REPORT OF

THE RE-TRIAL OF LEYLA ZANA

AND THREE OTHER KURDISH

FORMER PARLIAMENTARIANS

Before

No. 1 ANKARA STATE SECURITY COURT

on

18 July 2003

**A report published by the Centre for the Independence of Judges and Lawyers (CIJL)
of the International Commission of Jurists
Geneva, Switzerland**

I. Executive Summary

The re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan, all Kurdish former parliamentary deputies, continued before No.1 Ankara State Security Court on Friday, **18 July 2003**. The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed an observer, Dr. Patrick Vella, a former Judge in the Courts of Malta, to observe and report on the trial.

Leyla Zana and her co-defendants had been convicted on 8 December 1994 by the Ankara State Security Court of "*membership of an armed gang*" contrary to Article 168 of the Turkish Penal Cod 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.[1] The EctHR held that the Ankara State Security Court, as composed then, was not "*an independent and impartial tribunal*."[2] Following this ruling, Leyla Zana and her three co-defendants are now being re-tried and hearings have so far been held at No.1 Ankara State Security Court on 21 February 2003, 28 March 2003, 25 April 2003, 23 May 2003, 20 June 2003, and 18 July 2003.

On the basis of the observation of the hearing on 18 July 2003, the ICJ/CIJL welcomes some positive developments which indicated that certain aspects of the right to a fair trial were being respected. Nevertheless, the ICJ/CIJL believes that there is much room for improvement in so far as the principles of *equality of arms* between the prosecution and the defence and the *independence and impartiality of the tribunal* are concerned.

The ICJ/CIJL is satisfied that during this hearing, as in previous hearings, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal

[1] *Sadak and Others v. Turkey* (no.1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96).
[2] Ibid.

arguments and the testimony of witnesses in full. The defendants were able to participate in the proceedings and Leyla Zana was given the opportunity to make and read out a lengthy statement at the start of the afternoon session with no restrictions at all. A copy of her statement was handed to the Court registrar to be kept in the records of the case. No limitations were placed on public attendance at the hearing nor 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.

The ICJ/CIJL is furthermore pleased that during this hearing, contrary to previous hearings (other than the one on 20 June) when the defence was reported not to have been allowed to call any witnesses of its own, it was allowed to summon and call six witnesses who gave live (*viva voce*) testimony under oath. One witness for the prosecution, out of four as three did not appear, gave evidence and the defence was allowed to put forward a few questions to clarify something the witness had stated earlier, even though these questions were not made by the defence directly to the witness but through the Presiding Judge. Nevertheless, this was a positive development and in conformity with a ruling given in an earlier sitting that at future hearings, prosecution witnesses whose evidence was previously not susceptible to challenge, are henceforth to be made available for examination and cross-examination.

However, in the main, and as mentioned above, there still remains a serious amount of disregard for (1) the principle of the *equality of arms* between the prosecution and the defence, (2) the *independence and impartiality of the court*, and (3) the *presumption of innocence.*

Consequently, the ICJ/CIJL reiterates its 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 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It therefore, once again, urges the Turkish Government to ensure that at future hearings in this re-trial, all

the provisions of Article 6 of the ECHR to which the Republic of Turkey is a party, will be fully respected and implemented. The next hearing will take place on **15 August**.

II. Legal Framework

The ECHR is the primary binding regional instrument to have been ratified by Turkey. In terms of Article 90 of the Turkish Constitution, the ECHR actually forms part of Turkish domestic law.

Article 6 of the ECHR guarantees the *right to a fair trial* in criminal proceedings. 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.[3]

The equality of arms principle 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*".

III. Violations of the Right to a Fair Trial

(1) The continued detention of the defendants

As had already transpired in earlier sittings, at the conclusion of the hearing on 18 July, all members of the defence team led by Mr. Yusuf Alatas 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

[3] *Kaufman v. Belgium* (1986) 50 DR 98, EcmHR 15.

objected to the release of the defendants without giving any reasons to substantiate its objection. Unlike the defence submissions, the objection of the prosecution was recorded *verbatim* by the court stenographer.

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 submitted by the defence team, the court then reconvened and the Presiding Judge read out the court's decision refusing the defence request for the defendants' release. The Observer was informed by the interpreter that 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.

This rationale, read in conjunction with (1) the reason given during the 20 June hearing for refusing a similar request, namely that the court maintained its belief that the 1994 conviction was still valid in spite of the decision of the EctHR and (2) the allegation that the Presiding Judge had earlier commented on the guilt of the defendants in a pre-trial application[4] leads the ICJ/CIJL to maintain that there has been a violation of the *presumtion of innocence* as enshrined by Article 6 (2) of the ECHR. The reasons given by the Court to refuse the defendants' release, despite the fact that they have already been in prison for almost nine years, do not constitute sufficiently valid legal reasons to continue with the detention of the defendants.

It is the opinion of the ICJ/CIJL that as a natural and legal consequence of the ruling of the EctHR on 17 July 2001, the present re-trial is to be considered as, and in actual fact is, a completely new process with the aim of remedying the defects that existed in the first trial whereby the defendants were each sentenced to a 15 year term of imprisonment. Therefore, extreme care and caution must be taken to ensure that the trial this time is fair and in conformity with the ECHR and with Turkey's international obligations arising from the said Convention.

[4] 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*.

(2) Violation of the Principle of Equality of Arms

As in previous hearings, it was again quite apparent during the course of the hearing of the 18 July 2003 that the principle of *equality of arms* was still not being fully respected and applied in practice, and improvement in the system is earnestly recommended and urged.

The only oral submission made by the prosecution during the day's sitting was its objection to the request of the defendants for their release. This submission was taken down *verbatim* by the court stenographer while all verbal submissions made by members of the defence team were not recorded directly or *verbatim* by the court stenographer in the same way, but were only briefly summed up by the Presiding Judge and dictated in his own words into the record.

This different procedure for recording submissions made by the parties is of grave concern and even though it appears to be the recognized practice and system in all criminal trials in Turkey, it fails to comply with the principle of the "*equality of arms*" in so far as it undoubtedly places the defence at a substantial disadvantage vis-à-vis the prosecution.

The Observer, as other previous observers, is concerned that the procedure for recording defence submissions in a summarised form by the Presiding Judge, in contrast to the procedure for recording prosecution submissions *verbatim*, could prejudice the defendants in the following aspects, namely: (**1**) the impression might easily be given that any defence submission, lengthy and legally substantiated and argued as it might be, is nevertheless considered to be not as important as whatever the prosecution might say, (**2**) it could prevent defendants from arguing on appeal matters submitted on their behalf during the course of their trial as these would not have been properly, directly or even accurately entered into the records of the case, and therefore, appellate courts can never have a completely faithful record of the proceedings in the lower or first court.

Although during the hearing the defence did object to parts of the judge's summary, whether this was to submissions made by the defence or to what witnesses had stated, pointing out some points by way of clarification or asking the judge to enter some points which he had left out in his summary, the Observer was informed that acceptance of such objections remains always within the sole discretion of the Presiding Judge. After the hearing is over, the defence lawyer has no right to object to how his arguments, and/or to how a defence witness testimony are summarised by the Presiding Judge and entered into the record of the case. However, in the present hearing, defence lawyers did seek to clarify and/or add to the judge's summary on more than one occasion and on each occasion the judge accepted what the defence pointed out and did amend his summary.

(3) Defence was not allowed to examine witnesses it had called

The ICJ/CIJL is satisfied that during the 18 July 2003 hearing, the defence was allowed to call 6 witnesses to support its case. The witnesses were all heard during the sitting. This is a positive development, as according to the report of the ICJ/CIJL of the hearing on 23 May 2003, while the prosecution had been allowed to call 26 witnesses, the defence had been denied this right.

Furthermore, despite the fact that 6 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 *examining* the witnesses. Rather, as in the instant case, it is the Presiding Judge who examines the witnesses. In the present case, 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 provides room for doubt as to the veracity or accuracy of the court record as it is based solely upon recollections and summaries by the Presiding Judge 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 put in a procedurally inferior position vis-à-vis the prosecution as the procedure for examining witnesses varied subtantially between witnesses for the prosecution and witnesses for the defence. While it is a positive and welcome sign that all the defendants were allowed to give speeches during the last two hearings, nevertheless, the unequal manner in which evidence is taken leads to a violation of the right to a fair trial and is another clear example of *inequality of arms* between the prosecution and the defence, the former being afforded a more advantageous position than the latter.

(4) The Layout of the Court

As in other hearings in the re-trial of Leyla Zana and her co-defendants, at the start of the 18 July hearing, and after every adjournment, the prosecutor and the judges simultaneously entered the court room from the same door whilst the defence team entered the court room from a side door along with the public. When the judges rose to consider in chambers the request made by the defence for the release of the four

defendants, the prosecutor also retired with the judges and left the court room along with them through the same exit door.

Furthermore, during the hearing, the prosecutor sat on an elevated platform, on the same level with the judges and adjacent to them, and quite close to the judge sitting on the prosecutor's left. On the other hand, the defence lawyers sat at a table at ground floor level, the same level as the public and the defendants. The defence lawyers were also placed at quite a distance from the defendants in a way that no communication between them was possible during the hearing. The ICJ/CIJL Observer was informed by defence lawyer, Mr. Yusuf Alatas, that no communication can take place between the defence lawyers and the defendants either during the trial or during the breaks when the session is adjourned. He said that the only time he can communicate with his clients is at the prison where they are held.

Regarding the seating arrangement of the defendants, they sat in a place expressly reserved for them as in all criminal trials, facing the court and between the public and the court. During the whole hearing, defendants were surrounded by some six machine-gun armed military personnel. Also, armed policemen were placed in various positions around the court room.

The layout of the court and the proximity of the judges and the prosecutor who are all physically removed from the defence team, gives rise to legitimate grounds for fearing that the tribunal is submitted to external influence and pressure and, consequently, is not independent or impartial. Moreover, the fact that the prosecutor sits so close to the judges and on the same level with them undoubtedly indicates that in Turkey the prosecutor is given more importance and is held in higher esteem than the defence lawyer. To prove this further, the prosecutor, like the judges, was provided with a computer and a terminal which enabled him to see the records of the proceedings as they were being entered by the court stenographer or registrar. The fact that the defence was not provided likewise with such technological facilities and was placed on ground floor level beneath the judges and the prosecutor, on the same level as the public and at a distance from the defendants

and the judges leads the ICJ/CIJL to conclude there was, once again, a clear violation of the principle of the equality of arms between the prosecution and the defence as the latter was placed at a substantial disadvantage.

One can, therefore, reasonably suspect that the layout at No. 1 Ankara State Security Court, and the fact that the judges and prosecutor entered and exited the court room simultaneously, together and through the same door, facilitating communication between them about the proceedings, both in chambers as well as in the court room to the absolute exclusion of the defence, gives a picture of an absence of fairness and a feeling that the court is certainly not independent or impartial with the prosecutor being so close to it.

Furthermore, the ICJ/CIJL Observer was concerned that the large court room was not equipped with a public address system so that everything that was being said in this open and public trial could be easily heard and followed by all attending, the general public included. 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 very often he spoke in a very low and subdued voice making it extremely difficult to follow and hear all that he was saying. It is quite inconceivable how such a system is lacking in this day and age, especially when the same court room is equipped with other modern technological facilities, such as computers, a direct recording system, air conditioning, etc. It is hoped that the absence of a public address system was only of a temporary nature and that it will be installed eventually and quite soon for the benefit of all concerned. Not having a public address system is of a matter of great concern when one recalls that the trial, in accordance with the standards enunciated in the ECHR, has to be an open and public hearing, and consequently, has to be a transparent trial which cannot give rise to doubts and suspicions. The trial must be one where anyone attending can clearly see, hear and follow all that is happening without any hindrance whatsoever. 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.

IV. Conclusion

Despite the fact that the present case was a re-trial pursuant to the ruling of the EctHR on 17 July 2001which intended to rectify the defects that took place in the 1994 trial, it is regrettable that these defects have not all been effectively remedied. Despite some positive rulings by the court in the 20 June hearing, the ICJ/CIJL finds that, in the main, the fundamental principle and right to a fair trial were not fully respected and implemented as required by the ECHR. In particular, the *violation of the principle of equality of arms* between the prosecution and the defence, the *violation of the presumption of innocence* because of the continued detention of the four defendants and the insufficiently valid legal reasons given for such a state of affairs, and the reasonable suspicion that the *court is not an independent or impartial tribunal* for the reasons stated above, still prevail today. Reference is here made to what has already been reported in the concluding paragraph of the report of the ICJ/CIJL on the sitting of 20 June, namely that, "…the SSC [State Security Court], as an institution, is little more than a tool by which the state can ensure a continuing hold on power by resorting to authoritarian, repressive measures." [5]

The ICJ/CIJL urges the Government to ensure that at the next hearing, which has been scheduled for **15 August 2003**, the abovementioned defects are remedied in line with Turkey's international obligations.

[5] ICJ/CIJL report, *The Independence of Judges in the Republic of Turkey: Report of a Mission, 1999, p. 80.*

Annex A

1. Appointment of the Observer

The Trial Observer, Dr. Patrick Vella, a former Judge in the Courts of Malta, a past Member of the U.N. Human Rights Committee and a former Ad Hoc Judge at the European Court of Human Rights , was appointed by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists. Dr. Vella attended the hearing of Leyla Zana and her co-defendants at No. 1 Ankara State Security Court on 18 July 2003.

2. Methodology

The Observer monitored the entire hearing at No. 1 Ankara State Security Court on 18 July 2003, and was very ably assisted throughout by an interpreter who translated the proceedings expertly. He noted that several other observers from different organisations and bodies were also present in the court room during the day's hearing, as well as representatives from some foreign embassies and the European Parliament.

After the hearing, the Observer, along with the interpreter and other observers, met for over an hour with lead defence lawyer Mr. Yusuf Alatas at his law office. Here the defence lawyer answered all the questions which the Observer and others put to him to clarify matters of procedure and certain aspects of Turkish law relevant to the present case, aspects of which have been incorporated in this report. Mr. Yusuf Alatas expects at least another three sittings in this re-trial.