REPORT OF

THE RE-TRIAL OF LEYLA ZANA

AND THREE OTHER KURDISH

FORMER PARLIAMENTARIANS

Before

No. 1 ANKARA STATE SECURITY COURT

on

20 June 2003

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

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I. Executive Summary

The re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan continued before No 1. Ankara State Security Court on **20 June 2003**. The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed two observers, Ms. Linda Besharaty-Movaed, Legal Advisor, CIJL, and Mr. Stuart Kerr, Barrister of England and Wales, 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 Code. They were sentenced to a term of 15 years imprisonment. However, on 17 July 2001, the European Court of Human Rights (EctHR) ruled that the former parliamentarians had not received a fair trial at the State Security Court, which at the time of the trial included a military judge[1]. Pursuant to this ruling, Leyla Zana and her co-defendants were retried at Ankara State Security Court on 21 February 2003, 28 March 2003, 25 April 2003, 23 May 2003, and 20 June 2003.

For a full introduction and background to the trial, the ICJ/CIJL has published the report of its observer, Mr. Paul Richmond, Barrister of England and Wales who observed the proceedings on 23 May 2003.[2]

On the basis of the observation of the hearing on 20 June 2003, the ICJ/ CIJL welcomes some developments which indicated that aspects of the right to a fair trial were respected.

The ICJ/ CIJL is satisfied that, as in previous hearings, the defendants were at no stage excluded from the proceedings, and were able to hear legal argument and the testimony of witnesses in full. The defendants were able to participate in proceedings by making lengthy speeches, although there are concerns about the extent to which such participation is effective. No restrictions were placed on public attendance at the hearing, or on the defence lawyers in the exercise of their professional duties.

Further, the ICJ/CIJL welcomes the fact that, contrary to previous hearings where the defence was not allowed to call any witness, during the 20 June proceeding, four witnesses for the defence were allowed to be called to give live evidence. Another positive development was the ruling that at future hearings, prosecution witnesses, whose evidence was previously not susceptible to challenge, are to be made available for examination and cross-examination.

However, in the main, profound concerns about the disregard of the principle of equality of arms between the defence and the prosecution, of the independence and impartiality of the tribunal, and of the presumption of innocence remained. The ICJ/CIJL therefore finds that the right to a fair trial was not respected in the following ways: 1) the continued detention of the defendants on the pretext that their conviction by the State Security Court in 1994

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

[2] This report is available on the ICJ website at <www.icj.org>

remains valid, in contravention of the ruling of the EctHR,[3] indicates a violation of the presumption of innocence; 2) while the prosecutor's questions and submissions were entered directly into the court record, the defence had to rely upon the judge to summarise questions and answers; 3) the speeches of the defendants were not entered in the court record; 4) the lay-out of the court whereby the judges and the prosecutor were sitting in physical proximity on a raised platform and leaving and entering the court together, while the defence sat on benches below them, gives rise to legitimate grounds for fearing that the tribunal is not independent or impartial; and 5) the judges ruled that a prosecution witness should not be brought from Germany, contrary to the ruling of the ECtHR, thereby denying the defence the opportunity to cross-examine this witness.

The ICJ/CIJL reiterates its exhortation to the Turkish Government to fully respect and implement the provisions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to which it is a party.

II. Violations of the Right to a Fair Trial

(1) The continued detention of the defendants

At the conclusion of the hearing on 20 June 2003, counsel for the defence made an application for each of the defendants to be released. The prosecution objected to the release and the application was refused. The reason given for refusing the application was that the Court maintained its belief that the conviction reached in 1994 was still valid despite the fact that the EctHR had ruled to the contrary.

This reasoning, read in conjunction with the allegation that the Presiding Judge, Judge Orhan Karadeniz, commented on the guilt of the defendants in a pre-trial application[4], leads the ICJ/CIJL to conclude that there has been a violation of the presumption of innocence enshrined by Art. 6(2) ECHR. Where a judge expresses an opinion suggesting that he has formed an untimely impression of guilt, this has been held to violate the presumption of innocence doctrine.[5]

Furthermore, as this re-trial should be considered to be a new proceeding with the aim of remedying defects contained in the 1994 trial wherein defendants were sentenced to a term of imprisonment of 15 years each, then extreme caution must be used to ensure that the trial this time is fair and in conformity with Turkey's international obligations.

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

[4] See, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three Other Kurdish Former Parliamentarians before No. 1 Ankara State Security Court on 23 May 2003.*

[5] *Ferantelli and Santangelo v. Italy* (1996) 23 EHRR 288, paragraphs 59-60.

(2) The defence was denied the possibility of having its submissions to the court entered directly into the court record

As in the 23 May proceeding, it was apparent during the course of the hearing observed that the principle of equality of arms was not fully respected in so far as the prosecutor's submissions to the court were entered directly into the court record in his own words, whilst the defence lawyers were barred from dictating their submissions directly into the record. Instead, the defence had to rely upon the judge to summarise (rather than repeat verbatim) the defence questions and submissions before they were entered into the court record. 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 Observers are concerned that the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it 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 Observers, these matters serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

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 hearing observed, defence counsel did seek to challenge the judge's summary on at least one occasion. On that occasion, the judge amended his summary.

(3) After approval by the prosecutor, the defence was allowed to call 4 witnesses yet was denied the possibility of having its questions directly entered into the court record

The ICJ/CIJL is satisfied that at this hearing the defence was allowed to call 4 witnesses to support its case. To date, while the prosecution had been allowed to call 26 witnesses, the defence had been denied this right.[6]

Nevertheless, the ICJ/CIJL is concerned that when the defence made the request to hear oral testimony from its witnesses, it was the prosecutor and not the judge who asked defence counsel to explain what the defence witnesses would be stating. In response to

[6] The reason advanced for not hearing defence witnesses at prior hearings was that too much time had elapsed since the facts giving rise to the alleged offence took place, yet this reasoning had not been applied to witnesses for the prosecution, see, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three Other Kurdish Former Parliamentarians before No. 1 Ankara State Security Court on 23 May 2003.*

this question, the lead counsel, Mr. Yusuf Alatas, indicated that he had submitted a petition on 23 May indicating his reasons therein for examining the 4 witnesses. At this point, the Presiding Judge looked through several documents before he found said petition, and handed the same to the prosecutor who studied it and decided that the witnesses could be called.

In the opinion of the Observers, a trial whereby the prosecutor is making decisions as to the examination of witnesses and evidence is manifestly unfair and violates the fundamental right to an independent and impartial tribunal.

Furthermore, the defence witnesses were examined by the judge, not the defence. At one point, during the testimony of the second witness, Ihsa Ertas, whose testimony as defendant Orhan Dogan's former concierge served to demonstrate that the defendant could not have had personal knowledge of all persons who alleged to know him, the Presiding Judge mockingly asked the witness if he "always helps people he does not know." The Presiding Judge's demeanor vis-à-vis the defence witness clearly demonstrated the undisguised unfairness and lack of independence and impartiality of the tribunal. Furthermore, given this attitude, there is great room for doubt as to the veracity of the court record as it is based upon summaries that the Presiding Judge made of the statements by defence and defence witnesses.

(4) The speeches of the defendants were not entered into the court record

At the hearing, each of the defendants was afforded the opportunity of making a statement in support of his or her defence. Leyla Zana declined to make a speech (indicating that she would do so at a subsequent hearing), but Selim Sadak, Hatip Dicle and Orhan Dogan each made a speech.

However, the Observers noted that as with the defence witnesses, when the defendants were addressing the Court, their speeches were neither recorded *verbatim* in the court record by the court stenographer, nor were summarized by the Judge, for inclusion in the court record.

During his speech, Selim Sadak retorted to the Court that it was unfair for the Kurdish democratically-elected former parliamentarians to be tried and convicted by a State Security Court [which included a military judge] to a term of imprisonment of 15 years based solely upon statements by dubious police witnesses. Haticp Dicle argued forcefully for the right to be "treated equally before the law," while Orhan Dogan, a lawyer, concentrated on the evidence itself stating, "I have reviewed the laws of many countries yet there are none where questions by the defence must pass through the judge."

The first two defendants provided copies of their speeches to the court but Orhan Dogan made his speech from notes and subsequently, did not provide a copy of his speech to the Court. No record of his speech was included in the court record by the stenographer either in full or in summary form, through the Judge.

The ICJ/CIJL finds that the failure to record adequately the speech of the defendants and particularly the speech of Orhan Dogan violates the principle of the equality of arms. The speeches were treated in a manner which indicated that they carried less weight than prosecution submissions. In fact, the panel of judges looked uninterested and detached during the defendant's speeches.

Further, the ICJ/CIJL finds that the defence were subjected to a procedurally inferior position in comparison to the prosecution and that this irregularity violated the defendants' rights to participate effectively in the proceedings. While it is welcomed that the defendants were allowed to give speeches, the failure to record said speeches undermines their value. The unequal manner in which evidence is taken is a matter which can lead to violations of the right to a fair trial.[7]

(5) The layout of the Court and the physical proximity of the judges and the prosecutor give rise to legitimate grounds for fearing that the tribunal is not independent or impartial.

As described in the aforementioned ICJ/CIJL report on the 23 May hearing, at the start of the hearing and after every adjournment, the prosecutor entered the courtroom from the same door as the three judges whilst defence counsel entered from a side door along with members the public. When the judges rose to consider a defence application that had been opposed by the prosecutor, the prosecutor retired with the judges again through the same door. On one occasion that door remained open, and it was possible from the public gallery to see the prosecutor conversing with one of the panel of judges. On another occasion, two judges entered the courtroom while the prosecutor and the Presiding Judge stayed behind and entered a few minutes later.

Furthermore, during the hearing, the prosecutor sat on an elevated platform, directly adjacent to the judges, close enough, the observers noted, that the wing member of the judge's panel was able to pass to the prosecutor a file and vice versa. In contrast, the defence lawyers sat at a table at ground level, at the extreme edge of the court, 3 metres below the platform and at the same level as the public.

The ICJ/CIJL finds that there has been a violation of the right to a fair trial, in that there were legitimate grounds for fearing that the tribunal was not independent or impartial as the prosecutor and the panel judges could communicate about the proceedings, both in chambers and also in the courtroom by the passing of files, to the absolute exclusion of defence participation. As a consequence, there was no appearance of fairness, the importance of which has been underlined by the ECtHR on many occasions.[8]

[7] *Barbera, Messegue & Jasbardo v. Spain* (1989) 11 EHRR 360, paragraph 68.

[8] E.g, *Incal v Turkey*, (App. No. 22678/93) (9th June 1998)).

Moreover, it follows that the access of the prosecutor to the judges because of the seating arrangements leads the ICJ/CIJL to conclude that there has again been a violation of the principle of the equality of arms.

(6) Prosecution witnesses relied upon not made available for cross-examination

At the conclusion of the hearing the court ruled on how to proceed with two prosecution witnesses. Both are currently serving prison sentences, one in Mardin in the south-east of Turkey, the other in Germany.

The Court ruled that in respect of the "Mardin witness", the court would re-convene for an interim hearing to be held at Mardin State Security Court, solely to hear evidence from that witness, and for him to be cross-examined. The ICJ/ CIJL welcomes this decision, as previously the Court had ruled that the witness would not be made available for cross-examination. However, the ICJ/CIJL has some concerns arising from the fact that the Court designated to hear this witness will be differently constituted in that there will be different judges hearing the evidence. There is, therefore, concern that the evidence of the "Mardin witness" will, for no other reason, attract reduced status in the proceedings.

In respect of the "Germany witness", the court ruled that this witness would not be compelled to give live evidence.

The defence lawyers allege that this ruling is in direct contravention of the ruling by the the ECtHR in 2001 (*Sadak and others v Turkey*)[9] which, at paragraphs 61 – 69, expressly criticises the prosecution for relying on deposition evidence alone, without providing the defence with an opportunity to examine the witnesses, by bringing them to court. The ECtHR therefore found a violation of Art. 6 (3) (d) ECHR.

It is not clear to the Observers whether the "Germany witness" has provided deposition evidence on which the prosecution is relying. If so, then the ruling of the court in the present re-trial suggests that the same violation of Article 6 (3) (d) ECHR is simply being repeated and that no steps have been taken to remedy this defect from the 1994 trial.

III. Conclusion

Despite welcoming some of the rulings which the court made during the hearing of 20 June 2003, the ICJ/CIJL maintains its grave concerns at the fairness of the re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan.

In particular, the principle of equality of arms, the presumption of innocence, and the perceived and actual impartiality of the tribunal were not observed.

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

As indicated in the ICJ/CIJL's 1999 report on Turkey:

> "…cases of a politically repressive nature tried before SSCs [State Security Courts] demonstrate the manner in which the SSC system adopts objectives wholly inconsistent with the principles, the appearance and the reality of an independent judiciary. In a very real sense, many SSC prosecutors and judges tend to see themselves as guardians of the state rather than the guardians of the rights of the Turkish people. In this way, the SSC, 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."[10]

Indeed, the Observers have witnessed that in the present re-trial of Leyla Zana and her co-defendants, this statement still rings true

IV. Methodology

The Observers monitored the entire proceedings in No. 1 Ankara State Security Court on 20 June 2003. They were assisted by an interpreter who translated the proceedings simultaneously.

After the hearing, the Observers met briefly with the prosecutor in order to clarify questions of procedure. However, after being introduced, the prosecutor refused to answer any questions.

Similarly, the Observers attempted to meet with the Presiding Judge, Judge Orhan Karadeniz, but were prevented from doing so by the police.

The Observers met with Mr. Yusuf Alatas, who was able to answer questions of procedure, and clarify the rulings which had been given during the course of the proceedings.

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[10] *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission,1999*, p. 80, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.