INTERNATIONAL COMMISSION OF JURISTS
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" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

REPORT OF

THE RE-TRIAL OF LEYLA ZANA

AND THREE OTHER KURDISH

FORMER PARLIAMENTARIANS

Before

No. 1 ANKARA STATE SECURITY COURT

on

23 May, 20 June,
18 July, 15 August
15 September, 17 October
and 21 November 2003, and 16 January,
20 February, 12 March, 2 April and
21 April 2004

October 2004

A report published by the International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL) with the contribution of the Chambers of Lord Gifford, QC

Geneva, Switzerland

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I. Executive Summary

The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed observers[1] to monitor and report on the re-trial of **Leyla Zana**, **Selim Sadak**, **Hatip Dicle** and **Orhan Dogan**, all Kurdish former Members of Parliament of the ex-DEP (Democracy Party).[2] The re-trial took place before No.1 Ankara State Security Court and consisted of sixteen hearings beginning on 21 February 2003 and concluding with a guilty verdict on 21 April 2004.[3] The ICJ/CIJL monitored thirteen of the hearings which form the subject of the present report.[4]

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.[5] 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.*"[6] Following this ruling, Leyla Zana and her three co-defendants were granted the right to a re-trial.

The ICJ/CIJL is dismayed that after a prolonged re-trial, the judges of the Ankara State Security Court again found Leyla Zana and her former parliamentary colleagues guilty of "*membership of an armed gang*," confirming their 15-year prison sentence. In its judgement, the Court stated, "*…they are members of …the political wing of PKK which wants to establish a Kurdish State and who use their opinions [sic] as weapons of the PKK. Judgment no 1994/119 Basis 1994/183 dated 08.12.94 of our court is true, and no reason to necessitate its annulment could be identified.*"

On the basis of the observation of the hearings, the ICJ/CIJL welcomes practices which indicate that certain aspects of the right to a fair trial were respected. The ICJ/CIJL is satisfied that during each of the hearings, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal arguments and the testimony of witnesses in full. No limitations were placed on any of the lawyers making up the defence team of the defendants in the exercise of their professional duties, led by main defence lawyer, Mr. Yusuf Alatas of the Ankara Bar.

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[1] The following persons monitored the hearings in the re-trial of Leyla Zana and three other defendants: Mr. Paul Richmond, barrister of England and Wales, 23 May 2003 hearing; Ms. Linda Besharaty-Movaed, Legal Advisor, CIJL/ICJ 20 June 2003 and 2 April 2004 hearings; Mr. Stuart Kerr, barrister of England and Wales, 20 June 2003 hearing and all those that took place from 15 August and 21 April 2004; Dr. Patrick Vella, a former judge in the Courts of Malta, 18 July 2003 hearing. Mr. Richmond and Mr. Kerr both practise from the Chambers of Lord Gifford, Q.C., 8 King's Bench Walk Chambers.

[2] The pro-Kurdish DEP party was founded in May 1993 but was dissolved by the Turkish Constitutional Court on 16 June 1994. DEP MP's Mehmet Hatip Dicle and Orhan Dogan were taken into police custody on 2 March 1994 followed by the arrest of DEP MP Leyla Zana two days later. Selim Sadak was taken into police custody on 1 July 1994. See, "*Judgment in Leyla Zana and Fellow Kurdish MPs' Case to be delivered by European Court: After Eight Year Wait, Decision to be Handed down Tomorrow,"* Kurdish Human Rights Project, 10 June 2002.

[3] There were no hearings between 21 November 2003 and 16 January 2004.

[4] The ICJ/CIJL observed hearings on the following dates: 23 May 2003, 20 June 2003, 18 July 2003, 15 August2003, 15 September 2003, 17 October 2003, 21 November 2004, 16 January 2004, 21 February 2004, 12 March 2004, 2 April 2004 and 21 April 2004.

[5] *Sadak and Others v. Turkey*, ECtHR judgement of 17 July 2001, Series 201-VIII.

[6] Ibid.

Nevertheless, the ICJ/CIJL believes that in so far as the principles of *equality of arms* between the prosecution and the defence, the *independence and impartiality of the tribunal,* and the *presumption of innocence* are concerned, significant defects emerged. In summary, the ICJ/CIJL is concerned that a fair trial was undermined by the layout of the Court; the Court's disparity of approach to defence and prosecution lawyers, witnesses and evidence; the failure to require the prosecution to disclose relevant evidence; the lack of continuity of the composition of the judges' panel; and serious indications that the fundamental principle of the presumption of innocence was not respected.

Moreover, the ICJ/CIJL is concerned that the *guarantee of a trial within a reasonable time* was violated and that the *right to a public hearing* was unnecessarily limited. These are all factors that have led to a conclusion that the defendants were not afforded a fair trial.[7]

Furthermore, there is serious concern that the defendants' continuous detention from the date of their arrest in 1994 throughout the course of their re-trial, which ended on 21 April 2004, constitutes a violation of their *liberty and security* pursuant to Article 5 of the ECHR. Their detention took place in circumstances wherein: (1) the Court maintained its belief that the 1994 conviction was still valid despite the decision of the ECtHR, (2) the Presiding Judge allegedly commented that the defendants were guilty of the offences for which they were being tried, and (3) the trial proceeded at a rate of only one day per month, violating the Court's obligation to proceed with expedition where bail is refused.

The ICJ/CIJL is, moreover, alarmed about an allegation made by two of the defendants, Orhan Dogan and Hatip Dicle, at the hearing on 15 September that they had been inhumanely treated by security forces when they were being transferred from their place of detention to the Court. The ICJ/CIJL notes the failure of the Court to undertake any investigation and fears that the alleged inhuman treatment of the two defendants could have had a negative impact on their ability to participate effectively in the proceedings. The ICJ/CIJL calls on the judges or the prosecutor to instigate an independent and effective investigation into the incident and, if the allegations are found to be true, to employ appropriate sanctions against the perpetrators accordingly.

The ICJ/CIJL is pleased that the four defendants were finally released on 9 June 2004 pending an appeal of the decision of the State Security Court to the Court of Cassation. The ICJ/CIJL is furthermore satisfied at the decision of the Court of Cassation on 14 July 2004 to remand the case to the newly established Heavy Penal Court[8] yet is concerned that the prosecutors and judges may be the same as those in the first re-trial.[9]

In conclusion, given the serious concerns that were raised about the fairness of the proceedings throughout the re-trial, the ICJ/CIJL finds that the Ankara State Security Court failed to protect the defendants' rights to a fair trial and to liberty and security.

Consequently, the ICJ/CIJL reiterates its exhortation to the Turkish Government to ensure that it organises its justice system in order that all the provisions of the European Convention for the

[7] For a full discussion of each issue, please see Sections IV and V of this report.

[8] The Turkish Government abolished the State Security Courts in June 2004, replacing them with the new Heavy Penal Courts.

[9] The ICJ/CIJL will shortly issue a report on the proceedings at the Court of Cassation.

Protection of Human Rights and Fundamental Freedoms (ECHR)[10] are fully respected and implemented.

II. Introduction

The charge of "*membership of an armed gang*" against Leyla Zana and her co-defendants was pursuant to Article 168 of the Turkish Penal Code which provides as follows:

> "*Any person who, with the intention of committing the offences defined in Article 125*[11] *… forms an armed gang or organisation or takes leadership … or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.*
>
> *The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment.*"

The prosecution case was based firstly, on the activities that Leyla Zana and her co-defendants are alleged to have engaged in on behalf of the Workers Party of Kurdistan (PKK), namely, harbouring militants, negotiating with local leaders and threatening them as a way of forcing them to help the PKK establish itself in their regions. Secondly, the prosecution based its case on the content of oral and written statements made by the defendants in defence of Kurdish rights in which they allegedly expressed support for PKK activities.

The defence maintained that Leyla Zana and her co-defendants have never advocated the formation of a separate Kurdish state through armed action. Rather, through their speeches and writings they have sought to forge a peaceful, democratic resolution to the conflict between the Turkish government and its minority Kurdish population, a resolution in which the basic rights and distinct cultural identity of Turkey's Kurds are recognised by the Turkish state authorities. The defence argued furthermore that the political leaders associated with the Kurdish issue were being prosecuted solely in order to silence persons who have sought to criticise the Turkish government.

In hearings which took place on 21 February 2003, 28 March 2003 and 25 April 2003, the Court heard a total of 21 witnesses on behalf of the prosecution. However, various human rights groups expressed concern that the trial was not conducted in accordance with international fair trial guarantees. According to the London-based Kurdish Human Rights Project, at the hearing on 28 March 2003, "The Court denied requests from defence lawyers that the jailed parliamentarians be released pending the conclusion of the retrial; and that a member of the judiciary be removed due to his previous involvement in the case, raising concerns about impartiality."[12] The International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), after observing the hearing on 25 April 2003 commented that they were, "alarmed to witness repeated delays in this trial, as well as obvious violations of the rights of defence, which give evidence of continuing

[10] Turkey ratified the ECHR in 1954.

[11] Article 125 of the Turkish Penal Code provides:

> "It shall be an offence punishable by death to commit any act aimed at subjecting the State or part of the State to domination by a foreign State, diminishing the State's independence, breaking its unity or removing part of the national territory from the State's control."

[12] *European Court Orders Turkey to Grant Retrial for Leyla Zana and Others*, Newsline Issue 21 Spring 2002 p.10.

malfunctioning of the judicial system in Turkey despite recent legal reforms adopted by Turkey in the framework of EU accession. The observer indeed noticed restrictions placed upon the lawyers' ability to question the witnesses during the hearing."[13]

Based on its observation of all subsequent hearings in the re-trial, namely from May 2003 to July 2004, the ICJ/CIJL finds that concerns relating to the right to a fair trial by an independent and impartial tribunal remained outstanding throughout.

III. Legal Framework

The ECHR is the primary binding regional instrument to have been ratified by Turkey. In December 2003, Turkey ratified the International Covenant of Civil and Political Rights (ICCPR) but not the First Optional Protocol, which allows for individual petition.[14] Article 90 of the Turkish constitution establishes that international treaties ratified by Government and approved by the Grand National Assembly, have the force of law.

Relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948, the UN Basic Principles on the Independence of the Judiciary of 1985[15] and the UN Basic Principles on the Role of Lawyers of 1990.[16]

Article 6 of the ECHR guarantees the *right to a fair trial* in criminal proceedings. The object and purpose of the provision is "to enshrine the fundamental principle of the rule of law."[17] The principle that there should be *equality of arms* between the parties before the Court is of fundamental importance to the notion of a fair trial under this Article. Each party in a case is to have a reasonable opportunity of presenting its case to the Court under conditions which do not place that party at substantial disadvantage vis-à-vis its opponent.[18] The equality of arms principle also necessitates that there be parity of conditions for the examination of witnesses. Article 6 further provides that everyone is entitled to a fair and public hearing by "*an independent and impartial tribunal established by law*."

Article 5 of the ECHR guarantees the *right to liberty and security of the person*. Where a person is detained for the purposes of bringing him or her before a Court for trial on a criminal charge, that person should be brought promptly before a judge or a competent officer authorised to exercise judicial power in deciding to release that person on bail or to continue detention.[19]

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[13] Joint FIDH and OMCT Press Release: *Turkey: Release jailed Kurdish deputies* 29 April 2003.

[14] Turkey also made a reservation to Article 27 of the ICCPR relating to minority rights.

[15] *Basic Principles on the Independence of the Judiciary*, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, endorsed by General Assembly Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985. See G.A. Res. 40/32, UN GAOR, 40th Sess., Supp. No. 53, at 204, UN Doc. A/40/53 (1985); Res. 40/146, UN GAOR, 40th Sess., Supp. No. 53, at 254, UN Doc. A/40/53 (1985).

[16] *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 1990. G.A. Res. 45/121, 45th Sess.

[17] *Salabiaku v. France*, ECtHR judgement of 7 Oct. 1988, Series A141-A para. 28.

[18] *Kaufman v. Belgium,* ECtHR decision on admissibility of 9 December 1986.

[19] *Abdoella v. The Netherlands*, ECtHR judgement of 25 Nov. 1992, Series A248-A.

Pursuant to Turkey's recent legal reforms (the "harmonization packages"), persons who have suffered a violation of their rights under the ECHR as a result of a court judgement in Turkey now have the right to a re-trial.[20]

IV. Violation of the Right to a Fair Trial

Several irregularities noted during the course of the hearings indicate that the defendants were not treated in a manner that ensured their procedurally equal position during the course of the trial, that the principle of the presumption of innocence was not upheld and that several minimum fair trial standards as recognised by international law were not respected:

(1) Presumption of innocence

Everyone has the right to be presumed innocent, and treated as innocent, until and unless they are convicted according to law after a fair trial.[21] The right to presumption of innocence requires that judges refrain from prejudging any case. There are indications that in the present case, Judge Mehmet Orhan Karadeniz, the Presiding Judge, may not have accorded the defendants this fundamental right. According to Mr. Yusuf Alatas, the highly respected lead counsel in this case, pursuant to domestic law, the defence had to make a formal request to the Court for a re-trial. On this occasion, the two wing members of the bench agreed to grant a re-trial, however, the Presiding Judge refused to do so. According further to Mr. Alatas, in refusing the application for a re-trial Presiding Judge commented in open Court to the effect that, "*the deficiencies and mistakes identified by the European Court of Human Rights will not change the guilt of the accused*." This alleged public pre-trial comment must cast serious doubt upon the impartiality of the Presiding Judge. If true, the alleged statement demonstrates that prior to the commencement of the trial, the judge held a pre-formed opinion as to the guilt of the defendants and that that opinion would be likely to weigh on his ultimate decision regardless of the evidence put before him. The ICJ/CIJL Observer was informed that in light of the prejudicial comment, the defence applied for the Presiding Judge to be recused, however, that application was turned down.

In addition, the Observer was informed by his interpreter and by defence counsel that in the re-trial, the prosecution and the judges frequently referred to the defendants as the "convicted" ("*hukumlu*"). Indeed, the Observer himself read the word *hukumlu* to describe the accused at the hearing on 2 April 2004. He read this on a large screen connected to the court computer that was erected in court in order that the defence and those seated in the public gallery could read what was being entered into the court log. The ICJ/CIJL considers that the use of such prejudicial terminology is another indication that the judges have actually formed or at least gives the impression that they have a pre-formed opinion of the defendants' guilt.

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[20] *Presentation on the Independence of the Judiciary and the Legal Profession in Turkey* (April 2004) by Paul Richmond, Barrister of England and Wales <www.icj.org> See also, Amnesty International, *Concerns in Europe and Central Asia, Turkey, January – June 2003* which states, "A second 'adjustment package' that came into effect on 4 February [2003] granted the right to automatic retrial for those who the European Court of Human Rights (ECHR) had ruled had suffered a violation of the European Convention of Human Rights as a result of a Court judgment in Turkey. This opened the way for a retrial of the four imprisoned Democracy Party (DEP) deputies - Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak - who, according to an ECHR ruling, had been found not to have received a fair trial in 1994." p.2.

[21] Article 6(2) of the ECHR states, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Another indication that the presumption of innocence was not respected was that at the conclusion of the hearing on 20 June 2003, counsel for the defence made an application for each of the defendants to be released. The prosecution objected to the defendants' release and the application was refused on the ground that the Court maintained its belief that the conviction reached in 1994 was still valid despite the fact that the ECtHR had ruled to the contrary.

Further, it is apparent from reading the full transcript of the Court's judgment that the Court approached the task of conducting a re-trial merely as a review of the original verdict in 1994, and not, as should have been the case, to consider the evidence afresh in a trial *de novo*. For example, in the last paragraph of the conclusions, the judgment reads: "*…they are members of …the political wing of PKK which wants to establish Kurdish State and who use their opinions [sic] as weapons of the PKK. The judgment no 1994/119 Basis 1994/183 dated 08.12.94 of our court is true, and no reason to necessitate its annulment could be identified.*" The ICJ/CIJL is of the view that the Court's rationale demonstrates the large extent to which the 1994 verdict played a significant part in informing the Court's decision.

This reasoning, read in conjunction with both the use of the word the "convicted" to refer to the defendants and allegations that the Presiding Judge had commented on the guilt of the defendants in a pre-trial application,[22] lead the ICJ/CIJL to conclude that there has been a violation of the presumption of innocence enshrined by Art. 6(2) ECHR. Where a judge expresses an opinion suggesting that he has formed an untimely impression of guilt, this has been held to violate the presumption of innocence doctrine.[23]

Concerns that the judges conducted the trial with preformed opinions about the guilt of the accused are compounded by the manner in which evidence in support of the defence or prosecution evidence which tended to exonerate the accused was handled. For example, the prosecution asserted that Leyla Zana was in part responsible for kidnapping a witness, Ali Dursun, and forcibly recruiting him for the PKK. The prosecution relied on testimony from the witnesses' father, Abdullah, to establish this allegation. However, testimony from Ali Dursun himself refuted the allegation and exonerated Leyla Zana of any criminal involvement. Nevertheless, no reasons were provided in the judgment for doubting the validity of Ali Dursun's testimony and preferring the evidence of other witnesses.

The ICJ/CIJL considers that on crucial matters of factual dispute, the Court has a duty to provide adequate reasons for preferring one version of events to another. In this instance, the ICJ/CIJL forms the view that the seemingly unquestioning acceptance of inculpatory evidence without any consideration of contrary evidence demonstrates yet again that the judges held a pre-determined view of the defendants' guilt thereby violating the defendants' right to be presumed innocent.

(2) The layout of the court

[22] See, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three Other Kurdish Former Parliamentarians before No. 1 Ankara State Security Court on 23 May 2003*.
[23] *Ferrantelli and Santangelo v. Italy*, ECtHR judgement of 7 August 1996, Series 1996-111, paras. 59-60.

The layout of the State Security Court and the physical proximity of the judges and the prosecutor, as is customary in Turkish courts, gave rise to legitimate grounds for fearing that the right to a fair trial was not respected and that the tribunal may have been submitted to external influence, thereby jeopardizing its independence and impartiality.

At the beginning of each hearing and after every adjournment, the prosecutor and the judges simultaneously entered the Courtroom from the same door whilst the defence team entered the Courtroom from a side door along with the public. When the judges rose to consider in chambers any applications made by the defence, such as the application for the release of the four defendants, the prosecutor also retired with the judges to chambers, thus providing ample opportunity for discussion of the case in the absence of the defence.

In fact, on 20 June, when the judges rose to consider a defence application, it was possible from the public gallery to see into the anteroom and view the prosecutor conversing with one of the panel of judges during deliberations. The ICJ/CIJL Observer also noted that the prosecutor sat sufficiently close enough to the wing member of the judge's panel such that a file could be easily passed between them without reference to the defence. This created the impression that the prosecution and the judges are one and the same thus violating the fundamental principle that "*justice must not only be done, it must also be seen to be done*."[24]

On another occasion, two judges entered the Courtroom while the prosecutor and the Presiding Judge stayed behind and entered together a few minutes later. This gave the impression that the two had been conversing in chambers. Further, on 15 August, the Presiding Judge began proceedings by informing the Court that one of the witnesses for the prosecution who was due to attend to give evidence was not in attendance to do so. As this information came directly from the Presiding Judge and not, as would have been expected, from the prosecutor, the inference drawn was that the Judge had been provided with this information directly from the prosecutor outside of the Court.

Furthermore, throughout the proceedings, the prosecutor sat on an elevated platform next to the judges while the defence lawyers were relegated to a table at ground floor level at the same level as the public and the defendants. This leaves the undeniable impression that in Turkish courtrooms prosecutors are given more importance and are held in higher esteem than defence lawyers. This observation is reinforced by the fact that the prosecutor, like the judges, was provided with a computer which enabled him to see the records of the proceedings as they were being entered into the record by the Court stenographer. The defence, however, was not provided with a computer.

It is recognised though that on 2 April and 21 April 2004, a large screen connected to the court computer was erected so that the defence lawyers and the public alike could benefit from reading the court record as is was being typed by the court stenographer. The ICJ/CIJL commends this progress but regrets that it was tardily taken.

The ICJ/CIJL is also seriously concerned that the physical layout of the court was such that the defence lawyers were placed at quite a distance from the defendants in a way that no communication between them was possible during the hearing. In fact, defence counsel informed the Observer that the defence lawyers could not communicate with the defendants either during the trial or during the

[24] *Delcourt v Belgium, ECtHR judgment of 17 Jan. 1970, Series A11, para.31.*

breaks when the session was adjourned. Defence counsel stated that the only time that he could speak with his clients was at their place of detention.

The defendants themselves sat in a place expressly reserved for them, facing the Court and in between the Court and the public. During the entire hearing, defendants were surrounded by at least six military personnel armed with machine guns. Also, armed policemen were placed in various positions around the Courtroom. The visual effect of the four defendants surrounded by heavily armed guards with machine guns was jarring, giving the impression that their guilt had been pre-determined. It is clear that the presence of the guards, compounded by the inability of the defendants to communicate with their counsel during the hearing negatively impacted their ability to participate in the proceedings effectively.

The ICJ/CIJL is furthermore concerned that the large Courtroom was not equipped with a public address system. The interpreter confirmed that it was quite difficult sometimes to hear and understand what witnesses were stating, and in particular, what the Presiding Judge was saying or dictating as he spoke in a very low and subdued voice making it extremely difficult to hear him. It is quite inconceivable how such a system is lacking in this day and age, especially when the same Courtroom is equipped with other modern technological facilities, such as computers, a direct recording system, air conditioning, etc. Not having a public address system is of a matter of great concern when one recalls that the re-trial, in accordance with the standards enunciated in the ECHR, has to be an open and public hearing and one in which anyone attending can clearly see, hear and follow all that is happening without any hindrance whatsoever.[25] The ICJ/CIJL Observer and interpreter sat on the very first bench directly behind the defendants and nevertheless, had to pay extreme attention to hear what the Presiding Judge was saying. As mentioned earlier, this concern was in part remedied on 2 April and 21 April by the erection of a screen connected to the court computer, which enabled the public and the defence lawyers to read what was being entered into the court log. However, there had been thirteen previous hearings where this screen had not been provided.

The ICJ/CIJL therefore concludes that (i) the lay-out of the Court, (ii) the disparity in the treatment of the defence and the prosecution, (iii) the actual and perceived ability of the prosecutor to have contact with the judges at the exclusion of the defence, (iv) the obstacles preventing communication between the accused and their lawyers, (v) the presence of guards with machine guns around the defendants, and (vi) the difficulty for the defence and the public to hear what the judge was recording into the court record all give rise to a significant fear that the principle of equality of arms was not being respected and that the tribunal was neither impartial nor independent.

(3) Examination of defence witnesses

The ICJ/CIJL is concerned by the disparity between the manner in which the prosecution and defence were allowed to adduce oral evidence from witnesses as well as by the disparate manner in which evidence was recorded in the court log.

[25] *Stanford v UK*, ECtHR judgment of 23 Feb. 1994, Series A282-A para. 26.

At the conclusion of the prosecution case on 23 May, the defence lawyers applied to the Court to call witnesses on behalf of the defence.[26] The prosecutor resisted the application on the grounds that as a long period of time had elapsed since the facts that gave rise to the alleged offence took place, the witnesses would not be able to assist the Court in disclosing any relevant evidence. The judges thereafter refused the defence application to call and examine defence witnesses, citing in support of their decision the reasons advanced by the prosecutor.

Whilst it is recognised that equality of treatment between the prosecution and the defence does not necessarily require the attendance and examination of every witness the defence wishes to call,[27] in the opinion of the ICJ/CIJL, it must be questionable whether the decision of the State Security Court was compatible with Article 6 of the ECHR given that 1) the decision applied to *all* potential defence witnesses without exception, 2) the defendants face a sentence of 15 years imprisonment for a serious offence, and 3) the testimony of the witnesses will provide the defence with their only means of proving various disputed points. Moreover, in the opinion of the ICJ/CIJL, the reasons relied on by the Court for denying the defence the opportunity of calling and examining witnesses in support of the defence case may potentially violate Article 6. It would appear that the reasons advanced for not permitting the attendance and examination of the defence witnesses (i.e. that too long period of time has elapsed since the facts which gave rise to the alleged offence took place and the witnesses would not therefore be able to assist the Court in disclosing any relevant evidence) would apply equally to the prosecution witnesses. Yet the Court was prepared to hear oral testimony from no fewer than 26 prosecution witnesses. The decision of the State Security Court not to permit the defence to call and examine witnesses in support of its case subjected the defence to a procedurally inferior position vis-à-vis the prosecution in contravention of the principle of the equality of arms.

The ICJ/CIJL welcomes the fact that at the hearing on 20 June, contrary to the previous ruling where the defence was not allowed to call any witness, 4 witnesses for the defence were allowed to testify and that at the 18 July hearing, the defence was allowed to call 6 additional witnesses.

The ICJ/CIJL is, however, concerned that at the 17 October hearing, the judges did not allow another defence witness, Ahmet Turk, to testify, adopting the prosecution's objections as their reasons for the refusal. It was said that it would be wrong for Mr. Turk to give evidence since he had originally been a defendant in the initial trial in 1994.

It is the view of the ICJ/CIJL that the ruling to refuse the defence's application to call witnesses to give evidence violates article 6(3)(d) ECHR in that the defence was prevented from securing the attendance and examination of a witness on behalf of the defendants under the same conditions as witnesses against them.[28] The Observer was informed that there is no provision in domestic legislation which supports the Judges' ruling. Moreover, the reason given for disallowing the testimony of Mr. Turk appears to be deficient, given that several witnesses on whom the prosecution rely are convicted felons, who are serving terms of imprisonment at the time of these proceedings.

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[26]Defence counsel informed the Observer that defence witnesses would include new witnesses whose testimony had not been heard at the first trial.

[27] *Engel and Others v. Netherlands,* ECtHR judgment of 8 June 1976, Series A 222 para. 91.

[28] Art. 6(3) ECHR states, "Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

Furthermore, despite the fact that some defence witnesses were allowed to testify, it is a matter of great concern that normal procedure in criminal trials in Turkey precludes the defence from *directly examining* the witnesses. Rather, as in the instant case, it is the Presiding Judge who examines the witnesses. After putting forth his questions to the witnesses, the Presiding Judge simply summarized what he felt each of the witnesses said and thereafter dictated his summary to the Court stenographer, after the defence and prosecution clarified some points as summarized by the judge or indicated that they had nothing to add to what the judge had asked.

The fact that defence witnesses were examined solely by the Presiding Judge and not directly by the defence who called them is worrying and the ICJ/CIJL believes that this procedure could easily be improved upon and brought in line with the requirements of the ECHR regarding the examination of witnesses. Nothing can be more fundamental to ensure a fair trial than to have everything a witness states recorded *verbatim* into the Court record. This is the only way of examining witnesses which would not give rise to doubts and suspicions as to what a witness had actually stated. Hardly any notes were taken during the evidence given by each of the defence witnesses and the Presiding Judge seemed largely to rely upon his memory of what each witness had said in reply to his questions. This system of examining witnesses in Turkey inevitably leaves room for doubt as to the veracity or accuracy of the Court record as it is based solely upon the Presiding Judge's recollections and summaries of statements of defence witnesses.

The examination of prosecution witnesses was, however, radically different in that all testimony given by these witnesses was taken down directly by the Court stenographer and kept in the records of the case.

The ICJ/CIJL therefore believes that the defence was placed in a procedurally inferior position vis-à-vis the prosecution as: 1) several defence witnesses were not allowed to testify while all witnesses for the prosecution were allowed to do so; and 2) the procedure for examining witnesses varied substantially between witnesses for the prosecution and witnesses for the defence, to the prejudice of the former.

(4) Cross-examination of prosecution witnesses

(a) Equal conditions for cross-examination

In addition to the disparity between the manner in which the prosecution and defence were allowed to examine witnesses, there lacked parity of conditions for the cross-examination of these witnesses as well. Whereas the prosecutor was able to ask questions *directly* of the witnesses called in support of its case, the defence could not cross-examine those prosecution witnesses and was required to put its questions to the judge who, if he decided that the question was appropriate, would rephrase it and put it in terms that he deemed appropriate. This procedure took place within the hearing of the prosecution witnesses.

This circuitous and unusual procedure for cross-examination of prosecution witnesses, which is common to all criminal trials in Turkey, prevents the defence from effectively challenging the prosecution witnesses' testimony. It furthermore puts a potentially unreliable witness on notice of the challenges to his/her evidence and provides him/her with the opportunity to manufacture a suitable but incorrect answer. Furthermore, the defence is prevented from examining witnesses in terms which

accord with their trial strategy. For example, in the hearing on 23 May. the defence sought to question a Kurdish-speaking prosecution witness as to the identity of the interpreter who had translated his oral testimony into Turkish for the purposes of his witness statement. The prosecution objected to this question and the Presiding Judge ruled that the witness need not answer the question because it was not relevant. In the opinion of the Observer, the defence line of questioning was highly relevant in so far as it sought to adduce evidence indicating that the witnesses' interpreter was, in fact, a *gendarme officer* and therefore not impartial.

The defence also sought to cross-examine another prosecution witness as to his political allegiance. The prosecution objected to this question and the Presiding Judge again ruled that the witness need not answer the question because it was not relevant. In the opinion of the Observer, the question was indeed relevant in so far as the defence sought to adduce evidence to the effect that the prosecution witness was actively involved in the Nationalist Action Party (MHP), an ultra-nationalist party whose primary concern is to fight Kurdish separatism and Kurdish political aspirations in Turkey, and therefore not impartial. The defence question was therefore highly relevant to the issue of the credibility of the prosecution witness.

Furthermore, another witness for the prosecution, whose first language was Kurdish, was not provided with an interpreter in the Courtroom, as a result of which he could not understand defence counsel's questions. This witness had, with the assistance of an interpreter, prepared a statement written in Turkish. At the hearing on 23 May, he adopted this statement as his evidence-in-chief at the re-trial. The witness was then tendered for examination by counsel for the defence, however no interpreter was provided. Due to the witness's extremely limited understanding of Turkish (the language in which all Court proceedings are conducted in Turkey), he was unable to fully understand many of the questions put to him by the defence, remarking on several occasions, "I speak very little Turkish," "My Turkish is not very good," "I don't understand."

The ICJ/CIJL is deeply dismayed at the inequality of arms in so far as the prosecution was able to benefit from the witness giving his evidence-in-chief (the written statement) in his first language, Kurdish, but the defence was required to cross-examine the witness in Turkish, a language of which the witness had only an extremely limited understanding. In order for the prosecution and defence to have been afforded a procedurally equal position, a Kurdish-Turkish interpreter ought properly to have been provided for the cross-examination of the witness. In the absence of an interpreter, the Court ought to have adjourned the testimony of the witness until a later date when an interpreter would have been available.

(b) Anonymous witnesses

Most alarmingly, at the hearing of 17 October, in furtherance of the prosecution case, written testimony of a prosecution witness, Ejder Pagal, who is a serving prisoner was adduced. The judge read Mr. Pagal's written statement as this witness himself was not in attendance at court. Mr. Pagal's testimony was particularly damning as he alleged that he saw Leyla Zana conversing with Abdullah Ocalan, the former leader of the PKK, at a PKK camp. His testimony also indicated that it was not possible for him to be recognised as he had undergone cosmetic surgery to alter his appearance. It was said that a lawyer from the defence team was present when his statement was taken but that she was not allowed to ask any questions of the witness.

The ICJ/CIJL is alarmed about the manner in which the testimony of this witness was introduced as evidence. The judges gave no explanation as to why it was not possible or desirable to have the witness produced at court, especially given that live testimony of other serving prisoners has in fact been adduced in the course of the trial and susceptible to cross-examination, albeit through the judge.

Moreover, there are serious question about the reliability of the evidence given that the identity of the witness is open to question. While it is recognised that the anonymity of witnesses may be justifiable in order to ensure their safety, the ICJ/CIJL is not satisfied that the judges took any steps to ensure the reliability of the evidence, either in content or its source, in order to counterbalance the significant disadvantage under which the defence were accordingly placed wherein it was provided no opportunity to examine the witness and did not receive any safeguards that the identity of the witness had been verified.[29] Further, no reasons were given as to why this particular witness was entitled to the protection of anonymity, while no other witnesses, including other serving prisoners and former associates of the defendants, were not afforded this protection. Depriving the defendants of any information about the anonymous witness such that they could challenge his testimony significantly detracted from the actual and perceived fairness of the proceedings.

(c) Hearings in satellite courts

At the hearing on 16 January 2004, the Presiding Judge read the deposition of a witness, Abdulrehap Kandemir, a serving prisoner, who had testified at a local court. The deposition of his oral evidence was included as part of the evidence as a whole. At the hearing on 12 March 2004, the judge read testimony from another witness, Ali Dursun, who is also a serving prisoner. He, too, gave testimony at a local court in Bursa and the transcript of his testimony was read at the Ankara State Security Court in the same way. None of the defendants were permitted to attend or participate in either of these hearing or other hearings which took place in the local State Security Courts and no reasons were given for not bringing the two witnesses to give live evidence before the Ankara State Security Court.

The ICJ/CIJL notes that Mr. Dursun and Mr. Kandemir's testimony, both of whom are prosecution witness, was exculpatory in nature. The ICJ/CIJL thus welcomes the fact that this evidence was adduced despite the fact it did not assist the prosecution case.

Nevertheless, the ICJ/CIJL is extremely concerned about the practice of hearing the testimony of prosecution witnesses in local State Security Courts as different judges from those in Ankara hear the testimony which inevitably impacts on the consistency of approach to the evidence.[30]

More seriously, 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.[31] The defence

[29] On examining anonymous witnesses generally see, *Doorson v Netherlands*, ECtHR judgment of 26 March 1996, Reports 1996-11. In *Doorson*, unlike in the present case, the witnesses were extensively questioned, both by the investigating judge and by the applicant's lawyer, para 60.

[30] *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).

[31] *Ekbatani v Sweden*, ECtHR judgement of 26/05/1988, Series A 134. In *Ekbatani* the Court found that as the appellate court was examining the case on both facts and the law including making a full assessment of applicant's guilt or innocence, there was no justification for denying the applicant a public hearing or the right to be heard in person.

lawyers requested that the defendants be allowed to attend these hearings but their application was refused. This severely restricted defence's ability to cross-examine the witnesses. There is no suggestion that the defendants waived their right to be present or that the Turkish authorities acted with any diligence to secure the defendants' attendance at the satellite courts. There was also no reason that the imprisoned witnesses could not be brought from their place of detention to testify at the Ankara State Security Court.

It is therefore the view of the ICJ/CIJL that the unjustifiable exclusion of the defendants from the hearings in the satellite courts prevented them from effectively examining witnesses against them and fully participating in their own trial in violation of fair trial provisions enunciated Art. 6(3) of the ECHR.[32]

(5) The defence was prevented from adducing relevant evidence

In the hearing observed on 23 May and at previous hearings, several prosecution witnesses gave evidence as to the distance between a coffee shop where the defendants were alleged to have held a meeting in support of the PKK and a gendarme station. The evidence of the prosecution witnesses ranged from 60 metres to 700 metres. In that hearing, counsel for the defence applied to the Court to have an independent examiner appointed in order to undertake an official measurement of the distance between the coffee house and the gendarme station. The prosecution objected to the application and the Court refused to grant the defence request.

The refusal of the Court to grant the defence application is a further instance of the substantially disadvantaged position of the defence vis-à-vis the prosecution. The measurement evidence, which according to Turkish law could only have been obtained by an independent Court appointed examiner, would have been highly probative of the credibility of the prosecution witnesses. The failure of the Court to request that such evidence be obtained denies the defence an effective opportunity to challenge the prosecution case and effectively advance its own case and casts doubt upon the willingness of the Court to subject the evidence of the prosecution witnesses to any detailed scrutiny. The ICJ/CIJL recalls that the equality of arms principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself.

(6) The prosecution failed to disclose material evidence against the accused

During the course of the hearing observed on 23 May, a prosecution witness produced an audiocassette which he alleged contained a recording of his conversation with the defendants in which they reportedly expressed support for the PKK. This cassette was not disclosed to the defence prior to the trial. The defence was thereby denied the opportunity of having any knowledge of and commenting on material evidence introduced by the prosecution.

It transpired that the original audio-cassette contained a recording of a conversation held in Kurdish, but that this had subsequently been translated into Turkish and the cassette produced by the

[32] "Everyone charged with a criminal offence has the following minimum rights (c) to defend himself in person…"

prosecution witness in fact contained the Turkish translation. Upon a request from the defence, the prosecution agreed to disclose the Turkish version of the recording but not the original Kurdish version. The Presiding Judge refused the defence application for disclosure of the original Kurdish recording.

The failure of the prosecution to disclose either the Turkish or Kurdish version of the audiocassette prior to the trial inevitably affected the conditions under which the defence conducted the cross-examination. It was clearly denied the opportunity of familiarising itself with the evidence before the hearing and commenting on its existence, contents and authenticity. Perhaps even more worrying, however, is the decision of the judge not to order disclosure of the cassette that allegedly contained a recording of the original conversation in Kurdish. Without a copy of the original Kurdish conversation, the defence is fundamentally prejudiced in two key respects. First, it has no means of testing the prosecution witness's claim that the voices on the cassette are in fact those of the defendants; and second, no means exist for testing whether the translation of the Kurdish conversation into Turkish that has been admitted into evidence is in fact an accurate translation.

(7) The recording of legal submissions of the defence and statements of the defendants

The ICJ/CIJL is concerned that the principle of equality of arms was not fully respected in so far as the prosecutor's submissions to the Court were entered directly into the Court record in his own words, whilst the defence lawyers and defendants were barred from dictating defence submissions and speeches directly into the record. Instead, the defence had to rely upon the judge to summarise (rather than repeat verbatim) the defence submissions which were then entered into the Court record. The ICJ/CIJL considers that this procedure, which is common to all criminal trials in Turkey, fails to comply with the principle of equality of arms in so far as it places the defence at a substantial disadvantage in relation to the prosecution.

The ICJ/CIJL is concerned that the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it prevents defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed deprives appellate Courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower Court.

The ICJ/CIJL understands that although during the hearing the defence can object to the judge's summary, however, acceptance of this objection is within the judge's discretion. At the conclusion of the hearing, the defence lawyer has no right to object to how his/her argument is summarised in the record. In several of the hearings observed, defence counsel did seek to challenge the judge's summary on at least two occasions and on both occasions the judge amended his summary.

Further, at each hearing, the defendants were allowed to make a statement in support of his or her defence. However, it was noted that, as with the defence lawyers' submissions, statements by the defendants to the Court, were neither recorded *verbatim* in the Court record by the Court stenographer

nor were summarised by the judge for inclusion in the Court record.[33] The ICJ/CIJL is of the opinion that this procedure gives the impression that submissions by defence counsel as well as those by the defendants themselves are not afforded the weight that is given to submissions by the prosecutor, in violation of the principle of equality of arms between the prosecution and the defence.

(8) Continuity of the judges' panel

The Observer present at the 15 August hearing noted that at that hearing the panel of judges was differently composed from the proceedings that the same Observer monitored on 20 June. One wing member of the panel in June presided on 15 August and the wing members were, as far as the Observer was able to ascertain, entirely new to the proceedings.

Further, on 15 September, the Observer noted that the panel of judges was yet further re-composed. The Presiding Judge from 15 August returned to his role as a wing member, while another wing member from 20 June presided in September.

The ICJ/CIJL is concerned that the change in judicial personnel has a negative impact upon the ability of the Court to render a fair verdict based on the totality of the evidence. The ICJ/CIJL believes that it is an impossible task to reach a verdict when the Judges making the decision will not have heard all of the evidence and will therefore have to rely on the record of proceedings, which, has already been noted, is a source of concern itself, given the inaccurate and prejudicial manner in which proceedings are recorded. The ICJ/CIJL is of the opinion, therefore, that the lack of continuity in the panel of judges significantly impacts on the fairness of the trial.

(9) Alleged mistreatment of defendants

At the hearing on 15 September, an allegation was made by two of the defendants, Orhan Dogan and Hatip Dicle, that security forces had treated them inhumanely while they were being transferred to Court. Mr. Dogan and Mr. Dicle informed the Court of the alleged treatment when they made their statements to the Court, however, details of the alleged mistreatment were not given. When the judge was summarising the defendants' statements for the Court record, he had to be reminded by the defence lawyers to include a reference to the allegation in his summary. However, neither the Court nor the prosecutor requested an investigation into the allegations or reprimanded the security forces for such behaviour. Defence counsel informed the Observer that failure to undertake any investigation into mistreatment so that the alleged perpetrators could at least be warned about their conduct is not normal procedure.

While the ICJ/CIJL welcomes the fact that the Presiding Judge noted the complaint for the Court record, concerns still remain as to whether any further action will be taken by either the judges or the prosecutor in this regard. If defendants' allegations are true, the ICJ/CIJL believes that this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants prior to the trial, thereby limiting their ability to participate effectively in the proceedings. The failure to investigate the incident leads to a perception that the Court did not take the attacks

[33] On some occasions the defendants provided copies of their statements to the Court.

seriously enough to launch an investigation, or that even if it does take the matter seriously, it does not have any power over the security forces. The Turkish authorities have a positive obligation under the ECHR to ensure those under its jurisdiction are not subjected to inhuman and degrading treatment, and if there are such allegations, then the authorities are obliged to undertake a rigorous, independent investigation.

(10) The right to a public hearing

At the conclusion of the hearing on 16 January 2004, the Presiding Judge 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 that was seated in the public gallery broke into applause for the defendants. As a consequence, Judge Karadeniz 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 applied universally to all members of the public.

On 20 February 2004, police were stationed at the boundary of the court precinct in order to check the identity of those who wished to enter the court building. Additional police were stationed inside the court building to monitor those who passed the security checks into the building. The police were furnished with a list of individuals said to have attended the trial on 16 January.

The Observer noted that there were dozens of members of the public who were prevented from entering the court precinct, and others, including one lawyer who was partially impeded. The Observer was ordered not to watch what was happening by a member of the police and was thereafter hindered in monitory public access to the court precinct. Inside the court building, police checked the identity of those who had been permitted to proceed against a list of names. Concerns about the accuracy of the list arose from the fact that the name of one member of the delegation from the European Parliament appeared on the list although in fact this individual had not attended the trial on 16 January 2004.

The number of persons who attended the hearing on 20 February was significantly reduced, from approximately 400 for each of the previous hearings observed to approximately 75. It is considered that such a numerical discrepancy can be explained in part by the effectiveness of the police in deterring the public and also by the fact that many people, discouraged by the Judge's remarks in January, stayed away from the hearing. In addition, a newspaper reported that twelve people had been actually been refused entry into the court.[34]

On 12 March, police were again stationed at the entry of the court precinct in order to prevent members of the public from attending the hearing. As at the hearing in February, the numbers of those who succeeded in gaining access to the court was significantly reduced. Again, only approximately 75 members of the public were able to observe the trial.

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 interest of morals, public order or national security in a democratic society…*" Similarly, Article 14(1) of the International Covenant on Civil and Political

[34] *Turkish Daily News*, 21 February 2004.

Rights states in relevant part that, "The press and public *may be excluded from all or part of the trial for reasons of morals, public order (ordre public) or national security in a democratic society…"*

Article 23 of Turkish 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 notes that the public character of criminal proceedings is a crucial means by which confidence in the justice system can be maintained. However, the ICJ/CIJL also 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, and therefore susceptible to scrutiny, (including expert scrutiny).

However, for the following reasons, the ICJ/CIJL remains concerned about the exclusion of members of the public who attended the hearing in January. First, the ICJ/CIJL notes that the applause to which the Presiding Judge objected did not in fact interfere with the proceedings as it took place only *after* the conclusion of the hearing. Second, the members of the public who had attended not only the hearing in January but also all previous hearings, had in the main behaved impeccably, demonstrating deference and respect to the Court. Third, no investigation was undertaken to ascertain who in fact had applauded. Consequently, there was a real risk that those who had not applauded were excluded from the hearing, 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. Fifth, there was no indication from the judge that the exclusion sanction that he imposed would continue at future hearings beyond the hearing of 20 February.

As indicated above, the unfettered right to a public hearing is a fundamental principle enshrined in the ECHR. The ICJ/CIJL is of the opinion that the Presiding Judge's exclusion of a large number of the public from the hearing constituted a disproportionate response to any pressing social need, and therefore not justified. Further, because of the high profile of this trial, the public character of these proceedings assumes a greater importance. While the ICJ/CIJL welcomes the fact that members of the international community and official observers were not prevented from attending the trial, it is also noted that the right to a public hearing primarily affects and benefits the local community. Public confidence in the justice system emanates first from those whom it affects, namely the Turkish people.

(11) The right to be tried within a reasonable time

At the hearing on 21 November 2003, the prosecution had not succeeded in securing the attendance of any of the four witnesses who were due to attend to give evidence. No satisfactory reasons were provided for the failure of the prosecution to secure the attendance of the witnesses, especially given the fact that two of the witnesses were well-known professionals who could be easily located at their place of work. After speeches from the defendants and submissions from the lawyers for the defence, the trial was adjourned until 16 January 2004. No reasons were given for such a lengthy adjournment.

At the hearing on 20 February 2004, the court was due to hear a deposition from a prosecution witness who is detained in prison in Bursa. However, no deposition had been taken, and therefore the trial was not able to proceed as planned. No satisfactory reasons were provided for the failure of the prosecution to have secured the testimony of the witness. After statements by defence lawyers, the trial was adjourned until 12 March 2004.

These delays in the proceedings were typical examples of a number of delays that hindered an expeditious resolution of the trial. The trial has thus far been heard at the rate of one day per month yet no adequate justification has been provided for proceeding in such a slow manner, particularly given that the defendants continued to be held in detention.

The protracted nature of the proceedings must be considered in conjunction with the fact that between July 2001 (when ECtHR ruled that Turkey had breached the defendants' right to a fair trial in the initial trial) and February 2003 (when President Sezer ratified the second "Harmonization Law" that granted the right to re-trial for those whom the ECtHR had ruled had not received a fair trial), there was no domestic remedy available to the defendants. Therefore, there was a delay of 19 months before the re-trial could even begin.

While Turkey's ratification of the second Harmonization Law is welcomed, it is the opinion of the ICJ/CIJL that the protracted proceedings that have been encountered during this re-trial have compounded an initial unacceptable delay. As a State party to the ECHR, Turkey must organise its legal system such that its courts fully comply with the provisions the ECHR as well as other treaties to which Turkey is a State party. The ICJ/CIJL considers that hearing a trial over a period of 15 months to date in addition to the delay of 19 months before the re-trial commenced demonstrates the inability of Turkey's legal system to comply with the "reasonable time" guarantee provisions of Article 6(1) of the ECHR.[35]

Furthermore, it is the opinion of the ICJ/CIJL that, having regard to the lack of legal and factual complexity of the case – the defendants face only one charge each - as well as the conduct of the accused, the judicial and prosecuting authorities, there were no factors that could justify such protracted proceedings.[36] Moreover, there has been no impediment to the Court's collection of evidence as all the evidence which the prosecution needed to have compiled to present its case to the court would have been available for the initial trial in 1994.

Where fresh evidence was obtained from witnesses who had given evidence in the 1994 trial, the collection of such evidence was conducted in an extremely inefficient manner causing further delays

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[35] See *Bunkate v The Netherlands*, ECtHR judgment of 26 May 1993, Series A 248-B, para 23, where 15 1/2 months of inactivity and unjustified slowness violated article 6. See also *Matwiejczuk v Poland*, ECtHR judgment of 2 December 2003, para. 79, where the Court held that 13 months without a hearing demonstrated that no "special diligence" had been displayed by the authorities. The Court stated:

> "The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings." para 77.

[36] *Zana v Turkey*, ECtHR judgment of 25 November 1997, Reports 1997-VII, paras 75-85.

in the trial. In addition, there has been no indication that any of the defendants have employed dilatory tactics which could be said to have hindered the progress of the trial. Furthermore, given the fact that the defendants were detained for ten years and that the present re-trial is a completely new trial that must remedy the defects that existed in the first trial, the unjustifiable delays in the proceedings lead to the conclusion that the court failed to act with the special diligence required of it.

The ICJ/CIJL notes that the Court had indicated in 12 March 2004 that a verdict would be reached at the hearing on 2 April 2004. However, at the latter hearing, the judges heard lengthy and complicated legal and factual argument pertaining to the evidence of the trial and the fairness of the proceedings. The hearing was thereafter adjourned to 21 April for consideration of the arguments presented and to provide the defendants one further opportunity to attend the court so that the verdict could be announced to them in person. Although the ICJ/CIJL has in the main been extremely critical of repeated delays in the trial, it is believed that on this occasion the court made the appropriate decision.

V. Trial by an Independent and Impartial Tribunal

The ICJ/CIJL has serious misgivings relating to the extent of the independence of the judiciary due to the power of the Executive over this institution. Although the Turkish Constitution prohibits state authorities from issuing orders or recommendations concerning the exercise of judicial power, it is widely reported that in practice, the Government and the National Security Council (NSC), a powerful advisory body to the Government composed of civilian government leaders and senior military officers, periodically issues announcements or directives about threats to the State, which can be interpreted as instructions to the judiciary. Furthermore, the ruling body of the judiciary, the High Council of Judges and Prosecutors has the potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The Minister of Justice, a Minster of Justice Under-Secretary and five judges selected by the President chair the High Council. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council and therefore there is direct Executive influence in the process of judicial appointment, promotion, transfer and discipline. Furthermore, decisions of the Council are not open to judicial review.[37] There are serious concerns that the NSC, an omnipotent group within the Government, can be likely to influence the High Council which, in turn, can exert pressure on the judges of the State Security Court in highly politicised cases.[38]

There were indications that the independence of the judges in the present re-trial could have been compromised by external executive pressure. In between the hearings in October and November, it was widely reported in the Turkish press[39] that an unnamed government official had stated that if the European Union were to proscribe KADEK as a terrorist organisation then the "DEP trial [i.e., this trial] may take a different course." Although the source of this remark remains unidentified, the

[37] For a detailed discussion see Chapter VII of *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.

[38] At the hearing on 15 September, Orhan Dogan alleged that the NSC had in fact named the four defendants (and others) as people "harmful to the state" in a document which had been distributed to several institutions, including the Ministry of Justice.

[39] *Hurriyet,* 23 October 2003, *Radikal*. date of publication unknown.

ICJ/CIJL is concerned that the course of this trial may have been susceptible to executive influence motivated in turn by political considerations unconnected with the issues of this trial.

In order to protect the independence of the judiciary, the ICJ/CIJL calls for the dismantlement of the High Council in its present form and its re-constitution as an independent institution that is not functioning under the shadow of the Executive. Thus, Article 159 of the Turkish Constitution should be amended so as to remove the Minister of Justice and his Under-Secretary from the HC; this body should be provided with a Secretariat that is sufficiently funded, and decisions of the HC that are adverse to a judge or a prosecutor should be appealable to an independent judicial body.[40]

VI. Judgment

On 21 April 2004, the judges of the State Security Court announced their decision that the defendants had been found guilty of "*membership of an armed gang*." Their written reasons followed three weeks later and were translated in full for the ICJ/CIJL.

Concerns about the lack of care that the Judges used in considering their rationale for conviction were initiated by comments made by the translator of the document along with remarks made by the defence lawyer, Yusuf Alatas. It is said that the judgment lacks clarity and is grammatically deficient with many sentences tailing off unfinished. This careless attitude to producing sound reasons for the conviction enhances the view that the Judges approached the re-trial with pre-formed opinions about the guilt of the accused.[41]

It is further noted that the wording of the allegation against each of the accused relied heavily on the imputed charge of "*dividing the state*" normally charged under a different article of the Criminal Code, namely 125, and a charge which in fact none of the accused faced. For example, it is said of Leyla Zana, that she "*is a member of the outlawed armed organization PKK…she aims to separate a part of the territory which is under the State's sovereignty and to found an independent on these territories*." In addition, the conclusions of the judges indicate that their attention was primarily drawn to whether the defendants sought to establish a separate state or not. The ICJ/CIJL is concerned therefore that the judges have considered prejudicial matters which are irrelevant to the charge of being a member of an armed gang and that there has been a failure to analyse the facts of the case in relation to the one specific charge.

On 2 April 2004, the proceedings were dominated by the legal submissions made by the defence team. In addition, Yusuf Alatas submitted in written form the submissions he made orally in court. It was a document of approximately one hundred pages in length. The ICJ/CIJL is dismayed that at no point in their written judgment have the judges referred to any of the arguments made by the defence enhancing yet again concerns about the lack of importance that the judges attach to defence submissions, indicating a disregard for the equality of arms principle.

[40] *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission 1999*, Chapter XI, Conclusions and Recommendations, p. 188.

[41] See Section IV (1) The Presumption of Innocence of this report.

VII. Violation of the Right to Liberty: Detention of the Defendants

The defendants were released on 9 June 2004 following the decision of the Court of Cassation. As indicated previously, they had been in detention since their arrest in 1994 and subsequent trial by the State Security Court that year. The State Security Court granted the defendants a re-trial in February 2003 pursuant to legislative changes that granted the right to automatic re-trial for those whom the ECtHR had ruled had not received a fair trial.[42] Despite this re-trial, the defendants remained in detention and repeated applications by defence counsel for their release were denied. The ICJ/CIJL believes that the unwarranted detention of the defendants constituted an infringement of their fundamental right to *liberty and security* pursuant to Article 5 of the ECHR.

As had already transpired in earlier sittings, at the conclusion of the hearing on 18 July 2004, the defence team made verbal submissions for each of the four defendants to be released. Whilst the defence lawyers brought various submissions and legal arguments to substantiate their request for the defendants' release, these submissions, however, were not taken down *verbatim* by the Court stenographer, but merely and very briefly summarized by the Presiding Judge. The prosecution simply objected to the release of the defendants without giving any reasons to substantiate its objection.

Following a short ten minute break intended for the panel of three judges, along with the prosecutor, to discuss in chambers the request for the release of the defendants, the Court then reconvened and the Presiding Judge read out the Court's decision refusing the defence request for the defendants' release. The reason given by the Court for refusing this request was that there were still other witnesses to be heard in future sittings of this case. It is recognised that this may constitute a valid reason for refusing an application for bail, in order to prevent the defendants from interfering with the course of justice (for committing an offence or fleeing after having done so). However, it was not argued by the prosecution that there was a fear or suspicion that the defendants would in fact interfere with the course of justice nor did the Presiding Judge rule that a fear or suspicion of interference with the course of justice was the reason that detention should continue. It is therefore the opinion of the ICJ/CIJL that the reasons given for the continued detention of the defendants - namely that they needed to remain in detention as more witnesses remained to be heard – were deficient.[43]

On 15 September 2004, the defence made a further application for the release of the defendants. The Presiding Judge informed the Court that the application had been refused but gave no reasons for his decision. In each of the subsequent hearings, the defence made an application to the court for the defendants to be released but to no avail. No reasons were provided for the defendants' continued detention. As indicated above, it was finally the Court of Cassation to which the defendants appealed that ordered their release on 9 June 2004.

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 are unacceptable and therefore, that the obligation to proceed expeditiously has been violated.[44]

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[42] See footnote 19.

[43] See footnote 34.

[44] *Abdoella v The Netherlands*, ECtHR judgment of 25 Nov. 1992, Series A248-A, *paragraph 24*.

Therefore, 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 almost ten years, (2) no rationale was given for the continued detention of the defendants, (2) 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 (3) the Presiding Judge had allegedly earlier commented on the guilt of the defendants in a pre-trial application[45] point to the insufficiency of the legal grounds to continue the detention of the defendants. As such, in its steadfast refusal to release the defendants during the course of their trial, the State Security Court violated the defendants' rights to liberty and security of the person.

VIII. After the Trial

The judges of the Ankara State Security Court reached their verdict on 21 April 2004, announcing orally in court that the defendants had been found guilty. Over two weeks later, the judges promulgated their detailed judgment and reasons for reaching the conclusion. Immediately, however, the defence lawyers lodged an appeal to the Court of Cassation. The appeal was heard on 8th July 2004 at the Court of Cassation in Ankara. The ICJ/CIJL welcomes the fact that the appeal was heard without undue delay.

As a consequence of the verdict and the criticism it has evoked from the international community including the European Parliament and European Commission, the Turkish Government announced that it would be proposing to Parliament amendments to the Turkish Constitution to abolish the State Security Courts. Accordingly, on 16 June 2004, the Turkish Parliament adopted Law 5190, which established a Heavy Penal Court and abolished the authorities and duties of the State Security Courts and State Security Court Chief Public Prosecutors. The ICJ/CIJL recognises this legislative amendment as an extremely positive step towards ensuring that the Turkish criminal justice system is in line international standards. The Turkish Government is consequently encouraged to ensure that the newly established Heavy Penal Court will operate in accordance with the minimum standards defined by Article 6 of the ECHR and Article 14 of the ICCPR.

Moreover, in the aftermath of the verdict on 21 April, the ICJ/CIJL is further encouraged by other developments in the proceedings against Leyla Zana and her co-defendants. On 7 June, the Public Prosecutor responsible for proceedings before the Court of Cassation announced to the media that in his view the conviction of Leyla Zana was unsustainable in the light of the procedural irregularities in the re-trial. The next day on 8 June, as a consequence of these remarks, the four defendants were granted bail pending their appeal on 8 July and were released from custody. The ICJ/CIJL congratulates the Public Prosecutor for reacting swiftly to a verdict which resulted from a trial whose procedures were recognised as unfair and was therefore widely considered to represent a gross miscarriage of justice.

In addition, the ICJ/CIJL welcomes the fact that the four defendants have been released from custody, thereby ending what the ICJ/CIJL considers to have been a violation of their right to liberty and security as protected by Article 5 ECHR and Article 9 ICCPR.

[45] 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 the 23 May 2003*.

On 14 July 2004, the Court of Cassation remanded the case for another re-trial before the newly formed Heavy Penal Court. The ICJ/CIJL has three concerns about this procedure. First, the Court personnel who will act as prosecutors and who sit as judges in the new Heavy Penal Courts are the same as those who populated the old State Security Courts. Therefore, there is a real risk that the trial will be brought again before Judge Karadeniz or other judges who have already been involved in the initial proceedings and accordingly there is a likelihood that unfair procedures will be duplicated. Second, the ICJ/CIJL believes that second re-trial will further extend proceedings which the ICJ/CIJL already considers to have been overly protracted, thus violating the right to be tried within a reasonable time. Third, the ICJ/CIJL considers that continuation of proceedings against the defendants for a third trial amounts to an oppressive implementation of the Court's powers and risks extending the proceedings for an undetermined length of time.

IX. Conclusion

It is regrettable that the State Security Court failed to remedy 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 fully respected and implemented as required by the ECHR and the ICCPR. In particular, the *violation of the principle of equality of arms* between the prosecution and the defence, and 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 still prevail today. These deficiencies, coupled with the fact that the National Security Council, through the High Council, was in a position to exert pressure on the judges indicates that No. 1 Ankara State Security Court was neither *independent nor impartial* when hearing the case of Leyla Zana and three other Kurdish former Members of Parliament.

The ICJ/CIJL is very pleased that the State Security Courts were recently abolished but is concerned that their jurisdiction may continue to function in the same manner under the new Heavy Penal Courts.[46] The ICJ/CIJL thus urges the Turkish Government to ensure that the above-mentioned defects in the present case are remedied in trials before the new courts.

In conclusion, to ensure that the rule of law is fully respected, the ICJ/CIJL recommends that:

- The equality of arms between the prosecution and defence must be vigilantly protected at all times in criminal trials. This includes the physical separation of the prosecutor from the panel of judges throughout the trial, the physical placement of both the prosecutor and the defence at ground level, the provision of computers to both the prosecutor and defence, and the equal treatment of evidence given by witnesses and statements made by defence counsel
- Defence counsel must be allowed to examine witnesses directly and not through the judge who then summarizes the questions for witnesses
- Defence counsel must be given the full opportunity to cross-examine witnesses for the prosecution

[46] See comment by Yusuf Alatas, chief defence counsel for Leyla Zana and 3 other defendants, "First I will convey my criticism about the DGM's. They have been abolished but will continue to function under a new name, that of the 'High Criminal Court." *Turkish Daily News*, 10 July 2004.

- Legal submissions by defence counsel and statements by defendants must be entered verbatim into the court record and not in summary form
- The right to be presumed innocent until proven guilty must be vigilantly protected and accused persons shall not be referred to as the "convicted"
- The Court must apply special diligence to ensure that the right to be tried within a reasonable time is fully respected
- The Court must substantiate its verdict and reasoning vis-à-vis the actual charge, and not an alternate charge of which the defendants have no information
- Art. 159 of the Constitution be amended such that the Minister of Justice and the Under-Secretary of Justice are removed from the High Council of Judges and Public Prosecutors so as to ensure the independence of the judiciary from this body
- The newly created Heavy Penal Courts must not be replications of the abolished State Security Courts and must uphold the highest fair trial standards.

X. Background Information

Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak were former members of the Turkish National Assembly and the Democracy Party (DEP).[47] On the basis of repeated applications over the course of nearly three years by the public prosecutor to the Ankara State Security Court, on 2 March 1994, the National Assembly lifted the applicants' parliamentary immunity. Shortly thereafter, the defendants were taken into police custody. On 16 June 1994, the Constitutional Court dissolved the DEP and ordered the party's MPs to vacate their parliamentary seats.

The defendants were initially charged with "*treason against the integrity of the state*" a capital offence under Article 125 of the Penal Code. That charge was later changed to "*membership of an armed gang*" within the meaning of Article 168 of the Penal Code.

In its judgement of 8 December 1994, the Ankara State Security Court sentenced the defendants to 15 years imprisonment within the meaning of Article 168. The Court rejected the charge under Art. 125. It found, in sum, that defendants had engaged in intensive "separatist" activity under instructions from the PKK – a separatist armed group seeking to fund a Turkish state in South-eastern and eastern Turkey.

On 17 January 1996, the former parliamentarians lodged an application with the then European Commission on Human Rights alleging, by reference to Articles 6 and 10 of the ECHR that they had not been afforded a fair hearing by an independent and impartial tribunal and that their freedom of expression had been infringed.

On 17 July 2001, the European Court of Human Rights ruled that the former members of the Turkish Parliament had not received a fair trial. The Court ruled that there had been a violation of Article 6 because the Ankara State Security Court, which at the time of the trial included a military judge, was not "an independent and impartial tribunal". The Court further unanimously held that the applicant's rights under Article 6(3)(a) and (b) had been violated in so far as there had been a change in the characterisation of the offence during the last hearing of the trial and the applicant's had not been

[47] For all factual information cited, refer to *Sadak and Others v. Turkey*, ECtHR judgement of 17 July 2001, Series 201-VIII.

allowed additional time to prepare their defence against the new charge and furthermore, the applicant's had been denied an opportunity to examine or have examined key witnesses for the prosecution.[48]

On 3 February 2003, Turkey's President, Ahmet Necdet Sezer, ratified the most recent 'Harmonisation Law' aimed at bringing the country closer to meeting European Union membership requirements pertaining to human rights. According to the new law, when the European Court has ruled that a person has been denied a fair hearing in accordance with Article 6, that person shall have the right to a re-trial. On 4 February 2003, the ex-parliamentarians officially lodged an application for a re-trial pursuant to the new law adopted by the Turkish Parliament.

XI. Methodology

This report is based on observation of the hearings in the re-trial of Leyla Zana and three other defendants at No. 1 Ankara State Security Court on 23 May 2003, 20 June 2003, 18 July 2003, and 15 September 2003, 17 October 2003**,** 21 November 2004, 16 January 2004, 21 February 2004, 12 March 2004, 2 April 2004 and 21 April 2004.[49] The report also incorporates an analysis of the Court's verdict and the judgement.

Expert interpreters throughout the proceedings very ably assisted the Observers. It was noted that several other Observers from different organisations as well as representatives from some foreign embassies and the European Parliament were also present in the Courtroom during the hearings

After the hearing on 20 June, the ICJ/CIJL Observers requested to meet briefly with the prosecutor in order to clarify questions of procedure. However, after a brief introduction, the prosecutor refused to answer any questions. Similarly, the Observers attempted to meet with the Presiding Judge, Judge Mehmet Orhan Karadeniz, but were prevented from doing so by the police.

After each hearing, the Observers, along with their interpreter and other international trial monitors, met for over an hour with lead defence lawyer, Mr. Yusuf Alatas, at his law firm. The ICJ/CIJL wishes to thank Mr. Alatas for his patient assistance in clarifying matters of procedure and certain aspects of Turkish law relevant to the present case, aspects of which have been incorporated in this report. The ICJ/CIJL also wishes to warmly thank its interpreters, Ms. Feray Salman, Ms. Pyryl Akkus, and Ms. Zeri Inanç, for their excellent interpretation of the proceedings. The ICJ/CIJL is, above all, grateful to its trial observers, Mr. Paul Richmond, Dr. Patrick Vella, and in particular, Mr. Stuart Kerr, for their expert monitoring of the proceedings in the re-trial of Leyla Zana and three other Kurdish former members of parliament.

"Injustice anywhere is a threat to justice everywhere"
Martin Luther King, Jr., Letter from Birmingham Jail, April, 1963

[48] Ibid.
[49] See note 1.