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THE DEMOCRATIC REPUBLIC OF EAST TIMOR

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:

Judge Phillip Rapoza

CASE NO. 01A/2004

DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

v.

JOSEP NAHAK

Findings and Order on Defendant Nahak's Competence to Stand Trial

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For the Prosecutor:

Shyamala Alagendra

For the Defendant:

Alan Gutman

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I. Background

1. On 15 March 2002, Joseph Nahak was arrested as a suspect in an investigation concerning crimes against humanity committed in 1999. He was taken before the Investigating Judge of the Dili District Court where the Prosecutor requested that he be released "on the basis that at that time he was behaving in a very peculiar manner and to a lay person he appeared to be abnormal."[1]

2. On 19 February 2004, the Office of the General Prosecutor had Josep Nahak evaluated by Dr. Duncan Wallace, a psychiatrist, to obtain an expert evaluation concerning Nahak's competence to stand trial.[2] There was no court order in existence authorizing such evaluation, nor was Nahak provided access to counsel to help him decide whether or not to participate.

3. On 15 March 2004, the Deputy General Prosecutor for Serious Crimes filed an indictment charging the Defendant with one count of Crimes Against Humanity in the form of Murder, one count of Crimes Against Humanity in the form of Attempted Murder and one count of Crimes Against Humanity in the form of Persecution. Two other defendants, Sisto Barros aka Xisto Barros and Cesar Mendonca, were named in the same indictment

4. On 16 and 17 March 2004, the Court held a hearing on the Prosecutor's request for the pretrial detention of the three defendants, all of whom were represented by appointed counsel. On 17 March, the Court released the three defendants on substitute conditions pending trial.

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[1] Public Prosecutor v. Xisto Barros and others, Case No. 01/2004, Public Hearing Record (Morning, 16 March 2004) at p. 8.

[2] The Court treats the phrases "competence to stand trial" and "fitness to plead" as equivalent terms. Although these expressions reflect variations in terminology among the legal systems of different nations, they do not express different concepts. For all purposes pertinent to the present matter, the rationale underlying each is the same. See also Prosecutor v. Pavle Strugar, Case No. IT-01-42-T. "Decision re the Defense Motion to Terminate Proceedings," 26 May 2004. Par. 1. "Generally the Trial Chamber will use interchangeably the words 'fitness' or 'competence' to stand trial."

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5. On 14 May 2004, new counsel for the Defendant filed a motion requesting that Josep Nahak be subject to a competency evaluation and hearing.[3]

6. On 18 May 2004, the Court conducted a preliminary hearing in the case of Sisto Barros and Cesar Mendonca. Although the Defendant was also present, the Court did not conduct a preliminary hearing as to him in light of the motion previously filed by his attorney requesting a competency evaluation and hearing.

7. Also on 18 May 2004, counsel for both the Prosecutor and the Defendant agreed that the Court should order an independent evaluation of the Defendant and conduct a hearing regarding his competence to stand trial. The Court, in turn, ruled orally that in light of the information supplied, there was a "sufficient basis to have an independent evaluation of the Defendant with respect to his mental competence to stand trial."[4]

8. The Court, assisted by both the Prosecutor and counsel for the Defendant, made a continuing effort to obtain the assistance of an appropriate psychiatric professional to perform the evaluation. Obtaining such a professional was extremely difficult in light of the fact that no such expert permanently resides in East Timor.

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[3] The Defendant styled his motion as a "Sealed Request for Competency Evaluation and Competency Hearing" (emphasis in original). Whether or not a written request filed with the Registry shall be sealed is within the discretion of the Court and not the moving party. In the present case, the Court ruled on 18 May 2004 that the matter would not be sealed and any resulting competency hearing would be open to the public. The Court noted that under Section 28.1 of the Transitional Rules of Criminal Procedure (TRCP) (UNTAET Regulation 2000/30, as amended) all trial hearings shall be open to the public. Moreover, the Court observed that none of the exclusions provided in TRCP Sec. 28.2 apply in the present case. Accordingly, the Court concluded that any privacy interests of the Defendant were outweighed by the requirement that the processes of justice be open to the public.

[4] Public Prosecutor v. Xisto Barros and others, Case No. 01/2004, Public Hearing Record (Morning, 18 May) at p. 13.

9. On 20 September, the Court entered a written decision ordering that the charges against the Defendant be severed from the original indictment and that separate proceedings be conducted in the case against him.

10. As of 26 September 2004, the Court obtained the assistance of an Australian psychiatrist, Dr. Harry Freeman, for the purpose of conducting a competency evaluation of the Defendant.

11. On 27 September 2004, the Court issued an "Interim Order on Defendant's Motion for Competency Evaluation and Competency Hearing" in which it enunciated the legal standard by which the Defendant's competence was to be evaluated.

12. On or about 28 September 2004, Dr. Freeman conducted an evaluation of the Defendant. He later prepared an undated written report in October 2004 concerning the state of the Defendant's competence to stand trial. Dr. Freeman provided the Court an electronic copy of his report via email from Australia.

13. On 19 and 20 January 2005, the Court conducted a competency hearing with respect to the Defendant, who was present. Dr. Freeman testified at the hearing along with two other witnesses, including Antonio Ximenes, a case manager in Covalima for the East Timor Mental Health Programme and Florentino de Carvalho, a counselor for a Timorese mental health NGO named PRADET. Numerous documentary exhibits were admitted in evidence, including a copy of Dr. Freeman's report and a redacted copy of the 19 February 2004 competency evaluation of the Defendant by Dr. Duncan Wallace.[5]

[5] The parties agreed that Dr. Wallace's diagnosis and opinion concerning the Defendant would not be used on the issue of his competence to stand trial, although his observations of the Defendant could be employed for that purpose. This course of action was taken in light of the fact that at the time Dr. Wallace interviewed Nahak, the Defendant was not represented by counsel nor was the evaluation pursuant to an order of the Court.

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14. On 26 January 2005, counsel for the parties made their final arguments to the Court, the hearing was concluded and the matter was taken under advisement.

II. Applicable Law

15. Before addressing the issue of the Defendant's competence, it is first necessary to determine the applicable law pertinent to the matter at hand. This exercise is especially important in light of the fact that there are no constitutional or statutory provisions in East Timor that directly address the issue of competence to stand trial.

A. Sources of law in East Timor

16. The Special Panels for Serious Crimes were established within the Dili District Court in order to exercise that Court's exclusive jurisdiction over serious crimes occurring in 1999, including genocide, war crimes, crimes against humanity, murder, sexual offences and torture.[6] Moreover, the existence of mixed panels of national and international judges to hear serious crimes cases is recognized in Section 163.1 of the Constitution of East Timor.

17. The various sources of law in East Timor are described in Law No. 2/2002[7] and Law No. 10/2003.[8] None of those sources of law, including the Constitution of

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[6] See "II. Serious Criminal Offences," Sections 4 through 9 of UNTAET Regulation No. 2000/15. See also Section 9 ("Exclusive Jurisdiction for Serious Crimes") of UNTAET Regulation No. 2000/11 as amended; Section 1 ("Panels with Jurisdiction over Serious Criminal Offences") of UNTAET Regulation No. 2000/15.

[7] "Interpretation of Applicable Law on 19 May 2002." Pub. 7/8/2002.

[8] "Interpretation of Section 1 of Law No. 2/2002 of 7 August and Sources of Law." Pub. 10/12/2003.

East Timor and the laws emanating from both the National Parliament and the Government deal directly with the issue of competence to stand trial.[9]

18. Section 2.3(c) of Law No. 10/2003 also provides that the "regulations and other legal instruments from UNTAET, as long as these are not repealed" shall continue to serve as part of the applicable law. Nonetheless, existing UNTAET provisions, including the Transitional Rules of Criminal Procedure,[10] fail to address the issue of a defendant's competence to stand trial, although UNTAET Regulation No. 2000/15 does consider the issue of a person's criminal responsibility at the time of the offense.[11] Although both concepts deal with the mental state of the defendant, a person's lack of criminal responsibility when the offense was committed is a complete defense to a criminal charge, while a defendant's lack of competence to stand trial based on his condition at that time serves merely to bar his trial for so long as he is incompetent. Only the latter issue has been raised in the present case.

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[9] Similarly, statutory provisions now under consideration in East Timor do not provide significant guidance. Neither the Draft Penal Code nor the Draft Code of Criminal Procedure directly addresses the issue of a defendant's competence based on his condition at the time of trial. They do, on the other hand, deal with the issue of criminal responsibility at the time of the offense. Thus, under proposed Timorese law, a person is not criminally responsible if at the time of the offense, he was unable to appreciate the wrongfulness of his conduct or to control his actions due to a mental illness. ("É inimputável quem, por força de uma anomalia psíquica, for incapaz, no momento da prática do facto, de avaliar a ilicitude deste ou de se determinar de acordo com essa avaliação." Draft Penal Code, Article 22.1). Under proposed Article 265 of the Draft Code of Criminal Procedure, if a defendant is afflicted by advanced age, serious illness or lives abroad, he may consent to the trial proceeding in his absence if he is represented by counsel. The proposed section does not indicate, however, the procedures to follow in circumstances where the defendant, although physically present, is unable to understand what is transpiring in the courtroom at the time of his trial.

[10] UNTAET Regulation No. 2000/30 as amended by UNTAET Regulation No. 2001/25 (hereinafter "TRCP").

[11] Section 19 of UNTAET Regulation No. 2000/15 provides that a person shall not be considered criminally responsible if "at the time of the person's conduct" he does not have either the ability to appreciate the unlawfulness or nature of his conduct or the capacity to control his conduct to conform to the requirements of law. Colloquially known as the "insanity defense," this provision considers the defendant's mental state at the time of the offense and serves to fully exculpate the defendant for his conduct. This provision is consistent with Section 18.1 of the same regulation, which states that a person shall be criminally responsible "only if the material elements are committed with intent and knowledge." Consequently, a person who does not have the requisite mental state to commit a crime at the time of the offense is not criminally responsible for his actions.

19. Certain Indonesian legislation also continues to have the force of applicable law. This includes those legal provisions actually applied in East Timor prior to 25 October 1999, so long as they do not violate internationally recognized human rights standards.[12] Like the regulations of UNTAET, Indonesian criminal legislation does not directly deal with the issue of a defendant's competence to stand trial.[13]

B. International law

20. Although there is no applicable Timorese law dealing directly with a defendant's fitness for trial, international law does address the issue. This is significant because Section 9.1 of the Constitution of East Timor states that "[t]he legal system of East Timor shall adopt the general or customary principles of international law." Similarly, any "[r]ules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor" following their formal approval and publication. Section 9.2 of the Constitution. Accordingly, international law has official status in East Timor and is thus binding on this Court.

21. The constitutional provisions requiring the application of general or customary principles of international law are consistent with parallel UNTAET regulations that have not yet been repealed and which thus continue to serve as applicable law.[14] Section 3.1 (b) of UNTAET Regulation No. 2000/15 states in part that the Special Panel shall apply "where appropriate, applicable treaties and recognized principles and norms of international law." Similarly, TRCP Sec. 54.5 states that

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[12] See Section 3.1 of UNTAET Regulation No. 1/1999. See also Section 1 of Law No. 2/2002 and Sections 1 and 2.3(c) of Law No. 10/2003, supra at par. 16.

[13] The Indonesian Penal Code does, however, deal with the issue of criminal responsibility at the time of the alleged crime. Like the corresponding UNTAET provisions, Indonesian law considers "not punishable" and "not liable" those persons who at the time of the offense acted "by reason of the defective development or sickly disorder of his mental capacities." See Article 44.1 of the Indonesian Penal Code.

[14] Law No. 10/2003, supra at Section 2.3(c).

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"[o]n points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply."[15]

Rome Statute of the International Criminal Court

22. The Rome Statute of the International Criminal Court has been adopted in East Timor as provided in Section 9.2 of the Constitution.[16] Accordingly, its provisions constitute a source of internationally recognized principles and norms that may be applied in the present situation. To the extent that the Rules of Procedure and Evidence (RPE) of the International Criminal Court entered into force on 9 September 2002, consideration may also be given to them as representing an internationally accepted model for addressing issues of criminal procedure.[17]

23. The RPE make very clear that "[w]here the Trial Chamber is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned." Rule 135.4. In order to determine whether a defendant is able to stand trial, the court may order a medical, psychiatric or psychological examination of the accused.

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[15] The Court concludes that this provision applies in those circumstances in which neither the TRCP nor Indonesian law contain a specific rule dealing with a particular issue. TRCP Sec. 54.2 states that the transitional criminal rules "take precedence over Indonesian laws on criminal procedure; provided however that any point of criminal procedure which is not specified in the present regulation shall be governed by applicable law as provided in Section 3 of UNTAET Regulation [No.] 1999/1." The latter provision refers to UNTAET regulations, subsequent Timorese legislation and Indonesian law as applied in East Timor prior to 25 October 1999. See Law No. 2/2002 and Law No. 10/2003, supra. In the absence of any provision in any of the sources referred to in TRCP Sec. 54.2, TRCP Sec. 54.5 applies.

[16] The Rome Statute entered into force on 1 July 2002 and was adopted by the National Parliament of East Timor on 12 August 2002. Following approval by the President, the resolution adopting the Rome Statute was published on 11 June 2003, giving it official status as provided in Section 9.2 of the Constitution. Although Article 10 of the Rome Statute provides that the jurisdiction ratione temporis of the ICC "is only with respect to crimes committed after the entry into force of this Statute," both the Rome Statute and the corresponding Rules of Procedure and Evidence (RPE) nonetheless reflect "general or customary principles of international law" and thus can serve as a source of law in East Timor on the issue of how to address challenges to a defendant's competence to stand trial.

[17] This Court notes that the Rules of Procedure and Evidence (RPE) of the ICC "do not affect the procedural rules for any national court or legal system for the purpose of national proceedings." See "Explanatory Note" in the preliminary section of the RPE. Nonetheless, in the absence of such rules in East Timor, the Constitution provides that both general and customary principles of international law as well as rules provided for in international treaties adopted by East Timor "shall apply in the internal legal system of East Timor." Sections 9.1 and 9.2.

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Rule 135.1. Emphasizing that the lack fitness to stand trial is not an absolute defense but a mere bar to prosecution, the rule makes clear that a defendant deemed unfit to stand trial shall be subject to periodic review and possible reexamination. If, at a later point, the court "is satisfied that the accused has become fit to stand trial," then proceedings may resume. Rule 135.4.

24. Thus, the RPE indicate that when the issue of a defendant's competence to stand trial has been adequately raised, there should be an evaluation, hearing and judicial determination regarding his competence. Moreover, in those situations where the court concludes that the defendant is not competent to stand trial, the proceedings against him must be suspended. In the event that the defendant later becomes competent, his trial may then resume.

Jurisprudence of other international tribunals

25. International principles and norms applicable in East Timor can be discerned not only through the Rome Statute and the RPE, but also in the jurisprudence of other international courts and tribunals. Indeed, there is a sufficient body of international law on the issue of competence to stand trial to provide guidance in the case before this Court.

26. The issue of a defendant's mental competence to stand trial was raised at both the International Military Tribunal at Nuremburg and the International Military Tribunal for the Far East. At Nuremburg, the mental condition of three defendants, Gustav Krupp Bohlen und Halbach, Julius Streicher and Rudolf Hess was questioned. The tribunal ruled on the issue of competence in each case after having the defendant examined to determine whether he understood the nature of the charges against him and could contribute to his own defense. Similarly, the Charter of the International Military Tribunal for the Far East (IMTFE) required that the tribunal should "[d]etermine the mental and physical capacity of any accused to proceed to trial." Article 12(d). In the case of defendant Okawa

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Shumei, the IMTFE ruled that the case against him should be suspended as it was "not satisfied that the said accused has yet recovered the intellectual capacity and judgment to make him capable of standing trial and of conducting his defense, the said accused not having pleaded to the charges and having been unable during the proceedings to instruct his counsel effectively..."[18]

27. Although the statutes constituting both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do not directly address a defendant's competence for trial, trial chambers in both courts have ruled on the issue.[19]

28. As stated by the ICTY Trial Chamber in Prosecutor v. Pavle Strugar: "It is a common feature of legal systems of the world ... that an accused may be found unfit to stand trial. The precise formulation, scope and operation of the law in this regard inevitably varies between national jurisdictions, but the underlying principle appears to enjoy general acceptance."[20]

29. In Strugar, counsel for the defendant claimed that the accused, a retired General of the Yugoslav People's Army and "a man of intelligence and education" had been rendered unfit for trial based on a variety of disorders, including vascular dementia, post-traumatic stress disorder, depression, arthritis and kidney failure. These claims were not brought forward when the defendant initially pleaded to the indictment, but were raised five months after his trial had commenced. Based on the medical evidence and the panel's own observations of the defendant in the

[18] XLII Tokyo Major War Crimes Trial at 19637 – 19638 (R. John Pritchard ed., 1998).

[19] See Prosecutor v. Pavle Strugar, Case No. IT-01-42-T, "Decision re the Defense Motion to Terminate Proceedings." 26 May 2004. In that case the Trial Chamber stated that the defendant's motion to terminate the proceedings against him based on his lack of competence was "not grounded in any express provision of the constituting Statute, or the Rules of Procedure and Evidence, of this Tribunal. Further, no explicit legal basis for it is to be found in the existing jurisprudence of the [ICTY]. Yet both parties before the Trial Chamber have proceeded on the basis that if the Accused is found to be unfit for trial, the trial should be terminated." Strugar at par. 19.

[20] Id. at par. 19.

courtroom, the Court concluded that the defendant was fit to continue his trial, there being "no grounds for either discontinuing the proceedings . . . or adjourning them.[21]

30. In the case of Prosecutor v. Nahimana, Barayagwiza and Ngeze,[22] the ICTR granted, without elaboration, a motion requesting a medical, psychiatric and psychological examination of the defendant Ngeze to determine his competence to stand trial. The court did not pursue the issue further, apparently in light of the report's conclusion that the defendant was competent to stand trial.

31. Whether or not a defendant is sufficiently fit to proceed with his case was considered in a slightly different context in the matter of Prosecutor v. Slobodan Milosevic.[23] In Milosevic the defendant asserted the right to defend himself as provided in Article 21.4 of the ICTY Statute.[24] The Court noted that although there was "no evidence that the Accused is not fit to stand trial at all ... there is evidence that the health of the Accused is such that he may not be fit to continue to represent himself."[25] Noting its obligation to ensure that the trial was conducted in a fair and expeditious manner, the trial chamber ordered the examination of the defendant on the issue of his ability to continue representing himself in light of his chronic, severe hypertension. Where the doctors who examined him concluded that Milosevic was not fit to continue defending himself, the Trial Chamber appointed counsel to represent him. Nonetheless, the Appeals Chamber ruled that when the defendant was physically capable of doing so, he

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[21] Id. at par. 52.

[22] Case No. ICTR-99-52-T, "Trial Judgment," 3 December 2003. Par. 52.

[23] Case No. IT-02-54-T.

[24] Article 21 of the ICTY statute describes a number of rights of the accused and tracks the provisions of Article 14 of the ICCPR. See Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel." 1 November 2004. Par. 11.

[25] See "Order on Future Conduct of the Trial." Dated 6 July 2004.

should be allowed to take the lead in his own defense.[26] Recognizing the importance of a defendant's rights at trial, including his right to represent himself, the Appeals Chamber stated its expectation that the trial court would intervene "to the extent required by the interests of justice."[27]

Rationale behind the competency requirement.

32. There is an inextricable link between a defendant's right to a fair trial and the requirement that he be competent to understand and exercise his rights at that stage of the proceedings against him. This is the view taken not only by other international courts and tribunals, but also by this Court in its previous rulings on the matter.

33. In its "Interim Order," this Court started with the premise that every defendant before the Special Panels for Serious Crimes has certain basic rights that must be respected. These include the right to "a fair and public hearing." TRCP Sec. 2.1. This right is of constitutional dimension and is recognized in East Timor's Constitution. Thus, "[e]very individual is guaranteed the inviolable right of hearing and defense in criminal proceedings." Section 34.3 ("Guarantees in criminal proceedings") of the Constitution.

34. Moreover, the right to a fair trial is linked by the Constitution to the right of representation by counsel. "An accused person has the right to select, and be assisted by, a lawyer at all stages of the proceedings..." Section 34.2 ("Guarantees in criminal proceedings") of the Constitution.

35. The applicable law in East Timor also requires that a defendant must be informed "at every stage of the proceedings" that he has certain additional rights, such as:

[26] Milosevic, supra at par. 19.

[27] Id.

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a. "[T]he right to be assisted by and to communicate freely and without supervision with a legal representative of his or her own choosing..." TRCP Sec. 6.3(a).

b. "[T]he right to be informed in detail, and in a language which he or she understands, of the nature and cause of the charges against him or her;" TRCP Sec. 6.3(b).

c. "[T]he right to have the free assistance of an interpreter if he or she cannot understand or speak one of the official languages of the court;" TRCP Sec. 6.3(c).

d. "[T]he right to have adequate time and facilities for the preparation of his or her defense;" TRCP Sec. 6.3(d).

e. "[T]he right to examine...the witnesses against him;" TRCP Sec. 6.3(g).

f. "[T]he right...to obtain the attendance and examination of witnesses on his...behalf;" TRCP Sec. 6.3(g).

g. "[T]he right not to be compelled to testify against himself...or to admit guilt." TRCP Sec. 6.3(h).

36. Similarly, the International Covenant on Civil and Political Rights (ICCPR), which has the force of law in East Timor, also protects those who have been charged with a crime.[28] The ICCPR recognizes as "minimum guarantees, in full equality," a panoply of rights set out in the margin.[29]

[28] National Parliament Resolution No. 3/2003 ratifying the International Covenant on Civil and Political Rights. Approved 23 May 2003. Published 10 August 2003.

[29] Article 14 3 In the determination of any criminal charge against him, everyone shall be entitled to the following minimal guarantees, in full equality:

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37. Finally, the Rome Statute also provides for the right to a fair trial with the defendant being able to avail himself of an equally exhaustive list of guarantees. As with the rights delineated in the ICTY Statute, those contained in the Rome Statute are in large part drawn from the ICCPR.

38. As this Court has noted in its "Interim Order," "[i]n order to ensure that these important rights are respected and that an accused receives their benefit, each defendant must be competent to stand trial..." Thus, a defendant must be substantially able to understand and to exercise at trial the rights to which he is entitled under the law. Without such a capacity on the part of a defendant, the rights themselves become meaningless.

39. The same view was adopted by the Trial Chamber of the ICTY in Prosecutor v. Pavle Strugar in which the court noted that "it is significant that before the Tribunal an accused has a number of relevant procedural rights...The enjoyment of these rights would appear to presuppose that an accused has a level of mental and physical capacity."[30] The Court went on to state that "the appropriate

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(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

[30] Strugar at par. 21.

approach to be adopted in determining fitness to stand trial is to evaluate the capacity of the accused to exercise his express and implied rights."[31]

40. The Trial Chamber in Strugar also set out the various rights that "presuppose" that the defendant has a sufficient level of mental and physical capacity to exercise them. Many of them are identical to rights applicable in East Timor, including the defendant's right to understand the indictment, to defend himself in person or to be represented by counsel, to examine the witnesses against him, and to have the assistance of an interpreter.[32]

41. The Trial Chamber, in turn, inferred from those rights that an accused must have the capacity to:

- "understand the purpose, including the consequences, of the proceedings,
- understand the course of the proceedings, including the nature and the significance of pleading to the charges,
- understand the evidence, and
- testify (should the accused so choose)."[33]

As the Court stated, "[t]he nature of these rights indicates that their effective exercise may be hindered, or even precluded if an accused's mental and bodily capacities, especially the ability to understand, i.e. to comprehend, is affected by mental or somatic disorder."[34]

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[31] Id. at par. 36.

[32] Id. at par. 21.

[33] Id. at par. 22.

[34] Id. at par. 23.

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42. The Trial Chamber in Strugar also considered decisional law from those countries whose jurisprudence reflects prevailing international norms and principles on the issue of competence to stand trial. This Court does the same.

43. It has been generally recognized as fundamental to the concept of a fair trial that a defendant must understand the nature of the charges and proceedings against him. In order to measure the level of a defendant's understanding in that respect, the court should "evaluate the capacity of the accused to exercise his express and implied rights" at trial.[35] As noted by the Court in Strugar, this is in keeping with the "widely prevailing position in national jurisdictions."[36]

44. Typifying this perspective, the Supreme Court of the United States has ruled that for a defendant to be put on trial, he must have an adequate understanding of the charges and proceedings against him, as well as an ability to consult with his lawyer and assist in his own defense. Dusky v. United States.[37] In England, a defendant must have a sufficient mental capacity to present a defense. Dashwood v. Reg.[38] Similarly, in R v. Presser[39] it was held that certain minimum standards must be met to ensure that the defendant is fit to stand trial, including the ability to understand the charges and the nature of the proceedings, to be able to plead, to cooperate with his attorney and to assist in his own defense.[40]

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[35] Id. at par. 36.

[36] Id.

[37] 362 U.S. 402 (1960).

[38] (1943) KB 4.

[39] (1958) VR 45 (Australia).

[40] By the citation of these authorities, neither the Trial Chamber in Strugar nor this Court can be said to have adopted the approach of common law systems as such. Rather, reference is made to the jurisprudence of other countries as an expression of general and customary international law, which is binding upon the courts of East Timor. See Sections 9.1 and 9.2 of the Constitution. See also Section 3.1(b) of UNTAET Regulation No. 2000/15 and TRCP Sec. 54.5. Indeed, the same international principles and norms are represented in the legal provisions of civil law countries as well. See e.g. Article 152 of the Brazilian Code of Criminal Procedure, which provides that when a defendant suffers from a mental illness arising after the offense with which he is charged, the criminal proceedings against him will remain suspended until the accused recovers. ("Se se verificar que a doença mental sobreveio à infração, o processo continuará

45. What is critical to the analysis in each of these cases is whether there is any impediment (a) preventing the defendant from having a sufficient understanding of both the charges against him and the nature of the proceedings or (b) substantially impairing his ability to cooperate with his attorney and to assist in his own defense. See, infra, IV. Definition of "Competence to Stand Trial."

46. Another basis for ensuring that an accused is competent to stand trial is the general rule that a defendant should not be tried *in absentia*. See TRCP Sec. 5.1. The foundation for this rule is the internationally recognized principle that not only should a defendant be informed of the charges and aware of the proceedings against him, but also he should be able to confront his accusers and participate in his own defense. Necessarily the rule against trials *in absentia* is undermined if a defendant is present at trial physically but not mentally, or at least not with a mental state sufficient to understand and participate in the proceedings. As stated by the Trial Chamber in Strugar, "[t]his rule would appear to be devoid of any substance if it related to the mere physical presence of the accused in court."[41] Thus, the requirement that a defendant must be mentally competent to stand trial can be viewed as a "by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."[42]

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suspenso até que o acusado se restabeleça...") To the extent that international criminal law norms are sometimes expressed by reference to the jurisprudence of nations within the common law orbit, this reflects the increased use of "international due process" in tribunals such as the ICTY, ICTR and the ICC. See, Bassiouni, Foreword at xv to Richard May, International Criminal Evidence (Transnational Publishers, Inc. 2002). Nonetheless, in matters of international criminal procedure, the process of identifying prevailing norms is not a matter of "uphold[ing] the philosophy behind one of the two national criminal systems to the exclusion of the other...Rather, they combine and fuse, in a fairly felicitous manner, the adversarial and accusatorial system (chiefly adopted in common-law systems) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of the civil-law tradition). This combination or amalgamation is unique and besets and begets a legal logic that is qualitatively different from that of each of the two national criminal systems..." Prosecutor v. Drazen Erdemovic, Case No. IT-96-22, "Separate and Dissenting Opinion of Judge Cassese" (7 October 1997) at par. 4.

[41] Strugar, supra at par. 32.

[42] Drope v. Missouri, 420 U.S. 162, 171 (1975).

47. This perspective is consistent with the position taken by the Special Panels for Serious Crimes in the case of Prosecutor v. Tacaqui.[43] In that case the defendant had ceased speaking upon receipt of an indictment charging him with crimes against humanity. Thereafter he never spoke again, either in prison where he was held or in court during his trial. Although his behavior was otherwise appropriate and unremarkable, the defendant's persistent and unnatural silence led the Court to ask "[I]s he fit for trial or not? Can he understand what is happening around him...[Is he] present in flesh and blood, but absent in mind?"[44] The panel concluded, based on its observations of the defendant and the testimony of two expert witnesses, that the defendant was an elective mute, voluntarily choosing to remain silent for reasons that he declined to express. Accordingly, the defendant was "present" not only "in flesh and blood" but also "in mind" and the Court concluded that the defendant was fit for trial.[45]

48. Finally, there is another rationale supporting the need to ensure that a defendant is competent to stand trial. This consideration goes to the integrity of the trial itself and the purposes that such a proceeding serves. A trial is not only the defendant's day in court; it is also the occasion upon which society applies its laws to one of its members. In that context, not only is the defendant entitled to a fair trial, but so too is society, which must be assured that the process it uses to try an accused comports with standards of fairness and accuracy. In circumstances where a defendant cannot comprehend the nature of the proceedings against him, cannot rationally consult with his attorney or cannot assist in the preparation of his defense, the results of the trial are unlikely to be either fair or accurate. Society has an interest in ensuring that the conviction of a defendant is not the result of his helplessness at trial. Moreover, in the event a defendant in those circumstances

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[43] Special Panels for Serious Crimes, Case No. 20/2001, "Judgment." 12 December 2004.

[44] Id. at p. 8.

[45] Id. at p. 10.

were to be convicted, his inability to understand the proceedings would undermine any sentence that might be imposed, as underlying sentencing policies such as rehabilitation or retribution would not likely achieve their purpose in his case. Consequently, there is a social value associated with ensuring a defendant's competence to stand trial that goes beyond the personal interests of the defendant himself.

III. Decision to Conduct a Competency Hearing

49. As previously noted, on 18 May 2004, this Court orally ruled that there existed a "sufficient basis to have an independent evaluation of the defendant with respect to his mental competence to stand trial." Moreover, the Court ruled that a competency hearing should be conducted concerning the defendant's fitness to stand trial. Although the Court did not cite the basis for its determination, for such a proceeding to be ordered there must be some degree of doubt as to the defendant's competence to stand trial.

50. A hearing need not be held in every case involving claims of abnormal behavior or some form of mental disorder. Rather, the level of concern on the part of the Court relative to the defendant's competence must be significant. See Prosecutor v. Strugar, supra, at par. 25 stating that there must be "adequate reason" to question a defendant's fitness to stand trial; Pate v. Robinson, 383 U.S. 375, 385 (1966) citing "bona fide doubt" about the defendant's competence; Commonwealth v. Hill, 375 Mass. 50, 54 (1978) describing the test as whether there exists "a substantial question of possible doubt about the defendant's competence to stand trial."

51. In the present case, both the Prosecutor and counsel for Josep Nahak agreed that an independent evaluation of the accused should be conducted. They brought to the attention of this Court the contents of the psychiatric report prepared by Dr.

Duncan Wallace. In his report Dr. Wallace stated that the Defendant heard voices, spoke excitedly and claimed to have been grabbed by an invisible person named "Agus." When asked some basic questions about how courts function, Nahak stated that judges and lawyers "sit in a tribunal whilst people bring them food." Finally, Dr. Wallace concluded that the Defendant "is currently suffering from Chronic Schizophrenia of moderate severity. This is a serious mental disorder, which in his case is manifested by experiencing auditory hallucinations, whilst displaying fatuous affect and formal thought disorder."[46]

52. Considering the record before the Court at that time, there was a sufficient evidentiary basis to support a significant concern about the competence of Joseph Nahak to stand trial. Accordingly, it was appropriate to order both a competency evaluation and hearing in the Defendant's case.

IV. Definition of "Competence to Stand Trial"

53. As noted above, this Court entered an "Interim Order on Defendant's Motion for Competency Evaluation and Competency Hearing" in which it defined the meaning of the term "competence to stand trial" for the purpose of these proceedings.

54. As stated in the "Interim Order," a defendant is competent to stand trial if he has:

(1) A rational as well as a factual understanding of the charges against him;

(2) A rational as well as a factual understanding of the nature and object of the proceedings against him, and

[46] For the reasons previously stated (see, supra at n. 3), the parties agreed that Dr. Wallace's diagnosis and opinion concerning the Defendant would not be used in the final determination of his competence to stand trial. Nonetheless, the psychiatrist's diagnosis and opinion were referenced by the parties and considered by this Court in determining whether to conduct a second evaluation and a hearing. Accordingly, they are referred to here for that purpose only.

(3) A present ability to consult with his lawyer and to assist in the preparation of his defense with a reasonable degree of rational understanding.

55. As also noted in the previous "Interim Order," the Defendant in the present case must have both a rational and a factual understanding of the specific charges against him, the process of a trial, the roles of the participants and the consequences of a conviction. This also means that he must have both a rational and a factual understanding of the role of his lawyer in defending him. Additionally, he must have a present ability to consult with his lawyer and to assist in his own defense.

56. This approach has been adopted in other jurisdictions that employ the competence standards adopted here. Thus, in Strugar, the Trial Chamber concluded that it is necessary "to evaluate the capacity of the accused to exercise his express and implied rights...These capacities identified may be stated shortly as: to plead, to understand the nature of the charges, to understand the course of the proceedings, to understand the details of the evidence, to instruct counsel, to understand the consequences of the proceedings and to testify."[47] See also Dusky v. United States, 362 U.S. 402 (1960) stating "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as a factual understanding of the proceedings against him"; Drope v. Missouri, 420 U.S. 162 (1975) commenting "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial"; R v. Presser, (1958) VR 45 at 48, stating that a defendant must be able "to understand what he is charged with...to understand generally the nature of the proceeding....to understand what is going

[47] Supra at par. 36.

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on in court in a general sense...to understand...the substantial effect of any evidence against" and "to make his defence...through his counsel." (Smith, J.)

V. Standard of Proof

57. In addition to defining the term "competence to stand trial, " the Court must also set out the standard of proof to be used when evaluating the evidence and determining whether or not the Defendant's competence has been demonstrated.

58. In deciding what standard of proof to employ, it must be remembered that competence to stand trial is not an element of the offense with which the Defendant is charged. This is significant because every element of an offense must be proved beyond a reasonable doubt, in large part out of the desire to avoid an erroneous finding of guilt. Although a defendant should be competent at the time of trial, a mistaken determination regarding his fitness will not necessarily produce an erroneous finding of guilt, as would an incorrect finding with respect to an element of the offense. Moreover, the issue of a defendant's competence may be revisited at any time during trial, especially in light of new evidence suggesting that the defendant was not originally competent or subsequently ceased to be so.

59. Accordingly, it is not required that a defendant's competence be proved by "a higher standard as is required of the prosecutor when proving guilt in criminal cases."[48] As stated in Strugar, the test should be whether the defendant's competence has been established by "the balance of the probabilities," which is a lower evidentiary threshold than proof beyond a reasonable doubt.[49] Essentially, this standard requires proof that it is more probable than not that the matter in issue, here the defendant's competence, has been demonstrated. This standard, or

[48] Id. at par. 38.

[49] Id.

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others similar to it, have been employed in jurisdictions adhering to the competence criteria adopted by this Court.

60. There is a customary international norm on this point reflected in the jurisprudence of those states that have directly addressed the issue. Thus, the United States Supreme Court has held that the standard to determine competency to stand trial is not "proof beyond a reasonable doubt" or even "clear and convincing evidence." Rather, the standard of proof need only be by a "preponderance of the evidence." Cooper v. Oklahoma, 517 U.S. 348 (1996). See also, United States Federal Code, Title 18, Part III, Chapter 313 Sec. 4241(d) (defendant's competence determined by a preponderance of the evidence). In England, whether or not a defendant is under such a disability of mind as to be not fit for trial shall be determined on the basis of whether it is "more likely than not" that he is not competent by reason of a mental disorder. See Criminal Procedure Act (Insanity and Unfitness to Plead) 1991 (Chapter 25). See also the questions put to the jury as to fitness in the case of R. vs Young (13 June 2000). Finally, the Criminal Code of Canada provides that the court must be satisfied "on the balance of probabilities that the accused is unfit to stand trial." Section 672.22.

VI. Burden of Proof

61. Even with the enunciation of a standard of proof, the issue remains whether it is the Defendant's competence or his incompetence that must be proved by "the balance of the probabilities." Put another way, the question is whether the Prosecutor must prove that it is more probable than not that the Defendant is competent to stand trial or whether it is the Defendant who must demonstrate by the same measure of proof that he is not competent to stand trial.

62. As a matter of general and customary international law, "[t]he persuasive burden of proof remains with the prosecution throughout the international criminal

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trial."[50] This principle derives from the presumption of innocence, which is contained in the Statutes of both the ICTY and the ICTR as well as the Rome Statute of the ICC.[51] Accordingly, "[t]he onus thus remains with the prosecution to disprove any defense put forward by the excused. The sole exception in the tribunal jurisprudence is in the case of a defense of insanity in which the accused bears the onus of proving on the balance of the probabilities."[52]

63. The Court in Strugar stated, "In the view of the Trial Chamber the burden of proving that the Accused is not fit to stand trial should be on the Defence."[53] It is worthy of note that the Court did not claim that its "view" was a reflection of

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[50] May, International Criminal Evidence, supra at p. 121.

[51] See, ICTY Statute Article 21(3), ICTR Statute Article 20(3) and ICC Statute Art. 66(1). As with the referenced statutes, the Transitional Rules of Criminal Procedure recognize the presumption of innocence, but they do not address the issue of the burden of proof on the issue of guilt. See, TRCP Sec. 6.1 "All persons accused of a crime shall be presumed innocent until proven guilty in accordance with law..." Consistent with the prevailing international jurisprudence, the Special Panels ruled that the burden of proof on the issue of guilt is on the prosecutor. Thus, in the case of Prosecutor v. Joni Marques and Nine Others, Case No. 9/2000 (Decided 11 December 2001) the Court noted that the Transitional Rules provided "no guidance" as to the burden of proof on the issue of guilt. Nonetheless, the Court concluded that the issue was to be resolved "in such a way as will best favor a fair determination of the case and which is consistent with the spirit of the practices of international tribunals and the general principles of law." Joni Marques Decision at paragraph 670, page 349. The Court went on to observe that in light of the presumption of innocence favoring the defendant, "the Prosecution bears the onus of establishing the guilt of the accused, and the Prosecution must do so beyond reasonable doubt." Id. See also, Article 66 of the Indonesian Code of Criminal Procedure, which states, "A suspect or defendant shall not be burdened with the duty of providing evidence." The "Elucidation on the Law of the Republic of Indonesia No. 8/1981 on The Code of Criminal Procedure" states in the commentary on Article 66, "This provision is a manifestation of the principle of presumption of innocence."

[52] May, supra at p. 121. In large part, allocating to the defendant the burden to prove insanity is derived from the principle that "In every criminal act there is a presumption of sanity of the person alleged to have committed the offense. Thus, every person charged with an offense is presumed to be of sound mind and to have been of sound mind at any relevant time until the contrary is proven." Prosecutor v. Delalic et al., Case No. IT-96-21, Trial Chamber Judgment, 16 November 1998, at par. 1157. It is unclear whether this presumption, upon which the very social order relies – that people are generally of sound mind and capable of reason – is equally persuasive on the issue of competence to stand trial. In that matter the issue presented is not whether a person is generally of sound mind and capable of rational thought, but rather whether he specifically understands the charges against him, the nature of criminal proceedings and has a present ability to consult with his lawyer and assist in the preparation of his defense. A persuasive case can be made that any presumption of competence in such matters is overcome when, as in the present case, there is a sufficient evidentiary basis to support a "significant concern" about the fitness of a defendant to stand trial. See, supra at par. 52. In the presence of such a "significant concern," the burden of proving competence could rightly be shifted to the Prosecutor.

[53] Strugar, supra at par. 38.

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general or international criminal law on the matter. Indeed, in its citation of authority for its "view" of where the burden of proof "should" lie, the Trial Chamber did not cite international doctrine or jurisprudence on the issue of allocation of the burden of proof in cases concerning competence to stand trial. Rather, the authorities it cited related to the issue of diminished or lack of criminal responsibility in which international law clearly puts the burden on the defendant. Perhaps recognizing that criminal responsibility and competence to stand trial were comparable but not identical issues, the Court noted that its citation of authority was *"mutatis mutandis."* [54]

64. By the end of its decision, the Trial Chamber had distanced itself from its initial indication that the defendant has the burden to prove he was not fit to stand trial. In its conclusion, the Court stated that it "finds the Accused is fit to stand trial." It then immediately added: "It should be noted that this finding does not depend on the onus of proof."[55] (All emphasis supplied).

65. By implication, it appears that the Trial Chamber considered all the evidence before it and decided that it was more probable than not that the defendant was competent to stand trial. Consistent with its original allocation of the burden of proof to the defendant, the Court would have been expected to rule simply that the accused had failed to prove his own unfitness and, therefore, the trial would go forward. Rather, in the final instance the Court affirmatively found that the defendant was fit to stand trial, without "depend[ing] on the onus of proof" it had originally required. Essentially, the Court in Strugar concluded that the prosecutor had satisfied a burden of proof that the Court had not actually imposed.

66. If the reasoning of the Trial Chamber in Strugar appears somewhat opaque, it is likely due to the fact that it appears to be the only reported case at the

[54] "With respective differences taken into account."

[55] Id. at par. 52.

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international level in which the issue of burden of proof on the question of fitness for trial has been raised. In light of that fact, it can hardly be said that the view adopted by Strugar on the question of the burden of proof reflects general and customary international practice that is binding in East Timor. Indeed, even in national jurisdictions that assign a burden of proof on the issue of competence to stand trial such as England and the United States, "there remains no settled view of where the burden of proof should lie." Medina v. California, 505 U.S. 437, 447 (1992).

67. This Court shall decide the present matter as did Strugar, by evaluating the evidence without depending on any "onus of proof" that might otherwise be imposed on the Defendant.[56] In so doing, the question the Court must address is whether the evidence demonstrates that it is more probable than not that the defendant is fit to stand trial.[57]

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[56] This Court notes that the applicable law in East Timor does not appear to impose any burden on a defendant who claims the defense of lack of criminal responsibility by reason of a mental disease or defect under TRCP Sec. 19.1(a). The sole guidance provided under the Transitional Rules is the statement that "[t]he panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it." TRCP Sec. 19.2.

[57] Such an assessment of the evidence, as was performed in Strugar, nonetheless operates as the functional equivalent of placing the burden on the Prosecutor to prove the defendant's fitness for trial. If so, assigning that burden to the Prosecutor is especially fitting in the present case where it has already been determined that there is sufficient doubt about the Defendant's competence to warrant an evaluation and hearing. Accordingly, even if there exists a "presumption of competence to stand trial" that is akin to the "presumption of sanity," see Delalic, supra at n. 52, at this stage and in these circumstances it is appropriate to shift any resulting burden of proof from the Defendant to the Prosecutor. Nor should the allocation of the burden be resolved against the Defendant merely because he filed a motion requesting an evaluation and hearing. In so doing he was not the party who first raised the issue of competence, as even prior to the Defendant's indictment the Prosecutor had concerns about the Defendant's mental condition to the point that it had him evaluated. Moreover, it was the Prosecutor who had advised the Investigating Judge at the time of the Defendant's arrest that he was "not normal." In a case where both the Prosecutor and the Defendant have addressed the issue of the Defendant's fitness for trial, there is no reason to impose the burden of proof on the Defendant merely because his lawyer formally filed a motion on the point.

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VII. Findings of Fact

A. Facts

After hearing, this Court makes the following findings of fact based on the record evidence that it deems credible:

68. Prior to 1999, Josep Nahak did not display any mental or behavioral abnormalities.

69. During 1999, Nahak was a member of the pro-autonomy militia that opposed independence for East Timor. As did many alleged members of the militia, Nahak traveled to West Timor following the Popular Consultation in August 1999, in which a large majority of the voters opposed the autonomy option. At a point he returned to his village in East Timor, where he was severely beaten by people from the area in which he lived.

70. At some point during 1999, Nahak's condition changed and people in his community, a remote rural region of East Timor, began to describe him as "bulak," a term loosely defined as "crazy" or "insane." It has not been established whether any change in his condition resulted from injuries sustained in beatings that he received.

71. In 2002, Nahak was arrested as a suspect in an investigation concerning crimes against humanity committed in 1999. He was taken before the Investigating Judge of the Dili District Court where the Prosecutor requested that he be released "on the basis that at that time he was behaving in a very peculiar manner and to a lay person he appeared to be abnormal."[58]

[58] Public Prosecutor v. Xisto Barros and others, Case No. 01/2004, Public Hearing Record (Morning, 16 March 2004) at p. 8.

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72. On 19 February 2004, Nahak was interviewed at the request of the Prosecutor by Dr. Duncan Wallace, an Australian psychiatrist. The interview was conducted with the assistance of a Tetum translator.

73. During the interview, Nahak told Dr. Wallace that while in his garden he hears "voices" of people who are not physically present. He stated that he conducts conversations with them in English and Portuguese.

74. When asked to expound on this phenomenon, Nahak proceeded to speak excitedly about how an invisible person named "Agus" had grabbed him by the neck. According to Dr. Wallace, efforts to get him to explain further about the voices "were met with inappropriate indifference and a remarkable lack of curiosity on the matter."

75. From the questions related in Dr. Wallace's report, it can be inferred that there were allegations that when Nahak was originally arrested and brought to Dili he urinated in both a bus and a courtroom and ate a disinfectant block from a urinal.

76. When Dr. Wallace raised the issue of courts and their functions, Nahak "became serious and concerned. He said he understood what a judge and a lawyer did, saying that they sit in a tribunal whilst people bring them food! [emphasis in original] He could not or would not offer an answer about what was the role of a lawyer in court, but accepted a brief description without comment."[59] When asked to explain the difference between pleading guilty or not guilty at trial, the Defendant did not respond to the question put to him, but merely stated that he was "not guilty."

77. According to Dr. Wallace, Nahak displayed "formal thought disorder...going off on tangents from the questions he was asked," although he "did not appear to be

[59] Dr. Duncan Wallace, "Psychiatric Report on Josep Nahak date of birth 1964," 19 February 2004 at p. 2.

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responding to any auditory or visual hallucinations." He appeared conscious and alert at all times.

78. Dr. Wallace also interviewed Carlos Tilman, village chief, who stated that Nahak "was currently not normal. He said that he was definitely normal before 1999, but that he was 'crazy' when he returned from West Timor in 2000 and that he seemed to have gotten worse subsequent to the several beatings he sustained. He was emphatic that he was not crazy when he was in the militia and that people were very frightened of him then.... He said that people in the village were not currently afraid of him."

79. On 16 and 17 March 2004, the Defendant Nahak came before this Court for a hearing on the Prosecutor's request for an order of pre-trial detention against both him and the two co-defendants in his case. At the hearing he identified himself as Jose Mendonca, using what, according to Dr. Wallace's report, appears to be the last name of his godfather. (This Court notes that the use of a godparent's last name is not uncommon in some societies). He also later denied having a passport.

80. More significantly, the Defendant stated he was 59 years old, although at the time he was approximately 40 years old. Moreover, he stated that his one child is a girl although his family reports that his offspring is a boy.

81. When the Defendant addressed the Court he spoke in an inappropriately loud voice, causing people in the audience to laugh. Moreover, through the course of the proceedings on both days, he repeatedly left the courtroom, ostensibly to go to the bathroom. On at least one occasion, this Court saw the Defendant through a window simultaneously pressing both sides of his face with the open palm of each hand, as if to compress his head between them. Through much of the hearing the Defendant appeared completely detached from the events around him, although his two co-defendants were intent on what was occurring in the courtroom. Even

making allowance for Nahak's visual deformity (see infra at par. 86), it was evident that he spent much of the time looking out the window.

82. On 26 September 2004 this Court appointed Dr. Harry Freeman, an Australian psychiatrist, to conduct a competency evaluation of the Defendant. Dr. Freeman has a Bachelor Degree in Medicine. He later trained as a pychiatrist and is a member of the Royal Australian and New Zealand College of Psychiatrists. Although he has no formal training in forensic psychiatry, he has conducted up to 30 examinations on the issue of competence to stand trial. He has testified as an expert witness in the field of psychiatry on approximately 20 occasions, of which four related to a defendant's fitness for trial. He has also served as a psychiatrist in East Timor on occasion and has provided services to the local population.

83. Pursuant to the Court's order, on or about 28 September 2004, Dr. Freeman interviewed the Defendant at the hospital in Suai with the assistance of several other individuals, including Tetum interpreters. The interview was in large part a joint effort in which certain team members would interview Nahak and then report to the group what had transpired along with their impressons. Moreover, the participants, including Nahak, ate lunch together. Dr. Freeman's report and subsequent testimony were based on both his own observations and those of other team members.

84. Also participating in the interview of Nahak was Antonio Ximenes, a case manager for the Suai Mental Health office in Covalima.

85. At the request of Attorney Alan Gutman, on 13 December 2004, Florentino de Carvalho also went to Suai to interview Nahak. De Carvalho was a counselor with a Timorese mental health NGO known by the acronym "PRADET."

86. Nahak has some physical limitations, including a serious left-eye squint, which is significantly disfiguring. He also has "soft" neurological signs causing a loose

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gait and some muscle wasting. He has limited schooling, does not read and can barely write.

87. It was reported by Dr. Freeman that prior to 1999 he was "arrogant and unrestrained" but that his demeanor subsequently changed.

88. During the interview with Dr. Freeman, Nahak was evasive and sometimes irrelevant on matters of detail. His version of events continuously changed as he described what had occurred in 1999. He was often unintentionally amusing to those around him and he tended to engage in short, intense outbursts of over talkativeness.

89. Nahak stated he was not guilty of murder because the person he had cut with his sword was already dead at the time. At another point Nahak stated that he was not guilty because he was a follower and not a leader and, in any event, he felt that the community had already punished him with beatings. Nonetheless, he stated that he would cooperate concerning the charges against him.

90. At lunch Nahak "bolted down" two large plates of food and drank an excessive amount of water, both of which Dr. Freeman noted as highly unusual. Dr. Freeman discussed other habits with Nahak, including the fact that he drank his own urine. Nahak explained this as a practice he followed to ensure good health. (Although there are cultures that engage in this practice, there was no evidence presented that Timorese society is among them. Indeed, Nahak's uncle stated that no one in the area where Nahak lives drinks urine.)

91. There was discussion throughout the session about the beatings that Nahak had received after 1999. Some of those participating in the group discussion with Nahak stated that although they felt he was "always strange," he was a little worse mentally since the beatings. Nahak's uncle, who was present, stated that his nephew was "bulak." See, supra at par. 70.

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92. When one of Dr. Freeman's Timorese assistants asked Nahak if he was "bulak" he said "I don't know" and then he denied being "bulak." Antonio Ximenes testified that no final answer was ever provided by Nahak because he was "mixing" his words and continuously changing them. Ximenes, who speaks Tetum, said he could not understand Nahak because "I asked one question and he answered something else." At a point Ximenes terminated the conversation because he could not follow Nahak's comments.

93. Nahak spoke openly about involvement with spirits (or "ghosts") with whom he communicates. Dr. Freeman drew no conclusions about Nahak's mental state from this admission, stating that communication with spirits is a normal part of the mental life of the Timorese.

94. Nonetheless, Ximenes later explained in greater detail that while "normal" people communicate with spirits in some circumstances, there are "bulak" people who speak to spirits in a different way. He explained the difference as follows: in Timorese society it is common for the spirit of a person who has recently died to enter the body of a family member. The spirit then speaks through that person, explaining the circumstances of his death and the consequences to the family. These visitations by spirits of the recently dead are considered routine and last for approximately ten to fifteen minutes.

95. Ximenes contrasted this traditional communication with the dead with the spirit communications of people who are considered "bulak." In those cases, the person who is "bulak" often does not sleep and speaks continuously day and night, often laughing and crying in alternation for no apparent reason. Often such people are incoherent and hard to understand. As implied by Ximenes, the significance of the distinction is that Nahak's communications with spirits are of the latter, "bulak" variety.

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96. Ximenes explained that he was once called to witness a person who was apparently "bulak" but who was in fact merely a "normal" person through whom the spirit of a deceased family member was speaking. After approximately 15 minutes the individual recovered his senses and was "talking like a normal person."

97. Florentino de Carvalho also described his observations concerning the Defendant. He visited Nahak's farm and stated that it was poorly tended. The hut in which Nahak apparently lived was only covered by two or three palm leaves and there was an empty saucepan on the dirt floor.

98. When Carvalho encountered Nahak the defendant spoke quickly and didn't give Carvalho an opportunity to speak. Nahak acted in an erratic manner, sometimes ignoring Carvalho, abruptly standing up and walking about, and speaking in a confusing way. At a point Nahak told Carvalho that sometimes Jesus visited him at the farm and told him not to smoke so much tobacco.

99. Nahak also told Carvalho he had one child, who is a girl. Nahak's relatives and neighbors advised Ximenes that the child was not a girl, but a boy. When asked where his mother and father lived, he indicated the next farm, although in fact they did not live there but rather a distance away.

100. Carvalho spoke to members of the Defendant's family as well as his neighbors. They told him that Nahak does not care for himself and does not sleep well. They stated that sometimes he leaves his home at night and goes out to make sounds like an owl. On other occasions, for no discernible reason, he would throw stones at the homes of his neighbors and swear at them. He would often be seen laughing and talking to himself for no apparent reason. According to Carvalho, "The family said [that] prior to 1999 his behavior was normal. After 1999 his behavior changed..." They told Carvalho that he behaves like someone who is "bulak."

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101. Carvalho also spoke to the local administrator who told him that that Nahak was "bulak" and that he ran around the village naked, without any clothes "like a child."

102. Dr. Freeman concluded that the events of 1999 had "taken some toll" on Nahak and that his mental life and behavior were at the "margin of normality." According to Dr. Freeman, Nahak's condition suggested that "he could be living with schizophrenia" although he did not fit into any readily recognizable schizophrenic category. As a result, the doctor ruled out that diagnosis. Moreover, the doctor stated that even if Nahak were schizophrenic it would not automatically mean he was incompetent to stand trial.

103. Nahak demonstrated a very limited understanding of the legal process, although he stated he would continue to comply. Dr. Freeman stated: "I would have [great] difficulty in suggesting that he understood the nature of the process, the nature of the evidence, the nature of legal representation and the possible outcome of the participation in the process." The doctor further stated "I would have to [say] [that the same applies] to any East Timorese individual." The doctor concluded that Nahak's difficulties were primarily culturally based and not psychiatrically determined.

104. Dr. Freeman asserted that "the accused may, under some circumstances, be unable to perform one or all of those behaviors [whether to testify, whether to plead guilty, whether to question witnesses] and at the same time the accused ['s] capacity to perform in other areas might reasonably compensate..." for such deficiencies.

105. He went on to state that even if a person were not capable of a rational decision, so long as he was living "in a dignified and appropriate way," that person would still be competent to stand trial. On the other hand, he

acknowledged that if instead such a person was running around his village naked, "[a]t that particular time [he] would [be] completely incompetent," assuming that his behavior was not prompted by some other condition such as re-emergent malaria.

106. Dr. Freeman concluded that Nahak is eccentric and has both physical and emotional limitations, although "he is not presently suffering from any mental disorder." Dr. Freeman did not administer a mental state examination as used in conventional Western psychiatry because he felt it would be "inappropriate when used in examining people other than in the culture [in which] it was designed."

107. Finally, Dr. Freeman wrote in his report that "Josep Nahak is competent within the pr[e]scribed standards" to participate in the criminal process before the Special Panels for Serious Crimes.

108. In testifying about his opinion, Dr. Freeman significantly relied upon what he called the Defendant's "intentionality" which he described as Nahak's "willingness" to participate in the process even though he did not understand it. In large part the doctor attributed Nahak's cooperation to the fact that so far nothing untoward had come from his cooperation and he could continue to go about his life as usual.

109. When asked whether a person with a mental disease or defect who was also willing to cooperate with counsel would be fit to proceed to trial, Dr. Freeman agreed. He went on to state that even a severely mentally retarded person who was cooperative would likely be fit "if I thought they were going to be represented." In sum, Dr. Freeman's perspective concerning Nahak's purported competence to stand trial largely rested on his view that Nahak would comply with counsel who would, essentially, make decisions for him and thereby provide him a defense.

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110. Dr. Freeman distinguished a defendant's "knowledge" from his "understanding." The former relates more to the kind of awareness of things that comes from experience. The latter deals more with a person's capacity to appreciate the meaning and significance of those experiences..

111. As to the Defendant, Dr. Freeman stated that he was acquiring more knowledge about the process by participating in it. "Under the circumstances I think his understanding of the process may well be increasing all the time ...[Although he] has not, I suppose, total understanding of the whole process, he will have or maybe his children will have. That is as close as I can get."

112. Dr. Freeman was then asked "Is it your testimony that you [applied] that standard you just described, rather than the westernized standards the we normally apply in the courtroom?" to which he replied, "Yes."

113. The Prosecutor asked Dr. Freeman: "Is it your opinion that [with patience] and the time taken to explain to Joseph Nahak the trial process [and] the nature of the charges, he will be able to understand and talk to his lawyers about the proceedings he is involved in?" The doctor replied, "Yes, but his children would do it better." When then asked "But he would at that time understand?" he replied "I think so."

114. During the two-day competency hearing there was substantial opportunity for this Court to observe Nahak. Although seated with counsel, the Defendant did not talk to his attorney at all except to question him about recovering $5 and some cigarettes that he had lost, issues entirely removed from the proceedings and lacking any immediate significance.

115. On one of the two days Nahak spent the entire day repeatedly flipping through a magazine, apparently looking at the pictures. On several occasions he was observed by this Court talking to himself and laughing, as if something funny

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had been said. At a point, he apparently poured some liquid from a small bottle on the table in front of him. He then proceeded to apply it to his shirt, rubbing it in with a circular motion in the vicinity of his stomach.

116. At each court appearance the Defendant drank significant quantities of water through the course of each day. Before doing so, he would first make the sign of the cross upon himself, starting at his forehead.

117. On 20 January 2005, during the testimony of Antonio Ximenes, the defendant suddenly stood upright as if at attention and started speaking to this Court in a local language. In translation, it was explained that the Defendant was explaining that people had beaten him up and shot him in the leg. This Court suggested to defense counsel that the hearing could be suspended to permit him to speak to his client outside the courtroom. Counsel later reported that when this occurred, Nahak spoke rapidly to the point that it was difficult for the interpreter to understand him. Rather than pursue his remarks about being beaten up and shot, he complained to his lawyer about the loss of $5 and a package of cigarettes. He also mentioned the President of East Timor in this context.

118. Similarly, at a point during the testimony of Dr. Freeman, the Defendant interrupted the hearing with a complaint to his lawyer's assistant about some lost money and cigarettes.

119. Through the course of the two-day hearing the defendant repeatedly left the courtroom, on some occasions presumably to urinate.[60] On other occasions he appeared merely to walk around the grounds immediately adjacent to the courtroom. When the Defendant left the courtroom he would generally make an attempt at a military salute toward the presiding judge and then would leave without speaking to his lawyer or his lawyer's assistant. He would then walk

[60] For example, between 9:15AM and 11:00AM on 20 January 2005, the defendant left the courtroom seven times.

several steps to the door, open it and leave the courtroom, sometimes for extended periods of time while the proceedings continued in his absence.

B. Analysis

120. In reviewing the facts bearing on a defendant's competence to stand trial, a court may consider its observations of the defendant's demeanor and behavior in the courtroom, his interaction with defense counsel, reports of psychiatric examinations, as well as testimony by psychiatric witnesses and lay testimony concerning the defendant's conduct and mental condition. In cases where an expert witness testifies, the court must decide what weight to give to his or her testimony but is not bound by the expert's opinion concerning competence. This is because a decision with respect to competence is a legal and not a scientific determination. Nonetheless, expert opinions that are relevant to material issues should be given due consideration.

121. In determining whether or not a particular defendant is competent to stand trial, a court need not determine whether the individual operates at the highest level of functioning. Rather, the test is whether the defendant satisfies certain minimum requirements without which he cannot be considered fit for trial. As stated in Strugar, "as the jurisprudence of many nations has identified, in the application of criminal law what is required is a minimum standard of overall capacity below which an accused cannot be tried without unfairness or injustice."[61] That threshold is met, according to Strugar, "when an accused has those capacities, viewed overall and in a reasonable and commonsense manner, at such a level that it is possible for the accused to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights, i.e. to make his or her defence."[62]

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[61] Strugar, supra at par. 37.

[62] Id.

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122. The Trial Chamber in Strugar made clear that "a mental disorder is not a prerequisite for finding a person unfit for trial."[63] Also, it is a fact of nature that individuals vary as to their intelligence and understanding. Those normal variations among individuals do not raise concerns about fitness for trial. Thus, a finding of incompetence to stand trial must be based on something more significant than merely low intelligence on the part of a defendant.[64]

Testimony of Dr. Harry Freeman

123. In order better to assess the mental state of the Defendant, this Court appointed Dr. Harry Freeman to conduct an evaluation. Dr. Freeman was a thoughtful and impartial witness with experience relevant to the issue before the Court. Nonetheless, there were aspects of his testimony and his report that suggest that while of some value, they should not be considered determinative on the ultimate issue of whether or not the Defendant is competent to stand trial.

124. The first concern with respect to the evidence of Dr. Freeman is that he does not appear to have applied the competency standard enunciated by this Court in its "Interim Order" of 27 September 2004. Although his opinion regarding fitness was framed in terms of the "pr[e]scribed standards" of the Court, the doctor testified at length concerning his efforts to evaluate the Defendant in the context of what he described as the "mental life" of the Timorese. In doing so, Dr. Freeman adopted a largely cultural approach to the issue of competence, suggesting that fitness for trial needs to be evaluated differently for defendants in different cultures. When asked, "Is it your testimony that you [applied] that standard you just described, rather than the westernized standards that we normally apply in the courtroom?" the doctor replied, "Yes." Dr. Freeman also

[63] Id. at par. 35.

[64] Id. at par. 34. See also, Ngatayi v. The Queen (1980) 147 CLR 1 at 9.

explained that "the question of [Nahak's] understanding of his right and this process is one that critically relates to his cultural capacity to appreciate such a different mental life." Accordingly, Dr. Freeman attributed most limitations in the Defendant's understanding to cultural rather than mental or psychological factors.

125. There is no doubt that cultural sensitivity must be shown when interacting with defendants, victims and witnesses from non-Western societies. Nevertheless, although the legal-cultural assumptions upon which the Special Panels are based may vary significantly from those familiar to many Timorese, that does not mean that the average person in East Timor is culturally unable to understand the criminal process. Indeed, in numerous trials before the Special Panels, Timorese participants have demonstrated significant awareness of the nature of criminal charges, trial proceedings and the role of counsel. The two co-defendants of Nahak, Sisto Barros and Cesar Mendonca, were fully cooperative when they came before the Court, each engaging in a colloquy with the presiding judge during the preliminary hearing. Moreover, both defendants evidenced an appropriate understanding of the process in which they were participating and consulted with counsel during the hearing. Such behavior and conduct is typical of other Timorese defendants who have come before the Special Panels. It is common for defendants to speak to counsel during trial, to address the court coherently with respect to the charges against them, to plead guilty knowingly and voluntarily with respect to those same charges and to otherwise manifest that they aware and mentally engaged in the trial process and related court proceedings. There is no indication of a significant cultural impediment of the type that Dr. Freeman has indicated.

126. Consequently, Dr. Freeman's explanation of Nahak's deficiencies in terms of a cultural barrier is not persuasive. Dr. Freeman candidly stated "I would have [great] difficulty in suggesting that [Nahak] understood the nature of the process, the nature of the evidence, the nature of legal representation and the possible outcome of the participation in the process." Yet the doctor went on to assert, "I

would have to [say] [that the same applies] to any East Timorese individual." Although Dr. Freeman's view was sincerely stated, it does not comport with the experience of this Court relative to the Timorese who come before it. Thus, it does not ring true to say that Nahak is yet one more Timorese who for cultural reasons fails to understand what transpires in a courtroom. To the extent that the Defendant does not understand the criminal process, the source of his difficulty is to be found in his own mental limitations and not in some failure to translate the experience of the courtroom into terms that are culturally meaningful to him.

127. Related to the cultural point that he raised, Dr. Freeman also stated that while Nahak had "knowledge" from his experiences with the criminal process, he did not necessarily have an "understanding" about what was happening to him. He opined: "Under the circumstances I think that his understanding of the process may well be increasing all the time...[A]lthough he] has not, I suppose, total understanding of the whole process, he will have or maybe his children will have. That is as close as I can get." When the matter was pursued and Dr. Freeman was asked whether, with patience and time, Nahak could understand the nature of the charges, the trial process and be able to cooperate with his attorney, he replied "Yes, but his children would do it better." When asked "But he would at that time understand?" he replied, "I think so." This is nothing more than a restatement of Dr. Freeman's basic premise, to wit: that Nahak's inability to understand the criminal process is not rooted in his personal mental limitations but in his inability to comprehend the process for cultural reasons. As stated by Dr. Freeman, those cultural impediments are likely to lessen over time, such that future generations of Timorese will be more likely to understand the criminal process.

128. Although thoughtfully stated, Dr. Freeman's conclusion fails to account for the hundreds of Timorese who have come before the Special Panels and participated in a meaningful way in the criminal process. This is not to suggest that those living in the rural interior of East Timor necessarily have a thorough appreciation of every aspect of the judicial system that they have encountered.

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But that is not the standard here, as this Court must determine whether a certain minimum level of understanding has been achieved on the part of the Defendant currently before the Court.

129. Dr. Freeman also commented on the interplay between a defendant's competence to stand trial and the role of counsel. Essentially, Dr. Freeman concluded that even in circumstances where a defendant is unable to comprehend the charges against him or the nature of the criminal process, he could nonetheless proceed to trial. He based this conclusion on the view that if a defendant complies with counsel and is willing to participate, the trial could go forward so long as the defendant remains represented. In this respect he testified that he discerned sufficient "intentionality" on the part of Nahak to conclude that he was willing to participate in the process. Dr. Freeman further concluded that since the Defendant is represented by capable counsel, he is consequently fit to proceed to trial.

130. The view taken by Dr. Freeman is essentially a legal conclusion rather than a psychological one. Whether or not a lawyer may substitute his competence for that of his otherwise incompetent client is to be determined as a matter of law and is thus not a fit subject for expert medical testimony.

131. This Court concludes that it is not sufficient that a defendant is compliant with the criminal process and in that respect alone is cooperative with counsel. Even the minimum standard of competence requires that a defendant be able to cooperate with counsel, to inform his attorney concerning the facts of his case and to assist in the preparation of his own defense. Absent the capacity to make rational decisions at trial, a defendant who is simply yielding to the process is likely to do nothing more than accept the decisions of counsel as being the easiest available alternative.[65] Although a defendant need not be able to go to trial

[65] See, e.g. R. v. Miller [No. 2] No. SCCRM-00-101 [2000] SASC 152 (2 June 2000) at par. 30 (In the course of finding the defendant mentally unfit to stand trial, the Court noted "The accused is capable of exercising a choice as to whether to give evidence by saying yes or no. However, he does not have the

unaided, when a defendant is represented by counsel he must have sufficient present ability to assist his attorney in some meaningful way.

132. Necessarily, the involvement of counsel will enable a defendant to deal more readily with his limited knowledge of the law and legal formalities. Nonetheless, the major function of counsel is to assist the defendant but not to replace him. "The use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficiently for this purpose."[66] Accordingly, the mere fact that a defendant is represented by counsel does not mean, ipso facto, that the accused is competent simply because his lawyer is. Moreover, the mere fact that a defendant has the theoretical ability to say yes or no to his attorney does not mean that he has the capacity to make intelligent decisions concerning his own defense. Accordingly, a lawyer's presence in a case, even where he or she serves the best interests of the client, is not a substitute for a defendant being able to instruct his counsel and to actively assist in his own defense. A defendant, who is unable to do more than agree with his attorney because he does not have the capacity to do otherwise, cannot be described as competent, even though represented by counsel.[67]

133. Dr. Freeman also testified that a defendant's competency in other aspects of his life "might reasonably compensate" for his inability to testify, to plead guilty or to question witnesses. He asserted that even if a person were not capable of rational decision making at trial, so long as he was able to live "in a dignified and appropriate way" he would still be competent to stand trial.

134. Although Dr. Freeman was a careful and concerned witness on the issue of the Defendant's competence to stand trial, this conclusion is inconsistent with the

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capacity to grasp the rationale behind making such a decision. The accused would be likely to follow the advice of his solicitor because he is suggestible and it would be the easiest option for him.")

[66] Strugar, supra at par. 22.

[67] See, e.g. Regina v. Miller , supra at par. 30.

competence standard enunciated by this Court. The test of competence to lead one's daily life without aid or interference is different from the test of competence to stand trial. The conclusion that a particular defendant can function at a basic level day to day does not address his capacity to understand the charges against him, to understand the nature and to object of court proceedings or to consult with his attorney and to assist in the preparation of his defense. Consequently, it is not possible to substitute one form of competence for the other.

Evaluating the Defendant's Competence

135. As defined by this Court, the test of whether the Defendant is competent to stand trial requires that he have certain capacities. In that respect, he must have a rational and a factual understanding of both the charges and the criminal proceedings pending against him. He must also have a present ability to consult with his lawyer and to assist in the preparation of his own defense. A failure to have adequate capacity as to any one of these elements of competency would be fatal to a defendant's fitness to stand trial.

136. Understanding of the charges against him – It is highly doubtful that the Defendant understands the basic elements of the charges against him, which include three counts of crimes against humanity by reason of murder, attempted murder and persecution. To the extent that Nahak has commented on the charges, he has stated that he was not guilty of murder because the person he cut with his sword was already dead.

137. The fact that the Defendant is alleged to have been a joint participant in the attack with others subjects him to prosecution as part of a joint venture, even if the blow to which he refers was inflicted after death. The Defendant's repeated statement that his involvement came after the victim was already dead indicates a complete lack of understanding concerning the nature of the case against him and the manner in which he is being prosecuted. This is not to say that the defendant

must have an appreciation of every legal aspect of the Prosecutor's case. Nonetheless, his response to the charges suggests a lack of awareness concerning the evidence as it has been alleged. That aside, his assertions of innocence as to murder fail to address the separate pending charges of attempted murder and persecution. There is no evidence of his appreciating the nature or significance of those counts of the indictment as his comments on the case seem fixed on the murder with which he has been charged.

138. The defendant's assertion to Dr. Freeman that he was a follower and not a leader and that he had already been punished by the community are self-serving, but hardly suggest an understanding of the charges against him. The defendant's desire to deflect responsibility for his actions demonstrates nothing more than his knowledge that it is alleged that he did something bad, for which he hopes to avoid any further punishment. This is especially true in light of the beatings he experienced after his return from West Timor. The fact that the Defendant has reacted in this way does not suggest that he has a rational as well as a factual understanding of the charges against him.

139. Understanding of the nature and object of the proceedings against him – The Defendant appears to have little appreciation for the nature and object of the proceedings against him. When asked by Dr. Wallace the purpose of the court, Nahak responded that judges and lawyers sit in court and people bring them food. Similarly, when asked what the role of a lawyer was in court, he could not or would not answer. When asked to explain the difference between pleading guilty or not guilty at trial, the Defendant did not respond to the question put to him, but merely stated that he was "not guilty." In the part of his report that this Court may consider, Dr. Wallace stated that Nahak displayed a "formal thought disorder."

140. Dr. Freeman made similar observations concerning the Defendant and also testified "I would have [great] difficulty in suggesting that he understood the

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nature of the process, the nature of the evidence, the nature of legal representation and the possible outcome of participation in the process."[68]

141. The remarks of both Dr. Wallace and Dr. Freeman are consistent with this Court's observations of Nahak. Each appearance of the Defendant before the Court has been marked by eccentric, irrational and, at times, disruptive behavior on his part. See, supra at pars. 79 – 119. It was clear to this Court that in large part the Defendant had no meaningful appreciation for what was transpiring in court and no understanding of the nature and object of the proceedings.

142. As this Court has previously noted, the Defendant's response (or sometimes lack thereof) to the proceedings is not attributable to cultural factors. Rather, this Court concludes that Nahak's evident lack of understanding concerning the process in which he is engaged is attributable to his own personal limitations. In this respect the Defendant's limitations go beyond a mere lack of sophistication or legal knowledge but extend to his mental capacity to understand either the charges, the court process or the role of his lawyer.

143. This is not a matter of concluding that a simple, uneducated man is necessarily incompetent to stand trial. The overwhelming majority of defendants who come before the Special Panels are simple people of limited education. The concern about Nahak's competence has been raised in this case based on the Defendant's unique profile. Prior to 1999 he was considered "normal" by his family and neighbors. Thereafter, his mood and manner changed significantly and family members, acquaintances and people his village began to describe him as "bulak." Similarly when he was arrested in 2002, according to the Prosecutor, "he was behaving in a very peculiar manner and to a lay person he appeared to be abnormal."

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[68] For the reasons stated supra at pars. 123 and 124-134, this Court is not bound by the competency determination of Dr. Freeman, although it makes use of the observations and information that he supplied to the Court.

144. Evidence of that abnormality was to involve the following: Participating in conversations with disembodied voices; asserting that he had been grabbed by the neck by an invisible person named "Agus;" believing that Jesus had visited his farm on several occasions and told him not to smoke so much tobacco; running through his village naked; and hooting like an owl in the middle of the night for no apparent reason. It was uniformly reported that his conduct and speech were both erratic and impulsive. He would often be observed speaking continuously and nonsensically day and night, often laughing and crying in alternation for no apparent reason. Even those who spoke to him in his own language could not conduct a conversation with him because his speech was so confusing. Although Dr. Freeman ruled out the diagnosis of schizophrenia in his case, he acknowledged that Nahak's mental life and behavior were at the "margin of normality."

145. It is significant to this Court that Nahak's condition has been continuous since his return from West Timor and noted by a wide variety of observers. Although some have claimed that the Defendant is inclined to dissemble, this Court accepts the information provided as being substantially accurate. As such, Nahak's actions and behavior indicate that he suffers from some form of mental disturbance. Whether it is simply a "thought disorder" as described by Dr. Wallace or a condition deserving a more specific diagnosis, this Court need not resolve. Although the Court has given due consideration to Dr. Freeman's opinion that Nahak is not schizophrenic, "a mental disorder is not a prerequisite for finding a person unfit for trial." [69]

146. It is sufficient to conclude that the evidence demonstrates that the Defendant suffers from a form of mental disturbance that not only interferes with his routine functioning, but which also prevents him from having a rational as well as a factual understanding of both the charges against him, as well as the nature and object of these proceedings.

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[69] Strugar, supra at par. 35.

147. Present ability to consult with counsel and to assist in his defense – The final matter that this Court must consider is whether the Defendant has a present ability to consult with his lawyer and to assist in the preparation of his defense. This is perhaps the most significant element of the test of competence because "In some cases legal assistance to an accused may be a sufficient measure to compensate for any limitations of capacity of the accused to stand trial."[70] Nonetheless, "[t]he use of counsel requires, however, that the accused has the capacity to be able to instruct counsel sufficient for this purpose."[71]

148. It is not at all probable that Nahak understands the role of the lawyer who has been appointed to represent him. On the only occasion that the issue of counsel was raised with the Defendant, he told Dr. Wallace that judges and lawyers sit in the tribunal and that people bring them food. In the four days that the Defendant appeared before this Court he initiated a conversation with his attorney only once, apparently for the purpose of discussing some lost money and cigarettes, an issue completely unrelated to what was then transpiring in the courtroom. On another occasion when the Defendant stood and interrupted the proceedings, the Court gave him an opportunity to speak to his lawyer. When he did so, he resumed the previous topic, asking about $5 and some cigarettes that were missing. Once again, the issue had absolutely no bearing on the proceedings.

149. It must be noted once again that this behavior is completely different from that of other Timorese defendants who have come before the Court. While some defendants are more inclined to engage with counsel than others, Nahak evidences a level of such complete detachment from the proceedings that it appears that he is physically but not mentally present in the courtroom. Periodically, whatever other reality he is experiencing causes him either to leave the proceedings or to interrupt them. When given an opportunity to discuss his concerns with his

[70] Id. at par. 39.

[71] Id. at par. 22.

attorney, he turns to trivial personal issues completed unrelated to his defense, such as access to cigarettes. This is not the behavior of a person who has the capacity to instruct or assist his counsel at any meaningful level concerning his case. Nor can it be described as the behavior of a person with the capacity to work cooperatively with his lawyer, to communicate relevant information, to evaluate his lawyers advice or to make reasoned choices concerning the exercise of his rights. As a result of the mental disturbance from which he suffers, Nahak has little if any present ability to consult with his lawyer or to assist in his own defense.

150. The Defendant is either a severely limited person whose mental issues render him incompetent to stand trial, or he is a particularly cunning individual who for years has calculated his actions to produce the impression of incompetence to avoid accountability. This Court concludes that the weight of the evidence is in favor of the former conclusion, rather than the latter.

Conclusion

151. Based on the foregoing, this Court concludes that the Defendant does not have the competence required to be considered fit for trial. Whether or not the Defendant suffers from a diagnosable mental illness, his conduct and behavior evidence a mental disturbance that impairs his capacity to have a rational and factual understanding of the charges against him and these proceedings. Similarly, this impairment prevents him from having a present ability to consult with his attorney and to assist in his own defense.

VIII. Ruling on Competence to Stand Trial

152. Applying the standard of proof adopted by this Court, the Defendant's competence to stand trial must be established by a "balance of the probabilities"

meaning that it must be more probable than not that he is competent to stand trial. It is not enough for the evidence to show a mere "possibility" that the Defendant is fit for trial. Hence, the evidence must demonstrate that it is more probable than not that Nahak has a rational as well as a factual understanding of the charges against him and of the nature and object of the pending criminal proceedings. The evidence must similarly prove that he has a present ability to consult with his lawyer and to assist in the preparation of his defense.

153. Although the defendant may have a rudimentary understanding that he has been charged with a crime, the evidence has not proved that it is more probable than not that he has both a rational and a factual understanding of either those charges or the nature and object of the proceedings against him. Moreover, the evidence has not proved that it is more probable than not that he has a present ability to consult with his lawyer and to assist in the preparation of his defense with a reasonable degree of rational understanding.

154. Accordingly, where the Defendant's fitness has not been established by the balance of the probabilities, this Court rules that Josep Nahak is not competent to stand trial at the present time.[72]

IX. Disposition of the Case

155. As previously noted, a determination that a defendant is not competent to stand trial is not a defense to the charges against him. Rather, it operates as a bar to the commencement or continuation of his trial. As noted in RPE Rule 135.4, "Where the Trial Chamber [of the ICC] is satisfied that the accused is unfit to stand trial, it shall order that the trial be adjourned."

[72] The result would be the same if this Court were to consider whether or not there was sufficient evidence of the Defendant's "unfitness" for trial. The credible evidence before the Court establishes that it is more probable than not that the Defendant is not competent to stand trial.

156. Accordingly, the proceedings in the present matter must be suspended and the case must be adjourned.

X. Review of the Defendant's Condition

157. A determination that a defendant is not competent to stand trial is made at a particular point in time based on the facts that are then known. As stated in Strugar, "the question of fitness to stand trial is, by the nature of the subject matter, one which may possibly change."[73] Accordingly, a defendant's trial can commence even after a period of suspension, should the defendant's unfitness prove to be temporary.

158. In the present case, should there be a change in the Defendant's condition or should new evidence become available, the Prosecutor may request that the Court review and reconsider the issue of the Defendant's competence to stand trial.[74]

XI. Status of the Defendant Pending Review

159. Many national jurisdictions provide for the hospitalization of defendants deemed not fit for trial. Such provisions are similar to those made for defendants

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[73] Supra at par. 27.

[74] This Court notes that it is technically possible for the Defendant's condition to change and he could be found competent to stand trial after 20 May 2005. Unless the current legal regime is revised, it would then be necessary for a special panel of one Timorese and two international judges to conduct his trial. Considering that UNMISET support for the Special Panels concludes on 20 May 2005, there will be no international judges specifically provided for the Special Panels after that date. See Security Council Resolution 1543. Accordingly, the national judicial authorities will need to determine how best to address cases such as the present one and others where a serious crimes defendant becomes available for trial after 20 May 2005.

who are ruled not criminally responsible at the time of the offense, especially if they continue to pose a danger to themselves or to others.[75]

160. In the present circumstances there are no legal provisions in effect in East Timor that address this issue, nor is there any mental health legislation in effect which this Court could apply. An even more basic consideration is the absence of any inpatient mental health facility in East Timor that could receive the Defendant if this Court were to determine that his hospitalization in such an establishment were to be required.

161. Based on the record evidence before this Court, although it has been determined that the Defendant is not competent to stand trial, it cannot be said that he poses a danger either to himself or to others at this time. Instances in which he has proved to be a nuisance or a bother to those in his community do not rise to such a level as to require his forced hospitalization, much less his incarceration.

162. Accordingly, this Court concludes that it is appropriate and in the interests of justice that the Defendant remain in his current status, subject to the amended substitute restrictive measures imposed on 18 March 2004, until further order of the Court.

163. In the event of a change in circumstances indicating that action should be taken with respect to the Defendant's substitute restrictive measures, either the Prosecutor or the Defendant may request that the Court review and reconsider those measures.

[75] See, e.g. Articles 91 to 96 of the Portuguese Penal Code which establish security measures ("medidas des segurança") for those deemed not criminally responsible; Articles 92 to 101 of the Draft Penal Code of East Timor ("Capítulo VIII - As Medidas de Segurançe"). See also, Articles 501 to 508 of the Portuguese Code of Criminal Procedure ("Título IV – Da Execução das Medidas de Segurança"); Articles 345 to 347 of the Draft Code of Criminal Procedure of East Timor ("Capítulo VI – "Da Execução das Medidas de Segurança").

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XII. Final Comment

164. This Court recognizes the significance of its decision in this matter. So long as the Defendant remains not competent to stand trial, the case against him will not go forward. During that time, the victims, the witnesses and their families will not have their day in court, at least not with respect to this Defendant. Moreover, that opportunity may never come in the event that the Defendant does not become fit for trial in the future. Consequently, the Court has not taken this matter lightly and has attempted to explain thoroughly and in detail the reasons for its decision.

XIII. ORDER

The Defendant having been adjudicated not competent to stand trial at the present time, further proceedings in the case against him shall be suspended. This suspension shall continue until such time as the Court may determine that the Defendant has become competent to stand trial, at which point the case shall be scheduled for preliminary hearing with proceedings to continue in the normal course.

Accordingly, the case of Prosecutor v. Nahak is adjourned sine die.

Until further order of the Court, the Defendant shall remain subject to the amended substitute restrictive measures imposed on 18 March 2004.

SO ORDERED

Phillip Rapoza

Judge Phillip Rapoza
Special Panels for Serious Crimes

Date: 1 March 2005