# REPORT OF

# THE RE-TRIAL OF LEYLA ZANA AND THREE OTHER KURDISH FORMER PARLIAMENTARIANS

**Before**

**No. 1 ANKARA STATE SECURITY COURT**

**on**

**23 May, 20 June,**
**18 July, 15 August 2003**
**15 September 2003**

**September 2003**

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**Centre for the Independence of Judges and Lawyers (CIJL)**

**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 **23 May, 20 June, 18 July, 15 August, 15 September 2003**. The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed observers, Mr. Paul Richmond, a barrister of England and Wales for the hearing on 23 May, Ms. Linda Besharaty-Movaed, Legal Advisor, CIJL/ICJ for the hearing on 20 June, Mr. Stuart Kerr, a barrister of England and Wales, for the hearings on 20 June, 15 August and 15 September, and Dr. Patrick Vella, a former judge in the Courts of Malta, for the hearing on 18 July, to monitor and report on the re-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 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 within the meaning of Article 6 of the Convention.*"[2] Following this ruling, Leyla Zana and her three co-defendants are now being re-tried and eight hearings have been held to date at No.1 Ankara State Security Court. The hearings took place on 21 February 2003, 28 March 2003, 25 April 2003, 23 May 2003, 20 June 2003, 18 July 2003, 15 August 2003 and 15 September 2003.

On the basis of the observation of the hearings by the above-mentioned trial observers, the ICJ/CIJL welcomes practices which indicate that certain aspects of the right to a fair trial were being respected. The ICJ/CIJL is satisfied that during each of the hearings, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal arguments and the testimony of witnesses in full. No limitations were placed on public attendance at the hearings 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 of the Ankara Bar.

Nevertheless, the ICJ/CIJL believes that in so far as the principles of *equality of arms* between the prosecution, the defence and the *independence and impartiality of the tribunal* and the *presumption of innocence* are concerned, there continue to be significant defects[3]. In summary, the ICL/CIJL is concerned that the layout of the Court, the Court's disparity of approach to defence and prosecution witnesses, lawyers and evidence, the failure to require the prosecution to disclose relevant evidence, the lack of continuity of the composition of the judges' panel and serious indications that the fundamental

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[1] *Sadak and Others v. Turkey* (no.1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96), para.40.

[2] Ibid.

[3] For a full discussion of each issue, please see Section IV of this report.

principle of the presumption of innocence was not respected are all factors which have lead to a conclusion that the defendants have not been afforded a fair trial.

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.

Furthermore, the ICJ/CIJL expresses its concern that the defendants continue to be detained in circumstances wherein: (1) the Court maintains its belief that the 1994 conviction was still valid despite the decision of the ECtHR, (2) the Presiding Judge allegedly commented that the defendants are guilty of the offences for which they are being tried, and (3) the trial is proceeding at a rate of only one day per month, violating the Court's obligation to proceed with expedition where bail is refused. The ICJ/ CIJL is therefore concerned that the defendants' right to *liberty and security* have also been violated.

Moreover, the ICJ/CIJL notes that during the hearing of 15 August, in protest at the continued violations of the right to a fair trial, the defence chose to withdraw from active participation in the proceedings, Unlike previous hearings, no procedural applications were made to the Court, no evidence or witnesses for the defence were called, nor were any applications made for the defendants to be released on bail. In contrast to the previous hearings, the defendants themselves elected not to participate in the proceedings and did not make any statements to the Court.

The ICJ/CIJL is, furthermore, extremely concerned about an allegation made by two of the defendants, Orhan Dogan and Hatip Dicle, at the hearing on 15 September that they had been inhumanly and degradingly treated by security forces when they were being transferred to Court. While the ICJ/CIJL is satisfied that the Presiding Judge noted the complaint for the Court record, concerns still remain, as it was apparent to the observer that there was no effort by the prosecution to investigate the allegations, nor did the judges call for any such inquiry into the incident. The observer was informed that the failure to undertake any investigation so that the alleged perpetrators could at least be warned about their conduct is not normal procedure. If these allegations are true, the ICJ/CIJL believes that this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants thereby limiting their ability to participate effectively in the proceedings. The ICJ/CIJL calls on the judges or the prosecutor to immediately instigate an investigation into the incident and, if the allegations are found to be true, to employ appropriate sanctions against the perpetrators accordingly.

## *II. Introduction*

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

> "Any person who, with the intention of committing the offences defined in Article 125[4] … forms an armed gang or organisation or takes leadership … or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.
>
> The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment."

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

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

In previous hearings which took place on 21 February 2003, 28 March 2003 and 25 April 2003, the Court heard a total of 21 witnesses on behalf of the prosecution. However, various human rights groups have expressed concern that the trial may not be conducted in accordance with international fair trial guarantees. According to the London-based Kurdish Human Rights Project, at the hearing on 28 March 2003, "The Court denied requests from defence lawyers that the jailed parliamentarians be released pending the conclusion of the retrial; and that a member of the judiciary be removed due to his previous involvement in the case, raising concerns about impartiality."[5] The International Federation for Human Rights (FIDH) and the World Organisation Against Torture

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

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

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

(OMCT), after observing the hearing on 25 April 2003 commented that they were, "alarmed to witness repeated delays in this trial, as well as obvious violations of the rights of defence, which give evidence of continuing malfunctioning of the judicial system in Turkey despite recent legal reforms adopted by Turkey in the framework of EU accession. The observer indeed noticed restrictions placed upon the lawyers' ability to question the witnesses during the hearing."[6]

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

## *III. Legal Framework*

The ECHR is the primary binding regional instrument to have been ratified by Turkey. In addition, relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948 (UDHR), the UN Basic Principles on the Independence of the Judiciary of 1985[7] and the UN Basic Principles on the Role of Lawyers of 1990.[8]

Under the terms of Article 90 of the Turkish Constitution, the above instruments form an integral part of Turkish domestic law.

Article 6 of the ECHR guarantees the *right to a fair trial* in criminal proceedings. The object and purpose of the provision is "to enshrine the fundamental principle of the rule of law"[9] 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.[10]

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*".

Article 5 of the ECHR guarantees the *right to liberty and security of the person*. Where a person is detained for the purposes of bringing him or her before a Court for trial on a criminal charge, that person should be brought promptly before a judge or a competent

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

[7] 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).

[8] 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.

[9] *Salabiaku v. France* (1991) 13 EHRR 379

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

officer authorised to exercise judicial power in deciding to release that person on bail or to continue detention[11].

### *IV. Violation of the Right to a Fair Trial*

Several irregularities noted during the course of the hearing evidence the fact that the parties were not treated in a manner that ensured their procedurally equal position during the course of the trial:

#### (1) Presumption of Innocence

The ICJ/CIJL is deeply troubled at allegations that the Presiding Judge in the case of Leyla Zana and her co-defendants may not be impartial. According to Mr. Yusuf Alatas, a highly respected defence lawyer, in accordance with domestic law, the defence had to make a formal request to the Court for a re-trial[12]. On this occasion, the two wing members of the bench agreed to grant a re-trial, however, the president of the Court refused. According to Mr. Alatas, in refusing the application for a re-trial the president of the Court commented in open Court to the effect that, "the deficiencies and mistakes identified by the European Court of Human Rights will not change the guilt of the accused." In the opinion of the observer, this alleged public pre-trial comment must cast serious doubt upon the impartiality of the Presiding Judge. If true, it demonstrates that prior to the commencement of the trial, the Presiding Judge held a pre-formed opinion as to the guilt of the accused and that that opinion is likely to weigh on his ultimate decision regardless of the evidence that is placed before him. The observer understands that in light of the prejudicial comment, the defence did apply for the Presiding Judge to be replaced, however, that application has been refused.

In addition, the observer was informed by the interpreter and by defence counsel that in the re-trial, the prosecution and the judges have frequently referred to the defendants as the "convicted" ("*hukumlu*"). The ICJ/CIJL considers that the use of such terminology provides further evidence that the judges have actually formed or at least gives the impression that they have formed a prejudicial view of the defendants' guilt.

Moreover, 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.

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[11] *Abdoella v The Netherlands (1992)20 EHRR 585.*

[12] Amnesty International, *Concerns in Europe and Central Asia, Turkey, January – June 2003* states, "A second 'adjustment package' that came into effect on 4 February [2003] granted the right to automatic retrial for those who the European Court of Human Rights (ECHR) had ruled had suffered a violation of the European Convention of Human Rights as a result of a Court judgment in Turkey. This opened the way for a retrial of the four imprisoned Democracy Party (DEP) deputies - Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak - who, according to an ECHR ruling, had been found not to have received a fair trial in 1994." p.2.

This reasoning, read in conjunction with the use of the word "convicted" to refer to the defendants and the allegation that the Presiding Judge, Judge Orhan Karadeniz, had commented on the guilt of the defendants in a pre-trial application[13], leads the ICJ/CIJL to conclude that there has been a violation of the presumption of innocence enshrined by Art. 6(2) ECHR.[14] 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.[15]

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 in future hearings to ensure that the trial will be fair and in conformity with Turkey's international obligations.

### (2) The Layout of the Court

In each of the hearings in the re-trial of Leyla Zana and her co-defendants, at the start of the 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 counsel Mr. 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

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[13] 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*.

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

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

armed military personnel. Also, armed policemen were placed in various positions around the Courtroom.

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 that 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 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. On 20 June, when the judges rose to consider a defence application that had been opposed by the prosecutor, it was possible from the public gallery to see the prosecutor conversing with one of the panel of judges, during deliberations. On another occasion, two judges entered the Courtroom while the prosecutor and the Presiding Judge stayed behind and entered a few minutes later. On 15 August the Presiding Judge began proceedings by informing the Court that one of the witnesses for the prosecution who was due to attend to give evidence was not in attendance to give evidence. This information came directly from the Presiding Judge, and not, as the observer would have expected, from the prosecutor. The inference drawn was that the judge had been provided with this information directly from the prosecutor outside Court. The judge informed the parties that the evidence of the absent witness would be heard at the next hearing in September.

Read in conjunction with earlier observations it was apparent that (1) the layout of the Court and (2) the practice of the prosecutor and the judges of retiring to the same anti-chamber to consider any applications, made it clear that the prosecutor had access to and the opportunity to communicate with the panel of judges outside the Court to the absolute exclusion of the defence lawyers.

In the Courtroom itself, the observer noted on 20 June that the prosecutor sat sufficiently close enough to the wing member of the judge's panel such that a file could be passed between them - again without reference to the defence.

Furthermore, the ICJ/CIJL is 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.

For all these reasons, the ICJ/CIJL concludes that the lay-out of the Court, the disparity in the treatment of the defence and the prosecution, and the actual and perceived ability of the prosecutor to have contact with the judges give rise to a significant fear that the principle of equality of arms is not being respected and that the tribunal is neither impartial nor independent.

### (3) Examination of Defence Witnesses

At the conclusion of the prosecution case on 23 May, the defence lawyers applied to the Court to call witnesses on behalf of the defence.[16] The prosecutor resisted the application on the grounds that a long period of time had elapsed since the facts which gave rise to the alleged offence took place and that the witnesses would therefore not be able to assist the Court in disclosing any relevant evidence. The judges thereafter refused the defence application to call and examine defence witnesses, citing in support of their decision the reasons advanced by the prosecutor.

Whilst it is recognised that equality of treatment between the prosecution and the defence does not necessarily require the attendance and examination of every witness the defence wishes to call,[17] in the opinion of the ICJ/CIJL, it must be questionable whether the decision of the State Security Court was compatible with Article 6 of the ECHR given that 1) the decision applied to *all* potential defence witnesses without exception, 2) the defendants face a sentence of 15 years imprisonment for a serious offence and 3) the

[16] Defence counsel, informed the observer that defence witnesses would include new witnesses whose testimony had not been heard at the first trial.
[17] *Engel and Others v. Netherlands* (1979-80) 1 EHRR 647 at para 91; *Bricmont v Belgium* (1990) 12 EHRR 217 at para 89

testimony of the witnesses will provide the defence with their only means of proving various disputed points. Moreover, in the opinion of the ICJ/CIJL, the reasons relied on by the Court for denying the defence the opportunity of calling and examining witnesses in support of the defence case may potentially violate Article 6. It would appear that the reasons advanced for not permitting the attendance and examination of the defence witnesses (i.e. that a long period of time has elapsed since the facts which gave rise to the alleged offence took place and the witnesses would not therefore be able to assist the Court in disclosing any relevant evidence) apply equally to the prosecution witnesses as to the proposed defence witnesses. Yet, the Court was prepared to hear oral testimony from no less than 26 prosecution witnesses. The decision of the State Security Court not to permit the defence to call and examine witnesses in support of its case subjects the defence to a procedurally inferior position vis-à-vis the prosecution in contravention of the principle of the equality of arms.

However, the ICJ/CIJL welcomes the fact that at the hearing on 20 June, contrary to the previous ruling where the defence was not allowed to call any witness, 4 witnesses for the defence were allowed to be called to give live evidence. The ICJ/CIJL is furthermore satisfied that during the 18 July hearing, the defence was allowed to call 6 additional witnesses to support its case.

Nevertheless, despite the fact that 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 leaves 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 substantially between witnesses for the prosecution and witnesses for the defence.

### (4) Cross-examination of Prosecution Witnesses

It was most apparent during each hearing that there lacked parity of conditions for the examination of witnesses by the prosecution and defence. Whereas the prosecutor was able to ask questions *directly* of the witnesses called in support of the prosecution case, when the defence sought to cross-examine a prosecution witness, it was first required to put it questions to the judge. This procedure took place within the hearing of the prosecution witnesses. Furthermore defence questions were repeatedly met with objections from the prosecution but whether this was the case or not, the judge would proceed to decide whether or not he would put the question to the witness. If the judge decided to ask a question, he would rephrase it and put it in terms which he deemed appropriate.

This procedure for cross-examination of prosecution witnesses by the defence, which is common to all criminal trials in Turkey, prevents the defence from effectively challenging the witnesses brought by the prosecution. The requirement of having to ask questions through a judge puts a potentially unreliable witness on notice of the challenges to his/her evidence and provides him/her with the opportunity to manufacture a suitable but incorrect answer. Furthermore, defence counsel is prevented from examining witnesses in terms which accord with defence counsel's trial strategy. For example, in the hearing on 23 May the defence sought to question a Kurdish-speaking prosecution witness as to the identity of the interpreter who had translated his oral testimony into Turkish for the purposes of his witness statement. The prosecution objected to this question and the Presiding Judge ruled that the witness need not answer the question because it was not relevant. In the opinion of the observer, the defence line of questioning was highly relevant in so far as the defence sought to adduce evidence to the effect that the interpreter was in fact a gendarme officer and therefore not impartial.

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

Furthermore, a witness for the prosecution, whose first language was Kurdish, was not provided with an interpreter in the Courtroom. This witness had, with the assistance of an interpreter, prepared a statement written in Turkish. At the hearing on 23 May, he adopted this statement as his evidence-in-chief at the re-trial. The witness was then

tendered for examination by counsel for the defence, however, no interpreter was provided. Due to the witness's extremely limited understanding of the Turkish language (the language in which all Court proceedings are conducted in Turkey), he was unable to fully understand many of the questions put to him by the defence, remarking on several occasions, "I speak very little Turkish", "My Turkish is not very good", "I don't understand".

The observer is deeply concerned at an apparent inequality of arms in so far as the prosecution was able to benefit from the witness giving his evidence-in-chief (the written statement) in his first language, Kurdish, but the defence was required to cross-examine the witness in Turkish, a language of which he had only an extremely limited understanding. In the opinion of the observer, in order for the prosecution and defence to be afforded a procedurally equal position, a Kurdish-Turkish interpreter ought properly to have been provided for the cross-examination of the witness. In the absence of an interpreter, the Court ought properly to have adjourned the testimony of the witness until a later date with a direction that an interpreter attend on that occasion

It is therefore the opinion of the ICJ/CIJL that such disparity is inconsistent with the principle of equality of arms.

**(5) The Defence was prevented from adducing relevant evidence**

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

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

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

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

It transpired that the original audio-cassette contained a recording of a conversation held in Kurdish, but that this had subsequently been translated into Turkish and the cassette produced by the prosecution witness in fact contained the Turkish translation. Upon a request from the defence, the prosecution agreed to disclose the Turkish version of the recording but not the original Kurdish version. A defence application for the original Kurdish recording to be disclosed was refused by the Presiding Judge.

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

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

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

The ICJ/CIJL is concerned that the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the

trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it 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. These matters thus serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

The ICJ/CIJL 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 hearing observed, the defence counsel did seek to challenge the judge's summary on at least two occasions. On both occasions the judge amended his summary.

Further, at each hearing, each of the defendants was afforded the opportunity of making a statement in support of his or her defence. However, the observers noted that, as with the defence lawyers' submissions, statements by the defendants to the Court, were neither recorded *verbatim* in the Court record by the Court stenographer, nor were summarized by the judge for inclusion in the Court record.

On some occasions the defendants provided copies of their statements to the Court but on 20 June Orhan Dogan made his statement from notes and subsequently did not provide a copy of his statement to the Court. No record of his statement was included in the Court record by the stenographer either in full or in summary form, through the judge. The ICJ/CIJL is of the opinion that this procedure gives the impression that submissions by defence counsel as well as those by the defendants themselves are not afforded the appropriate weight.

Thus, the unequal manner in which evidence and submissions are 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.

### (8) Continuity of the judges' panel

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

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

Read in conjunction with the earlier observations that, (1) the submissions of the defence lawyers are summarised for the Court record, (2) the testimony of defence witnesses is summarised by the judge for the Court record, and (3) the witnesses for the prosecution are not directly cross-examined but are questioned via the judge who then summarises a line of questioning, the ICJ/CIJL is deeply concerned that the lack of continuity of the panel of judges exacerbates the problems already referred to in earlier reports. In particular, the potential margin of inconsistency further gives rise to the impression that defence arguments and evidence are not important.

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

### (9) Alleged mistreatment of defendants

At the hearing on 15 September, an allegation was made by two of the defendants, Orhan Dogan and Hatip Dicle, that security forces had treated them in an inhumane and degrading manner while they were being transferred to Court. Mr. Dogan and Mr. Dicle informed the Court of the alleged treatment when they made their statements to the Court. Details of the alleged mistreatment were, however, not given. When the judge came to summarise the speeches for the Court record, he had to be reminded by the defence lawyers to include in his summary, reference to the allegation. However, the Court did not request an investigation into the allegation, nor did the prosecutor indicate that he would undertake any effort to investigate the said allegation, nor did he request that the security forces deter from such behaviour. The observer was informed by defence counsel that failure to undertake any investigation into the said mistreatment so that the alleged perpetrators could at least be warned about their conduct is not normal procedure.

While the ICJ/CIJL welcomes the fact that the Presiding Judge noted the complaint for the Court record, concerns still remain as to whether any further action will be taken by either the judge or the prosecutor. If defendants' allegations are true, the ICJ/CIJL believes that this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants prior to the trial, thereby limiting their ability to participate effectively in the proceedings. The failure to investigate the incident at the very least leads to a perception of complicity between the Court and the security forces which further taints the proceedings.

### (10) Trial by an independent and impartial tribunal

The ICJ/CIJL also has misgivings relating to the extent of the independence of the judiciary. Although the Turkish Constitution prohibits state authorities from issuing

orders or recommendations concerning the exercise of judicial power, it is widely reported that in practice, the Government and the National Security Council (NSC), a powerful advisory body to the Government composed of civilian government leaders and senior military officers, periodically issues announcements or directives about threats to the State, which can be interpreted as instructions to the judiciary. Furthermore, the ruling body of the judiciary, the High Council of Judges and Prosecutors has the potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The High Council is chaired by the Minister of Justice, a Minster of Justice Under-Secretary and five judges selected by the President. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council and therefore there is direct Executive influence in the process of judicial appointment, promotion, transfer and discipline. Furthermore, decisions of the Council are not open to judicial review.[18] The ICJ/CIJL is concerned that the NSC, an omnipotent group within the Government, can be likely to influence the High Council which, in turn, can exert pressure on the judges of the State Security Court in the instant highly politicised case[19].

## *V. Violation of The Right to Liberty*

### (1) The continued detention of the defendants

The defendants have been in detention since their arrest in 1994 and subsequent trial by the State Security Court that year. The State Security Court granted the defendants a re-trial in February 2003 pursuant to legislative changes (the second "Harmonization package") that granted the right to automatic re-trial for those whom the EctHR had ruled had not received a fair trial.[20] Despite this re-trial, the defendants continue to remain in detention and repeated applications by defence counsel for their release are denied. The ICJ/CIJL is concerned that the continued detention of the defendants constitutes an infringement on their right to *liberty and security* pursuant to Article 5 of the ECHR.

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

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

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

[20] See footnote 13.

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. It is recognised that this may constitute a valid reason for refusing an application for bail, in order to prevent the defendants from interfering with the course of justice (i.e., committing an offense or fleeing after having done so). However, it was not argued by the prosecution that there was a fear or suspicion that the defendants would in fact interfere with the course of justice, nor did the Presiding Judge rule that a fear or suspicion of interference with the course of justice was the reason that detention should continue. It is therefore the opinion of the ICJ/CIJL that the reasons given for the continued detention of the defendants - namely that they are to remain in detention as more witnesses remain to be heard - are deficient.

On 15 September, the defence made a further application for the release of the defendants, following the same procedure as in the July hearing. The Presiding Judge informed the Court that the application had been refused but gave no reasons for his decision.

The trial has, thus far, been heard on eight days, at the rate of one day per month. It is expected that there will be at least two further hearings in October and November. ICJ/CIJL is worried that the protracted proceedings in the trial may give rise to a violation of Article 5 of the ECHR.

Where a person is held in detention pending the determination of a criminal charge, that person can expect special diligence on the part of the competent authorities to reach such determination of guilt or innocence with expedition. The ICJ/CIJL considers that the periods of inactivity in the trial are unacceptable and therefore, that the obligation to proceed expeditiously has been violated[21].

Therefore, the delay in reaching a conclusion to the trial, read in conjunction with the fact that: (1) the defendants have already been in prison for almost nine years, (2) no rationale is given for the continued detention of the defendants, (2) there is a presumption by the Court that the 1994 conviction was valid in spite of the decision of the ECtHR to the contrary, and (3) the Presiding Judge had allegedly earlier commented on the guilt of the defendants in a pre-trial application[22] are factors which do not constitute sufficiently valid legal grounds to continue the detention of the defendants.

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[21] *Abdoella v The Netherlands (1992)20 EHRR 585, paragraph 24*

[22] 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.*

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. Therefore, extreme care and caution must be taken to ensure that the rights of the defendants to a fair trial and to liberty of person are respected in conformity with the ECHR and with Turkey's international obligations arising from the said ECHR. As such, the defendants' right to liberty and security of the person are not being respected.

## *VI. Conclusion*

It is regrettable that the State Security Court has not remedied the defects identified by the ECtHR in 2001. Despite some positive rulings by the State Security Court, the ICJ/CIJL finds that, in the main, the fundamental principle and the 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 right to liberty* because of the continued detention of the four defendants, the violation of the *presumption of innocence* due to the insufficiently valid legal reasons given for such a state of affairs, and the reasonable suspicion that the *Court is not an independent or impartial tribunal* for the reasons stated above, still prevail today. These deficiencies, coupled with the fact that the National Security Council, through the High Council, is in a position to exert pressure on the judges indicate that No. 1 Ankara State Security Court was neither independent nor impartial when hearing the case of Leyla Zana and three other Kurdish former parliamentary deputies.

The ICJ/CIJL urges the Government to ensure that at the next hearing, which has been scheduled for **17 October 2003**, the abovementioned defects are remedied in line with Turkey's international obligations.

## *VI. Background Information*

Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak were former members of the Turkish National Assembly and the Democracy Party (DEP).[23] On the basis of repeated applications over the course of nearly three years by the public prosecutor to the Ankara State Security Court, on 2 March 1994, the National Assembly lifted the applicants' parliamentary immunity. Shortly thereafter, the defendants were taken into police custody. On 16 June 1994, the Constitutional Court dissolved the DEP and ordered the party's MPs to vacate their parliamentary seats.

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

[23] For all factual information cited, refer to *Sadak and Others v. Turkey* (no. 1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96).

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

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

On 17 July 2001, the European Court of Human Rights ruled that the former members of the Turkish Parliament had not received a fair trial. The Court ruled that there had been a violation of Article 6 because the Ankara State Security Court, which at the time of the trial included a military judge, was not "an independent and impartial tribunal". The Court further unanimously held that the applicant's rights under Article 6(3)(a) and (b) had been violated in so far as there had been a change in the characterisation of the offence during the last hearing of the trial and the applicant's had not been allowed additional time to prepare their defence against the new charge and furthermore, the applicant's had been denied an opportunity to examine or have examined key witnesses for the prosecution.[24]

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

## VII. Methodology

The observers monitored the proceedings hearing at No. 1 Ankara State Security Court on 23 May 2003, 20 June 2003, 18 July 2003, and 15 September 2003. They were very ably assisted throughout by an interpreter who translated the proceedings expertly. They noted that several other observers from different organisations and bodies were also present in the Courtroom during the hearings, as well as representatives from some foreign embassies and the European Parliament.

After the hearing on 20 June, the observers requested to meet 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

[24] Ibid.

with the Presiding Judge, Judge Orhan Karadeniz, but were prevented from doing so by the police.

After each hearing, the observers, 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 observers 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.