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THE APPEALS CHAMBER

Case before the International Criminal Court:

Prosecutor v. Lionel Strong of The Republic of Sirax

The Defense's Submission in the Appeal
from the Pre-Trial Chamber's Decision on Declination of Charges against Defendant
Lionel Strong of The Republic of Sirax

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LIST OF ABBREVIATIONS

Art.	Article
AP I	Additional Protocol I of the 1949 Geneva Conventions
AP II	Additional Protocol II of the 1949 Geneva Conventions
CIL	Customary International Law
CAH	Crimes against humanity
CUP	Cambridge University Press
Doc	Document
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
edn.	edition
e.g.	*exempli gratia* (for example)
EoC	Elements of Crimes
et al.	*et alii/et aliae* (and others)
GDP	Gross Domestic Product
ICC	International Criminal Court
ICJ Rep	International Court of Justice Reports
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
NHS	National Health Service
NIAC	Non-International Armed Conflict
OTP	Office of the Prosecution
OUP	Oxford University Press
p./pp.	page/pages
PE	Preliminary Examination
PTC	Pre-Trial Chamber
RPE	Rules of Procedure and Evidence
RS	Rome Statute of the International Criminal Court
UNSG	Secretary-General of the United Nations
UN	United Nations
UN Charter	Charter of the United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
v.	*versus* (against)
WHC	Convention Concerning the Protection of the World Cultural and Natural Heritage

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FACTUAL BACKGROUND

1. The State involved is the Republic of Sirax ("**Sirax**"). Sirax, once a country with one of the smallest Gross Domestic Product ("**GDP**"), has a growing economy governed by a parliamentary democracy with a population of almost 2.5 million inhabitants. While Sirax ratified the Rome Statute ("**RS**") in 2011, it had effectively withdrawn from the RS on 16 June 2022.

2. The Defendant is Lionel Strong, who, as a national of Sirax, served as the mayor of Newcastle, the capital city of Sirax, from January 2012 until July 2022. He suffered a hemorrhagic stroke resulting in amnesia on 21 July 2022, which rendered him unfit to stand trial and unlikely to ever regain fitness.

3. Multiple events led to the alleged conduct of the Defendant. In recent years, artifacts of rulers of ancient Tirosh have been discovered. As the majority of the population of Sirax are descendants of people who had been enslaved by the former ancient rulers of Tirosh, these artifacts are seen as deriding reminders of a cruel past. In 2018, Ciri Lancaster, the prime minister of Sirax, determined that these artifacts shall therefore be destroyed, and that possession and sales of such shall be a punishable crime.

4. Shortly thereafter, an opposition group called the "Karaxis Party" was formed. Their goal is to return Sirax to its former glory by, *inter alia*, preserving the artifacts of ancient Sirax. In November 2020, as a response to the rapidly growing group, the Sirax Parliament designated them as a terrorist organization and rendered membership punishable.

5. In January 2021, the Sirax Parliament approved funding for a modern international airport on the land where the ancient city of Highcastle, Tirosh, was believed to have been located. In June 2021, the construction workers unearthed an extensive complex of buildings, roads, and monuments associated with the enslavers from ancient Tirosh. On 7 June 2021, as a response to the prime minister's decree that all artifacts had to be destroyed, the Defendant ordered construction workers to demolish these artifacts. On 8 June 2021, the Karaxis Party leader Alina Jaspar ordered individuals armed with guns and associated with the group to block the demolition. In response, the Defendant ordered municipality personnel to clear out the government property. Whereas it is unclear who fired the first shots, intense fighting started by nightfall. Regrettably, individuals from both groups fell victim to the fighting. However, both groups received reinforcements. By 9

June 2021, as a result of the armed clashes, 800 members of the Karaxis Party and more than 100 members of the security personnel were killed.

PROCEEDINGS BEFORE THE PRE-TRIAL CHAMBER

6. On 30 October 2022, the majority of the Pre-Trial Chamber ("**PTC**") declined to confirm the charges against the Defendant and declared him to be unfit to stand trial, thus terminating all proceedings against him. Pursuant to Leave to Appeal, the Appeals Chamber has sought submissions of all parties on the three predetermined issues.

ISSUES

ISSUE I

Whether the PTC erred in holding that the International Criminal Court ("**ICC**") lacked jurisdiction over the Defendant because Sirax had withdrawn from the RS under Article 127 of the Statute despite the Prosecutor's public announcement of a preliminary examination ("**PE**") prior to the effective date of Sirax's withdrawal.

ISSUE II

Whether the PTC erred in holding that the allegations and evidence are insufficient to establish substantial grounds to believe that the Defendant committed attacks on historic monuments in a non-international armed conflict under 8(2)(e)(iv) of the Statute or the Crime Against Humanity ("**CAH**") of Persecution under Article 7(1)(h) of the Statute.

ISSUE III

Whether the Pre-Trial Chamber erred in holding that the Defendant was not fit to stand trial under Article 64(2) of the Statute and Rule 135 of the Court's Rules of Procedure and Evidence ("**RPE**").

SUMMARY OF ARGUMENTS

I. THE COURT HAS NO JURISDICTION OVER THE DEFENDANT AS SIRAX HAD WITHDRAWN FROM THE RS UNDER ARTICLE 127 RS

A. Sirax withdrew from the RS before a criminal investigation was initiated.

B. *Furthermore*, the PE pursuant to Article 15 is not a matter under consideration by the Court pursuant to Article 127(2) RS.

C. Even if the PE would constitute a matter under consideration by the Court, the pre-conditions of the exercise of jurisdiction were not met in the present matter.

D. *Lastly*, the Court shall respect that the Treaty is founded upon the consent of States, emphasizing the fundamental principle of State sovereignty.

II. THE PTC CORRECTLY DECLINED THE CONFIRMATION OF CHARGES AGAINST THE DEFENDANT

A. The alleged acts do not amount to a war crime under Article 8(2)(e)(iv) RS, as, firstly, the violent act at the construction site did not amount to an armed conflict, and, secondly, even if an armed conflict existed, there was no direct attack against the protected object.

B. *Furthermore,* the alleged acts do not amount to war crimes under Article 7(1)(h) RS. *Firstly*, the contextual elements of CAH are fulfilled. *Secondly*, the specific element of Persecution is not met. *Thirdly*, the subjective elements are not satisfied.

C. *Lastly*, even if the Court deems the alleged conduct to be a crime under the RS, the evidence submitted lacks probative value, as the eyewitness interviews and the smartphone videos lack probative value.

III. THE DEFENDANT IS UNFIT TO STAND TRIAL UNDER ARTICLE 64(2) RS AND RULE 135 RPE

A. All proceedings shall be terminated as the Defendant is unable to exercise his fair trial rights. *Firstly*, the Defendant is unable to instruct counsel. *Secondly*, he is unable to testify.

B. The Medical Report provides ample evidence to affirm the Defendant's unfitness to stand trial.

C. *Even if* the Court harbors doubts about the Medical Report, the Defendant’s lifestyle and publicly visible actions prove his unfitness to stand trial.

I. THE COURT HAS NO JURISDICTION OVER THE DEFENDANT AS SIRAX HAD WITHDRAWN FROM THE RS UNDER ARTICLE 127 RS

1. The Office of the Prosecution ("**OTP**") argues that the matter was already under consideration by the ICC before the effective date of Sirax's withdrawal. The Defense cannot agree with that. The Defense argues that the Court lacks jurisdiction over Sirax because (**A**) the jurisdiction of the Court was not triggered as Sirax withdrew from the RS before an investigation was initiated, and (**B**) the PE is not a matter under consideration by the Court pursuant to Article 127(2) RS. Furthermore, (**C**) even if the alleged conduct was already a matter under consideration by the Court, the pre-conditions of the exercise of jurisdiction set forth in Article 12 RS were not fulfilled when the Court's exercise of jurisdiction was triggered under Article 13 RS. Lastly, (**D**) the RS is founded on the voluntary ratification by the State Parties in the exercise of their sovereignty, which also is the ground for the State's right to withdraw from the Treaty at any time, and therefore, the Court's jurisdiction cannot survive once a State has withdrawn.

A. The Court's jurisdiction was not triggered as Sirax withdrew from the RS before a criminal investigation was initiated pursuant to Article 15 RS

2. The "conduct", of which the Defendant is being accused, occurred between 7 June 2021 and 9 June 2021 on Sirax's territory.[1] At that time, Sirax had been a Party to the RS since its ratification on 30 August 2011. Shortly after receiving the first reports from the alleged "conduct", the OTP released a Press Release disseminated by the Registrar on the Court's official website, indicating that they had initiated a "preliminary examination […] into these reported acts" on 15 June 2021.[2]

3. *Thereafter*, Sirax sent a formally correct, written notification to the depositary, the Secretary-General of the United Nations ("**UNSG**"), stating that Sirax was withdrawing from the RS.[3] The withdrawal from the RS according to Article 127 RS became effective on 16 June 2022, one year after the written notification was received by the UNSG.[4] Ever since, Sirax has no longer been a Party to the RS.

4. *After* the withdrawal became effective, the OTP filed a request for authorization to commence an investigation in Sirax pursuant to Article 53 RS. The PTC authorized the investigation the same

[1] UNESCO Report [7-8].
[2] *Sirax* Situation [5].
[3] Schabas (2010), Art. 127, p. 1206.
[4] *Sirax* Withdrawal.

day, and therefore, on 5 July 2022, the OTP initiated a formal investigation into the alleged "conduct".[5]

5. *Firstly*, as per Article 12(1) RS, a State which is Party to the RS accepts the jurisdiction over the crimes within the subject matter and the temporal jurisdiction of the ICC.[6] The Court may exercise its jurisdiction over crimes of a citizen of a State Party anywhere, or over a crime committed on the territory of a State.[7] The four jurisdictional triggering mechanisms are referrals by (i) State parties, (ii) United Nations Security Council ("**UNSC**"), (iii) Non-State parties, and (iv) the ICC Prosecutor's *proprio motu* action.[8]

6. A *proprio motu* action can be described as a PE *stage* in which the OTP starts performing "pre-investigative acts".[9] According to the ICC's PTC II *Afghanistan* decision, the Court's jurisdiction should not be considered as fully triggered when the OTP launches a PE under Article 15 RS.[10] In the PE stage, "[…] the Court's jurisdiction is not fully triggered, unless and until the Chamber authorizes the opening of an investigation".[11] The Court will only authorize "[…] the *commencement of the investigation* (emphasis added), without prejudice to subsequent determinations by the Court with regard to the jurisdiction […]" when it considers that there is a reasonable basis to proceed with the investigation.[12]

7. The Defense wants to reaffirm that the PE is not the same as the actual investigation. The Court should exercise caution not to conflate or mistake one for another. In the present matter, a PE was lawfully launched into the Situation in Sirax.

8. Thereafter, the Court authorized a formal investigation. However, the Defense argues that the Court erred in authorizing the investigation. The Court had no more temporal jurisdiction over Sirax when they authorized the investigation as the withdrawal was already effective.

9. *Finally*, the RS expressly states that any investigation, which was initiated after the withdrawal, discharges the State of any obligations arising from the RS.[13] Therefore, the Court's jurisdiction

[5] *Sirax* Situation [8].
[6] Schabas (2010), Art. 12, p. 284.
[7] Art. 12(2)b RS; Schabas (2010), Art. 12, p. 276.
[8] Art. 13 RS.
[9] Governa (2023), p. 134.
[10] *Afghanistan* Decision [19, 29].
[11] *Afghanistan* Decision [29]; *See also Kenya* Decision [17-18] (the first situation in which the OTP obtained an authorization to initiate an investigation).
[12] Art. 15(4) RS.
[13] *Contra* Art. 127(2) RS.

is not triggered as Sirax withdrew from the RS before an investigation was initiated pursuant to Article 15 RS.

B. The preliminary examination is not a matter under consideration by the Court

10. Under Article 127(2) RS, States are discharged from any obligations relating to investigations when withdrawing from the RS. Furthermore, the withdrawal from the RS shall not "prejudice in any way the continued consideration of any matter which was already *under consideration* by the *Court*".[14] Three reasons elucidate why the PE initiated by the OTP is not a matter under consideration by the Court.

11. *Firstly,* PEs are, as Judge Perrin de Brichambaut and Judge Lordkipanidze described in the Dissenting Opinion of the *Situation in the Republic of Philippines*,[15] of informal nature, and "do not carry sufficient weight for engaging the Court's jurisdiction".[16] The OTP preliminarily examines whether to take steps to proceed to a full investigation.[17] The PTC's power to authorize an investigation is the institutional answer – which managed to overcome objections by the delegations who were hesitant to accept a *proprio motu* option[18] – to the threat of prosecutorial activism against sovereign States.[19] Without the Prosecutor's request, no act of "triggering the triggering mechanism" of the jurisdiction has been made.[20]

12. *Secondly*, in the case *Situation in the Republic of Burundi,* the ICC addressed the withdrawal from the Statute referring to Article 127 and Article 15 RS and held that an authorized investigation by the PTC is a matter under consideration by the Court. It stated that "[…] the present decision is delivered prior to the entry into effect of Burundi's withdrawal […]", which is why "any obligations on the part of Burundi arising out of the Chamber's article 15(4) decision would survive Burundi's withdrawal".[21] Accordingly, it cannot be disputed that, *if authorized,* an investigation into the situation in Burundi would need to commence prior to the date on which the withdrawal became effective".[22] The logical conclusion is therefore that a PE *not authorized* by the Court is not a matter under its consideration.[23]

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[14] Art. 127(2) RS.
[15] *Philippines* Judgment.
[16] *Philippines* Dissenting [35].
[17] Bergsmo *et al.* in Triffterer/Ambos (2016), Art. 53 [9].
[18] UN Doc A/51/22 [151].
[19] Stahn in Stahn/Sluiter (2009), p. 265; See *e.g.*, UN Doc A/51/22 [150].
[20] Governa (2023), p. 134.
[21] *Burundi* Decision [26].
[22] *Id.*
[23] *Philippines* Dissenting [33].

13. *Thirdly*, a matter under consideration by the Court is not synonymous with a matter under consideration by the OTP. Despite Article 34 RS referring to the OTP as an organ of the Court, several articles within the RS use the term "Court" specifically to denote the judiciary (excluding the OTP). This distinction is, *inter alia*, evident in Article 19(3) RS, which states that "[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility."[24] Similarly, Article 95 RS specifies that "[w]here there is an admissibility challenge *under consideration by the Court* (emphasis added) pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19".[25] The phrase "under consideration by the Court" unmistakably refers to the judicial branch.[26]

14. *Furthermore*, in the *Situation in the Islamic Republic of Afghanistan*, the PTC specifically noted that in circumstances of proceedings under Article 15 RS, the PTC's role "is vested with a specific, fundamental and decisive filtering role".[27] This decision has further affirmed that the Court must be differentiated from the OTP and – in the situation of proceedings under Article 15 RS – the OTP is not part of the Court as defined in Article 127 RS.

15. In the present case, the PE was not "a matter under consideration by the Court prior to the date on which the withdrawal became effective".[28] The OTP carried out a PE. The Court, however, had not yet authorized any investigation, wherefore it was not a matter under its consideration. With that, the PE did not carry sufficient weight for engaging the Court's jurisdiction.

C. Even if the PE constitutes a matter under consideration by the Court, the pre-conditions of the exercise of jurisdiction were not fulfilled

16. Even if the Court finds that the PE is a matter under its consideration, the "pre-conditions" of the exercise of jurisdiction did not exist when the Court's exercise of the jurisdiction was triggered.

17. The PE initiated by the Prosecutor must adhere to the stipulations of Article 12(2) RS, titled "*[p]reconditions* (emphasis added) of the exercise of the jurisdiction". This Article outlines the necessary preconditions, in that "[…] the Court may exercise its jurisdiction if one or more of the [States concerned] *are* (emphasis added) Parties to this Statute or have accepted the jurisdiction

[24] *See* Heller (2017).
[25] *Id.*
[26] *Id.*
[27] *Afghanistan* Authorisation [30].
[28] Art. 127 RS.

of the Court in accordance with [article 12(3) of the Statute] […]".[29] Subsequently, the Court can only exercise its jurisdiction when the State in question is a Party to the RS at the time the jurisdiction is triggered.[30]

18. Article 13 RS states clearly when the Court's jurisdiction is triggered: "The Court *may exercise its jurisdiction* (emphasis added) with respect to a crime referred to in article 5 in accordance with the provisions of this Statute *if* (emphasis added): […] c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".[31]

19. Therefore, the "pre-conditions" of the exercise of jurisdiction as defined in Article 12 RS must exist at the time when the exercise of jurisdiction is triggered pursuant to Article 13 RS. Even if the *proprio motu* PE would be considered as a matter under consideration by the Court, the exercise of jurisdiction would have only been triggered when the PTC authorized the investigation on 5 July 2022. However, on 5 July 2022, when the Court authorized the investigation, Sirax was *no longer* a Party to the RS.[32] The "preconditions" of the exercise of jurisdiction under Article 12 RS were not fulfilled, therefore, the Court cannot exercise its jurisdiction in the matter at hand.

D. The Court shall respect that the Treaty is founded upon the consent of States, emphasizing the fundamental principle of State sovereignty

20. In the present matter, the Defense argues that the ICC is legitimized through the voluntary ratification of the RS by the participating States.[33] While judging in this case, the Court must respect that central principle. During discussions by the International Law Commission ("**ILC**") on the drafting of the ICC's jurisdiction, the exercise thereof was grounded in the full acceptance of States.[34] It was emphasized that "[…] [n]o person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State".[35] The Republic of Korea similarly argued, that "[…] [t]hose who favour the concept of inherent jurisdiction overlook the fact that the proposed Court is a Treaty body to be created through the consent of States".[36]

21. Furthermore, in the ICC drafting history, it was recognized that in order to respect State sovereignty, the principle of conferment of jurisdiction has to be applied.[37] State sovereignty

[29] *See also Philippines* Dissenting [25].
[30] *See also Philippines* Dissenting [26].
[31] Art. 13 RS.
[32] *Sirax* Situation [6].
[33] *Cf.* Art. 125(2) RS where it states that "[t]his Statute is subject to ratification, acceptance or approval by signatory States".
[34] Schabas/Pecorella in Ambos (2022), Art. 12, p. 278.
[35] UN Doc A/CN.4/430 and Add.1 [84].
[36] UN Doc A/CONF.183/C.1/L.6 [2].
[37] UN Doc A/CN.4/430 and Add.1 [53].

functions as a fundamental status quo norm[38] in international law. It means, in principle and *inter alia*, that a sovereign power obeys no other authority.[39] Sovereignty, specifically sovereign equality, is enshrined in Article 2(1) of the Charter of the United Nations ("**UN Charter**"). In separate opinions of ICJ proceedings, it has been argued that sovereign equality is the principle of independence of States[40] and that the political organs of the UN have an obligation to respect State sovereignty unless the Court decides that such exercise is contrary to international law.[41] Even though the ICC is not a UN organ, it must also respect State sovereignty. As per Article 21(1)(b) RS, the Court applies such fundamental principles enshrined in international law.

22. In summary, the question of whether the Court can exercise jurisdiction after the withdrawal took effect requires careful consideration. Without appropriate limitations, "the Court's jurisdiction would stretch to an extent that would defy the assurances and guarantees to the States embedded in the Statute".[42] The potential loss of the guarantees and assurances embedded in the RS, e.g., Article 127 RS, could result in States' declining trust in and acceptance of the Court and subsequently in States withdrawing[43] from the RS.[44] Withdrawals of significant Parties would be – in the words of Roger Clark – a nightmare that everyone fears, particularly those with memories of the ultimate unravelling of the League of Nations.[45] Therefore, the Defense asserts that the Court decides this matter without disregarding the right of withdrawal and in keeping with the principle of State sovereignty.

II. THE PTC CORRECTLY DECLINED THE CONFIRMATION OF CHARGES AGAINST THE DEFENDANT

23. The alleged acts (**A**) do not amount to a war crime under Article 8(2)(e)(iv) RS. The isolated act of violence did not reach the required level of intensity and organization to classify the situation as an armed conflict. Furthermore, there were no attacks directed towards a protected object. Secondly, the alleged acts (**B**) do not qualify as CAH under Article 7(1)(h) RS as they were not committed as part of a widespread or systematic attack directed against a civilian population. Lastly, the United Nations Educational, Scientific and Cultural Organization Report ("**UNESCO Report**") (**C**) fails to meet the evidentiary threshold.

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[38] Mills/Bloomfield (2017), p. 106.
[39] Fassbender in Simma *et al.* (2012), Art. 2(1) [3].
[40] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, p. 99 et. seq.; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, p. 109.
[41] *Questions of Interpretation and Application of the 1971 Montreal Convention*, p. 211.
[42] *Philippines* Dissenting [29]; *See* Kolb (2019), pp. 2219-2220 ("L'interprétation large signifierait que des poursuites peuvent être intentées longtemps après le retrait de l'Etat en cause").
[43] Or further prevent non-party States to become a party to the Statute, *see e.g.*, Ramathan (2005).
[44] *See, e.g.*, Withdrawal Strategy Document [8].
[45] Clark in Triffterer/Ambos (2016), Art. 127, p. 2322.

A. The alleged acts do not amount to a war crime under Article 8(2)(e)(iv) RS

24. For conduct to be classified as a war crime, the destruction of the archaeological site must have a nexus to an armed conflict. However, in the present matter, no NIAC existed. Therefore, the destruction of the archaeological site cannot be a war crime according to Article 8(2)(e)(iv) RS.

1. The violent act at the construction site did not amount to an armed conflict

25. A NIAC exists whenever there is "protracted violence between governmental authorities and organized armed groups or between such groups within a State".[46] For the conflict to be one of non-international character, the ICC determined in the absence of a definition in the RS[47] that the armed conflict (a) must reach a certain level of intensity and (b) the armed group must have some degree of organization to plan and carry out sustained military operations.[48]

26. In the present matter, neither criterion was met as demonstrated below. The Court shall therefore reaffirm its decision that there are no substantial grounds to believe that the Defendant committed the war crime of attacking historic monuments in a non-international armed conflict under Article 8(2)(e)(iv) of the Statute.

27. The Court shall furthermore reaffirm its decision in light of Article 8(3) RS. The RS specifically states that nothing in Article 8(2)(e) RS "shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means".

a) <u>A certain level of intensity has not been met</u>

28. To qualify a conflict as a NIAC, it must reach a certain intensity.[49] To analyze the intensity of the conflict, the International Criminal Tribunal for the former Yugoslavia ("**ICTY**") has held that the Court must have regard to, *inter alia*, the attacks spread over territories and over a period of time, and the mobilization and the distribution of weapons among both parties to the conflict.[50] Similarly, the PTC I in the *Lubanga* case established that "the armed groups in question [need] to have the ability to plan and carry out military operations for *a prolonged period of time* (emphasis

[46] *Lubanga* Judgment [533]; *Tadić* Judgment [561].
[47] Cullen in Stahn (2015), p. 764.
[48] *Lubanga* Decision [233]; *Lubanga* Judgment [535, 538].
[49] *Katanga* Judgment [1187]; *Lubanga* Judgment [538].
[50] *Katanga* Judgment [1187].

added)".[51] This was confirmed by the *Al Bashir* case, in which the Court again argued that the group needs to have the "ability to carry out military operations for a prolonged period of time".[52]

29. The conflict as a whole should be protracted in order to distinguish an armed conflict from isolated and sporadic actions.[53] Tensions and internal disturbances, such as the isolated violent act in the present matter, shall not be prosecuted as war crimes.[54] Such a prosecution could potentially undermine the credibility and legitimacy of the RS, but also infringe the State Party's sovereignty. The Defense submits that since the threshold for NIAC is not met in the present case, adjudicating the allegation in question as war crimes could not only undermine the credibility of the RS but also infringe on Sirax's sovereignty in addressing internal disturbances.

30. Based on the evidence presented, there are no substantial grounds to believe that the acts of violence, which happened between 8 June and 9 June, met the intensity threshold. The fighting at the construction site was a singular act of violence, which lasted less than 48 hours. Comparing the period of conflict in the present matter with other decisions of the Court, *e.g.,* in *Lubanga* or *Bemba*,[55] a conflict which lasted less than two days seems to be grossly inadequate to amount to a sufficient intensity.

31. Furthermore, the mobilization and distribution of weapons among the parties were not sufficiently intense.[56] The people participating in the act of violence were swiftly mobilized, however, the Defense argues that in comparison to the group's 100,000 members, a total number of 2000 participants is low. Furthermore, the distribution of weapons between the security personnel and the Karaxis members was unequal. Whereas the Karaxis members were only lightly armed with handguns and bats, the security personnel were armed with rapid-fire assault rifles and rocket-propelled grenades.[57]

32. A further indicative criterion for an armed conflict is the element of control over a territory.[58] Undisputedly, the Karaxis group has no control over any territory in Sirax.

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[51] *Lubanga* Decision [234].
[52] *Al Bashir* Decision [60].
[53] Art. 8(2)(f) RS; *Bemba* Decision [224-226]; *Lubanga* Decision [229].
[54] Art. 8(2)(d) RS; Klamberg in Klamberg (2017), p. 117.
[55] *Lubanga* Decision [235]; *Bemba* Decision [235].
[56] *See Katanga* Judgment [1187]; *Limaj et al.* Judgement [90]; *Mrkšić et al.* Judgement [407].
[57] UNESCO Report [7].
[58] *Al Bashir* Decision [60]; *Lubanga* Decision [232].

33. Therefore, the Defense asks the Court to reaffirm that in the context of the violence between the municipal forces of Newcastle and the Karaxis protesters, the threshold of intensity was not reached.

b) The Karaxis group does not have a sufficient level of organization

34. The Karaxis party is not and was not sufficiently organized to be regarded as an armed group. Established case law by the ICTY and the ICC provides a non-exhaustive list of factors that are potentially relevant to determine the threshold of a sufficiently organized group, which includes, *inter alia*, (1) the group's internal hierarchy, (2) the command rules and structure, (3) the availability of military equipment, including firearms, and (4) the group's ability to plan a military operation and put them into effect.[59]

35. In the present matter, the Karaxis group lacks the characteristics of a sufficiently organized group and is thus not able to carry out an impactful armed violence. Alina Jaspar, the "leader" of the Karaxis group, "urged"[60] the members of the group to participate in the violence at the archaeological site to stop the destruction thereof. The UNESCO Report underlines Jaspar's inability to command or instruct the members of the group. Following her outcry, 800 members of the group gathered at the construction site. Bearing in mind that the Karaxis group counts over 100'000 members, the influence of Jaspar seems to be rather limited, and her leadership role remains dubious. The assembly of the members at the site can be described as random, spontaneous, and voluntary by less than 1% of the members, which proves that the group did not have the ability to plan and enforce a military operation. The group evidently has no hierarchical structure, and its leadership has no capacity to exert authority over its member.[61]

36. Even though 2000 members participated in the isolated act of violence against the governmental site, the group was defeated by the military personnel in less than two days. In addition, the protestors' significant lack of appropriate military equipment resources for an armed conflict explains their defeat. This further emphasizes the inability of the group to carry out any sustained military operation. Therefore, the Defense establishes that the criteria of a sufficiently organized group has not been met in the present matter.

[59] *Katanga* Judgment [1186]; *Lubanga* Judgment [537]; *See also Limaj et al.* Judgement [90]; *Haradinaj et al.* Decision [60]; *Boškoski/Tarčulovski* Judgement [199-203].
[60] UNESCO Report [7].
[61] *See Boškoski/Tarčulovski* Judgement [195].

2. Even if a NIAC existed, there was no direct attack against protected objects

37. Even if the Court interprets the singular violent act as a NIAC, the specific elements of Article 8(2)(e)(iv) are not met as there was no direct attack against protected objects.

38. The protection of cultural property is anchored in customary international law and is firmly established in criminal international legal jurisprudence.[62] Article 8(2)(e)(iv) RS, similarly to Article 16 Additional Protocol II ("**AP II**"),[63] protects cultural property such as historical monuments during armed conflicts. However, the Defense argues that the archaeological site was not a protected object.

39. Sirax is not Party to the Convention Concerning the Protection of the World Cultural and Natural Heritage ("**WHC**"). However, the WHC is widely accepted and established in international law, as of 2024, 195 countries have ratified the Treaty.[64] Therefore, the Defense asserts that the WHC is customary law.[65]

40. Article 5 WHC stipulates that every State Party must make efforts to implement "to take the appropriate […] measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage." Upon first examination, the text suggests that governments are prohibited from intentionally causing damage to their own cultural assets. Nevertheless, the conclusion is undermined by the explicit provisions of Articles 3 and 7 WHC, which establish that the Parties have the authority to identify the specific artifacts that are safeguarded under the Convention.

41. The WHC only requires States to conserve the antiquities that they have the intention to save. Evidently, the archaeological site is not of cultural importance for the people of Sirax. On the contrary, the site is a deriding reminder of the painful past of enslavement. Therefore, Sirax and the majority of its population have no intention to protect, conserve, or present the archaeological site.

42. Furthermore, the archaeological site is not a UNESCO World Heritage site. Therefore, it follows that no special importance is allocated to the archaeological site.[66] The Court is asked to note that Sirax has consciously decided to build a modern international airport with three runways on land

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[62] *Strugar* Judgement [230]; O'Keefe (2010), p. 8.
[63] Article 16 AP II: "[…] it is prohibited to commit any acts of hostility directed against historic monuments, […]".
[64] UNESCO (2024).
[65] *See e.g.*, "[…] a Treaty having regard to the limited amount of State practice which is generally regarded as sufficient to establish the existence of a rule in customary international law, a Treaty to which a substantial number of States are parties must be counted as extremely powerful evidence of the law" in Baxter (1967), p. 278.
[66] *See Al Mahdi* Judgment [46].

for the reason of economic prosperity. The parliament carefully took into account the destruction of the archaeological site and balanced the interest of the protection of archaeological sites and the public interest of economic welfare. The affected community by the destruction of the archaeological site is exceptionally small, as the Karaxis members represent less than 5% of the population in Sirax.[67] The Siraxan democratically elected[68] parliament knew that the construction of the airport was vital for the economic prosperity of Sirax. With one of the smallest GDPs of any country, it has recently discovered a considerable amount of lithium in the Craggy Mountains near the country's northern border. By constructing the airport in the Capital of Sirax the transport of the rare minerals will therefore accelerate the economic growth of the country.

43. It thus follows that the destruction of the Sirax parliament to destroy the archaeological site does not lead up to a war crime under Article 8(e)(iv) RS.

3. The destruction of the archaeological site occurred after the fighting ended

44. A conduct which results in a war crime must not take place in the midst of a battle.[69] Nevertheless, such alleged conduct must be "closely related to the hostilities"[70] and must have taken place in the context of an armed conflict.[71]

45. However, in the present matter, the actual destruction of the archaeological site only started after the act of violence came to an end.[72] The Court is therefore asked to reaffirm that there are no substantial grounds to believe that the Defendant committed the war crime of attacking historic monuments in a NIAC under Article 8(2)(e)(iv) of the Statute.

B. The alleged acts do not constitute crimes against humanity under Article 7(1)(h) RS

46. The alleged acts do not amount to CAH under Article 7(1)(h) RS, as **(1)** the contextual requirements of Article 7 RS are not fulfilled. Further, **(2)** the alleged conduct does neither satisfy the specific objective nor the subjective elements of Persecution under Article 7(1)(h) RS.

1. The contextual elements of CAH are not fulfilled

47. Article 7(1) RS contextually requires the conduct to be committed as part of either a widespread or systematic attack directed against any civilian population.[73] In the present matter, there was no

[67] *See Al Mahdi* Judgment [80].
[68] UNESCO Report [3].
[69] *Katanga/Ngudiolo* Decision [380].
[70] *Lubanga* Decision [288]; *Kordić/Čerkez* Judgement [32-33].
[71] *Id.*
[72] UNESCO Report [7-8].
[73] Art. 7(1) RS.

attack against a civilian population. However, even if the events are to be considered such an attack, neither the threshold for widespread nor systematic is fulfilled.

a) The alleged conduct does not constitute an attack against a civilian population

48. According to Article 7(2)(a) RS, an "attack directed against any civilian population" means "a course of conduct involving the multiple commission of acts referred to in paragraph 1 of the Article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack". In the present matter, there was no indication of a policy encouraging an attack on Karaxis members.

49. While the 2020 national law appropriately identifies Karaxis party members as terrorists and restricts their assembly due to their historical association with enslavement atrocities, it is crucial to clarify that this designation does not imply a state policy aimed at instigating attacks against them. Instead, it underscores the threat that Karaxis poses to Sirax's national security and the legitimate aim of the Sirax government to protect the State accordingly.

50. Despite this legal designation and prohibition, the Karaxis illegally assembled on 8 June 2021, trespassing on government property, and threatening the safety of the construction workers, with the intent to confront the democratically elected government of Sirax. Municipal security personnel were instructed to only use force in the event of resistance from the terrorists. According to the UNESCO Report, the circumstances surrounding the initiation of violence remain unclear. Given the fervor of the Karaxis Party members when it came to blocking the demolition, it is plausible that the protestors prompted the conflict by opening gunfire against the security personnel. In such a scenario, the security forces would have been compelled to react defensively in the face of imminent danger. Given the perceived threat to national security posed by the Karaxis protestors, who were deemed terrorists, we must question whether the Defendant's order to counteract the danger can be interpreted as a legitimate act of self-defense, a right recognized by Article 31(3) RS and a reason to exclude criminal responsibility.[74] In any case, the conduct does not constitute an attack.

51. The conduct was also not directed against any civilian population. The term "civilians," though not explicitly defined in the RS, refers to individuals who are not part of state armed forces or organized armed groups involved in a conflict.[75] Article 51(3) of the Additional Protocol I ("**AP I**") notes that civilians lose their protected status if they directly take part in hostilities.

[74] *Kordić/Čerkez* Judgement [449].
[75] *Ntaganda* Judgment [883, 921].

Furthermore, the phrasing "directed against" requires that the civilian population must be the primary target.[76] In the present matter, the accused conduct exclusively targeted Karaxis protestors armed with handguns and bats, taking part in the hostilities. According to Article 51(3) AP I, they therefore are precluded from being classified as civilians. Indicators pertaining to the organizational structure of a group comprise the degree of accessibility of military equipment, the group's capability of strategizing and executing military operations, the open bearing of arms, and the magnitude, gravity, and intensity of military engagement.[77] Their organized and armed status, along with their designation as terrorists, precludes them from being classified as civilians. Moreover, the primary aim of the government forces was to clear out the construction site and use force against the terrorists only if they resisted. This indicates that the attack was not directed against a civilian population but against an armed and organized group that posed a threat to national security. Therefore, the Karaxis protestors do not fit the definition of civilians per the RS.

b) <u>The alleged conduct was not widespread or systematic</u>

52. Even if the events are to be considered an attack against a civilian population, it could neither be considered widespread or systematic. A "widespread" attack must be conducted on a large scale and cause a high number of victims.[78] It is therefore mainly a quantitative criterium. Factors like the geographic scope and frequency of the attack can also contribute to its classification.[79] In *Al Bashir*, the Court determined an attack to be widespread as it impacted hundreds of thousands of individuals.[80] On the other hand, where there are just a few hundred casualties affected, the attack must be on a large geographic scope to be considered widespread.[81]

53. In the present matter, the attack resulted in fewer than a thousand casualties overall, indicating - although tragic - a comparatively low number of victims. The attack must therefore have been of a large geographic scope since the casualties alone do not satisfy the criterion of widespread. However, in the present matter, the conduct was limited to a relatively small and specific geographical area, namely the archaeological site of Tirosh and its surrounding vicinity, and therefore not large scale. The attack occurred only in one single conduct, lasting two days, ruling out the possibility of it being frequent. Its nature was specific to the demolition of the archaeological site and did not involve multiple victims or targets beyond the site itself. Therefore,

[76] *Ongwen* Judgment [2675].
[77] *Ntaganda* Judgment [704]; *Bemba* Judgment [134]; *Katanga* Judgment [1185-1186]; *Lubanga* Judgment [536-537].
[78] *Gbagbo* Decision [222]; *Katanga/Ngudiolo* Decision [394].
[79] *Tadić* Judgment [633].
[80] *Al Bashir* Decision [84].
[81] *E.g.*, 357 casualties in *Bemba* Decision [108].

considering the limited scope, duration, and impact of the attack, it does not meet the criteria to be classified as widespread.

54. A systematic attack on the other hand is marked by the organized, non-random nature of violent acts, unlikely to occur randomly.[82] Isolated acts cannot be constructed under Article 7(1) RS.[83] It has also been consistently held that the "systematic" character of the attack refers to the existence of "patterns of crimes" reflected in the non-accidental repetition of similar criminal conduct on a regular basis.[84] For reference, in *Bashir* the Court categorized an attack as systematic where it lasted for well over five years and the committed acts significantly followed a similar pattern.[85]

55. Presently, the alleged acts only occurred within a time frame of two days and followed as a direct reaction to the illegal assembly and the threat posed by the Karaxis protesters. As such, it constitutes an isolated event triggered by specific circumstances, rather than displaying the regularity and intentional repetition typical of systematic attacks. Although decrees had been issued targeting Karaxis members due to their political activities and involvement with the Tirosh artifacts, the central government did not orchestrate any violent assaults against the group. It is essential to note that the defendant's actions were autonomous from these decrees and were driven by the economic objective of advancing the airport construction plan and clearing out the site from violent protestors, threatening the safety of the construction workers. Hence, this attack cannot be linked to the decrees in question. In conclusion, due to the absence of a consistent pattern of criminal conduct and the limited timeframe of just two days during which the attack took place, it cannot be classified as systematic.

2. The specific element of Persecution under Article 7(1)(h) RS is not met

56. Even if the events are to be considered a widespread or systematic attack against a civilian population, the alleged acts do not fulfill the specific elements of Persecution under Article 7(1)(h) RS, as neither the objective nor subjective elements are met.

a) <u>The objective elements are not satisfied</u>

57. Pursuant to the Elements of Crimes ("**EoC**") and Article 7(2)(g) RS, Persecution requires that the conduct target individuals due to their association with an identifiable group, based on political,

[82] *Gbagbo* Decision [223]; *Kordić/Čerkez* Appeal [94].
[83] *Côte d'Ivoire* Authorisation [89]; Schabas (2016), p.166-167.
[84] *Ongwen* Judgment [2679]; *Ntaganda* Judgment [692-693]; *Katanga* Judgment [1113, 1123].
[85] *Al Bashir* Decision [85].

racial, ethnic, or cultural characteristics,[86] and that the conduct was linked to any other crime covered in the RS.[87]

58. *Firstly*, the Defendant did not base his target on universally recognized impermissible grounds.[88] The Defendant targeted the protesters due to their unlawful conduct and the peril they posed to national security. Equipped with weapons, the protesters obstructed the demolition, posing a risk to Sirax's economic and security interests by impeding the construction of the airport. The Defendant's objective to clear the site stemmed from a national security interest as government property was being attacked. Therefore, the target was not made on impermissible grounds but based on the threat they posed at the moment. While the Karaxis Party can be linked to a group sharing political ideologies and a similar cultural heritage, it is crucial to emphasize that this party's political identity is intertwined with a history of enslavement and threatening national security, rendering it a non-protected political affiliation.[89] Consequently, targeting individuals associated with this illegal political group does not fall under the protection of universally recognized impermissible grounds.

59. *Secondly*, pursuant to Article 7(1)(h) RS, the conduct must be committed in connection to any other crime covered in the RS.[90] In the context of a connection to an armed conflict, a geographical and temporal connection to the act is adequate for the purposes of a CAH.[91] As established above, the alleged crimes do not constitute war crimes under Article 8(2)(e)(iv) RS. Furthermore, the destruction of the archaeological site came *after* the conclusion of the fighting. Hence, the alleged conduct was not committed in connection to another crime covered in the RS.

3. The subjective elements are not satisfied

60. Equally, the subjective elements of Persecution are not met, as the Defendant did not target the individuals with discriminatory intent nor was he aware that the conduct could have potentially been part of a widespread and systematic attack.[92]

61. The Karaxis protestors, predominantly comprised of former enslavers, were trespassing on government property, and attempting to halt a government construction project by violent means.

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[86] *Al Hassan* Charges [665]; *Ntaganda* Judgment [1009].
[87] *Burundi* Decision [130-133].
[88] *Id*.
[89] *See e.g.*, the clear and present danger test, which formulates a principle for the limitation of liberty with a conscious, intelligent weighing of the opposed social interests in Schenck v. United States.
[90] *Burundi* Decision [130-133].
[91] *Tadić* Judgment [633].
[92] *Al Hassan* Charges [670-671].

Notably, it is the Karaxis Party itself that has a history linked to the oppression and enslavement of others. Their attempts to obstruct the construction project, which is aimed at economic and infrastructural development, underscore their opposition to progress and national stability. The actions taken against them only escalated in response to the perceived threat posed by the violent protestors, deemed terrorists. Therefore, no discriminatory intent led the Defendant to order the destruction of the archaeological site and the municipal security forces to clear out the site.

62. As a result, the Defendant could not have been aware of participating in a widespread and systematic attack, as the incident was isolated and not part of any preconceived plan. Since there was no indication of systematic planning or coordination beyond the immediate circumstances, the Defendant lacked the requisite awareness of being involved in such an attack.

C. Even if the Court deems the alleged conduct to be a crime under the RS, the evidence submitted lacks probative value

63. Even if the Court decides that either a war crime and/or a crime against humanity has or have been committed by the Defendant, the evidentiary threshold pursuant to Article 61(7) is not fulfilled in the present matter. Since the UNESCO Report – the only evidence submitted by the Prosecution – does not meet the admissibility standards of Article 69(4) RS due to its lack of probative value, the Prosecution has failed to establish the evidentiary threshold of "substantial grounds to believe" with regards to the alleged crimes.

64. On account of Article 69(4) RS, the three-part admissibility test was created by the Court, which analyses whether the submitted materials (1) are relevant to the trial, (2) have probative value and (3) are sufficiently relevant and probative to outweigh any prejudicial effect caused by their admission.[93]

65. The assessment of the probative value is the second part of the admissibility test.[94] To pass the probative value test, innumerable factors can be taken into account, including, *inter alia*, the reliability, trustworthiness, and accuracy of the evidence.[95] In the present matter, the Defense argues that the evidence submitted by the Prosecution, including the eyewitness interviews and the smartphone videos, clearly have no probative value.

[93] *Bemba* Decision II [13-16]; *Lubanga* Admissibility [27-32].
[94] *Bemba* Decision II [15]; *Lubanga* Addmissibility [27-29].
[95] *Id*; *Bemba* Application [8].

1. The eyewitness interviews lack probative value

66. The UNESCO Report partly relies on eyewitness interviews.[96] These are anonymous, as the UNESCO Report fails to provide a list of interviewed witnesses. Anonymous hearsay evidence refers to a situation when there is not enough information about the original source of a remark.[97] This is further substantiated considering the impossibility of cross-examining the information source.[98]

67. In the present matter, the Defense cannot investigate or challenge the trustworthiness of the sources of the information, which unduly limits the right of the Defense under Article 61(6)(b) RS, which is a right of "considerable significance".[99] The Court has been adopting the position that, in order to counterbalance the disadvantageous position of the Defense, the Chamber may decline allegations that are supported only by anonymous or summary witness statements.[100]

68. In the present matter, the Prosecution presented an incomplete picture of the Defendant authorizing "deadly force" against the protesters. The sole sentence "Mayor Strong specifically authorized the municipal security personnel to employ deadly force against "these terrorists" if they resist", which could potentially incriminate the Defendant, is unreliable due to the fact that it is based on anonymous hearsay.[101] The origin of the pertinent assertion is unidentified, and the Court will not be able to cross-examine the information source, as the witnesses are anonymous.[102]

69. *Furthermore*, the Report solely says that it relies on eyewitness interviews, however, it does not say on how many. The incidents were solely described in a very summary fashion.[103] Without such important information, the eyewitness interviews lack substance and trustworthiness.[104] In conclusion, the Court will be unable to attribute much or any probative value on the anonymous hearsay of the UNESCO Report.[105]

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[96] UNESCO Report [1].
[97] *Gbagbo* Hearing [28].
[98] Katanga Judgment [90].
[99] *Gbagbo* Hearing [29].
[100] *Gbagbo* Hearing [35].
[101] *See Ruto/Sang* Decision [43].
[102] UNESCO Report [7].
[103] *See Gbagbo* Hearing [36].
[104] *See Gbagbo* Hearing [30].
[105] *See Gbagbo* Hearing [36].

2. The smartphone videos lack probative value

70. The UNESCO Report is also partly based on footage captured by smartphones.[106] Digital media is highly vulnerable to compromise, falsification, change, manipulation, and erasure.[107] In the digital age, with the abundance of data created during potential armed conflicts, it is crucial and challenging to discern between genuine and fabricated information.[108]

71. In the present matter the smartphone videos may have been manipulated to disseminate misleading or incorrect information among eyewitnesses, investigators, and judges, given the origin of the films and the provider to the Prosecution remains unknown. This might result in substantial consequences, such as wrongful convictions. Therefore, the Court is asked to confirm that the smartphone videos lack any probative value and can therefore not establish the evidentiary threshold.

72. Concluding, the OTP failed to submit any direct witness statements and/or smartphone video recordings, which the UNESCO Report is based on. This indicates that the OTP themselves did not consult any direct evidence in formulating their charges against the Defendant and that they based their case entirely on indirect evidence. Therefore, the threshold of "substantial grounds to believe" according to Art. 61(7) is not reached.

III. THE DEFENDANT IS UNFIT TO STAND TRIAL UNDER ARTICLE 64(2) RS AND RULE 135 RPE

73. The PTC decided correctly that the Defendant is unfit to stand trial due to the following: (**A**) The Defendant is unable to exercise his fair trial rights in the present proceedings, (**B**) the Report of Dr. Baleron, Court Appointed Psychiatrist ("**Medical Report**") provides ample evidence to affirm the Defendant's unfitness to stand trial, and (**C**) even if the Court harbors doubts about the Medical Report, the Defendant's public actions prove his unfitness to stand trial.

A. All proceedings shall be terminated as the Defendant is unable to exercise his fair trial rights

74. The Chamber must ensure, as expressed in Article 135 RPE, that no proceedings take place against an unfit person.[109] The Defense argues that the Defendant is unfit to stand trial due to amnesia and that no proceedings should be carried out against him.

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[106] UNESCO Report [1].
[107] *See* Freeman/Vazquez Llorente (2021), p. 171.
[108] Freeman (2020), p. 64.
[109] *Gbagbo* Fitness [56].

75. Whereas there is no express provision in the RS defining the fitness of the accused, the jurisprudence of the ICC sees the notion of "fitness to stand trial" as an aspect of the fairness of the trial.[110] The fair trial rights of an accused are inextricably linked to the requirement of the accused to be able to understand and exercise his rights at proceedings against them.[111] These rights include, *inter alia*, the capacity to (1) understand the purpose, including the consequences of the proceedings, (2) understand the course of the proceedings, including the nature and significance of pleading to the charges, (3) understand the evidence, (4) testify (should the accused choose to), and (5) instruct counsel.[112]

76. The assessment of a Defendant's fitness to stand trial is not made by establishing whether a given disorder is present.[113] The applicable standard is that of a "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".[114] The threshold that is required for an accused to stand trial is that they can make their defense.[115]

77. In order for the Court to evaluate the fitness of the accused, the Trial Chamber orders a medical examination of the person according to Article 135(1) RPE. In the present matter, the Court ordered such a medical examination which resulted in the Medical Report.[116] It concluded that the Defendant is seriously ailing. He suffered a hemorrhagic stroke, which resulted in severe short-term memory loss ("**amnesia**"). This means that the Defendant lost all memories of the past years, excluding his younger years.[117] Dr. Baleron ("**Expert**") and subsequently the legal evaluation of her Report by the Defense concludes that there is *no* possibility for the Defendant to participate effectively in any trial because of the severity of his cognitive impairment.[118]

1. The Defendant is unable to instruct counsel

78. The ICTY established the undisputed requirement that the accused needs to be able to instruct defense counsel.[119] The ICC applies these ICTY principles by affirming that meaningful participation means for the accused to be able to instruct counsel and engage with and participate

[110] Art. 67(1) RS; *Ongwen* Decision [14]; *Ongwen* Request [8]; *Gbagbo* Fitness [43]; *Gbagbo/Blé Goudé* Decision [33].
[111] *Nahak* Findings [32].
[112] *Gbagbo/Blé Goudé* Decision [35]; *Ongwen* Request [8]; *Strugar* Judgement [41]; *Strugar* Decision [36]; *Nahak* Findings [41]; *Kovačević* Decision [29].
[113] *Strugar* Judgement [41].
[114] *Id.* [55].
[115] *Strugar* Decision [37]; *Kovačević* Decision [27].
[116] Medical Report [1].
[117] Medical Report [3].
[118] Medical Report [5].
[119] *See, e.g.*, *Hadžić* Decision [38]; *Strugar* Decision [22].

in trial proceedings.[120] Instructing the counsel contributes to the ability of the accused to more adequately, among other things, understand the proceedings, understand the evidence, and testify.[121] Analyzing national common law jurisdictions, the ICTY assessed in the *Strugar* judgement that the test for fitness to stand trial requires a "limited cognitive capacity".[122] This means, *inter alia*, that the Defendant must be able to communicate with counsel.[123] Furthermore, in the *Nahak* case, the Special Panels for Serious Crimes in East Timor concluded that the minimum standard of competence is that the accused is able to cooperate with counsel, to inform their attorney concerning the facts of their case and to assist in the preparation of his own defense.[124]

79. In the present matter, the Medical Report specifically mentions, that "it is doubtful that [the Defendant] will be able to instruct defense counsel".[125] The Expert suggests by that statement that the Defendant is not (and will not be) able to instruct Defense counsel due to the fact that "he has no memory of events that occurred during the past several years".[126] A counsel will not be able to build a case and adequately present a Defendant's position when the accused has no ability to contribute to the defense.[127] The Defendant cannot inform his attorney concerning the facts of his case. He possesses no memory of any events in the time in which the accused "crimes" happened. The Chamber shall acknowledge that the minimum fair trial right is and will be infringed by allowing a trial where the Defendant won't be able to instruct the Defense counsel.

2. The Defendant is unable to testify

80. Furthermore, the Defendant will not be able to testify and therefore the fairness of trial will be violated. The fairness of trial includes the right to testify.[128] It is established case law that to ascertain fitness to stand trial, the accused should be able, if they should choose to, to testify or give an unsworn statement.[129]

81. In the present matter, the Medical Report asserts that "it is doubtful that [the Defendant] will be able to testify due to his inability to recall the events related to these proceedings." In any

[120] *Al Hassan* Decision [34]; *Ongwen* Request [8]; *Gbagbo* Fitness [50]; *Gbagbo/Blé Goudé* Decision [35].
[121] *Strugar* Decision [22].
[122] Strugar Judgement [52].
[123] *Id.*
[124] *Nahak* Findings [131].
[125] Medical Report [5].
[126] "Doubtful" in Cambridge Dictionary (2024); Medical Report [3].
[127] *Contra Hadžić* Decision [53].
[128] *Ongwen* Decision [14].
[129] *Gbagbo/Blé Goudé* Decision [35].

proceedings before the Court, where the Defendant's ill-health prevents him from testifying truthfully and sanely, his right to testify is effectively denied.

82. On the basis of the Medical Report, it is requested that the Court concludes that the Defendant is not fit to stand trial in accordance with Rule 135 RPE and Article 64(2) RS. A continuation of a trial in which the Defendant is unfit to stand trial would result in a "miscarriage of justice".[130] Accordingly, the Chamber shall decide for a cessation of all proceedings before the ICC.

B. The Medical Report is sufficient evidence to affirm the Defendant's unfitness to stand trial

83. The Court is respectfully requested to regard the Medical Report as sufficient evidence to affirm the Defendant's unfitness to stand trial. In the present case, the Trial Chamber, with the *consent of the Prosecutor*, opted to conduct a single medical examination for the Defendant to assess his fitness to stand trial. The appointment of the Expert adhered to the formal procedures of the ICC. In the present matter, the fulfilled formal procedures in connection with the OTP's consent to the appointment of *one* Expert provide a strong foundation for the Medical Report.

84. The Expert's assessment has been conducted correctly and impartially. The medical degrees from the University of Cambridge, University of Oxford, and the University of Edinburgh and a job position as a Professor of Forensic Psychiatry at the University of Dublin mark the highlights of the Expert's academic career. Furthermore, the Expert's practical work experience is vast, as she published over 100 articles in prestigious journals and testified in numerous trials before international and national Courts. She was included in the list of psychiatric experts approved by the ICC Registrar in 2018.[131]

85. The Expert is highly skilled and qualified to examine and assess the Defendant's capabilities. Therefore, the Court should rule out any doubts about the Expert's Medical Report of the Defendant and should apply the Expert's assessment to its decision.

C. Even if the Court harbors doubts about the Medical Report, the Defendant's lifestyle and publicly visible actions prove his unfitness to stand trial

86. *Even if* the Court harbors doubts regarding the evidentiary value of the Expert's Report, the Defendant's actions in his public life underscore his unfitness to stand trial. The Defendant has been morbidly obese for a considerable period. Over the past decade, he has been on Statin medication for high cholesterol and Beta blockers for high blood pressure.[132] It is evident that the Defendant's health has been declining in recent years and that his overweight (and the causes and

[130] *Strugar* Judgement [34].
[131] Medical Report [2].
[132] Medical Report [3].

effects thereto) likely led to his hemorrhagic stroke.[133] Furthermore, a memory impairment is a well-known long-term effect of a stroke,[134] and it is therefore unlikely that the Defendant is faking his amnesia.

87. One day after the stroke that induced the Defendant's amnesia, he appointed his Deputy to assume the role of the Mayor of Newcastle on 21 July 2022.[135] The Defendant's health was in such a compromised state that an immediate change in leadership was deemed necessary. Additionally, he granted Power of Attorney to his wife.[136] This gives his wife the legal right to make the financial and business decisions for the Defendant.[137] Those decisions underscore the severity of the Defendant's health condition. Presently, the Defendant resides in an assisted living facility designed for people with disabilities or the elderly.[138] Even if the Defendant can presently function at a basic level day to day in the assisted living facility, it does not mean that is fit to stand trial.[139]

88. *Therefore*, even if the Court maintains reservations about the Court-appointed medical expert's assessment regarding the Defendant's fitness to stand trial, the Court should acknowledge the Defendant's demonstrated inability to stand trial through his publicly visible actions. In light of this, the Chamber shall discontinue all proceedings before the ICC.

[133] NHS (2024).
[134] *See generally* Lim/Alexander (2009).
[135] *Sirax* Situation [12].
[136] *Id*.
[137] "Power of Attorney" in Cambridge Dictionary (2024).
[138] "Assisted Living Facility" in Cambridge Dictionary (2024).
[139] *See also Nahak* Findings [134].

SUBMISSIONS

Having presented all arguments, the Defense respectfully requests the Appeals Chamber to

1. **Uphold the PTS XV's Decision**, and

2. **Reaffirm**

a. the denial of the Prosecution's motion to confirm charges.

Respectfully submitted,

COUNSEL FOR THE DEFENSE

On behalf of Mr. Lionel Strong

Dated 17 March 2024.