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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.

Meeting: 1514th meeting (December 2024) (DH)

Communication from NGOs (Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, Solidarity with OTHERS) (13/09/2024) concerning the case of Yuksel Yalcinkaya v. Türkiye (Application No. 15669/20) (appendices in Turkish are available at the Secretariat upon request).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1514^e réunion (décembre 2024) (DH)

Communication d'ONG (Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, Solidarity with OTHERS) (13/09/2024) relative à l'affaire Yuksel Yalcinkaya c. Türkiye (requête n° 15669/20) (des annexes en turc sont disponibles auprès du Secrétariat sur demande) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



DGI

13 SEP. 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

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13 September 2024

**NGO Communication under Rule 9(2) of the Rules of the Committee of Ministers
concerning the execution of the judgment of the European Court of Human Rights in
the case of Yüksel Yalçinkaya v. Türkiye (Application no. 15669/20)**

Update on the Retrial of Yüksel Yalçinkaya

We are writing to update the Committee of Ministers on the outcome of the retrial of Mr. Yüksel Yalçinkaya, the applicant, as this represents an important development not only concerning the applicant's individual case but also in relation to the general measures required under the Yüksel Yalçinkaya judgment. The retrial concluded today, with the trial court reaffirming its initial conviction, despite the Grand Chamber's ruling that found violations of Articles 6, 7, and 11 of the European Convention on Human Rights. The court maintained its original decision, resulting in the same conviction.

In our communication dated 6 September 2024, we informed the Committee of Ministers about the status of the execution of the Grand Chamber judgment in the Yüksel Yalçinkaya v. Türkiye case. In that communication, we stated that the Turkish Government has not taken any legislative steps to align judicial practices with the Yüksel Yalçinkaya judgment. As the Committee will observe, the Government repeatedly asserts in its Action Plan that judicial

practice is already in alignment with the Court's findings in the Yüksel Yalçinkaya judgment. However, we have demonstrated, through the submission of numerous sample decisions annexed to our communication, that there has been no change in jurisprudence or judicial practice to meet the requirements of this judgment.

We also highlighted worrying public statements made by high-level political figures following the announcement of the Yüksel Yalçinkaya judgment. These statements publicly questioned the authority of the judgment, further reinforcing the perception that the Government is reluctant to ensure its proper, effective, and timely implementation. This reluctance has ultimately contributed to and even encouraged the unfortunate non-implementation of the Yüksel Yalçinkaya judgment, even in the applicant's case.

Additionally, as we reported in our communication, since the announcement of the Yüksel Yalçinkaya judgment, criminal investigations, and prosecutions have continued for the same acts and under circumstances similar to those addressed in the judgment. Courts at all levels have continued to adjudicate cases using the same approach and procedures as if the European Court had not issued the Yüksel Yalçinkaya judgment.

Article 311/2 of the Turkish Criminal Procedure Code obliges domestic courts to reopen criminal cases when the European Court of Human Rights finds that the conviction was given in violation of the European Convention on Human Rights or its protocols. As underlined also in the Yüksel Yalçinkaya judgment Article 46 of the Convention has the force of a constitutional rule in Türkiye in accordance with Article 90 § 5 of the Turkish Constitution.

Due to these statutory requirements, the retrial of Mr. Yüksel Yalçinkaya commenced on 28 November 2023 at the same Kayseri 2nd Assize Court, which had previously convicted the applicant. The court started the retrial by asking relevant authorities for information such as the applicant's Bylock Evaluation and Determination Report, and the Bank Asya transaction statements of the applicant, already assessed in the Grand Chamber judgment. The trial court also requested whether it was possible to obtain the raw data related to the content of ByLock, and, if possible, decided to ask for it to be sent to the court.

Before the second hearing, held on 2 April 2024, the Department of Anti-Smuggling and Organized Crime (KOM) responded to the court's requests for accessing the raw data by stating that: *"Since the raw data is not readable, it cannot be processed or separated based on User ID. Providing the entirety of the raw data to any suspect or defendant is also not possible, as it would contain information related to all suspects associated with ByLock."* In fact, the reply given by KOM was already known to the Grand Chamber, as noted in paragraph 121 of the judgment, where the Court summarized the Analysis Report on Intra-Organisational Communication Application, prepared by KOM and submitted by the Government during the

Grand Chamber proceedings. But this did not affect the Court's finding of violation of Article 6 of the Convention.

The Court's finding of a violation of Article 6 was based, among many other factors (See §§ 331-335), on the applicant's inability to directly challenge the ByLock data held by the prosecution, as well as the national courts' failure to adequately address the applicant's objections to the accuracy of this data with relevant and sufficient reasoning, despite its critical importance (§ 337).

At the last hearing held on 12 September 2024, as you will observe from the annexed hearing minutes, the trial court heard two witnesses who were allegedly on the applicant's ByLock contact list. Both witnesses denied having been in contact with him through ByLock and provided no information regarding any organizational activity involving the applicant. With regard to the ByLock data, the applicant's representative requested that the court ensure access to the raw data for independent examination and presented arguments questioning the accuracy and reliability of this data. However, the court rejected this request.

As the Committee will observe from the prosecutor's opinion requesting the conviction of the defendant, the prosecutor primarily based his argument on the defendant's use of the ByLock application, his membership in two associations that were closed after the coup attempt due to their affiliation with the Gülen movement, and his financial transactions with Bank Asya, without explaining how these actions, which were mere manifestations of the exercise of fundamental rights, could constitute the material and mental elements of the offense of membership in a terrorist organization. These were the grounds for the applicant's previous conviction, which resulted in the violation of Articles 6, 7, and 11 of the Convention.

At the end of the hearing, the court concluded that there were no legal violations in the procedures carried out during the previous stage regarding the applicant and that the prior judgment was in accordance with the law and procedure. Accordingly, the court decided to **APPROVE the previous judgment dated 21/03/2017, file number 2017/136-121**, which had led to the violation ruling by the ECtHR.

This decision is open to appeal before the regional appellate court and the Court of Cassation. However, it has significant repercussions, sending a message to other first-instance courts that are obliged to implement the principles of the Yüksel Yalçinkaya judgment in similar cases. The decision of the court in the applicant's case is another proof of the judiciary's persistent inaction in implementing and complying with the Yüksel Yalçinkaya judgment. Unlike the **Kavala and Demirtaş judgments**, which Türkiye has consistently refused to implement, the disregard of the Yüksel Yalçinkaya judgment by both the Turkish judiciary and the executive affects tens of thousands of people, with violations continuing daily, as reported in our previous

communication. The Committee of Ministers must therefore take urgent and strong action to ensure the implementation of the Grand Chamber's Yüksel Yalçinkaya judgment.

In light of the conviction decision of the Kayseri 2nd Assize Court disregarding the Court's binding judgment in the applicant's case and due to its effects on thousands of people's lives, we would like to reiterate our invitation to the Committee of Ministers to:

- **Include the Yüksel Yalçinkaya v. Turkey (no. 15669/20) case on the agenda of its December 2024 DH meeting under the debated meeting category, as the case requires urgent attention;**
- **Adopt an interim resolution with concrete suggestions to Türkiye for the execution of the judgment;**
- **Keep the case on the agenda of the quarterly CM Human Rights meetings;**
- **Invite the Turkish Government to regularly and adequately inform the Committee about domestic practices by providing samples of reasoned conviction decisions at all levels;**
- **Urge Turkey to take meaningful and effective steps, including any necessary legislative measures, to address the systemic problem and resolve persistent issues related to ongoing criminal proceedings and closed cases with final convictions.**

Yours sincerely,



Mustafa ÖZMEN

**Chairman of the Justice Square
Foundation**

On behalf of all co-signatories

Annexes: Hearing minutes (Sent For the Secretariat's use and analysis)

Co-signatories:

- **Justice Square Foundation** (Netherlands)
- **Cross Border Jurists Association** (Germany)
- **The Arrested Lawyers Initiative** (Belgium)
- **Solidarity with OTHERS** (Belgium)