2021), (“*Ntaganda Appeal Judgment*”) ..... 32
- Prosecutor v Bosco Ntaganda*, AC, ICC-01/04-02/-6-2666-Anx5, Situation in the Democratic Republic of Congo, Partly Concurring Opinion of Judge Chile Eboe-Osuji ..... 32

<i>Prosecutor v Bosco Ntaganda</i> , TC VI, ICC-01/04-02/06-1159, Situation in the Democratic Republic of Congo, Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses (9 February 2016) .....	42
<i>Prosecutor v Bosco Ntaganda</i> , TC VI, ICC-01/04-02/06-2359, Situation in the Democratic Republic of Congo, Judgment (8 July 2019) (“ <b>Ntaganda Trial Judgment</b> ”).....	28
<i>Prosecutor v Dominic Ongwen</i> , TC IX, ICC-02/04-01/15-1622, Situation in Uganda, Decision on Further Defence Request for a Medical Examination (1 October 2019).....	44
<i>Prosecutor v Dominic Ongwen</i> , TC IX, ICC-02/04-01/15-1762-Red, Situation in Uganda, Trial Judgment (4 February 2021) (“ <b>Ongwen Trial Judgment</b> ”) .....	34
<i>Prosecutor v Dominic Ongwen</i> , TC IX, ICC-02/14-01/15-637-Red, Situation in Uganda, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen (17 December 2016).....	40
<i>Prosecutor v Germain Katanga</i> , TC II, ICC-01/04-01/07-3436-tENG, Situation in the Democratic Republic of Congo, Judgment pursuant to article 74 of the Statute (7 March 2014) (“ <b>Katanga Article 74 Judgment</b> ”).....	29
<i>Prosecutor v Jean-Pierre Bemba Gombo</i> , TC III, ICC-01/05-01/08-3343, Situation in the Democratic Republic of Congo, Judgment pursuant to Article 74 of the Statute (21 March 2016) (“ <b>Bemba Article 74 Judgment</b> ”).....	28
<i>Prosecutor v Laurent Gbagbo and Charles Blé Goudé</i> , PTC I, ICC-02/11-01/11-286-Red, Situation in the Republic of Côte d'Ivoire, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before the Court (2 November 2012) (“ <b>Gbagbo Fitness Decision</b> ”) .....	44



<i>Prosecutor v Laurent Gbagbo and Charles Blé Goudé</i> , PTC I, ICC-02/11-01/11-656-Red, Situation in the Republic of Côte d'Ivoire, Decision on the confirmation of charges against Laurent Gbagbo (12 June 2014).....	34
<i>Prosecutor v Laurent Gbagbo</i> , TC I, ICC-02/11-01/15-253, Situation in the Republic of Côte d'Ivoire, Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules (30 September 2015)	44
<i>Prosecutor v Mahamat Said Abdel Kani</i> , TC VI, ICC-01/14-01/21, Situation in the Central African Republic II, Public redacted Decision on Mr Said's Fitness to Stand Trial (15 December 2023) (" <b>Mahamat Said Fitness Decision</b> ").....	40
<i>Prosecutor v Mahamat Said Abdel Kani</i> , TC VI, ICC-01/14-01/21-616, Order pursuant to rule 135 of the Rules of Procedure and Evidence (13 June 2023) .....	46
<i>Prosecutor v Pavle Strugar</i> , TC II, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings (26 May 2004) (" <b>Strugar</b> ") .....	42
<i>Prosecutor v Sylvestre Mudacumura</i> , PTC II, ICC-01/04-01/12-Red, Situation in the Democratic Republic of The Congo, Decision on the Prosecutor's Application under Article 58 (13 July 2012)	38
<i>Prosecutor v Thomas Lubanga Dyilo</i> , TC I, ICC-01/04-01/06-2842, Situation in the Democratic Republic of Congo, Judgment pursuant to Article 74 of the Statute (14 March 2012) (" <b>Lubanga Article 74 Judgment</b> ") .....	29
<i>Prosecutor v William Samoei Ruto and Joshua Arap Sang</i> , PTC II, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) .....	37

<i>Prosecutor v William Samoei Ruto</i> , TC V(A), Situation in the Republic of Kenya, ICC-01/09-01/11-844, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu (7 August 2013) .....	42
<i>Situation in the Philippines</i> , Appeals Chamber, ICC-01/21-77-OPI, Dissenting Opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze (18 July 2023) .....	23
<i>Situation in the Republic of Burundi</i> , PTC III, ICC-01/17-9-Red, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi (9 November 2017) (“ <b>Burundi Article 15 Decision</b> ”).....	22
<i>Situation in the Republic of Kenya</i> , PTC II, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (31 March 2010) (“ <b>Kenya Article 15 Decision</b> ”).....	21
<i>Situation in the Republic of the Philippines</i> , Appeals Chamber, ICC-01/21-77, Judgment on the appeal of the Republic of the Philippines against PTC I’s “Authorisation pursuant to article 18(2) of the Statute to resume the investigation” (18 July 2023) .....	23
<i>Situation in the Republic of the Philippines</i> , PTC I, ICC-01/21-12, Decision on the Prosecutor’s Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute (15 September 2021) (“ <b>Philippines Article 15 Decision</b> ”) .....	23
<b>Ad Hoc Tribunal Cases</b>	
<i>Prosecutor v Dario Kordić, Mario Čerkez</i> , TC, IT-95-14/2-T, Judgment (26 February 2001) .....	37
<i>Prosecutor v Drago Kunarac et al</i> , AC, IT-96-23/1-A, Judgment (12 June 2002) (“ <b>Kunarac Appeal Judgment</b> ”) .....	30

<i>Prosecutor v Dusko Tadić</i> , AC, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) .....	31
<i>Prosecutor v Duško Tadić</i> , TC, IT-94-1-T, Opinion and Judgment (7 May 1997).....	37
<i>Prosecutor v Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera</i> , Trial Chamber III, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Preclude Testimony by Charles Ntampaka (26 September 2007) (“ <b>Karemera TC</b> ”) .....	39
<i>Prosecutor v Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera</i> , Appeals Chamber, ICTR-98-44-AR.73.16, Decision on Appeal Concerning the Severance of Mathieu Ngirumpatse (19 June 2009) (“ <b>Karemera Severance Decision</b> ”) .....	40
<i>Prosecutor v Ieng Thirith</i> , 002/19-09-2007/ECCC/TC, Report Concerning Mrs. Ieng Thirith In Response to Trial Chamber Request Dated 6 January 2012 (24 February 2012) .....	41
<i>Prosecutor v Ieng Thirith</i> , TC, 002/19-09-2007/ECCC/TC, Decision on Ieng Thirith’s Fitness to Stand Trial (17 November 2011) (“ <b>Ieng Thirith Fitness Decision</b> ”) .....	39
<i>Prosecutor v Ieng Thirith</i> , TC, 002/19-09-2007/ECCC/TC, Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011 (13 September 2012).....	46
<i>Prosecutor v Ieng Thirith</i> , TC, 002/19-09-2007/ECCC/TC, Summary Expert Report on Mrs. Ieng Thirith (29 August 2012) .....	45
<i>Prosecutor v Laurent Semanza</i> , AC, ICTR-97-20-A, Judgment (20 May 2005) .....	42
<i>Prosecutor v Limaj et al</i> , TC II, IT-03-66-T, Trial Judgment (30 November 2005).....	29

*Prosecutor v Momčilo Perišić*, Trial Chamber I, IT-04-81-T, Decision on Admissibility of Expert Report of Patrick Treanor (27 November 2008) (“*Perišić*”) ..... 39

*Prosecutor v Vlastimir Đorđević*, AC, IT-05-87/1-A, Judgment (27 January 2014) (“*Đorđević*”) ..... 35

### **Other Cases**

*Juan Carlos Abella v Argentina*, Inter-American Commission of Human Rights, Case No. 11.137, Report 55/97 (18 November 1997) ..... 29

*Wilson v U.S.* 391 F.2d 460 (1968) ..... 44

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Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) 249 UNTS 215 ..... 35

International Covenant on Civil and Political Rights 999 U.N.T.S. 171 ..... 34

International Covenant on Economic, Social, and Cultural Rights 993 UNTS 3 ..... 34

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3 (“**API**”) ..... 32

Rome Statute (17 July 1998), 2178 UNTS 3 (“**RS**”) ..... 20

Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 (“**VCLT**”) ..... 24

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Joseph Powderly and Niamh Hayes, “Article 7 Crimes against humanity” in Kai Ambos, “Rome Statute of the International Criminal Court, Article-by-Article Commentary” (4 <sup>th</sup> edn, Beck, Hart, Nomos, 2022) .....	35
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C. Casasola-Castro <i>et al</i> , “Short-term and long-term effects of diazepam on the memory for discrimination and generalization of scopolamine” (2017) 234(20) <i>Psychopharmacology</i> (Berl) 3083 .....	45
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Hans-Peter Kaul, “Preconditions to the Exercise of Jurisdiction” in Antonio Cassese <i>et al</i> , “The Rome Statute of the International Criminal Court: A Commentary” (2002, OUP) .....	23

I. A. Segura <i>et al</i> , “A reappraisal of acute doses of benzodiazepines as a model of anterograde amnesia” (2021) 36(3) <i>Hum. Psychopharmacol</i> 2774.....	45
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Pål Grøndahl <i>et al</i> , “A study of amnesia in homicide cases and forensic psychiatric experts' examination of such claims” (2009) 32(5) <i>International Journal of Law and Psychiatry</i> 281.....	40
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## STATEMENT OF FACTS

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- I. **History of Sirax:** Sirax ratified the RS on 30 August 2011, which entered into force on 1 November 2011. Sirax sits on land where ancient Tirosh used to be located. The Tirosh civilization worshipped Karaxis, a dragon deity depicted on numerous artifacts. The Tirosh Kingdom existed from BC 200-AD 79.
- II. **Background to the events of 7 – 9 June 2021:** The majority of Sirax are descendants of slaves of the Tirosh Kingdom. In 2018, the Prime Minister decreed that all Tirosh artifacts were to be destroyed due to their historic association with this enslavement. In 2021, plans to construct an airport led to the discovery of an ancient Tirosh archaeological site. The UNESCO urged Sirax to preserve this archaeological discovery.
- III. **Formation of the KP:** The KP comprises descendants of the Tirosh Kingdom ruling elite. It is an opposition group in Sirax that aims to restore the Tirosh Kingdom's glory and preserve artifacts from the Tirosh era. By 2019, KP had over 100,000 members. In November 2020, the Sirax Parliament enacted a law designating the KP a "terrorist organization", banning them from running for elections and criminalizing membership in the group.
- IV. **Events of 7 – 9 June 2021:** On 7 June, Strong ordered the demolition of the Site. On 8 June, KP leader Alinda Jasper gathered 800 members to protest the Site's destruction. They were armed with handguns and bats. Strong deployed 1,000 MSP armed with assault rifles and grenade launchers and ordered the MSP to employ deadly force against "these terrorists". By night-time, the conflict escalated with 3,700 additional protestors and MSP joining the fight. By the evening of 9 June, the death toll stood at 800 protestors and 112 MSP.
- V. **Events after 9 June 2021:** After the KP withdrew from the fighting, the demolition resumed on 10 June 2021. The airport runway was completed a week later. On 15 June 2021, the OTP initiated a PE into the situation. The next day, Sirax withdrew from the RS, with withdrawal taking effect on 16 June 2022. Sirax did not cooperate with the UNESCO's investigation into the matter. The OTP sought authorization to commence an investigation on 5 July 2022, after the UNESCO's report was completed on 4 July 2022. Sirax has refused to prosecute Strong domestically.



**VI. Procedural history:** On 5 July 2022, PTC XV authorized the investigation into this situation. On 6 July 2022, Strong's arrest warrant was issued. On 1 August 2022, the OTP requested a confirmation of charges hearing against Strong. Following a stroke, Strong was examined by a court-approved psychiatrist, Dr. Baleron, who published an expert report assessing Strong to be unfit to stand trial. On 15 May 2023, PTC XV declined to confirm the charges due to lack of jurisdiction, insufficient evidence, and the permanence of Strong's unfitness to stand trial.

## ISSUES

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- I.** Whether the Court has jurisdiction over the Defendant because Sirax had withdrawn from the RS under Article 127, despite the Prosecutor's commencement of a preliminary examination prior to the effective date of Sirax's withdrawal.
- II.** Whether there are substantial grounds to believe that the Defendant committed the war crime of attacking protected objects under Article 8(2)(e)(iv) and the crime against humanity of persecution under Article 7(1)(h).
- III.** Whether the Defendant is fit to stand trial under Article 64(2) and Rule 135 of the RPE.

## SUMMARY OF ARGUMENTS

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### **I. The PTC erred in holding that the Court lacks jurisdiction over Strong's actions**

- (A) The Court has been seised of jurisdiction over Strong's crimes and can exercise such jurisdiction. Once the Court is seised of jurisdiction, the exercise of such jurisdiction is not subject to any time limit, as Article 12(2) does not impose any temporal restrictions on the exercise of jurisdiction. This interpretation of Article 12(2) also comports with the ordinary meaning of the provision in its context and in light of the object and purpose of the RS.
- (B) Notwithstanding Sirax's withdrawal from the RS, the Court may still exercise its jurisdiction over Strong. This is because the Court retains jurisdiction over all crimes on the territory of a State Party or by nationals of a State Party committed before the effective date of withdrawal. Furthermore, since the situation in Sirax was already a matter under consideration by the Court pursuant to Article 127(2), the Court retains jurisdiction despite Sirax's withdrawal. This comports with the proper interpretation of Article 127(2), and the correct understanding of what "Court" entails.

### **II. The PTC erred in holding that there is insufficient evidence to establish substantial grounds to believe that the alleged crimes were committed**

- (A) There are substantial grounds to believe that Strong committed the war crime of attacking protected objects under Article 8(2)(e)(iv). The attack took place during an NIAC, as the fighting at the Site was sufficiently intense and the KP protestors constituted an organized armed group. There was a sufficient nexus between the destruction of the Site and these hostilities because the perpetrators had directed an attack against the Site, and the destruction occurred in the immediate aftermath of the hostilities. The Site was a protected object, as it is a historic monument dating back to BC 200.
- (B) There are substantial grounds to believe that Strong committed the crime against humanity of persecution under Article 7(1)(h). The persecutory conduct of killing the KP protestors and destroying the Site occurred in the context of an attack committed against the civilian population. This attack consisted of the fighting at the Site and the laws targeting those who sought to preserve

Tirosh artifacts, which were committed pursuant to a state policy by Sirax. This attack was both widespread and systematic. Those who sought to preserve Tirosh artifacts were persecuted on cultural grounds, as the Site that was destroyed holds great cultural significance. Further, they were persecuted on political grounds as the laws were used to legitimize the killings.

### **III. The PTC erred in holding that Strong was not fit to stand trial**

- (A)** The Expert Report by Dr. Baleron is inadmissible as it is unreliable. It lacks details on pertinent issues regarding the diagnosis of Strong's stroke-induced amnesia and Dr. Baleron's methodology is deficient as it is uncorroborated, inadequate, and unclear. Furthermore, Dr. Baleron is not an expert on stroke-induced amnesia and its effects on a person's fitness to stand trial.
- (B)** Even if the Expert Report is admissible, Strong is fit to stand trial because he can exercise his fair trial rights under Article 67(1). Despite his inability to remember the events surrounding the alleged crimes, he can still meaningfully participate in his trial. Strong's memory loss does not affect the fairness of the trial because the Court can reconstruct the evidence from sources other than Strong. Should the Court find that Strong is unfit to stand trial, his condition should be periodically reviewed by the Court in accordance with Rule 135 of the RPE.

## WRITTEN ARGUMENTS

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### I. THE PTC ERRED IN HOLDING THAT THE COURT LACKS JURISDICTION OVER STRONG

1. According to PTC XV, whether the ICC has jurisdiction over Strong turns on the interpretation of “matter...already under consideration” in Article 127(2) of the RS.<sup>1</sup> PTC XV held that the OTP’s preliminary examination conducted before Sirax’s effective withdrawal did not render the situation a matter under the Court’s consideration.<sup>2</sup> A situation only becomes a matter under consideration when the OTP initiates a formal investigation. This holding is erroneous because: **(A)** the Court does have jurisdiction over Strong; **(B)** the exercise of this jurisdiction should not be restrained by Sirax’s withdrawal; and **(C)** in any event, the preliminary examination rendered the situation in Sirax a matter under consideration of the Court.

#### A. THE COURT HAS JURISDICTION OVER STRONG

2. A crime is within the Court’s jurisdiction if it: (i) falls within one of the categories of crimes under Article 5 (jurisdiction *ratione materiae*); (ii) was committed within the timeframe specified in Article 11 (jurisdiction *ratione temporis*); and (iii) was committed either on the territory of a State Party or by a national of a State Party (jurisdiction *ratione loci* or *ratione personae* respectively).<sup>3</sup> All conditions are satisfied.
3. First, jurisdiction *ratione materiae* exists because there is a “reasonable basis to believe”<sup>4</sup> that Strong’s actions constitute a war crime and a crime against humanity. This threshold is satisfied when the evidence supports a reasonable conclusion that the relevant crimes were committed.<sup>5</sup>

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<sup>1</sup> *Prosecutor v Lionel Strong*, PTC XV (15 May 2023) (“**Decision**”), [18(1.1)].

<sup>2</sup> *Id.*, [18(1.3)].

<sup>3</sup> *Situation in the Republic of Kenya*, PTC II, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya (31 March 2010) (“**Kenya Article 15 Decision**”), [39].

<sup>4</sup> Rome Statute (17 July 1998), 2178 UNTS 3 (“**RS**”), Article 53(1)(a); unless otherwise stated, all references to “Articles” hereinafter are to the Rome Statute; *Kenya Article 15 Decision*, [27].

<sup>5</sup> *Kenya Article 15 Decision*, [33].

This conclusion need not be the only reasonable or possible one.<sup>6</sup> The UNESCO report provides a reasonable basis to believe that Strong committed the crime against humanity of persecution under Article 7(1)(h) and the war crime of attacking historic monuments under Article 8(2)(e)(iv). The UNESCO report is based on eyewitness interviews, smartphone videos, hospital and morgue records, and details Strong's orders for the demolition of the Site and deadly force against the protestors that resulted in 800 deaths.<sup>7</sup> Secondly, there is jurisdiction *ratione temporis*. The Court has jurisdiction over crimes committed after the RS has entered into force for a State.<sup>8</sup> The alleged crimes were committed in 2021, after the RS entered into force for Sirax on 1 November 2011.<sup>9</sup> Finally, both jurisdiction *ratione loci* and *ratione personae* exist. The Court has jurisdiction over crimes either committed on the territory of a State Party or by a national of a State Party.<sup>10</sup> The crimes were committed within the territory of Sirax, a State Party, and by Strong, a national of that State Party.<sup>11</sup>

**B. THE COURT'S EXERCISE OF JURISDICTION SHOULD NOT BE RESTRAINED BY SIRAX'S WITHDRAWAL**

(1) *Article 127(2) concerns State obligations rather than the Court's jurisdiction*

4. The obligations in Article 127(2) pertain to the obligations of a withdrawn State.<sup>12</sup> While Article 127(1) affects the court's jurisdiction, Article 127(2) specifically governs the obligations of a withdrawing State.<sup>13</sup> Since Article 127(1) stipulates when withdrawal takes effect, while Article

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<sup>6</sup> *Id.*, [33]-[34]; *Situation in the Republic of Burundi*, PTC III, ICC-01/17-9-Red, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi (9 November 2017) ("**Burundi Article 15 Decision**"), [29]-[30]

<sup>7</sup> Decision, [9]; Decision, Appendix C, [1]-[7].

<sup>8</sup> RS, Article 11(2).

<sup>9</sup> Decision, [4]-[5].

<sup>10</sup> RS, Article 12(2).

<sup>11</sup> Decision, [1]-[2].

<sup>12</sup> *Burundi Article 15 Decision*, [23]-[25].

<sup>13</sup> *Ibid.*

127(2) talks about State obligations after withdrawal,<sup>14</sup> PTC XV’s holding should not have turned solely on Article 127(2).<sup>15</sup>

(2) *The Court may exercise its jurisdiction over crimes committed before withdrawal*

5. The Court retains jurisdiction over crimes committed before a State’s withdrawal takes effect, and may exercise such jurisdiction. This point has been consistently affirmed in *Burundi*,<sup>16</sup> *Philippines*,<sup>17</sup> and *Ali Kushayb*.<sup>18</sup> States that ratify the RS accept the Court’s jurisdiction over all Article 5 crimes committed from the moment the RS enters into force for that State until one year after notification of withdrawal in accordance with Article 127(1).<sup>19</sup> This acceptance of the Court’s jurisdiction is unaffected by a State’s withdrawal.<sup>20</sup>
6. This case is analogous to the case of the *Philippines*, where the Court sought to exercise its jurisdiction by requesting for authorization to commence an investigation<sup>21</sup> more than two years after the Philippines’ effective withdrawal. Nonetheless, because the alleged crimes occurred while it was still a State Party, the Philippines’ subsequent withdrawal did not affect the Court’s exercise of jurisdiction over the alleged crimes.<sup>22</sup> This holding was untouched on appeal.<sup>23</sup> Similarly, the alleged crimes occurred in Sirax before its effective withdrawal on 16 June 2022.<sup>24</sup> Weeks later, on 5 July 2022, the OTP filed its request for authorization to commence an

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<sup>14</sup> RS, Article 127.

<sup>15</sup> Decision, [18.1.3].

<sup>16</sup> *Burundi Article 15 Decision*, [24].

<sup>17</sup> *Situation in the Republic of the Philippines*, PTC I, ICC-01/21-12, Decision on the Prosecutor’s Request for Authorisation of an Investigation Pursuant to Article 15(3) of the Statute (15 September 2021) (“*Philippines Article 15 Decision*”), [111].

<sup>18</sup> *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, PTC II, ICC-02/05-01/20-302, Situation in Darfur, Sudan, Decision on the Defence ‘Exception d’incompétence’ (17 May 2021) (“*Ali Kushayb*”), [33].

<sup>19</sup> *Burundi Article 15 Decision*, [24].

<sup>20</sup> *Ibid.*

<sup>21</sup> *Philippines Article 15 Decision*, [5].

<sup>22</sup> *Id.*, [111].

<sup>23</sup> *Situation in the Republic of the Philippines*, AC, ICC-01/21-77, Judgment on the appeal of the Republic of the Philippines against PTC I’s “Authorisation pursuant to article 18(2) of the Statute to resume the investigation” (18 July 2023), [54]-[55].

<sup>24</sup> Decision, [5]-[6].

investigation.<sup>25</sup> Since the crimes occurred while Sirax was still a State Party, the Court can still exercise its jurisdiction over those crimes.

7. The Dissenting Opinion in the *Philippines* Appeals Chamber held that the Court must exercise its jurisdiction during the one-year period before effective withdrawal.<sup>26</sup> However, this buffer period can vary. A State Party may extend this period if it wishes to use the withdrawal mechanism as negotiating leverage against the ICC.<sup>27</sup> In other instances, a State Party may withdraw from the RS with immediate effect notwithstanding Article 127(1), when it rejects an RS amendment accepted by a seven-eighths majority of State Parties.<sup>28</sup> Due to this variability, it is unlikely the Court was meant to expedite its processes to exercise jurisdiction over a withdrawing State.

(3) *Such practice comports with the proper interpretation of Article 12*

8. The aforementioned principle that the exercise of jurisdiction is not subject to a time limit comports with the proper interpretation of the preconditions to the exercise of jurisdiction under Article 12. This interpretation should be adopted for four reasons.
9. First, Article 12 was intended to confine the bases of the Court’s jurisdiction to crimes committed on the territory of a State Party or by its nationals.<sup>29</sup> This was the result of a compromise between States that wanted the ICC to possess universal jurisdiction and States that preferred an opt-in or consent-based regime.<sup>30</sup> The purpose of this compromise was to achieve the broadest possible support for the ICC.<sup>31</sup> Reading a temporal limit into Article 12, such that the Court must

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<sup>25</sup> *Id.*, [8].

<sup>26</sup> *Situation in the Philippines*, AC, ICC-01/21-77-OPI, Dissenting Opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze (18 July 2023), [29]; RS, Article 127(1).

<sup>27</sup> RS, Article 127(1); Roger Clark and Simon Meisenberg, “Article 127 Withdrawal” in Kai Ambos, “Rome Statute of the International Criminal Court, Article-by-Article Commentary” (4<sup>th</sup> edn, Beck, Hart, Nomos, 2021), 2923.

<sup>28</sup> RS, Article 121(6).

<sup>29</sup> RS, Article 12(2); Hans-Peter Kaul, “Preconditions to the Exercise of Jurisdiction” in Antonio Cassese *et al.*, “The Rome Statute of the International Criminal Court: A Commentary” (2002, OUP), 607; Hans-Peter Kaul, Transcript of “The International Criminal Court: Trigger Mechanisms for ICC Jurisdiction” at Max Plank Conference on Unity and Diversity of the Judiciary and Law in Iraq (26 November 2011), 4.

<sup>30</sup> Victor Tsilonis, “The Jurisdiction of the International Criminal Court” (Springer, 2019), 29-30.

<sup>31</sup> Philippe Kirsch and John Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) 93 AJIL 2, 10.



additionally exercise jurisdiction while the State is still a State Party before its effective withdrawal, would contradict the drafters' intentions. Moreover, it does not comport with Article 12 to require States to consent a second time after having already consented to the Court's exercise of jurisdiction at the point of ratification. Once a State accepts the Court's jurisdiction according to Article 12(1) and one of the Article 12(2) jurisdictional bases are satisfied, consent to the Court's jurisdiction is automatically established.<sup>32</sup>

10. Secondly, this principle comports with a contextual interpretation of Article 12. A treaty provision should be interpreted in good faith according to its ordinary meaning in its context and its object and purpose.<sup>33</sup> Article 12 must be read against the context of other RS provisions. For example, Article 29 provides that crimes within the Court's jurisdiction are not subject to any statute of limitations.<sup>34</sup> Additionally, Article 16 provides that a case referred by the UNSC may be deferred for 12 months,<sup>35</sup> but it cannot be withdrawn.<sup>36</sup> By analogy, a State's withdrawal should not preclude the Court's exercise of jurisdiction.
11. Thirdly, Article 12 should be interpreted in light of the Court's aim to ensure that the "most serious crimes of concern to the international community as a whole must not go unpunished" and "to put an end to impunity for the perpetrators of these crimes".<sup>37</sup> An interpretation allowing States Parties to retroactively withdraw their consent to the Court's jurisdiction to shield individuals from criminal liability would contradict the Court's objectives, and run counter to the "fundamental and critical features of the system governing the exercise of the Court's jurisdiction".<sup>38</sup> This would also unduly constrain the OTP by forcing it to expeditiously commence an investigation even when it lacks material evidence.<sup>39</sup> Upon notice of the OTP's preliminary examination, Sirax promptly announced its withdrawal and refused to cooperate with

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<sup>32</sup> Kaul, *supra* n 29, 604-606.

<sup>33</sup> Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 ("VCLT"), Article 31(1).

<sup>34</sup> RS, Article 29; *Burundi Article 15 Decision*, fn 33.

<sup>35</sup> RS, Article 16.

<sup>36</sup> *Ali Kushayb*, [34]; Federica Gioia, "State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court" (2006) 19 LJIL 1095, 1121.

<sup>37</sup> RS, Preamble. The context of a treaty may be derived from its preamble; see VCLT, Article 31(2).

<sup>38</sup> *Ali Kushayb*, [33].

<sup>39</sup> Diba Majzub, "Peace or Justice? Amnesties and the International Criminal Court" (2002) 3 MJIL 247, 268.

investigations.<sup>40</sup> Sirax also declared that it would not prosecute Strong domestically,<sup>41</sup> further obstructing justice for Strong’s victims.

12. Finally, allowing States to escape the Court’s rightful exercise of jurisdiction would violate the principle of *pacta sunt servanda*, a universally recognized rule of treaty interpretation<sup>42</sup> which demands that agreements must be kept and performed in good faith.<sup>43</sup> Without this principle, treaties would not be binding and enforceable.<sup>44</sup> Permitting States Parties to retroactively rescind their agreement to the Court’s exercise of jurisdiction over the most serious crimes would violate this principle.

**C. *IN ANY EVENT, THE PRELIMINARY EXAMINATION RENDERED THE SITUATION IN SIRAX A MATTER UNDER CONSIDERATION BY THE COURT***

13. Even if PTC XV’s ruling that the Court’s jurisdiction turned on Article 127(2) was correct, it erred in ruling that the situation in Sirax was not a matter already under consideration. First, the situation is a matter under consideration by the Court because a preliminary examination had already been commenced over it. In the second sentence of Article 127(2), the first limb concerns “criminal investigations and proceedings”,<sup>45</sup> while the second pertains broadly to “matter[s]...under consideration”.<sup>46</sup> This means that the latter has a wider scope than the former, and includes preliminary examinations. This is evidenced by the drafting history of Article 127(2), as the ILC’s initial draft considered State obligations post-withdrawal only for “proceedings already commenced”.<sup>47</sup> However, the final adopted text includes “matter[s]...under consideration” and reflects the drafters’ intention for Article 127(2) to cover matters beyond investigations or proceedings, such as preliminary examinations. Moreover, in *Philippines*, the Court inferred that the Philippines’ obligations under Article 127(2) continued post-withdrawal

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<sup>40</sup> Decision, [6]-[7].

<sup>41</sup> *Id.*, [10].

<sup>42</sup> VCLT, Preamble.

<sup>43</sup> *Id.*, Article 26; James Crawford, “Brownlie’s Principles of Public International Law” (9<sup>th</sup> edn, OUP, 2019), 434.

<sup>44</sup> Crawford, *supra* n 43, 363.

<sup>45</sup> RS, Article 127(2).

<sup>46</sup> *Ibid.*

<sup>47</sup> ILC, “Draft Statute for an International Criminal Court” (1994), 2 YILC 26, Article 22(3).

because “the preliminary examination [there] commenced prior to the Philippines’ withdrawal”.<sup>48</sup> The Court implicitly included preliminary examinations within the ambit of Article 127(2). Even if preliminary examinations do not constitute criminal investigations and proceedings, they would constitute matters under consideration.

14. Secondly, the OTP’s initiation of a preliminary examination places the matter under consideration by “the Court”. “[T]he Court” in Article 127(2) refers to the entire ICC, as defined in Article 1,<sup>49</sup> which includes organs of the ICC.<sup>50</sup> The OTP performs its functions as part of “the Court” through its reports on preliminary examination activities in the Report of the Court to the Assembly of States Parties and the Report of the ICC to the UNGA.<sup>51</sup> Since the OTP opened a preliminary examination in Sirax on 15 June 2021 before Sirax’s withdrawal took effect on 16 June 2022,<sup>52</sup> the situation in Sirax was already a matter under consideration by the Court. Sirax’s withdrawal does not prejudice the Court’s continued consideration of this situation.

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<sup>48</sup> *Philippines Article 15 Decision*, [111] and fn 235.

<sup>49</sup> RS, Article 1.

<sup>50</sup> RS, Article 34(c).

<sup>51</sup> OTP, “Policy Paper on Preliminary Examination” (1 November 2013), [96].

<sup>52</sup> Decision, [5]-[6].

## II. THE PTC ERRED IN HOLDING THAT THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH SUBSTANTIAL GROUNDS TO BELIEVE THAT THE ALLEGED CRIMES WERE COMMITTED

15. For the war crime of attacking protected objects under Article 8(2)(e)(iv), PTC XV held that the attacks did not take place in the context of an armed conflict.<sup>53</sup> For the crime against humanity of persecution under Article 7(1)(h), PTC XV held that the attack was not done on any grounds under Article 7(1)(h), the destruction of the Site did not constitute an “attack” on a civilian population, and there was no widespread or systematic attack.<sup>54</sup> These holdings should be overturned as there are substantial grounds to believe that Strong committed (A) the war crime of attacking protected objects and (B) the crime against humanity of persecution, and (C) is individually criminally responsible for ordering these crimes.

### A. ***THERE ARE SUBSTANTIAL GROUNDS TO BELIEVE THAT STRONG COMMITTED THE WAR CRIME OF ATTACKING PROTECTED OBJECTS UNDER ARTICLE 8(2)(e)(iv)***

16. Strong’s order to destroy the Site meets the necessary requirements to establish the war crime of attacking protected objects under Article 8(2)(e)(iv). There are substantial grounds to believe that the requisite contextual elements, objective elements, and subjective elements of the crime are made out. The subjective elements were uncontentious before PTC XV.

(1) *The contextual elements are satisfied*

17. This crime requires that an NIAC existed,<sup>55</sup> and a sufficient nexus between the conduct and the NIAC.<sup>56</sup>

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<sup>53</sup> Decision, [18.2.1]-[18.2.2].

<sup>54</sup> *Id.*, [18.2.3].

<sup>55</sup> Elements of Crimes (2011), UN Doc. PCNICC/2000/1/Add.2 (“EOC”), Article 8(2)(e)(iv), Element 4.

<sup>56</sup> *Prosecutor v Bosco Ntaganda*, TC VI, ICC-01/04-02/06-2359, Situation in the Democratic Republic of Congo, Judgment (8 July 2019) (“*Ntaganda Trial Judgment*”), [731]; *Prosecutor v Jean-Pierre Bemba Gombo*, TC III, ICC-01/05-01/08-3343, Situation in the Democratic Republic of Congo, Judgment pursuant to Article 74 of the Statute (21 March 2016) (“*Bemba Article 74 Judgment*”), [142].

(a) An NIAC existed

18. An NIAC existed because the fighting at the Site was not a mere internal disturbance or tension.<sup>57</sup> For a conflict to constitute an NIAC, it must be between organized armed groups and reach a certain level of intensity.<sup>58</sup>

19. Relevant factors to be considered when determining if a group is an organized armed group include the: (a) existence of a command structure; (b) military (operational) capacity of the group, and (c) logistical capacity of the group.<sup>59</sup> These factors are not individually determinative; a group may be sufficiently organized if only some of these factors are present.<sup>60</sup> Pertinently, only *some* degree of organization is required.<sup>61</sup>

20. The KP, boasting a formidable membership exceeding 100,000 members, showcased its operational prowess by swiftly deploying 800 armed members on short notice.<sup>62</sup> The next day, the KP could still efficiently mobilize 1,200 more armed members overnight, and orchestrate the collective withdrawal of its entire force that same evening.<sup>63</sup> This rapid deployment and strategic withdrawal demonstrated a robust military and logistical capacity. The KP's resilience in the face of their leader's death on the first day<sup>64</sup> shows that the KP had a chain of command capable of issuing orders on a large scale. Further, their unity as a group is evidenced by handmade armbands with symbols relating to the Karaxis deity.<sup>65</sup>

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<sup>57</sup> RS, Article 8(2)(f).

<sup>58</sup> *Ntaganda Trial Judgment*, [703].

<sup>59</sup> *Ntaganda Trial Judgment*, [704]; *Prosecutor v Thomas Lubanga Dyilo*, TC I, ICC-01/04-01/06-2842, Situation in the Democratic Republic of Congo, Judgment pursuant to Article 74 of the Statute (14 March 2012) ("**Lubanga Article 74 Judgment**"), [537]; *Prosecutor v Germain Katanga*, TC II, ICC-01/04-01/07-3436-tENG, Situation in the Democratic Republic of Congo, Judgment pursuant to article 74 of the Statute (7 March 2014) ("**Katanga Article 74 Judgment**"), [1186].

<sup>60</sup> *Ntaganda Trial Judgment*, [704].

<sup>61</sup> *Prosecutor v Limaj et al*, TC II, IT-03-66-T, Trial Judgment (30 November 2005), [89].

<sup>62</sup> Decision, Appendix C, [5] and [7].

<sup>63</sup> *Id.*, [8].

<sup>64</sup> *Id.*, [7] and [8].

<sup>65</sup> *Id.*, [2] and [7].

21. For the requirement of intensity, relevant factors include the: (a) seriousness of the attacks and potential increase in armed clashes; (b) increase in number of government forces; (c) mobilization and distribution of weapons among both parties to the conflict and the effects of the violence on the civilian population, including the number of persons killed; and (d) whether the situation attracted the attention of international organizations.<sup>66</sup> The protractedness of the fighting is but one factor in ascertaining intensity,<sup>67</sup> and fighting that lasted thirty hours has been considered sufficiently intense.<sup>68</sup>
22. 1,800 people were involved in the first day of fighting, comprising 800 protestors and 1,000 MSP. This more than doubled on the second day, with 1,200 additional protestors and 2,500 additional MSP joining the fight.<sup>69</sup> The protestors, armed modestly with handguns and bats, faced heavily armed MSP wielding rapid fire assault rifles and rocket propelled grenades.<sup>70</sup> This equipment surpasses that of typical riot control units.<sup>71</sup> The protestors suffered heavy casualties, losing 800 people, whereas the MSP lost 112 people.<sup>72</sup> The fighting was of such intensity that it prompted the UNESCO to launch an independent investigation, classifying it as “one of the most egregious cases of ‘cultural cleansing’ in the 21<sup>st</sup> century”.<sup>73</sup>
- (b) There was a sufficient nexus between the conduct and the armed conflict
23. The destruction of the Site took place in the context of and was associated with the NIAC. There must be a sufficient nexus between the conduct and the armed conflict, which requires that the conflict must have minimally played a substantial role in the perpetrator’s ability to commit the

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<sup>66</sup> *Ntaganda Trial Judgment*, [716]; *Bemba Article 74 Judgment*, [137]; *Lubanga Article 74 Judgment*, [538].

<sup>67</sup> *Bemba Article 74 Judgment*, [139].

<sup>68</sup> *Juan Carlos Abella v Argentina*, Inter-American Commission of Human Rights, Case No. 11.137, Report 55/97 (18 November 1997), [156].

<sup>69</sup> Decision, Appendix C, [7]-[8].

<sup>70</sup> *Id.*, [7].

<sup>71</sup> Christian Sloan and Gary Vilke, “Riot Control Agents, Tasers, and Other Less Lethal Weapons” in Darrell Ross and Theodore Chan, “Sudden Deaths in Custody” (Humana Press, 2007), 113-138.

<sup>72</sup> Decision, Appendix C, [8].

<sup>73</sup> *Id.*, [1] and [9].

crime or the manner in which the crime was committed.<sup>74</sup> While the conflict need not be causal to the crime<sup>75</sup> and the conduct need not have occurred at a time or place where hostilities were happening,<sup>76</sup> the existence of these factors can show a nexus.

24. The armed conflict facilitated the perpetrators' ability to destroy the ancient ruins. After Strong ordered the demolition of the Site on 7 June 2021, armed protestors blocked the demolition from commencing.<sup>77</sup> It was only after the protestors were removed through the ensuing armed conflict that the demolition could resume.<sup>78</sup> The armed conflict also influenced the manner in which the Site was attacked. The rapid demolition and completion of the runway in just eight days<sup>79</sup> suggests it was aimed at preventing a resurgence of protestors at the Site.
25. Additionally, the destruction and the armed conflict were temporally and geographically proximate. The entire conflict occurred at the Site and the destruction began immediately after the KP withdrew.<sup>80</sup> In fact, the entire conflict was caused by Strong's order to destroy the Site, in contravention of the UNESCO communique.<sup>81</sup> It is immaterial that the Site was destroyed only after the fighting ended as IHL rules continue to protect the Site beyond the cessation of physical hostilities.<sup>82</sup>

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<sup>74</sup> *Ntaganda Trial Judgment*, [731]; *Katanga Article 74 Judgment*, [1176]; *Prosecutor v Drago Kunarac et al*, AC, IT-96-23/1-A, Judgment (12 June 2002) ("**Kunarac Appeal Judgment**"), [58].

<sup>75</sup> *Kunarac Appeal Judgment*, [58].

<sup>76</sup> *Id.*, [57]; *Ntaganda Trial Judgment*, [731]; *Katanga Article 74 Judgment*, [1176].

<sup>77</sup> Decision, Appendix C, [7].

<sup>78</sup> *Id.*, [8].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Id.*, [7]-[8].

<sup>81</sup> *Id.*, [7].

<sup>82</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi*, TC VIII, ICC-01/12-01/15-171, Situation in the Republic of Mali, Judgment and Sentence (27 September 2016) ("**Al Mahdi**"), [15]; *Kunarac Appeal Judgment*, [57]; *Prosecutor v Dusko Tadić*, AC, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), [70].

(2) *The objective elements are satisfied*

26. The requisite objective elements are satisfied. The perpetrators directed an attack against the Site, and the Site was a protected object.<sup>83</sup>

(a) The perpetrators directed an attack

27. An act of violence against protected objects is an attack. The definition of “attack” makes no differentiation between an attack occurring during active hostilities or after.<sup>84</sup> This position reflects the special status accorded to protected objects under the RS.<sup>85</sup> It finds support in *Ntaganda* by Judge Eboe-Osuji and Judge Ibáñez Carranza,<sup>86</sup> *Al Mahdi*,<sup>87</sup> and the ICTY case of *Kunarac*.<sup>88</sup>

28. It would undermine the ICC’s objective to “put an end to impunity” to adopt a narrowed definition of “attack” by limiting it to attacks during the actual conduct of hostilities.<sup>89</sup> Artificially restricting the meaning of “attack” would frustrate this objective.<sup>90</sup> Further, requiring an “attack” to occur during active hostilities would lead to an unprincipled distinction in the conduct covered under Article 8(2)(e)(iv). Those whose entire object is to destroy such historical sites may very well go unpunished.

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<sup>83</sup> EOC, Article 8(2)(e)(iv), Elements 1 and 2.

<sup>84</sup> *Al Mahdi*, [15]-[16].

<sup>85</sup> *Ibid.*

<sup>86</sup> *Prosecutor v Bosco Ntaganda*, AC, ICC-01/04-02/06, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgement’ (30 March 2021), (“*Ntaganda Appeal Judgment*”), [1164] and [1168]. We note that there was a stalemate regarding the definition of “attack”.

<sup>87</sup> *Al Mahdi*, [15]-[16].

<sup>88</sup> *Kunarac Appeal Judgment*, [60].

<sup>89</sup> RS, Preamble; *Ntaganda Appeal Judgment*, [1167].

<sup>90</sup> *Prosecutor v Bosco Ntaganda*, AC, ICC-01/04-02/-6-2666-Anx5, Situation in the Democratic Republic of Congo, Partly Concurring Opinion of Judge Chile Eboe-Osuji, [120].



(b) The Site was a historic monument and thus protected

29. In *Al Mahdi*, most of the protected objects were accorded UNESCO World Heritage Site status.<sup>91</sup> While the Site has not been accorded the same, it satisfies the criteria for this status. It “bear[s] a unique or at least exceptional testimony to a cultural tradition or to a civilization...which has disappeared”.<sup>92</sup> The Site contained the archaeological ruins of the ancient city of Highcastle, which disappeared almost two millennia ago due to a volcanic eruption.<sup>93</sup> It was once the central city of the Tirosh Kingdom,<sup>94</sup> a once-thriving civilization with its own religion and culture.<sup>95</sup> Even if the UNESCO had not accorded the Site World Heritage status, this is only because Sirax is not a party to the World Heritage Convention<sup>96</sup> and World Heritage declarations are made after a State submits a nomination proposal for the site.<sup>97</sup> Crucially, the UNESCO had called the ancient ruins “one of the most significant archaeological finds in the past 100 years” and urged the Sirax government to preserve these “ancient treasures”.<sup>98</sup>
30. Strong cannot rely on the defence of military objective.<sup>99</sup> A military objective is one which can “make an effective contribution to military action and whose total or partial destruction... offers a definite military advantage”.<sup>100</sup> The ancient ruins of Highcastle were destroyed to build a runway for an international airport.<sup>101</sup> The destruction of the ruins would not have granted Sirax any military advantage since the runway was meant for commercial use.

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<sup>91</sup> *Al Mahdi*, [80].

<sup>92</sup> UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention (31 July 2021), WHC.21/01 (“UNESCO Guidelines”), [77(iii)].

<sup>93</sup> Decision, Appendix C, [2].

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Id.*, [4].

<sup>97</sup> UNESCO Guidelines, Article 50.

<sup>98</sup> Decision, Appendix C, [6].

<sup>99</sup> *Ntaganda Trial Judgment*, [1146].

<sup>100</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977) 1125 UNTS 3 (“API”), Article 52(2); see *Ntaganda Trial Judgment*, fn 3156.

<sup>101</sup> Decision, Appendix C, [6]-[7].

**B. THERE ARE SUBSTANTIAL GROUNDS TO BELIEVE THAT STRONG COMMITTED THE CRIME AGAINST HUMANITY OF PERSECUTION UNDER ARTICLE 7(1)(h)**

31. The conduct of killing the 800 protestors and subsequent destruction of the Site (“**persecutory conduct**”) amounts to persecution of those who sought to preserve Tirosh artifacts (“**Tirosh Preservationists**”). The requisite (1) contextual elements, (2) objective elements, and (3) mental elements of the crime against humanity of persecution under Article 7(1)(h) are satisfied.

(1) *The contextual elements are satisfied*

32. The contextual elements are satisfied if the conduct was part of a widespread or systematic attack directed against a civilian population pursuant to a State policy.<sup>102</sup>

33. An attack is a course of conduct involving the multiple commission of acts under Article 7(1).<sup>103</sup> Here, this refers to the multiple killings at the Site, the laws criminalizing the possession and sale of Tirosh artifacts,<sup>104</sup> and designating the KP as a “terrorist organization”.<sup>105</sup> The persecutory conduct is ‘part of’ the attack where there is a temporal and geographical proximity between the two.<sup>106</sup> These laws subsist in Sirax. Even if the persecutory conduct occurred after the attack,<sup>107</sup> a nexus is established because the destruction occurred immediately after the attack, at the same location.<sup>108</sup>

34. The attack was directed against a civilian population, the Tirosh Preservationists. The presence of non-civilians within a civilian population does not deprive the population of its civilian

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<sup>102</sup> RS, Article 7(1) and 7(2)(a); EOC, Article 7(1)(h), Element 5.

<sup>103</sup> RS, Article 7(2)(a); *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, PTC I, ICC-02/11-01/11-656-Red, Situation in the Republic of Côte d'Ivoire, Decision on the confirmation of charges against Laurent Gbagbo (12 June 2014) (“**Gbagbo COC**”), [209].

<sup>104</sup> Decision, Appendix C, [4].

<sup>105</sup> *Id.*, [7]-[8].

<sup>106</sup> *Ntaganda Trial Judgment*, [696].

<sup>107</sup> Decision, [18.2.3].

<sup>108</sup> *Id.*, Appendix C, [8].

character.<sup>109</sup> Therefore, the Tirosh Preservationists are a civilian population although some participated in the armed conflict at the Site.

35. The attack was pursuant to a State policy. Such is the case if the State actively promotes or encourages an attack against a civilian population.<sup>110</sup> The Sirax government has a policy to eradicate all remnants of ancient Tirosh at all costs. This is evident from its decree to destroy all Tirosh artifacts and punish those who possess and sell them,<sup>111</sup> and the law designating the KP a “terrorist organization”, barring them from politics and criminalizing membership.<sup>112</sup>
36. The attack was widespread and systematic. An attack is widespread if it is large-scale in nature and targets a large number of persons.<sup>113</sup> Here, the attack was directed at all Tirosh Preservationists, which comprise at least 100,000 people.<sup>114</sup> An attack is systematic if the acts are organized and not random.<sup>115</sup> This can be shown by a State policy promoting such attack.<sup>116</sup> The attack occurred within the context of the aforementioned State policy targeting the Tirosh Preservationists.<sup>117</sup> Furthermore, Strong’s order to use “deadly force” against the protestors were not random as they relate to the law designating the KP as a “terrorist organization”.<sup>118</sup>

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<sup>109</sup> *Prosecutor v Dominic Ongwen*, TC IX, ICC-02/04-01/15-1762-Red, Situation in Uganda, Trial Judgment (4 February 2021) (“*Ongwen Trial Judgment*”), [2675].

<sup>110</sup> EOC, Introduction to Article 7, [3]; *Katanga Article 74 Judgment*, [1108].

<sup>111</sup> Decision, Appendix C, [4].

<sup>112</sup> *Id.*, [5].

<sup>113</sup> *Katanga Article 74 Judgment*, [1123].

<sup>114</sup> Decision, Appendix C, [5].

<sup>115</sup> *Katanga Article 74 Judgment*, [1123].

<sup>116</sup> *Gbagbo COC*, [216].

<sup>117</sup> II.B(1)(a), [35].

<sup>118</sup> Decision, Appendix C, [5] and [7].

(2) *The objective elements are satisfied*

37. The objective elements are satisfied as the persecutory conduct (a) was a severe deprivation of fundamental rights,<sup>119</sup> (b) was committed in connection with a crime under Article 7(1),<sup>120</sup> and (c) targeted the Tirosh Preservationists by reason of their identity as a group.<sup>121</sup>

38. First, the persecutory conduct severely deprived the protestors of their right to life<sup>122</sup> and to freely pursue cultural development.<sup>123</sup> This right is infringed upon through the destruction of objects comprising the group's culture, which may form the underlying act of persecution.<sup>124</sup> Second, the persecutory conduct was committed in connection with the killing of the protestors who were defending that very Site.<sup>125</sup> Such killing amounts to an Article 7(1) crime. Third, the perpetrators targeted the protestors by reason of their identity as a group. The group may be identifiable through objective criteria or in the negative by means of not belonging to the same group as the perpetrators.<sup>126</sup> In *Al Hassan*, PTC I held that the persecution was committed against "civilians opposed or considered to be opposed to the Ansar Dine/AQIM's political and religious ideology".<sup>127</sup> Similarly, the Tirosh Preservationists were identified either by their affiliation to the KP,<sup>128</sup> or by the fact that they disagreed with the government's policy of erasing all remnants of ancient Tirosh.<sup>129</sup>

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<sup>119</sup> EOC, Article 7(1)(h), Element 1.

<sup>120</sup> *Id*, Element 4.

<sup>121</sup> *Id*, Element 2.

<sup>122</sup> International Covenant on Civil and Political Rights 999 U.N.T.S. 171, Article 6.

<sup>123</sup> International Covenant on Economic, Social, and Cultural Rights 993 UNTS 3, Article 15(1)(a); UN Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21 (21 December 2009); UNGA, Universal Declaration of Human Rights UN Doc 217A(III) (10 December 1948), Article 27(1).

<sup>124</sup> *Prosecutor v Vlastimir Dordević*, AC, IT-05-87/1-A, Judgment (27 January 2014) ("*Dordević*"), [559].

<sup>125</sup> Decision, Appendix C, [7]-[8].

<sup>126</sup> Joseph Powderly and Niamh Hayes, "Article 7 Crimes against humanity" in Kai Ambos, "Rome Statute of the International Criminal Court, Article-by-Article Commentary" (4<sup>th</sup> edn, Beck, Hart, Nomos, 2022), 225.

<sup>127</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, PTC I, ICC-01/12-01/18-461-Corr-Red, Situation in the Republic of Mali, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (13 November 2019), [707].

<sup>128</sup> Decision, Appendix C, [5].

<sup>129</sup> *Id*, [4].

(3) *The mental elements are satisfied*

39. The perpetrators must have consciously intended to discriminate on the proscribed Article 7(1)(h) grounds,<sup>130</sup> viz., cultural and political grounds. Discriminatory intent may be inferred from the perpetrators' general behavior and circumstances surrounding the commission of the crime.<sup>131</sup>
40. A culture may arise from shared customs, arts, social institutions, and history.<sup>132</sup> The Tirosh Preservationists are a cultural group, having shared customs and history of appreciating Tirosh artifacts and descending from the Tirosh people.<sup>133</sup> The perpetrators intentionally targeted the Tirosh Preservationists on cultural grounds by destroying the Site. The Site is extensively adorned with dragon motifs representing the Karaxis deity.<sup>134</sup> It symbolizes the Tirosh Preservationists as a cultural group, as their ancestors worshipped Karaxis and their goal was to preserve artifacts containing the visage of Karaxis.<sup>135</sup> The Tirosh Preservationists named the KP after Karaxis and defended the Site with their lives.<sup>136</sup>
41. Indeed, destroying monuments representative of a specific culture constitutes a form of persecution.<sup>137</sup> While the persecutory conduct may be justified with the airport construction plans,<sup>138</sup> it is part of a broader pattern of erasing Tirosh culture through the decree to destroy all unearthed Tirosh artifacts and criminalize their possession and sale,<sup>139</sup> and building over land believed to contain ancient Tirosh artifacts.<sup>140</sup>

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<sup>130</sup> *Ongwen Trial Judgment*, [2739].

<sup>131</sup> *Ibid.*

<sup>132</sup> Yao Li, "Persecution in International Criminal Law and International Refugee Law" (2020) 6 *Zeitschrift für Internationale Strafrechtsdogmatik* 300, 306; Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) 249 UNTS 215, Article 1.

<sup>133</sup> Decision, Appendix C, [5].

<sup>134</sup> *Id.*, [2] and [5].

<sup>135</sup> *Id.*, [5].

<sup>136</sup> *Id.*, [5] and [8].

<sup>137</sup> *Prosecutor v Duško Tadić*, TC, IT-94-1-T, Opinion and Judgment (7 May 1997), [703]; *Prosecutor v Dario Kordić, Mario Čerkez*, TC, IT-95-14/2-T, Judgment (26 February 2001), [207]; *Dordević*, [559].

<sup>138</sup> Decision, Appendix C, [6].

<sup>139</sup> *Id.*, [4].

<sup>140</sup> *Id.*, [6].

42. Additionally, the Tirosh Preservationists were targeted on political grounds. This means targeting based on a perceived political affiliation to an opposition political party,<sup>141</sup> opposing ideology, or differences of opinion over public affairs.<sup>142</sup> This perceived affiliation is viewed from the perpetrator’s perspective.<sup>143</sup> The Tirosh Preservationists formed the KP as an opposition group to celebrate Tirosh heritage, return Sirax to its former glory and preserve Tirosh artifacts.<sup>144</sup> In response, the law was passed designating them as a “terrorist organization”.<sup>145</sup> The killing of the protestors was politically motivated as Strong authorized the use of “deadly force” against the “terrorists”, referencing this law.<sup>146</sup>
43. It is undisputed that the perpetrators knew the conduct was part of a widespread or systematic attack.<sup>147</sup>

**C. *STRONG IS INDIVIDUALLY CRIMINALLY RESPONSIBLE FOR ORDERING THESE CRIME***

44. Under Article 25(3)(b), an individual is criminally liable if the following elements are satisfied: the individual must be in a position of authority and instructed another person to commit the crime that occurs. Additionally, the order must have had a direct effect on the commission of the crime, and the individual must at least have been aware that the crime will be committed in the ordinary course of events due to the execution of the order.<sup>148</sup> Strong was in a position of authority as the mayor of Newcastle.<sup>149</sup> He ordered the construction workers to destroy the Site, who acted upon

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<sup>141</sup> *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, PTC II, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [273]; *Gbagbo COC*, [204].

<sup>142</sup> *Burundi Article 15 Decision*, [133].

<sup>143</sup> *Ibid.*

<sup>144</sup> Decision, Appendix C, [5].

<sup>145</sup> *Ibid.*

<sup>146</sup> *Id.*, [7].

<sup>147</sup> EOC, Article 7(1)(h), Element 6.

<sup>148</sup> *Prosecutor v Sylvestre Mudacumura*, PTC II, ICC-01/04-01/12-Red, Situation in the Democratic Republic of The Congo, Decision on the Prosecutor’s Application under Article 58 (13 July 2012), [63].

<sup>149</sup> Decision, Appendix C, [7].

the order and carried out the demolition.<sup>150</sup> Given his high-ranking position within Sirax, Strong would have known that the methods used by the workers would render the Site destroyed.<sup>151</sup>

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<sup>150</sup> *Id.*, [7]-[8].

<sup>151</sup> *Ibid.*

### III. THE PTC ERRED IN HOLDING THAT STRONG WAS NOT FIT TO STAND TRIAL

45. PTC XV should not have made a determinative ruling that Strong is permanently unfit to stand trial as (A) the Expert Report is inadmissible and (B) in any event, the Court should not accept that Strong is unfit to stand trial.

#### A. THE EXPERT REPORT IS INADMISSIBLE

46. The Court should exercise their powers under Article 69(4) to exclude the Expert Report.<sup>152</sup> An expert report is only admissible so long as it is reliable and its contents fall within the expertise of the witness.<sup>153</sup> The Expert Report should not be admitted as (1) it is unreliable in light of deficiencies in Dr. Baleron’s methodology and the lack of details on such methodology and (2) Dr. Baleron is not a qualified subject matter expert in the assessment of amnesia.

(1) *The Expert Report is unreliable due to deficiencies in Dr. Baleron’s methodology and the lack of details on such methodology*

47. For an expert report to be reliable, it must have sufficient information as to the sources used to substantiate its findings and these sources must be clearly indicated and accessible for the court.<sup>154</sup> Where evidence is so lacking in these indicia of reliability such that it does not meet the minimum standards of reliability, it should not be admitted.<sup>155</sup> The Expert Report is unreliable for the following reasons.

48. First, the Expert Report lacks sufficient detail. An expert report must contain sufficient details of the tests conducted so the court can make legal determinations.<sup>156</sup> A medical expert’s purpose is to guide the court in deciding whether an accused’s medical condition affects his fitness to stand

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<sup>152</sup> RS, Article 69(4); Rules of Procedure and Evidence (2019), ICC-PIOS-LT-03-004/19\_Eng (“RPE”), Rule 63(1) and 63(2).

<sup>153</sup> *Prosecutor v Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, TC III, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion to Preclude Testimony by Charles Ntampaka (26 September 2007) (“*Karemera Testimony Decision*”), [8]; *Prosecutor v Momčilo Perišić*, TC I, IT-04-81-T, Decision on Admissibility of Expert Report of Patrick Treanor (27 November 2008) (“*Perišić*”), [8].

<sup>154</sup> *Perišić*, [9].

<sup>155</sup> *Id.*, [9]-[10].

<sup>156</sup> *Prosecutor v Ieng Thirith*, TC, 002/19-09-2007/ECCC/TC, Decision on Ieng Thirith’s Fitness to Stand Trial (17 November 2011) (“*Ieng Thirith Fitness Decision*”), [29]-[30].



trial.<sup>157</sup> The Court cannot rely on an expert’s report if it lacks specific details on the accused’s medical condition.<sup>158</sup> In *Karemera*, the ICTR deemed the impugned medical report unreliable due to its lack of “information essential to reaching an informed decision”. The court further cautioned that reliance on it warranted particular care as the report played a “significant role in the... assessment of prejudice”.<sup>159</sup> Similarly, the Expert Report is the only report available which the Court could use to determine any prejudice to Strong’s right to fair trial.

49. In *Al Hassan*, the medical report spanned 58 pages including detailed explanations of the defendant’s condition, the methodologies employed, the testing parameters and limitations.<sup>160</sup> In contrast, the Expert Report spans less than two pages and the only basis provided for Strong’s stroke-induced amnesia diagnosis is Dr. Baleron’s “battery of diagnostic tests” and professional opinion without more.<sup>161</sup> The Expert Report neither described the methodology employed, nor explained why Strong’s condition is likely to be permanent and not feigned.<sup>162</sup> This does not guide the Court in deciding Strong’s fitness to stand trial. The Court should not accept Dr. Baleron’s assessment at face value when the Expert Report is bereft of details to assist the Court in determining Strong’s fitness.
50. Secondly, the brief duration spent on examining Strong suggests the assessment is not comprehensive. Memory loss is intricate and an accurate diagnosis requires thorough evaluation.<sup>163</sup> Typically, patients undergo extensive neurological, neuropsychological, and

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<sup>157</sup> *Prosecutor v Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera*, AC, ICTR-98-44-AR.73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse (19 June 2009) (“*Karemera Severance Decision*”), [19]; *Prosecutor v Mahamat Said Abdel Kani*, TC VI, ICC-01/14-01/21, Situation in the Central African Republic II, Public Redacted Decision on Mr Said’s Fitness to Stand Trial (15 December 2023) (“*Mahamat Said Fitness Decision*”), [35]; *Prosecutor v Dominic Ongwen*, TC IX, ICC-02/14-01/15-637-Red, Situation in Uganda, Decision on the Defence Request to Order a Medical Examination of Dominic Ongwen (17 December 2016), [11].

<sup>158</sup> *Karemera Severance Decision*, [22].

<sup>159</sup> *Ibid.*

<sup>160</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-1197-Anx-Red, Situation in the Republic of Mali, Public Redacted Version of “Annex to Registry Transmission of the Report of the Experts” (9 December 2012), 8-13 and 19-41.

<sup>161</sup> *Decision*, Appendix D, [4]-[5].

<sup>162</sup> *Id.*, [3]-[4].

<sup>163</sup> Juebin Huang, “Amnesias” (August 2023), *MSD Manual Professional Version*, <<https://www.msdmanuals.com/professional/neurologic-disorders/function-and-dysfunction-of-the-cerebral-lobes/amnesias?rulerredirectid=209>> (last accessed 1 January 2024).

nursing assessments that span multiple hours over several visits.<sup>164</sup> In *Al Hassan*, albeit in a different context of post-traumatic stress disorder, the medical experts spent 11 hours and 30 minutes interviewing the defendant physically, and 4 hours and 20 minutes through a telephone interview.<sup>165</sup> In *Ieng Thirith*, the medical experts conducted multiple examinations before concluding the accused had progressive dementia.<sup>166</sup> In contrast, Dr. Baleron spent only two hours on a single visit.<sup>167</sup> The Court should be circumspect in accepting his conclusions.

51. Thirdly, Dr. Baleron’s assessment lacks documented corroboration with tests from purpose-specific machines and diagnostic tests. In diagnosing stroke-induced amnesia, a holistic assessment involves integrating neuropsychological tests and magnetic resonance imaging (“MRI”) or computed tomography (“CT”) scans.<sup>168</sup> These tests can confirm damage to the *hippocampus* and *parahippocampal gyri* of the brain,<sup>169</sup> which causes retrograde amnesia.<sup>170</sup> Medical experts in *Ieng Thirith* used CT scans to confirm the accused’s diagnosis of dementia.<sup>171</sup> Dr. Baleron did not document any neuropsychological test results, which casts doubt on whether they corroborate his findings or if they were conducted at all. Since the examination was only two hours and at Strong’s assisted living facility,<sup>172</sup> it is unlikely that MRI or CT scans were performed.
52. Moreover, when evaluating claims of amnesia in criminal contexts, various sources of information should be consulted to corroborate the accused’s account.<sup>173</sup> This helps an expert

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<sup>164</sup> “Determining a Diagnosis, Neurological Exam and History”, *University of California San Francisco Memory and Aging Centre*, <<https://memory.ucsf.edu/diagnosis>> (Last accessed 1 January 2024).

<sup>165</sup> *Al Hassan Fitness Decision*, [65].

<sup>166</sup> *Prosecutor v Ieng Thirith*, 002/19-09-2007/ECCC/TC, Report Concerning Mrs. Ieng Thirith In Response to Trial Chamber Request Dated 6 January 2012 (24 February 2012), [6]-[8].

<sup>167</sup> Decision, Appendix D, [4].

<sup>168</sup> Patrik Michel *et al*, “Ischemic Amnesia: Causes and Outcome” (2017) 48(8) *Stroke* 2270, 2270-2271.

<sup>169</sup> S Maeshima and A Osawa, “Chapter 6: Memory Impairment Due to Stroke” in S. Dehkharghani “Stroke” (2021, Exon Publications), at “Anatomical Basis of Memory and Lesions Causing Memory Impairment”.

<sup>170</sup> *Ibid*; N Kapur, “Magnetic Resonance Imaging and Memory Disorders” in E.D. Bigler, “Neuroimaging II. Human Brain Function” (1996, Springer), at “Better Anatomical Definition of Cerebral Lesions”.

<sup>171</sup> *Ieng Thirith Fitness Decision*, [33].

<sup>172</sup> Decision, Appendix D, [1] and [4].

<sup>173</sup> Pål Grøndahl *et al*, “A study of amnesia in homicide cases and forensic psychiatric experts’ examination of such claims” (2009) 32(5) *International Journal of Law and Psychiatry* 281, 282.

obtain a more complete picture of the patient's illness, and precludes the possibility of him feigning his condition.<sup>174</sup> Dr. Baleron documented no external sources of information apart from Strong to corroborate his findings.<sup>175</sup>

53. Fourthly, the Expert Report does not explain the correlation between Strong's amnesia and his alleged permanent unfitness to stand trial. An accused's fitness to stand trial is not determined by a mere diagnosis of a mental infirmity, or by identifying conditions that can affect the functioning of the mind.<sup>176</sup> Rather, the focus should be on the accused's capacity to conduct his defence, notwithstanding any mental infirmities.<sup>177</sup> In *Strugar*, the court found that the Defence expert's report was unsatisfactory in showing that the accused was unfit to stand trial.<sup>178</sup> The report placed significant emphasis on identifying the accused's mental disorders, but failed to explain why the accused was unfit to stand trial because of these disorders.<sup>179</sup> Similarly, Dr. Baleron offers little explanation on the causal link between Strong's alleged amnesia and unfitness to stand trial.<sup>180</sup> The Court should not rely on the Expert Report without substantiation.

(2) *Dr. Baleron is not an expert on the subject matter of amnesia*

54. The Expert Report is unreliable as Dr. Baleron is not an expert in evaluating amnesia. An expert who assesses an individual must be a subject matter expert in that area.<sup>181</sup> Experts offer a view based on their specialized knowledge to assist the Court.<sup>182</sup> While an expert may have broad expertise in a field, the Court may require specialized rather than general knowledge. Psychiatry

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<sup>174</sup> Maeshima and Osawa, *supra* n 169, at "Anatomical Basis of Memory and Lesions Causing Memory Impairment".

<sup>175</sup> Decision, Appendix D, [4].

<sup>176</sup> *Prosecutor v Pavle Strugar*, TC II, IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings (26 May 2004) ("*Strugar*"), [46].

<sup>177</sup> *Ibid.*

<sup>178</sup> *Id.*, [47].

<sup>179</sup> *Ibid.*

<sup>180</sup> Decision, Appendix D, [5].

<sup>181</sup> *Prosecutor v Bosco Ntaganda*, TC VI, ICC-01/04-02/06-1159, Situation in the Democratic Republic of Congo, Decision on Defence Preliminary Challenges to Prosecution's Expert Witnesses (9 February 2016), [8]; *Prosecutor v William Samoei Ruto*, TC V(A), Situation in the Republic of Kenya, ICC-01/09-01/11-844, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu (7 August 2013), [12].

<sup>182</sup> *Prosecutor v Laurent Semanza*, AC, ICTR-97-20-A, Judgment (20 May 2005), [303].

is a multi-faceted discipline<sup>183</sup> in which comprehensive expertise across the entire field is likely implausible. Although Dr. Baleron is an expert in the field of forensic psychiatry,<sup>184</sup> he does not necessarily specialise in evaluating neuropsychological conditions like stroke-induced amnesia.<sup>185</sup> Forensic psychiatry is a broad field including determinations of the presence of emotional or mental issues in accident witnesses, evaluations of autonomous decision-making by impaired persons, and drafting of mental health legislation.<sup>186</sup> Dr. Baleron's expertise with "mentally disordered offenders" could refer to a wide range of non-neuropsychological conditions.<sup>187</sup>

55. Tests for diagnosing amnesia require sophisticated specialized knowledge about diagnostic quality parameters.<sup>188</sup> Psychologists and psychiatrists not trained in this field would not possess such knowledge.<sup>189</sup> Dr. Baleron does not specify whether he has such specialized knowledge beyond his general expertise in forensic psychiatry.<sup>190</sup> In *Karemera*, although the expert had a PhD in law, the court found that his expertise was not on constitutional issues, which was the central issue.<sup>191</sup> The court highlighted the complexity of legal studies and found it impractical for an individual to possess comprehensive expertise across all its facets.<sup>192</sup> Thus, the court did not admit the expert's report.<sup>193</sup> Similarly, Dr. Baleron's general expertise in forensic psychiatry may not suffice for the Court's reliance on his determination of the specialized issue of stroke-induced amnesia.

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<sup>183</sup> Julio Arboleda-Flórez, "Forensic psychiatry: contemporary scope, challenges and controversies" (2006) 5(2) World Psychiatry 87, 88.

<sup>184</sup> Decision, Appendix D, [2].

<sup>185</sup> Philip Harvey, "Clinical applications of neuropsychological assessment" (2012) 14 Dialogues in Clinical Neuroscience 91, 92.

<sup>186</sup> Arboleda-Flórez, *supra* n 183, 88.

<sup>187</sup> Decision, Appendix D, [2].

<sup>188</sup> M. J. Cima *et al*, "I Can't Remember Your Honor: Offenders Who Claim Amnesia" (2002) 5 German Journal of Psychiatry 24, 32; Huang, *supra* n 163.

<sup>189</sup> *Ibid*.

<sup>190</sup> Decision, Appendix D, [2].

<sup>191</sup> *Karemera Testimony Decision*, [13].

<sup>192</sup> *Id*, [12].

<sup>193</sup> *Id*, [17].

56. The multiple deficiencies in Dr. Baleron’s methodology and the lack of details of such methodology together with his potential lack of subject matter expertise renders the Expert Report unreliable. Because the victims’ pursuit of justice hangs in the balance, the Court should exercise its discretion to exclude the Expert Report. For similar reasons, the Court should accord the Expert Report little weight even if it is admitted.

**B. *EVEN IF THE EXPERT REPORT IS ADMISSIBLE, THE COURT SHOULD NOT TERMINATE THE PROCEEDINGS AT THIS STAGE***

57. Even if the Expert Report is admissible, the Court should not terminate proceedings here because (1) Strong can still exercise his fair trial rights and (2) his medical condition should continue to be monitored by the Court.

*(1) Strong can exercise his fair trial rights*

58. Fundamentally, the issue of an accused’s fitness to stand trial is for the Court, not an expert, to determine.<sup>194</sup> An accused is fit to stand trial so long as he can exercise his fair trial rights under Article 67(1).<sup>195</sup> The capacities for a meaningful exercise of fair trial rights include the capacity to understand the conduct, purpose, and possible consequences of trial proceedings, to instruct counsel, and to make a statement.<sup>196</sup> An accused’s fair trial rights are ensured if he has these capacities, “viewed overall and in a reasonable manner”.<sup>197</sup> Parties do not contest that Strong is “capable of entering into a plea, understanding the nature of the charges, and the consequences of the pleadings” as Dr. Baleron reported.<sup>198</sup> Strong is also capable of instructing counsel and testifying.

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<sup>194</sup> *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, PTC I, ICC-02/11-01/11-286-Red, Situation in the Republic of Côte d'Ivoire, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before the Court (2 November 2012) (“**Gbagbo Fitness Decision**”), [55]; *Mahamat Said Fitness Decision*, [35].

<sup>195</sup> *Prosecutor v Laurent Gbagbo*, TC I, ICC-02/11-01/15-253, Situation in the Republic of Côte d'Ivoire, Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules (30 September 2015), [12]-[13]; RS, Article 67(1).

<sup>196</sup> *Al Hassan Fitness Decision*, [70].

<sup>197</sup> *Ibid*; *Ieng Thirith Fitness Decision*, [27].

<sup>198</sup> Decision, Appendix D, [5].

59. Strong can testify. An accused need not be able to “fully testify”,<sup>199</sup> i.e., he need not understand the reach and implication of every question and how the answers may be legally interpreted.<sup>200</sup> The inability to recall material memories does not negate one’s capacity to testify<sup>201</sup> so long as one’s communication abilities are intact.<sup>202</sup> Memory loss becomes a factor the Court considers when evaluating the weight to give the testimony.<sup>203</sup> In *Ieng Thirith*, the accused’s impaired memory affecting her ability to accurately recall events regarding her crimes did not preclude her from testifying.<sup>204</sup> Should Strong elect to testify, the Court will determine the credibility of his testimony. Furthermore, fairness of the trial is not affected if the evidence before the court could be extrinsically reconstructed in light of the accused’s amnesia.<sup>205</sup> Such evidence includes evidence relating to the crime itself, or reasonable alibi.<sup>206</sup> This approach aligns with the case-centric approach advocated for in ad-hoc criminal tribunals.<sup>207</sup>
60. Strong is able to instruct counsel. This capacity entails the defendant being able to follow proceedings and instructing lawyers to make his defence.<sup>208</sup> Memory impediment is consequential if it hampers the capacity to follow proceedings. In *Ieng Thirith*, it was the accused’s inability to “sufficiently understand the course of the proceedings to enable her to adequately instruct counsel and effectively participate in her own defence” that made her unfit to stand trial.<sup>209</sup> Her cognitive decline caused her “considerable difficulties in being able to retain

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<sup>199</sup> *Strugar*, [49].

<sup>200</sup> *Prosecutor v Dominic Ongwen*, TC IX, ICC-02/04-01/15-1622, Situation in Uganda, Decision on Further Defence Request for a Medical Examination (1 October 2019), [18].

<sup>201</sup> *Strugar*, [49].

<sup>202</sup> *Gbagbo Fitness Decision*, [95]-[96].

<sup>203</sup> *Ieng Thirith Fitness Decision*, [57]; *Strugar*, [49] (noting evidence that there was some impairment of Strugar's capacity to testify due to problems with memory and concentration, but concluding that this was a matter to be considered in assessing the weight and credibility of the Accused's testimony).

<sup>204</sup> *Ieng Thirith Fitness Decision*, [57].

<sup>205</sup> *Wilson v U.S.* 391 F.2d 460 (1968), 464.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Strugar AC Decision*, [52]; *Gbagbo Fitness Decision*, [51].

<sup>208</sup> Michael Gelder *et al*, “New Oxford Textbook of Psychiatry” (OUP, 2000), [48]; *Strugar*, [48]; *Ieng Thirith Fitness Decision*, [59].

<sup>209</sup> *Ieng Thirith Fitness Decision*, [59].

information... long enough to comment on them intelligibly”.<sup>210</sup> Strong, however, remains capable of following proceedings, being “lucid and articulate”.<sup>211</sup>

(2) *In any event, Strong’s medical condition should continue to be monitored by the Court*

61. Strong should not be declared permanently unfit to stand trial. Instead, his condition should be re-evaluated every 120 days<sup>212</sup> for two reasons.

62. First, the Court is unable to make an accurate determination of Strong’s fitness at this stage because the Expert Report is unreliable. For the reasons given at [66]-[76] above, the Expert Report is unreliable. Further, a re-evaluation comports with the Court’s responsibility under Article 64 to ensure that the trial is fair and expeditious.<sup>213</sup> In *Mahamat Said*, the panel of experts clearly set out medical information they relied on, consulted the defendant’s treating physicians, and conducted an in-depth, comprehensive medical examination of him.<sup>214</sup> In contrast, the Expert Report is so lacking as to fail to guide the Court. To ensure a fair and expeditious trial, Strong should be re-evaluated.

63. Secondly, the Court should not rule out the possibility of Strong recovering his memories. Strong was treated with Diazepam a month before Dr. Baleron’s assessment, a drug which detrimentally affects short- and long-term memory.<sup>215</sup> This is supported by medical studies, where healthy individuals showed impaired recollection of stories immediately after Diazepam administration.<sup>216</sup> These effects can also last for more than 90 days.<sup>217</sup> It is plausible that Strong’s memory loss is temporarily induced by Diazepam. Instead of finding Strong permanently unfit,

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<sup>210</sup> *Prosecutor v Ieng Thirith*, TC, 002/19-09-2007/ECCC/TC, Summary Expert Report on Mrs. Ieng Thirith (29 August 2012), [62]; *Ieng Thirith Fitness Decision*, [50].

<sup>211</sup> Decision, Appendix D, [4].

<sup>212</sup> RPE, Rule 135(4).

<sup>213</sup> *Prosecutor v Mahamat Said Abdel Kani*, TC VI, ICC-01/14-01/21-616, Order pursuant to rule 135 of the Rules of Procedure and Evidence (13 June 2023), [5].

<sup>214</sup> *Mahamat Said Fitness Decision*, [38].

<sup>215</sup> I. A. Segura *et al*, “A reappraisal of acute doses of benzodiazepines as a model of anterograde amnesia” (2021) 36(3) *Hum. Psychopharmacol* 2774, at 10.

<sup>216</sup> *Ibid*.

<sup>217</sup> C. Casasola-Castro *et al*, “Short-term and long-term effects of Diazepam on the memory for discrimination and generalization of scopolamine” (2017) 234(20) *Psychopharmacology (Berl)* 3083, at “Long Term Evaluation”.

the Court should re-examine Strong to assess any signs of memory recovery. This approach was taken in *Ieng Thirith* where the accused was re-examined after receiving treatment for dementia, as it was unclear if her condition would improve.<sup>218</sup>

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<sup>218</sup> *Prosecutor v Ieng Thirith*, TC, 002/19-09-2007/ECCC/TC, Decision on Reassessment of Accused Ieng Thirith's Fitness to Stand Trial Following Supreme Court Chamber Decision of 13 December 2011 (13 September 2012), [4]-[6].



## SUBMISSIONS

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For the foregoing arguments advanced and authorities cited, the Common Legal Representative of the Victims respectfully requests the Appeals Chamber to adjudge and declare that:

- I.** The Court has jurisdiction over Lionel Strong regardless of the Republic of Sirax's withdrawal from the Rome Statute.
- II.** The evidence is sufficient to establish substantial grounds to believe that Lionel Strong committed the war crime of attacking protected objects under Article 8(2)(e)(iv) and the crime against humanity of persecution under Article 7(1)(h).
- III.** Lionel Strong is fit to stand trial under Article 64(2) and Rule 135 of the Rules of Procedure and Evidence.

On behalf of the Common Legal Representative of the Victim

