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Meeting:	1507th meeting (September 2024) (DH)
Item reference:	Action Plan (05/08/2024)

Communication from Türkiye concerning the case of Yuksel Yalcinkaya v. Türkiye (Application No. 15669/20) - *The appendices in Turkish are available upon request to the Secretariat.*

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Réunion :	1507e réunion (septembre 2024) (DH)
Référence du point :	Plan d'action (05/08/2024)

Communication de la Türkiye concernant l'affaire Yuksel Yalcinkaya c. Türkiye (requête n° 15669/20) ***(anglais uniquement)*** - *Les annexes en turc sont disponibles sur demande au Secrétariat.*

DH-DD(2024)882: Communication from Türkiye.
Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.
August 2024

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ACTION PLAN

***Yüksel Yalçınkaya v. Türkiye* (15669/20)**

Judgment of and Final on 26 September 2023

I. CASE DESCRIPTION

1. The European Court of Human Rights ("the Court") found a violation of the principle of no punishment without law. In reaching this conclusion, the Court found that the domestic courts had not established the offence's constituent material and mental elements in an individualised manner in convicting the applicant for membership of an armed terrorist organisation by relying decisively on the use of an encrypted messaging application named "ByLock" (Article 7).
2. The Court also found a violation of the right to a fair trial on the grounds that the applicant's defence submissions relating to the data obtained from the encrypted messaging application server had not been sufficiently taken into account and that no answer to the applicant's requests concerning his defence had been provided (Article 6 § 1).
3. The Court further found a violation of the right to freedom of assembly and association on account of the domestic courts' unforeseeable extension of the scope of offence when relying on the applicant's membership of a trade union and an association considered as affiliated with a terror organisation, to corroborate his conviction (Article 11).

II. INDIVIDUAL MEASURES

Just Satisfaction

4. Considering that there was no causal link between the violations and the pecuniary damage complained of, the Court dismissed the applicant's claims for pecuniary damage.
5. The Court also rejected the applicant's claims for non-pecuniary damage, considering that a finding of a violation could be regarded as sufficient just satisfaction.
6. In respect of costs and expenses, the Court awarded the applicant EUR 15,000. This sum was paid to the applicant within the deadline set by the Court. The information on the payment was published on HUDOC-EXEC.

Reopening of the Proceedings

7. The authorities would like to point out that Article 311 § 1 (f) of the Code of Criminal Procedure (Law no. 5271) gives the applicant the opportunity to request the reopening of the criminal proceedings (i.e. retrial) within one year of the Court's final judgment finding a violation.
8. The applicant availed himself of this remedy and submitted a request for the reopening of the proceedings. The criminal proceedings are still on-going before the Kayseri 2nd Assize Court and the most recent hearing was held on 2 April 2024. The next hearing was scheduled for 12 September 2024.
9. The authorities will inform the Committee of any new developments in this regard.

III. GENERAL MEASURES

10. At the outset, the Turkish authorities would like to recall the seriousness of the situation in the aftermath of the coup attempt as a contextual factor. The attempted coup brought before the judiciary such legal issues that had never been encountered before in the history of the Republic of Türkiye. These legal issues became even more complex due to the technological means used by criminals.
11. The Court itself pointed out that it was aware of the difficulties associated with the fight against terrorism and those that States encounter in the light of the changing methods and tactics used in the commission of terrorist offences. It, furthermore, acknowledged the unique challenges faced by the Turkish authorities and courts in the context of their efforts against the FETÖ/PDY, having regard to the atypical nature of that organisation, which pursued its aims covertly rather than through traditional terrorist methods (see *Yalçınkaya*, no. 15669/20, § 269, 26 September 2023).
12. The Court reiterated in this connection the finding it had made in a number of cases, and endorsed in the present case, that the attempted military coup in Türkiye disclosed the existence of a "public emergency threatening the life of the nation" within the meaning of the Convention. Therefore, it recognised the urgency and severity of the situation that the authorities and courts had to grapple with in the aftermath of the coup attempt (see, *ibid*, § 269).
13. The explanations on the matter are presented below, under the headings according to Articles of the Convention of which the Court found a violation.

A. Violation of Article 7 of the Convention

14. In its assessment under Article 7 § 1 of the Convention, the Court examined whether there had been a valid legal basis for the applicant's conviction and, in particular, whether the conclusion reached by the relevant domestic courts had been compatible with the object and purpose of that provision (see, *ibid*, § 241).
15. In its judgment, the Court noted that it was not its task under Article 7 of the Convention to establish whether the applicant had actually performed the acts imputed to him – in particular, whether he had actually used the ByLock application, which he denied – or to rule on his individual criminal responsibility, those being primarily matters for the domestic courts (see, *ibid*, § 243).
16. It underlined that its task was rather to consider, from the standpoint of Article 7, whether the applicant's conviction complied with the principles of legality and foreseeability enshrined in that provision (see, *ibid*, § 243).
17. In the instant case, the applicant was convicted of membership of an armed terrorist organisation. The Court therefore first examined whether at the time of the acts attributed to him such an offence had been clearly set out in domestic law (see, *ibid*, § 244).
18. Having regard to the relevant legislative provisions and their interpretation by the domestic courts, the Court considered that the offence of which the applicant had been convicted was codified and defined under Turkish law, in keeping with the principle of legality under Article 7 of the Convention (see, *ibid*, § 249).
19. Thus, the Court concluded that Article 314 § 2 of the Criminal Code, particularly when read in conjunction with the Prevention of Terrorism Act and the case-law of the Court of Cassation, was, in principle, formulated with sufficient precision to enable an individual to know, if need be with appropriate legal advice, what acts and omissions would make him criminally liable (see, *ibid*, § 249). In conclusion, the Court found no problem with the relevant domestic legislation in the context of Article 7 of the Convention.
20. Dismissing the applicant's arguments, the Court found that the assessment and designation of FETÖ/PDY as a terrorist organisation by the domestic courts was not incompatible with the Convention and the law (see, *ibid*, 251-254). The Court further conducted an examination of the applicant's conviction for membership of the FETÖ/PDY in the present case. The Court noted in this regard that the applicant's

conviction for membership of the FETÖ/PDY was mainly based on the findings that he had used the ByLock messaging application (see, *ibid*, § 257).

21. The Court made significant assessments on the connection between the ByLock and the FETÖ/PDY. In this regard, it noted in particular the findings regarding the profile of some users of the application, the content of the decrypted communications, statements made by suspects in other FETÖ/PDY-related investigations confirming its use within the organisation, and the statements of the licence owner of the application noting, with hindsight, that it had been developed for the use of the FETÖ/PDY. The Court held, accordingly, that ByLock was not just any ordinary commercial messaging application, and that its use could *prima facie* suggest some kind of connection with the FETÖ/PDY (see, *ibid*, § 259).
22. Therefore, the Court held that it needed to verify whether the relevant constituent elements of the offence, and in particular the subjective, or mental, element, had been 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 had represented a foreseeable, and not an expansive, interpretation and application of the criminal provision in question (see, *ibid*, § 260).
23. The Court explained its assessment on this matter as follows:

… Admittedly, the assessment of the relevance or the weight attached to a particular piece of evidence is not, in principle, within the remit of the Court under Article 7 of the Convention. It considers, however, that over and above its evidential value, the finding regarding the use of ByLock here effectively replaced an individualised finding as to the presence of the constituent material and mental elements of the offence, thereby bypassing the requirements of Article 314 § 2 of the Criminal Code – as interpreted by the Court of Cassation itself – in contravention of the principle of legality and bringing the matter within the realm of Article 7 (see, ibid, § 262).

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 … (see, ibid, § 263).

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, ibid, § 264).

The Court stresses that this finding under Article 7 does not as such concern the relevance of the ByLock evidence to establishing the applicant's guilt to the required standard of proof. The issue here is rather that, to all intents and purposes, 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. It is moreover clear from the domestic court judgments and the Government's submissions that the other acts attributed to the applicant had very limited bearing on the outcome (see, ibid, § 268).

24. As is seen, the Court made its assessment on the basis of the judgments and decisions rendered in the present case.
25. In this regard, the Government would like to provide up-to-date information concerning the current judicial practice:
26. According to the established case-law of the Court of Cassation, in order for a person to be convicted of membership of a terrorist organisation, (i) the existence of an organic link between the person and the organisation must be established on the basis of the continuity, diversity and intensity of the person's activities, and (ii) it must be demonstrated that the person acted knowingly and willingly within the hierarchical structure of the organisation. The Constitutional Court has also referred to this piece of case-law of the Court of Cassation in many of its judgments (see, *ibid*, § 184).
27. According to the established domestic judicial practice, a member of an organisation is a person who embraces the objectives of the organisation, becomes a part of the hierarchical structure of the organisation, and thus relinquishes his/her will in favour of that of the organisation by being ready to discharge the duties to be entrusted by the organisation. Membership of an organisation means joining it, affiliation with it and subordination to the hierarchical power prevailing in the organisation. A member of the organisation must have an organic link with it and participate in its activities. An organic link, which is the most important element of membership, is a link which is vivid, transitive and active. It makes a perpetrator available for commands and instructions,

and determines his/her hierarchical position. In the case of aiding an organisation or committing an offence on behalf of an organisation, there are commands or instructions given by ranking members or other members of the organisation[1].

28. In order for the constitution of the offence of being a member of an armed organisation, there must exist an organic link with the organisation and as a rule, there must exist acts and activities of a continuous, diverse and intense character. However, the perpetrators of the offences that can only be committed by the members of the organisation must also be considered as members of that organisation, even if these offences do not have the characteristics of continuity, diversity and intensity in terms of their nature, the way they are committed, the severity of the harm and danger that occurs and their contribution to the aims and interests of the organisation. Actions such as simply sympathising with an organisation or adopting the aims, values and ideology of that organisation, reading and holding possession of the related publications, or respecting the leader of the organisation are not sufficient for being a member of that organisation[2].
29. The Government would like to emphasise that the Court found no problem with respect to the domestic legislative provision governing the offence of membership of an armed terrorist organisation, i.e. Article 314 of the Criminal Code, in the context of Article 7 of the Convention (see, *ibid*, § 249 and paragraphs 19-20 above). The Court also did not criticise the case-law of the Court of Cassation on the subject which has been developed over many years, some examples from which are mentioned above. The issue that led the Court to find a violation was the fact that the established judicial practice had not been properly followed in the particular case involving the ByLock application.
30. At this point the authorities note that the current practice and case-law of the Turkish judicial authorities show that a practice compatible with the principles laid down by the Court has become established. In this context, samples of recent judicial decisions on the matter are presented below.

i) First-Instance Courts

31. The Gümüşhane Assize Court, in its ruling dated 10 January 2019, tried and acquitted an accused person whose mobile phone line registered in his/her name had connected

[1] See, among a large number of judgments containing assessments on membership of a terrorist organisation, the judgments of the 3rd Criminal Chamber of the Court of Cassation nos. E.2022/1757, K.2024/7246; E.2022/40228, K. 2024/6987.
[2] See, among a large number of judgments containing assessments on membership of a terrorist organisation, the judgments of the 3rd Criminal Chamber of the Court of Cassation nos. E.2022/1757, K.2024/7246; E.2022/40228, K. 2024/6987.

to ByLock servers 51 times according to CGNAT records. In its judgment, the Assize Court referred to the case-law of the Court of Cassation and stated that in order for the offence to be constituted, it was important for the accused to join the network with the instruction of the organisation and to use the software for communication purposes to ensure confidentiality. The Assize Court further indicated that the alleged use of the ByLock software, for which there was no findings and evaluation report and the content of which could not be ascertained, could not, by itself, constitute conclusive evidence establishing the existence of the criminal elements of continuity, diversity and intensity, which are required for the charge of membership of an armed terrorist organisation to be proven. On these grounds, the trial court acquitted the accused person. Upon the public prosecutor's appeal on points of facts and law, the 6th Criminal Chamber of the Erzurum Regional Court of Appeal rejected the appeal on 5 March 2020, and upon cassation review, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal in its decision of 23 February 2023, thus rendering a final decision (see Annex 1).

32. The Düzce 2nd Assize Court, in its ruling dated 3 December 2019, tried and acquitted an accused person whose mobile phone line registered in his/her name had connected to ByLock servers according to CGNAT records. In its judgment, the Assize Court referred to the case-law of the Court of Cassation and stated that in order for the offence to be constituted, it was important for the accused to join the network with the instruction of the organisation and to use the software for communication purposes to ensure confidentiality. The Assize Court further indicated that the alleged use of the ByLock software, for which there was no findings and evaluation report and the content of which could not be ascertained, could not, by itself, constitute conclusive evidence of the quality required for the charge of membership of an armed terrorist organisation to be proven. On these grounds, the trial court acquitted the accused person. Upon the cassation appeal requested by the public prosecutor, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal in its decision of 19 January 2023, thus rendering a final decision (see Annex 2).
33. The Ankara 20th Assize Court, in its ruling dated 29 June 2020, tried and acquitted an accused person whose mobile phone line registered in his/her name had connected to ByLock servers 12 times according to CGNAT records. In its judgment, the Assize Court referred to the case-law of the Court of Cassation and stated that in order for the offence to be constituted, it was important for the accused to join the network with the

instruction of the organisation and to use the software for communication purposes to ensure confidentiality. The Assize Court further indicated that the alleged use of the ByLock software, for which there was no findings and evaluation report and the content of which could not be ascertained, could not, by itself, constitute conclusive evidence establishing the existence of the elements of continuity, diversity and intensity, which are required for the charge of membership of an armed terrorist organisation to be proven. On these grounds, the trial court acquitted the accused person. Upon the public prosecutor's appeal on points of facts and law, the 4th Criminal Chamber of the Ankara Regional Court of Appeal rejected the appeal on 26 November 2021, and upon cassation review, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal in its decision of 17 January 2024, thus rendering a final decision (see Annex 3).

34. The Ankara 29th Assize Court, in its ruling dated 13 July 2021, tried and acquitted an accused person whose mobile phone line registered in his/her name had connected to ByLock servers 109 times according to CGNAT and HTS records. The Assize Court made the following assessments in its judgment:

"ByLock user information is determined through the IP addresses registered on the ByLock server; the determination of the User-ID numbers of the users registered on the ByLock server and the analysis of the e-mail/message contents can be made with the ByLock findings and evaluation report, which is important for determining the legal status of the accused. The CGNAT (HIS) records, which are a kind of metadata, serve as a trace and sign, but are not sufficient by themselves to show that the person concerned is an actual ByLock user.…

… considering that it is detected according to the discovered CGNAT records that the person was directed to the IP addresses of the ByLock application, if the User-ID number and password of the person cannot be identified, it cannot be determined only on the basis of the CGNAT records whether the person is one of the actual ByLock users whose User-ID and password have not yet been identified or simply one of the people who were directed to the ByLock servers through trap methods.

[Our court has taken note of] the expert report dated 13 January 2020 on whether the accused was connected to the ByLock software on the basis of the HTS, CGNAT and internet traffic record information of the phone number used by the accused, which were added into the case file, and

the report indicating that the phone line no. 0546 … established communication and connection with the IP address belonging to the ByLock servers/systems 109 times in

different time periods; that the CGNAT and GPRS/WAP base station information matched with each other; and that the findings in the ByLock database query report and the HTS record contents matched each other.

The only basis for the allegation that the accused used the ByLock software is the CGNAT (HIS) records, and since the CGNAT (HIS) records are only summary data, they alone are not sufficient to show that the accused is an actual ByLock user. At the end of the trial, ***considering that a findings and evaluation report showing that the accused had used the ByLock software by creating a user name and password could not be submitted to the case file, that no [incriminating] witness or suspect statement against the accused was entered into the case file,***

... and no other evidence of the accused person's contact with the FETÖ/PDY Armed Terrorist Organisation could be obtained, [our court reaches the conclusion that] ***there is no sufficient, conclusive and convincing evidence beyond any doubt that the accused formed an organic link with the armed terrorist organisation, that he took part in its hierarchical structure, and that he carried out activities involving diversity, continuity and intensity in line with the objectives and instructions of the organisation.****"*

35. In this judgment, the Assize Court, in sum, deemed the findings and evaluation report is of crucial importance to determine that the accused was a ByLock user. The Assize Court, as a result, acquitted the accused on the grounds that there was no evidence that the suspect had engaged in activities involving continuity, diversity and intensity in line with the objectives and instructions of the organisation. Upon the public prosecutor's appeal on points of facts and law, the 4th Criminal Chamber of the Ankara Regional Court of Appeal rejected the appeal on 9 December 2022, and upon cassation review, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal in its decision of 2 April 2024, thus rendering a final decision (see Annex 4).
36. The Ankara 17th Assize Court, in its ruling dated 25 February 2021, tried and acquitted an accused person whose mobile phone line registered in his/her name had connected to ByLock servers according to CGNAT records. In its judgment, the Assize Court referred to the case-law of the Court of Cassation and stated that in order for the offence to be constituted, it was important for the accused to join the network with the instruction of the organisation and to use the software for communication purposes to ensure confidentiality. The Assize Court followed that it must be certainly demonstrated, through the ByLock findings and evaluation report and the CGNAT

records indicating USER ID, password and similar elements, that the accused person had connected to, and used, the ByLock system with a view to maintaining organisational confidentiality and ensuring communication. The Assize Court further indicated that the alleged use of the ByLock software, for which there was no findings and evaluation report and the content of which could not be ascertained, could not, by itself, constitute conclusive evidence establishing the existence of the criminal elements of continuity, diversity and intensity, which are required for the charge of membership of an armed terrorist organisation to be proven. On these grounds, the trial court acquitted the accused person. Upon the public prosecutor's appeal on points of facts and law, the 21th Criminal Chamber of the Ankara Regional Court of Appeal rejected the appeal on 29 June 2022, and upon cassation review, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal in its decision of 21 March 2024, thus rendering a final decision (see Annex 5).

37. As can be seen from the sample judgments presented above, the first-instance courts pay attention to whether the criteria for membership of an organisation, which are emphasised by the Court in the present case as well, notably proof of an organic link based on continuity, diversity and intensity and the presence of a mental element. When these elements are not present, an acquittal decision is rendered since the constituent elements of the offence in question do not exist. There are many similar rulings handed by the first-instance courts that are also upheld by the Court of Cassation on these grounds. It does not seem possible to present all of these rulings due to the extent of the action plan. Nonetheless, 10 examples of similar rulings are enclosed herewith (see Annexes 6-15).

ii) Decisions of Regional Courts of Appeal and the Court of Cassation

38. Furthermore, in cases where the above-mentioned criteria for membership of an organisation are not applied by the first-instance courts in line with the case-law of the Court of Cassation, such judgments are quashed by the Court of Cassation or the Regional Courts of Appeal, thereby a uniform practice is ensured. In this context, some of the quashing decisions are presented below:

39. On 27 February 2024 the 3rd Criminal Chamber of the Court of Cassation, in its quashing decision on the cassation appeal filed by the accused, who had been found to be a ByLock user, noted as follows (see Annex 16):

"…There is no doubt that, where it is established beyond any doubt by conclusive technical data that an individual is included in the said network by the organisation's

instruction and it is used as a communication tool in order to ensure confidentiality, this will be an evidence indicating the individual's relation to the organisation on the ground that the ByLock communication system was developed in order to be used by the members of the FETÖ/PDY armed terrorist organisation and has been used exclusively by certain members of that criminal organisation. ***It has been observed, however, that the accused person's statement to the effect that "he had downloaded the ByLock software on the recommendation of a customer named Mutlu and that he had corresponded on it only to inform his customers about the special offers in his store, that he had not participated in any organisational activities and that he had no connection with the organisation" as well as the content of the correspondence in the ByLock findings and evaluation report were similar to what he stated in his defence submissions.***

In the context of verifying the accused person's defence submissions, an inquiry should have been made as to whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report as the people who added him, those whom he added and those with whom he was in contact on the application and, if any, their statements taken over the course of the criminal proceedings against them, in so far as they concerned the accused, should have been brought into the case file and witness testimonies should have been heard from them. *In addition, it should have been ascertained whether there were any witness or confessor statements about the accused by conducting a query on the UYAP (National Judicial Network) data pool; if any, certified copies of the relevant information and documents should have been brought into the case file and read out to the accused and his defence counsel at the hearing in accordance with Article 217 of the Code of Criminal Procedure; and if necessary, the relevant persons should have been heard as witnesses before the legal status of the accused was assessed and decided on. For these reasons, the impugned ruling, which was rendered as a result of inadequate inquiry, has been found to be in contravention of the law."*

40. In its decision above, the Court of Cassation quashed the conviction of the accused, who was undoubtedly a Bylock user but who stated that he had no connection with the organisation. The Court of Cassation indicated that the determination, on the basis of technical data which would lead to a definite conclusion without any suspicion, that the relevant person became a part of this network in line with the organisational instruction and used it for confidential communication, would undoubtedly constitute evidence

demonstrating the person's relation with the organisation. However, in the present case, the Court of Cassation quashed the decision on the grounds that it could not be established that the relevant person became a part of this network in line with the organisational instruction and used it for confidential communication and that further inquiry was therefore required.

41. On 25 January 2024 the 3rd Criminal Chamber of the Court of Cassation, in its quashing decision on the cassation appeal filed by the accused, who had been found to be a ByLock user, noted as follows (see Annex 17):

"…in the trial held as a result of the investigation initiated against the accused on the charge of using the ByLock communication system, which was found to be used by the FETÖ/PDY organisation for the purpose of organisational communication, it was established within the scope of the case file that [the accused] had been included in this network upon the instruction of the organisation and he had used it for communication purposes to ensure confidentiality, since ByLock is a network created for the use of members of the armed terrorist organisation and used exclusively by certain members of a criminal organisation, according to the ByLock findings and evaluation report and message contents which were used as grounds for conviction. However, considering that the first log date of the accused, who was born in 1997, was 9 November 2015 and that he was 18 or -19 years old and a high school student on the last contact date in February 2016, that no organisational connection and activity of the accused after the aforementioned date could be detected, and that the correspondence in the ByLock content was not sufficient to show that the accused had entered the hierarchy of the organisation, it has been understood that the accused, given his age, would not have been in a position to know that the structure with which he was in a relationship was an armed terrorist organisation in terms of its nature at that time and therefore the criminal intent element of the offence of being a member of an armed terrorist organisation would not have materialised in respect of the accused. For these reasons, the fact that the impugned conviction ruling was rendered in respect of the accused, instead of an acquittal pursuant to Article 30 § 1 of the Turkish Criminal Code and Article 223 § 2 (c) of the Code of Criminal Procedure, has been found to be in contravention of the law."

42. In this judgment, the Court of Cassation did not consider the existence of ByLock alone sufficient for the conviction of the accused. The Court of Cassation examined whether there was criminal intent and assessed the accused's situation in terms of the criteria of continuity, diversity and intensity of his activities. As a result, it concluded that the

accused had no criminal intent and should be acquitted. Therefore, there is currently no automatic presumption of guilt based on ByLock use in the domestic law. As is seen, all constituent elements of the offence and the criteria determined by the case-law are examined in detail and a decision is delivered accordingly.

43. On 9 January 2024 the 3rd Criminal Chamber of the Court of Cassation, in its quashing decision on the cassation appeal filed by the accused, who had been found to be a ByLock user, noted as follows (see Annex 18):

"…There is no doubt that, where it is established beyond any doubt by conclusive technical data that an individual is included in the said network by the organisation's instruction and it is used as a communication tool in order to ensure confidentiality, this will be an evidence indicating the individual's relation to the organisation on the ground that the ByLock communication system was developed in order to be used by the members of the FETÖ/PDY armed terrorist organisation and has been used exclusively by certain members of that criminal organisation. It has been observed, however, that the accused person denied being a ByLock user in his defence submissions. In the context of verifying the accused person's defence submissions, an inquiry should have been made as to whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report as the people who added him, those whom he added and those with whom he was in contact on the application and, if any, their statements taken over the course of the criminal proceedings against them, in so far as they concerned the accused, should have been brought into the case file and witness testimonies should have been heard from them; and only thereafter a ruling should have been rendered, in consideration of the results of these steps. ***For these reasons, the impugned ruling, which was rendered as a result of inadequate inquiry, ...*** *has been found to be in contravention of the law."*

44. As is seen, the Court of Cassation considers the ByLock findings and evaluation report necessary to check the accused's defence. The Court of Cassation further finds it necessary to inquire other issues, *inter alia*, those adduced by the defendants to exculpate themselves in addition to the ByLock findings and evaluation report, as seen in the sample judgments. Otherwise, the Court of Cassation would quash the judgment delivered by the first instance court by remitting the case file. In this respect, the authorities are of the opinion that the current practice of the Court of Cassation and the domestic courts is in conformity with the case-law of the Court.

45. In the decision dated 6 March 2024, the 3rd Criminal Chamber of the Court of Cassation held that if it is found without any doubt and based on unquestionable technical data that a person is registered to the ByLock network upon the instruction of the organisation and that it is used for communication purposes in order to ensure confidentiality, it shall be considered unquestionable evidence that indicates the person's affiliation with the organisation. However, the Court of Cassation went on to add that the defence submission of an accused who stated that he/she was not a user of ByLock should be reviewed. Therefore, the Court of Cassation quashed the decision on the grounds that, according to Article 217 of the CCP, the ByLock findings and evaluation reports that were understood to have arrived at the stage of appeal as well as the identification reports and records of statements of the witnesses who made statements regarding the accused should have been read out and discussed during the hearing, and the legal status of the accused should have been determined and evaluated after duly hearing the said persons in the capacity of witness (see Annex 19).
46. Consistently, in a recent decision dated 28 March 2024, the 3rd Criminal Chamber of the Court of Cassation quashed the lower court's judgment on the grounds that, according to Article 217 of the Law no. 5271, the ByLock findings and evaluation reports that were understood to have arrived at the stage of appeal should have been read out to the accused and his/her defence counsel during the hearing and they should have been asked if they had anything to state; it should have been inquired whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report as the people who added him, those whom he added and those with whom he was in contact; if so, the statements at all stages should have been included in the file; and the legal status of the accused should have been determined and evaluated after hearing the said persons in the capacity of witness (see Annex 20).
47. The 3rd Criminal Chamber of the Court of Cassation emphasised the importance of ByLock evidence in its decision dated 5 March 2024. It stated that the detailed ByLock findings and evaluation report should have been brought by the relevant units, the identification details of the persons whose names were included in the roster records, if any, should have been detected and whether they were accused of this offence and whether they had made statements regarding the accused in the file should have been inquired, files, if any, should have been obtained and reviewed, and they should have been summoned to a hearing and their statements heard in the capacity of witness.

Furthermore, the Court of Cassation stated that it should have been inquired whether there were any statements or information regarding the applicant in the UYAP database; if so, these persons should have been duly heard in the capacity of witness, the accused and his/her defence counsel should have been asked if they had anything to state, and a decision should have been rendered accordingly. For these reasons, it quashed the decision of the Regional Court of Appeal (see Annex 21).

48. Likewise, the 3rd Criminal Chamber of the Court of Cassation stressed the significance of the ByLock evidence in its decision dated 7 February 2024 where it quashed the conviction delivered by the first instance court. In its decision, the Court of Cassation stressed that it should have been inquired whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report present in the file as the people who added him, those whom he added and those with whom he was in contact; if so, the statements regarding the accused at all stages should have been included in the file, and the legal status of the accused should have been evaluated after hearing the said persons in the capacity of witness (see Annex 22).
49. The 3rd Criminal Chamber of the Court of Cassation emphasised the importance of ByLock evidence included in the file but quashed the accused's conviction in its decision dated 19 February 2024. In its decision, the Court of Cassation stressed that, along with other matters, the relevant units should have been asked at which stage the USERID detection studies were and requested once more the detailed ByLock findings and evaluation report, the various evidence obtained should have been read out to the accused and his defence counsel during the hearing according to Article 217 of the Law no. 5271 and they should have been asked if they had anything to state and, if necessary, the persons who made statements should have been heard in the capacity of witness, and a decision should have been made based on the conclusion; however, the said judgment was delivered on the basis of inadequate inquiry and examination and therefore it was contrary to the law (see Annex 23).
50. Lastly, in a decision dated 13 June 2024, the 3rd Criminal Chamber of the Court of Cassation stressed that, after reading out the ByLock findings and evaluation report to the accused and his defence counsel during the hearing and asking if they had anything to state, the relevant units should have inquired whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report as the people who added him, those whom he added and those with

whom he was in contact; if so, the statements regarding the accused at all stages should have been included in the file, and the legal status of the accused should have been evaluated after hearing the said persons in the capacity of witness (see Annex 24).

51. Thus, the Court of Cassation ensured a judicial practice where all the necessary elements of criminal intent, continuity, diversity, intensity of the accused's activities and hierarchical link for the offence of membership of an armed terrorist organisation are inquired. For more sample decisions see Annexes 25-34.

iii) Judgments of the Constitutional Court

52. The role of ByLock evidence in determining membership of a terrorist organisation was addressed many times by the Constitutional Court. As can be seen in the following sample judgments, the Constitutional Court adopted a judicial practice in compliance with the European Court's findings.

53. For example, in the judgment of Ferhat Kara [3], the Plenary of the Constitutional Court indicated as follows: "*In the judicial proceedings, not the downloading of the impugned application to the device, but the signing up to it and its use for organisational purposes were taken into consideration. As a matter of fact, according to the findings of the judicial authorities, no investigation was conducted against individuals only for having downloaded the ByLock application to their devices. Yet, in case of any allegation to the contrary, it is observed that the judicial authorities conducted inquiries in this respect."* (*Ferhat Kara* no. 2018/15231, 4 June 2020, paragraph 158).

54. In its *Nagehan Özgül*[4] decision, the Constitutional Court made the following assessments regarding the alleged violation of the principles of equality of arms and adversarial proceedings (*Nagehan Özgül,* no. 2018/38165, 15 June 2022, §§ 43-47):

43. In the present case, the evidence taken as basis to convict the applicant for the offence of membership of a terrorist organisation includes her being a ByLock user and being employed at institutions that were shut down due to their affiliation with the organisation. As there was no evaluation in the reasoned judgment regarding the Bank Asya account activities that were obtained during the investigation stage, it does not seem possible to state that these account activities occurred upon the instruction of the organisation's leader. In its upholding decision the Court of Cassation stated that rendering a decision without waiting for the ByLock findings and evaluation report did not affect the outcome; however, it did not provide any explanations as to what the other

[3] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/15231
[4] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/38165

pieces of evidence considered sufficient for conviction were and the exclusion of the finding of ByLock usage from its evaluations in their entirety. Therefore, there is no doubt as to the fact that the decisive evidence, among others, was the data concerning the alleged use of ByLock that was taken as basis for her conviction for the offence of membership of a terrorist organisation. At all stages of the proceedings, the applicant objected to her alleged use of ByLock and stated that the GSM line taken as basis for ByLock findings belonged to her but she neither installed nor used the application.

44. In its Ferhat Kara ([Plenary], no. 2018/15231, 4 June 2020) decision, the Constitutional Court considered that a person's use of the encrypted communication network -used for the purposes of ensuring confidentiality in organisational communication only by FETÖ/PDY members due to its structure, usage and technical features- being taken as basis for the conviction of membership of a terrorist organisation does not render ineffective the procedural safeguards and is not clearly an arbitrary practice. It held that the allegations regarding the use of ByLock evidence as the sole or decisive evidence for the conviction amount to ordinary legal-remedy complaints by nature (Ferhat Kara, § 161). In the practice of the Court of Cassation, finding without any doubt and based on unquestionable technical data that a person is registered to the ByLock network upon the instruction of the organisation and that it is used for communication purposes in order to ensure confidentiality is considered evidence that indicates the person's affiliation with the organisation. ***Accordingly, where the conviction judgment for the offence of membership of an organisation is based on the use of ByLock, the ByLock Findings and Evaluations Report indicating the User-ID, password and similar elements must be added to the file. In case the said report cannot be obtained, a decision must be delivered upon a technical report to be obtained from an expert on whether the accused person used the ByLock application over the relevant line after the comparison of the HIS(CGNAT) records obtained from the BTK and HTS results in the case file by means of matching them with the operator's records. Also, it should be stated according to the practice of the Court of Cassation that the ByLock CCPO Query Report issued by law enforcement units was not sufficient to determine with unquestionable technical data that the accused who refused to accept he/she is a ByLock user actually used the ByLock application.***

45. The Court delivered the conviction judgment on the grounds that the applicant was a part of the hierarchic structure of the FETÖ/PDY armed terrorist organisation and had organic links to this organisation, based on the finding that he used this application

according to the results of the ByLock query, as the ByLock communication application was solely used by FETÖ/PDY members. However, within the scope of the practice of the Court of Cassation, it was not explained why the ByLock query results report, which is considered insufficient by itself for the unquestionable determination of ByLock use with technical data, is considered a technical data/evidence capable of leading to a definite conclusion under the circumstances of the present case. In other words, the link between the contents of the query results issued by law enforcement units and the act imputed to the applicant was not demonstrated clearly. Moreover, the reasoned judgment did not contain any explanations as to whether the Bank Asya account activities were ordinary and their effect on the conclusion reached. The reason why being employed at institutions that were shut down due to their affiliation with the organisation is considered organisational activity was not evaluated either.

47. In the present case, it can be seen in the conviction judgment the Court delivered for the offence of membership of a terrorist organisation that it did not separately and clearly discuss some of the allegations that directly affect the result of the case against the applicant. ***In this regard, the Court failed to sufficiently demonstrate, by means of technical data in accordance with the practice of the Court of Cassation, the fact of ByLock usage - which is accepted as evidence, which shows that the applicant voluntarily and knowingly became a part of the hierarchical structure of FETÖ/PDY, and which involves continuity, diversity and intensity – since such a finding is solely based on query results.*** *Furthermore, it was seen that no evaluation was made as to whether the Bank Asya account activities were ordinary and whether they were carried out upon the instruction of the leader of the organisation for the purpose of aiding it. This matter led the proceedings as a whole not to be fair.*

55. In its *Sabri Yılmaz*[5] decision (no. 2018/11960, 30 March 2022) the Constitutional Court made the following assessments regarding the alleged violation of the principles of equality of arms and adversarial proceedings (*Sabri Yılmaz,* no. 2018/11960, 30 March 2022, § 49):

... the applicant's request for obtaining ByLock contents was rejected. The HIS(CGNAT) records were not obtained from the BTK and a technical report was not obtained from an expert on whether the accused person used the ByLock application over the relevant line after the comparison of those records and HTS results. The conviction judgment

[5] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/11960

was rendered solely based on the data on the ByLock Query Results Report. It is the trial court, as a rule, which has the power to evaluate the evidence regarding a certain case and decide whether the evidence shown is related to the case. Moreover, both at this same stage and within this context, it is not the duty of the Constitutional Court to find a person guilty or innocent or determine a lighter or heavier punishment. The conclusion to be reached by the Constitutional Court in this context does not mean that the applicant will definitely be acquitted or convicted. It is natural that a decision will be rendered based on the result of the examination and evaluation to be performed by means of the instance court eliminating the shortcomings stated here (Ruhşen Mahmutoğlu, § 67). Moreover, the applicant was considerably disadvantaged in terms of benefiting from procedural opportunities before the prosecution as a result of the instance court in the present case solely taking as basis the Query Results Report that was submitted to the file by the prosecution and the law enforcement units as to the existence of the facts put forward as reason for conviction, and the instance court failing to conduct a necessary and sufficient examination/evaluation regarding the evidence submitted by the applicant for questioning the authenticity and credibility of these reports. It is not possible for the applicant to prove his allegations by his own means. Under these circumstances, it is clear that the method adopted by the court did not comply with the requirements of the principles of equality of arms and adversarial proceedings and did not involve guarantees protecting the applicant's benefits. This situation resulted in proceedings being unfair as a whole.

56. As is seen, the Constitutional Court adopted a judicial practice in line with the principles set forth by the European Court.

B. Conclusion regarding Violation of Article 7

57. As can be seen in the sample judicial decisions, with regards to the offence of membership of an armed terrorist organisation, the judicial authorities examine whether the accused's affiliation with the organisation surpassed having sympathies towards it and led him/her to have a position within its hierarchy and whether this affiliation involved diversity, continuity and intensity that warrants conviction for the offence of membership of the organisation, as well as the criminal intent, within the framework of the criteria determined with the comprehensive case-law of the Court of Cassation. It can be seen from many other similar decisions, the samples of which have been provided above, that these criteria are being implemented in a consistent manner. For example, in its judgment of 27 February 2024 (see § 40 above), the 3rd Criminal Chamber of the

Court of Cassation quashed the judgment convicting the accused person, stating that it could not be established that the accused person had had an organic link with the organisation and had taken part within the hierarchical structure as a result of the examination made in respect of him who was undoubtedly a user of ByLock. Again, as seen in other sample judgments, the judgments in respect of the accused persons who were found established to be ByLock users were quashed on the grounds that further investigations should be carried out to determine whether the elements of the offence were constituted in the present case within the framework of the criteria established by the case-law of the Court of Cassation. These sample judgments demonstrate that it is not possible to state that there is an established judicial practice in which being a ByLock user is accepted as a presumption leading to almost strict liability and directly applied as a reason for punishment. The domestic courts consider being a ByLock user as evidence, but reach a conclusion by making an assessment as to the elements of the offence in question such as hierarchical link, criminal intent, diversity, continuity and intensity in the accused person's acts.

58. Thus, authorities consider that the current judicial practice is in compliance with the Court's findings set out in the judgement at hand. No further general measure is necessary within the context of Article 7 of the Convention.

C. Violation of Article 6 of the Convention

59. The Court noted that essence of the applicant's complaint within the meaning of Article 6 is based on allegations as to domestic courts' use of the data concerning his alleged use of ByLock as a decisive factor without duly addressing the applicant's concerns.

60. Within this scope, the Court found that its task under Article 6 § 1 was rather to assess the fairness of the proceedings as a whole, taking into account the specific nature and circumstances of the case, including the way in which the evidence was taken and used, and the manner in which any objections concerning the evidence were dealt with (see, *ibid*, § 310)

61. Before proceeding with this examination, the Court wished to clarify whether the specific nature of the evidence at issue, that is encrypted electronic data stored at the server of an Internet-based communication application, requires it to adapt the application of the relevant guarantees under Article 6 § 1 in any way (see, *ibid*, § 311).

62. The Court acknowledged that electronic evidence has become ubiquitous in criminal trials in view of the increased digitalisation of all aspects of life. It noted more pertinently, and without prejudice to its subsequent examination in the present case, that

recourse to electronic evidence attesting that an individual is using an encrypted messaging system which had been specially designed for and used exclusively by a criminal organisation in the internal communications of that organisation, can be very important in the fight against organised crime. It also noted that electronic evidence differs in many respects from traditional forms of evidence, including as regards its nature and the special technologies required for its collection, securing, processing and analysis. The Court also reiterated that the use of untested electronic evidence in criminal proceedings may involve particular difficulties for the judiciary as the nature of the procedure and technology applied to the collection of such evidence is complex and may therefore diminish the ability of national judges to establish its authenticity, accuracy and integrity. Moreover, the handling of electronic evidence, particularly where it concerns data that are encrypted and/or vast in volume or scope, may present the law enforcement and judicial authorities with serious practical and procedural challenges at both the investigation and trial stages (see, *ibid*, § 312).

63. The Court pointed out that electronic or other data collected by intelligence services may be increasingly resorted to in criminal proceedings as direct or indirect evidence. Referring to the Venice Commission, the Court stressed that in order to anticipate, prevent or protect itself against threats to its national security, a State needs effective intelligence and security services and that intelligence constitutes one of the main weapons the State has in the struggle against terrorism. The Court also notes that it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in pre-empting such attacks (see, *ibid*, § 315).

64. The Court noted that issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review (see, *ibid*, § 304). The Court noted that it is not for the Court to pronounce on whether and in what circumstances and format intelligence information may be admitted in criminal proceedings as evidence (see, *ibid*, § 316).

65. The Court considered that, having regard to its limited role in determining the admissibility of a piece of evidence or reviewing its assessment by national courts, it was not necessary, for the purposes of its present examination under Article 6, to determine whether the contested evidence had been actually obtained lawfully in terms of domestic law and had been admissible, or whether the domestic courts had made any substantive errors in their assessment of the relevant evidence. The Court stressed that

its task under Article 6 § 1 is rather to assess the fairness of the proceedings as a whole, taking into account the specific nature and circumstances of the case, including the way in which the evidence was taken and used, and the manner in which any objections concerning the evidence were dealt with (see, *ibid*, § 310).

66. The Court noted that there were no objective indications before it to doubt that the MİT or other public authorities had acted in good faith in relation to the ByLock data (see, *ibid*, § 317).
67. The Court did not accept the objections raised by the applicant concerning the lawfulness of CGNAT data and HTS records (see, *ibid*, §§ 320-322). The Court also noted that the applicant had available to him all the ByLock reports relied on by the domestic courts in the criminal proceedings, and that the accuracy of the ByLock data pertaining to him had been verified on the basis of data obtained from other sources. The Court further noted that a technical report produced in 2020 explained that it was not possible to sort the raw data on a user ID basis without first processing them (see, *ibid*, § 326).
68. While the Court does not ignore the significance of these factors, it considers that they are not determinative of the question whether the applicant's defence rights vis-à-vis the ByLock evidence were duly respected in the present case (see, *ibid*, § 326). In this regard, the Court stated that it would concentrate on the applicant's ability to effectively challenge ByLock evidence in proceedings (see, *ibid*, § 311). The Court summarised the complaints which it examined in turn as follows (see, *ibid*, § 325):

"*The applicant mainly complained that he had been unable to properly challenge the ByLock evidence in his regard as the data collected by the MİT from the ByLock server had not been shared with him or submitted to independent examination in accordance with the principles of equality of arms and adversarial proceedings, and as required under Article 134 § 4 of the CCP.*"
69. **In its assessment as to Article 6**, **the Court firstly** addressed non-disclosure of the relevant Bylock data to the applicant.
70. As regards this issue, the Court emphasised that the entitlement to disclosure of evidence is not an absolute right. The Court stressed that there may be a variety of reasons which may require the withholding of evidence from the defence, including concerns over national security or the preservation of the fundamental rights of others (see, *ibid*, § 329).
71. The Court continued its explanations concerning the matter as follows:

Moreover, where the evidence in the hands of the prosecution relates to a large mass of electronic information, it may not be possible, or even necessary, to disclose that information to the defence in its entirety. The applicant's right to disclosure must not be confused with a right of access to all that material. The Court is accordingly able to accept that there may have been legitimate reasons for not sharing the raw data with the applicant in the present case. It is further reiterated that in cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see, *ibid*, § 329).

72. As regards the present case the Court noted firstly that according to the information in the case file, the reasons advanced by the Government before the Court to justify the non-disclosure of the relevant data to the applicant had never been actually adverted to in the domestic courts' judgments; so the applicant's request simply had gone unanswered. The Court stressed that its task is rather to examine whether any prejudice sustained by the applicant on account of the non-disclosure of the relevant ByLock data was counterbalanced by adequate procedural safeguards and whether he was given a proper opportunity to prepare his defence, as required by Article 6 of the Convention (see, *ibid*, § 330).

73. Accordingly, while the Court acknowledges that it is in no position to determine whether, in what form and to what extent the relevant data should have been shared with the applicant, it cannot but note that the applicant was given no explanation by the domestic courts as to why, and upon whose decision, the raw data – particularly to the extent that they concerned him specifically – were kept from him (see, *ibid*, § 331). Indeed, the Court did not criticise non-delivery of raw data to the applicant, it criticised the fact that the domestic courts had remained inactive without providing a reasoning concerning this request of the applicant.

74. The Government would like to point out that the reason why raw data was not shared with the applicant is obvious according to the expert report[6] dated 2 April 2020 which was examined by the Court within the context of the judgment of *Yalçınkaya*. In this respect, it was explained that it was not possible to sort the raw data on a user ID basis without first processing them (see, *ibid*, § 121). However, the Court noted that the

[6] "Analysis Report on Intra-Organisational Communication Application" prepared by the Anti-Smuggling and Organised Crime Department

applicant had been given no explanation by the domestic courts as to why the raw data had been kept from him. Accordingly, it flows from the judgment that failure to provide sufficient reasoning as to this request was one of the reasons for the violation of Article 6.

75. The authorities would like to stress that the reasonable and substantiated requests related to the case file do not remain unaddressed. The trial courts provide necessary explanations, and thereby, it is ensured that the principles of equality of arms and adversarial proceedings are duly applied. Where the trial authorities carry out a deficient assessment, the problem may be eliminated by means of objection remedies provided for in the domestic law, and a possible violation is prevented within the context of Article 6 of the Convention. The sample court decision below indicates that there is an established practice on this matter.

76. Within this scope, as regards the alleged violation of the principles of equality of arms and adversarial proceedings, the Constitutional Court made the following assessments in the decision of *Oğuzhan Aksoy*[7] (*Oğuzhan Aksoy*, no. 2018/37293, 13 September 2022, § 68-69):

As a result, the Court did not discuss in its reasoned decision the objections raised in terms of the compliance of the CGNAT records -evidence- with the acceptance that the applicant had been included in the ByLock communication system with the instruction of the organisation and that this program had been used for communication purposes in order to ensure confidentiality, and in which aspect it did not rely on the applicant's defence submissions at the stages; ***the Court and the Chamber did not provide the applicant with the opportunity to examine these records in their entirety and to effectively challenge their content.*** *In principle, it is for the trial court to assess the available evidence in a given case and to decide whether the evidence adduced relates to the case. Moreover, both at this stage and in this context, it is not the duty of the Constitutional Court to decide on guilty or innocence or to determine a slighter or heavier sentence, nor does the conclusion to be reached by the Constitutional Court here mean that the applicant must be acquitted or convicted. A decision will be rendered according to the result of the examination and evaluation to be made by eliminating the deficiencies mentioned here by the first instance court.*

[7] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/37293

… It is not possible for the applicant to prove his allegations with his own means. Under these circumstances, it is clear that the method adopted by the Court and Chamber did not comply with the requirements of the principles of equality of arms and adversarial proceedings and did not involve guarantees protecting the applicant's benefits. This situation resulted in the proceedings being unfair as a whole.

77. **Secondly**, the Court noted that recalling once again the critical importance of the raw ByLock data to the applicant's case, the domestic courts' failure to respond to his request for such independent examination – even if only to explain why such independent examination was not deemed necessary – was problematic (see, *ibid*, §§ 332-333). The point considered as problematic by the Court is the fact that the request for independent examination was remained unaddressed (see, *ibid*, § 326). On the other hand, the Court referred to the expert report and noted that it was not possible to sort the raw data on a user ID basis without first processing them (see, *ibid*, § 121).
78. In summary, the Court found that the domestic courts had failed to respond to the applicant's request for an expert examination without providing sufficient reasoning. On this basis, the Government is of the opinion that the underlying reason for the violation at hand is the domestic courts' failure to submit sufficient reasoning in their practice. Therefore, the relevant general measures are those aiming to improve judicial practice, such as awareness raising activities, training and guidance from the higher courts. Here, the authorities would like to provide information on the current judicial practice (*for general measures concerning awareness raising and training activities, see below*).
79. For instance, the Constitutional Court noted the following in the application of *Esra Saraç Arslan*[8] in which it held that the principles of equality of arms and adversarial proceedings had been violated due to dismissal of the request for performance of expert examination on the data concerning ByLock evidence (*Esra Saraç Arslan*, no. 2019/10514, 28 December 2022, §§ 57-59):

In her defence submissions at investigation and trial stages, the applicant objected to the allegation that she was a user of ByLock and stated that the records of ByLock Inquiry Result and CGNAT records submitted in the case file were not accurate. The applicant stated during her questioning before the Magistrate Judgeship that she had downloaded the program but not used it. ***At the second hearing of the proceedings, the***

[8] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/10514

applicant's defence counsel requested that the Police Department be asked whether the findings of connection list concerning ByLock were possible and that an expert examination be carried out. The court dismissed the request in view of the current stage of the proceedings and existing ByLock findings, and it announced the conviction judgment at the next hearing.

In the present case, the request of the applicant for performance of expert examination on technical data concerning ByLock was dismissed*, and a conviction judgement was issued in view of the ByLock query result report and CGNAT records. The reasoned decision did not provide an explanation as to the fact that CGNAT records had been examined specifically in relation to the accused person and the present incident. It was also observed that the statement given before the Magistrate Judgeship, which the Court of Cassation took as a basis in the upholding decision, was related to the acknowledgement that the program had been downloaded from the application store.* ***However, the Court of Cassation accepted as evidence not downloading of ByLock program but its use for organisational purposes****; and the Constitutional Court did not see any problem with respect to this finding within the context of the examination made in terms of the Constitution.*

As a result, the fact that the domestic court took into account only the query result report and CGNAT records submitted by the Police Department in the case file as regards the existence of facts, which the domestic court showed as a basis of the conviction, and ***that the expert examination requested by the applicant detained pending trial for the establishment of the accuracy and reliability of these reports and records was dismissed without performing a sufficient examination/assessment put the applicant in a disadvantaged position vis a vis prosecution authority in terms of benefiting from procedural opportunities****. It was not possible for the applicant to prove her allegations with her own means. Under these circumstances, it is clear that the method adopted by the court did not comply with the requirements of the principles of equality of arms and adversarial proceedings and did not involve guarantees protecting the applicant's benefits. This situation resulted in the proceedings being unfair as a whole.*

80. For instance, the Constitutional Court noted the following in the application of *Soner Onursal*[9] in which it held that the principles of equality of arms and adversarial proceedings had been violated due to dismissal of the request for performance of expert

[9] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/42246

examination on the data concerning ByLock evidence (*Soner Onursal*, no. 2019/42246, 16 March 2023, §§ 31-33):

In the present case, in his defence submissions at investigation and trial stages, the applicant objected to the allegation that he was a user of ByLock and stated that the records of ByLock Inquiry Result and CGNAT records submitted in the case file were not accurate. ***At the stage of preparation for hearing, the applicant's defence counsel requested in writing the performance of an expert examination on ByLock data and the obtaining of a report. The court continued to hear the case without making an assessment concerning this request and issued a conviction judgment.*** *The applicant's objections that a ruling had been issued without performing an expert examination on ByLock data were not addressed in the decisions of the Regional Court of Appeal and the Court of Cassation.*

As a result, the applicant's request to obtain a technical report from an expert as to whether he was the person using ByLock on the specified line by comparing the CGNAT and HTS records was not accepted and conviction was ordered. Moreover, the fact that the Court took into account only the ByLock query result report and CGNAT records as regards the existence of facts, which the domestic court showed as a basis of the conviction, and that ***the failure to carry out a sufficient examination/assessment as regards the evidence indicated by the applicant detained pending trial for the establishment of the accuracy and reliability of these records put the applicant in a disadvantaged position vis a vis prosecution authority in terms of benefiting from procedural opportunities****. It was not possible for the applicant to prove his allegations with his own opportunities. Under these circumstances, it is clear that the method adopted by the court did not comply with the requirements of the principles of equality of arms and adversarial proceedings and did not involve guarantees protecting the applicant's benefits. This situation resulted in the proceedings being unfair as a whole. For the explained reasons, it must be held that there were violations of the right to equality of arms and adversarial proceedings under the scope of the right to a fair trial safeguarded by Article 36 of the Constitution.*

81. In its judgments, the Constitutional Court, in summary, found a violation on the ground that the rejection of the request for an expert examination without an adequate assessment/evaluation put the accused person in a significantly disadvantageous position and remitted the files to the courts of instance for retrial. As is seen, the findings

in the Constitutional Court's judgments coincide exactly with the Court's approach to the issue.

82. The authorities would also like to point out that the Constitutional Court's decision in the case of *Sabri Yılmaz* mentioned above (*see, paragraph 55 above*), in which the Constitutional Court ruled that the principles of equality of arms and adversarial proceedings had been violated, contains similar assessments.

83. **The Court, thirdly, highlighted** the fact that a number of other arguments raised by the applicant to point out his concerns regarding the reliability of the ByLock evidence were similarly left unanswered by the domestic courts. The Court noted that the national courts did not examine the arguments that MİT was not authorised to collect data to be used as evidence during criminal proceedings and that the domestic court's decision of 9 December 2016 cannot render as retrospectively 'lawful' and reliable the evidence collected in such manner (see, *ibid*, § 334).

84. In response to the applicant's above argument, the Court indicated that it was not for the Court to pronounce on whether and in what circumstances and format intelligence information may be admitted in criminal proceedings as evidence. Moreover, the Court noted the findings of the Venice Commission[10] on the issue of whether intelligence services have the authority to collect evidence. As indicated by the Venice Commission, "in order to anticipate, prevent or protect itself against threats to its national security, a State needs effective intelligence and security services" and that intelligence constitutes "one of the main weapons the State has in the struggle against terrorism". The Court also notes that it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in pre-empting such attacks (see, *ibid*, § 315). It flows from the judgment that the Court did not admit the applicant's argument as to the legality of this evidence.

85. As pointed out by the Court and explained in the Constitutional Court's decision in the case of *Ferhat Kara*, the image of the ByLock raw data, delivered to the Ankara Chief Public Prosecutor's Office by the MİT, was obtained, and a copy of it was sent to the KOM for examination, and the other image was secured at the safety deposit office inside a lockbox. These images are secured in lockboxes (see § 177 and *Ferhat Kara*, § 59).

[10] The Report on the Democratic Oversight of the Security Services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) (CDL-AD(2007)016-e) and updated at the 102nd Plenary Session (Venice, 20-21 March 2015) (CDL-AD(2015)010)

86. The European Court also noted that there were no objective indications before it to doubt that the MİT or other public authorities had acted in good faith in relation to the ByLock data (see, *ibid*, § 317).
87. Considering all of these assessments made by the Court, what the Court considers to be a problem here is the lack of sufficient reasoning by the national courts in response to the applicant's allegations. The Government would like to provide sample judgments to demonstrate the current judicial practice.
88. The Constitutional Court made the following assessment as to lawfulness of the ByLock evidence in its judgment of *Ferhat Kara* (*Ferhat Kara*, § 136):

"Consequently, the delivery of the data concerning the ByLock application, which had been found out during the intelligence efforts conducted in respect of a terrorist organisation aiming to overthrow the constitutional order, to the Ankara Chief Public Prosecutor's Office in order to contribute to revealing the material truth during the investigations/proceedings against this organisation did not prima facie involve any unlawfulness. Moreover, there was no finding established by the Court of Cassation or inferior courts to suggest the existence of any unlawfulness in respect of this process. On the contrary, in several of its decisions the Plenary of the Court of Cassation in Criminal Matters reached the conclusion that the manner in which ByLock had been obtained -as a piece of evidence- was in line with the law (see, for one of such decisions, decision no. E.2018/16- 419, K.2018/661 dated 20 December 2018 of the Plenary of the Court of Cassation in Criminal Matters). Therefore, the submission, to the Ankara Chief Public Prosecutor's Office, of the digital materials concerning the ByLock communication system, which were obtained/found out by the MİT within the scope of its legal powers, as well as of the technical report issued in this respect cannot be considered to constitute a practice involving a manifest error of discretion or manifest arbitrariness."

89. In conclusion, it appears that the issue here is again the failure to provide sufficient reasoning as to the applicant's arguments. In view of the above, the authorities would like to underline that according to the domestic law, the courts are supposed to provide sufficient reasoning in response to the reasonable requests of the suspects. General measures are taken to improve judicial practice to this effect.
90. **Fourthly**, the Court noted that the Ankara Regional Court of Appeal had requested the KOM to provide the content of the exchanges engaged in by the applicant over ByLock, as well as information regarding the individuals that he had communicated with.

However, the relevant court had then delivered its judgment without awaiting the submission of those data, which had been eventually included in the file after the applicant's conviction had become final. The applicant's objections regarding the absence of those data had been also dismissed by the Court of Cassation, which had held that the delivery of the appeal judgment without awaiting the submission of the detailed ByLock findings and evaluation report had not affected the outcome. However, the European Court considered that giving the applicant the opportunity to acquaint himself with the decrypted ByLock material in his regard would have constituted an important step in preserving his defence rights (see, *ibid*, §§ 335-336).

91. The authorities would like to indicate that as is evident from the sample judicial decisions provided above as to the violation of Article 7, the judicial authorities consider it necessary to obtain the ByLock findings and evaluation report. As noted by the Court (see, *ibid*, § 107), the findings and evaluation report contain all the data available and recoverable in the ByLock raw data of the person concerned. Therefore, in addition to the technical data proving that the person was a ByLock user, this report also contains the content of the conversations and information on the persons who were registered in the contact list and with whom the person was in contact. In this respect, adding the findings and evaluation report into the file, making it available for the accused's examination and asking the accused to submit his/her comments on it provides the accused with a possibility to use his/her defence rights. In this context, the sample judicial decisions provided below also demonstrate that there is no systemic problem in practice.

92. In its judgment of 27 February 2024 quashing the accused's conviction, the 3rd Criminal Chamber of the Court of Cassation made, *inter alia*, the following assessments as grounds for the quash (see Annex 35):

"In the event that the accused, who states that the ByLock program was installed on his/her phone but does not admit that he/she is a ByLock user, is found to have used the ByLock application with technical data beyond any doubt, the evidence that he/she is a ByLock user is decisive in terms of the establishment of the imputed offence, and the documents regarding the findings of ByLock and ***the detailed ByLock findings and evaluation report should be obtained from the relevant bodies; with a view to checking the defence of the accused, who states in his/her defence that he/she is not a ByLock user, it is necessary to inquire whether there is an investigation or prosecution against the persons who appear in the ByLock findings and evaluation report as the persons***

who added, the accused, those whom he/she added and with whom he/she was in contact, and the statements taken during the stages in connection with the accused, if any, should be added to the file and their statements should be taken as witnesses..”

93. In its judgment of 22 February 2024 quashing the accused’s conviction, the 3rd Criminal Chamber of the Court of Cassation made, *inter alia*, the following assessments as grounds for the quash (see Annex 36):

94. *“... the decision has been found to be unlawful on account of the fact that* ***a decision should have been delivered after i) reading out the ByLock findings and evaluation reports and the ByLock content transcripts to the accused and his defence counsel under Article 217 of the Law no. 5271; ii) where it was determined that they belonged to the accused, asking him whether he had any comment on them in view of the fact that the digital analysis reports -which are understood to have been added to the file at the stage of appeal on points of fact and law- regarding the digital materials seized from the accused, who stated in his defence that he was not a ByLock user, and the ByLock findings and evaluation reports -which are understood to have been added to the file at the appeal stage- indicated that the accused used the ByLock with ID nos. 144344 and 325326; iii) making an inquiry into the issue of whether there was an investigation or prosecution against the persons appearing in the ByLock findings and evaluation report as the persons who added the accused, those whom he added and with whom he was in contact, and iv) adding to the file the statements taken during the stages in connection with the accused, if any, and v) hearing those persons in the capacity of a witnesses with a view to reviewing the defence submissions of the accused.****”*

95. In its judgment of 12 February 2024 quashing the accused’s conviction, the 3rd Criminal Chamber of the Court of Cassation made, *inter alia*, the following assessments as grounds for the quash (see Annex 37):

“As indicated in the decision of the (abolished) 16th Criminal Chamber of the Court of Cassation, acting as a first-instance court, dated 24 April 2017 no. E.2015/3, K.2017/3, which was upheld and became final by the decision of the Plenary of the Court of Cassation in Criminal Matters dated 26 September 2017 no. E.2017/16-956, K.2017/970, and in the decision of the Constitutional Court dated 4 June 2020 no. 2018/15231 on the application of Ferhat Kara; the ByLock communication system is a network which is designed for the use of the members of the FETÖ/PDY armed terrorist organisation and is used exclusively by certain members of this terrorist organisation

and therefore, where it is found, on the basis of technical data which would lead to a definite conclusion without any suspicion, that the relevant person has become a part of this network in line with the organisational instruction and used it for confidential communication, this finding will undoubtedly constitute evidence demonstrating the person's relation with the organisation; however, ***the delivery of a decision as a result of inadequate inquiry has been found unlawful on account of the fact that a decision should have been delivered after i) making an inquiry into the issue of whether there was an investigation or prosecution against the persons appearing in the ByLock findings and evaluation report as the persons who added the accused, those whom he added and with whom he was in contact, ii) adding to the file the statements taken during the stages in connection with the accused, if any, iii) hearing those persons in the capacity of a witnesses, iv) and reading out the ByLock findings and evaluation report relating to ID no. "401571" -which is understood to have been added to the file at the appeal stage- to the accused and his defence counsel at the hearing in accordance with Article 217 of the Law no. 5271 with a view to reviewing the defence submissions of the accused, who stated in his defence that he was not a ByLock user.****"*

96. In its judgment of 6 February 2024 quashing the accused's conviction, the 3rd Criminal Chamber of the Court of Cassation made, *inter alia*, the following assessments as grounds for the quash (see Annex 38):

"The ByLock communication system is a network which is designed for the use of the members of the FETÖ/PDY armed terrorist organisation and is used exclusively by certain members of this terrorist organisation; therefore, where it is found, on the basis of technical data which would lead to a definite conclusion without any suspicion, that the relevant person has become a part of this network in line with the organisational instruction and used it for confidential communication, this finding will undoubtedly constitute evidence demonstrating the person's relation with the organisation; however, ***the delivery of a decision as a result of inadequate inquiry has been found unlawful on account of the fact that a decision should have been delivered after i) making an inquiry into the issue of whether there was an investigation or prosecution against the persons appearing in the ByLock findings and evaluation report as the persons who added the accused, those whom he added and with whom he was in contact, and ii) adding to the file the statements taken during the stages in connection with the accused, if any, iii) and hearing those persons in the capacity of a witnesses with a***

view to reviewing the defence submissions of the accused, who stated in his defence that he was not a ByLock user."

97. Similarly, the 3rd Criminal Chamber of the Court of Cassation stressed the importance of the ByLock evidence in its judgment dated 5 March 2024. However, it quashed the decision on the grounds that it should have been inquired whether there was any investigation or prosecution against any of the persons who appeared in the ByLock findings and evaluation report as the persons who added the accused, those whom he added and those with whom he was in contact, and if so, they should have been heard in the capacity of a witness in terms of reviewing the defence submissions of the accused who stated that he was not a ByLock user despite there being a "ByLock findings and evaluation report" in the file (see Annex 39). It was pointed out that the persons the accused communicated with via ByLock, which is a secret communication tool that allows communication provided that certain passwords are shared with one another, should have been detected and their statements should have been heard.

98. The Government would like to emphasise that only some of the numerous judgments delivered consistently with the same approach by the Court of Cassation on the subject are given here. The Constitutional Court also decides on the matter in line with the Court's case-law.

99. For example, the Constitutional Court made the following assessments in its judgment in the case of *Harun Evren*[11] (no. 2020/17037, 13 April 2022), in which it found a violation of the principles of equality of arms and adversarial proceedings within the scope of the right to a fair trial (*Harun Evren*, no. 2020/17037, 13 April 2022, §§ 35-37):

"The Constitutional Court accepts that considering the applicant's use of an account at Bank Asya as an organisational activity is only possible if it is established that it was carried out in accordance with the instructions received from the terrorist organisation. The decisions of the Court of Cassation have also indicated that usual activities in accounts at Bank Asya cannot be considered as organisational activities. The inferior court, however, relied solely on the fact that the applicant had an account at Bank Asya and did not make any findings or assessments concerning the account activities. Therefore, it must be acknowledged that the findings regarding the applicant's use of ByLock was the decisive -albeit not the only- evidence leading to the conviction.

[11] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/17037

The examination of the reasoned decision did not reveal any concrete data indicating that the inferior court conducted any inquiry regarding the CGNAT query records of the ADSL number with the IP address found to have been connected to the ByLock server IPs and used by the applicant, and the HTS records of the GSM number, if any. ***Although at the eighth hearing held on 27 September 2017 the applicant requested the identification and hearing of the persons indicated in the ByLock Findings and Evaluation Report, these requests were also rejected without any justification. Moreover, the statements taken during the investigations from those who had added the ID no. 141200 allegedly used by the applicant and the relevant prosecution documents, if any, were not obtained.***

In the present case, in view of the fact that the use of ByLock was decisive for the establishment of the offence, no inquiry was carried out into the issues raised by the applicant to the contrary of this evidence, and the requests for the collection of evidence were rejected. However, the evidence requested by the applicant could only be obtained with the assistance of a court. Accordingly, the applicant was not provided with reasonable opportunities to refute the evidence which he had no possibility of obtaining. ***In conclusion, the applicant was placed in a disadvantageous position vis-à-vis the prosecution with regard to procedural opportunities, and the principles of equality of arms and adversarial proceedings were violated.***

100. In its *Yunus Usluer*[12] decision, the Constitutional Court held that the right to a reasoned judgment had been violated as a substantive allegation that could change the outcome of the decision had not been addressed. In that decision, the Constitutional Court stated the following (*Yunus Usluer,* no. 2018/38137, 10 May 2022, §§ 41- 43):

In the present case, the sole evidence taken as basis for convicting the applicant for the offence of membership of a terrorist organisation is the query results report indicating that he was a ByLock user. At all stages of the proceedings, the applicant objected to his alleged use of ByLock and stated that the GSM line taken as basis for ByLock findings belonged to him but he did not use the application.

The Court handed down the conviction on the grounds that the applicant was a part of the hierarchic structure of the FETÖ/PDY armed terrorist organisation and had organic links to this organisation, based on the finding that he used this application according to the results of the ByLock report (Query Results Report) dated 26 January

[12] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/38137

2017, as the ByLock communication application was exclusively used by FETÖ/PDY members. ***The ByLock Findings and Evaluation Report dated 20 June 2017 and the Data Analysis Report dated 22 February 2018, which had been issued with respect to the applicant, were added to the case file following the appellate review (see § 18). Therefore, the relevant documents were not examined by the instance court or the Regional Court of Appeal, nor did the applicant have the opportunity to be informed about these pieces of evidence against him or to submit his objections to the authenticity and credibility of these documents in line with the principles of equality of arms and adversarial proceedings.*** *In the reasoned judgment of the instance court, it was not explained why the ByLock Query Results Report- which is considered insufficient on its own for the establishment of ByLock use with technical data which are beyond any doubt and lead to a definite conclusion in line with the practice of the Court of Cassation- was considered technical data/evidence capable of leading to a definite conclusion under the circumstances of the present case. In other words, the link between the contents of the report issued by law enforcement units and the act imputed to the applicant was not demonstrated clearly. Nothing regarding the assessment of these matters was stated in the decisions of the Regional Court of Appeal and the 16th Criminal Chamber of the Court of Cassation*

It is the trial court, as a rule, who has the power to evaluate the evidence regarding a certain case and to decide whether the evidence shown is related to the case. Moreover, both at this same stage and within this context, it is not the duty of the Constitutional Court to find a person guilty or innocent or determine a lighter or heavier punishment. The conclusion to be reached by the Constitutional Court in this context does not mean that the applicant will definitely be acquitted or convicted. It is natural that a decision will be rendered based on the result of the examination and assessment to be performed by means of the instance court eliminating the shortcomings stated here (Ruhşen Mahmutoğlu, no. 2015/22, 15 January 2020, § 67).). Furthermore, in the present case, it appears that the court used abstract statements in its judgment convicting the applicant of the offence of membership of a terrorist organisation and did not separately and clearly discuss the allegations regarding the applicant. ***In this regard, it is not possible to accept that the Court sufficiently demonstrated with technical data in accordance with the practice of the Court of Cassation the fact of ByLock use that shows the applicant knowingly and willingly became a part of the FETÖ/PDY hierarchical structure; was continuous, diverse and intense; and was considered***

evidence, in view of the fact that such an acknowledgement is solely based on query results. In other words, it has been concluded that the link between the applicant and the ByLock application, which is a communications network created for the FETÖ/PDY members to use and was exclusively used by some of the members of this organisation, was not clearly established. This matter led the proceedings as a whole to be no longer fair."

101. In view of the above, the authorities would like to note that domestic courts established a practice where the inclusion of the ByLock Findings and Evaluation Report into the case-file is ensured before the final judgement.

102. **Fifthly**, emphasising the deficiencies in the domestic courts' reasoning, the Court considered the failure of the domestic courts to support their practices with sufficient and pertinent reasoning, and to address the applicant's objections regarding their veracity to be one of reasons giving rise to the violation of the right to a fair trial (see, *Yalçınkaya*, cited above, 337).

103. The Court noted that the domestic courts were required to make further explanation as to how it was ascertained that ByLock was not, and could not have been, used by anyone who was not a "member" of the FETÖ/PDY within the meaning of Article 314 § 2 of the Criminal Code (see, *ibid*, 340).

104. Detailed information on the legal value of the ByLock data as evidence and the current judicial practice in this respect has already been submitted above within the framework of the Court of Cassation's case-law under the heading of violation of Article 7. The Government would like to reiterate that Bylock is a communication application that can only be installed by following certain procedures and is only available to the FETÖ/PDY members. As can be seen within the sample judgments provided above, these facts are examined by the domestic courts in a sufficiently detailed manner. Therefore, it might be indicated that the domestic courts established a judicial practice where evidential value of the ByLock data is thoroughly explained in the courts' judgments. Furthermore, the authorities would like to note that the Court also admitted that ByLock was not just any ordinary commercial messaging application, and that its use could even *prima facie* suggest some kind of connection with the FETÖ/PDY (see, *ibid*, 259). In order to avoid repetition, the Government confines itself to referring to the previous explanations.

The Remaining Evidence

105. In its assessment, the Court noted that the domestic court had not sufficiently discussed the applicant's use of an account at Bank Asya and membership of a trade union and an association. The membership of a trade union and an association is examined below under the heading of violation of Article 11.

106. The act of depositing money with Bank Asya is examined in detail in judicial practice within the framework of the criteria required by the Court of Cassation for membership of an illegal organisation and decisions are delivered on that basis. The existing case-law and practice are compatible with the Court's case-law and the Convention. The sample decisions provided below will clarify this point.

107. For example, on 15 December 2020 the Kırşehir Assize Court decided to acquit the accused of the charge of membership of a terrorist organisation. It stated the following in its decision (see Annex 40):

"... It has been understood that ***there is no evidence or witness statements in the file to support that the accused deposited his money in the bank upon the call of the organisation's leader; the account activities coincide with the accused's defence and witness statements; there is no evidence in the file that the accused had a hierarchical link with the organisation****; the issues mentioned within the scope of the whole file cannot be considered as organisational activities sufficient to prove that the accused is a member of an illegal organisation going beyond affiliation, and accordingly, the acts of the accused cannot be considered as evidence sufficient to prove that the accused is a member of an illegal organisation in the above-mentioned decision of the Court of Cassation;* ***no concrete evidence has been obtained to prove beyond any doubt that the accused committed the imputed offence****; these acts of the accused do not present any diversity, continuity or intensity in such a way as to indicate that the accused is part of the hierarchical structure of the armed terrorist organisation, and that the acts of the accused are not sufficient for membership of the armed terrorist organisation****; as indicated in the decision of the 16th Criminal Chamber of the Court of Cassation dated 26 October 2017 no. E.2017/1809 K.2017/5155,* ***the acts of the accused cannot be considered as organisational activities sufficient to prove that he is a member of the organisation and that they are considered as acts not going beyond sympathy****. It is therefore decided that the accused should be acquitted in line with the principle of in dubio pro reo on the ground of lack of conclusive and convincing evidence to prove beyond any doubt that the accused committed the offence charged."*

108. In the review of appeal on points of fact and law, the 4th Criminal Chamber of the Ankara Regional Court of Appeal dismissed the appeal on the merits, and upon appeal on point of law, the 3rd Criminal Chamber of the Court of Cassation upheld the first-instance court's decision on 7 March 2024, and the decision therefore became final (see Annex 41).

109. In another set of sample proceedings, on 7 December 2018 the Kars 2nd Assize Court convicted the accused of aiding an illegal organisation without being a member of it, in a case where depositing money with Bank Asya was also accepted as evidence. Upon appeal on points of fact and law, on 16 April 2019 the 2nd Criminal Chamber of the Erzurum Regional Court of Appeal quashed the decision and acquitted the accused. In its decision, the Regional Court of Appeal noted that there was no sufficient evidence that the accused had deposited money with Bank Asya upon the instruction of the organisation's leader. Having examined the appeal on point of law, the 3rd Criminal Chamber of the Court of Cassation upheld the acquittal by its decision of 18 March 2024 and the decision became final (see Annex 42).

110. In its decision dated 10 May 2023, the 3rd Criminal Chamber of the Court of Cassation quashed the accused's conviction as in the sample judgments given above, in a manner consistent with the Court's findings. In the same judgment, the Court of Cassation made, *inter alia*, the following assessments in relation to depositing money with Bank Asya (see Annex 43):

"Having regard to the fact that the usual account activities carried out at Asya Katılım Bank A.Ş., which is affiliated with the FETÖ/PDY armed terrorist organisation and whose management and control and the privileges of its shareholders except for dividends were transferred to the Savings Deposit Insurance Fund by the decision of the Banking Regulation and Supervisory Authority (BDDK) dated 29 May 2015 and which continued its legal banking activities until its operating permit was revoked in accordance with the last paragraph of Article 107 of the Banking Law no. 5411 by the BDDK's decision of 22 July 2016, cannot be considered as organisational activities or aiding the organisation, and that it is necessary to establish that opening accounts and depositing money were carried out for the benefit of the organisation in line with the instructions of the organisation's leader/organisation;

The delivery of a decision as a result of inadequate inquiry has been found unlawful on account of the fact that all records showing the transactions of the accused's accounts in other banks from the date of opening should have been obtained to be assessed

together with the account in Asya Katılım Bank A.Ş. with a view to determining the criminal liability of the accused and a detailed report should have been obtained from an expert in the field of banking on the banking activities and deposit activities carried out by the accused in other banks on the same dates as well as on the closing date of the accounts and the date of termination of the deposits, and it should have been established beyond doubt whether the account activities carried out by the accused in Asya Katılım Bank A.Ş., which is affiliated with the organisation, were carried out in line with the call of the FETÖ/PDY Armed Terrorist Organisation/its leader to save the Asya Katılım Bank and in line with its aims."

111. In its judgment of 17 April 2024, the 3rd Criminal Chamber of the Court of Cassation quashed the conviction of the accused. The Court of Cassation made the following assessments in the relevant judgment (see Annex 44):

"In view of the fact that the usual account activities carried out at Asya Katılım Bank A.Ş., which is affiliated with the FETÖ/PDY armed terrorist organisation and whose management and control and the privileges of its shareholders except for dividends were transferred to the Savings Deposit Insurance Fund by the decision of the BDDK dated 29 May 2015 and which continued its legal banking activities until its operating permit was revoked in accordance with the last paragraph of Article 107 of the Banking Law no. 5411 by the BDDK's decision of 22 July 2016, cannot be considered as organisational activities or aiding the organisation in respect of the imputed offence; according to the examination of the account records in Bank Asya, the transactions in Bank Asya cannot be considered as falling outside the usual banking transactions, and it could not be established beyond any doubt that the accused acted with the intention of aiding the organisation given the fact that there is no other evidence contrary to his defence; the decision to convict him as a result of a mistake in the assessment of the evidence, instead of a decision to acquit him of the imputed offence, has been found to be unlawful."

112. In its judgment of 13 March 2024, the 3rd Criminal Chamber of the Court of Cassation quashed the conviction of the accused. The Court of Cassation made the following assessments in the relevant judgment (see Annex 45):

"... Having regard to the fact that the usual account activities carried out at Asya Katılım Bank A.Ş., which is affiliated with the FETÖ/PDY armed terrorist organisation, cannot be considered as organisational activity or aiding the organisation and that payments and other transactions serving the purpose of the organisation and carried

out for the benefit of the bank upon the instruction of the leader of the organisation can be considered as organisational activity in respect of the offence of membership of the organisation, and as aiding the organisation when taken alone; the accused's acts of depositing money only a few times should have been considered as usual banking transactions, and therefore, there is no conclusive, concrete and fully convincing evidence, beyond any doubt, sufficient to convict the accused, indicating that he acted upon the instructions of the ringleader of the organisation and therefore knowingly and willingly aided the FETÖ/PDY armed terrorist organisation contrary to his defence. Accordingly, the decision to convict him instead of a decision to acquit him of the imputed offence has been found unlawful in accordance with the principle of "in dubio pro reo".

113. In its judgment of 20 February 2024, the 3rd Criminal Chamber of the Court of Cassation quashed the conviction of the accused. The Court of Cassation made the following assessments in the relevant judgment (see Annex 46):

114. *"Having regard to the fact that the usual account activities carried out at Asya Katılım Bank A.Ş., which is affiliated with the FETÖ/PDY armed terrorist organisation, cannot be considered as organisational activity or aiding the organisation and that payments and other transactions serving the purpose of the organisation and carried out for the benefit of the bank upon the instruction of the leader of the organisation can be considered as organisational activity in respect of the offence of membership of the organisation, and as aiding the organisation when taken alone; and in view of the fact that there is no conclusive and convincing evidence that the accused deposited money with the bank affiliated with the organisation for the purpose of supporting it upon the instruction of the organisation's leader and with this intent, contrary to the defence submissions of the accused during the stages, in respect of whom no connection to the organisation's hierarchical structure could be established according to the examination of the Bank Asya account records and the expert report."*

115. In its judgment of 18 January 2024, the 3rd Criminal Chamber of the Court of Cassation quashed the conviction of the accused. The Court of Cassation made the following assessments in the relevant judgment (see Annex 47):

"Although it appears from the examination of the Bank Asya account transactions and the expert report in the file that the accused opened a participation account and deposited money in certain periods, it has been understood that the accused stated that he had deposited the money he had allocated for the renovation of the shop he had

purchased on 10 February 2014 at Bank Asya branch close to the location where he would buy the renovation materials, that he had opened a participation account with the guidance of the cashier, that he had withdrawn the money when he had needed it during the renovation process, and that he had not deposited any money after the completion of the renovation process, and that he submitted to the file the title deeds, bank receipts, rental agreements regarding the purchase and sale of shops and rental procedures. In addition, in view of the fact that there is no evidence in the file that the accused deposited money with the motive of aiding the organisation contrary to the defence of the accused and that there were no transactions in line with the other ongoing instructions, it has been found unlawful to convict the accused, instead of acquitting him of the offence charged, due to a mistake in the assessment of the evidence, in the absence of evidence to prove beyond any doubt that the accused acted with the intention of aiding the organisation."

116. The Constitutional Court also has made consistent assessments on the subject in line with the Court's judgments.

117. For example, in the case of *Hakan Darıcı and Others*[13], in which the Constitutional Court found a violation of the right to a reasoned decision within the scope of the right to a fair trial, the Constitutional Court made the following assessments (*Hakan Darıcı and Others,* no. 2021/34045, 20 July 2023, §§ 35-37):

"In the present case, the domestic courts had an expert examination carried out on the banking data. However, it has been found that contrary to the established practice of the Court of Cassation, the expert reports did not cover all account transactions since the opening of the account, that the reports were drawn up only on the basis of transactions in December 2013 or January 2014 and afterwards, and that the relevant reports were not sufficiently explanatory as required by the case-law of the Court of Cassation. ***The reasoned decisions referred to some account transactions taking place in 2014 and afterwards, but did not provide any explanation as to the date on which the applicant's account at Bank Asya had been opened, the nature and volume of the banking transactions related to this account before the instruction of the leader and executives of the FETÖ/PDY to support Bank Asya, how the relevant account had been used after this instruction, and what the volume of the transactions considered as active use had been. In other words, no adequate***

[13] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/34045

assessment was made as to why the banking transactions in question could not be considered as usual. Therefore, it could not be demonstrated that the applicants' banking transactions taking place after the instruction of the organisation's leader and executives to support Bank Asya were incompatible with those taking place before this instruction or that there was an unusual account activity. *Furthermore, the decisions of the Regional Court of Appeal and the 16th Criminal Chamber of the Court of Cassation did not contain any statement that these issues were assessed. Likewise, it has been observed that the relevant decisions do not contain any assessments demonstrating that the applicants' acts, namely their membership of associations and trade unions established to have links with the organisation, went beyond the mere sympathy and affiliation and that they acted with the intention of aiding the organisation. In conclusion, it has been understood that the applicants' allegations capable of changing the outcome of the judgment were not covered in the reasoning."*

118. For example, the Constitutional Court made the following assessment in the judgment of *Gürcan Balık*[14] in which it held that the right to a reasoned judgment within the scope of the right to a fair trial had been violated (see *Gürcan Balık,* no. 2020/16435, §§ 66-72, 17 November 2022):

"On the basis of the case-law of the Court of Cassation, the monetary transaction at the said Bank is categorically not considered as falling within the scope of the organisational activity. The judgments of the Court of Cassation acknowledged that the usual bank account activities at Bank Asya, which continued its operations on 22 July 2016 until its permission for operation was revoked and had affiliation with the FETÖ/PDY, could not be considered as falling within the scope of the organisational activity. However, the Court of Cassation considered as evidence the payments and other unusual banking transactions serving the objectives of the organisation and made for the benefit of the Bank upon the instruction of the organisation's ringleader.

According to the practice of the Court of Cassation, a person who made monetary transactions at Bank Asya could only be punished if it was established beyond any doubt that he/she had acted upon the instruction of the organisation's ringleader. The assessment in this regard is made by following these steps: the records of the accused person's account opening information including before 2014, monthly balance

[14] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/16435

information and all account activities in Bank Asya are added to the case-file and examined; an expert report on the available records is obtained; and it is established whether the accused person opened participation accounts and purchased foreign currency or gold, deposited money, etc. after and in line with the instruction of the organisation leader.

In the present case, the court has not established a link between the transactions giving rise to the criminal charges and the call made by the organisation's leader on 25 December 2013 to deposit money in Bank Asya...

In order for the account activities in Bank Asya, which were relied on to sentence the applicant for the offence of membership of the organisation, to be considered as evidence, according to the criteria determined by the Court of Cassation, it should be established beyond any doubt that the person made the payments and other -unusual - banking transactions serving the objectives of the organisation and made for the benefit of the Bank upon the instruction of the organisation's ringleader. ***Because, according to the well-established case-law, in order for the account activities in Bank Asya to be considered within the scope of organisational activity, it must be established by an expert report that an increase in the deposit account was made upon the instruction or that liquidity was provided to the Bank with a transaction other than the usual account activities.***

In the present case, the court held that the applicant had acted in accordance with the call of the organisation's leader on the grounds that on 10 January 2014 and 14 January 2014 the applicant had deposited money in Bank Asya and kept it in his bank account during the period where the call in question had been made; that despite all the warnings announced via the national press, he had not withdrawn his deposit from the Bank; and that he had continued to keep his deposit in his Bank Asya account to provide support to the organisation. The court consequently convicted the applicant. ***According to the court, the money in question had been deposited before the instruction of the organisation's leader. Drawing attention to the relevant judgments of the Court of Cassation, the applicant, at all stages of the proceedings, argued that keeping the money during the period when the call had been made could not be accepted as evidence for the offence of being a member of a terrorist organisation. The court made no assessment on the applicant's defence submission in question. Moreover, no inquiry was conducted as to the accuracy of the applicant's defence submissions to the effect that the expert report on his account activities in Bank Asya was erroneous,***

that the deposit in question was transferred to other banks and that there existed documents showing these transactions, nor were the conclusions reached in this respect discussed in the reasoned judgment.

For these reasons, it should be held that there has been a violation of the right to a reasoned judgment within the scope of the right to a fair trial guaranteed by Article 36 of the Constitution."

119. For other sample judgments of the Constitutional Court in the same vein, the judgments of *Bekir Savcı and Others*[15] (no. 2021/24370, 20 June 2023) and *Nagehan Özgül* may be examined. As is seen, there exists well-established and consistent case-law of both the Court of Cassation and the Constitutional Court in respect of the subject. These judgments show that the practice in the domestic law as to depositing money in Bank Asya is in line with the Court's case-law and the Convention standards.

D. Conclusion regarding Violation of Article 6

120. As explained in detail above, the underlying reasons for the violation at hand stemmed from the judicial practice of the domestic courts dealing with the present case. The Government would like to note that as demonstrated by the most recent sample judgments, the current judicial practice is in conformity with the Convention standards. The authorities therefore consider that no further general measure is necessary.

E. Violation of Article 11 of the Convention

121. The applicant submitted that the judicial bodies' decision to convict him of a terrorism offence and to sentence him, on the grounds, *inter alia*, of his membership of a trade union and an association had constituted an interference with his rights guaranteed under Article 11 of the Convention.

122. The Court's assessment regarding the subject reads as follows (see, *Yalçınkaya* cited above, §§ 390 - 396):

"It is common ground that the trade union and the association in question were established and were operating lawfully prior to their dissolution by Legislative Decree no. 667 after the attempted coup d'état on the ground that they posed a national security threat on account of their affiliation with the FETÖ/PDY. The Court considers that acts which appear on their face to come within the scope of Article 11 of the Convention and which do not incite violence or otherwise reject the foundations of a democratic society should benefit from a presumption of legality That being said, it is open to the domestic

[15] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/24370

authorities to rebut this presumption in a given case. It should thus be ascertained whether the domestic authorities did so in the present case.

In that regard, the Court notes that there is no explanation in the trial court's judgment in respect of the nature of the actions of the trade union and the association in question which brought about their dissolution by Legislative Decree no. 667. The trial court's assessment on that point was limited to observing that they had been shut down pursuant to the said Legislative Decree on account of their affiliation with the FETÖ/PDY."

123. The Court, consequently, considered that the issue giving rise to the violation of Article 11 of the Convention concerned the domestic courts' failure to provide sufficient reasoning as to how the applicant's involvement in those structures affected the materialisation of the offence of membership of a terrorist organisation.

124. As a piece of information on the current practice, it may be noted that membership of an association or trade union is not accepted as sufficient evidence *per se* for the offence of being a member of the FETÖ/PDY terrorist organisation. In assessing the evidence regarding membership of an association or trade union, the judicial authorities reach a conclusion by making a detailed examination as to whether this evidence shows that the accused person's relation with the organisation is within the hierarchical structure of the organisation beyond the level of sympathy towards it and whether the accused's acts involve diversity, continuity and intensity as required for the constitution of the offence in question. The recent sample judgments demonstrate that the practice has become settled in the domestic law.

125. In its judgment of 11 November 2021, the Eskişehir 2nd Assize Court acquitted the accused person who had an account in Bank Asya and was a member of an association that was dissolved pursuant to the Decree-Law for having connection and affiliation with the armed terrorist organisation. The Assize Court referred to the Court of Cassation's consideration that membership of an association was not a criterion in itself for the constitution of the offence of being a member to a terrorist organisation; it also found that there was no evidence showing that the accused person had deposited money in Bank Asya upon the organisation's instruction and decided to acquit him. Following the appeal on points of facts and law, on 19 January 2023 the 4th Criminal Chamber of the Ankara Regional Court of Appeal dismissed the request for appeal on the merits. Subsequently, another request for the appeal on points of law was filed and on 24 January 2024 the 3rd Criminal Chamber of the Court of Cassation upheld the judgment. The acquittal therefore became final (see Annex 48).

126. In its judgment of 22 October 2019, the Konya 6th Assize Court acquitted the accused person who was a member of an association that was dissolved pursuant to the Decree-Law for having connection and affiliation with the armed terrorist organisation. The Assize Court stated that there existed no evidence showing that the accused person had conducted the organisational activities other than the membership of the said association and thus, the mere membership of that association could not be considered as a criminal element. Following the appeal on points of facts and law, on 31 January 2020 the 2nd Criminal Chamber of the Konya Regional Court of Appeal dismissed the request for appeal on the merits. Subsequently, another request for the appeal on points of law was filed and on 15 January 2024 the 3rd Criminal Chamber of the Court of Cassation upheld the judgment. The acquittal therefore became final (see Annex 49).

127. In its acquittal judgment dated 21 June 2019, the Denizli 5th Assize Court made the following assessments (see Annex 50):

128. "*... it has been seen that [the accused person] was a member of the association and trade union belonging to the organisation. However; having regard to the judgment of the 16th Criminal Chamber of the Court of Cassation (E. 2017/3695, K. 2018/729) concerning being a member of the association and being a provincial representative of the trade union belonging to the organisation, no concrete, conclusive and convincing evidence beyond any doubt has been obtained, showing that the accused person established an organic link with the organisation despite having known the ultimate purpose of the organisation, that he submitted his will to the disposal of the organisation's hierarchical power, that he carried out acts of diverse, continuous and intense nature on behalf of the organisation and that he was a member of the organisation. Consequently, it has been decided to acquit the accused person.*"

129. In its judgment dated 12 December 2023, the 3rd Criminal Chamber of the Court of Cassation upheld the ruling of the first instance court and it thus became final (see Annex 51).

130. In its judgment dated 2 October 2017, the Kars 2nd Assize Court sentenced the accused person, who was a member of the association and trade union shut down under the Decree-Law along with the other pieces of evidence, for the offence of aiding and abetting the organisation without being a member of it. In the appellate review, on 8 October 2019 the 2nd Criminal Chamber of the Erzurum Regional Court of Appeal set aside the judgment convicting the accused person and acquitted him. The following assessment was included in the judgment (see Annex 52):

"The first instance court convicted the accused person for the offence of knowingly and willingly aiding and abetting an armed terrorist organisation on the grounds that the SGK (Social Security Institution) records showed that he had worked for the workplaces belonging to the organisation between 2010- 2016, that he had opened an account in Bank Asya on 29 January 2014 and that he was a member of the association and trade union belonging to the organisation. According to the entire case file, the sufficient and convincing evidence requiring his conviction could not be obtained concerning the fact that the accused person carried out continuous, various, and intense acts and activities in line with the purposes of the organisation in such a manner as to demonstrate that he embraced the founding purposes, acts and activities of the organisation. For this reason, it has been decided to acquit the accused person under Article 223 § 2 (e) of the CCP as it has not been established that he committed the imputed offence..."

131. On 23 March 2023, the 3rd Criminal Chamber of the Court of Cassation upheld the ruling of Regional Court of Appeal and it thus became final (see Annex 53).

132. These principles set forth by the Court of Cassation are applied by the first instance courts. Otherwise, the Court of Cassation quashes these judgments and remits the case file to the first instance courts. Relevant samples on the subject are given below:

133. For example, in its judgment quashing the accused person's conviction on 11 December 2023, the 3rd Criminal Chamber of the Court of Cassation noted the following (see Annex 54):

"According to the results of the inquiry made on the accused person's account activities in Bank Asya, which is considered as the source of finance for the organisation, it is seen that he opened a participation account on 17 November 2014 and withdrew his deposit and closed the account on 20 April 2015; that he continued to use his account subsequent to the transfer of Bank Asya to the Savings Deposit Insurance Fund ("TMSF") and carried out transactions. Having regard to these findings, he did not deposit money [in the said Bank] in accordance with the instructions of the organisation's leader, but the relevant transactions have been considered as usual ones. ***The accused person's membership of associations could not be regarded as an activity beyond sympathy and affiliation indicating that he had acted with the intent to aid the organisation. It could not be established that he had conducted any significant organisational acts or actions after the operational activities, known by the public, carried out by the FETÖ/PDY armed terrorist organisation. There is no evidence beyond any doubt as to the applicant's having established an organic link with the***

organisation and becoming involved in its hierarchical structure despite knowing the ultimate goal of the organisation. The judgment convicting the accused person was rendered without taking into account the fact that his actions remained at the level of sympathy and as a result of the erroneous assessment of the evidence. [In the circumstances], *the judgment convicting him, although the accused person should have been acquitted, has been found to be unlawful."*

134. In its judgment quashing the accused person's conviction on 27 November 2023, the 3rd Criminal Chamber of the Court of Cassation noted the following (see Annex 55):

"... According to the witness statements, the accused person was a partner of a company belonging to the organisation and a member of the association shut down via the Decree-Law; he conducted activities as a trustee within the tradesmen's quarter (esnaflar bölgesi) before 2013 and gave financial support; and he participated in conversation meetings (sohbet). It could not be established that he carried out any organisational acts or activities after the period when the organisation's operational activities became publicly known. ***The accused person's relation with the organisation is not of continuous, varied and intense nature indicating that he was involved in the hierarchical structure of the organisation beyond the level of sympathy towards it. In addition, there is no decisive and sufficient evidence beyond any doubt as to the accused person has committed the offence of being a member of a terrorist organisation or the offence of aiding and abetting [a terrorist] organisation. [In the circumstances], the judgment convicting him, although the accused person should have been acquitted, has been found to be unlawful.****"*

135. In its judgment quashing the accused person's conviction on 28 December 2023, the 3rd Criminal Chamber of the Court of Cassation noted the following (see Annex 56):

"... It has been understood that the accused person has relations with the layers [of the organisation's structure pyramid] utilised as the so-called legitimacy window of the organisation. However, there is no sufficient evidence indicating that he was aware of the organisation's ultimate aim. ***Having regard to the facts, the allegations in the indictment, the court's acceptance, the accused persons' acts involved in the case-file and the witnesses' statements; it has not been found that he used a code name indicating his link with the organisation as of the date of the offence; and that he was a part of the communication network of the organisation. As seen in his unrebutted defence submissions in the very beginning of the investigation, there is not any other evidence in respect of the accused person than his membership of the association and***

media outlets and his being a shareholder of the Bank Asya A Group. For this reason, it has been understood that his activities remained at the level of sympathy on the ground that his acts within the scope of the case-file were not of continuous, varied and intense nature indicating that he was involved in the hierarchical structure of the organisation and had an organic link therewith. *Furthermore, according to the records in respect of the accused person's bank account, no sufficient and strong evidence beyond any doubt for his conviction could be obtained as to his having deposited money and opened a participation account in Bank Asya, the terrorist organisation-affiliated financial establishment, for organisational purposes and to procure benefits for the organisation in accordance with the instruction of the organisation's leader. [In the circumstances], the judgment convicting him, although the accused person should have been acquitted, has been found to be unlawful."*

136. In its judgment quashing the accused person's conviction on 27 April 2024, the 3rd Criminal Chamber of the Court of Cassation noted the following (see Annex 57):

"According to the account activities in Bank Asya and the reports issued by the Financial Crimes Investigation Board (MASAK) and the experts, on 16 December 2002 the accused person opened an account in the Bank for the first time. Despite the fact that the accused person opened participation accounts on 8 January 2014 and 4 February 2015 in parallel with the dates when the instructions in question were given, it has been understood that as of the period before 2014, he opened a participation account and continued to use it after the transfer of Bank Asya to the TMSF. The accused person's account activities were not carried out upon the instruction of the organisation's leader, but as a result of routine banking transactions, and his actions regarding membership of associations and trade unions could not be considered as falling within the scope of activities that exceed the level of sympathy and affiliation and prove that he acted with the intention to aid the organisation. Having regard to these facts, there is no evidence beyond any doubt as to his having acted in order to aid the organisation. [In the circumstances], the judgment convicting him as a result of the erroneous assessment of the evidence, although the accused person should have been acquitted, has been found to be unlawful."

137. In its judgment quashing the accused person's conviction on 03 May 2023, the 3rd Criminal Chamber of the Court of Cassation noted the following (see Annex 58):

"It has been found that the usual bank account activities at Asya Katılım Bankası A.Ş., the management and supervision of which were transferred to the TMSF with their

partnership rights excluding dividends via the decision of the BDDK dated 29 May 2015 and which continued its operations until its permission for operation was revoked via the decision dated 22 July 2016 under the last paragraph of Article 107 of the Law no. 5411 and had affiliation with the FETÖ/PDY, could not be considered as falling within the scope of the organisational activity.

According to the account activities in Bank Asya and the expert reports included in the case-file, on 31 January 2014 the accused person opened an account in the said Bank for the first time. He continued to keep his gold account in the Bank until 7 March 2016, and considering that the money in his account was withdrawn on 7 March 2016, it has been understood that the accused person did not withdraw his money from the said bank after the transfer of Bank Asya to the TMSF and kept it in his account. The account activities in question were not carried out with the instruction of the organisation's leader, but as a result of routine banking transactions, and the accused person's acts ***regarding the membership of associations and trade unions could not be considered as falling within the scope of activities that exceed the level of sympathy and affiliation and prove that he acted with the intention to aid the organisation.*** *Having regard to these facts, there is no evidence beyond any doubt as to his having acted in order to aid the organisation. [In the circumstances], the judgment convicting him as a result of the erroneous assessment of the evidence, although the accused person should have been acquitted, has been found to be unlawful."*

138. There are many similar rulings handed by domestic courts on above grounds (for more sample decisions, see Annexes 59-61). As can be understood from the sample decisions, it can be considered that a Convention compliant judicial practice, which is supported by consistent and established case-law, has been adopted in Turkish Law. The existing practice is in line with the Court's judgment and the Convention standards. The authorities therefore consider that there are no other general measures to be taken.

F. Training and Awareness-Raising Activities

139. The Justice Academy, the only competent institution as to pre-service and in-service trainings for judges and prosecutors, was established in 2003 and has a public legal personality and scientific, administrative and financial autonomy. Since its establishment, the Academy has been providing in-service and pre-service training on a high number of topics including, *inter alia*, the right to a fair trial.

140. The Turkish authorities would like to emphasise that the issues on human rights, and in particular the case-law of the European Court of Human Rights, have been

incorporated into the training of judges and prosecutors, and that such trainings are diligently provided.

141. Within the scope of the pre-service trainings at the Justice Academy, 5231 candidate judges and prosecutors have been trained in the fields of "Human Rights and Their Protection" and "Constitutional Jurisdiction and Individual Application" since 2020. In addition, 3803 candidate judges and prosecutors have been provided training on "Reasoning of Judgments in Criminal Proceedings".

142. 312 judges and prosecutors have received trainings on the subject of, *inter alia*, right to a fair trial (right to a reasoned judgment, right to access to the court, equality of arms, right to defence, lengthy proceedings) through distance learning system.

143. Within the framework of the Project on Strengthening the Criminal Justice System and the Capacity of Justice Professionals on Prevention of the European Convention on Human Rights Violations (CASII), the Ministry of Justice organised 13 coordination meetings on procedural safeguards and the prevention of potential ECHR violations in criminal investigations and prosecutions related to terrorism, the financing of terrorism, and cybercrimes. These meetings were attended by a total of 411 participants including judges, public prosecutors, law enforcement officers (including representatives from the General Police Department, Provincial Police Departments, Provincial Gendarmerie Commands, and Customs Directorate), financial crime investigation experts, experts from the Information and Communication Technologies Authority, as well as representatives from the Ministry of Justice, the Union of Turkish Bar Associations, and the Turkish Criminal Law Association as a non-governmental organisation. Additionally, 9 round table meetings on the same topics were attended by a total of 879 participants, including judges and public prosecutors, law enforcement personnel, financial crime investigation experts, and representatives from the Ministry of Justice and the Justice Academy of Türkiye. Furthermore, 300 judicial employees participated in four series of international workshops. 10 Turkish judicial employees were assigned to serve and gain experience at the Registry of the ECtHR or various departments of the Council of Europe for a period of two to three months.

144. Guide on Admissibility of Evidence in Criminal Matters (15,564 copies), Guide on Fight against the Financing of Terrorism (17,519 copies), Guide on Investigations into Cyber Crimes (17,574 copies), Guide on Seizure of Cryptocurrencies (3,000 copies) and Guide on Digital Evidence (3,000 copies), which contain examples of good practices within the context of the case-law of the Court, were prepared and disseminated to

particularly 149 Chief Public Prosecutor's Office, high judicial institutions, the Union of Turkish Bar Associations, the project stakeholders and all the relevant institutions in order to be made available for the use of practitioners.

145. A brochure regarding the general principles of the right to a fair trial (Article 6 § 1 of the Convention), the minimum guarantees provided to suspects and accused persons (Article 6 §§ 2 and 3 of the Convention), and the rights of persons under custody was printed in 75,000 copies for the purpose of informing the public about the rights protected under the Convention and the Court's case-law and about criminal justice. The brochure in question was disseminated to the public through assize courts (67,950 copies), local bar associations (5,850 copies), the Ministry of Justice and via the open court days organised within the scope of the project.

146. Serving judges and prosecutors have been provided with in-service trainings prepared by the Justice Academy of Türkiye on the Writing of Reasoned Judgments in Criminal Law, the Right to Liberty and Security, the Fight against the Financing of Terrorism and the Fight against Cyber Crimes; and a total of 2016 judges and prosecutors attended the trainings in question."

147. Within the scope of the Project on Supporting Effective Execution of Constitutional Court's Judgments in the Field of Fundamental Rights, 60 judges and prosecutors have received Fundamental Human Rights Training "the 2nd Promotion Training" in 2024.

148. Under the auspices of the Justice Academy, an online seminar on "Comparative Perspectives on the Reasoning of Judgments" was held in 2021 with the participation of 174 persons, including the members of the Turkish judiciary, within the scope of the Work on Reasoning of Judicial Judgments.

149. The authorities, consequently, would like to emphasise that judges and prosecutors in Türkiye are provided with continuous training on human rights and the Court's case-law, that their competence in this area is developed through planned training programmes and that necessary measures are taken to prevent possible violations.

G. The European Court's findings under Article 46

150. The European Court made its assessments on the basis of the facts occurred within the context of the present case.

151. As a matter of fact, the Committee should consider the current judicial practice, which was thoroughly explained above on the basis of sample judgments, for the purpose of supervision of execution of the judgment at hand. There is a consistent, well-established

and Convention compliant case-law concerning the issues examined under *Yalçınkaya* case.

152. Moreover, the domestic law has effective judicial remedies. Where a final judgment convicting a person is not in line with the framework set out in the judgments of the ECtHR and the Constitutional Court, the persons concerned may lodge an individual application with the Constitutional Court in respect of this judgment. As explained in detail above, the Constitutional Court has adopted a judicial practice in compliance with the Court's case-law. Where the Constitutional Court finds a violation, it remits the case-file to the relevant instance court for reopening of the proceedings in order to eliminate the reasons of violation. On this ground, in view of the principle of subsidiarity, the fact that domestic mechanisms are capable of providing effective remedies if need be in respect of similar cases should be considered by the Committee.

H. Translation and Dissemination of Judgment

153. The hereby judgment was translated into Turkish and published on the official website of the Court (https://hudoc.echr.coe.int/fre?i=001-229312).

154. The Turkish authorities further ensured that the translation of the judgment, together with an explanatory note, has been disseminated to the relevant first instance courts, the Court of Cassation, the Constitutional Court, the Human Rights and Equality Institution of Türkiye and the Ombudsman Institution.

IV. CONCLUSION

155. The Committee of Ministers will be duly informed of the individual and general measures within the scope of the present case.