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An ASSEDEL commentary

Reading the Dissents: A Doctrinal Critique of Separate Opinions in *Yasak v. Türkiye*

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Introduction

On 5 May 2026 the Grand Chamber of the European Court of Human Rights delivered its judgment in *Yasak v. Türkiye* (no. 17389/20), finding a violation of Article 7 by eleven votes to six and a violation of Article 3 by nine votes to eight, and thereby reversing the Chamber judgment of 27 August 2024, which had found no violation of either provision. The judgment attracted several separate opinions. This commentary engages, on their doctrinal substance, the two dissenting texts and the one individual dissent in which the German, Dutch and Irish members of the Grand Chamber participated: the Joint Partly Dissenting Opinion on Article 3 (signed, among others, by Judges Schukking and Seibert-Fohr, and by Judge Ní Raifeartaigh); the Joint Dissenting Opinion on Article 7 (signed, among others, by Judge Ní Raifeartaigh); and Judge Ní Raifeartaigh's separate Dissenting Opinion on Article 7.

ASSEDEL engages these opinions as a matter of doctrine, not of personalities. The critique that follows is addressed to the reasoning the opinions advance, measured against the Court's own established case-law. Where we identify tension, it is tension between propositions of law, not between a judge's prior commitments and her vote.

The discussion proceeds as follows. Section I states the facts. Section II addresses the Article 3 dissent. Section III addresses the joint Article 7 dissent. Section IV addresses Judge Ní Raifeartaigh's individual opinion. Section V concludes.

I. The case

Mr Şaban Yasak was convicted in 2018 by the Çorum Assize Court under Article 314 § 2 of the Turkish Criminal Code of membership of an armed terrorist organisation (the FETÖ/PDY), on the basis of conduct connecting him to the educational structures of the Gülen movement. The movement had been designated a terrorist organisation by Turkey's National Security Council on 26 May 2016, and the first final domestic judicial decision confirming that designation was issued on 26 September 2017 (see *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023, § 155). He was sentenced to seven years and six months' imprisonment and served part of that sentence in Çorum Prison.

The Grand Chamber held, as to Article 7, that the domestic courts had failed to establish, in an individualised manner, the constituent mental element of the offence — in particular, that mere involvement in a structure perceived at the relevant time as a religious or educational movement could not, in itself, establish the specific intent required for conviction of membership of a terrorist organisation. At paragraph 202 of the judgment the Grand Chamber expressly identified the danger of “guilt by association”. As to Article 3, it held that the cumulative conditions of the applicant's detention attained the threshold of degrading treatment.

II. The Joint Partly Dissenting Opinion on Article 3

A. The structure of the dissent

The dissent accepts the framework of *Muršić v. Croatia* ([GC], no. 7334/13, 20 October 2016) and concludes that the applicant, who disposed of between 3 and 4 sq. m of personal space, fell within the band in which no strong presumption of a violation arises, and that the additional conditions of his detention did not, cumulatively, attain the threshold of severity. The objection is methodologically respectable. On four points, however, the reasoning departs from the case-law it invokes.

B. The cumulative assessment

Where a detainee disposes of between 3 and 4 sq. m of personal space, the space factor remains a weighty consideration in the Court's assessment, and a violation of Article 3 will be found where that factor is coupled with other inappropriate aspects of the physical conditions of detention (Muršić , §§ 137-139; the three cumulative conditions capable of rebutting the strong presumption of a violation that arises below 3 sq. m are set out at Muršić , § 138). The Court has consistently assessed the conditions of detention as a whole, having regard to their cumulative effect: a serious lack of personal space weighs heavily as a factor and may disclose a violation of Article 3 either on its own or taken together with other shortcomings (Muršić , §§ 122-141; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012, §§ 149-159).

The dissent acknowledges this cumulative requirement in form but, in substance, addresses each adverse factor in isolation and characterises each as either non-decisive or as a matter of internal prison organisation. The analytical operation by which a set of conditions is disaggregated and each element dismissed seriatim is not the cumulative assessment that Muršić and Ananyev require; it is its inverse. A cumulative test cannot be satisfied by the serial elimination of the factors that compose it.

C. The courtyard calculation (paragraph 8)

At paragraph 8 the dissent reasons that, on the basis of the CPT's minimum standard of one hour of daily outdoor exercise, the 64 sq. m courtyard could accommodate a number of detainees in rotation. Two difficulties arise.

First, the calculation imports a logistical-capacity criterion into the Article 3 analysis. The Court's settled interpretive standpoint is that of the person subjected to the conditions of detention; the relevant question is the effect of those conditions on the detainee, not the administrative optimisation of a facility (Ananyev , § 141; Muršić , §§ 96-101). The reasoning at paragraph 8 adopts the standpoint of the administrator allocating capacity rather than that of the detainee experiencing the conditions.

Second, the CPT minimum of one hour of daily outdoor exercise is a floor, not a measure of adequacy. The Court has treated that minimum as a basic safeguard whose breach is a serious aggravating factor, while making clear that compliance with it does not, in itself, render conditions adequate; the adequacy of outdoor exercise is assessed together with the space and facilities available for it (Ananyev , § 150). The dissent's use of the one-hour figure as an operational benchmark of sufficiency inverts the function the case-law assigns to it. It is also worth recalling that in Muršić itself the applicant enjoyed two hours of daily outdoor exercise and three hours of free movement outside his cell, which the Grand Chamber treated as significant

alleviating factors in the application of its principles to the facts (Muršić , §§ 153-172) — a regime materially more generous than the one defended at paragraph 8 of the present dissent.

D. The December 2020 letter (paragraph 12)

At paragraph 12 the dissent concedes the governing principle that a detainee's consent cannot render objectively inhuman treatment compatible with Article 3, and then relies on the applicant's December 2020 letter declining a transfer as evidence that his suffering did not attain the autonomous threshold of Article 3.

The two propositions are difficult to hold together. If the detainee's stated preference is, as a matter of principle, incapable of bearing on the autonomous assessment under Article 3, the letter cannot carry the evidential weight the dissent assigns to it; if the letter does carry that weight, then the detainee's preference is being permitted to bear on the assessment of treatment that is, by hypothesis, to be measured by an objective standard. The Court has consistently held that the absolute character of Article 3 — from which no derogation is permissible under Article 15 § 2 — does not yield to the conduct or the wishes of the person concerned (Labita v. Italy [GC], no. 26772/95, 6 April 2000, § 119; Bouyid v. Belgium [GC], no. 23380/09, 28 September 2015, § 81). A detainee's election to remain in a given facility, for reasons of proximity to family or counsel, is made within the constraints of detention and cannot consistently be treated as qualifying the State's substantive obligation.

E. The Mehmet Hanifi Baki invocation (paragraph 13)

At paragraph 13 the dissent relies on the domestic courts' application of the criteria set out in the Constitutional Court's Mehmet Hanifi Baki judgment, described as being in harmony with Muršić , and treats that domestic compliance as substantially determinative of the Article 3 question.

A clarification of the Court's standard is required here. The assessment of whether ill-treatment attains the minimum level of severity required by Article 3 is relative: it depends on all the circumstances of the case, including the duration of the treatment and its physical and mental effects (Muršić , § 97; Bouyid , § 86). But that is an assessment the Court itself must conduct; it is not one in which the Court defers to the domestic authorities by way of a margin of appreciation. Once the threshold of severity is attained, the prohibition is absolute and admits of no balancing against competing interests, even in the most difficult circumstances such as the fight against terrorism and organised crime (Labita , § 119; Bouyid , § 81; and, on the principle that not even an exceptional context absolves the State of its Article 3 obligations, *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15 December 2016, §§ 184-185). The domestic courts' good-faith application of Muršić -compatible criteria is relevant to the Court's assessment, but it cannot be dispositive of it; to treat it as dispositive is to convert the Court's autonomous assessment under an absolute provision into a review of domestic compliance. The weight the dissent places on Mehmet Hanifi Baki is, in this respect, in tension with the autonomous and non-deferential character of Article 3 review.

F. A point of jurisprudential comparison

The doctrinal concern set out above does not rest on the dissent alone. It is sharpened by the recent practice of the Second Section. In Tergek v. Türkiye (no. 39631/20, 29 April 2025) the Chamber held, by four votes to three, that there had been no violation of Article 10 where the prison authorities had refused to deliver internet printouts and photocopies to a prisoner convicted of FETÖ/PDY membership. Judge Seibert-Fohr was among the three dissenting judges (with Judges Bårdsen and Lavapuro). Their joint dissent criticised the majority for accepting an insufficiently clear legal basis for the restriction, for endorsing a blanket measure not weighed against the individual's circumstances, and for deferring to the reasoning of the domestic courts in place of the closer scrutiny the case required.

We do not advance Tergek as a substantive parallel to Yasak : the two cases concern different Convention provisions — Article 10 and Article 3 — which apply different tests, and the security-based justifications invoked by the respondent State differ in kind. The comparison is confined to a single, narrower point. The three doctrinal requirements articulated in the Tergek dissent — insistence on a clear legal basis, refusal of blanket and non-individualised reasoning, and refusal of substantive deference to domestic courts where the Convention requires independent assessment — are the same three requirements whose absence we have identified, on points B to E above, in the Yasak Article 3 dissent. The comparison is therefore between identifiable doctrinal positions in two separate opinions, not between a judge's disposition and her vote.

G. Conclusion on Article 3

On the four points addressed above, the dissent's reasoning departs from the methodology of Muršić and Ananyev and from the autonomous, non-deferential character of Article 3 review affirmed in Bouyid and Khlaifia . Its analytical idiom is that of administrative review of a detention facility; the case-law requires the assessment of cumulative conditions from the standpoint of the person detained.

III. The Joint Dissenting Opinion on Article 7

A. The thesis, and a structural difficulty

The joint dissent advances a single thesis: the defect identified by the majority — the absence of an individualised assessment of the constituent mental element of the offence — is properly a matter of the fairness of the proceedings under Article 6, not of the legality of the punishment under Article 7. The dissent accepts (at paragraphs 1 and 6) that there was no admissible Article 6 complaint before the Grand Chamber, and that the precise form of any Article 6 violation need not be identified. The operative consequence of the dissent's position is therefore that the applicant should obtain no finding of a violation under either Article.

The first difficulty is structural. The dissent identifies a Convention-relevant defect in the conviction; assigns it to Article 6; accepts that Article 6 is procedurally unavailable; and concludes that no violation arises. The conclusion of non-protection does not follow from a constraining procedural rule applied to an indisputable classification; it follows from the classification itself, which is the contested question. The Court has consistently held that the Convention is intended to guarantee rights that are practical and effective, not theoretical and illusory (Airey v. Ireland , 9 October 1979, § 24), a principle that bears on

the exercise of interpretive choice where a substantive defect might be accommodated under more than one provision.

B. The substantive criminal-law foundation: mens rea as a constituent element

It is necessary to be precise about why the defect engages Article 7 and not merely Article 6. The objection that the matter belongs to Article 6 would have force if the deficiency concerned the assessment of evidence bearing on an otherwise complete offence. It does not. The offence under Article 314 § 2 of the Turkish Criminal Code — membership of an armed organisation — is a specific-intent offence: the mental element is not an evidentiary incident of the *actus reus* but a constituent element of the offence, without which the offence is not made out. This is not a contested proposition. The Grand Chamber held precisely this in *Yüksel Yalçınkaya v. Türkiye* ([GC], 2023), finding that the domestic courts' interpretation was "inconsistent with [the] essence of [the] impugned offence which required specific intent", and that Article 7 requires, for the purposes of punishment, the existence of a mental link through which personal criminal liability may be established (§ 242; see also, on the mental-link requirement, *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018, §§ 242 and 246; *Sud Fondi srl and Others v. Italy* , no. 75909/01, 20 January 2009, § 116).

Where a systemic domestic practice dispenses with the individualised establishment of a constituent element of an offence, the result is not the misapplication of the legislative norm but the application of a different norm — one in which specific intent is presumed from association rather than established in the individual case. That is a defect in the substantive legality of the conviction, and it falls within Article 7. The concept of "law" in Article 7 carries the qualitative requirements of accessibility and foreseeability, which must be satisfied as regards both the definition of the offence and the penalty (*Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, §§ 140 and 150; *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, § 91). And, decisively, the Court has held that a State practice incompatible with the written law in force, which empties of its substance the legislation on which it purports to be based, cannot be regarded as "law" within the meaning of Article 7 (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, 22 March 2001, §§ 67-87). A conviction for membership reached without any individualised finding of the specific intent that the offence requires is the application of a norm that the legislature did not enact; *nullum crimen sine lege* is therefore directly engaged.

In brief, the concern is not that every judicial error in assessing mens rea automatically gives rise to a violation of Article 7. Rather, the critical question arises when domestic courts, as a matter of systemic practice, treat association-based evidence as sufficient proof of the specific intent required for the offence in question. Terrorist-organizational membership is a specific-intent offence: a person cannot be convicted of membership in a terrorist organization unless the requisite mental element has been established in an individualized manner. Modern criminal law is founded on the principle that prosecution must prove every constituent element of a criminal offence beyond a reasonable doubt. Where domestic courts treat an individual's association with a social, religious, educational, or other community that has subsequently been designated as a terrorist organization as sufficient, in itself, to establish criminal membership, without independently proving the specific intent required by the offence, the resulting defect transcends the guarantees of Article 6 and engages the principle of legality protected by Article 7. Such a practice risks producing convictions without proof of a constituent element of the offence and thereby permits punishment

for conduct that, absent the required mental element, does not satisfy the legal definition of the crime. In those circumstances, the issue is no longer merely one of evidentiary assessment or procedural fairness; it concerns the substantive legality of the conviction itself and the principle of *nullum crimen, nulla poena sine lege*.

C. The distinction drawn from Yalçınkaya

The dissent seeks to distinguish Yalçınkaya on the basis that the conviction there rested decisively on a single item of evidence (use of the ByLock application), whereas the conviction here rested on several items. The implicit premise is that a plurality of evidentiary items cures the defect of inference.

The premise does not hold. The deficiency identified in Yalçınkaya was not the number of evidentiary items but the method : the attribution of the constituent elements of the offence in a virtually automatic manner, without individualised assessment of the mental element (*Yalçınkaya* , § 242). If each of several evidentiary strands is treated, individually, as an automatic proxy for the specific intent the offence requires, their aggregation does not yield an individualised finding of intent; it yields a longer sequence of presumptions of the same character. The qualitative defect is not remedied by quantitative accumulation. To hold otherwise would be to accept that the systemic flaw identified in Yalçınkaya dissolves as soon as the domestic court lists more items of the same inferential kind.

D. The fourth-instance objection

The dissent (and Judge Ní Raifeartaigh's individual opinion at paragraph 17) raises the concern that to find a violation here is to draw the Court into the assessment of evidence, contrary to its subsidiary role. The Court is indeed not a court of fourth instance, and it is primarily for the domestic courts to assess the evidence and to rule on individual criminal responsibility (Yalçınkaya, and the general principles restated there). But the objection requires a distinction that the dissent does not draw.

Article 7 itself requires the Court to satisfy itself that there was a contemporaneous legal basis for the conviction and that the result reached by the domestic courts was compatible with the Convention; to accord the Court a lesser power of review would render Article 7 nugatory (Vasiliauskas v. Lithuania [GC], no. 35343/05, 20 October 2015, § 161; Rohlena v. the Czech Republic [GC], no. 59552/08, 27 January 2015, § 52). The Court's task is not to reweigh the evidence but to determine whether the offence, as actually applied, retained the constituent elements that the principle of legality requires. That is a legality question, not an evidentiary one. The distinction between an individual error of assessment in a functioning system and a systemic departure from the substantive requirements of the offence — the latter being what Yalçınkaya found in respect of the post-2016 prosecutions — is the distinction the fourth-instance objection must, but does not, engage.

IV. Judge Ní Raifeartaigh's separate Dissenting Opinion

The individual opinion develops four further arguments.

A. The framing of the applicant's reliance on precedent (paragraphs 5-6)

The opinion characterises the applicant's submission as "seductively simple" (paragraph 6) and, at paragraph 5, likens Yalçınkaya to a recently arrived train still standing at the platform. The figure suggests that the applicant's reliance on the precedent is a matter of convenience. The doctrinal observation in response is short: an applicant is required to bring his case within the existing case-law, and the fact that the governing precedent concerns the same respondent State and the same offence is a feature of that case-law, not a defect in the applicant's pleading. That a precedent is recent and directly in point is the ordinary condition of its authority, not a reason for suspicion of the party who invokes it.

B. *Mens rea*, foreseeability and culpability (paragraphs 12-14)

Paragraphs 12-14 object to the recognition of mens rea as an Article 7 requirement detached from foreseeability, treating this as a doctrinal innovation. With respect, the case-law already contains the proposition. There is a clear correlation in the Court's reasoning between the foreseeability of a criminal-law provision and the personal liability of the offender, and Article 7 requires a mental link disclosing an element of liability if a penalty is to be imposed (G.I.E.M. [GC], 2018, §§ 242 and 246; Yalçınkaya , § 242). The line from Sud Fondi (2009, § 116) through Varvara v. Italy (no. 17475/09, 29 October 2013, §§ 69 and 71) to G.I.E.M. recognises the autonomous content of culpability as a condition of a "penalty" under Article 7. The majority's approach in Yasak is the application of that line, not a departure from it; the dissent's reliance on the same line (at its own paragraphs 8-9) sits uneasily with its characterisation of the majority's reasoning as novel.

C. The fourth-instance objection (paragraph 17)

This is addressed at Section III.D above. The Court's review under Article 7 of whether a conviction retained the constituent elements of the offence is a legality review that the case-law requires (Vasiliauskas , § 161; Rohlena , § 52); it is distinct from the reweighing of evidence that the fourth-instance doctrine forbids.

D. The "bold new step" framing (paragraphs 21-22)

Paragraphs 21-22 present the recognition of a self-standing mens rea requirement as a new role for the Court in shaping domestic substantive criminal law, and ask to which offences and to what mental elements the requirement extends. The premise — that the judgment takes the Court into new territory — should be resisted. The recognition that a penalty requires a mental link establishing personal liability is already settled (G.I.E.M. [GC], 2018, §§ 242 and 246). What the Yasak majority did was to apply that settled requirement to a systemic practice that dispensed with the individualised establishment of the constituent mental element of a specific-intent offence. Where courts remove a constituent element of an offence, they do not merely apply the existing norm imperfectly; they apply a materially different norm, with the consequence that conduct is treated as criminal which did not satisfy the legal definition of the offence at the material time. That consequence is the precise concern of Article 7. The open questions identified at paragraphs 21-22 are real questions for the future development of the case-law, but they arise within an established framework and do not constitute objections to the result reached.

The opinion candidly poses, at paragraph 22, the underlying question whether the Convention should speak to the substance of criminal punishment or confine itself to procedure. The Court's case-law has already answered it. The qualitative requirements of Article 7 attach to the substantive definition of the offence (Kafkaris , §§ 140 and 150; Del Río Prada , § 91), and a State practice that empties the substantive law of its content is not "law" for the purposes of Article 7 (Streletz, Kessler and Krenz , §§ 67-87). A Convention confined to procedure could not reach the case in which procedural regularity is preserved as the form within which the substantive law is hollowed out — which is the very risk that the systemic findings in Yalçınkaya identified.

V. Conclusion

The three opinions, at the decisive points of each analysis, substitute a check of formal compliance with domestic criteria for the substantive assessment the case-law requires: cumulative assessment of detention conditions from the standpoint of the detainee under Article 3, and individualised establishment of the constituent mental element of the offence under Article 7. On the authorities — Muršić , Ananyev , Bouyid and Khlaifia under Article 3; Kafkaris, Del Río Prada, Sud Fondi , Varvara , G.I.E.M., Streletz, Kessler and Krenz and Yalçınkaya under Article 7 — that substantive assessment is not a doctrinal innovation but the settled content of the guarantees in issue. The function of civil-society commentary, conducted within the framework the Court has itself established, is to hold the reasoning of separate opinions to that settled content. It is in that spirit, and to that end alone, that this commentary is offered.

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