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**REPORT OF
THE TRIAL OF
HUSEYIN CANGIR**

Before

DERIK CRIMINAL COURT OF PEACE

on

17 March and 21 April 2004

21 June 2004

**A report published by the
Centre for the Independence of Judges and Lawyers (CIJL) of the
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(Report Name)

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I. Executive Summary

The trial of Hussein Cangir, a human rights lawyer and member of the Mardin Bar Association, continued before the Derik Criminal Court of Peace in the province of Mardin in Southeast Turkey on **17 March** and **21 April 2004**.¹ The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ), in conjunction with Avocats sans frontières (ASF) Belgium, appointed an observer, Mr. Stuart Kerr, to observe and report on the hearing on 17 March. The aforementioned organizations appointed Mrs. Margaret Owen² to monitor and report on the hearing on 21 April 2004. Both observers are Barristers of England and Wales.

Hussein Cangir, 27 years-old, was charged with the *"hanging of posters without permission on 9th of December 2003"* on the basis that he *"did not request permission from the Governor."* The charge was laid under Article 536, paragraph 3 of the Turkish Penal Code. The posters in question were Human Rights Association (HRA) posters that carried the HRA logo and the inscription *"Peace Will Win, Equality with Diversity"* displayed underneath in Kurdish and in Turkish. They were placed on municipal sites in the town of Derik on 9 December 2003 to coincide with Human Rights Week, from 10 –17 December 2003.

At the conclusion of the hearing on 21 April 2004, Mr. Cangir was convicted of the offence charged and sentenced to hefty fines.³

The ICJ/CIJL and ASF are concerned that the proceedings against Mr. Cangir were ever brought at all and are of the opinion that the charge reflects a pattern of attempts to harass and intimidate members of the legal profession.⁴ The two organizations are of the view that the criminal proceedings against Mr. Cangir were in fact brought for political purposes in an attempt to intimidate him and stifle the freedom of expression of an individual lawyer

¹ The first hearing in the trial of Huseyin Cangir took place on 11 February 2004

² Mrs. Owen had, in addition, been appointed by the London-based Kurdish Human Rights Project to observe this hearing on 17 March

³ See Appendix A of this report

⁴ See ICJ/CIJL reports on charges brought against numerous Turkish lawyers: 27 Lawyers (2002); Filiz Kalayci (2003); the President of the Bar Association of Diyarbakir (2003) at <www.icj.org> See also, *Presentation on the Independence of the Judiciary and the Legal Profession in Turkey* (April 2004) by Paul Richmond, Barrister of England and Wales, wherein the author reports on the repeated criminal prosecution of lawyers who conduct defenses in cases of a political nature or who comment on Turkey's human rights practices, p. 5 at <www.icj.org> and *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, ICJ's Centre for the Independence of Judges and Lawyers, p. 134 *et seq.*

known for his work as a human rights defender and for representing individuals perceived to have threatened the integrity of the Turkish State.

Regarding the hearings themselves, the ICJ/CIJL and ASF welcome some practices which indicate that certain aspects of the right to a fair trial were respected, including the right to be informed of the charge promptly, to have adequate time and facilities to prepare the defence, the right to a public hearing, and the prohibition against self-incrimination. Further, no restrictions were placed on either the defendant or his lawyers in the conduct of the defence.

However, the ICJ/CIJL and ASF are of the view that the proceedings were subject to an unnecessary delay. On 17 March, the proceedings were adjourned without any significant progress having been made owing to the failure of the Public Prosecutor to provide the court with information as to Mr. Cangir's prior convictions (or lack thereof). There is a real risk that the principle of the presumption of innocence can be violated when judges receive information pertaining to the past criminal history of an accused person prior to the determination of guilt or innocence. In the present case, the observers could see no valid reason for delaying the trial for this information to be made available.

The ICJ/CIJL and ASF are also concerned that the trial exemplifies a systemic failure to comply with the principle of equality of arms and the right to be tried by an independent and impartial tribunal. In the Criminal Courts of Peace, the attendance of the Prosecutor is not required, giving the impression that the judge who tries the case is in fact carrying out the dual role of prosecuting and judging the offence. The ICJ/CIJL and ASF are not satisfied that this practice complies with international standards called for by the International Covenant on Civil and Political Rights (ICCPR⁵) or the European Convention on Human Rights and Fundamental Freedoms (ECHR⁶).

Furthermore, the ICJ/CIJL and ASF reiterate their exhortation to the Turkish Government to recognise that equality of arms between the parties before a court is essential and of fundamental importance to the notion of a fair trial under the ECHR. They therefore urge the Turkish Government to ensure that at future trials, all the provisions of Article 6 of the ECHR to which the Republic of Turkey is a party will be fully respected and implemented.

⁵ Article 14 ICCPR governs the right to a fair trial. Turkey ratified the Covenant on 3 June 2003

The ICJ/CIJL and ASF further remind the Turkish Government of its international obligations to guarantee freedom of expression⁷ and to allow lawyers to exercise their right to freedom of expression without fear of or actual intimidation, hindrance, harassment or prosecution.⁸

II. *Background on Hussein Cangir*

Mr. Cangir is a practicing lawyer in the Kiziltepe district and is the Chairman of the management committee of the Mardin branch of the Human Rights Association. The defendant has been active, ever since he qualified as a lawyer five years ago, in representing Kurdish clients alleging acts of torture by state agents and in defending them when they are charged with crimes against the state. He has been involved in three major torture cases, in trials relating to the right to freedom of expression, and in murder cases by unknown persons or persons where the implication is that the perpetrators are agents of the State. He has also represented Kurdish clients in cases relating to the safe return to their home villages and in claims for compensation over destruction of houses and the consequences of land mines. He has a record as a zealous human rights defender particularly in cases of complaints of rape and sexual torture inflicted on Kurdish women by the police and gendarmerie and inevitably has acquired a high profile as a human rights lawyer.

III. *The Prosecution Case*

On 5 January 2004, the Derik Public Prosecutor's Office indicted Mr. Cangir in the Derik Criminal Court of Peace, charging him with the "*hanging of posters, written in the Kurdish language, on the 9th of December 2003*" on the basis that he "*did not request permission from the Governor.*" The charge was laid under Article 536, paragraph 3 of the Turkish Penal Code which reads as follows:

"Whoever posts printed documents, pictures or handwritten documents at places other than those designated for such documents or without having obtained permission of competent authority, shall be punished by a light fine."

⁶ Article 6 ECHR governs the right to a fair trial and is directly applicable in Turkish domestic law

⁷ Article 10 ECHR

⁸ Principle 16 (a) and 16 (c) of the *UN Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Mr. Cangir had hung eight posters, all of which had written in the top right hand corner "10-17 [December] Human Rights Week" and the name *Zelal Bicer* written beneath a hand drawn circle and two children holding hands with the words "Peace Will Win, Equality with Diversity" displayed underneath in both the Kurdish and Turkish languages.

On 9 December 2004, the posters had been spotted and removed by police. Mr. Cangir presented himself at the District Security Directorate later that day and informed the police that he had affixed the posters. Although it was recognised that Mr. Cangir had obtained permission to affix these posters from the Mayor of Derik, the Prosecution alleges that such permission was insufficient, as the accused was allegedly required to obtain permission from a *higher* authority, namely the Derik District Governor's Office. Therefore, the Public Prosecutor alleges, Mr. Cangir had committed the offence as charged.

The Public Prosecutor called for Mr. Cangir's conviction and for the confiscation of the posters.

IV. The Defence Case

Mr. Cangir did not seek to refute the factual basis of the prosecution. He accepted that he had placed the posters on public buildings. However, the Defence refuted the prosecutor's allegation on two counts.

First, the Defence pointed to the fact that on 6 November 2003 Mr. Cangir applied for and obtained permission to affix the posters. Such permission had been obtained from the local mayor, Ayse Karadag, a matter which the prosecutor accepts. Further, the Defence argued that there is nothing in the wording of article 536 of the Turkish Criminal Code which specifies that permission for putting up posters needs to be obtained from the Office of the District Governor per se. The Defence therefore asserted that Mr. Cangir had committed no offence.

Second, the Defence pointed to the fact that Mr. Cangir is the Chair of the Mardin branch of the Human Rights Association and was accordingly acting on behalf of a recognised organisation. Article 44 stipulates that there is no obligation for an individual to obtain permission for putting up posters if acting on behalf of an organisation. Similarly, therefore, the Defence argued that no offence had been committed.

V. *The Hearings*

The hearings took place at the Criminal Court of Peace before a single Judge, Muhurrem Endes. Mr. Cangir was represented at the 17 March hearing by Aygul Demirtas, a member of the Diyarbakir Bar Association, and a team of six other advocates.

After a short hearing on 17 March, the Judge adjourned the hearing to 21 April 2004. It was said that this adjournment was required because the Public Prosecutor had failed to provide the court with information about the defendant's prior convictions. No progress was made in the trial, the observer being informed that the Judge would not begin to hear the substance of the trial until the missing information had been provided. The ICJ/CIJL and ASF are not satisfied that this lack of information constituted a sufficient reason for delaying the proceedings. Moreover, while it is recognised that informing the Court of the prior convictions of a defendant before a verdict is reached does not necessarily violate fair trial standards, the ICJ/CIJL and ASF nevertheless consider that this is an undesirable practice. They are of the opinion that the Judge could not have been genuinely assisted by such information about the accused. Rather, any information regarding the defendant's prior convictions, if any, would be likely to be prejudicial. The ICJ/CIJL and ASF thus believe that there are significant risks that the presumption of innocence enshrined in article 6(2) ECHR may be violated.

At the 21 April hearing, Mr. Cangir was represented by a team of ten advocates, including Aygul Dermitas and Reyhan Yalcidag, Vice President of HRA. No restrictions were placed on the lawyers' ability to perform their professional duties, although the number of advocates representing the accused was the subject of adverse criticism by the Judge.⁹

At this hearing, the Defence reiterated its rebuttal of the allegation against Mr. Cangir. In addition, the Defence referred to legal reforms of the 4th Harmonization Package¹⁰ that had resulted in changes in the law which allowed the Kurdish language to be used. Furthermore, the Defence pointed to a recent ruling by the Court of Cassation in Ankara

⁹ In Turkey, it is a common feature of trials against lawyers and human rights defenders for several other members of the Bar Associations to appear on behalf of the accused, both to demonstrate solidarity and to prevent any attempts on behalf of the court to restrict lawyers from performing their professional duties

¹⁰ Law 4778, adopted on 2 January 2002

concerning similar prosecutions in Van whereby that Court quashed a lower court's decision allowing confiscation of HRA posters by authorities.¹¹

The ICJ/CIJL and ASF were satisfied that at both hearings, Mr. Cangir was allowed to consult with his lawyers in a private room beforehand. In all, the observers were satisfied that both the accused and his representatives had been informed promptly of the charge against Mr. Cangir and had been provided with adequate time and facilities to prepare the defence.

In addition, the ICJ/CIJL and ASF were satisfied that no restrictions were placed on the public in attending the hearings or on the defendant in fully participating in the proceedings.

However, it is a matter of concern that at both hearings - as is the usual practice in Turkish courts - rather than allowing the defendant to dictate his statements directly into the court record, the Judge dictated a *summary* of the defendant's statement to the court stenographer. Thus, the transcript is not a verbatim record of what the defendant actually said and leaves room for small nuances of expression which can be distorted or subtly changed. The principle of equality of arms in criminal proceedings, which is the cornerstone of the right to a fair hearing, requires that there be parity between the Prosecution and the Defence. The practice of entering evidence and submissions by the Prosecution verbatim into the court record while only entering summaries of Defence statements upsets the fair balance between the Prosecution and Defence and conflicts with one of the most important tenets of a fair trial that the Court must not only act impartially but must also be *seen* to act impartially.¹²

¹¹ See Section VIII below

¹² In the Turkish system, the relationship between the judiciary and the Prosecutor appears symbiotic. In the experience of the ICJ/CIJL, Judges and Prosecutors work closely together and rarely will one refuse the request of the other. This professional intimacy is reflected in the physical arrangements of the court. Where a Prosecutor is present, he sits up on the bench with the judge or judges and is not easily distinguishable from them. When present in a courtroom, he is often to be seen in close conversation with the judge, whereas the defense lawyers have restricted opportunities to be heard. The defense lawyers are positioned huddled below the Judge and Prosecutors bench, at the level of the accused and the public. This gap in levels in the courtroom accentuates the appearance of inequality of arms.

Although the Prosecutor was not present in the present case, it can be reasonably inferred that he and the judge worked in tandem behind the scenes to bring about the conviction. For a further discussion of the close relationship between Prosecutors and Judges, see *ICJ/CIJL Consolidated Report on the Re-trial of Leyla Zana and Three Other Defendants*, October 2003 at <www.icj.org>

Furthermore, the practice of hearing trials in the absence of the Prosecutor is a matter of great concern. No representative of the Public Prosecutor, Ahmet Dermiyurek, attended Mr. Cangir's hearings nor was required to do so under the Turkish Criminal Code. The absence of the Prosecutor gives the impression that the Judge who tries the case is in fact carrying out the dual role of prosecuting and judging the offence.

VI. *The Verdict*

At the termination of the hearing on 21 April, the Judge delivered his verdict immediately, finding Mr. Cangir guilty. He read his pre-prepared judgment from a lap-top computer, sentencing Mr. Cangir to a fine, which he suspended.¹³

VII. *Evaluation of Fairness of Proceedings*

The right to a fair trial by an independent and impartial tribunal is an "*absolute right that may suffer no exception.*"¹⁴ This principle is enshrined in Article 6 (1) of the European Convention on Human Rights and is so basic that the UN Human Rights Committee, the expert body charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has stressed its paramount importance.

The ICJ/ CIJL and ASF believe that the Judge's fulfilment of a prosecutorial function during the hearings in Mr. Cangir's trial constitutes a violation of the fundamental right to be tried by an independent and impartial tribunal which requires that "*justice must not only be done, it must also be seen to be done.*"¹⁵

Furthermore, Mr. Cangir was denied a fair trial by an independent and impartial tribunal as the Judge had clearly decided on a guilty verdict before hearing the arguments for the Defence, and had not appeared to consider any of the Defence arguments, at either the second or the final hearing. This is evident from the fact that the Judge was able to read out his judgment and detailed sentence from the screen of his laptop computer only moments after the conclusion of the legal arguments. It was plain, therefore, that the Judge had reached his conclusion as to Mr. Cangir's guilt before the commencement of the proceedings on 21 April 2004.

¹³ See Annex A, The Verdict and the Sentence

¹⁴ *Gonzalez del Rio v. Peru*, (263/1987), 28 October 1992, Report of the HRC, vol. II (A/48/40), 1993, at 20

¹⁵ *Delcourt v Belgium*, ECHR judgment of 17 Jan. 1970, Series A11, para.31

Furthermore, the content of the judgment and the manner in which the judgement was delivered lead the ICJ/CIJL and ASF to have serious concerns that the presumption of innocence, which requires that judges and juries refrain from prejudging any case, was violated in this trial. This fundamental principle was also violated as demonstrated in the court's reasoning which indicated that the burden of proof fell on the accused who had to prove his innocence, rather than on the prosecution to establish his guilt.¹⁶ Of the Defence argument that no wording in article 536 required that permission be obtained specifically from the Governor for hanging posters, but simply from a competent authority, the Judge stated that although permission of the Governor was not specified, "*it should be **inferred** that his permission was needed*" [bold added].

The Prosecutor had not provided any evidence to substantiate this proposition, nor did the Judge provide any explanation as to why he had reached such a conclusion. The ICJ/CIJL and ASF therefore conclude that, in practice, the burden fell upon Mr. Cangir to disprove this alleged inference in the law. Moreover, even if it is a presumption in law that permission to affix posters should be obtained from the Governor, then it is incumbent on States' contracting to the ECHR to confine such presumptions within reasonable limits.¹⁷ It is the view of the ICJ/CIJL and ASF that no such presumption could reasonably have been anticipated by the accused and that accordingly the burden remained with the Prosecution to prove that specific permission from the Governor was required. However, as mentioned above, the Prosecutor was not present at any of the hearings and therefore was not made to prove the charges and the defendant, presumed guilty, had to prove his innocence.

Further, the ICJ/CIJL and ASF recognise that article 7 ECHR embodies, *inter alia*, the principle that the criminal law must not be extensively construed to an accused's detriment¹⁸. Where judicial interpretation of statute is required, that interpretation must be accessible and foreseeable. It is the opinion of the ICJ/CIJL and ASF that, in this instance, the law has been interpreted in a way which was wholly detrimental to Mr. Cangir. The inference drawn by the judge from article 563 of the criminal code was unpredictable, and therefore in accessible and unforeseeable. The ICJ/CIJL and ASF therefore form the view that the manner in which the law was interpreted does not comply with the principle of article 7 ECHR.

¹⁶*Barbera, Messegue and Jabardo v Spain*, ECHR judgment of 6 Dec. 1988, Series A146, para 77

¹⁷*Salabiaku v France*, ECHR judgment of 7 Oct. 1988, Series A141-A, para 28

¹⁸ *EK v Turkey* (2002) 35 EHRR 41 at paragraph 51-52

Moreover, it is significant that the Judge, even when expressly requested by the Defence, failed to take into account the significant recent decision of the Court of Cassation to quash a similar conviction in another court.¹⁹ This failure is particularly egregious in view of the fact that the Minister of Justice had publicly drawn attention to the importance of the decision of the Court of Cassation and its significance in relation to the general issue of implementation of legal reforms as part of the process to gain accession to the EU.²⁰

VIII. Decision of Court of Cassation Regarding Seizing of Posters in Van

The ICJ/CIJL and ASF ascertained that in December 2003 a number of prosecutions were initiated in the Southeast of Turkey against lawyers and human rights defenders who had affixed HRA posters in public venues. Following a decision in the Van Criminal Court of Peace on 10 December 2003 resulting in the successful prosecution of similar offences, HRA posters were seized in Mardin, Van, Siirt, Adiyaman, Hakkari among other places.

¹⁹ See Section VIII

²⁰ In December 2003, during Human Rights Week, the Prime Minister of Turkey was reported as saying, in the context of Turkey's progress in the Accession process that "*you see, they are now putting up posters in Kurdish*". He made this statement just when these posters were being confiscated and prosecutions were being prepared.

The prosecution in Van, according to the indictment, was based on the fact that:

“...some of the posters contained Kurdish words, and thus displayed they would damage the indivisible integrity of the State and its country and were damaging to the basic qualities of the Republic as laid down in the Constitution, and that the Van Branch of HRA was in this way trying to conspire in the Turkish Republic on the basis of race, religion, sect and regional difference”.

However, on 22 December 2003, on reference from the Ministry of Justice, the Court of Cassation²¹ in Ankara, sitting with four judges, quashed the decision of the Van Criminal Court of Peace and ruled that the conditions for the confiscation of posters had not been satisfied.²² It did so in accordance with Article 343 of the CMUK (Criminal Procedure Code), and in compliance with the law reforms of the 4th Harmonization Package.

While it is noted that the charges against Mr. Cangir rely on a different article of the Turkish Criminal Code to those prosecutions reviewed by the Court of Cassation on 22 December 2003, the ICJ/CIJL and ASF nevertheless consider that the charges against Mr. Cangir demonstrate the prosecuting authorities' unwarranted pursuit of lawyers and human rights defenders with alternative charges for the following reasons: first, the charges relate to an identical activity carried out simultaneously to those activities prosecuted in Van; second, the prosecution against Mr. Cangir was first recorded by the Public Prosecutor on 10 December 2003 and was referred to as *"affixing banned publications;"* third, by the time the indictment was drawn up on 5 January 2004, the Court of Cassation had ruled days earlier (on 22 December 2003) that the judgment of the Van Criminal Court of Peace should be quashed; and fourth, Mr. Cangir was then indicted on a different charge, namely *"hanging of posters, written in the Kurdish language [without] permission from the Governor."* This leads the ICJ/CIJL and ASF to conclude that the utilization of an alternative charge against Mr. Cangir is indicative of an institutional desire to criminalise legal behaviour and accordingly to frustrate the practical effect of law reforms under the 4th Harmonization package.

Furthermore, the Public Prosecutor's practice of alternative charging must be placed within the context of a widespread practice whereby Public Prosecutors who find themselves

²¹ Known, in the English translation, as the Constitutional Court and also as the Supreme Court of Appeals

²² According to the Minister of Justice, Cemil Cicek, this ruling had made a significant contribution to the accession process by enforcing implementation of the reforms

unable to secure a conviction under articles which have been amended under law reform packages, simply recharge under alternative provisions.²³

Therefore, the ICJ/CIJL and ASF conclude that the prosecution of Mr. Cangir indicates not only a deliberate flouting of the spirit of reforms instigated by the Harmonization laws but also demonstrates an on-going resistance by the prosecuting authorities and courts to their implementation on the ground.²⁴

IX. Background

a) The Town of Derik

Derik is a town situated in the Southeast of Turkey, approximately 20 kilometres west of Mardin and 40 kilometres north of the border with Syria. Its population is almost entirely Kurdish.

Through interviews with Mr. Cangir himself, his lawyers and the mayor of Derik, Ayse Karadag, the observer, Mr. Stuart Kerr, was able to ascertain the political situation in this region as perceived by the local population. Although there has been an official ceasefire in military action between the PKK (Kurdish Workers' Party) and the army of the Turkish Republic since 1999, clashes still persist between "separatist" forces and the army, resulting in loss of life and casualties on both sides. Such activity has been a feature of the rural areas and villages that surround Derik. Consequently, the local population is viewed as being sympathetic to Kurdish separatism and has reportedly been subjected to the unsavoury corollary effects of the authorities' attempts to stifle insurgency, namely reported arbitrary

²³ See, *Presentation on the Independence of the Judiciary and the Legal Profession in Turkey*, by Paul Richmond, 15 April 2004 <www.icj.org>

²⁴ Despite considerable constitutional and legislative reforms in Turkey since 2001 in response to the EU Copenhagen Criteria and the drive to achieve the goal of EU membership, there has been very little actual implementation of new laws on the ground. Seven harmonization reform packages (the so-called "Harmonization Laws") have been passed but although many measures abusive of human rights have been altered or abolished, in the Southeast of Turkey particularly, police, prosecutors and judges have found articles in the Constitution, other laws, by-laws, regulations and administrative laws that they use to continue to harass, intimidate, restrict, prohibit, and condemn human rights lawyers representing Kurdish clients, and pro-Kurdish NGO's. Activities which can be considered essential and obvious to human rights associations and human rights defenders - such as preparing and displaying posters on Human Rights Day - continue to be viewed by the state authorities (police, prosecutor and judiciary) as insulting to the State, and its *indivisible integrity* because the wording (however innocent) is in Kurdish. Yet, the use of the Kurdish language, the mother tongue of over 90% of the people living in Southeast Turkey, and of over 10% of the population in the country, is now permitted under the Harmonization Laws.

detention, extra-judicial killings²⁵ and torture²⁶, harassment of ordinary members of the public and elected officials and notable figures of the community.

As a result, Derik has been the place where a number of official complaints against the behaviour of state officials have been initiated, and human rights activists have been particularly vocal in criticizing the actions of state officials. Locals thus perceive the prosecution of individuals such as Hussein Cangir to be part of a concerted attempt by the authorities to undermine the social and administrative fabric of the town.

This concern is no better illustrated by the fact that the mayor, a representative of the pro-Kurdish Democratic People's Party (DEHAP²⁷), faces charges herself, also under article 536 of the Turkish Criminal Code, because she failed to ensure that peace slogans written by school children on the walls of a school with her permission were removed. Moreover, she is currently being investigated for a political speech she made at a conference of DEHAP mayors in November 2003.

b) The Prosecution of Lawyers in Turkey

The ICJ/CIJL has noted in a number of cases that the functioning of the Turkish criminal justice system continues to be undermined by the fact that lawyers who repeatedly conduct defences in cases of a political nature or who comment on Turkey's deficient human rights practices, continue to be subjected to criminal prosecutions for activities carried out in the exercise of their duties. Often multiple charges are brought against one individual and the proceedings they face can be protracted, significantly impacting on the lawyers' freedom to carry out their professional duties.²⁸

This pattern of ongoing trials against human rights offenders is in breach of Turkey's international obligations and its duty to implement the recent legal reforms under various laws and regulations. Moreover, arbitrary interpretations of the reform laws, although often leading to the suspension of sentences or commutation, are in effect a form of judicial harassment designed to intimidate human rights defenders and lawyers and

²⁵ See *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on the mission to Turkey*, 18 December 2001, E/CN.4/2002/74/Add.1

²⁶ See *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, ICJ's Centre for the Independence of Judges and Lawyers, Chapter IX.

²⁷ Demokratik Halk Partisi

²⁸ See note 6 supra

simultaneously hinder them from properly performing their professional duties. So, for example, the defendant, Hussein Cangir, in this case, is prevented, by virtue of having to attend to his own defence, from representing his clients in other cases. On the day of this trial, he should have been defending clients in two cases in the Mardin courts, but had to find substitute lawyers to represent them which could endanger the success of his advocacy. If his conviction stands he will be unable to work as a lawyer and there will be pressure on the Bar Association to expel him from membership. The ICJ/CIJL and ASF consider that this pattern of prosecutions against lawyers constitutes a significant dysfunction in the rule of law in Turkey

X. Conclusion

As a result of the observation of the proceedings held at Derik Criminal Court of Peace on 17 March 2004 and 21 April 2004 and interviews held with the accused, his lawyers and local officials, the ICJ/CIJL and ASF conclude that the prosecution of Huseyin Cangir represents an attempt by the State to harass and intimidate a lawyer in order that he might refrain from pursuing his legitimate professional duties and exercising his right to freedom of expression. This prosecution represents yet another example of state-sponsored harassment of lawyers and is in violation of the *UN Principles on the Role of Lawyers*²⁹ which state that,

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference ... (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Moreover, while many aspects of a fair trial were met, the ICJ/CIJL and ASF are not satisfied that the right to be tried by an independent and impartial tribunal has been respected and find furthermore that the fundamental principle of equality of arms was violated. Further, as is a feature of many criminal proceedings in Turkey, the proceedings have been subjected to an unwarranted delay. The purpose of the delay, which in the

²⁹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

instant case was to ascertain Mr. Cangir's prior convictions, provokes further concerns that the presumption of innocence may be violated.

The application of an abundance of laws and regulations which can be selectively and arbitrarily applied to restrict and impede the rights of human rights defenders depending on the attitudes of individual judges, governors, prosecutors and police officers is in direct conflict with Turkey's obligations under international treaties, the judgements of the ECHR and the Harmonization Packages producing recent legal reforms.

The ICJ/CIJL and ASF call on the Turkish Government to ensure that its criminal justice system complies with international standards, most notably with article 6 ECHR including, in particular, the right to be tried by an independent and impartial tribunal and the right to be presumed innocent. Moreover, it is incumbent upon the Turkish Government to respect the principle of equality of arms, guarantee freedom of expression³⁰ and allow lawyers to perform their professional functions without fear of or actual intimidation, hindrance, harassment or prosecution.³¹

³⁰ Article 10 ECHR

³¹ Principle 16 (a) and 16 (c) of the *UN Basic Principles on the Role of Lawyers*

APPENDIX A: The Verdict and Sentence

The Judge, as in the previous hearing, dictated a summary of the defendant's speech to the Court stenographer. Apart from declaring that since there was no express mention in the law that "*the permission of the Governor was not required, it should be inferred that his permission was needed,*" he did not address any of the Defence arguments, but proceeded instantly to read out the verdict that he had already written on his laptop computer.

The Judge declared that the defendant was guilty and, reading from his laptop, sentenced him as follows:

- 1) Under article 536, paragraph 2 of the Turkish Penal Code (TPC): 1-year imprisonment. Fine 86,694.000 Turkish Lira (TRL)³²
- 2) Under article 536, paragraph 3 of the TPC: increase to 2 years imprisonment. Fine 173.388.000 TRL
- 3) Under article 536, paragraph 3 of the TPC 9/10th decrease of sentence to 2 months 12 days imprisonment. Fine 17.338.000 TRL
- 4) Under Law No. 59 1/6th decrease to 2 months imprisonment. Fine 14.448.000 TRL
- 5) Under Law 647/4 Fine of 5,776.000 a day calculated to 346.560.000 TRL
- 6) Under Law No. 72, all the fines were to be combined.
- 7) Under Law 647/515, payment of fines to be made within one month of verdict
- 8) **The sentences are suspended**
- 9) Under Law 94, the Defendant was warned against committing further offences during the suspension.
- 10) The defendant was permitted to appeal to the High Court.

³² 1 USD = approximately 1.5 million TRL