FINAL REPORT OF

THE TRIAL OF 27 TURKISH LAWYERS

No. 1 ANKARA HEAVY PENAL COURT

31 OCTOBER 2002

A report published by the International Commission of Jurists
Geneva, Switzerland

22 January 2003

Table of Contents

I. Executive Summary

This is the final report of the trial of twenty-seven Turkish lawyers who were charged with "professional misconduct" for allegedly having disrupted the peace during court proceedings in December 2000.[1]

This trial is the first recorded instance wherein a complaint made by an agent of the state gave rise to the criminal prosecution of members of the legal profession for professional misconduct. Pursuant to Article 240 under which the lawyers were charged, "professional misconduct" constitutes a serious offense punishable by imprisonment, a heavy fine and dismissal from public service. The Bar Association has no jurisdiction over a charge of professional misconduct.

The ICJ appointed an observer, Mr. Paul Richmond, to monitor and report on the lawyers' trial before No. 1 Ankara Heavy Penal Court which took place on 9 May 2002, 11 July 2002 and 31 October 2002.

The ICJ is satisfied that the charge against the lawyers was dismissed on 31 October. Nevertheless, it is concerned that even though this charge was *prima facie* non-political in character, it was brought in circumstances where it was perceived to be a manifestation of state-sponsored harassment and intimidation of members of the Turkish legal profession who represented individuals charged with serious criminal offences against the Turkish state. The ICJ is of the view that the charge was, in effect, brought as a result of the identification of lawyers with their clients' causes

The ICJ's finding that the trial was political in nature is supported by the fact that the accused lawyers were openly identified as "terrorist lawyers" by representatives of the state, including the Chief Public Prosecutor. Furthermore, other evidence that substantiates this finding is as follows: the court minutes during the 5 December 2002 proceeding made no reference to a disruption in the courtroom by the lawyers; the state agent who filed the complaint was not present in the courtroom; several of the defendants who were alleged to have disrupted court proceedings were not present in the courtroom; the lawyers' reports on the proceedings were corroborated by an independent journalist who was present in the courtroom; the court file did not contain any statements from witnesses despite an 11-month investigation; and prior to the 9 May trial, the defendants, their lawyers and the ICJ observer were filmed by an unidentified individual.

Furthermore, the ICJ finds that although some aspects of the right to a fair trial were respected, others such as the right to be tried by an independent tribunal, the right to equality of arms as well as the right to be informed of the charge were not respected

The ICJ reminds the Turkish Government of its international obligations to not identify lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution.[2]

---

[1] See ICJ reports on the criminal proceedings against the 27 lawyers at No. 1 Ankara Heavy Penal Court on 9 May 2002 and 11 July 2002, respectively at <www.icj.org>

[2] Principles 16 and 18, 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

II. The Trial

1. The Charge Against the Lawyers

The 27 lawyers (hereinafter "Ankara 27") were charged with “professional misconduct”, a criminal offence pursuant to Article 240 of the Turkish Penal Code. This charge stemmed from the lawyers' representation of political prisoners at Ulucanlar prison during a court proceeding in December 2000. It was alleged that at this hearing the lawyers "shouted slogans" at the court and "incited those persons present in the courtroom to resist the gendarmes."[3]

The report of a journalist who was present in the courtroom during the aforementioned hearing refutes the claim that the 27 lawyers disrupted the peace. The report states:

> Fatma Hulya Tunga [one of the defendants] stated that she wished to read her petition entitled, "F-Type prisons and hunger strikes". This raised tension in the courtroom. The lawyers demanded rejection of the judge stating that the court was under the influence of the administration. The bench decided to withdraw from the case. At the end of the hearing the defendants started shouting ‘long live our hunger strikers’, the gendarmes took them out of the courtroom by force. The lawyers who tried to intervene were also beaten. One of the lawyers, Suna Coskun, had a doctor's report that she could not work for a day after the incident.[4]

The official minutes of the court likewise made no reference to a breach of the peace in the courtroom by the lawyers. The minutes read in relevant part as follows:

> Fatma Hulya Tumgan stated that she wished to address the court by reading her statement regarding the F-Type Prison death fasts. The Public Prosecutor stated that the statement did not need to be read because her defence statement had already been taken but that the written statement could be provided to the court and admitted in evidence in the case if necessary. Lawyer Zeki Ruzgar demanded that Fatma Hulya Tumgan be permitted to read her defence statement to the court. The court decided to admit Fatma Hulya Tumgan’s defence statement relating to F-Type Prisons and attach it to her file. The hearing continued. Fatma Hulya Tumgan and Hatice Yurekli signed a two-page statement which was attached to the file. Lawyer Ibrahim Ergun wanted to address the court in relation to Fatma Hulya Tumgan’s defence but the judges refused. Lawyer Ibrahim Ergun asked that it be recorded that he had not been able to address the court. The judge stated that the defence was complete.

Nevertheless, despite the fact that the court minutes did not contain any reference to the disruption of the peace, lawyers representing the Ulucanlar prisoners

---

welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 1990. G.A. Res. 45/121, 45th Sess.

[3] Indictment dated 27 Nov. 2001

[4] *Radikal*, 6 Dec. 2000

were charged with violating Article 240 of the Turkish Penal Code. This article provides as follows:

> Apart from situations written in the Act, whatever the reason may be, if a public servant abuses or misuses their duty/responsibility, depending on the degree of the offence, they shall be imprisoned for 3 years. In the event of any mitigating circumstances the penalty shall be between 6 months to 1 year imprisonment and in both circumstances there shall be a heavy financial penalty as punishment. Furthermore, there shall also be suspension or dismissal from being a public employee.

According to the Indictment dated 27 November 2001, the particulars of the alleged offence were that:

> "… at a hearing before No. 5 Ankara Heavy Penal Court on 5 December 2000 in which persons convicted of membership of the DHKP-C and TKIP appeared to answer charges arising from the Ulucanlar Prison rebellion of 26 September 1999, the lawyers representing the said defendants shouted slogans against the gendarmes and incited persons present in the courtroom to resist the gendarmes."

Article 240 of the Turkish Penal Code, as set out above, creates a criminal offence of professional misconduct. The failure of any public employee to act in accordance with his/her duty is a serious offence punishable by a term of imprisonment, a heavy fine and dismissal from public service. The Bar Association has no jurisdiction in respect of a complaint of professional misconduct under Article 240 of the Turkish Penal Code.

The Observer was informed that Article 240 of the Turkish Penal Code was originally enacted in order to provide a complaint mechanism for Turkish citizens dissatisfied with the conduct of any public employee instructed to act on their behalf. The Observer was also informed that the courts do have experience of criminal prosecutions of lawyers on charges of professional misconduct, however, in all cases, the criminal proceedings have been commenced as a result of a complaint made by an ordinary citizen against the lawyer instructed to act on their behalf. **The Observer understood that the trial of the Ankara 27 was the first recorded occasion on which a complaint made by an agent of the state had given rise to criminal proceedings against a member of the legal profession under Article 240 of the Turkish Penal Code**.

2. Other applicable law, decrees or regulations

Articles 58 and 59 of the Law on Lawyers are relevant in so far as they outline the conditions of inquiry for lawyers accused of offences committed during the course of their professional duties. Article 58 provides as follows:

> "All investigations concerning offences committed by lawyers during the course of their duty shall be carried out by the Public Prosecutor responsible for the area, following the grant of permission by the Minister of Justice. The offices and homes of lawyers may only be searched with a court order and

under the supervision of a Public Prosecutor and a representative of the Bar Association. Such a search may only be undertaken in respect of the matter in relation to which the court order was obtained. Lawyers should not be subjected to body searches unless they are suspected of offences requiring heavy sentencing."

Article 59 of the Law on Lawyers provides as follows:

"The file in respect of an investigation carried out in pursuance of Article 58 shall be sent to the Under-Secretary of the Minister of Justice responsible for Heavy Penal matters. Following their investigation, if it is decided that legal action is necessary then the file will be sent to the Public Prosecutor of the Heavy Penal Court nearest to where the offence was committed. Within five days, the Public Prosecutor shall prepare an indictment and pass it to the Heavy Penal Court to decide whether there are grounds for a final investigation or not.

A copy of the indictment shall, in accordance with the Procedure Rules of the Penal Court, be given to the lawyer against whom there is an investigation. Following receipt of the indictment, the lawyer may, within the time period set by law, request that further evidence be obtained. If the request is acceptable it is taken into consideration and, if necessary, the judge will order further more detailed investigation.

The trial of a lawyer against whom it is decided to open an investigation will be held at the Heavy Penal Court nearest to where the offence was committed. The Bar Association of which the lawyer is a registered member will be notified of the prosecution."

3. The nature of the prosecution case

The trial of the 27 lawyers before No. 1 Ankara Heavy Penal Court was based upon events that took place during the 5 December 2000 criminal trial of prisoners who were alleged to have committed criminal acts at Ulucanlar prison in September 1999. That trial was presided over by Judge Necdet Yaman, Judge Abdurrahman Kelesoglu and Judge Inci Ozden. The Public Prosecutor was Sadi Aslan.

According to the official court minutes of the hearing on 5 December 2000, the following defence lawyers were in attendance: Zeki Ruzgar; Kazim Bayraktar; Filiz Kalayci; Betul Vangolu; Sevim Akay; Belgun Culhaoglu; Mecit Engeci; Huseyin Yukselbicen; Nurten Caglar; Oya Aydin; Vedat Aytac; Nuray Ozdogan; Sevil Ceylan; Keles Ozturk; Medine Ayhan; Goksel Arslan; Gulizar Tuncer; Aytul Kaplan; Haci Ali Ozhan; Ertugrul Cem Ilhan; Dilek Midik; Devrum Karakulah; Ibrahim Ergun; Ozgur Sariyildiz; Riza Karaman; Gaye Dincel and Selcuk Kozagaci.

Some time after the trial, Kemal Tekin, a gendarme captain, filed a written complaint with the Office of the Public Prosecutor (the complaint itself was undated). The complaint alleged that the 27 lawyers representing the defendants had, during the court proceedings, failed to act in accordance with their professional duty by

"shouting slogans" and "inciting those persons present in the courtroom to resist the gendarmes".

The complaint was then forwarded by the Ministry of Interior to the Minister of Justice[5] who, on 25 April 2001, instructed the Office of the Public Prosecutor to commence an investigation into the conduct of the lawyers in attendance on 5 December 2000. After the Public Prosecutor's report of the investigation was completed, the Minister of Justice found there to be a case to answer and instructed that charges should be brought and legal proceedings commenced against the 27 lawyers.[6] The Public Prosecutor prepared the Indictment dated 27 November 2001.

From 27 November 2001 to 9 May 2002, there were written submissions by the prosecution and the defence. The first hearing took place on 9 May 2002 before No. 1 Ankara Heavy Penal Court. The second hearing took place on 11th July 2002 before the same court. The third and final hearing took place on 31st October 2002 before the same court.

4. The nature of the defence case

In their defence statement, the 27 lawyers maintained that there was insufficient evidence to support the accusation that they had shouted slogans and provoked those present in the courtroom to resist the gendarmes during the 5 December 2000 hearing. The lawyers stated that the complaint made against them was an attempt to punish them for providing legal representation to individuals who were charged with offences arising out of their expression of political ideals contrary to those of the Turkish state.

---

[5] The Ministry of the Interior forwarded the complaint to the Ministry of Justice with a letter dated 19 December 2000 attached. The letter states in relevant part:

> "1. At 14.00 on 5 December 2000, at a hearing regarding the case of the Ankara Closed Central Prison rebellion, members of illegal organisations (DHKP-C and TKIP) demonstrated in the court by singing and refusing to leave the court.
>
> 2. As gendarme officers attempted to remove them from the hearing, DHKP-C terrorist organisation members Mr. Mustafa Yigit and Miss Hatuce Yurekli beat and resisted the gendarme officers. Miss Hatuce Yurekli squeezed her legs between her chair, so as to prevent herself from being removed from the court.
>
> 3. During the course of this incident, the 27 lawyers acted together with their clients by demonstrating and shouting slogans with them in order to incite the defendants and observers present in the courtroom to resist the gendarmes.
>
> We request that all necessary procedures be invoked to deal with the above-mentioned lawyers."

[6] By way of a letter dated 14 November 2001, the Minister of Justice found there to be a case to answer and authorised the prosecution. The said letter states that the 27 lawyers are accused of:

> "Acting together with their detained clients, members of the DHKP-C and TKIP terrorist organisations, who were being tried at No.5 Ankara Heavy Penal Court in relation to the rebellion which occurred at the Ankara Central Closed Prison [Ulucanlar] in 1999, by shouting slogans at the end of the hearing on 5.12.2000, inciting the defendants and the observers in the courtroom to resist the gendarmes."

The defence case was that after the trial on 5 December 2000 commenced, the defendants, in an attempt to make their defence, started to address the court regarding the incident at Ulucanlar Prison, however, as they did so, the gendarmes and judges intervened in an effort to prevent them from commenting upon the incident. The lawyers representing the defendants objected and demanded that their clients should be allowed to exercise their right to make a defence. The judges refused to hear the defendants. At this point, the gendarme officers present in the courtroom began to physically assault the defendants. The defence case statement went on to allege that the gendarme officers proceeded to beat, punch and pull the hair of the defendants as they stood in the dock. The lawyers stated that they immediately protested and demanded that the judges order the gendarmes to stop abusing their clients. The lawyers maintained that the judges failed to intervene and instead left the courtroom.

According to the defence case statement, at this point the defendants began to shout slogans and the lawyers themselves intervened in an attempt to stop the violence that was being inflicted upon their clients. In response, the gendarmes and police officers beat the lawyers, resulting in one of their number being injured.

The Observer noted during the course of his observations that at no stage of the proceedings were the defendant lawyers excluded from observing the proceedings against them. No restrictions were placed upon their ability to defend themselves in person when they so wished or upon their choice of legal representative. They were able to hear the prosecution case in full and put forward their defence by way of oral and written submission. They were able to refute the prosecution's evidence. The court authorities also complied with their duty to notify the accused of the date and location of the hearing.

The Observer notes that the defendants were afforded over five months to prepare their case between the indictment being preferred and the start of the trial. A further five-and-a-half months then elapsed between the start of the trial and its conclusion, a period of time during which only three short hearings were held. The case against the lawyers was not especially complex. They faced a single charge and the prosecution's evidence comprised a single complaint by one gendarme officer. Although 27 lawyers were charged, they were all able to access separate representation. All of the lawyers were on bail during the proceedings and so no restrictions were placed upon their ability to communicate in confidence with their legal representatives. The Observer received no complaints of the defence having been denied full access to all appropriate information, files and documents necessary for the preparation of their case, nor any complaints to the effect that they had been denied adequate preparation time.

5. The role of the prosecution and defence counsels

The prosecution was represented by Public Prosecutor Yalcin Erkumay[7]. The Observer understands that Mr. Erkumay was not specifically selected to prosecute the Ankara 27, rather, the case was randomly allocated to No.1 Ankara Heavy Penal

[7] The Observer attempted to obtain an audience with Mr. Erkumay at lunch-time on 31st October 2002, but was informed by court staff that he had already completed his list of cases for the day and had left the building.

Court. The case was then assigned to Mr. Erkumay because he is responsible for prosecuting all cases in Court No. 1.

The defendants were represented by members of the Contemporary Lawyers Association ("CLA"). The Observer understands that the 27 lawyers were able to appoint lawyers of their own choosing. All of the defendants were members of the CLA themselves and they chose to appoint their colleagues to act as their legal representatives.

The Observer is concerned that the principle of "equality of arms" was not fully respected in that the prosecutor had a right to summarise his argument using his own words, but the defence lawyers and defendants were barred from dictating their own defence arguments directly into the record. As the Court did not have any accurate mechanism for recording oral submissions made during the course of the hearing, it relied upon a typist to generate the only account of the evidence given and representation made in the courtroom. The typist recorded only that which the judge or public prosecutor dictated to her. Defence lawyers, meanwhile, had to rely upon the judge to summarise the statements of the defendants and argument of counsel. The Observer 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 vis-à-vis the prosecution.

The Observer 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 prosecution. Second, it may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed could be said to deprive appellate courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower court. In the opinion of the Observer, these matters serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

As a result of information obtained from interviewees, the Observer understands that although during the hearing the defence can object to the judge's summary, acceptance of this objection is within the judge's discretion. After the hearing is over, the defence lawyer has no right to object to how his/her argument is summarised in the record. In the hearings observed, the defence counsel did not seek to challenge the judge's summary at any stage of the proceedings.

The Observer reports further that counsel for the prosecution and defence counsel had access to files and documents necessary for the preparation of their case. Each was afforded adequate time and facilities to prepare their case. Each was informed of the date, time and place of the hearings in the case. Each was able to address the court by way of full oral submissions and during the said submissions each was afforded an effective opportunity to challenge the others case and advance their own case.

The Observer is not able to report upon the ability of counsel to call and effectively examine witnesses since none were called by either party during the course of the hearings observed.

6. The conduct of the presiding judge

The trial was presided over by Judge Mustafa Danisman, Judge Nihat Akalin and Judge Zeki Gungor.

The Observer is satisfied of the judge's attitude and approach towards the prosecution and defence. It was most apparent that the judges hearing the trial of the Ankara 27 were competent and experienced. They were in command of the issues before them and demonstrated a willingness to provide the defendants a satisfactory opportunity to present their defence. The Observer welcomes the Court's decision on 9 May 2002 to adjourn the trial so as to allow defendants from Istanbul to present their defence in person. The Observer is also satisfied of the Court's decision on 11 July 2002 to adjourn the trial so as to allow the defendant Goksel Arslan another opportunity to present his defence and not compel him to travel to Ankara in order to do so.

7. Judgement

At the hearing on 31st October 2002, the public prosecutor invited the court to acquit all 27 of the defendant lawyers. The judges unanimously ruled that the alleged charge was not supported by sufficient evidence to find that an offence had been committed and acquitted all of the defendants.

III. Evaluation of the fairness of the proceedings

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the primary binding regional instrument to have actually been ratified by Turkey.[8] In addition, relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948 (UDHR), UN Basic Principles on the Independence of the Judiciary of 1985[9] and the UN Basic Principles on the Role of Lawyers of 1990.[10]

1. Concerns relating to compliance with international fair trial standards

The ICJ believes that the criminal charge against 27 lawyers before No.1 Ankara Heavy Penal Court is in reality a form of harassment of lawyers in the discharge of their duties.

---

[8] Turkey has been a State Party since 1954.

[9] 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).

[10] 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.

To enable any legal profession to effectively perform its role in the defence of individuals, lawyers must be able to counsel and represent their clients in accordance with their established professional standards and judgement free from any influence, pressure, threat or undue interference.

A legal obligation to protect the role of lawyers is implicit within the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms to which Turkey is a party.

The right of every accused to be legally represented in the conduct of his/her defence can only be said to be fully effective when lawyers can, without fear, fulfil their duties towards their clients. Where such conditions are not present and the personal security of lawyers is an issue the effectiveness and the integrity of the lawyers' work are potentially compromised.

The existence of threats against lawyers is often the result of the identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to accusations of holding the same views and opinions as their clients. The trial of the 27 lawyers, therefore, must be examined within this context.

Based on observations of the hearings on 9 May 2002, 11 July 2002 and 31 October 2002, the Observer has concerns in relation to the application of the following international fair trial guarantees.

a. The right to be tried by an independent and impartial tribunal

Both the preliminary investigation and the prosecution of the 27 lawyers had been approved, not only by the Public Prosecutor's Office, but more significantly, by the Minister of Justice and the Under-Secretary of the Minister of Justice, respectively. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council, the body which is responsible for the appointment, promotion, transferring and discipline of members of the Turkish judiciary. The judges seized of the trial of the 27 lawyers were thus left in the invidious position of knowing that individuals capable of exercising a profound influence over their entire judicial career had already found there to be a prima facie case to answer. In such circumstances where their independence can be seen to be compromised, the ICJ is satisfied at the decision of the judges to acquit the 27 lawyers on the basis of insufficient evidence despite the fact that this was done so on the recommendation of the public prosecutor.

b. Right to be informed of the charge

The Observer received numerous complaints from the 27 lawyers that they were not afforded their right to be informed of the charge against them with sufficient clarity in accordance with Article 6(3)(a) of the European Convention on Human Rights ("ECHR"). The complaints focused upon the fact that although the indictment detailed the particulars of the offence as "shouting slogans", there was no

particularisation of what each defendant was alleged to have said and therefore no indication as to whether what they shouted, if they did shout, was in fact a "slogan".[11]

The Observer is of the opinion that although the indictment against the lawyers did provide the legal basis for the charge by indicating that the conduct of the accused amounted to "professional misconduct" under Article 240 of the Turkish Penal Code, nevertheless, the lawyers' right to be informed of the charge against them was not fully respected as the facts which formed the basis of the accusation were not clearly set forth. Specifically, the charge failed to detail precisely what the defendant lawyers were alleged to have shouted. In so far as they were therefore unable to challenge whether they shouted slogans or not, the Observer is of the opinion that the right of the 27 lawyers to prepare a proper defence was compromised.

c. The right to be presumed innocent until proven guilty

The Observer noted that at the outset of the hearing on 9 May 2002, the Court asked the defendants to declare whether they had any previous convictions. Two of the lawyers declared that they had previously been convicted of offences under Article 213 of the Turkish Penal Code ("incitement to hatred on grounds of race or religion"). Whilst the Observer recognises that the European Commission has expressed its view in several cases that informing decision-makers of a person's prior convictions before a verdict is reached does not necessarily violate fair trial guarantees, including the presumption of innocence enshrined by Article 6(2) of the ECHR,[12] the Observer nevertheless considers that the practice of requiring a defendant to declare his/her criminal record at the outset of a criminal trial in the presence of the tribunal that is to determine his/her fate can be prejudicial and is not a practice that should be encouraged. The Observer considers that if justice is to be not only done, but also seen to be done, this practice ought properly to be abolished.

d. The right to be tried within a reasonable time

The Observer has some concerns over the length of time that was allowed to elapse between the alleged offence and the start of the trial. The charge related to an incident that was alleged to have taken place at a court hearing on 5 December 2000. It is not clear when the Gendarme Captain responsible for complaining about the conduct of the lawyers initiated his complaint but it is clear that the Ministry of the Interior forwarded the said complaint to the Ministry of Justice by way of a letter dated 19 December 2000. It is also clear that the lawyers were not formally charged until 27 November 2001. The intervening 11 months were occupied with the Ministry of Justice authorising the Public Prosecutor's Office to commence an investigation,

[11] The court record of the first hearing on 9th May 2002 reveals that the accused consistently brought to the court's attention the fact that they charge lacked essential information. This issue was addressed in the statement handed out in court on behalf of 15 of the 27 accused it was then reiterated by accused Selcuk Kozagacli who stated that: "In the indictment it is not known which slogan was shouted and we cannot know whether what was shouted was a slogan or not".

[12] *X v. Austria*, 3 April 1967, 23 Coll. Dec. 31 (presiding judge disclosed details of the accused's previous convictions to lay judges before a verdict was reached on a burglary charge); *X v. Austria*, 1 April 1966, 19 Coll. Dec. 95 (accused's previous convictions for theft were referred to during the course of trial); *X v. Denmark*, 14 December 1965, 18 Coll. Dec 44 (the public prosecutor informed the court of the accused's numerous previous convictions before the jury reached a verdict on a rape charge).

the Public Prosecutor's Office undertaking an investigation, the Public Prosecutor's Office forwarding the investigation report to the Ministry of Justice, the Ministry of Justice considering the investigation report and finally the Ministry of Justice authorising the preferment of charges against the 27 lawyers.

The Observer notes that although the complaint involved allegations against 27 lawyers, the nature of the investigation required was a relatively straightforward one bearing in mind that the complaint amounted to an allegation of a simple disturbance within the precincts of a courtroom. Further, the 27 lawyers faced only a single charge. This suggests that the investigation would have been narrow rather than having to address the situation of multiple defendants facing the prospect of multiple charges. Furthermore, since the offence was alleged to have occurred within courtroom No.5 of the Ankara Heavy Penal Court, there should have been no difficulty in identifying and locating potential witnesses to the incident. Finally, the Observer is not aware of any suggestion that the accused acted in any way other than to have co-operated fully throughout the investigation stage. In light of the foregoing considerations, the Observer questions why a period of almost a year was allowed to elapse between the date of the alleged offence and the date of charges being preferred, given that excessive delay in the administration of justice constitutes a danger to the rule of law.

However, it is an examination of the prosecution file that causes the greatest concern over the apparent delay in bringing formal charges in the present case. The prosecution file contained no evidence whatsoever in support of the charge brought against the 27 lawyers, other than the original complaint by the Gendarme Captain who was not present in the courtroom when the offence was alleged to have taken place. This begs the question as to precisely what sort of an investigation was carried out during the 11 months between the date of the alleged offence and the date when charges were preferred. In the view of the Observer it seems unarguable that 11 months was a reasonable period of time for an investigation to be conducted when the absence of any prosecution evidence, other than the initiating complaint, suggests that no detailed investigation was ever undertaken.

2. Compliance with international fair trial standards

a. The right to defence

The Observer notes that the defendant lawyers were not excluded from observing the proceedings against them. No restrictions were placed upon their ability to defend themselves in person when they so wished or upon their choice of legal representative. They were able to hear the prosecution case in full and put forward their defence. They were able to refute the prosecution's evidence. No restrictions were placed upon their ability to advise their counsel in the examination of witnesses, although none were in fact called. The court authorities also complied with their duty to notify the accused of the date and location of the hearing. In view of the foregoing, the Observer concludes that the 27 lawyers were afforded their right to make a defence in accordance with Article 6(3)(c) of the ECHR.

b. Right to adequate time and facilities to prepare the defence

The Observer notes that over five months elapsed between the indictment being preferred and the start of the trial. A further five-and-a-half months then elapsed between the start of the trial and its conclusion, a period of time during which only three short hearings were held. The case against the lawyers was not especially complex. They faced a single charge and the prosecution's evidence comprised a single complaint by one gendarme officer. Although 27 lawyers were charged, they were all able to access separate representation. All of the lawyers were on bail during the proceedings and therefore no restrictions were placed upon their ability to communicate in confidence with their legal representatives. The Observer received no complaints of the defence having been denied full access to all appropriate information, files and documents necessary for the preparation of their case. In view of the foregoing, the Observer concludes that the 27 lawyers and their legal representatives were afforded adequate time and facilities for the preparation of their defence in accordance with Article 6(3)(b) of the ECHR and Principle 21 of the Basic Principles on the Role of Lawyers.

c. The right not to be compelled to testify or confess guilt

The Observer is unaware of any restrictions having been placed upon the defendant lawyer's right to remain silent. Furthermore, no complaints were received of the accused having been coerced to testify or to confess. In the opinion of the Observer therefore, the 27 lawyers were afforded their right not to be compelled to testify or confess guilt in accordance with the European Court's interpretation of Article 6 of the ECHR.

IV. Conclusion

Any comment on the trial of the Ankara 27 must necessarily extend beyond an analysis of the fairness of the proceedings in the courtroom to include the overall context within which the criminal charges against the lawyers arose. It is through this optic that the Observer reports his profound concern that bringing criminal charges against the Ankara 27 was an attempt by the Turkish state to intimidate and harass lawyers in the discharge of their legitimate professional duties.

Several facts evidenced during the course of the observation of the trial of the Ankara 27 support this position. First, the charge was not initiated by the public prosecutor who was in court on the date of the incident, 5 December 2000, but by a written complaint filed with the Office of the Public Prosecutor by Kemal Tekin, a Gendarme Captain, who was not present in the court on the said day. Second, no incident report was filed by the police or gendarmes present in the courtroom on the day of the alleged incident. Third, some of the accused claimed that they were not present in the court at the moment of the incident. Fourth, the prosecution was brought despite the official court record of proceedings on 5 December 2000 making no reference to any breach of the peace occurring in the courtroom, whether initiated by the gendarmes or the defence lawyers. Fifth, as indicated previously, the prosecution was brought despite an article published in the 6 December 2000 edition of the newspaper '*Radikal*', written by a journalist present in the courtroom at the time of the alleged incident, being entirely corroborative of the lawyers' version of events as asserted in their defence statement. Sixth, after an elapse of an 11-month period for investigation of the charge, at the time of the hearing on 9 May 2002, the

court file contained no statement from any witness present in the courtroom at the time of the alleged incident. Finally, the political nature of this trial can also be supported by the fact that immediately prior to the hearing on 9 May 2002, the defendants, their legal representatives and those attending the hearing (including the Observer) were filmed by an individual who refused to reveal his identity and who stated that he was acting "under orders".

The Observer therefore reports that, in his opinion, although the charge brought against the 27 lawyers was prima facie non-political in character, the circumstances in which it was brought indicate that it was a manifestation of state-sponsored or state-tolerated harassment and intimidation of members of the Turkish legal profession for having provided advice and representation to individuals charged with political and serious criminal offences against the Turkish state.

The Observer is fortified in his conclusion after having met with the Chief Public Prosecutor of Ankara on 11 July 2002. During the course of this meeting the Chief Public Prosecutor openly stated that lawyers who represent members of illegal organisations are actually the tools of these organisations and are "terrorist lawyers".

Annex A

1. Background information concerning the accused

In the order in which they appeared on the indictment, the 27 lawyers tried before No.1 Ankara Heavy Penal Court were: Ayhan Medeni; Nurten Caglar; Fahriye Belgun (Culhaoglu); Dilek Midik; Vahide Ozgur Sariyildiz; Sevil Ceylan; Aytul Kaplan; Devrim Karakulah; Riza Karaman; Riza Karaman; Gaye Dincel; Huseyin Yuksel Bicen; Nuray Ozdogan; Nazan Vangolu; Vedat Aytac; Haci Ozhan; Filiz Kalayci; Suna Coskun; Kazim Bayraktar; Gulizar Tuncer; Ibrahim Ergun; Selcuk Kozagacli; Sevim Akat; Keles Ozturk; Goksel Arslan; Zeki Ruzgar; Mevit Engeci; and Oya Aydin.

All of the lawyers were members of either the Ankara Bar Association or the Istanbul Bar Association. Their professional experience ranged from less than 1 year to over 20 years in practice.

2. Socio-political background to the trial

Article 2 of the Turkish Constitution describes the characteristics of the Republic as a "democratic, secular, and social State governed by the rule of law, in accordance with the concepts of social peace, national solidarity, and justice; respectful of human rights, committed to Ataturk nationalism, and based on the fundamental principles set forth in the preamble". Thus, the principle of the rule of law is given a prominent place in the Constitution together with other fundamental characteristics of the Turkish State.

According to Turkish law, the power of the judiciary is exercised by judicial (criminal), military and administrative courts. These courts render their verdicts in the first instance, while superior courts examine the verdict for subsequent rulings.

Criminal courts of original jurisdiction are Justice of the Peace Courts (Sulh Ceza Mahkemeleri), Courts of General Criminal Jurisdiction (or Courts of First Instance) (Asliye Ceza Mahkemeleri), and Heavy Penal Courts (Aoir Ceza Mahkemeleri). Justice of the Peace Courts and Courts of General Criminal Jurisdiction have one judge, and are generally located in the capitals of sub-provinces. Heavy Penal Courts are composed of three judges, one of whom is the head, and are located in provincial capitals. In addition, State Security Courts deal with political and serious criminal cases deemed threatening to the security of the state. Turkish courts have no jury system; judges render decisions after establishing the facts in each case based on evidence presented by lawyers and public prosecutors. The Supreme Court of Appeal (also known as the Court of Cassation) is the only competent authority for reviewing decisions and verdicts of lower-level judicial courts, both civil and criminal.

Article 9 of the Turkish Constitution provides for an independent judiciary. Under Article 138, judges are protected from instructions, recommendations or suggestions that may influence them in the exercise of their judicial power. Furthermore, no legislative debate may be held concerning the exercise of judicial

power in a pending trial and both legislative and executive organs are required to comply with court decisions without alteration or delay. Article 139 of the Constitution provides judges with security of tenure, although certain legitimate exceptions are authorised.

Notwithstanding these provisions, there is continuing concern within the international community regarding the extent of the independence of Turkish judges in practice. These concerns centre on the make up of the ruling body of the judiciary, the High Council of Judges and Prosecutors and its 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 Council is chaired by the Minister of Justice, a Minister of Justice Under-Secretary and five judges selected by the President, thereby failing to separate the judiciary from the executive. Decisions of the Council are not open to judicial review. Discussion within the Turkish government about possible changes to the High Council suggests that the government is aware that it is not satisfactory.[13]

Turkey has also been the target of much criticism over a long period of time by human rights organisations[14], United Nations Mechanisms[15] and the European Court of Human Rights[16] on the issue of the extent to which Turkish lawyers are able to exercise their role in the judicial process without undue restriction and pressure. Observers have commented that on occasion lawyers are subjected to state-sanctioned or state-tolerated harassment, intimidation and violence merely for providing professional legal services to their clients. Lawyers who repeatedly conduct defences before the State Security Courts are, at least in some cases, considered to share the political views of their clients and, as such, termed "terrorist lawyers" by the police, the public prosecutors and the courts. Lawyers who appear in trials before the State Security Courts in cases of torture and extra-judicial killing are, in some quarters, qualified as "public enemies". Lawyers who publicly comment on the human rights practices of Turkey or the Kurdish situation tend to be regarded, in some official circles, as enemies of the state and branded separatists.

---

[13] 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 of the International Commission of Jurists, Geneva, Switzerland.

[14] Turkey has been highlighted in many reports of the International Commission of Jurists, see for example *Attacks on Justice*, years 1999, 2000 and 2002 and *The Independence of Judges and Lawyers in the Republic of Turkey, Report of a Mission, 1999*. See also, Amnesty International documents, as for example, *Lawyers severely ill-treated outside Buca Prison in Izmir*, EUR 44/31/96, March 1996; *17 years in the balance: Lawyer Esber Yagmurdereli returns to prison in freedom of expression case*, EUR 44/074/1998, November 1997; *Ocalan Lawyers at Risk*, EUR 44/020/1999, February 1999 and Amnesty International Annual Reports of 2000 and 2001.

[15] See, for example, report of cases of harassment of lawyers in the reports of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy (E/CN.4/1998/39, 12 February 1998; E/CN.4/1999/60, 13 January 1999; E/CN.4/2000/61, 21 February 2000 at 287-302; E/CN.4/2002/72, 11 February 2002 at 184-189); Report submitted by Ms. Hina Jilani, Special Representative of Secretary-General on Human Rights Defenders (E/CN.4/2002/106, 27 February 2002) and Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain (E/CN.4/199840, 28 January 1998; E/CN.4/1997/31/Add1, 11 February 1997.

[16] See for example ECtHR, *Kurt v. Turkey*, 25 May 1998 and ECtHR, *Okcuoglu v. Turkey*, 8 July 1999.

At its most severe, the harassment and intimidation of Turkish lawyers has taken the form of arrest and detention. Lawyers have been deprived of their liberty for prolonged periods of time and placed at risk of physical and emotional abuse. It is equally of concern that lawyers have been exposed to prolonged and repeated criminal prosecution for their work. Less serious, but nevertheless equally objectionable forms of harassment have included disrespectful or threatening treatment of lawyers in the performance of their duties by members of the security forces, including unnecessary searches, verbal abuse and interception of telephone calls.[17]

[17] See *The Independence of Judges and Lawyers in the Republic of Turkey, 1999.*

Annex B

1. Appointment of the Observer

The Trial Observer, Mr. Paul Richmond, Barrister of England and Wales, was appointed by the ICJ and was charged with reporting directly to the ICJ. Mr. Richmond observed hearings on 9 May 2002, 11 July 2002 and 31 October 2002.

The Observer was briefed by the ICJ in the way made apparent in this report. This report has been prepared in general reliance upon the Trial Observation Manual prepared by the ICJ which formed part of that briefing.

2. Methodology

The Observer attended hearings at No.1 Ankara Heavy Penal Court on 9 May 2002, 11 July 2002 and 31 October 2002. He was accompanied by a legally qualified interpreter capable of simultaneous translation.

During the Mission to Turkey the Observer also held meetings with a number of the defendant lawyers, representatives of the Contemporary Lawyers Association, Mr. Sadik Erdogan (Head of the Ankara Bar Association), Mr. Ozdemir Ozok (Head of the Turkish Bar Associations), Judge Mustafa Danisman (Presiding Trial Judge), Mr. Fatih Kasirga (Chief Public Prosecutor of Ankara) and Mr. Alatas (Head of the Human Rights Association). The Observer had unfettered access to the complete prosecution file and obtained copies of the official court minutes of each hearing that he observed.

The report also includes information from a number of written sources. Among these are documents, reports, books etc. from UN agencies, news agencies, humanitarian NGOs and researchers on Turkey. These sources where used are appropriately attributed.

The Observer and the ICJ would like to express their gratitude towards all those agencies, organisations and individuals that have contributed to the information presented in this report.