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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

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Communication from an NGO (Stichting Justice Square) (13/02/2024) concerning the case of Yuksel Yalcinkaya v. Türkiye (Application No. 15669/20).

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 : 1492e réunion (mars 2024) (DH)

Communication d'une ONG (Stichting Justice Square) (13/02/2024) relative à l'affaire Yuksel Yalcinkaya c. Türkiye (requête n° 15669/20) ***[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.

Amsterdam, 13 February 2024

Council of Europe

DGI – Directorate General of Human Rights and Rule of Law

Department for the Execution of Judgments of the European Court of Human Rights

F-67075 Strasbourg Cedex

France

dgi-execution@coe.int

Subject: 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 Yalçınkaya v. Türkiye (Application no. 15669/20) – Second Submission

Dear Madams and Sirs,

1. **Stichting Justice Square** hereby respectfully submits its observations and recommendations 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"* regarding the execution of the judgment of the Grand Chamber of the European Court of Human Rights in **Yüksel Yalçınkaya v. Türkiye** (Application no. 15669/20) Judgment of 26 September 2023), in advance of the 1492nd meeting (March 2024) (DH) of the Ministers' Deputies on the execution of judgments.
2. **Stichting Justice Square**, based in Amsterdam, is a non-profit and non-governmental human rights organisation that works to make a meaningful impact on the lives of persecuted people, refugees, victims of war, and those affected by conflict and displacement by promoting democratic values globally, fostering international cooperation and advocating for the protection of human rights.
3. Stichting Justice Square has been closely following the execution of the Yalcinkaya judgment by the Turkish authorities since 26 September 2023 and will continue to do so in the future. On 31 October 2023, the lawyers of our organisation sent to the

Committee of Ministers their observations pursuant to Rule 9 (2) of the "Rules of the Committee of Ministers on the Supervision of the Execution of Judgments and Conditions for Amicable Settlement", together with copies of the judgments in this matter. The submission of our Organisation has been published on the website of the Committee of Ministers[1]. The purpose of this submission is to reflect the developments and the current situation in the scope of the execution of the Yalcinkaya decision from 31 October 2023, the date of our previous submission, until today.

I. Introduction

4. Following the pronouncement of the judgment of the Grand Chamber on 26 September 2023, the lawyers of our organization, in order to contribute to the swift implementation of the judgment by national courts, arranged for the translation of the judgment into Turkish and published the Turkish translation of the judgment on their website shortly after the pronouncement of the judgment. An updated version of this translation was subsequently posted on the Court's HUDOC database for the use of victims, lawyers, judges and prosecutors in Türkiye[2].

5. After the Grand Chamber's judgment of 26 September 2023 in Yuksel Yalcinkaya, many similarly situated persons requested a retrial before different Turkish courts. All of these requests have been rejected by the courts.

6. The purpose of our communication is to provide the Committee of Ministers with updated information and clarifications on the implementation of the ECtHR judgment in Yüksel Yalçınkaya v. Turkey (no. 15669/20), in particular information on the state of play regarding the general **“measures to be taken in respect of similar cases”** as required by the said judgment. In this sense, it is to provide updated information on new investigations by the judicial authorities in Turkey, new indictments, new convictions and judgements upheld by the Regional Court of Justice and the Court of Cassation, particularly in relation to persons in a similar situation.

7. In the special circumstances of the case, the Court emphasized that the situation leading to the finding of a violation of Articles 7 and 6 of the Convention did not arise out of an isolated incident, but resulted from a systemic problem. According to the Court, this problem has affected and continues to affect a large number of individuals.

8. There are currently more than 8,000 applications containing similar complaints awaiting examination by the Court (§ 414 judgment). As the Grand Chamber has emphasized, where a violation results from a systemic problem affecting a large number of people, the enforcement of such a judgment will require general measures at national level (§ 416 judgment). Therefore, in order to avoid having to find similar violations in a large

[1]https://hudoc.exec.coe.int/eng?i=DH-DD(2023)1389E
[2]https://hudoc.echr.coe.int/?i=001-228393

number of cases in the future, the wrongs identified in the Yalcinkaya judgment should, to the extent relevant and possible, be addressed by the Turkish authorities on a wider scale. In this respect, as the Court has noted, under Article 90(5) of the Constitution of the Republic of Turkey, international agreements duly put into force have the force of law (§ 418 judgment).

9. As the Grand Chamber repeatedly emphasized in its judgment, there is a systemic problem with the investigations and prosecutions in Turkey, particularly in relation to the Hizmet/Gülen movement. This systemic problem has affected and continues to affect many people living in the country. As of the date of the decision, there were approximately 8,000 individual applications on similar issues before the Court alone. However, as stated in our previous submission to the Committee of Ministers, if this systemic problem remains unresolved, both the number of victims in Turkey and the number of individual applications to the Court on this issue will continue to increase exponentially.

10. Unfortunately, to date, no effort has been made by either the administrative or judicial authorities to address this systemic problem identified by the Grand Chamber. On the contrary, numerous high-ranking officials, including the President of the Republic and the Minister of Justice, have stated that the Grand Chamber's Yalcinkaya decision was wrong, and in line with these statements, all requests for renewal of the trial made by similarly situated persons have been rejected by the courts. In complete contradiction to the findings of the Grand Chamber, new investigations and convictions of persons in similar situations have been continued by judicial units. In this sense, the number of those who have been tried and convicted for membership of the so-called terrorist organization continues to increase day by day.

II. Case Description

11. As set out in detail in our previous communication of 31 October 2023, on 21 March 2017, the Kayseri High Criminal Court sentenced the applicant Yüksel Yalçınkaya, who was working as a teacher in a public school in Kayseri, to 6 years and 3 months' imprisonment for membership of an armed terrorist organisation. The conviction was based on the applicant's use of the encrypted messaging application "ByLock", having an account at Bank Asya, and being a member of the Active Educators' Union and the Kayseri Volunteer Educators Association. The applicant applied to the ECtHR on 17 March 2020, claiming that his trial and conviction violated Articles 6, 7, 8 and 11 of the Convention.

12. According to the Grand Chamber, the domestic courts interpreted the applicable provisions of the Criminal Code and the Anti-Terrorism Law in a far-reaching and unpredictable manner. The scope of the offence was unforeseeably extended to the applicant's detriment, contrary to the purpose of Article 7 of the Convention. For these

reasons, the Court finds a violation of Article 7 of the Convention. As regards Article 6 of the Convention, it noted that, until early 2016, the ByLock application could be downloaded from publicly available app stores or websites, that there were some uncertainties concerning the raw data and that adequate measures had not been taken to ensure the overall fairness of the proceedings. In accordance with Article 46 of the Convention, the Grand Chamber noted that the situation leading to the conclusion that there had been a violation of Articles 7 and 6 of the Convention in the present case did not arise from an isolated incident. In this connection, the Court noted that it had more than 8,000 cases pending before it and that this number was likely to increase significantly in the future.

III. General measures required for the implementation of the judgment in respect of similar cases

A. General judicial situation regarding people in similar situations – Pending Judicial Proceedings

1. Criminal investigations continued to be carried out with the same offense and under similar circumstances

13. After the announcement of the Yuksel Yalcinkaya judgment on 26 September 2023, the judicial authorities continued to launch investigations against a large number of people on charges of "being a member of an armed terrorist organization" on the grounds of using the Bylock program, depositing money in Bank Asya, being a member of legally established and operating associations. Following the announcement of the Yuksel Yalcinkaya verdict by the Grand Chamber, on 24 October 2023, 611 people were detained in 77 provinces for using the Bylcok program or similar charges3

14. On January 10, 2024 and January 17, 2024, Minister of Interior Ali Yerlikaya announced via social media the arrest of people living in different provinces who had "records of increasing their accounts in Bank Asya"[4]. According to the statements of Minister of Interior Ali Yerlikaya, between January 1, 2023 and December 31, 2023, 6,775 operations were conducted in relation to the Hizmet Movement. 9,639 people were detained and 1,689 were arrested. Judicial control provisions were imposed on 1,677 people[5]

2. Pending Criminal Prosecutions before the Trial Courts and the Court of Cassation and Subsequent Processes

15. Public prosecutions have been launched and pursued against individuals who have been investigated on the grounds of direct or indirect links with the Hizmet movement

[3]https://www.aa.com.tr/tr/gundem/fetoye-yonelik-77-ildeki-kiskac-operasyonlarinda-611-supheli-yakalandi/3030812
[4]https://www.icisleri.gov.tr/kiskac-4-operasyonlari-ile-32-supheli-yakalandi
[5]https://twitter.com/aliyerlikaya/status/1752201691200393572?s=12&t=Q2BVk0QWfT4oEJH5LyZi4A

for membership of an armed terrorist organization. The indictments about some of these persons against whom public lawsuits have been filed are attached.

16. As a result of their trials, they were convicted for using the Bylock app, for depositing money in Bank Asya, for being a member of associations and foundations that were established legally but were later closed down by decree laws, or on similar charges. The convictions in these matters are attached.

17. The convictions were appealed against by the defendants or their lawyers. The Regional Courts of Appeal, which examined the appeals, rejected the appeals of the individuals. The rejection decisions of the Regional Courts of Appeal on this matter are attached hereto.

18. The rejection decisions of the Regional Courts of Appeal have also been appealed by the defendants or their lawyers. The Court of Cassation rejected these appeals and upheld the judgment. The decisions of the relevant Criminal Chamber of the Court of Cassation are attached hereto.

19. **Please note that the sample judgments of domestic courts are sent only- <u>for the Secretariat's use and analysis</u>. Please do not publish these decisions as they include personal data.**

B. Situation regarding general measures need to be taken in relation to closed cases with final convictions

20. The reopening of criminal proceedings in similar cases that have been closed with a final conviction is the most appropriate, if not the only, way to remedy other similar violations and to put an end to the violations found in the present case and to provide the applicant with a remedy.

21. In Turkish law, in general, there are two main extraordinary remedies that can remedy similar violations by reopening cases that have been closed by a final judgment. The first is the reopening of judicial proceedings under Article 311 § 1 of the Code of Criminal Procedure. The second remedy is the appeal by the Chief Public Prosecutor of the Court of Cassation to the competent criminal chamber of the Court of Cassation in accordance with article 308 (and 308/A for cases finalised by regional appeal courts) of the Code of Criminal Procedure.

1) Reopening of cases by trial courts under article 311 § 1 of the Code of Criminal Procedure categorically rejected by trial courts

22. Following the judgment of the Grand Chamber in Yalçınkaya v. Turkey (no. 15669/20), a large number of persons in a similar situation filed requests for "reopening of criminal proceedings" before the competent assize courts in accordance with Article 90 of the Turkish Constitution and Article 46 of the ECHR and Article 311 § 1 of the Code of Criminal Procedure.

23. In fact, Article 311 § 1 of the Code of Criminal Procedure constitutes a legal basis in order for the trial courts to remedy the deficiencies that might exist in similar cases to the case of Mr Yüksel Yalçınkaya.

24. We would like to bring the Constitutional Court's Ibrahim Er and others' judgment (No: 2019/33281) to the attention of the Committee of Ministers, which imposes an obligation to trial courts to reopen criminal proceedings, under the principle of the objective effect of the Constitutional Court's judgments, in the similar cases where the Constitutional Court already found a violation.

25. In its judgment on the Yılmaz Çelik Application (Application Number: 2014/13117), the Constitutional Court examined the case of an applicant who had been convicted of membership to a terrorist organisation under Article 314 § 2 of the Turkish Criminal Court. With its judgment dated 19 July 2018, the Constitutional Court ruled that the right to a fair trial had been violated on the grounds that the trial court's reasoning that the said structure had the elements of a terrorist organization had been insufficient. Upon the reopening of the criminal proceeding by the trial court, the applicant was acquitted complying with the judgment of the Constitutional Court. Following the Constitutional Court's judgment in the Yılmaz Çelik case, many others, who had been sentenced for being a member of the same terrorist organization, were also acquitted as the result of the reopened cases.

26. However, in the case of İbrahim Er and Others, who were convicted with a final judgment for membership in the same organization *(the organization that was the subject matter of the Yilmaz Celik case)* and had not previously made an individual application to the Constitutional Court, had their applications for reopening rejected by the local courts in accordance with the Constitutional Court's decision. Subsequently, they made an individual application to the Constitutional Court.

27. On 26 January 2023, the Constitutional Court, reminded that it had already examined the same issue in its Yılmaz Çelik case and held that *the rejection of the local courts' request for reopening of criminal proceedings within the scope of the objective effect of this constitutional interpretation and the necessity to apply the Constitutional Court's decision to other cases of the same nature violated the right to a fair trial in the context of the right to a reasoned decision*. In other words, the Constitutional Court held that where a violation of a right established in the Convention and the Constitution has been found, it must be applied to all similar pending and finalised proceedings and cases without the need to bring them before the courts concerned.

28. Ibrahim Er and others' judgment of the Constitutional Court indeed constitutes a sufficient basis for reopening the criminal proceedings under Article 311 § 1 of the Code of Criminal Procedure.

29. **Stichting Justice Square**, which closely follows the implementation of the Court's Yüksel Yalçınkaya judgment on the ground, made an open appeal to its followers on its social media accounts, to collect examples of judgments of the courts that rejected retrial requests. We had received many such decisions from our followers and sent the Committee of Ministers many sample decisions for the Secretariat's use and analysis in our previous submission.

30. As could be understood from those judgments, the assize courts have categorically rejected the reopening requests of the convicts who had been convicted of the same offense based on similar evidence, including the alleged use of the Bylock app. It could also be understood from the conviction decisions of some persons that they were sentenced on the grounds that they had an account in Bank Asya, which benefited from the presumption of legality until the date of its closure as stated in the judgment of the Grand Chamber, and in which their salaries were deposited. It can further be seen from the convictions of some individuals that they were convicted on the grounds of membership to associations, which were established and operated legally before their closure and which were clearly emphasised in the Yulsel Yalçınkaya judgment as being directly related to the exercise of a right falling within the scope of Article 11 of the Convention. In none of those conviction judgments, the trial courts proved or analysed the existence of material and mental elements of the offense of being a member of a terrorist organization as described in the Yalçınkaya case. Similarly, the defense rights of defendants were violated in similar conditions described in the Yalçınkaya case. The criminal prosecutions were nothing but the formal procedures that needed to be completed to announce the conviction of the defendant. No defense arguments of the defendants were ever considered by the trial courts in all of the samples submitted to the Committee of Ministers attached to this submission.

31. **Stichting Justice Square** would like to point out that the requests for the reopening of criminal proceedings of persons convicted of the same offense under similar circumstances as Yüksel Yalçınkaya have continued to be categorically rejected by the trial courts and therefore no general measures were taken by the Turkish authorities to remedy the deficiencies identified in the cases closed by the final judgments similar to Yüksel Yalçınkaya's case, and therefore no *restitutio in integrum* measures were taken in respect of similar cases including the ones pending before the European Court of Human Rights.

2) The reopening of cases by trial courts as the result of the procedures under Articles 308 and 308A of the Code of Criminal Procedure remains uncertain

32. Under article 308, the Chief Public Prosecutor of the Court of Cassation may appeal against the judgments of trial courts that have been approved by any criminal chamber

of the Court of Cassation. The Chief Public Prosecutor may act either ex officio or upon request. There is no time limit if the appeal is to be made in favour of the accused.

33. Similarly, the Chief Public Prosecutor's Office of the Regional Court of Appeal may lodge an appeal with the Regional Court of Appeal against final decisions of the criminal chambers of the Regional Court of Appeal as set out in Article 308A of the Code of Criminal Procedure. The Chief Public Prosecutor's Office may act *ex officio* or upon request within thirty days from the date of the decision. However, there is no time limit for appeals in favour of the accused.

34. As of the date of this submission, **Stichting Justice Square** is not aware of any appeal proceedings that have ever been initiated *ex officio* under these articles. Similarly, we are not aware of any outcome of such a procedure that might have been initiated at the request of or on behalf of a defendant. We will keep the Committee of Ministers informed in the future of any developments that may occur as a result of these procedures.

C. Conclusions and Recommendations to Committee of Ministers

35. Following the judgment of the Grand Chamber in Yüksel Yalçınkaya v. Turkey (no. 15669/20), the Government has not yet submitted an action plan or an action report. However, the statements made by senior figures, including the President, against the implementation of the judgment following its announcement are worrying and have the potential to negatively affect the proper, effective, and prompt implementation of the judgment, particularly in relation to similar cases.

36. Judicial organs have continued to launch new investigations or prosecutions or continued the pending ones without no change in their practice that resulted in the violation judgement in the Yalcinkaya case.

37. The courts have categorically rejected the defendants' requests to reopen cases that have been closed by final judgments, thus preventing them from remedying the defects that may have existed in their judgments, similar to the case of Mr Yüksel Yalçınkaya.

38. There is no publicly available information on whether and to what extent the Chief Public Prosecutors will use the powers granted to them under Articles 308 and 308A of the Code of Criminal Procedure.

39. We will continue to inform the Committee of Ministers of the developments on the execution of the Yüksel Yalçınkaya judgment.

40. As mentioned above and in our precious submission, the proper, effective, and prompt execution of this judgment concerns the lives of thousands of people in Turkey. This is not limited to over 8,000 similar cases pending before the Court as of 26 September 2023. According to the Minister of Justice’s announcement on 6 October 2023, 253,754 real or alleged members of the Hizmet movement have been prosecuted for

membership in a terrorist organisation since July 2016, and 122,904 of them have already been convicted. The number of pending cases before the Court will significantly increase in the coming months. Irrespective of the evidence used, whether the alleged use of Bylock app or not, in convicting them, in none of those judgments trial courts ever interested in establishing the material and mental elements of the offense in question. Any sort of connection of persons with the Hizmet movement was deemed sufficient to convict them for such a serious offense. In all over 8,000 pending cases before the Court and other thousands of cases similar to that of Yüksel Yalçınkaya, the defendants have already been sentenced to at least 6 years and 3 months imprisonment for the same offense, in violation of Articles 6 and 7 of the Convention. Their sentences have either already been served, or are currently being served, or are yet to be served in prisons. Every day, people are being arrested for the execution of their sentences throughout the country for unjust convictions similar to those in the Yüksel Yalçınkaya verdict. Investigations and prosecutions continue with arrests and detentions on charges similar to and under the same conditions as the systemic problem identified in the Yüksel Yalçınkaya judgment.

41. **These facts and the worryingly persistent systemic problem identified by the Court, coupled with the statements of senior politicians questioning the authority of the Yüksel Yalçınkaya case and the Court itself, require the Committee of Ministers to act urgently to ensure that Turkey fully, effectively and promptly implements the Grand Chamber's Yüksel Yalçınkaya judgment particularly in respect of, but not limited to, the cases currently pending before the domestic courts, in accordance with the Court's findings**.

42. For these reasons, **Stichting Justice Square,** kindly invites the Council of Ministers :

- to include Yüksel Yalçınkaya v. Turkey (no. 15669/20) judgment on the agenda of the its earliest possible DH meeting ;
- to urge Turkey to present its action plan on time,
- to examine it under the enhanced procedure and under debated meetings and to keep the follow-up of this case on the agenda of each human rights meeting.

Sincerely yours,

Mustafa Özmen,
Stichting Justice Square, President

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Annex: Copies of decisions and other documents