IBA ICC MOOT COURT
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2024 International Criminal Court Moot Court Competition

Case before the International Criminal Court (ICC):
The Prosecutor v. Lionel Strong
Situation in The Republic of Sirax

Appeal from the Pre-Trial Chamber's Denial of Confirmation of Charges

This is a fictional case intended to enable students to familiarize themselves with the law and practice of the ICC. Participating teams will be divided into three roles: (1) Counsel for the Prosecution which brings this appeal; (2) Common Legal Representative of the Victims, participating under Article 68(3) of the Rome Statute of the International Criminal Court (the 'Statute'); and (3) Counsel for the Defendant (Lionel Strong). In accordance with the rules of the competition, each team shall write a Memorial for each of these roles, setting forth its legal arguments in the context of the interlocutory appeal by The Prosecutor, challenging the Pre-Trial Chamber's Denial of Confirmation of Charges concerning Lionel Strong. Oral arguments shall follow the order set forth above.

Established Agenda for the Appeal of the Pre-Trial Chamber's Decision

Pursuant to Pre-Trial Chamber XV's decision to grant the Prosecution's request for leave to appeal the Denial of Confirmation of Charges of 15 May 2023 (reproduced below), the Appeals Chamber seeks submissions of all parties and participants on the following three issues:

a. Whether the Pre-Trial Chamber erred in holding that the ICC lacked jurisdiction over the Defendant because the Republic of Sirax had withdrawn from the Rome Statute (RS) under Article 127 of the Statute despite the Prosecutor's public announcement of a preliminary examination prior to the effective date of Sirax's withdrawal?

b. Whether the Pre-Trial Chamber 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 of persecution under Article 7(1)(h) of the Statute.

c. 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?

Corrected Pre-Trial Chamber XV's Decision in the Situation in The Republic of Sirax

Prosecutor v. Lionel Strong

Pre-Trial Chamber XV of the International Criminal Court (ICC) renders this decision denying the application of the Prosecution to confirm the charges relating to Defendant Lionel Strong pursuant to Article 61 of the Rome Statute. Mr. Strong, a national of The Republic of Sirax (Sirax), is accused of committing crimes against humanity and war crimes in the territory of Sirax, which was party to the Statute at the time of the acts in question.

The Evidence

1. This case concerns the destruction of an ancient Tirosh archaeological site and associated artifacts in Sirax and the killing of 800 protesters who tried to prevent their destruction on 7-9 June 2021.

2. The Defendant, Lionel Strong (age 73), is a national of Sirax who from January 2012 to July 2022 served as the Mayor of Newcastle (pop. 1 million), the capital city of Sirax. He does not have dual nationality with any other country.

3. The Pre-Trial Chamber's decision in this case is based on four attached documents, which are considered part of this decision:

(1) Map of the Republic of Sirax, attached at Appendix A;
(2) Declaration of the Republic of Sirax withdrawing from the International Criminal Court, dated 16 June 2021, attached at Appendix B;
(3) Report of the United Nations Educational, Scientific and Cultural Organization (the 'UNESCO') on the destruction of the archaeological ruins of Tirosh, dated 4 July 2022, attached at Appendix C; and
(4) Report of Dr. Meley Baleron, Court-Appointed Psychiatrist, dated 21 August 2022, attached at Appendix D.

Background

4. The Republic of Sirax ratified the Rome Statute on 30 August 2011, and the Treaty entered into force for the Republic of Sirax on 1 November 2011**.** Sirax ratified the 1949 Geneva Conventions in 1965 and the two Additional Protocols thereto in 1985.

5. Shortly after receiving reports that Sirax government forces had destroyed an ancient Tirosh archaeological site and killed 800 protesters there, on 15 June 2021, the Office of the Prosecutor publicly announced the initiation of a preliminary examination of the situation under Article 15

of the Statute. That day, the Prosecutor issued a Press Release posted by the Registrar on the Court's website, which stated:

> The recently reported destruction of the Tirosh archaeological site and the killing of 800 protesters there may constitute war crimes and crimes against humanity under the Rome Statute of the International Criminal Court. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has launched an investigation into this matter. At the same time, my Office has opened a preliminary examination and will be looking into these reported acts. Let me be clear: if the evidence confirms the initial reports of this atrocity, my office will seek to bring the perpetrators to justice.

6. On 16 June 2021, the Republic of Sirax notified the Secretary General of the United Nations that it was withdrawing from the Statute, effective in one year, on 16 June 2022. The notification is attached at Appendix B.

7. On 4 July 2022, the UNESCO issued a report implicating Lionel Strong in the destruction of the recently discovered Tirosh archaeological site and the killing of 800 protesters based on eyewitness interviews, smart phone videos, and hospital and morgue records. The Report, which indicates that it could not be completed sooner on account of the Republic of Sirax's non-cooperation with respect to accessing essential witnesses and records within its territory, is attached at Appendix C.

8. Armed with the UNESCO Report, on 5 July 2022, the Office of the Prosecutor filed a request for authorization to commence an investigation of the Situation in The Republic of Sirax pursuant to Article 15(3), which a differently composed bench of the Pre-Trial Chamber authorized that same day.

9. On 6 July 2022, at the request of the Office of the Prosecutor, a differently composed bench of the Pre-Trial Chamber issued an arrest warrant for Lionel Strong, finding on the basis of the UNESCO Report that there were reasonable grounds to believe that he was criminally liable for the crime against humanity of persecution under Article 7(1)(h) of the Statute, and for the war crime of attacks on historic monuments under Article 8(2)(e)(iv) of the Statute. According to the evidentiary material submitted by the Prosecution and analysed by the Pre-Trial Chamber, the criminal conduct stemmed from:

> (1) Mr. Strong's orders to city construction teams under his command to use explosives and bulldozers to demolish the recently discovered Tirosh archaeological site in Newcastle;
>
> (2) Mr. Strong's orders to heavily armed municipal security forces under his command to use deadly force to clear out the individuals protesting the demolition of the archaeological site resulting in the deaths of 800 protesters; and
>
> (3) Mr. Strong's orders after the conclusion of the fighting for the construction teams to resume demolition of the archaeological site, ultimately erasing all signs of the ancient city and its artifacts.

10. On 7 July 2022, the Republic of Sirax informed the ICC Registrar that it would not cooperate in the investigation of Lionel Strong because it had withdrawn from the Statute prior to the initiation of proceedings concerning him. Further, the Republic of Sirax informed the Registrar that it had determined that Mr. Strong had done nothing wrong, and it would not be criminally pursuing the matter in its domestic courts.

11. Since the Republic of Sirax was unwilling to criminally pursue the matter, on 15 July 2022 the ICC Prosecutor filed its Documents Containing the Charges ("DCC") pursuant to Article 61(3) of the Statute, charging Lionel Strong with commission of war crimes in a non-international armed conflict under Article 8(2)(e)(iv) and the crime against humanity of persecution under Article 7(1)(h) of the Statute. The charged mode of liability was "ordering" under Article 25(3)(b) of the Statute.

12. On 21 July 2022, Lionel Strong was hospitalized after suffering a haemorrhagic stroke. While in the hospital, Mr. Strong provided Power of Attorney to his wife and his Deputy took over as Mayor of Newcastle.

13. With Lionel Strong's wife's consent, on 23 July 2022, the Republic of Sirax appointed the Deputy Attorney General of Sirax, Samantha Stark, to represent Mr. Strong in proceedings before the International Criminal Court. The Pre-Trial Chamber immediately approved Ms. Stark as Mr. Strong's Defense Counsel. The Government of Sirax notified the ICC that it would not be participating separately in the proceedings since Deputy Attorney General Stark would be representing the Government's interests while defending Mr. Strong.

14. On 1 August 2022 the ICC Prosecutor requested a hearing on confirmation of charges pursuant to Article 61 of the Statute.

15. With the consent of the Office of the Prosecutor and Defense Counsel Stark, pursuant to Article 64(2) of the Statute and Rule 113 of the ICC Rules of Procedure and Evidence, on 7 August 2022 the Pre-Trial Chamber appointed a psychiatric expert from the list approved by the Registrar to travel to Newcastle and evaluate Mr. Strong's mental State. After meeting with Mr. Strong on 21 August 2022, the expert, Dr. Meley Baleron, whose Report is attached as Appendix D, concluded that Mr. Strong is not fit to participate meaningfully in his trial. The expert further opined that it is extremely unlikely that Mr. Strong will regain fitness, regardless of treatment or intervention, and that there are no accommodations that could enable him to participate effectively in his trial because of the severity of his cognitive impairment.

16. On 25 August 2022, Defense Counsel filed a motion in opposition to Confirmation of Charges on the following grounds:

a. that the ICC lacks jurisdiction over the Defendant because the Republic of Sirax had withdrawn from the Statute under Article 127 prior to the formal initiation of any proceedings related to this Situation;

b. that the allegations and evidence are insufficient to establish substantial grounds to believe that the Defendant committed crimes under Article 8(2)(e)(iv) or Article 7(1)(h) of the Statute; and

c. that the Defendant is not fit to be tried by the Court pursuant to Article 64(2) of the Statute and Rule 135 of the Rules of Procedure and Evidence.

17. On 1 September 2022, the Court appointed a Common Legal Representative of the Victims to represent the interests of the international community harmed by the destruction of the Tirosh archaeological site and objects.

Findings and Conclusions of the Pre-Trial Chamber

18. On 30 October 2022, representatives of the ICC Office of the Prosecutor, Counsel for Lionel Strong, and the Common Legal Representative of the Victims submitted briefs and made oral presentations before this Pre-Trial Chamber on the issues raised by the Defense. Defense Counsel informed the Chamber that Lionel Strong had waived his right to be present at these proceedings. After duly considering their submissions and arguments, the Pre-Trial Chamber hereby makes the following findings and conclusions:

1. <u>The Court lacks jurisdiction over the Defendant.</u>

1.1. The Prosecution asserts that the ICC has jurisdiction to prosecute Lionel Strong under Article 12(2), which grants the ICC jurisdiction over war crimes and crimes against humanity committed by a national of a State party to the Statute as well as such acts committed by individuals in the territory of a State party to the Statute. Although Mr. Strong is a national of Sirax, and Sirax was a party to the Statute when the acts in question occurred in its territory, Sirax's withdrawal from the Statute became effective on 16 June 2022, several weeks before the Prosecutor requested the Pre-Trial Chamber's authorization to commence an investigation into the situation in Sirax. This case, therefore, turns on the interpretation of Article 127(2) of the Statute, which provides that the withdrawal of a State from the treaty shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."

1.2. The Prosecution argues that the matter was already under consideration by the ICC before the effective date of Sirax's withdrawal because: (a) the Prosecutor publicly announced the commencement of a preliminary examination of the situation on 15 June 2021 while the Republic of Sirax was still a Party to the Statute; and (b) had it not been for the Republic of Sirax's non-cooperation which delayed the UNESCO report, the Court would have initiated the investigation prior to the Republic of Sirax's withdrawal taking effect.

1.3. Regardless of the reasons, the Prosecutor did not initiate a formal investigation until several weeks after the Republic of Sirax's withdrawal from the Statute had become effective. The Pre-Trial Chamber recalls that a preliminary examination is not an investigation—it is just an initial step unilaterally taken by the Prosecutor to determine whether there is a reasonable basis to proceed with an investigation. The Pre-Trial Chamber therefore does not consider a preliminary examination to constitute a matter under consideration by the Court for purposes of Article 127(2) of the Statute.

The Pre-Trial Chamber therefore finds that the ICC lacks jurisdiction over this case.

2. The allegations and evidence are insufficient to establish substantial grounds to believe that the Defendant committed a war crime or a crime against humanity under the Rome Statute

2.1. For there to be the war crime of intentionally directing attacks against historic monuments under Article 8(2)(e)(iv) of the Statute, the act must take place during an "armed conflict." As described in the Report of the UNESCO (Appendix C), the conduct at the airport construction site in Newcastle did not qualify as such because the fighting was insufficiently intense or protracted, the protesters lacked the requisite level or military organization, and the destruction of the archaeological site occurred after the fighting had ended.

2.2. The Pre-Trial Chamber therefore finds that there are no substantial grounds to believe that Lionel Strong committed the war crime of attacking historic monuments in a non-international armed conflict under Article 8(2)(e)(iv) of the Statute.

2.3. Concerning the charge of persecution as a crime against humanity brought under Article 7(1)(h) of the Statute against Mr. Strong, there must be widespread or systematic attacks against a group based on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognized as impermissible under international law. The Report of UNESCO indicates that the municipal security forces fired upon the protesters because they were armed, trespassing on government property and attempting to halt a government construction project by violent means, not because of their political affiliation. Moreover, the destruction of the archaeological site came after the conclusion of the fighting; it therefore could not be part of an "attack" on a civilian population. It is also significant that UNESCO had not designated the archaeological ruins of Highcastle as a World Heritage site, and the Republic of Sirax did not consider the site of cultural significance. Finally, the fighting was limited to two days at a single geographic site, and therefore could not meet the widespread or systematic requirements of Article 7 of the Statute.

The Pre-Trial Chamber therefore finds that there are no substantial grounds to believe that Lionel Strong committed the crime against humanity of persecution under Article 7(1)(h) of the Statute.

3. <u>The Defendant is not fit to stand trial.</u>

3.1. Based on the Report of the court-appointed psychiatric expert, the Pre-Trial Chamber rejects the Prosecution's arguments that Defendant is sufficiently fit to stand trial; that Defendant may be faking his amnesia; or that the Defendant may recover his memories if the trial is delayed rather than dismissed.

We are persuaded by Dr. Baleron's Report that Lionel Strong is permanently unfit to stand trial because of his stroke-induced amnesia and therefore terminate the proceedings against him.

For these reasons, the majority of Pre-Trial Chamber XV hereby:

- Declines to confirm the charges against Lionel Strong of the Republic of Sirax;
- Declares Lionel Strong unfit to stand trial and terminates the proceedings against him; and
- Orders the Registrar to notify the parties and participants of this decision.

Dissent by Judge Variance:

I found the arguments of the Prosecution on all three issues persuasive, and I therefore dissent from the Decision of the Pre-Trial Chamber.

[Signed] Judge Friendly, Judge Learned, and Judge Variance (dissenting)
Dated 15 May 2023

At The Hague, The Netherlands

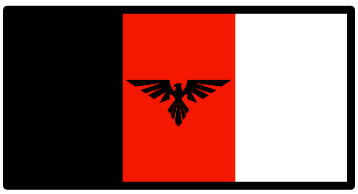
Appendix A

Map of Sirax



Appendix B

Declaration of the Republic of Sirax withdrawing from the International Criminal Court



16 June 2021

Mr. Secretary-General,

I write to you as the depositary for the Rome Statute.

The Republic of Sirax ratified the Rome Statute establishing the International Criminal Court (ICC) on 30 August 2011, and the Treaty entered into force for Sirax on 1 November 2011.

I have been authorized by the Parliament and Prime Minister of Sirax, pursuant to Article 127 of the Rome Statute, to notify the ICC through your good offices that the Republic of Sirax hereby withdraws from the Rome Statute, effective in one year, on 16 June 2022.

Please accept, Mr. Secretary General, the assurances of my highest consideration.

Lymon Vermax

Minister of Foreign Affairs
Republic of Sirax

Appendix C



Report of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on the destruction of the archaeological ruins of Tirosh

dated 4 July 2022

1. This report was prepared in the aftermath of the destruction of one of the most significant archaeological finds in the past 100 years. It is based on eyewitness interviews, smartphone videos, and hospital and morgue records. It is regrettable that, although the events took place in June 2021, this report could not be completed sooner on account of the Republic of Sirax's non-cooperation with respect to accessing essential witnesses, videos, and records within its territory.

2. The Republic of Sirax (pop. 2.3 million; 2,160 sq. kilometres) is located on land that once comprised the ancient Kingdom of Tirosh, on the northern shore of the Stormy Sea. According to historic records, from BC 200-AD 79, the Tirosh people had a thriving civilization, which worshiped a dragon deity known as Karaxis, whose visage appeared on monuments, temple friezes and mosaics throughout the central city of Highcastle, on the south coast of Tirosh. In AD 79, the nearby Tesseran Volcano erupted, destroying the buildings of Highcastle and entombing the city under a five-meter deep blanket of ash and pumice. This precipitated the fall of the Tirosh Kingdom.

3. In modern times, the Republic of Sirax became an independent country in 1961 and joined the United Nations that year. Since then, it has been governed by a parliamentary democracy, dominated by the Progressive Party. With an economy based primarily on fishing and agriculture, the Republic of Sirax has one of the smallest GDPs of any country but its fortunes have recently improved with the discovery in 2017 of an estimated 3 million tonnes of lithium reserves (a rare mineral used for production of electric car batteries) in the Craggy Mountains near the country's northern border.

4. The large majority of the population of the Republic of Sirax are descendants of peoples who were enslaved by the rulers of ancient Tirosh. In recent years, building and road construction projects in the capital city of Newcastle have unearthed artifacts from the ancient Tirosh city of Highcastle that were long buried. Other than the 1949 Geneva Conventions, Sirax is not a party to any Convention that protects cultural objects during war or peacetime. Deriding reminders of her ancestor's enslavement, the Prime Minister of the Republic of Sirax, Ciri Lancaster, decreed

in 2018 that all artifacts of that period are to be destroyed, and the Republic of Sirax Parliament passed a law rendering possession or sale of such items a crime punishable by up to 1 year imprisonment.

5. Shortly thereafter, an opposition group calling itself the Karaxis Party was founded to celebrate the ancient heritage of Sirax and return the Republic of Sirax to the glory of its once powerful kingdom. While they share the same language and ethnicity with other Siraxans, members of the Karaxis Party claim to trace their ancestry to the ruling elite of Tirosh. One of the group's goals is the preservation of ancient Tirosh artifacts containing the visage of Karaxis. By 2019, the Karaxis Party numbered over 100,000 members. In November 2020, the Sirax Parliament enacted a law designating the Karaxis party a "terrorist organization" banned from fielding candidates in national and local elections and rendering membership in the party a "terrorist offense" punishable by up to 5 years imprisonment. Nonetheless, the group continued to meet secretly and to recruit members via social media.

6. In January 2021, the Sirax Parliament approved funding for the construction of a modern international airport with three runways on land where the ancient city of Highcastle was believed to have been located. In June 2021, airport construction workers unearthed an extensive complex of buildings, roads, and monuments adorned with dragon motifs from the Tirosh era. A Reuters news story, dated 5 June 2021, described it as the world's greatest archaeological discovery in a century. On 6 June 2021 UNESCO sent a communique urging the government of the Republic of Sirax to preserve these ancient treasures.

7. In contravention of the UNESCO communique, on 7 June 2021, the mayor of Newcastle, Lionel Strong, ordered city construction workers to use explosives and bulldozers to demolish the archaeological site and bury it under concrete in order to complete the construction of airport runways and a terminal on municipal land. Television news coverage of dozens of bulldozers descending on the site precipitated an outcry by Alinda Jasper, the leader of the Karaxis party, and at her urging on 8 June 2021, approximately 800 armed individuals associated with the Karaxis Party, most wearing handmade armbands with dragon insignia, arrived at the site and blocked the demolition from commencing. In response, Mayor Strong ordered heavily armed municipal security personnel, numbering 1,000, to forcibly clear out the Karaxis protesters from the construction site. Mayor Strong specifically authorized the municipal security personnel to employ deadly force against "these terrorists" if they resist. In contrast to the Karaxis protesters who were lightly armed with handguns and bats, the security personnel under Mayor Strong's command were armed with rapid fire assault rifles and rocket propelled grenades.

8. It is not clear who fired the first shots, but by nightfall on 8 June 2021, 300 members of the Karaxis Party (including Alinda Jasper) and a dozen members of the municipal security force were killed in the intense fighting between the two groups at the airport construction site. That night, 1,200 additional armed Karaxis protesters and 2,500 additional municipal security forces arrived at the scene of the confrontation. The fighting resumed at dawn on 9 June 2021; 500 Karaxis protesters and 100 members of the municipal security force were killed during the next 16 hours. Outnumbered and outgunned, with ammunition running low, the Karaxis Party members

collected their injured and withdrew under cover of darkness on the evening of 9 June 2021. At Mayor Strong's order, the demolition of the ruins began on 10 June 2021, and the runway was completed on 18 June 2021 – erasing all signs of the ancient city and its invaluable artifacts.

9. UNESCO considers this one of the most egregious cases of "cultural cleansing" in the 21st century and urges the International Criminal Court to prosecute the offenders.

Appendix D



Report of Dr. Meley Baleron, Court Appointed Psychiatrist

Date: 21 August 2022

1. With the consent of both the Office of the Prosecutor and Counsel for Mr. Lionel Strong, the ICC requested that I travel to the Republic of Sirax and assess the fitness of Mr. Strong for trial before the ICC. Mr. Strong served as Mayor of Newcastle, Sirax from 4 January 2012 to 21 July 2022. I visited him at an assisted living facility in Newcastle where he has resided since 23 July 2022.

2. I have an undergraduate degree from University of Cambridge (1984) an MD from University of Oxford (1988), and a PhD in forensic psychiatry from University of Edinburgh (1992). I am an expert forensic psychiatrist currently based in the Republic of Ireland where I am a Clinical Professor of Forensic Psychiatry at the University of Dublin. I have expertise in the assessment, treatment, and rehabilitation of mentally disordered offenders and I have published over 100 articles on the subject of competency in prestigious journals across the world and have testified about defendants' competence in numerous trials before both national and international courts. Since 2018, my name has been included in the list of psychiatric experts approved by the ICC Registrar.

3. Mr. Lionel Strong is 73 years old. At 170 cm (5'7) and weighing 109 kg (240 lbs.), he is morbidly obese. For the past decade he has been on Statin medication for high cholesterol and Beta blockers for high blood pressure. On the morning of 21 July 2022, Mr. Strong was rushed to the Newcastle City hospital after suffering an apparent haemorrhagic stroke. He was treated there with diazepam to prevent recurrence, labetalol to reduce blood pressure, and mannitol to decrease intracranial pressure in the subarachnoid space, and then transferred on 23 July 2022 to the Stone Gardens assisted living facility to convalesce. His health has stabilized but the stroke resulted in severe short-term memory loss, which is likely to be permanent. While he retains his memories of events in his younger years, he has no memory of events that occurred during the past several years.

4. Using a battery of diagnostic tests, I evaluated Mr. Strong for two hours in his suite at the Stone Gardens facility on 21 August 2022. Although he was lucid and articulate, he had no memory of the events of June 2021. While there have been incidents where criminal defendants have faked

incompetency, it is my professional opinion that Mr. Strong is not feigning these manifestations of his illness.

5. Based on my evaluation, I have concluded that Mr. Strong suffers from stroke-induced amnesia and he is not fit to participate meaningfully in his trial. I consider it unlikely that Mr. Strong will regain fitness, regardless of treatment or intervention. While Mr. Strong has the ability to enter a plea, to understand the nature of the charges, and to understand the consequences of the proceedings, it is doubtful that he will be able to instruct defense counsel or to testify because of his inability to recall the events related to these proceedings. I believe there are no accommodations that could enable him to participate effectively in his trial because of the severity of his cognitive impairment.

[signed] **Meley Baleron, MD PhD**