

STATE ACCOUNTABILITY?
THE ŐEMDİNLİ TRIAL RE-HEARING
TRIAL OBSERVATION REPORT

September 2007

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KURDISH HUMAN RIGHTS PROJECT
BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

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Kurdish Human Rights Project is an independent, non-political human rights organisation founded and based in London, England. A registered charity, it is dedicated to promoting and protecting the human rights of all people in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include Kurdish and non-Kurdish people.



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Introduction

This report follows-up on the 2006 report produced by the Kurdish Human Rights Project and the Bar Human Rights Committee for England and Wales entitled *Promoting Conflict – The Şemdinli Bombing*. That report traced and put in context the trial of two non-commissioned military officers, Ali Kaya and Özcan İldeniz, and a former PKK member turned state informant Veysel Ateş, for the unprovoked bomb attack on the Kurdish-owned *Umut* bookstore, in the town of Şemdinli, in the Hakkari region of south-east Turkey on 9 November 2005. The attack resulted in the death of one man and the injury of two others. The case attracted much attention both internationally and domestically for the extent to which it exposed the involvement of the military in so-called ‘deep state’ activities and put into question the authorities’ will to carry out an effective investigation to uncover the real facts of the case. The first session of the trial took place on 4 - 5 May 2006 at the Van 3rd Heavy Penal Court.

From its observation of the first trial and interviews conducted during the mission, which formed the basis of the first report, the mission was concerned that the following international human rights standards had been compromised in the investigation of the Şemdinli bombing and subsequent trial:

- (i) The right to life;
- (ii) The obligation to conduct a prompt, thorough and impartial investigation into allegations of killings by state agents;
- (iii) The obligation to conduct an effective investigation capable of identifying and punishing those responsible for the deprivation of life;
- (iv) The independence of the prosecution and judiciary.

On 19 June 2006 the Van 3rd Heavy Penal Court convicted and sentenced Ali Kaya and Özcan İldeniz to 39 years imprisonment each after being found guilty of “forming a criminal organisation, killing people, attempting to kill people and causing injury”. The verdict met a mixed response: on one hand the conviction was celebrated as a triumph of judicial independence and a refusal by the judiciary to turn a blind eye to the facts of the incident. This was done in the face of considerable

pressure, such as military efforts to influence the outcome of the trial through public comments on the commendable character of one the accused, and the disbarment of a Public Prosecutor due to the contentious nature of his indictment, wherein he named senior military figures broadly suspected of links to the bombing. In spite of this pressure, Van 3rd Heavy Penal Court accepted the indictment and proceeded with the case.

On the other hand, the outcome of a trial fell short of the hopes and expectations of many for whom this was the first real opportunity to expose the extent of alleged military involvement in security incidents and attacks within Turkey through the operation of the deep state organisations JİT (Gendarme Intelligence Organisation) and JİTEM (Gendarme Intelligence Gathering and Anti-Terror). The facts were irrefutable; the defendants had been caught red-handed. It depended only on the willingness of those with the power and authority to investigate a possible military role in orchestrating the attack and bring those responsible to account.¹ However, the judicial panel was reluctant to convict the defendants under Article 302 for “undertaking activities aimed at destroying the unity of the state and territorial integrity of the country”, and restricted itself to a simple criminal conviction for “forming a criminal organisation, killing people, attempting to kill people and causing injury”, denying the possibility of the landmark case hoped for.

The verdict handed down by Van 3rd Heavy Penal Court was appealed by both the victim and the defence. On 16 May 2007, the 9th Criminal Chamber of the Court of Appeal returned its verdict: the case was to be re-opened due to “insufficient investigation”, and the defendants were to be retried by a military tribunal. The incongruity of the appeal court decision with the facts of the case and the evidence submitted at trial was enormous. Both domestically and internationally the trial was perceived as an opportunity for the Turkish state to confront the forces working at undermining its democratic legitimacy and the rule of law. With the appeal court decision, the flame of such expectation was well and truly quenched and in its place emerged speculation of a cover-up.

In the course of its observation of the opening of the re-hearing on 11 July 2007, this mission upholds the concerns of the 2006 mission. Indeed, in light of the events surrounding the ruling of the court of appeal and the handing over of military jurisdiction, concerns regarding the independence of the judiciary have been amplified. In addition the mission noted that restrictions on public access to the trial undermined the requirement that trials be publicly held.

1 ‘Turkey: No impunity for state officials who violate human rights; briefing on the Şemdinli bombing investigation and trial’, Amnesty International, May 2006 AI index: EUR 44/0062006

Part one of this report provides the political backdrop to the re-hearing, placing it in the wider context of the European Union accession process and ongoing military interference in politics, particularly during the recent presidential and parliamentary elections.

Part two outlines the background of proceedings before the 9th Criminal Chamber of the Court of Appeal in Ankara. It sets out the issues surrounding the grounds of appeal as put forward both by the defence and by lawyers for the victims. These grounds included the failure to convict the defendants under Article 302 of the Penal Code, the failure of the judiciary to take into account the wider context in which the bombings took place, problems arising from the methods by which the evidence was collected and the question of jurisdiction.

Part three outlines the developments that took place following the decision to re-open the case including the defendants' request that the judicial panel be replaced and the panel's ultimate replacement by Supreme Council of Judges and Public Prosecutors. Part three further looks at the issues surrounding the loss of case files and the effect this incident had on the proceedings.

Part four provides a narrative of proceedings at the re-hearing in the Van 3rd Heavy Penal Court on 11 July 2007. It considers the legal implications of the re-hearing, focusing on the panel, the legal team and most importantly, the question of jurisdiction. The section also examines discussions on the question of an 'insufficient investigation'. Part five relates the verdict of the re-hearing and developments subsequent to the hearing, including the granting of military jurisdiction to the case in September.

The mission's conclusions and recommendations follow, while the Annexes provide a list of those interviewed by the mission and a translation of the re-hearing transcript.

1. The Spring Constitutional Crisis: The Şemdinli Trial and Appeal in a Context of Ongoing Military Interference in Politics

The Şemdinli trial was widely seen as a test for Ankara to prove its commitment to the rule of law as part of its efforts to join the EU and its ability to act independently of the powerful security services. Many of the far-reaching reforms Ankara has undertaken over the past several years to bring Turkey in line with EU norms of democracy have been aimed at limiting the military's powers and its role in political decision-making.²

Those interviewed by the mission said that the public did not doubt that the military played a role in the Şemdinli bombing. While the military is despised in some quarters, in others the military is seen as the protector of the country against external threats, as well as internal seditious and radical elements. On that basis its supporters reason that it should have discretion to decide how to exercise its control.³ It is the perception of itself as the ultimate arbiter of power which the military prefers.

The first report on the Şemdinli bombing published by the Kurdish Human Rights Project and Bar Human Rights Committee⁴ reviewed the rising violence against Kurdish communities and the victimisation of Kurdish trade unionists, human rights defenders and political activists by security elements, resulting in a de facto return to a state of emergency in Kurdish cities; all done in the name of bringing an end to armed conflict in the Southeast. The report stated, "The Şemdinli incident... is a test of the Turkish authorities' will to ensure the supremacy of the rule of law and due process as well as its will to establish a genuine and effective democracy"⁵.

More recently the question of Turkish democracy and the military's influence thereon, has once again been under the spotlight. On 27 April 2007, the military threatened to intervene against the government. This ominous caution was in

2 'Court says senior officers involved in Şemdinli bombing', 19 July 2006, Turkish Daily News

3 The mission held several interviews on 10-11 July 2007. See Annex for full list

4 'Promoting Conflict – The Şemdinli Bombing. Kurdish Human Rights Project, Bar Human Rights Committee. September 2006.

5 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p 18

response to the decision of Recep Tayyip Erdoğan, the Prime Minister and leader of the ruling Adalet ve Kalkınma Partisi (Justice and Development Party - AKP), to nominate his foreign minister, Abdullah Gül, to replace President Ahmet Necdet Sezer, who was due to step down on 16 May 2007. Like Mr. Erdoğan, Mr. Gül has a background in political Islam. While the military could tolerate a Prime Minister from the AKP, it could not tolerate an AKP President: the Turkish President is also Chief of the Armed Forces – from which he derives considerable power. He can approve the expulsion of overtly pious officers, and he appoints judges and university rectors. He can also veto legislation deemed to violate the secular constitution. To the generals, as to millions of secular demonstrators, no AKP man can be trusted in this role. They argued that Mr Erdoğan should have to reach out to the opposition and agree on a candidate outside his own party.⁶

In a statement posted on the general staff's website, the military spoke of risks to Atatürk's secular republic. In a country with a history of military rebukes, the so-called "e-coup" sparked a political crisis that led to an early election moved from 4 November to 22 July.

The European Union responded to this intervention on 3 May 2007, telling the Turkish military to stay out of politics and warned that Ankara's bid to join the union hinged on "core" values of "the supremacy of democratic civilian power" over the armed forces. This was a pre-requisite for any country hoping to join the EU.⁷ EU Enlargement Commissioner Olli Rehn appealed to the Turkish military to respect "the rules of the democratic game and its own role in that democratic game."⁸

For some the heart of the matter is the rise of political Islam and the erosion of the staunchly secular identity of the Turkish state. The army sees itself as custodian of secularism. The AKP has its roots in political Islam but insists that it respects the secular principles of the Constitution.⁹ Furthermore, the AKP introduced a range of constitutional and judicial changes, which along with an improving economy, led the EU to agree to open membership talks with Turkey in 2005.¹⁰ Membership of the EU requires strict adherence to a range of principles, referred to as the Copenhagen Criteria, which includes the stability of institutions guaranteeing democracy,

6 'A battle for the future', The Economist, 19th July 2007.

7 'EU warns army in Turkish dispute', The Guardian, 3 May 2007.

8 'Turkey's political crisis', BBC News Online <<http://news.bbc.co.uk>>

9 'Defending the secular "faith"', Stephanie Irvine, BBC News Online <<http://news.bbc.co.uk>>

10 'A battle for the future', The Economist, 19th July 2007.

the rule of law, human rights and respect for and protection of minorities.¹¹ This suggests that concerns about the growth of oppressive political Islam are unfounded, however the military and other bureaucratic elites like to portray it.

Prime Minister Recep Tayyip Erdoğan, responding to allegations that his party is using EU accession as a means of promoting religious ideology has argued that too strict a definition of secularism damages democracy, and restricts personal freedoms. “The essential problem is to find a way to stay united, preserving our differences,” he says. “Rights and freedoms are necessary for everyone.”¹²

In the last few years the military’s political powers have been restricted considerably. The National Security Council now contains more elected civilians than military members, and the civilian government can now audit military accounts. In 2006, military courts lost the power to try civilians. These changes have not been well-received by the military, and in light of security incidents of recent years, there has been speculation of deliberate attempts by the military to derail the accession process with a view to maintaining its own, previously unchallenged, power base.

The July general election resulted in an overwhelming vote of confidence for the AKP. In what was seen as the most crucial Turkish election in at least a generation, the ruling party won 47 per cent of the vote, giving it a majority of about 130 in the 550-seat Grand National Assembly in Ankara. More than 80 per cent of the electorate voted in what Mr Erdoğan declared as a triumph for democracy – an implicit reference to the generals and their political allies, whose attempt to undermine the government on the issue of a presidential candidate ended in a fiasco.¹³ He promised to “press ahead with reforms and the economic development that we have been following so far”, adding “we will continue with determination to achieve our European Union goal.”¹⁴

On 28 August 2007 Mr Gül was sworn into office after a third round of voting in parliament, which he won by a clear majority. Gül took his oath at the ceremony in parliament, pledging loyalty to democracy and to the secular Republic. “As long as I am in office, I will embrace all our citizens without any bias,” he said.

11 In 1993, at the Copenhagen European Council, the Union took a decisive step towards the fifth enlargement, agreeing that “the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.” Thus, enlargement was no longer a question of ‘if’ but ‘when’. Concerning the timing, the European Council states: “Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.” At the same time, it defined the membership criteria, which is often referred to as the ‘Copenhagen criteria’. <<http://ec.europa.eu/cgi-bin/etal.pl>>

12 ‘Tough test for Turkey’s democracy’, Chris Morris, BBC News Online. <<http://news.bbc.co.uk>>

13 ‘Gamble pays off as Turkey’s PM wins historic landslide’, Ian Traynor, The Guardian. 23 July 2007.

14 ‘Turkish PM vows to pursue reform’, BBC News Online <<http://bbc.news.co.uk>>

In response, Turkey's military chief, General Büyükanıt, warned that "centres of evil were trying to undermine the state". Clearly referring to Mr Gül, he continued that they were "trying to corrode the secular nature of the Turkish Republic".¹⁵

15 'Turkish leader to review cabinet', 29 August 2007, BBC News Online <<http://bbc.news.co.uk>>

2. Application to and Ruling of the Court of Appeal

Grounds for Appeal

The indictment principally charged the defendants¹⁶ with the following:

- undertaking activities aimed at destroying the unity of the state and territorial integrity of the country (Article 302 of the Turkish Penal Code)
- murder and attempted murder
- conspiracy/ forming a gang to commit these offences

The indictment was prepared by Public Prosecutor Ferhat Sarıkaya. In addition to charges against the accused, including a charge under Article 302, which has historically tended to be used against PKK members, the indictment contained allegations against senior military figures, implicating them in the design and co-ordination of the attack in Şemdinli in November 2005 and pointing to the role of the military in ‘deep state’ organisations. On the basis of this he was disbarred on 20 April 2006 accused of politicisation of the judiciary. There was surprise both domestically and internationally at the severity of the action. Reports suggest that the indictment was initially well-received by the government, in particular in the context of EU accession talks; it was only upon the intervention of the military that an investigation of the Prosecutor was instituted. However, despite this, Van 3rd Heavy Penal Court accepted the indictment and chose to proceed with the trial.¹⁷

On 19 June 2006 Van 3rd Heavy Penal Court sentenced Ali Kaya and Özcan İldeniz to a total of 39 years 5 months and 10 days imprisonment each, finding them guilty of murder, attempted murder and ‘forming an organisation to commit acts that are described by offences by law’ (Article 220 of the Turkish Penal Code). The defendants were therefore not convicted under the indictment’s more serious charge of ‘undertaking activities aimed at destroying the unity of the state and territorial integrity of the country’ (Article 302) which carries a life sentence.

16 The defendants are Ali Kaya and Özcan İldeniz, two non-commissioned military officers and former PKK member Veysel Ateş. Ateş was tried and convicted separately. His conviction is also under appeal.

17 For full details see Promoting Conflict – The Şemdinli Bombing, KHRP, September 2006, pp 27-29

Following the conviction and sentencing, the victim, Seferi Yılmaz, and the defendants, Ali Kaya and Özcan İldeniz were granted leave to appeal to the 9th Criminal Chamber of the Court of Appeals, located in Ankara. In accordance with the new Penal Code, if the verdict of the lower court were approved on appeal, the accused would have their sentences reduced to 26 years.¹⁸

Lawyers representing the victim appealed since the suspects were not convicted under article 302 of the Turkish Penal Code for acting in a way that disrupts state unity. Sinan Sivri, presiding Judge in the Van 3rd Heavy Penal Court during the original trial, reportedly objected to the verdict against the non-commissioned officers and the refusal of the other members of the judicial panel to convict them under article 302. He demanded life imprisonment on the grounds that the bombing was organised in a volatile region. In his written objection, he claimed:

When we take the time and the place of the incident into consideration [the] attack was certainly not only against Seferi Yılmaz... The attack was also against the unity of army and state. In accordance with these elements the attack should be regarded against the unity of state [*sic*]¹⁹

Following sentencing of the defendants, Diyarbakır Bar Association Chair and lawyer for the victim Sezgin Tanrıku confirmed that they would appeal against the verdict:

instead of being sentenced under article 220 ... they should be sentenced under article 302. This was the opinion in the indictment anyway. Because of this we will appeal to the Court of Appeals.²⁰

Expanding on the failure of the judges to tackle what were considered to be the bigger issues in the trial Tanrıku explained:

We believe the criminal organisation is not limited to these three defendants. The organisation should be uncovered with the whole of its structure abolished and its acts revealed and punished. For this, an effective trial is required. [...] It is important that the defendants have been sentenced for the offence of “forming a criminal organisation”. It should not be forgotten that these individuals were soldiers on active duty. It is the first time a verdict is passed so fast in relation to soldiers on

18 ‘Şemdinli Verdict: 39 years Imprisonment for Non-commissioned officers’, Today’s Zaman, 20 June 2006 <<http://www.todayszaman.com/tz-web/detaylar.do?load=print&link=34149&yazarAd=>

19 Info-Turk No.334, 21 June 2006 <<http://www.info-turk.be/334.htm>>

20 Tolga Korkut, BIA News Centre, ‘Şemdinli gang not only three people’, 21 June 2006, <http://www.bianet.org/php/yazdir.php?DosyaX=../2006/07/01_eng/news81032.htm>

duty, gangs. There is another important aspect of this verdict. It might be an indication to who [*sic*] may be behind similar incidents in the region, shedding light on these.²¹

Chairman of the Van Bar Association, Ayhan Çabuk, reflecting on the importance of this trial observed that there have been many unexplained explosions and attacks where the military and ‘deep state’ organisations were suspected. He said, “Previously there was never any proof of military involvement: this is the first time the military was caught red-handed. For this reason it is very important to fully investigate who is really pulling the strings behind these attacks”.²²

Mr. Çabuk continued, “there were initially three defendants; more were expected and hoped for. Büyükanit should have been indicted. All the evidence points to the impossibility of low-ranking officers being capable of planning the attack. There is strong evidence of detailed planning and preliminary preparations in terms of surveillance of the property”. Further, the two non-commissioned officers were officially on duty on the day of the attack and their papers indicated that they were stationed in two different military bases which would have made it extremely difficult to arrange the attack without some kind of external direction and assistance. Mr. Çabuk argued that “this points strongly to military collusion”.²³

According to Cüneyt Caniş, the Chairman of İnsan Hakları Derneği (Human Rights Association of Turkey - İHD) Van Branch and a lawyer representing the victims, the report prepared by the Public Prosecutor Metin İçek for the appellate court was highly politicised in respect of the option of prosecuting the defendants under article 302. The prosecutor maintained that it was an outrage to dream of prosecuting the security forces that protect the state under the same article that was used to prosecute members of the PKK.²⁴

Following sentencing Mahmut Güler, lawyer for the defendants, dismissed the trial as a travesty of justice that had been politicised by EU interest in the outcome: “the court didn’t listen to Kaya’s defence. Reaching a decision under these conditions is improper. It appears the court wanted to send a message to the EU. I don’t know why but EU representatives were very interested in this trial [...] we will appeal this

21 Tolga Korkut, BIA News Centre, ‘Şemdinli gang not only three people’, 21 June 2006, <http://www.bianet.org/php/yazdir.php?DosyaX=../2006/07/01_eng/news81032.htm>

22 Interview with the KHRP mission, 10 July 2007. Van

23 Interview with the KHRP mission, 10 July 2007. Van

24 Interview with the KHRP mission, 10 July 2007. Van.

decision as soon as possible.”²⁵ As corroboration, Güler mentioned the dismissal of Public Prosecutor Ferhat Sarıkaya on charges of politicizing the judiciary.²⁶

An important ground for appeal from the point of view of the defendants was the question of investigation and witness evidence collection. Prior to the first session of the original trial on 4 May 2006, the evidence of a number of witnesses to the events surrounding the Şemdinli bombing was collected. Much of the evidence was that of witnesses who were not resident in Van and so were not able to give testimony before the Court. A local judge in their area heard their evidence. Selçuk Kozağaçlı, a lawyer for the victims, reported to the mission that 35 witnesses and one of the complainants had given evidence as part of this exercise.²⁷ This manner of collecting evidence denied the defendants their right to cross-examine the witnesses on their testimony.

Court of Appeal Ruling

On 16 May 2007, the 9th Criminal Chamber of the Court of Appeals, which conducted the appellate review of the case, handed down its decision to overturn the verdict of the Van 3rd Heavy Penal Court on the grounds of “insufficient investigation”. Specifically the court pointed in its report to the inability of the defence to cross-examine witnesses on their testimony in the original trial.

In relation to arguments that the defendants should have been convicted under Article 302 the appeal court said that there was insufficient evidence to do so and released a statement saying “the assertion that the defendants, who were members of the Turkish military, have committed the same crimes that the terrorist organization commits is based on an opinion that goes far beyond the imagination, is purely built upon assumptions and lacks any legal value.”²⁸

The appeal court also ruled that the defendants had been wrongly brought before civilian courts and that the crimes with which the defendants were charged fall within the jurisdiction of the military courts. Noting that all activities of the Turkish Armed Forces (TSK) relating to separatist terrorism have a military character, the court referred to the provisions of the Military Penal Code concerning crimes committed by the military forces.

25 Court says senior officers involved in Şemdinli bombing, Turkish Daily News, 19 July 2006 <<http://www.turkishdailynews.com.tr/article.php?enewsid=49228>>

26 ‘Supreme Court overrules verdict on Şemdinli case’, The New Anatolian, 17 May 2007.

27 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006 p. 36

28 ‘Controversial Şemdinli verdict overturned’, The New Anatolian, 17 May 2007 <<http://www.today-szaman.com/tz-web/detaylar.do?load=detay&link=111465>>

Ayhan Çabuk, commenting on the finding of “insufficient investigation”, said that in the first trial there had been sufficient evidence to sentence the defendants; the prosecution had satisfied the burden of proof, which was beyond a reasonable doubt. When considering the decision of the appeal court to overturn the conviction, Mr Çabuk maintained that the finding was clearly intended to frustrate the original verdict of Van 3rd Heavy Penal Court. In relation to the ruling that the case should be handed over to military jurisdiction, Mr. Çabuk claimed that if the case is handed over, this would set a dangerous precedent and there would be “no possibility that it will ever be properly prosecuted. This indicates that the 9th Criminal Chamber of the Court of Appeals wants to leave the soldiers unpunished.”²⁹

Supporting this suggestion that the military is reluctant to assess the culpability of officers within its ranks, the mission was informed that since the verdict of Van 3rd Heavy Penal Court, the defendants have not been formally relieved of their military duties, nor have they been suspended pending the outcome of their appeal. This is notwithstanding the officers’ ongoing detention.

Quite tellingly, Vedat Gülşen, lawyer for the defendants, expressed his satisfaction with the appeal decision:

This will improve the morale of our colleagues in the counterterrorism units. This decision will serve as a precedent for crimes committed during the performance of their duties in the counterterrorism units. This is very important. From now on in the event of any dispute between civil and military courts, this decision will set a precedent, and military courts will be considered empowered. This decision is a first in this respect. I hope this decision will be beneficial to us all, to our homeland, to our nation and to our state ³⁰

In a trial that was mired in controversy and undue influences, an extremely positive aspect was the determination of the judiciary to withstand the pressures placed on it and to prosecute the indictment that led to a conviction of Ali Kaya and Özcan İldeniz. Media coverage suggested that the ruling of the appellate court had put an end to this. It had overturned the trial ruling and, more than that, ruled that the two non-commissioned officers will be tried by a military court and not a civilian court. “So the military will now have the final say and this case is closed forever. What has happened at the bookstore in Şemdinli on November 9, 2005 where a person was killed will now be regarded either as a mystery or a major cover-up.”³¹ Third-party

29 Interview with KHRP mission, 10 July 2007. Van

30 ‘Controversial Şemdinli verdict overturned’, *The New Anatolian*, 17 May 2007

31 ‘What happened to the Semdinli case?’ İlnur Çevik, *The New Anatolian*, 17 May 2007

lawyers Murat Timur and Tahir Elçi agreed with this perception of an attempted cover-up.³²

A statement released by İHD following the ruling of the appellate court pointed to the reluctance in Turkey to investigate public officers, in particular security force members, for involvement in illegal activities. It commented that inevitably, the judiciary ruled either that there was no need to process a case, or files were transferred to other cities on security grounds. Prosecution of security force members is further obstructed due to the fact that evidence related to incidents is collected and controlled by force members who naturally have no interest in securing a conviction against their colleagues. İHD maintained that the conduct of the Şemdinli trial was consistent with all of this. It argues that ultimately, this undermines public confidence in the judicial system and its independence.³³

32 'Military thwarted in Semdinli case', Kurdishinfo.com, 15 June 2007

33 Human Rights Association of Turkey, Press Release 18 May 2007 "Outcomes of Şemdinli Trial Decision: Rule of law, Independent and Impartial Judiciary; Effective Investigation or shortly "Law State" <<http://www.ihd.org.tr/press/press20070518.html>>

3. Developments following the decision of the 9th Criminal Chamber of the Court of Appeal

Application to Replace Judicial Panel

Following the appeal ruling, the case was referred back to Van 3rd Heavy Penal Court to be re-heard. On 13 June 2007 it accepted the direction of the appellate court and re-opened the case. Notwithstanding the direction of the appellate court that the case should be held in a military court, the Van 3rd Heavy Penal Court maintained its jurisdiction over the case.³⁴ It ordered an on-site investigation of the scene of the bombing to be carried out on 29 June 2007, and scheduled a re-hearing for 11th July 2007.

The defendants made an approach to the court challenging its retention of jurisdiction. Public Prosecutor Metin İçek supported the defendants' challenge and an application was made seeking the dismissal of judges İlhan Kaya, chairman of Van 3rd Heavy Penal Court and Eşref Aksu, member of the same court. The application was made to the Van 4th Heavy Penal Court whose decision on the matter is final. On 29 June 2007, Van 4th Heavy Penal Court returned its decision to refuse the application.

While this refusal to replace the judicial panel augured positively for the judiciary's independence in the administration of its functions, a disconcerting new development soon emerged. Swiftly following the decision of Van 4th Heavy Penal Court to refuse the application made by the defendants and the Public Prosecutor, the Supreme Council of Judges and Public Prosecutors (HSYK) issued a decree

34 Rejection of a higher court ruling by a lower court is possible in the Turkish Legal system under Article 307 of the Turkish Criminal Procedure Code.

reshuffling more than one thousand judges and prosecutors.³⁵ The judicial panel of Van 3rd Heavy Penal Court, which oversaw the original trial and was due to hear the re-opened trial, was affected in the reshuffle. İlhan Kaya, Eşref Aksu and İbrahim Özer, the deputy chief public prosecutor in Van, were all relocated to another province. Kaya was appointed to Bakırköy and was replaced with Zekerya Erdoğan, the chairman of the Boyabat Criminal Court.³⁶ It was reported that the judges had asked for the transfers. In total, the HSYK transferred 1,499 judges and prosecutors around the country.³⁷

The newly appointed panel was scheduled to sit in Van 3rd Heavy Penal Court from 14 July 2007. Lawyers representing the victim expected that the original panel who first heard the case would still be in situ prior to this date. Thus, they believed that any decision the judicial panel handed down on the scheduled 11 July re-hearing, whether with regard to jurisdiction or investigation of the incident at Şemdinli during the first trial, could potentially be overruled by the new panel when it took to the bench.

None of those interviewed by the mission had any insight or foreknowledge of the new judicial panel or its disposition; however it was considered likely that the HSYK would have ensured that the new panel would be sympathetic to the ruling of the 9th Criminal Chamber of the Court of Appeals with regard to jurisdiction and investigation. Interviewees emphasised to the mission the responsibility of the

35 The Supreme Council of Judges and Prosecutors (HSYK) holds a critical position in relation to judicial independence and security for judges. Originally established by a law of the National Security Council and later defined by the Constitution (Article 159), the HSYK is the key organ in the professional lives of the judges and prosecutors who serve in the judicial and administrative jurisdictions. The Council is empowered and entrusted with such matters as admission to the profession, appointments, transfers, promotion, disciplinary action, dismissal from the profession, and removal of personnel and alterations in the jurisdictional boundaries of the courts. The HSYK is made up of the Minister of Justice (Chairman), the ministry undersecretary (ex officio member) and 5 judges. The members who are judges are selected and appointed by the President of the Republic from candidates presented to him by the Court of Cassation and the Council of State. The doubts raised from the viewpoint of judicial independence by the designation of the head of the executive as the final authority in the appointment process are obvious. In the case of the President of the Republic coming from a political party (as is normal), these doubts are multiplied. Furthermore, making the Minister of Justice Chairman of the Council and the ministry undersecretary an ex officio member has increased the initiative and effectiveness of the executive within the Council. The mode of operation of the Council adds to the adverse effects arising from its structure. The Council, which has no separate organisation, independent budget, building or even a secretariat and whose operations are overseen by ministry officials, is not noticeably different from any of the units of the ministry's central organisation. Neither is there any public openness or transparency in the working of the Council. <<http://www.tusiad.org.tr/turkish/rapor/demokratik/html/bolum3.html>>

36 'Controversial Şemdinli case fallout continues', Today's Zaman, 30 June 2007 <<http://www.todayszaman.com/tz-web/detaylar.do?load=print&link=115460&yazarAd=>>

37 'Judges in Şemdinli case transferred', Turkish Daily News, 30 June 2007 <<http://www.turkishdailynews.com.tr/article.php?newsid=77142>>

new panel to uphold the independence demonstrated by the original judicial panel in the administration of its functions. Cüneyt Caniş spelled this out to the mission: “this trial is a very tough test for the credibility of Turkish judiciary; the disbarment of the first Public Prosecutor, Ferhat Sarıkaya, was the first example of interference. Greater and greater pressure is being exerted on the judiciary”.³⁸

Public Prosecutor Metin İçek was appointed to prosecute the case against the defendants when the 9th Criminal Chamber of the Court of Appeal returned its verdict. He quickly requested the release of the defendants on the grounds of lack of evidence and insufficient investigation. The mission was informed that the call for the release of the defendants was echoed by others in the regional public prosecutors office.

Loss of Case Files

Late in May 2007 case files that were being transported from the 9th Criminal Chamber of the Court of Appeals in Ankara to Van were destroyed in a car crash. The files never reached the defendants’ lawyers in Van. The media speculated about circumstances surrounding the accident. The mission was informed of newspaper reports that on the day of the accident, the vehicle transporting the files had taken an unorthodox route from Ankara to Van, choosing to follow the back roads instead of the main highways. Cüneyt Caniş informed the mission that this would have little impact on the victim’s prosecution of the case as there are 68 hard copy files in the prosecution’s case. For convenience, these files had been previously copied to CD ROM and therefore were still accessible.³⁹

Reporting what it described as the “latest twist in the notorious Şemdinli trial”, Today’s Zaman said that the actual case files described as “completely destroyed” were those that related to the former PKK member, turned agent of the state, Veysel Ateş, and did not include material on the defendants, non-commissioned officers Ali Kaya and Özcan İldeniz. It was believed that among the files lost was confidential material that pertained to the true nature of Ateş’ involvement in the events of November 2005. The crash had ensured their permanent removal from circulation.⁴⁰ This incident, though not having direct bearing on the case against Kaya and İldeniz, is of concern to the mission, fuelling as it does suspicions that attempts are being made to limit the amount of available information on the

38 Cüneyt Caniş, lawyer for the victim, interview with the KHRP mission, 10 July 2007. Van.

39 Cüneyt Caniş, lawyer for the victim, interview with the KHRP mission, 10 July 2007. Van.

40 More mystery in Şemdinli case as files lost in car accident, Today’s Zaman, 14 June 2006 <<http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=114018>>

circumstances surrounding the bombing and the exact nature of the interplay between those involved.

4. Re-hearing in Van 3rd Heavy Penal Court

Prior to the 11 July 2007 re-hearing the mission spoke to a range of individuals and asked what their expectations were. Three possible outcomes were predicted.

Firstly, in line with the ruling of the 9th Criminal Chamber of the Court of Appeals, Van 3rd Heavy Penal Court might agree that the case should be heard by a military court. Secondly the Court might agree to the determination of “insufficient investigation” and order an on-site investigation. The determination of “insufficient investigation” raised a number of questions regarding the right to a fair trial, particularly for the defendants. Thirdly, the court might disregard both rulings of the appeal court and proceed to conduct a full re-hearing. This was expected to be the least likely outcome. Given the re-arrangement of the judicial panel, it was expected that the court would avoid making a final determination with respect to either aspect of the ruling of the court of appeal as any ruling made that day could potentially be overturned by the new judicial panel when it took the bench on 14 July 2007. Sezgin Tanrıku told the mission that he was not optimistic for the outcome of the re-hearing; he believed that it was likely that everything would be done to secure an acquittal for the defendants.⁴¹

Security and Access to the Re-hearing

The trial was scheduled to re-open in Van 3rd Heavy Penal Court on 11 July 2007 at 2PM. Various commentators suggested the this late scheduling of the hearing, as opposed to a whole day being committed to the proceedings, indicated that the court expected the hearing to be brief and inconclusive.

While observers at the first hearing on 4 and 5 May 2006 commented on the striking level of security surrounding the trial⁴², a relatively low-level of security or ordinary level of security marked the hearing on 11 July 2007. The mission observed fewer than twenty military and police officers in the immediate vicinity of the exterior of the courthouse. There certainly was not a reinforced security presence; this reflected the perceived low-level security risk associated with the Şemdinli re-trial.

41 Sezgin Tanrıku, lawyer for the victim and Chair of Diyarbakır Bar Association, interview with the KHRP mission, 10 July 2007. Van.

42 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 33

The area surrounding the court was calm with minimal attendance by the general public. The defendants were transported to the court directly prior to the hearing. This contrasts with the first hearing where the defendants were transported to court at 4:30AM to avoid confrontation with the crowds who had amassed around the courthouse from early in the day.⁴³

Armed members of the gendarmerie were dispersed around the entrance of the court buildings and throughout the interior. The mission was assured that their presence and number were standard. Upon entering the courthouse security personnel conducted routine checks with all those who entered the building required to pass through a metal detector and agree to have any bags or other items searched. Cameras were not permitted in the interior of the court buildings; however, there were no objections to pictures being taken of the exterior of the court buildings and of the security presence there. In the area immediately outside the courtroom were a number of individuals, more than twenty, who were identified to the mission as plain-clothed military intelligence personnel.

After passing through several corridors and stairways into the heart of the courthouse, the mission was halted and asked to provide documentation identifying them as lawyers before they could gain access to Courtroom 35 and its immediate vicinity. When this requirement was satisfied the mission had unimpeded access to Courtroom 35 and the surrounding area. From what the mission could observe of the security process, access to the courtroom where the hearing was held was restricted only to those who presented identification that satisfied the security personnel. Present in the public gallery of the courtroom were journalists, the mission and security personnel only; the mission did not discern any members of the general public. It is not clear whether the general public was denied access to the trial if they failed to meet a particular identification requirement. The apparently restricted access to the trial, at least contingent upon presentation of identification (the observer's passport was requested to verify her professional documentation) raises concerns about the requirement for a public hearing.⁴⁴

The hearing began after minor delays at 2:45PM. The judicial panel sat in the same courtroom as the initial trial of 4-5 May 2006. The relatively small size of Courtroom 35 was a source of consternation during the first trial as it was considered too small

43 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006, p. 33

44 The European Court of Human Rights and Commission have stated that at least one court must deal with the merits of a case in public, unless the case falls within one of the permissible exceptions. [Fredin v. Sweden (No. 2), (20/1993/415/494), 23 February 1994, at 6-7] A public hearing requires oral hearings on the merits of the case held in public, which members of the public, including the press, can attend. [Van Meurs v. the Netherlands (215/1986), 13 July 1990, Report of the HRC, (A/45/40), 1990, at 60]. Amnesty International Fair Trial Manual. Dec 1998. AI Index: POL 30/02/98

to accommodate the keen public interest; a petition by lawyers for the victims for that trial to be heard in a larger courtroom within the building was refused.⁴⁵ On this occasion lawyers for the victim did not make a similar petition. Sezgin Tanrıkulu informed the mission that this was not done as they did not expect firstly, that such a petition would be successful nor secondly, that the courtroom for the re-hearing would have to accommodate as large a number of people, in light of the anticipated reduction in public interest in the trial.⁴⁶

Upon entry to the rectangular courtroom, the mission observed that the main arena of the courtroom was to the right, whilst to the left and back of the courtroom was an area for the public gallery. Facing the judicial platform at the front of the room against the left wall was an area for the victim's lawyers and against the right wall directly opposite them, seating for the defendants' lawyers. The President of the Court, flanked by his two colleagues sat on a raised platform overlooking the room. The Public Prosecutor enjoyed the benefit of the raised platform to the right of the judges. Directly facing the judicial platform was the dock, surrounded by white metal railings. The public gallery was located directly behind the dock and was furnished with rows of wooden benches, ill-designed to comfortably facilitate observers seated for extended periods of time.

Nothing adorned the whitewashed walls of the courtroom except for two raised flags either side of the judicial platform and a sign bearing the inscription *Adalet Mülkün Temelidir* (Justice is the foundation of the State) hanging above the President of the Court.

The victim, Seferi Yılmaz, was also present in the courtroom.

Throughout the hearing there was a strong military presence in the courtroom. Roughly a dozen soldiers with semi-automatic weapons were strategically positioned throughout the courtroom. Six soldiers stood directly behind the defendants who were seated in the dock facing the judicial panel. The soldiers alternately faced the defendants' backs, facing the judicial panel and prosecutor, and lawyers representing the defendants and victim, or turned toward the public gallery, weapons in hand. This security presence was echoed in the gallery where a number of senior military personnel were reportedly overseeing the proceedings.

45 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 33

46 Sezgin Tanrıkulu, lawyer for the victim and Chair of Diyarbakır Bar Association, interview with the KHRP mission, 10 July 2007. Van

Media Coverage of the Re-hearing

Compared to the first trial there was relatively little media interest in the re-hearing. The first trial stimulated a high level of attention in the media domestically, as well as in Europe and internationally. The diminished interest this time around had a number of explanations.

According to Cüneyt Caniç⁴⁷, around the time of the first hearing, private television channels were broadcasting special hour-long features examining the trial and the issues it had ostensibly exposed, speculating about the existence of ‘deep state’ operations and the role of the military in the Turkish state. The Şemdinli case captured the public imagination for the sheer volume of evidence that suggests military and ‘deep state’ involvement. In response to these broadcasts, an embattled military released several statements, as well as harnessing the support of NGOs that favoured military interests, publicly questioning the patriotic credentials of the broadcasters. The interviewees to whom the mission spoke commented that this is the default position of the military when it is subjected to criticism: it questions the allegiances of its critics and their commitment to a bright democratic future for Turkey, with a subtext of “you’re either with us or against us”. It was further speculated that the military had directly approached the television companies with a view to discouraging their coverage of the trial. There followed an abrupt decline in air-time devoted to covering the Şemdinli trial.

Secondly, the mission was informed that the prevailing public view is that the accused had been tried and properly convicted in the first trial; the ruling on the appeal did not affect this perception and so public interest and media interest in the trial were limited. The public’s expectation was that given the overwhelming evidence against the defendants, the counts against them would be irrefutable. At last the military itself in effect would be put on trial for its ‘deep state’ activities. It is likely that the ruling of the appeal court was unsurprising to a media and public accustomed to a climate of military impunity and that Şemdinli was absorbed into the long history of unresolved allegations of ‘deep state’ activities.⁴⁸

While international and national media interest in the trial had diminished from its previous intensity, there was nonetheless a significant local presence as well national media presence. Local media took a particular interest in the presence of an international observation mission at the trial. The mission did not note any other international observers at the re-hearing.

47 Interview with the KHRP mission, 10 July 2007. Van.

48 Mission interview with Abdulbasit Bildirici of Mazlum-Der, Van branch. 11th July 2007, Van. <www.mazlumder.org>

The Re-hearing⁴⁹

Lawyer for the victim Cüneyt Caniř explained to the mission that the re-hearing was not technically a re-trial as the indictment that was prosecuted in the first trial still stood; however, the case would be re-heard in light of the ruling of the 9th Criminal Chamber of the Court of Appeal of insufficient investigation during the first trial and its preference for a military tribunal to hear the case against the defendants.

As mentioned above, through the course of its inquiries the mission learned that the newly allocated panel would sit in Van 3rd Heavy Penal Court from 14 July 2007. Nonetheless on 11 July 2007 only one of the original judicial panel was present. The remaining two judges' places on the panel were taken up by Sinan Sivri and İbrahim Öneker from Van 4th Heavy Penal Court. According to the trial transcript, the appearance of these judges on the bench for this hearing was 'due to the rejection of Court President İlhan Kaya and member of our court judge Eřref Aksu, and also that Eřref Aksu is on annual leave'.⁵⁰

The victim was represented by ten lawyers during the hearing; these were the counsel present from a pool of more than sixty lawyers who sought to demonstrate their solidarity with the victim. The defendants were represented by three lawyers.

During the trial, lawyers for the victim objected to requests by the Public Prosecutor for certain tracts of the Prosecutor's submissions to be underlined to emphasise the position of the Prosecutor's Office on, for example, the question of jurisdiction; this self-appointed editorial role, they argued, constituted an interference by the public prosecutor in the official court transcript. Lawyers for the victim also objected to the practice of the Public Prosecutor during the hearing of reading the entirety of his written submissions to the Court, instead of making oral submissions summarising the contents of the written documents. This tactic, they contended, was intended to frustrate the conduct of the trial and to dominate the proceedings.

Jurisdiction

When the 9th Criminal Chamber of the Court of Appeals handed down its ruling in relation to military jurisdiction in the case, Van 3rd Heavy Penal Court rejected the ruling in accordance with its authority to do so under Article 307 of the Turkish Criminal Procedure Code. This decision was made by the same panel that convicted and passed sentence on the accused following the trial of 4-5 May 2006.

49 See Annex II for a translation of the hearing transcript.

50 See Annex II for details.

As detailed above in section 3, following Van 3rd Heavy Penal Court's rejection of the appeal court ruling on jurisdiction, lawyers for the defendants sought to have the judges dismissed from the case by applying to the Van 4th Heavy Penal Court for an investigation into the judicial panel. On 29 June 2007, Van 4th Heavy Penal Court handed down its decision to reject the defendants' application. Shortly after this, the HSYK announced its decision to re-locate more than 1,000 judges.

On 11 July 2007, the question of jurisdiction was put to the judicial panel again by the Public Prosecutor and lawyers for the defendants. Both objected to the decision of Van 3rd Heavy Penal Court to reject the decision of the 9th Criminal Chamber of the Court of Appeals in respect of jurisdiction and called on the court to follow the ruling of the superior court favouring military jurisdiction. The Prosecutor and lawyers for the defendants addressed the question of jurisdiction almost exclusively in their submissions.

Lawyers for the defendants contended that ultimately Van 3rd Heavy Penal Court had no jurisdiction in the matter and therefore that any decision it handed down was without legal basis: without jurisdiction, a court could not make a ruling. They argued that the judicial panel's contention that a military tribunal did not constitute a proper court for the purpose of conducting a criminal trial was senseless; it was a Turkish court created under Turkish law with full judicial functions and powers. Lawyers for the defendants also claimed that the jurisprudence of the European Court of Human Rights supported this position. This assertion was not supported by specific references to any case law.⁵¹

51 Indeed, the jurisprudence of the European Court of Human Rights does not per se rule out the use of military courts by member states. In *Morris v United Kingdom* the Court noted "that the practice of using courts staffed in whole or in part by the military to try members of the armed forces is deeply entrenched in the legal systems of many member States. It recalls its own case-law which illustrates that a military court can, in principle, constitute an "independent and impartial tribunal" for the purposes of Article 6 § 1 of the Convention. For example, in *Engel and Others* the Court found that the Netherlands Supreme Military Court, composed of two civilian justices of the Supreme Court and four military officers, was such a tribunal. However, the Convention will only tolerate such courts as long as sufficient safeguards are in place to guarantee their independence and impartiality."

Therefore, while the ECtHR may not deem military courts illegitimate in principle, it does not uniformly hold military courts and tribunals to be independent and impartial in all circumstances. Given the circumstances surrounding the Şemdinli case, it is difficult to see how safeguards to guarantee independence and impartiality could be deemed to have been met.

See *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22; *Morris v United Kingdom*, application no. 38784/97, 26/05/2002 para. 59

When prompted by the judicial panel, the defendants said that they echoed the allegations and demands of their lawyers.

The Public Prosecutor asked Van 3rd Heavy Penal Court to hand the case over to military jurisdiction as directed by the 9th Criminal Chamber of the Court of Appeals. If the court insisted on retaining jurisdiction in the matter, the Public Prosecutor requested that they send the case back to the Court of Appeals for a final determination.⁵² Lawyers for the victim reiterated their earlier arguments, emphasising that the military tribunal would not be independent or impartial in the discharge of its duties. This was reflected in the structure of the military courts where the Military High Court of Appeals is presided over by senior military personnel. The Military High Court of Appeals is the court of last resort of the decisions and judgments given by military courts. Any absence of independence and impartiality would also constitute a denial of the defendants' right to a fair trial. Compounding these misgivings were the comments by Chief of Staff, General Büyükanıt to the media about the honest nature of one of the defendants.⁵³ As already mentioned, the mission was informed that the soldiers remained at least formally on active duty and had not been suspended since the incident in November 2005 or since their subsequent conviction. In light of all this, lawyers for the victims believed that this would amount to a virtual acquittal of the defendants Ali Kaya and Özcan İldeniz.⁵⁴

“Insufficient investigation”

(i) Witness evidence

In interview, lawyers for the victim contended that the ruling of “insufficient investigation” was simply an additional hoop through which they were being asked to jump. They contended that the evidence on which the accused had been convicted, specifically their identity and the nature of their involvement in the Şemdinli bombing had never been in doubt. The defendants had been caught red-handed and approximately fifty witnesses had testified to this. It was contended

52 In the the hearing transcript in Annex II below, the Court of Appeals is referred to in translation variously as General Criminal Council and Court of Cassation.

53 Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 25

54 The difficulties inherent in prosecuting military personnel for serious criminal offences and its implications for the prosecution of the Şemdinli bombing are examined in detail in ‘Promoting Conflict – The Şemdinli Bombing’, Kurdish Human Rights Project, Bar Human Rights Committee. September 2006. p. 26-27. Turkish law does not allow for allegations of serious criminal offences against military personnel to be tried in civilian Heavy Penal Courts. A separate system of Military Courts (which include a Military High Court of Appeals, Military Courts of First Instance and a High Military Administrative Court of Appeals) is responsible for this.

that the evidence that had been adduced at the first trial certainly satisfied the legal burden of beyond a reasonable doubt.

Cüneyt Caniř, told the mission that a central contention in the defendants' appeal was the manner in which the evidence of witnesses in the first trial had been recorded. As already stated above, in preparation for the trial of 4-5 May 2006, statements were taken from more than fifty witnesses by a local judge and submitted as evidence.⁵⁵ Lawyers for the defendants did not have the opportunity to exercise their right to cross-examine the witnesses on the assertions contained in the statements. This failure to provide for defence examination of prosecution witnesses was indeed a serious flaw in the original trial and a possible breach of Article 6 of the European Convention of Human Rights.

Nonetheless, the lawyers for the victim are confident in the veracity of the witness testimonies and argue there was no reasonable doubt raised by the evidence on which the defendants had been convicted. They therefore feel that any defence cross examination of the witnesses would further underline the soundness of the evidence on which the original conviction was based. As such, they would welcome a cross examination.⁵⁶

According to Ayhan Çabuk⁵⁷, the defence also wished to introduce new witnesses to the case. These witnesses had not testified during the first trial and according to Mr Çabuk, they are PKK members-turned agents of the state who had been arrested during clashes between the PKK and the military in Hakkari. The claim of the new witnesses was that the PKK was responsible for the incident in Şemdinli. The defence does not deny that Ali Kaya and Özcan İldeniz were in Şemdinli on the day of the bombing, nor that they were on duty on that day. They put forward that they were conducting an official investigation, and that the bombing was carried out by the PKK. Mr Çabuk believed that any evidence adduced by the new witnesses would be prima facie unreliable as the new witnesses were collaborating with the state. Sezgin Tanrıkulu used the term "nylon" (fabricated) to describe the new witnesses for the defendants.⁵⁸ Turkish media also described the arrest of Abdurrahman Yeřilyurt, a PKK member who surrendered himself to police in the eastern city of Batman on

55 For more detail on this process, please see Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 36

56 Ayhan Çabuk, lawyer for the victim and Chairman of Van Bar Association, interview with the KHRP mission, 10 July 2007. Van. The process of collecting witness statements and the unavailability of witnesses to give evidence directly to the court is considered in Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 37

57 Ayhan Çabuk, lawyer for the victim and Chairman of Van Bar Association, interview with the KHRP mission, 10 July 2007. Van.

58 Sezgin Tanrıkulu, lawyer for the victim and Chair of Diyarbakır Bar Association, interview with the KHRP mission, 10 July 2007. Van

June 16, and his subsequent desire to act as witness for the state. In his statement to police, Yeşilyurt named three PKK members he claimed were responsible for carrying out the Şemdinli attack. Lawyers for the defence requested the opportunity to cross examine this latest state witness.⁵⁹

(ii) On-site investigation

Following the decision by the 9th Criminal Chamber of the Court of Appeals that Ali Kaya and Özcan İldeniz had been convicted following “insufficient investigation”, Van 3rd Heavy Penal Court ordered that an on-site investigation be conducted on 29 June. The governor of Hakkari province did not allow the investigation to be performed on that date, citing security reasons. The Governorate did not offer an alternative date on which the investigation could be carried out.

Lawyer for the victim, Sezgin Tanrikulu told the mission that he believed an on-site investigation would have little added value as it would yield no new useful information; he referred to the indictment of former Public Prosecutor Ferhat Sarıkaya wherein he had maintained that the defendants were caught “red-handed” .⁶⁰ During the hearing lawyers for the victims objected to the refusal of the Governorate of Hakkari to carry out the on-site investigation. They maintained that the local authority was neglecting its duties, and with roughly 20,000 security personnel located in the region, security could be easily assured. It was submitted that the real reason behind the refusal of the Governate was to indefinitely block access to the site. Lawyers for the victims maintained that an on-site investigation was unlikely to reveal anything new, and so by indefinitely delaying the trial the Governorate was aligning itself with the defendants, and ultimately the military.

Notwithstanding the alleged security concerns, lawyers for the defendants also contended that by not implementing an order of the court to conduct an on-site investigation, the Governorate was violating the Constitution to implement judgments without delay and in addition Articles 283 and 161(5) of the Turkish Penal Code. This indefinite delay in proceedings, they argued, obstructs the course of justice and robs the defendants of the respite of finality of the verdict against them.

59 ‘Şemdinli Verdict: 39 Years Imprisonment for Non-commissioned Officers’, Today’s Zaman, 20 June 2006 <<http://www.todayszaman.com/tz-web/detaylar.do?load=print&link=34149&yazarAd=>>

60 Sezgin Tanrikulu, lawyer for the victim and Chair of Diyarbakır Bar Association, interview with the KHRP mission, 10 July 2007, Van. The potential positive contribution of an on-site investigation by the tribunal to ascertaining the credibility of witness statements recorded prior to the trial is discussed in Promoting Conflict – The Şemdinli Bombing, KHRP, September, 2006. p. 37

5. The Verdict

In handing down its judgement, the panel elected not to follow the ruling of the 9th Criminal Chamber of the Court of Appeal and maintained that they had jurisdiction in the matter. However, in this regard, the panel decided to follow the request of Public Prosecutor and send the case to the Grand Chamber of Appeal for a final determination in relation to jurisdiction.⁶¹ The hearing was adjourned until 17 August 2007 for the ruling of the Grand Chamber. In handing down its judgement, the judicial panel did not address the issue of insufficient investigation.

Developments Subsequent to the 11 July 2007 Re-hearing

On 17th August the Van 3rd Heavy Penal Court sat once again, this time with the entire new panel of judges present. The panel decided to postpone the hearing until 14 September to allow them to read and assess the case file. On 14 September the Van 3rd Heavy Penal Court ruled that the case should be heard in a military court.

61 Jurisdiction of Grand Chamber of Appeal

Conclusions

The Şemdinli incident has been presented and discussed as an opportunity to test the Turkish authorities' commitment to the supremacy of the rule of law and due process guaranteed by a genuine and effective democracy. The initial verdict, finding both defendants guilty, was a positive indicator that the Turkish judiciary was prepared to hold members of the military to account, particularly in relation to violations of the right to life. However the appeal and re-hearing have reinforced a number of significant concerns in relation to the ability and willingness of the state to carry out a prompt, thorough and impartial investigation. They have also cast doubt upon the integrity of the public prosecutor's office and the independence of the judiciary. In addition, this report raises concerns about the restriction of public access to the trial, which undermines the requirement that trials be held in public.

The main substantive question addressed at the 11 July 2007 re-hearing was that of jurisdiction in response to the decision of the 9th Criminal Chamber of the Court of Appeal that the defendants should be retried by a military tribunal. On 14 September 2007 the newly-appointed panel of Van 3rd Heavy Penal Court confirmed that the case should be heard by a military tribunal. This decision is of concern, given that one of the main issues surrounding the case has been the apparent reluctance of the military to prosecute its own personnel. This report has suggested that there is evidence of interference by the military with the decisions by the courts in this case. This is of particular concern, in that the case itself questions the strength of the rule of law in Turkey. It is of the utmost importance in upholding the rule of law that the judiciary is able to make its decisions free from pressure or influence by the military or government.

The rehearing also involved some consideration of the issues of witness evidence and insufficient investigation. The justification for the reconsideration of these issues must be closely examined, given that the defendants were caught 'red-handed' with approximately fifty witnesses testifying to that effect. If the defendants have been unlawfully denied their procedural rights in relation to the cross-examination of witnesses, this must be addressed. However, the judiciary must ensure that procedural discrepancies are not manipulated to obstruct the course of justice. In the event, the court did not address the issue of insufficient investigation in handing down its verdict on 11 July 2007.

A particularly disturbing aspect of the context surrounding the rehearing was the decision of the HSYK to relocate more than one thousand judges and prosecutors, including the judicial panel that would have presided over the rehearing at Van 3rd Heavy Penal Court. Though relocation of judges and officials by the HSYK is a common occurrence, in this context it amounted to the effective contravention of the decision of the Van 4th Heavy Penal Court refusing the defendant's application for the dismissal of Van 3rd Heavy Penal Court's judicial panel. This raises suspicion of deliberate interference in judicial affairs by a body made up of members of the executive arm of the Turkish Government. This development raises serious concerns as to the freedom and independence of the judiciary in addition to the apparent interference of the military.

Great importance has been attributed to the Şemdinli trial for its potential to create a precedent that condemns the history of impunity for crimes committed by the Turkish military. Furthermore, as the Şemdinli bombing has heightened tensions in an already unstable relationship between much of Turkey's Kurdish population and the State, the case is of the utmost importance in demonstrating Turkey's commitment to fostering peace and reconciliation in the region. This report has shown that there remains cause for concern in a number of respects. These concerns must be closely monitored as the case proceeds to a hearing by military tribunal.

Recommendations

This report urges the state of Turkey to:

- Conduct a thorough investigation of the allegations of military involvement in the Şemdinli bombing and the subsequent allegations of military interference with the judicial process;
- Ensure that similar allegations of state involvement in violations of the right to life are properly prosecuted and the perpetrators appropriately sentenced;
- Develop adequate controls and restrictions on the involvement of the military in criminal prosecutions and on the jurisdiction of military tribunals to ensure that such jurisdiction is not used as a means of denying the culpability of agents of the state;
- Develop and implement reforms to the appeals process in Turkey to remove discrepancies such as the ability of a lower court to reject the decision of a superior court on appeal;
- Ensure that the defence's right to cross-examine prosecution witnesses is upheld in line with article 6 of the European Convention of Human Rights;
- Ensure that the power of the HSYK to reshuffle and censure judges and public prosecutors is not abused so as to influence the outcome of ongoing cases;
- Introduce further training for the judiciary, prosecutors and state officials regarding international human rights standards and the importance of independent investigations;
- Recognise the effect of the ongoing conflict on the reform process and take steps to end it, including entering into dialogue regarding its resolution;

- Develop and maintain the independence of the judiciary and the supremacy of the rule of law.

This report urges the European Union to:

- Continue to closely monitor both the conflict in south-east Turkey and the cases of human rights violations implicating state agents;
- Continue to exert its considerable influence on Turkey to increase the pace of its reform processes directed towards implementation of the Copenhagen Criteria.

This report urges local NGOs, human rights organisations and civil society groups to:

- Continue to closely monitor the progress of the Şemdinli case and related investigations by liaising with victims, witnesses and legal professionals and reporting on their findings;
- Continue to provide legal assistance to victims and witnesses where necessary to foster the maintenance of fairness in proceedings.

Appendix I: Interviews and Meetings Held by the Mission on 10-11 July 2007

- Cüneyt CANIŐ, lawyer for the victim, Chairman of the İHD Van branch
- Ayhan Çabuk, lawyer for the victim, Chairman of Van Bar Association
- Abdulbasit Bildirici, Mazlum-Der, Van branch
- Sezgin Tanrıkulu, lawyer for victim, Head of Diyarbakır Bar Association
- Seferi Yılmaz, owner of Umut Kitapevi (Hope Book House) in Őemdinli district of Hakkari and victim of the attack

Appendix 2: Transcript of the Hearing, Van 3rd Heavy Penal Court, 11 July (Translated from the Turkish)⁶²

HEARING RECORD

VAN No. 3 Serious Criminal Court
2007/189 Principal

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Hearing no. 2

Date of hearing: 11.07.2007

President: Muharrem Ballı	37668
Member: Sinan Sivri	37458
Member: İbrahim Öneker	40138
Public prosecutor: Sezgin Kanmaz	35207
Court clerk: Halil İbrahim Derge	86754

The hearing commenced at the time and date in the appointed courtroom in the presence of the above bench.

The remanded accused Ali Kaya and Ozcan İldeniz with defence counsel lawyers Mahmut Güler, Orhan Nalcioğlu and Vedat Gülsen, intervenors Seferi Yılmaz and Metin Korkmaz, injured parties-intervenors Seferi Yılmaz, Hamide Korkmaz and Metin Korkmaz and their counsel lawyers Cüneyt Caniş, Metin İriz, Selçuk Kozağaçlı, Bahattin Özdemir, Sezgin Tanrikulu, Ayhan Çabuk, Murat Timur, Bekir Kaya, Ayşe Batumlu and Münip Ermiş arrived and the remanded accused were taken in without handcuffs. The hearing was continued.

The fact that due to the rejection of Court President İlhan Kaya and member of our court judge Eşref Aksu, and also that Eşref Aksu is on annual leave, it has been recorded that the bench consists of judges Sinan Sivri (37458) and İbrahim Öneker (40138) from the Van no. 4 Serious Criminal Court.

⁶² Due to differences in translation, some of the legal terminology in this transcript is rendered differently to in the body of the text. For example Van 3rd Heavy Penal Court is referred to as 'Van No. 3 Serious Criminal Court' and 9th Criminal Chamber of the Court of Appeal is referred to as 'ninth criminal department of the Court of Cassation'.

It is seen that at the previous hearing a decision was made to accept the request of the defence counsel made prior to the quashing by the Court of Cassation for a broadening of the new investigation, also raised in the decision of the Court of Cassation in paragraphs (a) to (g) of section 2 (accepted by the High Court office and indicated in the quashing decree), also that the PKK members who gave themselves up mentioned in the decree should be heard as witnesses, furthermore, that Mehmet Emin Özer, Mehmet Karakoç, Murat Şendoğan, Erdem Yılmaz, Mustafa Yanık, İshak Çelik and Hüseyin Hoşgör said to be from the village guard and military should be heard as witnesses regarding the time of the incident and the aftermath, and that an examination should be carried out in the presence of a bomb expert in Semdinli district centre of Hakkari province at 11 am on 29.06.2007.

- a) in order to resolve the situation whereby the signature of court clerk Hamdi Paksoy is missing from the first page of the report of the Semdinli Public Prosecutor's office of 09.11.2005 he is to be summoned through the Semdinli Public Prosecutor's Office where he is employed to attend the examination, and notification to be provided to the court,
- b) for those members of the PKK terror organisation, Sabri Adanır, Hasan Salar and Abdurrahman Yeşilyurt who surrendered to units of the Gendarmerie in Silopi, Batman, Yüksekova and Şırnak after the incident in question on 9 November 200 and who made statements that the explosion in question was carried out by the PKK terror organisation, cited in the written submissions of the defence counsel of 04.05.2006 and subsequent oral statements at the hearing and mentioned in paragraph 2/g of the decision of the ninth criminal department of the Court of Cassation in the quashing judgment, and Orhan Gezer and Arif Kaçım, whose statements entered the file at the appeal stage, should be heard as witnesses in situ at the examination. If the above named are still in custody correspondence to be written to the Prosecutors' Offices and Prison Directorate where they are being held. Also, in the event of it not being possible for them to be produced for the examination on the ground instructions to be written to the courts in the places in which they are situated, appending the statements they made to police, requesting their knowledge of the incident in question;
- c) letters to be sent separately to the relevant Prisons and Public Prosecutors' offices in order to ensure the presence of the remanded accused on the day of the examination in the appointed place;
- d) Reminders to be sent to the accused, defence counsel, intervenors and their counsel, in order for them to prepare, if there are any other requests,

submissions, and if there are any, witnesses, at the examination scene (reminders made to those present);

- e) To notify defence counsel for accused Ali and Özcan lawyer Mahmut Güler, who had to leave due to his flight departure being imminent, and all three defence counsel and also lawyer Yurdakan Yıldız, counsel for accused Veysel, of examination interim judgments and records of hearings including dates and times (also to be faxed to their fax numbers);
- f) Separate correspondence to be sent to security directorates in Van, Başkale, Hakkari and Şemdinli (Provincial-district) Gendarme commands and administrative offices (Governors or District governors' offices) to ensure the provision of the necessary security en route and at the site of the examination.

A 2-page objection dated 14.06.2007 was made by the public prosecutor Sezgin Kanmaz 35207 during the hearing to the decision to continue the remand in custody of the accused bearing in mind the nature of the offence and the existing evidence, and to the decision of the no. 9 Criminal Office of the Court of Cassation regarding lack of jurisdiction, and to this court's adherence only to paragraph 2 of the Court of Cassation judgment relating to the insufficient investigation and its interim decision to hold an examination at the crime scene, stating: '...it is requested that they be released on account of the fact that it is apparent that there is no evidence in the file pertaining to their having committed these offences; if a contrary decision is reached the file should be sent to the Van no. 4 Serious Criminal Court..'

In a judgment made by the court bench dated 14.06.2007, no. 901, it is stated:

- a) '...the objection regarding the unanimous decision to order the continuation of the remand in custody was unanimously considered inappropriate and a decision was taken to refer the objection in question to the Van no. 4 Serious Criminal Court for examination in accordance with article 268 of the Law on Criminal Courts;
- b) '...regarding the interim judgment made by a majority decision, with the opposition of member 37668 Muharrem Ballı, to only adhere to paragraph 2 of the Court of Cassation decision, relating to the insufficient investigation, and to carried out an examination at the crime scene and to hear witnesses; while Muharrem Ballı is of the opinion that paragraph one of the decision of quashing should also be adhered to, the bench reached the majority verdict that adherence to the subject covered in paragraph 2, regarding which there is an existing decision, is appropriate and that objections in line with article 267 of the Law on Criminal Courts to the continued remand of the accused are not appropriate, and that any

objections should be referred to the Van no. 4 Serious Criminal Court, which has jurisdiction. Subsequently, requests along the same lines were faxed by the defence counsel. These were forwarded to the appeals body.

It is also seen that the Van no. 4 Serious Criminal Court had registered the requests of the Public Prosecutor and defence counsel under different numbers (2007/1089 – 2007/1090), combining all these objections, making unanimous decision no. 1088 of 15.06.2007 in which:

1 – Taking into consideration the offences with which the remanded accused Ali Kaya, Özcan İldeniz and Veysel Ateş are charged, the existing evidence and the minimum and maximum sentences envisaged for these offences all requests for conditional release are rejected and the continuation of their custodial remand is decided;

2 – Other grounds for objection (partial adherence to quashing and holding of examination) are rejected on account of their not being of a possible court decision listed in the law on criminal courts, the file to be returned to the court.

It was seen that the address of Hasan Salar, who is to be heard as a witness, had been notified by the Şanlıurfa Suruç Military Service Office. It was read out.

Prior to the hearing the defence counsel requested the rejection of court president İlhan Kaya and member judge Eşref Aksu. On the subject of the request the decision was made by the Van no. 4 Serious Criminal Court to reject the request for rejection, whereupon the decision was objected to by the defence counsel. The file was thus sent to the Diyarbakır Duty Serious Criminal Court for examination (authorised by article 250 of Law on Criminal Courts). It was seen that the file has yet to be returned.

It was seen that an interim decision was taken to carry out an examination at the crime scene; in response to correspondence requesting the provision of security replies were received stating that security could not be provided. For this reason and also the objection to the Court president and member judge the decision was taken to abandon the examination and it was also seen that the correspondence to the Semdinli Prosecutor's office had been returned without a reply.

It was seen that the the conviction at the Diyarbakir no. 4 Serious Criminal Court of Hasan Salar, who is to be heard as a witness by our court, has been received. It was read out.

It was seen that documentation regarding Sabri Adanır, who is to be heard as a witness by our court, has been sent by the Sırnak Prosecutor's Office. It was read out.

It was seen that instructions sent to the Malazgirt Criminal Court of First Instance regarding witness Orhan Gezer had been returned, citing the fact he had moved to his address in Yenimahalle in İnegöl, Bursa. Between sittings instructions had been written to İnegöl Serious Criminal Court and the witness had been heard. This was read out.

It was seen that witness Hasan Salar had been heard on instruction in the Gaziantep no. 3 Serious Criminal Court. It was read out.

Accused Ali Kaya was asked: He said: 'I request adherence to the Court of Cassation decision of quashing and my release.'

Accused Ozcan İldeniz was asked: He said: 'I request adherence to the Court of Cassation decision of quashing and my release.'

The intervenor counsel were asked: Lawyer Selçuk Kozagaçlı stated they would make a joint declaration, continuing: 'We have prepared our written petition, we reiterate its content. We request that a prosecution be launched regarding the responses to correspondence concerning the non-provision of security for the examination and, that since the interim judgments regarding the adherence to the quashing decision no. 2 cannot be implemented, a decision be made opposing the quashing no. 1 and for the file to be returned to the General Criminal Council [Court of Cassation].

Lawyer Sezgin Tanrikulu from the intervenor counsel said: since the date of the incident the court has been put under pressure by various bodies. There is also a question of a change in the bench due to appointments and change of place. Therefore we request that the court maintains its stance on jurisdiction and returns the file to the General Council and that the custodial status of the accused is continued, considering the evidence of their having committed the offence.

Lawyer Mahmut Güler, counsel for accused Ali and Özcan was asked: 'The quashing verdict and initial convictions have disappeared. We request firstly that the court adhere to the quashing verdict and send the file to the military court that has jurisdiction. Military courts are just courts established in accordance with law. We also wish to make our declaration on the subject of release. The condition for remand is for the existence of superior evidence. On looking at the file and the facts established in the quashing verdict of the Court of Cassation it is evident that the allegation pertaining to the accused committing the offence is based on no more than supposition and the condition for remand has therefore not been met. Most of

the evidence has been collected and since those witnesses that have not been heard are accused witnesses there is no question of evidence being spoiled.'

Lawyer Orhan Nalcioglu, counsel for accused Ali and Özcan, was asked: 'Since military courts are legitimate courts established by law there is no question of their not being recognised. The European Court of Human Rights has also accepted this. According to the new Law on Criminal Courts it is in contravention of law to maintain a stance against a quashing for lack of jurisdiction and the procedures of a court lacking jurisdiction are invalid. I agree with the submissions of my colleague and request the release of my clients.'

Lawyer Vedat Gülşen, counsel for accused Ali and Özcan was asked: 'We have experience a paradox from the beginning of the trial as regards the attitude of the court. As was established in the quashing verdict regarding the judgment made in 4 hearings by the court, no procedures were carried out and none of our requests were accepted. No evidence in favour [of the accused] were collected. The human rights of the accused have been violated. In the opinion of the Court of Cassation Prosecutor it was stated that no definite evidence was found. On appeal the file went to the no. 1 Criminal Department of the Court of Cassation, where a majority decision of non-jurisdiction was made, whereupon an objection was made, this objection being rejected by the General Criminal Council of the Court of Cassation on the grounds that it was not within their remit. However, in an opposition view to this decision the point was made regarding the file having the nature of making an example. The 9th Criminal Department of the Court of Cassation quashed the judgment on non-jurisdiction. The court decided to adhere to this judgment as regards its criticisms and advice. Since it is not possible to concur with these findings and since the court cannot carry out further investigation without resolving the question of jurisdiction, the examination and hearing of witnesses are invalid. On our objection the Van no. 4 Serious Crimes Court this matter was recognised but made a judgment that it was unable to accept the objection and was therefore not in a position to make a judgment. The court's violation of law by closing legal channels has the nature of violating the human rights of the accused; first and foremost, on the making of a decision on jurisdiction, we request that the file be sent to a military court since the court does not have the right to maintain its stance. We repeat the submission of our colleagues regarding release. There is no question of the accused, who are soldiers, fleeing from justice.'

Accused Ali Kaya was asked: 'I repeat our requests regarding release and non-jurisdiction.'

Accused Ozcan İldeniz was asked: 'We agree with the submissions of our lawyers.' The prosecution was asked: 'In addition to repeating our opinion submitted at the hearing on 13.06.2007 we would also like to make additions to it:

At the investigation stage of the trial, since according to the evidence the actions of the accused did not meet the criteria for offences laid down in article 250 of the Law on Criminal Courts (the offences listed in articles 302 and 316 of the Turkish Penal Code Law no. 5237) and since it was apparent that the material elements of these offences were not present the prosecutor carrying out the investigation should have reached a decision of non-jurisdiction. However, he made an erroneous evaluation and initiated a public trial on these offences in the Van no. 3 Serious Crimes Court.

While the Van no. 3 Serious Crimes Court should have returned the file on the grounds of non-jurisdiction in accordance with article 170/3 of the Law on Criminal Courts, supported by article 170- 1a, but, in spite of there being a 15-day examination period, accepted unanimously on Monday 16.03.2006 the indictment drawn up and sent on Friday 03.03.2006.

As a result of the trial carried out at the Van no. 3 Serious Criminal Court on article 302 of the Turkish Penal Code [TPC] a sentence was handed down in accordance with article 220 of the TPC, when in fact there was no offence and there was no jurisdiction. As a matter of fact the court, which accepted this offence, should have made a decision of non-jurisdiction at every stage in accordance with article 250, paragraph 1g of article 252 and articles 5/1 and 6 of the Law on Criminal Courts.

In the opinion of the Court of Cassation Prosecutor following the appeals of the defence counsel, counsel for those joining and prosecutors it is stated: Quashing of the judgment and a decision of non-jurisdiction is requested on the grounds that the legal elements of the offences in question in the indictment, enshrined in articles 302 and 316 of the TPC, are definitely not present, this was clear from the outset from an examination of the file. While the difference between the offence of membership of an organisation and participation in a crime should have been dwelt upon, an action was deemed to have been carried out and via disconnected ideas the existence of a criminal organisation was accepted, the accused were considered to be members of this organisation and they were said to have carried out the action on behalf of this organisation and the conviction was handed down for membership of a criminal organisation. While there was no evidence the court made a judgment on this offence, which was not within the jurisdiction of the court.

It has been seen that in an examination of the judgment by the General Criminal Council of the Court of Cassation the following view was reached: Some of the members: '...An indictment full of such inappropriate assessments was accepted by the court without consideration of the content of article 174 of the Law on Criminal Courts, whereas from the description of the incident in the indictment it has been understood that none of the conditions contained in article 302 of the TPC

(engaging in actions designed to threaten the entirety of the country and the unity of the state) exist.

In the quashing verdict of the no. 9 Criminal Department of the Court of Cassation: Just as in the indictment there is no evidence of the elements of the offences described in articles 302 and 316 of the TPC existing, it is also apparent that it takes a theory devoid of legal values, based totally on suppositions to equate the acts of Ali Kaya and Özcan İldeniz, who are military persons involved in combatting the separatist terror organisation which is engaged in actions threatening the entirety of the country and the unity of the state, with the crimes committed by this organisation. Moreover, since in the judgment reached by the court at the conclusion of the trial based on the indictment thus drawn up it is stated that the actions attributed to the accused were carried out as part of their duties in combatting terrorism, the files should have been combined due to judgments no. 1996/24 -24 of 05.07.1996 and 2000/88-88 of 18.12.2000 in the Court of Reconciliation, in accordance with article 125 of TPC no. 765 corresponding to article 302 of TPC no. 5237 and article 3 of law no. 5252 a decision of non-jurisdiction should have been made and the file sent to the military court with jurisdiction, in accordance with articles 9 and 12 of Law no. 353 on Military Courts. A decision to quash the verdict was thus made.

The Van no. 3 Criminal Court where the file was sent with the quashing verdicts: it combined the files but blatantly made no decision regarding non-jurisdiction and acted as if it had jurisdiction, continuing the trial and taking interim decisions, whereas, according to article 170 of the law on criminal courts the question of non-jurisdiction, which prevents the acceptance of the indictment, relates to public order and must be resolved before all other matters, in accordance with articles 5 and 7 of the same law. It is also clearly stated in article 7 that procedures carried out by a judge or court that do not have jurisdiction are invalid.

According to articles 323 of the Law on Criminal Court Procedure and 304/3 of law no. 5271 on Criminal Court Law, and the content of Court of Cassation General Criminal Council judgment no.1999/16, principal no. 1999/2-168 of 22.06.1999, Court of Cassation General Criminal Council judgment no.1976/314, principal no. 1976/2-320 of 05.07.1976, Court of Cassation Interpretation Board Judgment no. 1931/48, principal no. 12 of 09.12.1931 and Court of Cassation General Criminal Council judgment no.21/59 of 25.02.1991 courts do not have the right to maintain their original stance when faced with a quashing decision by the Court of Cassation relating to jurisdiction. According to this the Van no. 3 Serious Criminal Court should have made a decision of non-jurisdiction and sent the file to the relevant court; if it was, in spite of this, to maintain its stance, it should have made a decision of persistence in accordance with article 307/3 of Law on Criminal Courts no. 5271 and sent the file to the Court of Cassation General Criminal Council, or adhere to the decision and sent the file to the court with jurisdiction. If this court too made

a decision of non-jurisdiction the matter would have been resolved by the Court of Reconciliation and if a court was found to have jurisdiction the trial would have been continued.

It is apparent that the interim decisions made on 13.06.2007 by the Van no. 3 Serious Criminal Court, which did none of these, instead acting as if it was the court with jurisdiction despite the quashing decision, are invalid, as will future interim decisions be.

The Van no. 3 Serious Criminal Court changed the classification of the legal elements in the quashing judgment and the indictment offence, in a way which does not exist in article 302 of the TPC no. 5237, handing down a conviction in accordance with article 220 of the TPC. It is absolutely clear that this offence accepted by the court is not among the offences listed in article 250 of the Law on Criminal Courts. According to the court's acceptance it should in any case have immediately made a decision of non-jurisdiction in line with articles 250, 252/1-g and 5/1 and 6.

At this juncture the intervenor lawyers made an intervention, saying it was not in accordance with law for the prosecutor to record such a long declaration in detail, 'we request the submission be summarised by the Court President. The declaration is being recorded with underlining and such like. We request a decision be taken to stop this. This matter is covered in articles 219, 220 and 221 of the Law on Criminal Courts.'

The defence counsel lawyer Orhan Nalcioğlu said: 'It is correct for the prosecution to record his submission in person. We request rejection of the objection.'

The prosecution was asked: 'the discretion lies with the court', he said.

Deliberations were made:

Objection unanimously rejected. Hearing continues.

The prosecution continued submission:

In the decision made on 15.06.2007, no. 2007/1088 by the Van no. 4 Serious Criminal Court it was stated that the interim decisions made by the Van no. 3 Serious Criminal Court regarding resolving shortcomings in the Court of Cassation's quashing verdict, while not taking a decision on the question of non-jurisdiction, were of no legal value and having no consequence.

Subsequently the Van no. 3 Serious Criminal Court notified in a decision of 22.06.2007 that the crime scene examination had been abandoned.

On account of the above grounds, the Court of Cassation quashing verdict that was in accordance with law and procedure and the entirety of the file, and as stated in our opinion of 13.06.2007, the fact that the elements of the offences listed in articles 302, 316 and 220 of the TPC are not present, and that there is insufficient evidence in the file as regards the other offences, the possibility of evidence being unearthed in favour of the accused as noted in the decision of the Court of Cassation, we request that, given the fixed addresses of the accused, the long period they have spent in custody, to be evaluated by the court with jurisdiction, also taking into consideration the fact that the custody of the accused was extended wrongfully and unjustly in contravention of article 7 of the Law on Criminal Courts by a court without jurisdiction, that the accused be released and that a decision of non-jurisdiction be made, in line with the quashing verdict of the Court of Cassation, and that the file be forwarded to the Van Military Court. We also submit our written opinion to the court.

Deliberations were made:

- 1- Taking into consideration submissions of defence and intervenor counsel unanimous decision to extend remand of accused Ali Kaya and Özcan İldeniz, being held in Van Military Closed Prison in accordance with decision no. 746 of 28.11.2005 of the Van no. 4 Military Criminal Court, and accused Veysel Ateş, being held in Bitlis E Type Closed Prison in accordance with decision no. 55 of 22.11.2005 of the Şemdinli Peace Court. The remand in custody of the above to be continued, taking into consideration the nature of the offences and the existing evidence. Letters to be written to the prisons in question in order for the accused to be readied for the next hearing. The continuance of their remand was explained to accused Ali Kaya and Özcan İldeniz and notification to be written to accused Veysel Ateş.
- 2- It is understood that an objection has been made to the decision to reject our court president İlhan Kaya and member judge Eşref Aksu and since this matter is yet to be clarified no decision can be made regarding this matter; once this is resolved the interim decision regarding examination, hearing of witnesses and other matters will be evaluated. Therefore, the hearing is adjourned until 17.08.2007 at 14.00, due to other dates being full, on the condition the bench meets for reassessment within 30 days on 24.07.2007. The above decision to adjourn was reached by majority verdict with the opposition of member judge 37458 Sinan Sivri, who considers a decision should be made on the issue of maintaining the original judgment as regards the quashing decision. 11.07.2007

President 37668 Member 37458 Member 40138 Clerk 86754

Opposing view

While concurring with the decision to extend the remand of the accused a decision should be made as to whether to adhere to the quashing verdict of the 9th Criminal Department of the Court of Cassation or to maintain the original judgment in order to resolve the question of jurisdiction as regards public order, which is primary. I do not concur with the majority view as I believe that, when the file is taken into consideration, our court has jurisdiction and that therefore the original decision should be maintained.

Clerk 86754

Member 37458

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