



## JUSTICE UPDATE

*Period: 28 February – 7 March 2005*  
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### 1. COMPETENCE TO STAND TRIAL BEFORE THE SPSC

#### First Finding of Incompetency to Stand Trial in an International Law Tribunal

On 1 March 2005, in the case of *Deputy General Prosecutor for Serious Crimes v Josep Nahak*, the sole presiding judge, Judge Phillip Rapoza, handed down a decision that Josep Nahak was incompetent to stand trial. This was an important decision as the first hearing on the issue of competency to stand trial in the history of Timor Leste's Special Panel for Serious Crimes (SPSC), and only the second competency hearing from an international tribunal. As there was no domestic legislation concerning a defendant's fitness to stand trial, the Court was required to resort to international norms and principles, and set down a number of procedural definitions relating to competency. JSMP congratulates the Court on its thorough analysis and evaluation of the issues involved and resulting comprehensive case law.

#### Resort to International Law

As the *Nahak* judgement points out, there are currently no constitutional or statutory provisions in the extensive domestic legal regime that governs Timor Leste that directly address the issue of competency to stand trial. The crucial factor in the *Nahak* case which allowed for such a hearing was the possibility of the incorporation of general or customary principles of international law into the domestic legal system by the operation of s 9.1 and s. 9.2 of the Timor Leste Constitution, s 3.1 of UNTAET Regulation 2000/15 and the TRCP s 54.5. The *Nahak* decision cites the Rome Statute of the International Criminal Court, the ICCPR and the collective jurisprudence of other international tribunals as providing general guidance on the issue of competency to stand trial.

The norms and principles that emerge from this jurisprudence locate an inherent competency requirement in the rules of criminal procedure. Although they are cited in many different forms, these rules variously guarantee a number of rights, including the right to a fair trial, the right to legal counsel before trial, the right to prepare a defence, the right to call and examine witnesses, and the right to be present (both physically and mentally) at one's own hearing. The importance of these rights is that they exist to ensure a fair trial for the defendant who has every opportunity to refute the charges laid at them and to ensure that a defendant is not unjustly punished.<sup>1</sup> More broadly, the case of *Nahak* suggest that "there is a social value associated with ensuring a defendant's competence to stand trial that goes beyond the personal

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<sup>1</sup> Amnesty Fair Trials Manual, 1.

interests of the defendant himself”.<sup>2</sup> If a defendant is unable to exercise these rights, (eg the defendant cannot converse with his lawyer) the process and the quality of adjudication is severely compromised. Given the allegations that the special Panels are often pro-prosecutorial in nature, *Nahak* serves as an important statement regarding the trial of those who may otherwise be susceptible to a less cautious tribunal.

### **Necessary Development of Legal Definitions for the Purposes of the Proceedings.**

As well as emphasizing the importance of competency to a fair trial and the judicial process, *Nahak* delivered a number of legal definitions crucial to the process of competency adjudication.

#### ***Decision to conduct a Competency Hearing***

For a competency hearing to be ordered, *Nahak* states that there “must be some degree of doubt as to the defendant’s competence to stand trial”. On the basis of the evidence presented by the Prosecution and the Defendant, the Court in this instance found that there was “sufficient concern” as to the state of Josep Nahak’s competency to warrant a hearing. The Court was careful to point out, however, in the final judgment, that a finding of incompetence does not serve as a defence but merely adjourns the trial to a later date should the defendant become competent.

#### ***Definition of Competence to Stand Trial***

Drawing on both international and other domestic standards of competency, *Nahak* states that:

‘a Defendant will be competent to stand trial where that defendant has:

- (1) A rational as well as factual understanding of the charges against him;
- (2) A rational as well as factual understanding of the nature and object of the proceedings against him; and
- (3) A present ability to consult with him lawyer and to assist in the preparation of his defence with a reasonable degree of understanding.’

JSMP is pleased that these are closely in line with international standards of due process and require a comprehensively sound mental state.

#### ***Standard of Proof***

Again drawing on the jurisprudence of other jurisdictions, the Court set a relatively low standard of proof, being on “the balance of probabilities.” *Nahak* justifies this on the grounds that the higher standard of proof beyond a reasonable doubt, required when establishing elements of a criminal offence, is in fact a positive standard that is necessary to counter the possibility of an erroneous finding of guilt. On the other hand, although such a verdict is highly undesirable, as the *Nahak* case sought to avoid, an incorrect assessment of competence does not necessarily risk an erroneous finding of guilt.

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<sup>2</sup> *Nahak*, par. 48.

### ***Burden of Proof***

While the Court decided that the relevant question is whether ‘the evidence demonstrates that it is more probable than not that the defendant is fit to stand trial’<sup>3</sup> and leant away from imposing an ‘onus of proof’, the Court acknowledged that the practical effect of this was to place the onus on the prosecutor to prove that the defendant is fit for trial. Neither the Court nor JSMP was troubled by this practical reality as it accords with the requirements for a decision to conduct a competency hearing that there already be a significant doubt as to the defendant’s mental competency.

### ***Expert Testimony***

JSMP feels it is important to comment on issues raised by the use of expert testimony in *Nahak*.

Any case which requires expert testimony necessarily raises an equality of arms argument. This is especially true where there are limited expert resources, as is the case in Timor Leste. Where the weight of the state is against an individual, that individual must have access to adequate resources to rebut the charges against him. Certainly defense counsel made an issue of the lack of resources of the accused, the consequent lack of an alternative expert assessment and accordingly the preponderance of evidence on which to base an affirmative judgment of competency. This would constitute - a potential violation of s 2 of the *Transitional Rules of Criminal Procedure* which guarantees a right to fair trial and due process. -

Moreover, JSMP is concerned that the evidence presented by the sole expert witness was essentially disposable for the purposes of the proceedings. Instead of addressing the legal questions listed under the definition of ‘Competent to Stand Trial’, the psychiatrist who testified presented more of an anthropological assessment that Nahak’s limitations were cultural and not mental, and that as much would be true of any East Timorese individual. JSMP takes affront at this suggestion which is an insult to both Timorese and universal humanity. Fortunately the Court was able to refer to the testimony of Timorese PRADET counselor Mr Florentino de Carvalho and Timorese PRADET case manager Mr Antonio Ximines that the behaviour of Josep Nahak was not normal within the cultural practices of East Timor and that Josep Nahak was indeed mentally ill.

The issue at the heart of *Nahak* was the development of jurisprudence on fair trials. The right to a fair hearing is indispensable to the integrity of the justice system and the way in which such tribunals deal with vulnerable people is a measure of the quality of the justice being delivered. This is very important in age of proliferation of international tribunals in post conflict situations where participants may well suffer mental illness following or exacerbated by the trauma they have experienced and JSMP applauds Judge Rapoza and the Special Panel for Serious Crimes on a sensitive and detailed approach to the relevant law and its application in Timor Leste.

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<sup>3</sup> *Nahak* , par. 67.

## **2. DELAYS AND POSTPONEMENTS IN THE COURT OF APPEAL**

During February, JSMP observed that all the hearings and trials that were scheduled in the timetable of the Court of Appeal, commenced with delays of at least one hour or were postponed.

On 3 March the hearings scheduled to take place at 11.00 a.m. were postponed to 04.00 p.m. Even after this postponement, the hearings began 50 minutes after the appointed hour.

JSMP recognizes the amount of work that the Court of Appeal has to deal with on a daily basis (to JSMP's knowledge the Court has heard appeals in eight cases in 2005). JSMP also takes into consideration the fact that the court must deal with some urgent issues and events which occur without warning. Still, we are compelled to express concern about the issue of postponements as a recurrent problem.

As far as JSMP knows, the Parties were only informed of the delays and postponements after having waited for lengthy periods of time in the Courtroom for the trial to begin. As an example, 50 minutes after the scheduled hour, the Court clerk came to inform the Public Prosecutor (who was from the Serious Crimes Unit) that the hearing would be held not in the morning, but at 4.00 p.m.

Delays and postponements such as this not only damage the court's regular functioning but also constitute a considerable waste of the court actors' time. Furthermore, they bring unnecessary emotional stress to the suspect, victim and their respective families, who are in situations that involve some anxiety.

JSMP believes that these negative aspects should be taken into consideration and could easily be avoided. Therefore, we recommend that, whenever possible, the Court of Appeal's timetable be amended with sufficient time to notify the Parties of possible delays.