OBSERVATIONS ON YASAK V. TÜRKİYE

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ASSEDEL
Observations on the Judgment of the European Court of Human Rights
Yasak v. Türkiye

ECtHR's Perilous Endorsement of Unforeseeable Convictions for Legal Acts
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Executive Summary

This report provides a detailed analysis of the European Court of Human Rights' (ECtHR) judgment in ***Yasak v. Türkiye***, delivered on 27 August 2024. The case concerns the conviction of Şaban Yasak for his alleged membership in the Gülen Movement. The ECtHR deemed Yasak's conviction foreseeable despite his limited role as a student coordinator from 2011 to 2014 and his use of a code name. Prepared by ASSEDEL at Yasak's request, this report argues that the judgment is based on **an erroneous factual account** and **overlooks critical shortcomings** in domestic proceedings, **casting doubt on the fairness of the trial**.

In this judgment, the ECtHR did not examine the applicant's Article 6 complaints concerning the right to a fair trial. Nevertheless, the Court concluded that there was no violation of Article 7, implicitly assuming the fairness of the domestic proceedings despite the **application file containing ample information on the unfairness of the domestic process**.

The *Yasak* case diverges substantially from the Court's earlier *Yalçınkaya* judgment. In *Yalçınkaya*, a violation of Article 7 was found where the conviction was based mainly on the use of the ByLock application, which suggested membership in the Gülen Movement but not a terrorist organization. The report argues that **there is no meaningful distinction between *Yalçınkaya* and *Yasak***, as the acts attributed to Yasak involved only student coordination within the Gülen Movement and the use of a pseudonym. In *Yasak*, the Court attached excessive importance to the element of **'secrecy'** in the Gülen Movement, which, according to the report, **should not justify criminal liability**. The report contends that **Yasak's conviction lacked the material and mental elements required for a criminal offense, as similarly seen in *Yalçınkaya***.

The *Yalçınkaya* judgment affects hundreds of thousands of individuals, but its principles have not been implemented in Türkiye. Despite the similarities, the Second Section's Chamber reached a conclusion in *Yasak* that contradicted its prior case law by failing to recognize the absence of any criminal activity in Yasak's involvement with the Gülen Movement before its designation as a terrorist organization.

This report highlights the following key points:

- **Factual omissions and inaccuracies:** Critical discrepancies in witness statements and procedural irregularities were overlooked in the Court's reasoning.
- **Unfair trial proceedings:** The domestic trial was marred by limited hearings, virtual participation from prison, and a lack of direct confrontation with witnesses.
- **Failure to properly examine Article 6:** The ECtHR's conclusion that Yasak's trial was fair without thoroughly investigating the right to a fair trial under Article 6 represents a significant flaw in the judgment.
- **Inconsistent approach to the unforeseeable application of legal provisions:** The judgment diverges from prior rulings, especially the Yalçınkaya judgment, which remains unimplemented despite similar circumstances. The conviction for Yasak's legal acts should be considered unforeseeable.

Prepared by a commission of distinguished human rights law experts, this report challenges the ECtHR's examination and conclusions in the *Yasak* judgment.

ASSEDEL calls for a reconsideration of the judgment, which poses **a genuine risk of hindering the exercise of liberties under Articles 8, 9, 10, and 11 of the Convention by religious and social groups**, with a view to fostering discussion on protecting human rights in politically sensitive cases like Yasak's.

- **Introduction:**

ASSEDEL is pleased to present its observations on the European Court of Human Rights' (ECtHR) *Yasak v. Türkiye* judgment delivered on 27 August 2024. In this case, the Court departed from the principles established in the Grand Chamber's *Yalçınkaya* judgment, where it found multiple violations of the right to a fair trial concerning the use of ByLock evidence in cases of alleged membership in a terrorist organisation, namely the Gülen Movement, and also ruled that the applicant's conviction for this offense was unforeseeable based on the activities attributed to him, which domestic courts cited as evidence of membership.

In the *Yasak* judgment, however, the Chamber of the Second Section deemed the applicant's circumstances to be distinguishable from those in *Yalçınkaya*. In *Yasak,* the activities in question were limited to the applicant's role as a student coordinator in the Gülen Movement and his alleged use of a code name from 2011 to 2014. ASSEDEL maintains that none of these activities demonstrate a terrorist nature, nor do they exhibit any criminal or illegal characteristics. Despite this, the Court concluded that the applicant was aware of the secret and allegedly criminal aspects of the Gülen Movement.Thus, the Court deemed his conviction foreseeable, following what it considered to be fair proceedings, even though it did not examine the complaints regarding this matter. Consequently, it found no violation of Article 7.

Upon the request of the applicant to ASSEDEL, who expressed profound disappointment at the outcome of the ruling, a commission of human rights law experts prepared this report. The applicant asserts that none of his activities constituted criminal conduct, and his conviction represents a blatant disregard for human rights. He has provided ASSEDEL with his complete application file, including all annexed documents, as well as the Turkish government's submissions and their annexes.

After conducting an in-depth analysis of the judgment and cross-referencing the documents submitted by the applicant, ASSEDEL has identified multiple factual errors and omissions. These inaccuracies have, unfortunately, led to significant shortcomings in the Court's analysis. In addition to these factual discrepancies, the Court's reasoning and conclusions in this judgment are inconsistent with its previous case law, particularly the *Yalçınkaya* judgment.

In this submission, we will first outline the factual omissions that appear to have influenced the Court's reasoning, including discrepancies and omissions in witness statements, and the shortcomings in the conduct of the proceedings, which fell far short of fair trial standards. Moreover, the relevant domestic case law cited in the judgment is misleading and does not accurately reflect the legal context.

Subsequently, we will analyse the Court's examination of the case, which not only contradicts its own extensive case law but also stands in stark contradiction to the *Yalçınkaya* judgment, due to the factual inaccuracies identified. We respectfully submit these observations to legal scholars, practitioners, and the Court with the intention of fostering further discussion on this important matter.

ASSEDEL has been authorised by the applicant to share key documents related to the case with interested scholars, legal professionals, and human rights organisations upon request.

A. Facts as of the case as *reported* and *omitted* in the judgement

i. Witness statements subject to trial (discredited testimonies for release from detention):

The facts of the case are summarised in the judgment between paragraphs 5 and 56. This factual account is of utmost importance, as the Court bases its legal analysis based on these facts.

After examining the documents presented to the Court by both parties, we are convinced that certain factual omissions—though some may appear minor to readers lacking sufficient background knowledge of the case—are, in fact, quite significant. The course of the legal analysis might have been different had the facts been presented more comprehensively.

We will enumerate these **misleading factual omissions** below.

- The Court refers to the statements of witnesses E.B., B.A., Y.B., and A.B. in paragraphs 5 to 11 of the judgment. After summarising these testimonies, the Court shifts to discussing the applicant's custody and detention phase. Notably, the Court emphasizes that the applicant stated he did not recognise the witnesses (§ 17). However, the statement from witness A.B. was actually taken after the applicant's own statement. During the police interrogation, the applicant was questioned only about the statements of witnesses B.A. and Y.B. Thus, the applicant appears to have denied the allegations of these two witnesses, who had given statements in exchange of benefitting from the provisions of effective/active remorse/repentance.

- It is important to note that individuals accused of membership in a terrorist organization in FETÖ/PDY cases are often pressured into utilizing the active remorse provisions. Within this context, these individuals are incentivised to provide the names of alleged members of the Gülen movement in exchange for their release from pre-trial detention and reduced penalties. These sentences are often structured in a way that ensures the individual does not return to prison, through credit given for time served or through deferred sentencing (HAGB). As a result, individuals benefiting from the effective remorse provisions in FETÖ/PDY trials gain disproportionate advantages, which could be seen as a form of "impunity". Therefore, the testimonies of these witnesses should be treated with skepticism, and a thorough examination of their reliability is essential. Witness statements obtained under such circumstances in FETÖ/PDY cases are inherently unreliable (see *Habran and Dalem v. Belgium*, nos. 43000/11 and 49380/11, § 100; *Adamco v. Slovakia*, App. no. 45084/14).

At this juncture, the Court's explanation of the active remorse provisions, characterising them merely as *"a provision that made it possible to reduce a sentence in exchange for providing information"* (§ 6), is insufficient and fails to adequately capture the reality of FETÖ/PDY trials.

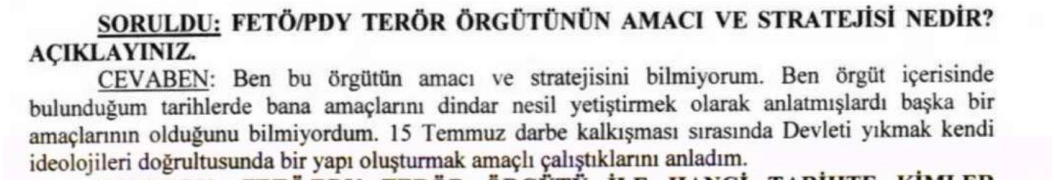
These two witnesses, aged 27 and 28 at the time they provided their statements, had no prior criminal records or involvement in any criminal activities, similar to the applicant's situation. Their activities, which they claimed "repentance", were all legal in nature. It is evident that they were attempting to evade criminal charges encountered over the activities mostly benefiting from the presumption of legality (*Yalçınkaya*, §§ 342-343). Notably, B.A. submitted a statement comprising 22 pages, while Y.B. provided ten pages; both statements contained no references to any criminal activity (see Annexes 1 and 3 of the government's observations). If any criminal

activities had been mentioned, they would be expected to appear in the judgment's factual summary.

In this context, the applicant was justified the validity of the two witness statements obtained under the active remorse provisions, which should have been verified *ex officio* by the judicial authorities in accordance with their duty to seek material truth.

- The Court has referenced witness statements concerning the applicant, which indicate that he held the position of a BBTM (regional student coordinator) within the Gülen Movement (GM). However, it is noteworthy that nearly all of these witnesses described their participation in the Gülen Movement as ordinary religious activities aimed at spiritual/religious fulfillment. Understanding the *mens rea* of the applicant in relation to the alleged crime hinges on the context provided by these witnesses, yet the Court's analysis omits any favorable references to this context.

For instance, when B.A. was questioned about the aims and strategies of the FETÖ/PDY, he responded as follows:



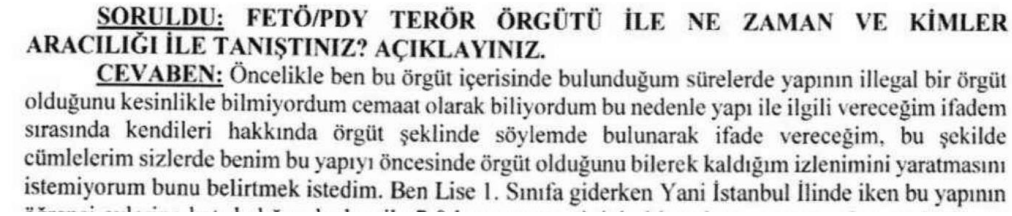
SORULDU: FETÖ/PDY TERÖR ÖRGÜTÜNÜN AMACI VE STRATEJİSİ NEDİR? AÇIKLAYINIZ.

CEVABEN: Ben bu örgütün amacı ve stratejisini bilmiyorum. Ben örgüt içerisinde bulunduğum tarihlerde bana amaçlarını dindar nesil yetiştirmek olarak anlatmışlardı başka bir amaçlarının olduğunu bilmiyordum. 15 Temmuz darbe kalkışması sırasında Devleti yıkmak kendi ideolojileri doğrultusunda bir yapı oluşturmak amaçlı çalıştıklarını anladım.

- The excerpt from B.A.'s statement regarding the aims and strategy of the FETÖ/PDY (Annex 1 of the government's observations)

> *"I don't know the aim and strategy of this organization. At the time when I was involved, they told me that their goal was to nurture a religious generation. I was unaware that they had any other motives. During the July 15 coup attempt that I realized they endeavored to establish a regime aligned with their ideology and sought to overthrow the state."*

The Court summarizes certain portions of A.B.'s testimony in § 10. We consider that the activities outlined in this paragraph do not constitute any criminal conduct. A.B.'s statements are particularly significant regarding the applicant's *mens rea*. However, the Court chose not to reference these crucial remarks in the judgment.



SORULDU: FETÖ/PDY TERÖR ÖRGÜTÜ İLE NE ZAMAN VE KİMLER ARACILIĞI İLE TANIŞTINIZ? AÇIKLAYINIZ.

CEVABEN: Öncelikle ben bu örgüt içerisinde bulunduğum sürelerde yapının illegal bir örgüt olduğunu kesinlikle bilmiyordum cemaat olarak biliyordum bu nedenle yapı ile ilgili vereceğim ifadem sırasında kendileri hakkında örgüt şeklinde söylemde bulunarak ifade vereceğim, bu şekilde cümlelerim sizlerde benim bu yapıyı öncesinde örgüt olduğunu bilerek kaldığım izlenimini yaratmasını istemiyorum bunu belirtmek istedim. Ben Lise 1. Sınıfa giderken Yani İstanbul İlinde iken bu yapının

- The excerpt of the A.B.'s statement regarding the aim and strategy of GM (Annex-5 of the government's observations)

"First, when I was part of that organisation, I did absolutely not know that organization was illegal, I knew [them] as [religious] community (...) I don't want my statements to create the perception that I was staying with them while I knew that this entity is a [illegal] organisation, I want to clarify that."

These two statements are critical because these witnesses served in the Gülen Movement with at least the same intensity as the applicant. According to their statements, Y.B. served as the regional coordinator for students, while A.B. was the regional supervisor of students, similar to the applicant's alleged role. Additionally, they were involved in certain activities that the Court appears to blame the Movement for activities in which the applicant did not participate. Therefore, their motivations for being part of the Gülen Movement as student coordinators are crucial for assessing the *mens rea* applicable to the applicant.

It should be noted that it is common for witnesses who provide statements under the active repentance provisions to blame the Gülen Movement for the events of July 15th. When they claim that the Movement attempted to overthrow the government, they are not basing their statements on concrete facts they personally witnessed; rather, they are expressing opinions aligned with the official narrative. In reality, they do not have the freedom to contradict this narrative; otherwise, they risk being charged with membership in a terrorist organisation.

- A clear example confirming this aspect can be even found in the factual background of the case. The Court cites the testimony of Y.B., whose statement carries significant weight in the judgment. Y.B. claims that "*he was not aware that the organisation in question was planning a coup d'état on 15 July 2016, but that that week he had regularly received prayers via the ByLock messaging system and had been invited to pray them (il n'était pas au courant que l'organisation incriminée projetait un coup d'État le 15 juillet 2016 mais que, cette semaine-là, il avait régulièrement reçu des prières via la messagerie ByLock et été invité à les pratiquer.)"* (§ 8).

The Court attaches importance to this witness and similar remarks. However, anyone with basic knowledge about the events of July 15th and the ByLock application would recognise that this statement is a clear fabrication.

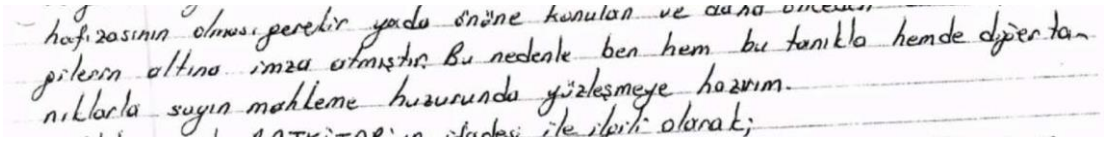
In the *Yalçınkaya* judgment, the Court established that the ByLock application was taken down in early 2016 (§ 252). Thus, ByLock was no longer in use at the time of the events, meaning that Y.B.'s testimony is false, at least in this regard. This discrepancy further supports our argument that statements made under the active repentance provisions are unreliable.

- It should be noted in passing that the Court can sometimes be vulnerable to misleading information. For example, in the *Başer and Özçelik* case, the Court referenced a letter allegedly written by Mr. Fethullah Gülen to the applicants (§ 184). Since late 2013, The Turkish Government has accused the Gülen Movement of infiltrating state institutions with utmost secrecy. Within this context, Turkey dismissed one-third of its judiciary—over 4,000 judges—after the 2016 coup attempt. Even in the *Yasak* judgment, the Court overemphasized the Movement's secrecy. Yet, paradoxically, the same Court referred to this letter in the facts of the case as if it were plausible that the leader of such a clandestine organisation would write a letter to his alleged follower judges—a blatantly absurd act for an entity supposedly committed to secrecy. It was later revealed that this letter was a forgery, allegedly produced by the prosecution[1].

[1] https://stockholmcf.org/turkish-govt-submitted-forged-letter-to-ecthr-as-evidence-in-case-of-imprisoned-judges/

ii. Unfair domestic proceedings (limited hearings, virtual participation from prison without attorney, unchallenged witness testimonies, and conflicts of interest with 'repentant' witnesses):

- In the first hearing held on 27 November 2024, the applicant submitted his written plea. The Court references this document in § 31 and merely notes that the applicant denied the accusations and witness statements. However, in his plea, the applicant stated that he had read the entire bill of indictment and observed that there was no individualisation of his actions in relation to the narrative in the indictment. He did not merely contest the witness statements of B.A., Y.B., A.B., H.E., and E.B., but also expressed his willingness to confront all of these witnesses in court.



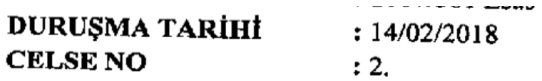
- The excerpt of the applicant's written plea in which he requested to face the witnesses (Annex-45 of the government's observations)

In this first hearing, **none of the witnesses were present at the hearing**. The Assize Court ordered the collection of statements from H.E., Y.B., and B.A. in accordance with the prosecutor's request.

- The Court suggests that the applicant was convicted during the third hearing on 14 February 2018 (§ 34), potentially **leading one to conclude that the proceedings lasted for a sufficient period**. However, the criminal proceedings before the Çorum Assize Court actually concluded in **just two hearings**. The session on 23 August 2017 was merely a preparatory hearing (*tensip duruşması*), which is a procedural meeting and not considered a formal hearing in Turkish criminal procedure. While the ECtHR has dealt with numerous cases involving thousands of minutes of criminal procedure, this is the first instance where a preparatory hearing has been counted as a formal hearing (compare Aydın Sefa Akay v. Turkey, App. no. 59/17, 23 April 2024, § 43).

Moreover, the Court explicitly stated in its communication report that *"At the **second hearing** held on 14 February 2018, the Çorum Assize Court convicted the applicant as charged and sentenced him to seven years and six months' imprisonment. The Assize Court largely relied on the evidence indicated in the bill of indictment and noted, in addition, that the applicant had been a member of two associations affiliated with FETÖ/PDY".*[2]

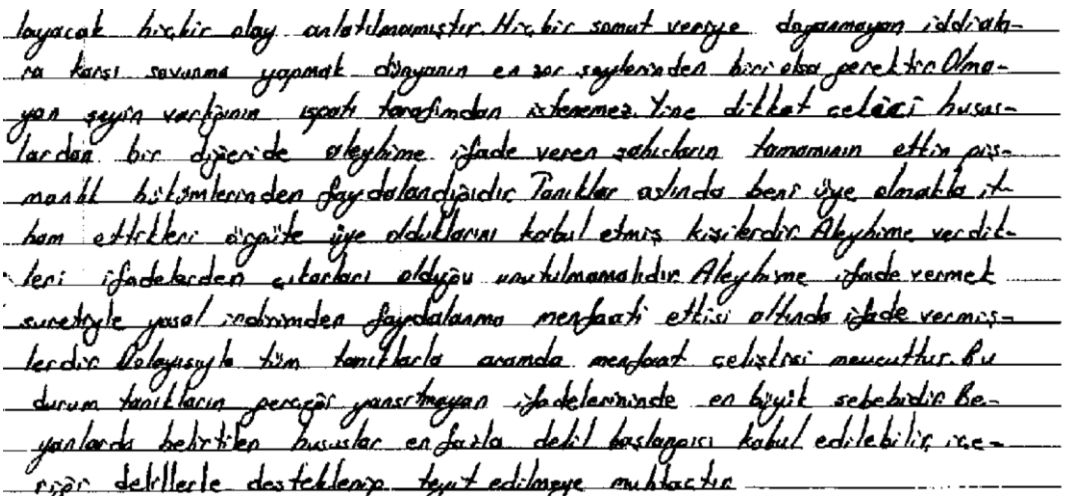
Furthermore, it is clearly indicated at the top of the hearing minutes that it was indeed the second hearing.



- Minutes of the 2nd hearing (Annex- 50 of the government's observations)

[2] https://hudoc.echr.coe.int/?i=001-208744

- On 14 February 2018, prior to the commencement of the second hearing, the applicant submitted a written plea to the Assize Court from prison. In his plea, the applicant emphasised that the witness statements lacked concrete information and that the witnesses appeared to seek benefits from the **active repentance provisions in exchange for a reduction** of their punishment. He pointed out the **conflict of interest between himself and the witnesses**, asserting that their statements needed to be corroborated with other evidence. The applicant contended that these statements were unreliable. He ultimately requested his release and acquittal (see Annex-51 of the government's observations).



- Excerpt from the written plea (Annex-51 of the government's observations)

However, the **Court appears to have deemed this plea negligible**, as there is **no mention of the letter** in the judgment's factual summary.

- In the second (final) hearing, as in the previous one, **none of the witnesses were heard** once again. According to the Court's account, in that hearing (§ 34), "*the prosecutor argued that the case file was sufficient and that there was no need to wait for further witness statements; for their part, the applicant and his lawyer left it to the discretion of the Assize Court to decide whether to render the verdict without seeking further evidence (... le procureur soutint que le dossier était suffisant et qu'il n'y avait pas lieu d'attendre que fussent recueillies des déclarations d'autres témoins ; de leur côté, le requérant et son avocat s'en remirent à la discrétion de la cour d'assises pour la question de savoir s'il convenait de rendre le verdict sans rechercher des compléments de preuves.)*"

However, upon examining the minutes of the hearing, we identified a **significant inconsistency.** The Court first asked the defense for their opinion on the prosecutor's opinion that there was no need to wait for witness statements, and the defense lawyer deferred it to the Court's discretion. Later, the Court sought the prosecution's opinion on extending the inquiry (*tevsii tahkikat*), and the prosecutor did not request it. Crucially, the Court failed to seek the defense's opinion on the extension of the inquiry. Thus, the description provided in paragraph 34 of the judgment does **not accurately reflect the actual course of proceedings**.

Furthermore, it would have been prudent for the defense lawyer not to oppose the prosecutor's request to dispense witness testimony. **Under Turkish criminal procedure law**, if a witness is not heard in court, their **testimony becomes inadmissible evidence** particularly if it constitutes the sole piece of evidence.

In this regard, **the Court should recognise** the fact that it is compulsory for the **local court to hear witnesses** under Article 210 of the Turkish Code of Criminal Procedure (CCP), which reads as follows:

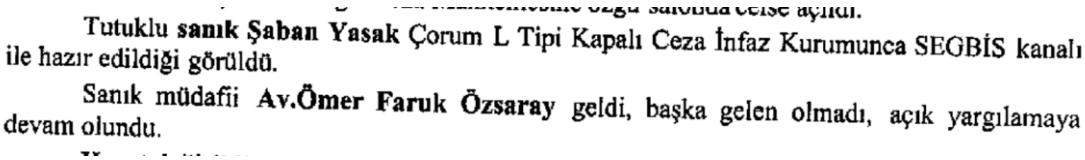
> *Documents not to be read during the hearing*
> *Article 210 – (1) If the only evidence for an incident is just a witness testimony, this witness shall be definitely heard in the main hearing. The reading of the record or written explanation, which is produced during a previous hearing, shall not substitute a hearing.*

In the ***Fikret Karahan*** **judgment of 16 March 2021** (App. no. 53848/07), the Court adressed a similar issue and found that *"a confrontation between the applicant and E.A. was essential not only to allow the applicant to challenge the reliability of the latter's allegations regarding him – which he could have admittedly done through his lawyer, at least to a certain extent – but above all to dissipate the uncertainty surrounding the physical identification that was at the heart of the case brought against the applicant, which could not sufficiently have been achieved through the lawyer's questioning of the witness."* (§ 55, *Fikret Karahan v. Turkey*)

In that case, the Court unanimously found a **violation of Article 6** §§ 1 and 3 (d) of the Convention due to the fact that the **witness had not been brought** before the domestic court.

It should also be noted that the disregard of this peremptory provision of the CCP would constitute grounds for the higher courts to overturn the decision. **The Court of Cassation has an extensive body of case law** on this issue, underscoring the mandatory nature of hearing witness testimony in such circumstances (Court of Cassation, 3.CD. 19.10.2022, E. 2021/9871 – K. 2022/6447; 3.CD. 29.11.2022, E. 2022/34717 – K. 2022/8801; 3.CD. 24.11.2022, E. 2021/20594 – K.2022/8418; 3.CD. 2.11.2022, E. 2022/6721 – K. 2022/7219).

- Another crucial missing element in paragraph 34 of the judgment is the fact that the applicant participated in the hearing via the **audiovisual information system *(SEGBİS)*** from Çorum Prison. Consequently, he was not physically present in the courtroom, nor was his lawyer beside him. This arrangement **denied the applicant and his lawyer the opportunity to discuss matters privately during the hearing**. Typically, the Court's judgments in similar applications include this type of information for each hearing. However, in this case, **the Court failed to mention this** significant detail, which alone could render the **trial unfair**. This fact is clearly documented in the minutes of the hearing.



Tutuklu **sanık Şaban Yasak** Çorum L Tipi Kapalı Ceza İnfaz Kurumunca SEGBİS kanalı ile hazır edildiği görüldü.

Sanık müdafii **Av.Ömer Faruk Özsaray** geldi, başka gelen olmadı, açık yargılamaya devam olundu.

- Minutes of the 2nd hearing (Annex- 50 of the government's observations)

The applicant, Mr. Yasak, informed ASSEDEL that while the proceedings were pending before the Assize Court, he did not receive any visits from a lawyer during his detention in Çorum prison. Under these circumstances, his participation in the final hearing via SEGBİS, coupled with his physical absence from the courtroom, had **a profound impact on his right to legal assistance**. This situation further restricted his ability to communicate effectively with a lawyer and adequately prepare his defense.

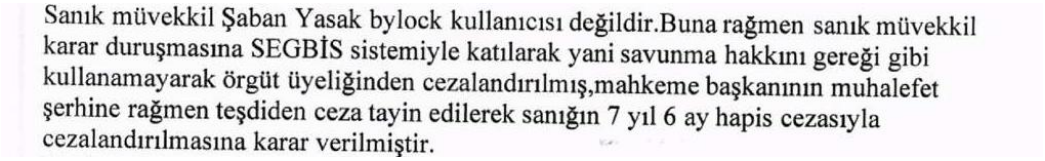
In this context, the Turkish Constitutional Court recently examined a highly sensitive case, *Emre Sunar* (App. no: 2021/63876, 12 June 2024), involving the "military secret organisation (*askeri mahrem yapılanma*) of FETÖ/PDY". The violations found in *Sunar* parallel those in the *Yasak* case.
In *Emre Sunar*, the Constitutional Court found a violation of the right to a fair trial on two key grounds: (i) the applicant participated in the last and fourth hearing via SEGBİS, while he was physically present in the courtroom for the previous three hearings; (ii) two witnesses were not heard by the Court. The Court particularly noted the significance of the applicant's presence at the final hearing, where the prosecutor delivered his opinion, and the applicant needed to be able to effectively respond.

Given these obvious similarities, the proceedings conducted against Şaban Yasak before the Çorum Assize Court were flawed with several shortcomings, and exhibit clear unfairness on the same grounds as identified in the *Emre Sunar* case.

- In the motivated decision of the Assize Court, the most senior judge—the president of the Assize Court—attached a **dissenting opinion**, opposing the aggravated sentence and voting for the applicant's release. Typically, the Court references separate or dissenting opinions that are favorable to applicants; yet, once again, it chose not to include this dissenting opinion in its judgment.

- Regarding the applicant's petition to the Court of Cassation, the judgment merely states that *"he repeated and developed, for the most part, the arguments he had already set out in his appeal against the Assize Court's judgment (see paragraph 50 above): he denied having taken part in any activity whatsoever, legal or illegal, of FETÖ/PDY, and argued that it had not been shown by clear, precise and unambiguous evidence that he was a member of that organisation* (§ 52).

However, the applicant's lawyer explicitly raised concerns about the conviction, highlighting that it occurred despite the applicant's inability to fully exercise his defense rights, as he participated in the final hearing via SEGBİS. Moreover, the dissenting opinion of the president of the Court against the aggravated sentence was disregarded. The judgment, however, does not appear to give weight to these issues, deeming them insignificant to report in the facts.


Sanık müvekkil Şaban Yasak bylock kullanıcısı değildir.Buna rağmen sanık müvekkil karar duruşmasına SEGBİS sistemiyle katılarak yani savunma hakkını gereği gibi kullanamayarak örgüt üyeliğinden cezalandırılmış,mahkeme başkanının muhalefet şerhine rağmen teşdiden ceza tayin edilerek sanığın 7 yıl 6 ay hapis cezasıyla cezalandırılmasına karar verilmiştir.

- Excerpt of the petition to the Court of Cassation (Annex-69 of the government's observations)

- At the conclusion of its analysis, the Court determined that there was no violation, asserting that the applicant's membership *"was established in the course of proceedings which* ***had not been held to be contrary to the principles of fairness*** *guaranteed by the Convention and in which* ***no disregard for the rights of the defence had been found***" (§ 178). The Court emphasized the significance of the trial's fairness before domestic courts in its assessment of Article 7.

Given the importance of this aspect, it is critical that the Court acknowledges the fact that FETÖ/PDY trials are typically conducted in breach of Article 6 § 3 (c) of the Convention.

Following the declaration of the state of emergency, the Turkish government's first action was the unjustifiable restriction of defense rights. The initial Legislative Decree No. 667, promulgated after the declaration of the state of emergency, granted prosecutors full authority to order surveillance of lawyer-client consultations. Furthermore, Legislative Decree No. 676 introduced similar provisions into Law No. 5275 concerning the enforcement of sentences and preventive measures.

The Court is well aware of this situation, as violations of Article 6 § 3 (c) of the Convention were a significant issue in *Yalçınkaya*. In that judgment, the Court noted in § 154:

> Article 6 § 1 (d) of Legislative Decree no. 667 introduced some restrictions, to be applied during the course of the state of emergency, on the right to legal assistance of persons detained in relation to certain offences against the Nation and the State set out in the fourth chapter of Book Two of the Criminal Code (including the offence of membership of an armed organisation under its Article 314), the offences falling within the scope of the Prevention of Terrorism Act, and collective offences. Article 6 § 1 (d) provided, inter alia, that the meetings of persons in detention with their lawyers could be recorded, that the meetings could be attended by an officer to monitor the exchanges, or that the documents and files exchanged and the records kept by the detainees or their lawyers could be seized upon the decision of the public prosecutor, where it was deemed necessary for the reasons listed therein. This article was incorporated into Article 6 § 1 (d) of Law no. 6749 adopted on 18 October 2016 and published in the Official Gazette on 29 October 2016.

However, while there were additional complaints regarding violations of Article 6, and the Court found violations of the right to a fair trial on various other grounds, it did not deem it necessary to address this particular issue separately in *Yalçınkaya* (§ 367).

Furthermore, the Court examined the same problem in the *Canavcı and Others* case. In that instance, the Court found a violation of Article 8 § 2 of the Convention, reasoning that *"the Court cannot but find that the discretion enjoyed by the public prosecutors in imposing restrictions on the applicants' communication with their lawyers was not subject to any conditions, that the scope of that discretion and the manner of its exercise were not defined and that no other specific guarantees were provided in that regard. This being so, it considers that, in the circumstances of the present case, the adoption of the impugned measures against the applicants, which were enforced for a limited period during the state of emergency, was liable to be arbitrary and incompatible with the requirement of lawfulness (see, mutatis mutandis, Bykov v. Russia [GC], no. 4378/02, § 81, 10 March 2009, and Vig v. Hungary, no. 59648/13, § 62, 14 January 2021)."* (Canavcı and others v. Türkiye, App. no. 24074/19, 14 November 2023, § 105).

In Turkey, communications between lawyers and detainees involved in FETÖ/PDY prosecutions are routinely monitored by prison personnel, making private consultations virtually impossible.

ASSEDEL believes that there are very few proceedings in FETÖ/PDY trials that can genuinely be considered fair. The Court is undoubtedly aware of this reality. An applicant's failure to raise specific concerns about the fairness of these trials does not render them just. If the Court issues a leading judgment affecting tens of thousands of victims based on such grounds, it is imperative that the fair trial arguments be thoroughly examined and presented. Otherwise, selecting such a case as a leading judgment would not contribute to the protection of human rights but rather to the perpetuation of human rights violations.

iii. No mention of secret activities in the Assize Court's decision and witness statements :

- The Court summarizes the motivated decision of the Assize Court in paragraphs 36-44, with a key focus on evidence assessment in paragraph 42. In this section, the Court states that the Assize Court concluded that the accused was **"secretly pursuing activities"** within the alleged organization **based on witness statements** obtained throughout the proceedings.

However, it is noteworthy that the decision does not contain any explicit statement indicating that the accused was, in fact, secretly pursuing activities.

Dosya kapsamındaki aşamalarda alınan tanık beyanlarından sanığın FETÖ/PDY Silahlı Terör Örgütü içerisinde sorumlu düzeyde faaliyet yürüttüğü, örgüt içerisinde Büyük Bölge talebe Mesulü olduğu ve Recep kod adını kullandığı hususunun tanıklar Yakup Beşoluk ve Abdülsamet Baktitar beyanlarından anlaşıldığı ,

- Excerpt of the relevant part of the decision (Annex-52)

We should note here that the Court frequently refers to the organization as having a "secret structure". In all witness statements, it is asserted that the witnesses characterized the applicant as a member of this secret structure. However, upon examining all **witness statements, we found no evidence** that the witnesses explicitly classified the applicant as part of the "secret structure" of the organisation.

- The Court refers to witness statements that were submitted to the file after the Çorum Assize Court's decision in paragraphs 45-49.

In § 45 of the judgment, the Court states that B.A. reiterated the statements made before the Bulancak Court during the criminal investigation stage, in which he described the applicant as one of the regional heads of the students within the "secret structure" of the accused organisation. However, as highlighted above, Y.B.'s statements before the Court contain no reference to a secret structure.

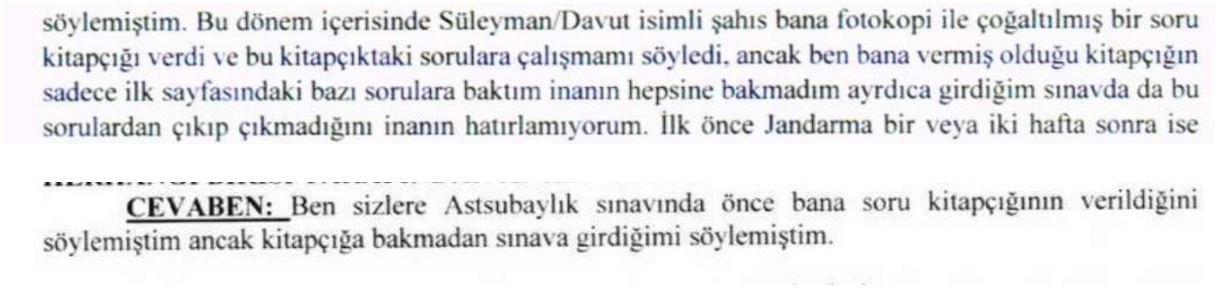
TANIK BEYANINDA; önceki beyanlarımı tekrar ederim. Sanık bizim bölge talebe mensubu idi.ikinci öğretim bölgesinden sorumlu idi. Beş altı evden sorumlu idi, evlerin ev abilerini haftada bir toplardı bizim eve gelirdi evleri ziyaret ederdi. Haftada bir öğrencilerde ev abileri ile toplanırdı, toplantılarda dini konularda sohbet yapılırdı. Evlerin ihtiyaçları varmı yokmu konuşulurdu. Öğrencilerden para toplanmazdı, parayı bölgeciler toplardı, BBTM ler öğrencilerle ilgilenirdi. Gezilere giderken sanık organize ederdi. Tanıklık ücreti istemiyorum. Bilgim ve görgüm bundan ibarettir dedi.

- Excerpt of the statement (Annex-55 of the government's observations)

The Court summarizes several witness statements from sub-officers I.K. and A.T., as well as officer I.A. and cadet O.K., who provided information about the alleged infiltration of the army and claimed that the applicant was a member of the secret structure of the accused organization. However, the judgment does not mention that these statements were given under the active remorse provisions.
I.K.'s assertion that the examination booklet containing the questions to be asked was provided to him by members of the organisation is particularly critical. This is significant because, until this point, the **witness statements have lacked any concrete evidence of criminal activity**. Therefore, this statement warrants close attention.

Upon examining I.K.'s statements, we noted discrepancies between his account and what is presented in the judgment. He mentions this event twice. First, he states, *"Süleyman/Davut gave me a photocopy booklet and told me to work on these questions; however, I only looked at the first page. I honestly do not remember whether these questions were on the exam or not."*

At the end of his statement, he clarifies, *"I said that a question booklet was given to me for the exam for sub-officers, but I also stated that I entered the exam without looking at the booklet."*



söylemiştim. Bu dönem içerisinde Süleyman/Davut isimli şahıs bana fotokopi ile çoğaltılmış bir soru kitapçığı verdi ve bu kitapçıktaki sorulara çalışmamı söyledi, ancak ben bana vermiş olduğu kitapçığın sadece ilk sayfasındaki bazı sorulara baktım inanın hepsine bakmadım ayrıca girdiğim sınavda da bu sorulardan çıkıp çıkmadığını inanın hatırlamıyorum. İlk önce Jandarma bir veya iki hafta sonra ise

CEVABEN: Ben sizlere Astsubaylık sınavında önce bana soru kitapçığının verildiğini söylemiştim ancak kitapçığa bakmadan sınava girdiğimi söylemiştim.

- Excerpts of the statement (Annex-58 of the government's observations)

Regarding witness I.K., it is important to note that his house was searched while he was on duty in Syria, and he returned to give his statement afterward. At the time of his testimony, he had not been dismissed from public service, which would typically be expected for someone accused of membership in the Gülen Movement. His motivation to avoid prosecution and the potential loss of his job should not be overlooked. This aspect is evident in the minutes of his statement; however, the judgment did not address these considerations.

Furthermore, despite the lack of certainty in his statements, even if we accept that I.K.'s statements are true, they do not indicate any criminal activity on the part of the applicant.

It is also critical to note that the testimonies of the six individuals referenced in paragraphs 46 and 47 were not presented to the Çorum Assize Court. Consequently, the content of these statements was never brought to the applicant's attention, either by the prosecution or by the Court.

The Samsun Regional Appellate Court rejected the applicant's appeal, referencing only the witness statements examined by the Çorum Court. Thus, the witness statements in paragraphs 46 and 47 were never considered in the proceedings.

iv. Constitutional Court proceedings (despite clear complaints of the applicant on unfair proceedings, "too formalist" dismissal from the Court for non-exhaustion):

The Court summarizes the applicant's petition lodged with the Turkish Constitutional Court in paragraph 54. This application is crucial, as it serves as a prerequisite for exhausting domestic remedies before bringing the case to the ECtHR.

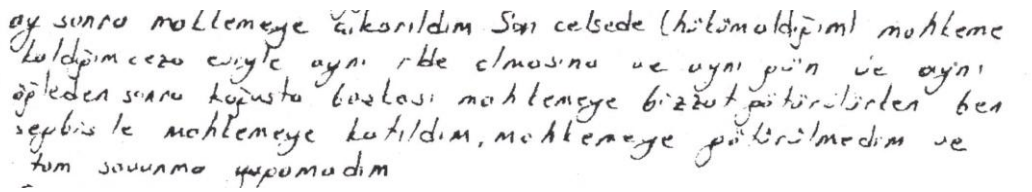
First, ASSEDEL evaluates the applicant's arguments highlighted in this paragraph as tenable and valid. The applicant contends that the punishment for acts protected by the Constitution was unforeseeable. He explains that the attempted coup d'état of 15 July 2016 was the first act of violence attributed to the organisation in question. He asserts that there is no evidence to suggest he was aware of the organization's existence prior to that event, indicating that he was

unaware of the 'terrorist' nature of FETÖ/PDY. This lack of awareness, he argues, precludes the establishment of the *mens rea* necessary for proving membership in an armed terrorist organisation.

The applicant raises several complaints regarding violations of his rights, presenting a variety of arguments. Although many points are put forward, the structure of these allegations is somewhat fragmented, which may have led the Court to not fully compile and consider the applicant's arguments and complaints. Nevertheless, it is essential for the Court to thoroughly examine the applicant's claims, especially in such a leading case.

In its assessment, the Court notes that the applicant, in his application to the Turkish Constitutional Court, specifically criticized the Turkish courts for a lack of independence and impartiality, which he linked to a systemic disregard for the principle of the irremovability of judges, particularly in relation to his right to a fair trial.

However, the applicant explicitly asserts **that he was unable to defend himself** effectively due to his lack of physical presence at the final hearing, where he was ultimately convicted. He notes that the hearing took place in the same province as the prison where he was held [Çorum Assize Court and Çorum Prison], while many other inmates were able to participate in hearings physically. Instead, he participated in the hearing via **SEGBİS**. This complaint highlights a critical aspect of his right to a fair trial. His allegation is both understandable and concrete, and the **omission of this complaint from the judgment** cannot be dismissed as a mere clerical error - it has the potential to influence the Chamber's analysis.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- Excerpt of the complaint in the application form (Annex-90 of the government's observations)

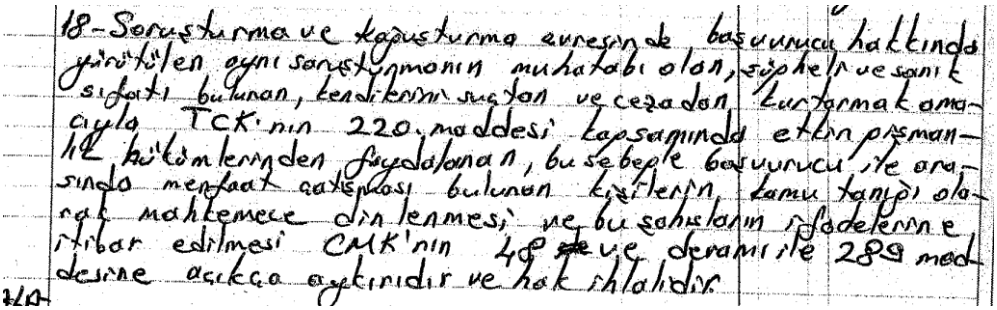
Additionally, the applicant's arguments regarding the **impartiality of the judiciary** should not be dismissed as mere general criticism. He contends that judges and prosecutors who favor victims in FETÖ investigations have faced pressure from public opinion and political forces, resulting in investigations and suspensions. The Emergency Decree-laws have undermined the judicial guarantees enshrined in the Constitution, allowing for the dismissal of judges and prosecutors without trial, thereby compromising judicial independence. Consequently, Domestic courts have rejected his legitimate legal requests and defenses, and even binding rulings from the Turkish Constitutional Court and the ECtHR have gone unheeded. Therefore, these assertions are crucial arguments that cannot be reduced to a complaint about a general, systemic disregard for the immovability of judges.

v. Application lodged with the Court (despite clear complaints regarding fairness, dismissal from the Court upholding the controversial approach of the Constitutional Court):

The applicant succinctly lists numerous complaints within the two pages of the application form, which he filled out by hand while in prison without legal assistance. Nevertheless, his

complaints are clearly articulated and address not only the general question of **judicial impartiality** under Article 6, but also a **specific issue concerning fairness**, as outlined in paragraph 18:

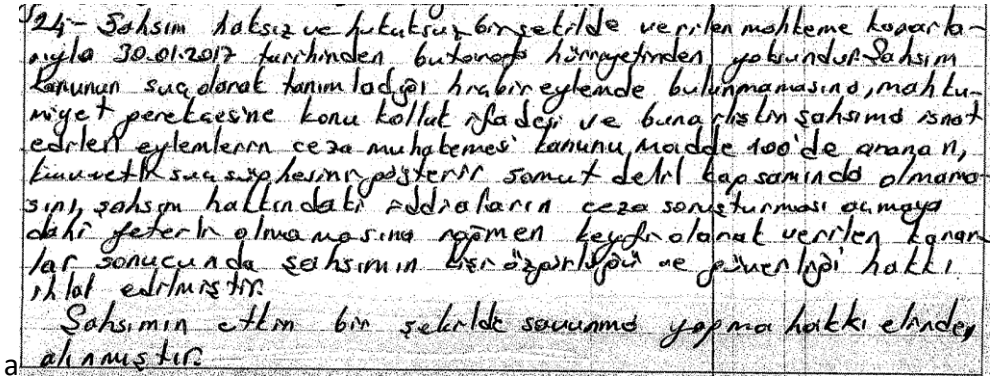
> *18. The fact that suspects and accused persons in the same investigation against the applicant during the investigation and prosecution phase, **who benefited from effective remorse provisions** under Article 220 of the Turkish Penal Code in order to avoid themselves from crime and punishment, thus **having conflicting interests with the applicant**, have been listened to as public witnesses and relying on their testimony is in clear violation of Article 48 et seq. [provisions regarding refraining from testimony] and Article 289 [absolute grounds for violation of law] of the Code of Criminal Procedure and is a violation of rights.*



a. Excerpt of the application form to the Court

Furthermore, in paragraph 24 of the application, the applicant invoked Article 5 of the Convention, complaining about his deprivation of liberty and, at least in substance, his conviction. Notably, his complaint in an unnumbered paragraph immediately following paragraph 24 deserves particular attention.

> *24. I have been deprived of my liberty since 30.10.2017 due to unjust and unlawful court decisions. Although I have not committed any act defined as a crime by the law, although **the statement before the police accepted as ground for conviction** and the actions attributed to me in connection therewith are not within the scope of concrete evidence that shows strong suspicion of crime as required by Article 100 of the Code of Criminal Procedure, although the allegations against me are not even sufficient to launch a criminal investigation, my right to personal liberty and security has been violated as a result of **arbitrarily issued decisions**.*
> ***My right to an effective defence has been deprived.***



b. Excerpt of the application form to the Court

It is worth noting that the applicant submitted his petitions to both the Court and the Constitutional Court **without legal assistance**. As a young, law-abiding citizen who has spent precious years in prison, whose situation, according to ASSEDEL, exemplifies a clear denial of

justice and contradicts Article 7 of the Convention, he lacked the financial means to hire a lawyer. Against this backdrop, in terms of the exhaustion of domestic remedies rule, the Court should have adopted a *pro victima* interpretation.

A detained individual, without the financial resources for adequate legal assistance, should be viewed with consideration, particularly in light of the challenges faced in securing proper defense.

ASSEDEL wishes to emphasize that the applicant presented clear and specific allegations under Article 6 to both the Constitutional Court and the ECtHR. However, it appears he did not articulate all the same arguments in both courts, which may have led the jurist rapporteur to conclude that the Article 6 arguments should be dismissed for non-exhaustion of domestic remedies. Despite this, the applicant raised complaints regarding the deprivation of his right to an effective defense in both applications. The Court should have adopted a *pro victima* approach, and his Article 6 complaints should not have been rejected on grounds of non-exhaustion but rather examined on their merits.

ASSEDEL surmises that the applicant's Article 6 complaints were likely rejected by a partial decision, most probably by a single judge. It is important to note that this decision was made by a judge who did not have a comprehensive understanding of the application, as evidenced by the Court's account of the facts.

B. "(Ir)relevant" domestic case-law cited by the European Court: PKK-Gülen confusion despite their sharp differences:

The Court summarises the relevant Turkish case law between paragraphs 79-90. In fact, there was no need for the Court to refer to the domestic case law in such detail, as it had already been examined in *Yalçınkaya*, unless there had been a renewal in case law following that judgment.

In paragraph 79, the Court references the *Metin Birdal* judgment of the Constitutional Court dated 22 May 2019. It is surprising to see this judgment cited, as it is not recent, and there is no mention of it in *Yalçınkaya*. In *Yalçınkaya*, the Court cites the more recent and pertinent decisions of *Adnan Şen* (dated 15 April 2021) and *Ferhat Kara* (dated 4 June 2020) from the Constitutional Court, which are more applicable to the applicant's case. It seems that the Court has **unreasonably opted to diverge from *Yalçınkaya*,** even when there is a wealth of pertinent domestic case law available.

The Government cites this judgment in its observations across three separate paragraphs: 313, 314, and 400. In fact, these paragraphs are essentially a copy-and-paste of the Government's observations in *Yalçınkaya*, with only the paragraph numbers differing.

313. A member of an organisation is a person who becomes a part of the criminal organisation and relinquishes one's will in favour of that of the organisation by submitting oneself to the superior will of the organisation. A person does not necessarily have to have committed an offence to be sentenced for membership of a terrorist organisation. Membership of a terrorist organisation is a punishable criminal offence in itself (see, for the offence of membership of a terrorist organisation, *Metin Birdal*, §§ 61-65). For this reason, an individual shall be sentenced for membership of the organisation if he joins it while knowing that it is a terrorist organisation, acts in accordance with the organisation's instructions, and forms an organic and hierarchical link with the organisation. If the person concerned commits a criminal act upon an instruction he has received from the organisation, he shall also be sentenced separately for that act in addition to membership of a terrorist organisation.

314. In conclusion, in determining whether the offence of membership of a terrorist organisation as described in Article 314 § 2 of the TCC has materialised, judicial bodies examine all the evidence indicating the person's inclusion in the hierarchical structure of the terrorist organisation and hold an assessment in the light of the aim, nature, recognition, structure and modus operandi of the terrorist organisation (see *Metin Birdal*, § 61).

704. A member of an organisation is a person who becomes a part of the criminal organisation and relinquishes one's will in favour of that of the organisation by submitting oneself to the superior will of the organisation. A person does not necessarily have to have committed an offence to be sentenced for membership of a terrorist organisation. Membership of a terrorist organisation is a punishable criminal offence in itself (see, for the offence of membership of a terrorist organisation, *Metin Birdal*, §§ 61-65). For this reason, an individual shall be sentenced for membership of the organisation if he joins it while knowing that it is a terrorist organisation, acts in accordance with the organisation's instructions, and forms an organic and hierarchical link with the organisation. If the person concerned commits a criminal act upon an instruction he has received from the organisation, he shall also be sentenced separately for that act in addition to membership of a terrorist organisation.

705. In conclusion, in determining whether the offence of membership of a terrorist organisation as described in Article 314 § 2 of the TCC has materialised, judicial bodies examine all the evidence indicating the person's inclusion in the hierarchical structure of the terrorist organisation and hold an assessment in the light of the aim, nature, recognition, structure and *modus operandi* of the terrorist organisation (see *Metin Birdal*, § 61).

Yalçınkaya v. Turkey (15669/20)

400. In order for an illegal act under legal disguise to constitute the offence of membership of an armed terrorist organisation, it must satisfy the elements of continuity, intensity, diversity and hierarchical link, or it must meet all elements in itself by its nature. For this reason, as stated in the decision of the Constitutional Court on the individual application of *Metin Birdal*, even though a person's acts do not constitute an offence in themselves, they may give rise to the offence in question when assessed as a whole. In other words, the acts in question determine the status or profile of the applicant (for a similar assessment, see the decision of the Constitutional Court on the individual application of *Metin Birdal*, § 62). For example, being a member of an association having affiliation and connection with a terrorist organisation does not constitute an offence in itself. However, when it is examined in combination with other acts such as using a code name within the hierarchical structure of the organisation within the framework of the organisational activities, holding organisational meetings and being responsible for the houses belonging to the organisation, it may be acknowledged that the impugned act meets the material elements of the offence of membership of a terrorist organisation.

793. In order for the illegal acts under legal disguise to constitute the offence of membership to an armed terrorist organisation, they have to meet the elements of continuity, intensity, diversity and hierarchical link, or the act has to meet all elements in itself due to its nature. For this reason, as stated in the decision of the Constitutional Court in the application of *Metin Birdal*, even though a person's acts do not constitute a crime on their own, when evaluated as a whole, they can give

Yalçınkaya v. Turkey (15669/20)

rise to the crime in question. In other words, the acts in question determine the status or profile of the applicant (for similar assessment, see *Metin Birdal*, § 62). In fact, being a member to an association having affiliation and connection with a terrorist organisation does not constitute an offence in itself. However, when it is examined with other acts such as using a code name in the organisation's hierarchy within the framework of the organisational activities, holding organisational meetings and being responsible for houses of the organisation, it could be acknowledged that the impugned act meets the material elements of the offence of membership to a terrorist organisation.

- Excerpts of the Government's observations in Yasak and Yalçınkaya

Indeed, it is entirely expected that the Turkish Government would submit the same arguments to the Court especially since the Court **communicated *Yalçınkaya* and *Yasak* simultaneously** as part of a group of five cases. The Court relinquished *Yalçınkaya* in favor of the Grand Chamber, which additionally suggests that the other cases, including *Yasak*, should have followed the precedent set in *Yalçınkaya*.

What is particularly noteworthy is that, although there was no specific accusation against Mr. Yalçınkaya regarding the use of a code name—apart from the mention of ByLock—the Government submitted the same observations without any changes, even retaining the same punctuation.

In paragraph 133, the Chamber refers to this judgment and the Government's observations, which assert that *"it is not necessary for a person to have committed an offence for him to be punished for membership of an illegal organisation: membership of such an organisation is a punishable offence in itself"*.

Furthermore, in paragraph 142, the Court summarizes the Government's observations, which appear to relate specifically to the applicant's case, stating: *"For example, being a member of an association affiliated to a terrorist organisation does not constitute an offence in itself; but when examined in combination with other acts such as using a code name within the hierarchical structure of the organisation and in activities carried out on its behalf, holding organisational meetings and taking responsibility for houses belonging to the organisation, it may be accepted that the act in question falls within the scope of the material elements of the offence of membership of a terrorist organisation."*

However, these explanations are merely a copy-paste of the observations in *Yalçınkaya*, which were clearly not tailored to the specifics of Mr. Yasak's case.

It is extremely noteworthy that the same arguments put forth by the Government were clearly rejected by the Grand Chamber, which did not even find it necessary to reference them in its judgment. However, the Chamber seems to have taken note of the *Metin Birdal* judgment and

the Government's arguments, giving them consideration despite their earlier dismissal by the Grand Chamber.

A valid argument could be made that the Grand Chamber is justified in its stance. First, Metin Birdal was accused of membership in the PKK (Kurdistan Workers' Party). While one might hold a political view that aligns with the PKK's aims, it is universally recognised that the PKK engages in armed struggle.
The Constitutional Court also emphasised this aspect of the case in the paragraphs cited below, which were not referenced in the Court's judgment. Additionally, the PKK has been designated a terrorist organisation by European states and the EU for many years. Thus, there is no credible basis for the argument that the applicant was unaware of the organisation's nature. Convictions for membership in a terrorist organization based on affiliations with **the PKK and the Gülen Movement represent two distinct cases**.

Moreover, while the Court references certain sections of the *Metin Birdal* decision regarding the principles of membership in a terrorist organisation (specifically §§ 60-72), it becomes evident in subsequent paragraphs that Birdal's case bears no relevance to the applicant's situation. The Court neglects to mention critical parts of the *Metin Birdal* judgment, particularly §§ 74, 75 and 79, which are essential for understanding the differences between the cases of the applicant and Metin Birdal.

> 74. The PKK, of which the applicant was sentenced for being a member, is a terrorist organisation which has been **perpetrating acts of violence that have caused the deaths of many civilians and security forces** throughout the country, particularly in the eastern and south-eastern regions of the country, **for nearly forty years.** The PKK has been and continues to be active at the time of the events subject to the application. In some of the terrorist incidents committed by the PKK terrorist organisation in Doğubayazıt district of Ağrı on 5/8/2010, 26/10/2011, 11/11/2011, 30/4/2012 and 31/5/2012, **members of the terrorist organisation as well as security forces were killed and injured**. It is understood that Doğubayazıt district, where the events subject to the application took place, has been a region where the activities of the PKK terrorist organisation have been concentrated for a long time. As a matter of fact, even on more recent dates such as 31/1/2018, 12/3/2018, 14/4/2018 and 20/5/2018, fatal terrorist incidents were reported in Doğubeyazıt district. Therefore, it must be accepted that the fight against terrorism in the said region is of a highly sensitive nature and that the units fighting against terrorism have a wider discretionary authority in the same direction.
> 75. In the concrete case, an **investigation was initiated** against the applicant and some other persons **on the grounds that they had organised violent incidents** at demonstrations in line with the instructions of the PKK terrorist organisation and the applicant was followed by the security forces. The Court found from the visual recordings obtained from the press statement dated 10/8/2010 that the applicant was present at the place where the explosives used in the demonstration, which later turned violent, were prepared and that he and his friends warned each other. The Court also emphasised that the applicant had changed his clothes with a friend in order to avoid being caught by the security forces. Consequently, the Court concluded that the applicant had been one of the organisers of the violence that took place on that date.
> (…)
> 79. On the other hand, the court of first instance did not reach the conclusion that the applicant was a member of a terrorist organisation solely on the basis of his participation in the aforementioned demonstrations. The Court concluded that **the applicant was a member of** the said organisation when it evaluated the police reports on the formation of an action group called **'Self-Defence Units'** in the Doğubayazıt district where the events took place in line with the instructions of the PKK terrorist organisation (see § 17), the denunciations made against the applicant and other defendants and the applicant's actions together (see § 19). § The court also relied on the telephone conversation between the applicant and another person about shooting

> up a police station, the nature and frequency of the relationship and communication between the applicant and the other defendants, all of whom had been convicted for membership of a terrorist organisation and some of whom had apparently fled to join the rural part of the organisation (see § 19). The Court of First Instance also took into account the fact that the applicant had observed a minute's silence for a deceased member of a terrorist organisation, had participated in a demonstration in which slogans in favour of the leader of the terrorist organisation had been chanted, including 'Long live President Apo', and had chanted 'Revenge, Revenge' at one of the demonstrations (see § 19).

When duly examined, it becomes clear that there is no parallelism between Şaban Yasak and Metin Birdal. If we reference *Metin Birdal* as a precedent for anyone who is not involved in terrorist acts but nonetheless faces charges, it sets a troubling precedent. Under such logic, no individual would be exempt from terrorism charges if they are in any way linked to the organisation in question.

As mentioned above, cases involving the PKK and those associated with the Gülen Movement are not comparable. If one wishes to draw a comparison, the judgment in *Ragıp Zarakolu* may be more appropriate, as it addresses activities that could be more closely aligned with those attributed to the applicant. In that case, the Court found a violation of Article 5 § 1 of the Convention. Paragraph 45 of that judgment illustrates the Court's approach to the case:

> 45. Le Gouvernement argue que la privation de liberté subie par le requérant était conforme à l'article 5 § 1 de la Convention puisque l'intéressé était en relation avec l'académie politique du parti en question, dont certains membres et dirigeants auraient été notoirement liés à l'organisation terroriste en question. (…) L'allégation selon laquelle le BDP ou certains membres de son académie politique auraient fait partie d'une organisation illégale ne peut être considérée comme suffisante pour persuader un observateur objectif que le requérant pouvait avoir commis une infraction liée au terrorisme. En l'absence de faits, d'informations ou de preuves solides, les éléments cités par le Gouvernement ne démontrent nullement que le requérant se soit livré à une activité délictuelle. Au contraire, ils révèlent, de l'avis de la Cour, que les faits reprochés à l'intéressé étaient liés à l'exercice par celui-ci des droits garantis par la Convention, notamment par les articles 10 et 11. (Ragıp Zarakolu v. Turkey, App. No : 15064/12, 15 Septembre 2020)

ASSEDEL believes that the Chamber's shift in the selection of relevant case law is inappropriate and contradicts the examination and analysis conducted by the Grand Chamber in *Yalçınkaya*.

C. Merits of the Case (Unforeseeable conviction for legal acts, no basis for labeling the Gülen Movement as terrorist at the material time, and failure to establish material and mental elements or specific intent):

Merits of the Case: Unforeseeable Conviction for Legal Acts, Lack of Evidence Labeling the Gülen Movement as Terrorist, and Failure to Establish Material and Mental Elements or Specific Intent"

In the *Yasak* judgment, the Chamber accepts that an individual who is deeply involved with the Gülen Movement could have foreseen potential terrorism charges despite not engaging in any criminal activity; this suggestion is fundamentally flawed on several grounds.

The Gülen Movement and Turkey's ruling party were widely perceived to be in an alliance during the first decade of the AKP's rule, with the Movement's activities in the education sector gaining broad acceptance and appreciation across Turkish society. However, this partnership collapsed amid the Gezi protests of 2013 and the corruption scandal of December 17-25, 2013, which implicated then-Prime Minister Erdoğan's close associates and family members. In response, the Turkish government launched a harsh crackdown on dissenting media, especially those aligned with the Gülen Movement, to suppress negative coverage.

This crackdown on the media was accompanied by pressure on the judiciary. Since December 2014, the government enacted various legal amendments affecting the composition of the High Judicial Council. Just hours after the controversial coup attempt on July 15, 2016, the Judicial Council convened to suspend 2,745 judges and prosecutors—individuals who had undoubtedly been blacklisted beforehand, even before those responsible for the coup were officially identified. During the state of emergency, one-third of the judiciary was expelled from the profession. Following the 2017 constitutional amendments, it became virtually impossible to speak of an independent judiciary in Turkey.

In this atmosphere—where any critical voice is swiftly silenced, dissenting media outlets have been shuttered, opposition leaders and politicians detained, and the judiciary has been aligned with the government—the judiciary has effectively endorsed the government's narrative regarding the coup attempt and the Gülen Movement. Any other stance was practically unfeasible.

i. The "D-Day" of the criminalisation of the Gülen Movement:

The National Security Council of Turkey first designated the Gülen Movement as a terrorist organisation in May 2016 (Yalçınkaya, § 251). However, in all democratic countries, particularly in Europe, the Gülen Movement is not recognised as a terrorist organisation and continues its activities as before, even after July 15, 2016. The Movement is believed to have millions of followers concentrated in the education sector and across various levels of society, including hundreds of thousands of public servants and thousands of bureaucrats. Approximately one-third of the judiciary, a significant number of security bureaucrats, and the vast majority of staff officers in the Army have been dismissed from public service without any concrete evidence under the pretext of their alleged links with the Movement. Additionally, the

assets of many wealthy businessmen have been seized, and hundreds of journalists have been imprisoned. The most widely circulated daily newspaper has been shut down, and many media outlets have been taken over. A common trait among those purged and followers of the Gülen Movement across all sectors—particularly in education—is their professional success, coupled with the fact that none of them had any prior criminal records.

No one in the world can accept that millions of law-abiding citizens suddenly become terrorists overnight. Therefore, when analysing the crime of membership in a terrorist organisation, it is essential to thoroughly examine the context surrounding membership in the Gülen Movement.

It can be considered that the first act of violence attributed to the Gülen Movement, which could legitimise its designation as a terrorist organisation, is the coup attempt on July 15, 2016, if it has been fully proven through impartial and fair trials by independent judicial bodies that the coup attempt was organised, planned, and carried out by the hierarchy, management, and members of the Movement. This has not been made so far. Also, numerous statements from high-ranking politicians and members of the judiciary indicate that the Gülen Movement was not considered a terrorist organisation prior to the coup attempt.

Thus, ASSEDEL holds the view that activities indicating a relationship with, or membership in, the Gülen Movement prior to the coup attempt should be regarded as legal and protected by the presumption of legality.

In *Yalçınkaya,* the Court established that "the FETÖ/PDY, which was formerly known as the "Gülen movement" or the "Gülen community" (cemaat) internationally, **was largely perceived as a religious group** since its inception in the 1960s (*Yalçınkaya*, § 18).

The Commissioner for Human Rights, Mr. Nils Muižnieks, highlighted this issue in a memorandum (CommDH(2016)35) published two months after the coup attempt. Key sections of the memorandum are as follows:

> 20. Nevertheless, the Commissioner must also take note of the fact that this organisation's **readiness to use violence**, a *sine qua non* component of the definition of terrorism, **had not become apparent to Turkish society at large until the coup attempt**. Furthermore, it **has not yet been recognised as a terrorist organisation** in a final judgment of the Turkish Court of Cassation which, according to the Turkish authorities, is a crucial legal act in the Turkish legal system when it comes to the designation of an organisation as terrorist. Despite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah Gülen movement appears to have **developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business.** It is also **beyond doubt that** many organisations affiliated to this movement, which were closed after 15 July, were open and **legally operating** until that date. There seems to be general agreement that it would be **rare for a Turkish citizen never to have had any contact or dealings with this movement** in one way or another.
>
> 21. The Commissioner stresses that these considerations do not address the nature or motivations of FETÖ/PDY itself, but point to the need, when criminalising membership and support of this organisation, to distinguish between persons who engaged in illegal activities and those who were sympathisers or supporters of, or members of legally established entities affiliated with the movement, **without being aware of its readiness to engage in violence**. (…)

> 22. **The Commissioner therefore urges the authorities to dispel these fears by communicating very clearly that mere membership or contacts with a legally established and operating organisation, even if it was affiliated with the Fethullah Gülen movement, is not sufficient to establish criminal liability and to ensure that charges for terrorism are not applied retroactively to actions which would have been legal before 15 July.**

On 21 March 2011, Bekir Bozdağ, who served as Deputy Prime Minister from 2011 to 2013 and 2017 to 2018, as well as Justice Minister from 2013 to 2017 and 2022 to 2023 in Turkey, addressed allegations against the Gülen Movement in Parliament. In his remarks, he responded to concerns raised about the same allegations on the Movement as: [3]

> Fethullah Gülen is a valuable asset raised in this country; you like him, You may not like him, but he is a valuable person, a wise person, he is doing his service for the upbringing of generations that are loyal to the national and spiritual values of this country; everything is open, open under the supervision and control of the state, everything is in front of your eyes... When you look at the services provided, you can see that there is no case against him.
> If you accuse someone of being a 'gang' without a prosecutor's claim or a conviction, you do him a great injustice. He himself is not here, but it is unacceptable to accuse clean people of being a 'gang', while those who are being investigated and prosecuted with the allegation of gangs, those who are being investigated and prosecuted with the allegation of gangs, those who are being investigated and prosecuted with the allegation of striking a blow to democracy, are making efforts to bring them to the Parliament to become MPs.

During a meeting in Trabzon on 24 March 2014, then-Prime Minister Recep Tayyip Erdoğan addressed the concerns surrounding the Gülen Movement. His remarks provided clarity on the government's stance regarding the Movement and its activities:

> "They came to found seventeen universities; I approved them all. They asked for land for their schools, we granted it. They invited us [to their meetings in] the international community, and we presented them to heads of states or governments. They mentioned a Turkish Language Olympics, we provided all sorts of support."[4]

Following the attempted coup in 2016, President Recep Tayyip Erdoğan stated that:

> "I am in pain for not having previously exposed this organisation's real face. May Allah and my nation forgive me."[5].

These statements are only a few examples that the Gülen Movement was regarded as a lawful and legitimate organisation at that time. Therefore, the classification of the Gülen Movement as a terrorist organization was not based on any substantiated activities or accusations of covert operations. Instead, this designation appears to be purely political.

However, if a member of the Movement has tangible links to the coup attempt or the coup plotters through meaningful connections, their prosecution and conviction for membership in a terrorist organisation would be deemed foreseeable. This is why, in *Yalçınkaya*, the Court left open the possibility of a different verdict regarding the nature of the FETÖ/PDY based on subsequent developments (*Yalçınkaya*, § 253).

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[3] https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d23/c097/tbmm23097082.pdf

[4] https://www.hurriyet.com.tr/gundem/erdogan-trabzonda-konustu-26075452

[5] https://www.ntv.com.tr/turkiye/rabbim-de-milletim-de-bizi-affetsin,a-10dDB6SEucoS9ZT8sSmQ

The paragraph 263 in *Yalçınkaya* is of utmost significance:

> "The Court points in this connection to the absence of any meaningful explanation in the relevant domestic court judgments as to certain matters that went to the essence of the offence, such as how the mere use of ByLock, irrespective of what that use had actually entailed, led directly to the conclusion that the **applicant knew that the FETÖ/PDY harboured terrorist aims that it intended to achieve by the use of force and violence**, or that he had submitted himself to the will of the FETÖ/PDY, **possessed the specific intent for the realisation of its purposes**, and participated in its activities as a part of its hierarchy, or made any other concrete material or mental contribution to the organisation's actual existence or reinforcement, as required under national law. (*Yalçınkaya*, § 263).

The Court's findings in the ***Parmak and Bakır*** judgment are also highly relevant for examining the case of the applicant, who faced conviction for his actions within a group that was not designated as a terrorist organisation at the time of the alleged acts.

The Court highlighted in this case that:

> 71. (…) Nevertheless, the Court finds relevant the case-law of the Court of Cassation that, where domestic courts are confronted with the **assessing for the first time whether an organisation can be classified as terrorist**, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and **whether it has resorted to violence or a credible threat to use violence** in pursuing that action plan. **(**Parmak and Bakır v. Turkey, App. nos. 22429/07 and 25195/07, 3 december 2019)

Thus, for the conviction of a follower of the Gülen Movement for membership in a terrorist organisation, **it must be established that the individual was aware of the terrorist aims**.

According to ASSEDEL's understanding, even the official narrative surrounding the coup attempt is quite controversial. This is evident in the fact that the National Assembly's report on the coup attempt was neither discussed nor publicised, effectively making it disappear from public discourse[6]. The vast majority of the accused soldiers, with the exception of a few high-ranking officers within the Chief of Staff, claimed that they had no knowledge of the coup attempt. Therefore, the involvement of the so-called Gülenist soldiers in the coup attempt, as well as the extent of that involvement, remains an unanswered question.

Following the assessment in *Yalçınkaya*, in *Yasak,* the Court acknowledges that the **Gülen Movement had not yet been formally designated,** as required under domestic law, **as an armed terrorist** organisation when the applicant carried out the various acts attributed to him. However, as in *Yalçınkaya,* the Court does not consider this fact sufficient on its own to render the applicant's conviction incompatible with Article 7 of the Convention.

Nevertheless, ASSEDEL considers that this fact carries significance in examining the *mens rea* and the element of 'special intent' when determining compliance with Article 7. Furthermore, as referred to in *Yalçınkaya,* the Court emphasised this fact in the ***Yasin Özdemir*** **judgment**, where a violation of Article 10 was found.

In *Yasin Özdemir,* paragraph 40 of the judgment is particularly relevant:

[6] https://www.indyturk.com/node/532851/siyaset/tbmm-ba%C5%9Fkanl%C4%B1%C4%9F%C4%B1-fet%C3%B6n%C3%BCn-darbe-giri%C5%9Fimini-ara%C5%9Ft%C4%B1rma-komisyonu-raporu-bize

> 40. La Cour relève également qu'il n'existait, à l'époque des faits, aucune condamnation définitive des adhérents du mouvement fetullahiste pour être dirigeants ou membres d'une organisation illégale ou terroriste, même si le groupe était considéré comme dangereux par certains organes de l'exécutif. En effet, la question de savoir si le mouvement était une communauté à caractère éducatif et religieux ou s'il s'agissait d'une organisation visant à l'infiltration illégale dans les organes de l'État faisait l'objet de vifs débats dans l'opinion publique en avril 2015, époque où le requérant a posté les commentaires en cause (*Yasin Özdemir v. Turkey*, App. No : 14606/18, 7 December 2021).

In *Yalçınkaya*, the Court explains why the fact that the Gülen Movement was not declared as a terrorist organisation is not sufficient to reach a conclusion that there is a violation of Article 7, as follows:

> 253. (…) the Court can accept that F. Gülen's earlier acquittal of the charge of founding an armed terrorist organisation did not per se exclude the possibility of a different verdict regarding the nature of the FETÖ/PDY at a later time on the basis of subsequent developments.

Thus, the Court does not wish to preclude the possibility of a future case where the conviction of an applicant may be deemed foreseeable, even if the accused has committed acts related to the coup attempt but carried them out before it occurred.

ASSEDEL asserts that this possibility should be applied only in limited circumstances, specifically for those individuals who clearly possess knowledge of or involvement in terrorist acts.

However, in *Yasak*, the Court did not refer to the last phrase of paragraph 253 of *Yalçınkaya*, which establishes the reasoning that the non-recognition of the Gülen Movement as a terrorist organisation does not automatically acquit all activities occurring within it. The Chamber seems to downplay the significance of the fact that the Gülen Movement was not designated as a terrorist organisation at the time the acts attributed to the applicant were committed.

ASSEDEL suggests that this aspect warrants special emphasis, particularly concerning the examination of *mens rea*. We will explore this further below.

In the view of the foregoing, ASSEDEL considers that all acts conducted within the Gülen Movement before the coup attempt should be presumed legal, and the contrary should be proven on a case-by-case basis by demonstrating in each case the material and mental elements of the offense of being a member of a terrorist organisation are fully met.

ii. Prosecution's criteria for terrorist organisation are not met for the Gülen Movement:

In § 25 of *Yasak*, the Court first summarises how the prosecution evaluates the Gülen Movement and its general criminal liability. The prosecution accuses the Gülen Movement of misusing religion to achieve its secular goals, following its leader's directives to establish a new political, social, and economic order. The Movement allegedly employs code names, special communication channels, and undisclosed financial sources, operating with significant discretion to infiltrate and take over all constitutional institutions.

First and foremost, it should be noted that neither the indictment nor the reasoned judgment reveals the investigative sources behind their narratives concerning the Gülen Movement.

In fact, even if we assume that these narratives were based on investigations conducted by the prosecutor, this paradigm does not illustrate any terrorist or other criminal activity. The prosecution also shares this perspective, stating that *"the organisation's aim was not to come to power by **legitimate means**, but to overthrow parliament, the government and other constitutional institutions by using force and violence: (..) (le but de l'organisation était non pas de parvenir au pouvoir par des moyens légitimes mais de renverser le Parlement, le gouvernement et les autres institutions constitutionnelles en faisant usage de la force et de la violence (..)*) ».

Hence, even the prosecution highlights that the activities attributed to the Gülen Movement were 'legitimate', except for the attempted coup.

The prosecutor enumerates three elements had to be present for a structure to be classified as a 'terrorist organisation': (i) an ideology or aim (ii) an organised structure and (iii) the use of force and violence by the structure to achieve its aims (§ 29).

However, the Gülen Movement has been declared a terrorist organization by the government, and the role of the judicial authorities has been limited to substantiating this assumption. Consequently, in FETÖ/PDY trials, the application of well-established Turkish case law becomes unreasonable due to the abuse of anti-terror laws.

Thus, regarding the three elements suggested by the prosecution, none of these elements is demonstrated for the Gülen Movement.

First, there is no evidence that Gülenist ideology promotes terrorism; in fact, the reality is quite the opposite. This movement has been generally criticized and even accused of apostasy by radical Islamists for its modern, peaceful Islamic perspective and its promotion of interfaith dialogue. Numerous academic sources are available on this topic, yet the judgment fails to reference them, relying instead on the narratives of the Turkish government.

Second, while the Gülen Movement may possess an intellectual or spiritual framework, there is no evidence to suggest that its members or followers have the concrete organisational ties necessary to classify it as a criminal organisation. Followers may choose to associate with the movement, and if they are dissatisfied, they can simply leave. For a social group with millions of followers, any negative information regarding organizational bonds should be known to the public, and the government should have acknowledged it.

The third element, the use of violence, is solely evidenced by the coup attempt. However, to our knowledge, there is no concrete or conclusive evidence establishing a meaningful link between Mr. Gülen or any of his followers and involvement in the coup attempt beyond a reasonable doubt. Even if future evidence emerges implicating certain individuals connected to the Gülen Movement, those individuals would be held accountable. However, this situation should not reflect on other followers of the group who have not engaged in any criminal activities.

iii. No significant distinction between Mr. Yalçınkaya and Mr. Yasak:

In *Yasak,* the Court diverges from its approach in *Yalçınkaya* by emphasising that Mr. Yasak was convicted of membership in an armed terrorist organisation for acts committed between 2011 and 2014, based on a wide array of evidence (§ 150).
The Court presents a variety of accusations based on witness statements. However, upon closer analysis, it becomes evident that the main and only activity attributed to the applicant is his role as a regional student coordinator. His duties primarily involved supporting the psychological, mental, and ethical development of young boys within the framework of a religious community. **There is no allegation against him involving any criminal activity**. This will be elaborated further in the section on the *actus reus* of the crime in our analysis.

Thus, the applicant is a law-abiding citizen who allegedly participated in the educational activities of the Gülen Movement—an initiative widely appreciated even by supporters of the AKP.

In comparison, Mr. Yalçınkaya was a teacher dismissed from public service by Legislative Decree No. 672 and was convicted based on allegations such as holding an account at Bank Asya, membership in two associations, and, notably, the use of the ByLock application.

Turkish judicial authorities treated the ByLock app as dogmatic and irrefutable evidence of membership in the Gülen Movement and, consequently, a terrorist organisation. However, the Court refuted this baseless criminalisation paradigm in *Yalçınkaya*. It concluded that no criminal act was attributed to the applicant that could establish the legal elements required for the offence of membership in a terrorist organisation.

ASSEDEL believes that, in the eyes of a neutral observer, there is no meaningful difference between the two applicants, as neither engaged in any criminal or illegal activity. Therefore, the distinction drawn by the Court in *Yasak* is erroneous, and the judgment's foundation is fundamentally off on the wrong foot. There is **no reasonable justification for departing from the outcome of the *Yalçınkaya* judgment**. However, had there been genuine activities demonstrating the accused's knowledge of terrorist activities, a legitimate basis for distinguishing the case from *Yalçınkaya* would exist.

iv. Shortcomings of domestic decisions identified in *Yalçınkaya* :

In the *Yasak* judgment, the Court summarised the *Yalçınkaya* case as one in which the conviction for membership of an armed terrorist organisation was based decisively on the use of the ByLock app, without individual establishment of the material elements and the mental element *([§ 150] la condamnation de M. Yalçınkaya pour appartenance à une organisation terroriste armée reposant dans une mesure déterminante sur l'utilisation de l'application de messagerie cryptée ByLock, sans établissement individualisé des éléments matériels et de l'élément moral constitutifs de l'infraction prévue à l'article 314 § 2 du CP*).

ASSEDEL considers that the Chamber's brief, one-phrase summary of the *Yalçınkaya* judgment does not accurately reflect the core essence of that ruling. The primary criticism in *Yalçınkaya* was not simply the lack of individualised establishment of the offence's elements, but rather the failure to properly establish both the *actus reus* and *mens rea* necessary for the conviction. By

condensing *Yalçınkaya* into a such single phrase, the Chamber potentially obscures the deeper implications of the judgment.

The consequence of the violation of Article 7 in *Yalçınkaya* is clear: it should ultimately lead to the applicant's acquittal. In *Yalçınkaya* the Court scrutinised all the evidence presented against the applicant and determined that his conviction was unforeseeable, given that the activities cited as evidence did not reasonably support the offense. The criticism was not merely focused on the failure to individualise the crime but on the fact that the conviction was imposed without establishing the material and mental elements of the offence. Thus, the Chamber's summary in *Yasak* risks diluting the substantial findings of *Yalçınkaya.*

In *Yalçınkaya*, the Court scrutinised the applicant's conviction for membership in a terrorist organisation, which primarily relied on ByLock evidence, through the lens of the established case-law of the Turkish Court of Cassation. The Court made referenced to relevant domestic case-law concerning the offence of membership in an armed terrorist organisation, particularly in paragraphs 248 and 260, noting:

> 248. The Court of Cassation has further clarified that conviction for membership of an armed terrorist organisation follows only where the accused's organic link with the armed organisation is established, based on the **continuity, diversity and intensity** of his or her activities, and **where it is demonstrated that he or she acted knowingly and willingly within the organisation's hierarchical structure and embraced its objectives**.
>
> It has moreover specified the mental element of the offence as being **"direct intent and the aim or objective of committing a crime".** It therefore follows that a person taking part in an organisation has to know that it is one that **commits, or aims to commit, crimes** (ibid.), and has to **possess a specific intent for the realisation of that purpose** (see paragraph 83 above). Although the commission of an actual crime in connection with the organisation's activities and for the achievement of its aims is not required to establish the offence of membership of an armed terrorist organisation, the individual must nevertheless have made a concrete material or mental contribution to the organisation's actual existence or reinforcement.
>
> 260. The Court also notes, however, that the act that is penalised under Article 314 § 2 of the Criminal Code in question is **not mere connection with an allegedly criminal network, but membership of an armed terrorist organisation,** to the extent that such membership is established **on the basis of the constituent – objective and subjective** – elements set out in the law as noted in detail in paragraphs 245-248 above, and as confirmed in the Constitutional Court's judgment in the Adnan Şen case (see paragraphs 184-187 above). Accordingly, and as pointed out by the Ankara Regional Appeal Court (see paragraph 83 above), only persons whose position within a terrorist organisation had reached a level warranting their consideration as a "member" of that organisation could be convicted under Article 314 § 2. It therefore falls to the Court to verify whether the relevant constituent elements, and in particular the subjective, or mental, element, were duly established in the applicant's respect, in keeping with the requirements of the applicable law, and whether the assessment by the domestic courts of these constituent elements in the applicant's case represented a foreseeable, and not an expansive, interpretation and application of the said criminal provision (see, for a similar examination, Korbely, cited above, §§ 84 and 85, and Navalnyye, cited above, §§ 59-69).

However, even in contradiction to its own well-established case law, in FETÖ/PDT trials, the Turkish judiciary tends to focus on seeking evidence that indicates an **individual's membership in the Gülen Movement**, rather than offering a reasonable explanation regarding the **criminal aspects of the activities** attributed to them.

The Turkish judiciary's understanding of the ByLock application and its criminal implications concerning membership in the Gülen Movement—and consequently, in a terrorist organisation—is succinctly summarised in *Yalçınkaya* as follows:

> 232. The Government referred in this connection to the domestic courts' reasons for finding why the use of the ByLock application was considered to meet all the constituent requirements of the offence of membership of an armed terrorist organisation, such as continuity, diversity, intensity and hierarchical link, irrespective of the content of the exchanges made over that application. The Government stressed that in case of secretive terrorist organisations, retrieving the contents of the messages in relation to individual users and establishing the context in which they were exchanged were often impossible because of the secure forms of the communications used; yet the **judicial authorities had nevertheless duly established that ByLock was used exclusively by the executives and members of the terrorist organisation and had been developed by the FETÖ/PDY for secret intra-organisational communication**. They explained that as an **organisation based on secrecy**, the FETÖ/PDY favoured face-to-face communication; however, where that was not possible, **the organisation chose to conduct its communication via encrypted means**. The friends' groups established in ByLock demonstrated the existence of a hierarchical structure and cell-type organisation, which were features of terrorist organisations. Based on those findings, the Government – while confirming at the hearing that the technical means by which the applicant had acquired the ByLock application were unknown to them – stated that it was not possible for a person who had no link to the organisation to download and use the ByLock application, and that **ByLock users were already aware of the illegal purposes of the organisation, wanted those to be achieved and participated in organisational activities to that end**. According to the Government, if a person had downloaded that application, which had been developed by the organisation and exclusively used by its members, and used it despite all technical difficulties, that showed that such a person fully submitted to the will of the organisation and adhered to its hierarchy. **The mental element of the crime had, therefore, materialised in the applicant's case, who had established organisational communication with the members of the FETÖ/PDY via ByLock in line with the instructions of the organisational hierarchy, without ever calling into question those instructions**.

However, in *Yalçınkaya*, the Court criticised the assessment of the local courts as follows:

> 264. The interpretation adopted by the domestic courts rather seems to presuppose the very conclusions to which it purports to lead, in that it treats them as flowing automatically from the mere use of ByLock. In so doing, it **effectively imputes criminal responsibility to a user of that application without establishing that all the requirements of membership of an armed terrorist organisation (including the necessary intent) have been fulfilled.** In the Court's view, this is not only incompatible with the essence of the offence in question, which requires proof of an organic link based on continuity, diversity and intensity and the presence of a very specific mental element, but is also irreconcilable with the right of an individual, under Article 7 of the Convention, not to be punished without the existence of a mental link through which an element of personal liability may be established (see G.I.E.M. S.r.l. and Others, cited above, §§ 242 and 244).

In *Yalçınkaya*, the Court found that there was a "presumption of guilt" associated with the use of the ByLock app, particularly when this app was treated as conclusive evidence of an individual's membership in the Gülen Movement (§ 268). The Court found a violation of Article 7 in the following manner:

> 271. (…) The offence of membership of an armed terrorist organisation under Turkish law was at the material time, and still remains, **an offence of specific intent**. The presence of some specific subjective elements is therefore a *conditio sine qua non*. Despite that, the finding by the

domestic courts, through expansive interpretation of the applicable provisions of the Criminal Code and the Prevention of Terrorism Act, that the use of ByLock denoted membership of an armed terrorist organisation, **without seeking to establish the presence in the applicant's specific case of the knowledge and intent required under the legal definition** of the crime in domestic law, effectively **attached objective liability** to the use of ByLock. The Court is of the view that this **expansive and unforeseeable interpretation** of the law by the domestic courts had the effect of **setting aside the constituent – notably the mental – elements of the offence** and treating it as akin to an offence of strict liability, thereby departing from the requirements clearly laid down in domestic law. The scope of the offence was, therefore, extended to the detriment of the applicant in an unforeseeable manner, contrary to the object and purpose of Article 7.

v. *Actus reus* of the crime: Conviction merely for using a pseudonym and mentoring students

In paragraph 162 of *Yasak "the Court notes first of all that, the Assize Court held, in a judgment with extensive reasons in fact and in law, that the applicant had deliberately joined the organisation in question and had pursued covert activities (activités occultes) in the course of his duties within the organisation's secret structure, and that it deduced from this that these acts were punishable under Article 314 § 2 of the Criminal Code."*

In the subsequent paragraph, § 163, the Court further *"notes that the person concerned was found guilty of the acts of which he was accused, namely of having, at least during the period between 2011 and 2014, carried out **unlawful activities within the secret structure** of the organisation in question (mené des activités illicites au sein de la structure secrète de l'organisation en question)."*

As previously noted in our analysis of the facts, **the Assize Court does not discuss the alleged secret structure of the organisation**, **nor does it classify the applicant's activities as covert or unlawful.** Furthermore, the narratives presented in the Assize Court's reasoned judgment are not based on any investigative reports or credible sources. In fact, the domestic Court's narrative about the Movement even differs from the prosecutor's indictment, which itself lacked any investigative foundation.

In FETÖ/PDY trials, the Turkish judiciary fails to analyse the legality of the activities attributed to the accused individuals. On the contrary, the overwhelming majority of these activities are regarded as evidence that benefits from the 'presumption of legality'.

The Assize Court did not qualify the activities of the applicant as covert or illegal but only as indications of membership in the Gülen Movement. In *Yalçınkaya*, and in most cases, the central piece of evidence is the use of ByLock. In *Yasak*, in the absence of this "strong" evidence, the indication was the applicant's role as a student coordinator. In other cases, this significant indication may be some other evidence that is, in fact, nothing more than an ordinary activity.

In paragraph 163, there are only two elements attributed to the applicant: using a code name and serving as the principal regional coordinator for students.

In paragraph 164, the Court observes that it is clear these acts did not benefit from the presumption of legality at the time they were performed, nor did they fall within the applicant's exercise of the rights guaranteed by the Convention. This assumption is deeply flawed, and if read textually, one could even suggest that the Court is undermining the exercise of rights protected by the Convention, which it is obliged to protect and interpret.

The Court seems to have accepted the Gülen Movement as an obscure community, and on every occasion in the judgment, it directly identifies it as a covert or secret organisation. In reality, the Movement is widely known, and it is highly unlikely that any young person with religious sensitivity in Turkey has not encountered it.

In this regard, the *Yalçınkaya* judgment emphasised *"the need to establish the presence of the elements of the relevant offence on an individual basis was all the more compelling in the present context,* ***given the organisation's pervasive presence in all sectors of Turkish society*** *for a considerable period of time, as noted by the domestic judicial authorities."* (*Yalçınkaya*, § 266)

As mentioned earlier, the views expressed by the Commissioner for Human Rights in his memorandum on this matter are particularly significant:

> 20. (…) this organisation's **readiness to use violence**, a *sine qua non* component of the definition of terrorism, **had not become apparent to Turkish society at large until the coup attempt.** (…) the Fethullah Gülen movement appears to have **developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business.** It is also **beyond doubt that** many organisations affiliated to this movement, which were closed after 15 July, were open and **legally operating** until that date. There seems to be general agreement that it would be **rare for a Turkish citizen never to have had any contact or dealings with this movement** in one way or another.

Hence, qualifying the Gülen Movement as a covert organisation to such an extent that any sincere follower should be considered as willingly and knowingly participating in its **alleged secrecy is an extreme and erroneous conclusion**.

However, the Movement has been accused of infiltrating the military, judiciary, and bureaucracy. When criticisms of the Gülen Movement's "secrecy" are made, they should primarily refer to the alleged "mahrem hizmetler (private services)" (see, § 164, *Yalçınkaya*).

The applicant was not accused of the 'private' or 'secret' activities of the Gülen Movement. For instance, the activities of the witness Y.B., who gave statements under the effective remorse provisions described in paragraph 8, or the activities of witnesses detailed in paragraph 47, whose statements were added to the file after the conviction, may be evaluated—if accurate—as part of the Movement's 'secret' aspect.

The Court elaborates on these 'secret' activities through witness statements, particularly in paragraphs 8, 10, and 47 of the judgment. However, when these statements are carefully examined, and as demonstrated in our analysis of the facts (see our observations above), **none of the activities that could be classified as 'secret' have been attributed to the applicant.**

The residences where students following Fethullah Gülen's religious teachings have stayed have been well-known to the state's security mechanisms for over 40 years. As a civil society organisation, it was natural for them to have certain individuals overseeing activities within the organization. The court has completely disregarded the social reality in Turkey, where various religious and ideological organizations, including the Gülen Movement, have operated in full liberty.

If the Court's conclusion were correct, how can we overlook the responsibility of law enforcement agencies? There is an organisation spread throughout the country, with individuals operating as representatives of the Gülen Movement in each district, allegedly engaged in secret and criminal activities. Yet none of these individuals have been subjected to criminal investigations. Unfortunately, this is nothing more than an affront to reason.

In the communication letter of this case, the Court, asked the government *"to provide information as to the position and the responsibilities of a student coordinator ("bölge talebe mesulü", "büyük bölge talebe mesulü" or "İlci") in the structure of FETÖ/PDY and to explain, in particular, what organisational aim the activities undertaken by such coordinators served. The Government are further requested to indicate whether there is any information in the case file as to the time frame of the applicant's responsibility as a student coordinator, and whether any organisational activities had been discovered after that period."*[7]

The government provided some explanations regarding these activities in § 422 of its observations. However, the Court does not reference these explanations or definitions anywhere in the judgment and fails to analyse the criminal aspects of these activities.

Thus, the Court, through its unproper examination, appears to engage in a form of guilt by association against the applicant.

Furthermore, the Court appears to place undue emphasis on the use of 'code names'. In reality, the term **'code name'** as referred to in the judgment is more accurately understood as the use of **pseudonyms** ('müstear isim') within the Movement and Turkish society at large. The Court seems to lack a nuanced understanding of religious communities and the complexities of Turkish political history. Religious individuals, including followers of the Gülen Movement, have historically faced discrimination in Turkey, particularly prior to the AKP era, when they were often excluded from public service through intelligence-led background checks. For instance, during the 28 February process, thousands of devout soldiers were dismissed from their positions. The use of pseudonyms in this context served as a protective measure against infiltration and surveillance by intelligence agencies—a common practice in many civil society organisations. **Anonymity** and the use of **pseudonyms** are also widely **accepted as part of privacy** in modern life and are **safeguarded by the Convention,** especially in a world where surveillance techniques have become increasingly sophisticated. Moreover, in religious communities, followers often adopt new religious names, a phenomenon that should be explored through sociological analysis.

It is noteworthy that, according to the Turkish official narrative, *"Bylock application **was used exclusively by the executives and members** of the terrorist organisation and had been developed by the FETÖ/PDY for secret intra-organisational communication. They explained*

[7] https://hudoc.echr.coe.int/?i=001-208744

*that as an **organisation based on secrecy**, the FETÖ/PDY favoured face-to-face communication; however, where that was not possible, the organisation chose to conduct its communication via encrypted means."* Moreover, *"ByLock users were already aware of the illegal purposes of the organisation, wanted those to be achieved and participated in organisational activities to that end."* (§ 232, *Yalçınkaya*)

According to the government, the ByLock application was exclusively used by Gülenists. The Court also accepted that *"ByLock was not just any ordinary commercial messaging application, and that its use could prima facie suggest some kind of connection with the Gülen movement"* (§ 259, *Yalçınkaya*).

The Court also noted "the arguments regarding the sui generis nature of the FETÖ/PDY as an organisation operating in secrecy." However, the Court concluded that *"difficulties encountered by the State authorities in penetrating a communication tool allegedly used by an organisation designated as terrorist after use of that tool are not sufficient reason to attach criminal liability in a virtually automatic manner to those who previously used that tool, in disregard of the guarantees laid down in Article 7 of the Convention"* (§ 265, *Yalçınkaya*).

Thus, **the use of a special messaging tool, which was most likely used by the Gülenists to ensure secrecy within their ranks, is not, in itself, a sufficient argument for the Court to criminalise an individual for membership in a terrorist organisation.**

However, in Yasak, this **so-called secrecy** was employed by the Court as a fundamental argument to portray the same organisation as criminal.

Moreover, in *Yalçınkaya*, the Grand Chamber highlighted that *"the act that is penalised under Article 314 § 2 of the Criminal Code in question is not mere connection **with an allegedly criminal network, but membership of an armed terrorist organisation."*** (§ 260, *Yalçınkaya*)

Therefore, the Grand Chamber acknowledged the gravity of the crime of being a member of a terrorist organisation and underscored the need for caution when analysing the conformity of Turkish judicial practices with Article 7 of the Convention. Any incident or element that could potentially suggest some form of illegality should not, through an extremist interpretation, be automatically equated with terrorism. Such an interpretation should not be legitimised by the Court.

If the Court refers to the Gülen Movement as a covert organisation, and implies that the allegations of infiltration into the state through illegal operations, such as exam fraud, are valid, then its approach may be considered justified. However, the Court concludes as if all these allegations have been proven before independent and impartial courts, which is not the case in Turkey. Even if such allegations were substantiated, there is no evidence to suggest that the applicant was involved in these activities in any capacity.

When a social group or organization values **secrecy,** this characteristic **does not *per se* constitute** grounds for deeming the entity **criminal or illegal**. Many legitimate organisations, including religious, political, or cultural groups, may operate discreetly for various reasons, such as protecting members' privacy, shielding sensitive information, or avoiding discrimination and hostility in a politically volatile environment. The mere presence of secrecy does not indicate malicious intent or illegal activity.

Governments do have a legitimate interest in monitoring groups that exhibit clandestine behaviors, particularly when there are reasonable suspicions of unlawful conduct. However, such assessments must be conducted within the bounds of established legal principles and must be accompanied by robust safeguards to protect the rights to privacy and freedom of association.

Moreover, secrecy within a group should only be considered as one factor among many in evaluating its legality. Even if a legal authority acknowledges that an organisation operates discreetly, **such an observation may serve as an *obiter dictum*** rather than the main argument, or the sole argument, as it appears to be in this case. It is imperative that any designation of an organisation as illegal or criminal be based on substantive and verifiable evidence of unlawful conduct, rather than merely the level of secrecy it maintains. To label an organisation as such based solely on its secretive nature risks conflating legitimate civil society activities with criminal behavior and could have a chilling effect on the freedoms of expression, association, and religion.

In paragraph 164, the Court further states that *"the applicant was not accused of having carried out those activities within the framework of a lawful body which had acted in accordance with the law: it is established that the applicant's activities were aimed in particular at broadening the base of support which the organisation in question intended to recruit, particularly among students, and at infiltrating public institutions. Moreover, it must not be overlooked that the national courts have also established that the activities of the members of the organisation in question, such as those at issue in the present case, were carried out in secret with a view to achieving the organisation's objectives, and that the organisation had also resorted to unlawful actions such as intercepting university entrance or civil service examination papers for the benefit of its supporters (see paragraphs 37-40 above). Consequently, the Court is not convinced by the applicant's argument that he was convicted for lawful acts."*

The Court states that the applicant was not convicted for activities carried out within the framework of a lawful body that acted in accordance with the law.

This suggestion is highly erroneous. The applicant was allegedly a student coordinator, and his role primarily involved supporting the psychological, mental, and ethical development of students within the context of a religious community. If the Court accepts the criminalisation of such activities, it would undermine judicial security regarding the exercise of the rights to private life and the freedoms of religion, expression, and assembly. Therefore, **this activity should be protected under Articles 8, 9, 10, and 11 of the Convention.**

The Court asserts in this paragraph that the applicant's activities were part of the infiltration of public institutions. However, there is no single supporting evidence in the witness statements against the applicant to substantiate this claim. The Court again refers to the organisation resorting to unlawful actions, such as intercepting university entrance or civil service examination papers for the benefit of its supporters, citing paragraphs 37-40 of the judgment.

In those paragraphs, the Court summarises the motivations of the Assize Court, but these explanations consist of general narratives (which were not based on any investigative sources) regarding FETÖ/PDY. **None of these unlawful activities**, including the alleged infiltration of public institutions or the interception of university entrance and civil service examination papers, **were directed against the applicant**.

Furthermore, a careful reading of the witness statements reveals that the activities related to distributing exam booklets or preparing for public exams were not actions attributed to the applicant. Moreover, these witness statements including this information were not discussed at all at the trial of Yasak and submitted to the Court at the Court's proceedings by the Government.

If such accusations were attributed to an individual, the prosecution would typically draft additional counts of accusations and bills of indictment against the suspects. However, the case file contains no official accusations directed at the applicant or even against the witnesses.

In this context, in *Yasak,* the **Court appears** to reformulate and extend the Turkish judiciary's accusations against the applicant. It seems to be conducting a criminal proceeding as **if it were an appellate court, modifying the findings of the lower court at its own discretion, which constitutes a clear breach of its jurisdiction.** Even if the Court had the authority to engage in such adjudication, its examination would be profoundly unlawful, as it would convict the applicant for activities that the prosecution did not even accuse him of.

In the *Yasak* judgment, the Court appears to have accepted certain unsubstantiated rumors, concluding that the Gülen Movement possesses secretive and obscure aspects. While the Movement has millions of followers, it is unrealistic to claim that no individual within it has committed a criminal act. However, these allegations must be substantiated through objective investigations conducted by an independent judiciary, with those found guilty held accountable. The overwhelming majority of individuals associated with the Gülen Movement, who have no criminal records, should not be implicated in unlawful activities, as this violates the principle of individual criminal responsibility.

While some individuals may have committed crimes, millions of law-abiding followers and graduates from schools associated with the Gülen Movement have a **legitimate right to pursue public service positions**, as enshrined in Article 70 of the Turkish Constitution. This right is further **protected by Article 25 of the UN International Covenant on Civil and Political Rights** (ICCPR). Additionally, it is important to note that **no European country's** legislation or case law **recognizes "infiltration" as a criminal act,** including the Turkey's legislation.

Accusations of "infiltration" have been directed against the Gülen Movement in Turkey for the past four decades, but these claims appear to be little more than public derogatory rhetoric, especially considering Gülen's acquittal of such accusations in 2008.

The applicant was accused of serving as a student coordinator within the Gülen Movement. As suggested by the Court in this paragraph, individuals in such a position are expected to have sufficient means to carry out the alleged unlawful acts. However, while there are numerous witness statements concerning him, not a single one indicates that the applicant engaged in any such unlawful activities. This absence of evidence raises questions about the veracity of the rumors surrounding these alleged acts.

- ***Parmak and Bakır* judgment of the Court:**

The Court's findings in the *Parmak and Bakır* judgment are highly relevant for examining the case of the applicant, who faced conviction for his actions within a group that, in fact, displayed no criminal conduct.

In *Parmak and Bakır,* the Court found a violation of Article 7 where the applicants were convicted of being members of a terrorist organisation, namely the "Bolshevik Party" or the "Bolshevik Party of North Kurdistan/Turkey." The conviction was based on moral coercion for violence, grounded in simple evidence such as the discovery of flyers, documents, books, periodicals, and a manifesto. The İzmir Assize Court convicted the applicants on the premise that the organisation in question had self-identified following ideological disputes with the TKP/ML, which was recognised as a terrorist organisation.

The Court highlighted in this case that:

> 71. (…) Nevertheless, the Court finds relevant the case-law of the Court of Cassation that, where domestic courts are confronted with the **assessing for the first time whether an organisation can be classified as terrorist**, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and **whether it has resorted to violence or a credible threat to use violence** in pursuing that action plan. **(**Parmak and Bakır v. Turkey, App. nos. 22429/07 and 25195/07, 3 december 2019)

After scrutinising the conclusions of the domestic courts, the Court observed that:

> 73. (…) the cumulative elements of the offence of membership of a terrorist organisation, as construed by the Court of Cassation, were not demonstrated by the domestic courts to be present in the applicants' cases. In that respect, while the domestic courts held that the organisation in question had **not engaged in any armed attacks**, **they did not address the question whether the organisation had adopted an action plan or similar operational measures for such a purpose**. In this connection, the Court notes that there is no indication in the case-file that the organisation in question**, beyond the mere proclamation of certain goals**, had adopted any concrete **preparatory steps** or indeed **any form of action** with a view **to carrying out violent acts**. (…)
>
> 74. It is therefore clear that the domestic courts convicted the applicants on membership of a terrorist organisation **because of the political ideas and aspirations** expressed in some of the documents found to be the product of the organisation. The Court notes in this respect that the **applicants were not prosecuted for any specific speech offences**, such as incitement to violence or hostility, but under the separate heading of membership of a terrorist organisation.
>
> 75. Furthermore, according to the wording of amended section 1 of Law no. 3713, **the act of subscribing to a form of ideology, sharing ideas or combining with others to cultivate an interest in an ideology is not sufficient to qualify as terrorism**. It is **necessary** for the organisation **to intend to commit crimes by the use of force and violence**, which ultimately implies a degree of material coercion. The Court notes that the domestic courts did not explain how the concept of moral coercion relates to the constitutive elements of the offence, including with respect to the degree of coercion and the severity it must attain to warrant the conclusion that it amounts to terrorism.

Thus, in *Parmak and Bakır*, the Court established that organisational **activities aimed at supporting an ideology are not sufficient to qualify as terrorism**. For this designation, it is **necessary** for the organisation **to have the intent to commit crimes through the use of force and violence.**

- **Venice Commission's findings and *Demirtaş* judgment:**

In *Selahattin Demirtaş v. Turkey*, the Court referred to the findings of the *Venice Commission*, which noted that ***"the domestic courts often tended to decide on a person's membership of an armed organisation on the basis of very weak evidence."*** The Court highlighted that the case of Demirtaş "appears to bear out that observation," and concluded that "**the range of acts** that may have justified the applicant's pre-trial detention in connection with serious offences punishable under Article 314 of the Criminal Code **is so broad that the content of that Article**, **coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities**. In the Court's view, such a broad interpretation of a provision of criminal law cannot be justified where it entails equating the exercise of the right to freedom of expression with belonging to, forming or leading an armed terrorist organisation, in the absence of any concrete evidence of such a link." (*Selahattin Demirtaş v. Turkey,* [GC] App. no: 14305/17, 22 December 2020, § 280)

The Court ultimately concluded that **the terrorism-related offences in question, as interpreted and applied in this case, were not "foreseeable".** (*Selahattin Demirtaş v. Turkey,* [GC] App. no: 14305/17, 22 December 2020, § 337)

In In fact, the *Yasak* case is another example that bears out the findings of the Venice Commission once again.

vi. *Mens rea* of the crime: absolute lack of terrorist or criminal intention of the applicant

According to the Court's case-law, the requirement of accessibility and foreseeability entails that, in principle, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established. Accordingly, Article 7 requires, for the purposes of punishment, the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (*G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, §§ 242 and 243, 28 June 2018, *Yalçınkaya*, § 242).

In *Yalçınkaya*, Court established that *"the factual finding regarding* ***the use of ByLock alone*** *was considered to have* ***made out the constituent elements of the offence*** *of membership of an armed terrorist organisation. The effect of this unforeseeable and expansive interpretation of how the provisions of Article 314 § 2 of the Criminal Code and the Prevention of Terrorism Act should apply was to create an almost automatic* ***presumption of guilt*** *based on ByLock use alone,* ***making it nearly impossible for the applicant to exonerate himself from the accusations*** *(G.I.E.M. S.r.l. and Others, § 243)"* (*Yalçınkaya*, § 268).

The Court further underlines that "*the offence of membership of an armed terrorist organisation under Turkish law was at the material time, and still remains, an* ***offence of specific intent****. The presence of some specific subjective elements is therefore a conditio sine qua non. Despite that, the finding by the domestic courts, through expansive interpretation of the applicable provisions of the Criminal Code and the Prevention of Terrorism Act, that* ***the use of ByLock denoted membership*** *of an armed terrorist organisation,* ***without seeking to establish the presence in the applicant's specific case of the knowledge and intent*** *required under the legal definition of the crime in domestic law, effectively attached objective liability to the use of ByLock. The Court*

*is of the view that this expansive and unforeseeable interpretation of the law by the domestic courts had the effect of s**etting aside the constituent – notably the mental – elements of the offence** and treating it as akin to an offence of strict liability, thereby departing from the requirements clearly laid down in domestic law. The scope of the offence was, therefore, extended to the detriment of the applicant in an unforeseeable manner, contrary to the object and purpose of Article 7"* (*Yalçınkaya*, § 271).

In *Yalçınkaya,* the Court criticised the presumption of guilt based solely on the use of the ByLock app, which was deemed irrefutable evidence of membership in the Gülen Movement, without properly establishing the constituent elements of the crime.

Similarly, in *Yasak*, there is no significant difference from the *Yalçınkaya* case. This time, **the ByLock evidence was replaced by the applicant's role as a student coordinator, with the presumption of guilt based on that role, even though no criminal conduct was demonstrated**. His alleged involvement in the Movement resulted in a guilty verdict, **making it nearly impossible for him to exonerate himself from the accusations** (*G.I.E.M. S.r.l. and Others*, § 243), as the presumption of guilt rested solely on his position within the organisation.

Between paragraphs 169-179, the Court examines the intentional element of the crime. ASSEDEL considers that the Court reaches its conclusion without conducting a thorough and detailed examination.

In paragraph 175 of *Yasak*, the Court distinguishes the case from *Yalçınkaya*, stating that *"the Court observes that the national courts established the intentional element of the offence charged by referring to a wide range of incriminating evidence showing that the applicant, as a manager within the organisation's secret structure, had continued his secret activities on behalf of the organisation in question."*

The Court does not deem it necessary to specify **which activities** of the applicant, or **when they were carried out, led to its conclusion regarding the intentional element**. In this context, reference should be made to paragraph 163 of the case, where the Court *"notes that the person concerned was found guilty of the acts of which he was accused, namely of having, at least during the period between 2011 and 2014, carried out unlawful activities within the secret structure of the organisation in question".*

It is relevant here to highlight the reference to the *Adnan Şen* judgment of the Constitutional Court, which cites the following explanation for the intentional element as referred to in the case law of the Court of Cassation.

> 82. "(…) Amongst many Court of Cassation judgments, the Constitutional Court cited the following passage from the Sixteenth Criminal Division (E.2019/521, K.2019/4679, 5 July 2019), as relevant:
> (…)
> Mental element: The mental element of the crime is direct intent and the 'aim/objective of committing a crime'. **A person partaking in an organisation must know that the organisation is one that commits crimes [or] aims to commit crimes**."

a. Significance of the 2008 acquittal and non-recognition of the organisation as terrorist at the material time:

The applicant cites the acquittal of F. Gülen, the spiritual leader of the Movement, in 2008. He argues that, contrary to the prosecution's assertion that activities such as managing private residences for students, appointing a person in charge (imam) of these residences, or organising training for various examinations are unlawful acts committed by the organisation, these accusations were specifically directed against Gülen long ago. In this context, the applicant invokes the principle of **res judicata** (§ 122).

The Court considers it unnecessary to elaborate on the applicant's argument regarding the principle of *res judicata,* which is relative and limited to *inter partes*, and was raised for the first time before the Court (§173). The Court primarily relies on its reasoning in *Yalçınkaya,* where it rejected a similar argument (see paragraph 253), noting that the acquittal of F. Gülen prior to the charge of forming an armed terrorist organisation did not preclude the possibility of reaching a different conclusion about the nature of FETÖ/PDY based on information that had subsequently come to light.

As explained above, the Court did not wish to close the door to potential future accusations based on acts committed after F. Gülen's acquittal, particularly those related to involvement in the coup attempt. However, the accusations directed at the applicant were identical to those previously made against Gülen.

Nevertheless, ASSEDEL believes that had Mr. Yalçınkaya been convicted of the same charges as Mr. Yasak, the Grand Chamber might have placed significant weight on Gülen's acquittal, particularly in terms of establishing the *mens rea* (intentional element) of the offense.

According to the interpretation of the domestic courts, several sensitive judicial investigations, such as the December 2013 corruption operations and the MIT trucks operation, which are believed to have been orchestrated by Gülenists, are classified as terrorist activities. Any discussions questioning these events or deviating from the official narrative have often led to convictions for glorifying a crime and a criminal.

However, in *Yasin Özdemir* judgment, the Court ruled that discussions challenging the official narrative concerning the activities of the Gülen movement are protected under Article 10 of the Convention.

ASSEDEL is of the opinion that the Court's conclusions in *Yasin Özdemir*, particularly given the emphasis on the timing of the expressions in question, reveal significant findings that contradict the reasoning in *Yasak*. The relevant paragraphs of the judgment are as follows:

> 37. The Court notes that these comments consisted mainly of the applicant's views on topical political issues: his criticisms of the measures taken by the administrative and judicial authorities in the fight against the Fetullahist organisation, his views on the facts underlying the judicial investigations initiated on 17-25 December 2013 into allegations of corruption, his criticisms of the policies pursued by the political authorities against the opposition, and his criticisms of the political authorities' alleged relations with an armed Islamist organisation.
> 38. The Court observed that, **at the time of their publication**, those messages contained ideas and opinions **expressed in the context of public debates** on sensitive issues, and that similar ideas had already been expressed not only by members of the Fetullah movement but also by the legal opposition, in particular the opposition political parties, and by the national and

> international media. **The Court noted in particular that these opinions in no way suggested the use of violence or called for revolt.**
> 40. The Court also noted that, **at the material time, there had been no definitive conviction of members of the Fetullah movement for being leaders or members of an illegal or terrorist organisation, even though the group was regarded as dangerous by certain executive bodies. Indeed, the question of whether the movement was an educational and religious community or an organisation seeking to illegally infiltrate State bodies was hotly debated in public opinion in April 2015, when the applicant posted the comments at issue.**
> 42. In the light of the foregoing, the Court considers that such a broad interpretation of the criminal-law provision in question (Article 215 of the Criminal Code) **could not have been foreseen** by the applicant **at the time of the events in issue**. (Yasin Özdemir v. Turkey, App. No : 14606/18, 7 december 2021).

In a similar vein, in the *Atilla Taş* judgment, the Court noted that the participation in a protest meeting in 2016, cited as evidence for detention, was examined in the context of whether the newspaper in question was considered to be controlled by a terrorist organisation. The Court emphasized that, **at the material time, there was no court decision establishing that the newspaper was under the control of a terrorist organisation**. (Atilla Taş v. Türkiye, App. No. 72/12, 19 January 2021, § 134).

It is also noteworthy to cite the case of the veteran journalist Nazlı Ilıcak, who wrote and made TV programs on the Gülen movement-related media outlets, thus she was charged with *"attempting, firstly, to overthrow by force and violence the constitutional order, the Turkish Grand National Assembly and the government or to prevent the bodies in question from exercising their functions and, secondly, with having committed offences on behalf of a terrorist organisation without being a member of it"* on grounds of her columns, programs, and social media messages (Ilıcak v. Turkey (No 2), App. no 1210/17, 14 December 2021, § 61).

The Court found a violation of Articles 5 § 1 and 10 and, in contrast to the Turkish government's narrative, highlighted that:

> 141. (…) the police officers and judges who accused relatives of certain government members in December 2013 **were not, at the time of the events, accused of being members of a terrorist organisation**. They were **known, at most**, as **part of a group opposed to the government**, and later as officials suspended from their duties. Furthermore neither the fact that supposed members of the illegal FETÖ/PDY organisation, like other opponents of the government, used such information in their criticism of the government, nor the fact that the police chiefs or judges interviewed by the applicant were later accused of being members of the FETÖ/PDY organisation, changes the fact that, at the time of their publication, the controversial interviews had the value of journalistic information and contributed to a public interest debate.

b. Very first "designated terrorists" detention lacked reasonable suspicion:

The notorious first judgment of the Court of Cassation declaring the Gülen Movement as a terrorist organisation was a trial involving two judges, Mustafa Başer and Metin Özçelik. One of the main arguments used by the government to assess the Gülen Movement as a terrorist organization is based on the facts pertaining to this case.

Following the release of police officers involved in controversial investigations, these two judges *"were charged with attempting to overthrow the government and interfere with its operation, membership of the armed terrorist organisation FETÖ/PDY, abuse of power, and breach of the confidentiality of an investigation, on the basis of Articles 312, 314 (in connection*

with section 7 of Law no. 3713 on Terrorism), 257 and 285 of the Criminal Code. The indictment referred to a report dated 30 June 2015, prepared by the anti-terrorist section of the Directorate General of Security, referring to the Gülenist movement as FETÖ/PDY and describing its structure and activities." (§ 95, *Başer and Özçelik v. Türkiye*, App. nos: 30694/15 and 30803/15, 13 September 2022).

On 24 April 2017, the 16th Criminal Chamber of the Court of Cassation found the applicants guilty of **membership in an armed terrorist organisation** and abuse of power, sentencing them both to ten years' imprisonment (§ 97, *Başer and Özçelik v. Türkiye*). This marked the first and only judicial decision affirming the declaration of the Gülen Movement as a terrorist organisation.

In this judgment, the *"Court observes that the second applicant was placed in pre-trial detention on 30 April 2015, and the first applicant was placed in pre-trial detention on 1 May 2015; they were detained because they were suspected of attempting to overthrow the government and impair its operation, and of* ***being members of an armed organisation****. They were indicted on 21 September 2015. The public prosecutor demanded that they be convicted not just for attempting to overthrow the government and undermine its functioning, and for* ***being members of FETÖ/PDY****, but also for abusing their power, and for breaching the confidentiality of an investigation. On 24 April 2017 the applicants were found guilty of membership of an illegal organisation and abuse of power, and were convicted by the 16th Criminal Chamber of the Court of Cassation. Their conviction was confirmed on 26 September 2017 by the General Assembly of the Court of Cassation in Criminal Matters."* (§ 194, *Başer and Özçelik v. Türkiye*)

After its detailed scrutiny, the Court concluded *"that there has been a violation of Article 5 § 1 of the Convention for lack of reasonable suspicion that the applicants committed an offence."* (§ 203, *Başer and Özçelik v. Türkiye)*

Thus, for the Court, the **detention of the two judges—who were the subject of criminal proceedings that led to the Gülen Movement being classified as a terrorist organisation—lacked reasonable suspicion of committing the crime** of membership in an armed organisation at the time of their detention in May 2015.

However, in *Yasak*, the activities **of an ordinary university student, who engaged in civil society activities between 2011 and 2014—well before the judges' detention** without reasonable suspicion—were assessed as **foreseeable** grounds for facing terrorism charges.

ASSEDEL establishes that in *Yasak*, there is a **significant regression in the Court's approach** compared to several previous judgments concerning activities deemed as terrorist activities by the Turkish judiciary. It is imperative that the Grand Chamber addresses this jurisprudential conflict created in *Yasak*.

c. Court's sole evidence: witness statements:

In paragraph 175 of the *Yasak* judgment, the Court notes that the national courts established the intentional element of the offense charged by referencing a wide range of incriminating evidence, indicating that the applicant, as a manager within the organisation's secret structure, had continued his secret activities on behalf of the organisation.

However, the only evidence presented against the applicant, described as a "wide range of incriminating evidence (large éventail de preuves à charge)", consists of witness statements indicating that the applicant served as a student coordinator.

As explained above, the Court referenced numerous witness statements in the facts of the case. Many of these statements were added to the file after the applicant's conviction, which typically should not have been included since they were never discussed by the domestic courts. Furthermore, the applicant was not given an opportunity to respond to these statements.

It appears that the Court felt it necessary to mention these statements to emphasise the criminal nature of the Gülen movement.

However, two essential questions arise: first, are these statements reliable, and second, did the applicant or any other accused individuals have the opportunity to respond to them? It is clear that the applicant did not have this opportunity, but it remains uncertain whether the other accused persons addressed these statements. Regarding reliability, it is also important to consider how other courts weighed these statements. It is not uncommon for repentant witnesses to retract their statements during trial, or for their claims to be refuted by the accused in court.

The Court reached its conclusion based on the government's narratives without allowing any possibility to challenge these accusations. Moreover, as previously demonstrated, the **statements referred to were selected selectively, highlighting only the negative aspects while overshadowing any contradictions or positive elements.**

d. Mistake provisions:

Another significant issue concerning the moral element of the offense relates to the *mistake provisions* in Turkish criminal law. In paragraph 176, the Court refers to the Constitutional Court's position that when an accused person claims to be unaware of the true nature of the FETÖ/PDY, that assertion should be examined in light of Article 30 of the Criminal Code, which pertains to mistakes. This examination should consider factors such as the individual's position within the organization and the nature of the acts attributed to them.

Article 30 of the Turkish Criminal Code provides the following:

> "(1) Any person who, while performing an act, is unaware of matters which constitute the actus reus of an offence as defined in the law, is not considered to have acted intentionally. Culpability for recklessness arising from such mistake shall be preserved.

In fact, if the mistake provisions were properly applied, these systemic violations of Article 7 would not have occurred. While the Gülen Movement may have transformed from a once-desirable community into what is now portrayed as the root of all evils, the vast majority of its followers did not realize how or which events precipitated this change. Therefore, if the Gülen Movement is now classified as a terrorist organisation following the coup, it is important to note that almost no one within the movement had concrete knowledge of, or responsibility for, the events that paved the way for this transformation.

The first Court of Cassation judgment recognising the Gülen Movement as a terrorist organisation involved the former judges Mustafa Başer and Metin Özçelik, as cited above. In

paragraph 164 of *Yalçınkaya*, the Court summarizes the Court of Cassation's interpretation of the mistake provisions for these two judges as follows:

> 164. Having regard to the special status of M.Ö. and M.B. as judges in the organisational structure – who were considered to belong to the "private" (mahrem) part of the organisation, along with members of the armed forces and law enforcement agencies –, their level of education, and the knowledge and information that they had acquired through their profession, the Sixteenth Criminal Division held that they were in a position to know the organisation's ultimate goal, its configuration within the armed forces and, consequently, the fact that it was an armed terrorist organisation. The mistake provision stipulated under the Criminal Code would not, therefore, be applied in their case. They were accordingly convicted of, inter alia, membership of an armed terrorist organisation, on account of their use of the ByLock application that had been created for the exclusive use of the FETÖ/PDY members, and of their conduct in respect of the mass release of FETÖ/PDY suspects, which they had carried out in accordance with the instructions issued by the FETÖ/PDY, an act which the court deemed could only be carried out by a devoted member of the organisation.

However, the same Court of Cassation applied the mistake provisions[8] in the case of Birol Erdem, a seasoned judge who served as the Undersecretary of the Ministry of Justice from November 21, 2011, to January 1, 2014, during the same period as Mr Yasak's activities. **Birol Erdem's significant membership even in management roles in the Gülen Movement was undisputed.** Thus, if a follower of the Gülen Movement were to be held accountable, he would be at the top of the list. Nonetheless, **the Court of Cassation acquitted him based on the mistake provisions. Following an appeal against this judgment, he was acquitted again, this time due to a lack of intent to commit a crime.**

In summary, the Turkish judiciary appears to apply the law selectively, favoring certain individuals while treating others differently. An ordinary citizen who allegedly served as a student coordinator is presumed to have acted willingly and knowingly to further the organisation's terrorist aims. Similarly, the provisions concerning mistake were not applied to Mr. Yalçınkaya, just as they were not applied in Mr. Yasak's case (§ 261, *Yalçınkaya*).

vii. Conviction after unfair proceedings:

Finally, and most importantly, the Court observes in paragraph 178 that, *"before the national courts, the applicant merely denied his membership of the secret structure of the organisation in question and stated that he had attended only a few dinners and conversations organised by establishments linked to the organisation in question, with the result that he could scarcely be regarded as anything other than a sympathiser of the organisation in question. It should not be overlooked, however, that the applicant's membership of the secret structure of the organisation in question and the continuity, diversity and intensity of the activities he had carried out in secret within that framework had been established in the course of proceedings which had not been held to be contrary to the principles of fairness guaranteed by the Convention and in which no disregard for the rights of the defence had been found."*

In *Yalçınkaya*, the Court found a violation of Article 7, which is a rare occurrence for a democratic country where the rule of law prevails. Furthermore, this case is not isolated;

[8] https://www.justicesquare.com/wp-content/uploads/2022/12/YARGITAY-9.-CEZA-DAIRESININ-BIROL-ERDEM-HAKKINDAKI-GEREKCELI-KARARI.pdf

it relates to more than 8,000 applications before the Court and potentially 100,000 cases in Turkey.

According to submissions made to the Committee of Ministers by international organisations[9], no judicial authority, including the Court of Cassation and the Constitutional Court, has referenced this historic judgment or aligned themselves with the *Yalçınkaya* judgment. It is evident that, **following the declaration of a state of emergency, Turkish courts have adopted a practice of *denial of justice* to (perceived) members of the Gülen Movement.** Even in the face of severe human rights violations established by the Grand Chamber, the local court convicted the applicant, Mr. Yalçınkaya, to the same punishment on 12 September 2024[10]. The domestic courts seem to disregard the Court's rulings when they favor the victims.

Under these circumstances, the applicant's denial of his relationship with the Movement is logical and understandable. Presenting a more principled defense before such a draconian judiciary would be tantamount to self-incrimination. ASSEDEL holds the view that the acts attributed to the applicant are not only legal but also protected under Articles 8, 9, 10 and 11 of the Convention.

Furthermore, the passive defense exhibited by both the lawyer and the applicant before the Assize Court should be evaluated within the context of the proceedings. As previously mentioned, despite the mandatory provisions of criminal procedure, the Assize Court did not order the witnesses to be heard. In the absence of this crucial aspect, the evidence should be considered meaningless, if not inadmissible.

Even in today's Turkey, any relatively objective and experienced judge should have acquitted the applicant based on the evidence presented. Thus, the applicant's denial of the witness statements was reasonable from a procedural law standpoint. Additionally, as noted in our observations on the facts, the applicant requested the opportunity to confront the witnesses in his written plea submitted to the Court.

Thus, the applicant's denial should be duly considered in its context, and no negative consequences should be drawn against the victim in this situation.

Regarding the last and key erroneous finding in this paragraph of the judgment, the Court states that *"the applicant's membership was established in the course of proceedings which had not been held to be contrary to the principles of fairness guaranteed by the Convention and in which no disregard for the rights of the defence had been found. (Il ne faut cependant pas perdre de vue que l'appartenance du requérant à la structure secrète de l'organisation en question et la continuité, la diversité et l'intensité des activités qu'il a menées en secret dans ce cadre ont été établies dans le cadre d'une procédure qui n'a pas été jugée contraire aux principes d'équité garantis par la Convention et dans laquelle aucune méconnaissance des droits de la défense n'a été relevée)"*.

In the judgment, as demonstrated above, the relevant facts concerning the unfairness of the proceedings were obscured. The testimonies referenced by the Government in its observations and relied upon by the Court lack credibility, particularly considering that these statements were given in exchange for a form of 'impunity.' Upon closer examination,

[9] https://hudoc.exec.coe.int/eng?i=DH-DD(2024)1053E
[10] https://hudoc.exec.coe.int/eng?i=DH-DD(2024)1075E

ASSEDEL identified several discrepancies in these witness statements (see above, our observations on the facts).

The first-instance proceedings were notably brief, significantly deviating from the usual judicial practice in Turkey.

Moreover, during the two hearings (not three), none of the witnesses were heard by the Assize Court, nor was the applicant afforded the opportunity to confront them, resulting in a clear violation of Article 6 § 3 (d) of the Convention (see above, our observations on the facts).

Additionally, the applicant was not physically present at the second and final hearing at the courthouse. Instead, he participated via SEGBİS (a video conference system) from prison, without proper legal assistance, as his lawyer was at the courthouse, and without meaningful contact with the Court. He clearly raised complaints about these shortcomings before the Constitutional Court, yet these were omitted from the judgment's account of the facts. Any competent lawyer reviewing the applicant's submission to the Constitutional Court should not have overlooked this argument (see above, our observations on the facts).

As explained in the first part of our observations, the Court in *Fikret Karahan* and the Constitutional Court in *Emre Sunar* found violations of the right to a fair trial in similar cases.

Thus, the proceedings before the Assize Court were unequivocally conducted in clear violation of Article 6 §§ 1, 3 (b), (c), and (d) of the Convention.

Within this context, the assessment by Prof. Ersan Şen and Dr. Erkan Duymaz on the Yasak judgment is significant. They suggest that[11]:

> *"It is a questionable attitude for the ECtHR to assume that the trial is fair when it does not examine the right to a fair trial. The fact that the Constitutional Court did not make an assessment on the merits in terms of defence rights on the grounds that ordinary remedies had not been exhausted does not give any idea as to whether the proceedings were conducted in accordance with the principle of 'fair trial'.*
>
> *Moreover, the ECtHR not only stated that no situation contrary to fairness and defence rights was detected in the concrete case, but also used this to support/strengthen its assessment in terms of the principle of 'legality in crime and punishment' guaranteed by Article 7 of the Convention. The reason why we draw particular attention to this point is that, as understood from the judgement, although the applicant claimed that the witness statements did not reflect the truth, the witnesses were not heard in court. Considering that the witness statements are decisive evidence and that there is no evidence that the accuracy of the HTS records obtained from another file has been discussed, it is problematic that the finding that no violation of the requirements of a fair trial has not been detected leads to a result against the applicant.* ***In short, it is open to criticism to assume that a trial which has not been subjected to detailed examination in terms of defence rights is fair and to conclude on this basis that the assessment of the elements of the offence charged against the applicant was reasonably foreseeable***."

[11] Prof. Dr. Ersan Şen, Dr. Erkan Duymaz, İHAM'ın Yasak/Türkiye Kararı Değerlendirmesi (Evaluation on the ECtHR's Yasak v. Turkey judgment) https://sen.av.tr/tr/makale/ihamin-yasak-turkiye-karari-degerlendirmesi

- **Conclusion:**

ASSEDEL considers the *Yasak* judgment to be critically flawed, marked by significant errors, misinterpretations, and bias against the Gülen Movement. In this case, the Court upheld a conviction under Article 7 for an individual whose role as a student coordinator for the Gülen Movement involved nothing more than providing guidance and mentorship to university students and younger pupils. Witness statements described the applicant as a devout Muslim and a follower of the Movement, yet no substantive criminal activity was attributed to him beyond these actions. However, the Court highlighted the alleged secret nature of the Movement, based on selective portions of witness testimonies, and found no violation of Article 7, seemingly in line with the Turkish government's unsubstantiated narrative.

In contrast, the *Yalçınkaya* judgment addressed the systemic issue wherein followers of the Gülen Movement are convicted not for direct involvement in the 2016 coup or any genuine criminal activity, but solely for their association with the Movement through ordinary activities that should benefit from the 'presumption of legality'. ASSEDEL believes this amounts to applying the principle of "guilt by association"—a notion unacceptable in any country that upholds the rule of law.

In the FETÖ/PDY trials, the evidence presented often merely establishes the accused's relationship with the Movement, without proving any illegal activity. This mirrors the approach in *Yalçınkaya,* where the mere use of the ByLock app led to a "presumption of guilt". Similarly, in *Yasak*, the applicant was accused of membership in a terrorist organization based solely on his involvement with the Movement, despite the fact that, according to ASSEDEL, his actions were lawful and peaceful—activities that should have also benefitted from the presumption of legality.

The *Yasak* judgment is in clear contradiction to the Grand Chamber's findings in *Yalçınkaya* and *Bakır and Parmak,* as well as other cases like *Yasin Özdemir*, *Başer and Özçelik*, *Nazlı Ilıcak,* and *Atilla Taş*. The Court's conclusion of no violation of Article 7 effectively legitimizes the criminalization of ordinary, lawful activities that should be protected by the Convention. The judgment fails to clarify which specific actions of the applicant were criminal in nature and knowingly committed with a terrorist intent, thus undermining the protections Article 7 provides against arbitrary convictions.
Furthermore, although the Court did not examine the applicant's specific complaints under Article 6, it reached a non-violation conclusion, suggesting that the proceedings in the domestic court *"had not been held to be contrary to the principles of fairness guaranteed by the Convention and in which no disregard for the rights of the defence had been found"*. However, the trial before the Assize Court was evidently unfair. The Court relied on witness statements that were merely read during the hearing, without being presented or cross-examined, in violation of procedural rules and Article 6 § 3 (c) of the Convention.

Additionally, the applicant was not physically present at the second and final hearing but participated via the SEGBİS video conferencing system. He raised complaints about these procedural violations, but his efforts were limited as he was navigating his case from prison, without proper legal assistance. While the Court may have rejected some of the applicant's complaints due to technical shortcomings attributable to him, it is unacceptable for the Court to deem the proceedings fair in light of these evident violations.

It is particularly troubling that the Turkish judiciary, including the Constitutional Court—the supposed "protector of human rights"—has not once cited the *Yalçınkaya* judgment. Furthermore, the applicant, Mr. Yalçınkaya, was reconvicted for the same crime following his retrial on September 12, 2024 in a complete disregard of Article 46 of the Convention. This silence surrounding such a key ruling in Turkish courts suggests that the term *Yalçınkaya* has become effectively 'forbidden' within the judiciary.

ASSEDEL believes that there is no significant difference between the cases of Yalçınkaya and Yasak. Thus, the findings of the Chamber clearly contradict the conclusions of the Grand Chamber in *Yalçınkaya*. There is no reasonable justification for departing from the outcome of the *Yalçınkaya* judgment.

ASSEDEL emphasizes that the *Yasak* judgment grants the Turkish government *carte blanche* to criminalise anyone perceived to be associated with the Gülen Movement, regardless of whether they have engaged in criminal activity. If this judgment is not reexamined by the Grand Chamber, it will set a dangerous precedent, undermining the protections guaranteed by the Convention for thousands of individuals in Turkey. Even beyond Turkey, such a precedent could weaken judicial protections for ordinary citizens across Europe, leaving them vulnerable to arbitrary convictions under political pressure.

ASSEDEL wishes to believe that the judgment, which gives the impression of aiming to narrow the scope of the *Yalçınkaya* ruling, is not the result of political pressure from the Turkish government, but rather unintentional errors made during the examination of the case. However, the case of Şaban Yasak—a law-abiding citizen convicted of membership in the Gülen Movement solely for engaging in lawful activities protected by the Convention—should not serve as a basis for curtailing the positive repercussions of *Yalçınkaya* which may have unsettled Ankara. Furthermore, if there is a compelling need for the Court to narrow the scope of *Yalçınkaya,* the Grand Chamber should undertake this task, considering the systemic and widespread nature of the problem.

ASSEDEL firmly believes that this erroneous judgment, which contradicts the Court's established case law and has significant negative implications for the exercise of fundamental rights, must be revisited by the Grand Chamber. If the *Yasak* case is permitted to stand as it is, future rulings in Turkey will likely reference it to justify further arbitrary convictions, while the Grand Chamber's *Yalçınkaya* ruling—addressing systemic issues affecting over 100,000 similar cases—will be sidelined. The *Yasak* judgment will perpetuate a grave miscarriage of justice, impacting thousands of individuals.

These substantial errors in the facts and merits of the case should be reexamined by the Grand Chamber to clarify the genuine meaning and scope of *Yalçınkaya*, which appears not to have been fully adhered to by the Chamber. This reevaluation is essential to maintain the coherence of the Court's case law. Given that the issue affects hundreds of thousands of individuals and addresses a systemic problem threatening the rule of law in Turkey, the Court should take a clearer stance against the unlawful incrimination of innocents.