

**REPORT ON THE RE-TRIAL  
OF LEYLA ZANA AND THREE OTHER  
FORMER KURDISH PARLIAMENTARIANS  
AT ANKARA STATE SECURITY COURT  
ON 16 JANUARY 2004**

## **I. Executive Summary**

The re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan, all Kurdish former parliamentary deputies, continued before No.1 Ankara State Security Court on **16 January 2004**. The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed an observer, Mr. Stuart Kerr, a barrister of England and Wales, to monitor and report on the re-trial.

Leyla Zana and her co-defendants had been convicted on 8 December 1994 by the Ankara State Security Court of "*membership of an armed gang*" contrary to Article 168 of the Turkish Penal Code and were sentenced each to a term of 15 years imprisonment. However, on 17 July 2001, the European Court of Human Rights (ECtHR) ruled that the said four former parliamentarians had not received a fair trial at the Ankara State Security Court which at the time of the trial included a military judge.<sup>1</sup> The ECtHR held that the Ankara State Security Court, as composed then, was not "*an independent and impartial tribunal within the meaning of Article 6 of the Convention.*"<sup>2</sup> Following this ruling, Leyla Zana and her three co-defendants are now being re-tried and ten hearings have been held to date at No.1 Ankara State Security Court. The ICJ/CIJL appointed observers to monitor seven of the nine previous hearings of the re-trial.<sup>3</sup>

On the basis of the observation of the hearing on 16 January 2004, the ICJ/CIJL welcomes practices which indicate that certain aspects of the right to a fair trial were being respected. The ICJ/CIJL is satisfied that during the hearing, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal arguments in full. No limitations were placed on public attendance at this hearing (although the ICJ/CIJL has concerns about proposed limitations in the future, as discussed below) nor on any of the members of the defence team the exercise of their professional duties, led by main defence lawyer, Mr. Yusuf Alatas of the Ankara Bar. The ICJ/CIJL welcomes the fact that exculpatory prosecution evidence has been adduced to the court to form part of its deliberations.

However, in addition to other numerous specific violations of article 6 of the European Convention on Human Rights (ECHR), such as the violation of the principles of the *equality of arms*, the *independence and impartiality of the tribunal*, the *presumption of innocence*,<sup>4</sup> and the *right to be tried within a reasonable time*<sup>5</sup>, the ICJ/CIJL is concerned about the proposal by the judge to restrict

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<sup>1</sup> *Sadak and Others v. Turkey* (no.1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96), para.40.

<sup>2</sup> *Ibid.*

<sup>3</sup> Please see *Report on the retrial of Leyla Zana and three other Parliamentarians at Ankara State Security Court on 23 May, 20 June, 18 July, 15 August, 15 September and 17 October 2003*, published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL). This report can be found on the web-site of the International Commission of Jurists at <[www.icj.org](http://www.icj.org)>

<sup>4</sup> *Report on the retrial of Leyla Zana and three other Parliamentarians at Ankara State Security Court on 23 May, 20 June, 18 July, 15 August, 15 September and 17 October 2003*, a report published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL).

<sup>5</sup> *Report on the retrial of Leyla Zana and three other Parliamentarians at Ankara State Security Court on 21 November 2003*, a report published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL).

the right to a public hearing by refusing entry to those members of the public who had attended the hearing on 16 January 2004.

The ICJ/CIJL is also very worried that the defendants continue to be detained in circumstances wherein the re-trial is proceeding at a rate of only one day per month, thus violating the Court's obligation to proceed with expedition where bail is refused. The ICJ/ CIJL is therefore of the opinion that the defendants' rights to *liberty and security* have also been violated.

## **II. Violation of the Right to a Fair Trial**

### **(1) The Right to a Public Hearing**

At the conclusion of the hearing on 16 January 2004, Judge Karadeniz ruled that the defendants would remain in detention, and adjourned the trial until 20 February 2004. As the defendants were being led from the courtroom, a large section of the public who were seated in the public gallery applauded the defendants. As a consequence, the Judge ruled that no member of the public who was in attendance at the hearing on 16 January would be permitted entry to the court on the 20 February. No investigation was undertaken to ascertain which members of the public had applauded, but nevertheless, the sanction imposed applied universally to all members of the public.

Article 6(1) ECHR provides that everyone is entitled to a public hearing. The "press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society".

Article 23 of Law 2845 concerning the establishment and duties of the State Security Courts provides authority to the Judge to exclude or have arrested any person who disrupts the public order in a hearing. Article 378 of the Turkish Criminal Procedures Code provides a similar power to the Judge.

The ICJ/CIJL therefore recognises that the Judge has the discretion to exclude members of the public where it is considered that public order may be disrupted. It is further recognised that there has been no ruling preventing other members of the public from attending, nor indeed members of the international community who have been observing the trial (including MEPs, observers from ICJ/CIJL, FIDH and staff from various embassies). The ICJ/CIJL therefore welcomes the fact that the trial will remain to a certain extent public.

However, for the following reasons, the ICJ/CIJL remains concerned about the proposed exclusion of members of the public who attended in January. First, the ICJ/CIJL notes that the applause to which the Judge objected did not in fact interfere with the proceedings, as it was conducted *after* the conclusion of the hearing. Second, the members of the public who have attended, not only in this hearing but also in all previous hearings observed, have in the main behaved impeccably, demonstrating deference and respect to the court proceedings. Third, no investigation was undertaken to ascertain who in fact had applauded. Consequently, there is a real risk that those who had not applauded will be excluded, including the families of the accused. Fourth, given the extreme measure proposed, no warning had been issued to the public to modify its behaviour accordingly. A warning about future conduct may well have been a sufficient measure to achieve the desired order.

The ICJ/CIJL is of the opinion that the unfettered right to a public hearing is a fundamental principle enshrined in the ECHR and that the proposed exclusion of a large number of the public is not justified. The ICJ/CIJL therefore urges the Court to reconsider its decision to exclude a large number of members of the public.

### **(2) Continued detention of the defendants**

The defendants have been in detention since their arrest in 1994 and subsequent trial by the State Security Court that year. Despite the current re-trial, the defendants continue to remain in

detention and repeated applications by defence counsel for their release are denied. As, under domestic legislation, there is no procedural remedy available to the defendants to challenge their detention, the only avenue open to them is to appeal to the ECtHR. At the hearing on 21 November 2003, defence counsel informed the Court that it had lodged an application with the ECtHR alleging a breach of article 5 ECHR in respect of each of the defendants.<sup>6</sup>

Further, at the hearing on 16 January, detailed applications were made to the court, citing *inter alia* the provisions of article 104 Criminal Procedures Codes of Turkey. Continued detention of accused persons after arrest can be justified only in circumstances where *there are reasonable grounds for believing that the accused may fail to appear at any future hearing, or that the accused may interfere with the evidence in the trial.* No such justifications have been relied upon by the prosecution, nor have they formed the reasons given by the Court to rule against the applications made for the defendants release. In fact, on 16 January, when the Judge ruled that the defendants should remain in detention, no reasons at all for the decision were provided. It is therefore the opinion of the ICJ/CIJL that, under the provisions of Turkish domestic law, the defendant's continued detention cannot be justified.

Furthermore, as has been discussed in previous reports,<sup>7</sup> the ICJ/CIJL has been extremely concerned that the continued detention of the defendants constitutes a violation of their right to liberty and security pursuant to article 5 of the ECHR.

Where a person is held in detention pending the determination of a criminal charge, that person can expect special diligence on the part of the competent authorities to reach such determination of guilt or innocence with expedition. The ICJ/CIJL considers that the periods of inactivity in the trial as discussed above are unacceptable and therefore, that the obligation to proceed expeditiously has been violated<sup>8</sup>.

Thus, the delay in reaching a conclusion to the trial, read in conjunction with the fact that: (1) the defendants have already been in prison for 10 years, (2) no rationale has been given for the continued detention of the defendants, (3) there is a presumption by the Court that the 1994 conviction was valid in spite of the decision of the ECtHR to the contrary, and (4) the Presiding Judge had allegedly earlier commented on the guilt of the defendants in a pre-trial application<sup>9</sup> are factors which do not constitute sufficiently valid legal grounds to continue the detention of the defendants.

It is the opinion of the ICJ/CIJL that as the present re-trial is a completely new trial that has been undertaken to cure the defects that existed in the first trial, extreme caution must be exercised to ensure that the rights of the defendants to a fair trial and to liberty of person are respected in conformity with Turkey's international obligations arising from the said ECHR. As such, the defendants' right to liberty and security of the person are not being respected.

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<sup>6</sup> Art. 5 the ECHR provides that:

*"1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;*

*(a) the lawful detention of a person after conviction by a competent court; ...*

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

<sup>7</sup> Report on the retrial of Leyla Zana and three other Parliamentarians at Ankara State Security Court on 23 May, 20 June, 18 July, 15 August, 15 September and 17 October 2003, a report published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL).

<sup>8</sup> *Abdoella v The Netherlands*(1992)20 EHRR 585, paragraph 24.

<sup>9</sup> See, ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three other Kurdish Former Parliamentarians before the No.1 Ankara State Security Court on 23 May 2003.

The 10 year detention of the defendants with no end in sight and based on a defective trial constitutes a violation of the defendants' fundamental right to liberty and security of the person. The ICJ/CIJL exhorts the Turkish Government to ensure that its Courts comply with international standards and calls for the immediate release of the defendants from detention.

### (3) Hearings in Satellite Courts

At the hearing on 16 January, the Judge read testimony from a witness, Abdulrehap Kandemir. Mr. Kandemir is a serving prisoner. His evidence was heard at a local court, and the transcript of his evidence was read at the Ankara State Security Court to be included in the trial. None of the defendants are permitted to attend or participate in hearings which take place in local State Security Courts.

The ICJ/CIJL notes that the evidence of Mr. Kandemir, a prosecution witness, was exculpatory in nature, and therefore the ICJ/CIJL welcomes the fact that this evidence was adduced despite the fact it did not assist the prosecution case.

Nevertheless, the ICJ/CIJL, as has been discussed in previous reports<sup>10</sup> are extremely concerned about the practice of hearing the testimony of prosecution witnesses in local State Security Courts. Those concerns are summarised in the following way: different judges from those in Ankara hear the testimony which inevitably impacts on the consistency of approach to the evidence. The defence are restricted in their ability to question the witness effectively. No reasons have been given for not bringing those witnesses to give live evidence in Ankara.

Furthermore, the ICJ/CIJL is extremely concerned that the hearings in which the testimony of imprisoned witnesses took place were in the absence of the accused. The right to a fair trial enshrined in article 6(1) ECHR includes the right to hearings in the presence of the accused<sup>11</sup>. The defence lawyers have requested that the defendants be allowed to attend these hearings, but his application has been refused. There is no suggestion that the defendants have waived their right to be present or that the Turkish authorities have acted with any diligence to secure the defendants' attendance. Their absence prevents the defendants from fully participating in the trial. In particular they are prevented from effectively examining witnesses against them, as they are unable to consult with their lawyers and provide instructions during the hearings. It is therefore the view of the ICJ/CIJL that the exclusion of the accused from these hearings is completely unjustifiable and violates the right to a fair trial.

The ICJ/CIJL can see no reason that the witnesses who are imprisoned cannot be brought from their place of detention to give live evidence in the main court. Therefore, the ICJ/CIJL calls for an end to the practice of hearing parts of the trial in local courts

## III. Conclusion

It is regrettable that the State Security Court has not cured the defects identified by the ECtHR in 2001. Despite some positive rulings by the State Security Court, the ICJ/CIJL finds that, in the main, the fundamental right to a fair trial was not respected and implemented as required by the ECHR. In particular, the *violation of the principle of equality of arms* between the prosecution and the defence, the *violation of the right to liberty* because of the continued detention of the four defendants, the *violation of the presumption of innocence* due to the insufficiently valid legal reasons given for such a state of affairs, and the reasonable suspicion that the *Court is not an independent or impartial tribunal* for the reasons stated above, still prevail today.

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<sup>10</sup> Report on the retrial of Leyla Zana and three other Parliamentarians at Ankara State Security Court on 23 May, 20 June, 18 July, 15 August, 15 September and 17 October 2003, a report published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL).

<sup>11</sup> Ekbatani v Sweden (1988) 13 EHRR 504

The ICJ/CIJL urges the Government to ensure that at the next hearing, which has been scheduled for **20 February 2004**, the proposed restrictions on entry into a public hearing are not in fact imposed, and further that the abovementioned shortcomings are remedied in line with Turkey's international obligations.