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Meeting: 1521st meeting (March 2025) (DH)

Communication from NGOs (Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, Soldiarity with OTHERS, Human Rights Solidarity, Human Rights Defenders) (16/12/2024) in 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 : 1521e réunion (mars 2025) (DH)

Communication d'ONG (Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, Soldiarity with OTHERS, Human Rights Solidarity, Human Rights Defenders) (16/12/2024) dans 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.

**Council of Europe**
**DGI – Directorate General of Human Rights and Rule of Law**
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15 December 2024

**2nd Update on the Retrial and Reconviction of Yüksel Yalçınkaya**

**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)**

We are writing to you to provide you with an additional update regarding the retrial and reconviction of Mr. Yüksel Yalçınkaya. Along with this update, we are also sending a copy of the conviction decision and its unofficial translation for your reference.

In our previous communications, we informed the Committee of Ministers about the status of the execution of the Grand Chamber judgment in the case of Yüksel Yalçınkaya v. Türkiye. In that communication, we stated that the Turkish Government has not taken any legislative steps to align judicial practices with the Yüksel Yalçınkaya judgment. As the Committee will observe, the Government repeatedly asserts in its 5-month-late submitted Action Plan that judicial

practice is already in alignment with the Court's findings in the Yüksel Yalçınkaya judgment. However, we have demonstrated, through the submission of numerous sample decisions annexed to our communications, 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 Yalçınkaya 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 Yalçınkaya judgment, even in the applicant's case.

Additionally, as we reported in our communications, since the announcement of the Yüksel Yalçınkaya judgment, criminal investigations, and prosecutions have continued for the same acts and under circumstances similar to those addressed in the judgment. National 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 Yalçınkaya judgment.

We anticipate that the Department for the Execution of Judgments of the European Court of Human Rights has inquired into and observed this situation during its recent visit to Türkiye. However, we remain deeply concerned that, despite the Turkish Government's complete disregard and obvious inaction regarding the execution of the Yüksel Yalçınkaya judgment, the Committee of Ministers has not included this case in its *"Consolidated List of Cases for the 1521st Meeting (March 2025) (DH)",* adopted during the 1514th meeting, despite our repeated calls for action.

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 Yalçınkaya 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, as we reported in our communication dated 6 September 2024, the retrial of Mr. Yüksel Yalçınkaya 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, 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.

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. Moreover, **the court imposed a travel ban** on the applicant, despite having already issued the same ruling with an identical prison sentence, which had already been fully served.

As the Committee will observe from the annexed reasoned conviction decision of the trial court in Kayseri, once again, the trial court primarily based its arguments 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.

The decision of the first instance court is now before the Regional Appellate Court and will subsequently go to 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 Yalçınkaya 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 Yalçınkaya judgment. To date, no court, including the Constitutional Court, has issued a single ruling that explicitly references the Yalçınkaya judgment or adheres to the principles established by the Grand Chamber in its landmark decision.

**Analysis of the Kayseri Court's Second Conviction Decision**

We would like to inform the Committee at the outset that the domestic court re-convicted Mr. Yalçınkaya relying on the line of reasonings put in the Second Chamber's Yasak judgment, which was not yet final at the time of the decision, instead of responding to the principles set out in the Yalçınkaya judgment.

As the Committee will observe, in the analytical section of the trial court's reasoning, there is not a single reference to the Yalçınkaya judgment or the findings of the Court contained therein. Instead, the trial court explicitly cites the Yasak case, as evidenced on pages 38 and 44 of the reconviction decision.

In the new judgment, the trial court inferred hypothetical conclusions (see page 44 of the decision) from the message contents attributed to the applicant (which the applicant denies), and stated that these contents proved the applicant's use of the ByLock application, asserting that this was sufficient for convicting the applicant of membership in a terrorist organization. However, in the Yalçınkaya judgment, the Grand Chamber had already examined these message contents upon the Government's submissions and acknowledged that these contents did not contain any criminal elements.

The trial court has even interpreted paragraph 177 of the Yasak judgment as if the Court implied that once it is proven that a person used ByLock or had any kind of connection with the Gülen movement, this would suffice for convicting the person of membership in a terrorist organization, effectively granting approval for such a conviction. Subsequently, based on paragraph 177, the trial court deemed it acceptable to convict Yalçınkaya again.

However, the trial court has neither addressed the deficiencies identified by the Grand Chamber in its finding of a violation of Yalçınkaya's right to a fair trial, nor rectified the shortcomings concerning the material and mental elements of the offense of membership in a terrorist organization as outlined in the Grand Chamber's violation judgment.

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. However, the Chief Public Prosecutor's Office neither provided the raw data nor the parts related to the applicant.

The response of the Ankara Chief Public Prosecutor's Office has also demonstrated that ByLock raw data would/could not be sent in any case file, and no court would be able to commission an expert report regarding the reliability of these data.

Although the Kayseri court included this response and arguments in its decision, the grounds it provided for rejecting the request are not new. In fact, the Government had already repeated these points in its submissions to the ECtHR regarding the Yalçınkaya case, stating why the raw data were not provided to the applicant*: "... under these circumstances, disclosing the entirety of the raw data to the applicant would lead to the sharing of data concerning all users, constitute an interference with the privacy rights of other users, create a security risk, and likely compromise ongoing investigations"* (§296, Yalçınkaya).

According to the Kayseri court, which deemed the response from the Chief Public Prosecutor's Office sufficient, submitting the data for the defense's examination could compromise their integrity. The Grand Chamber, however, did not find this argument persuasive and stated that even if not the entirety of the data, the parts concerning the applicant should be disclosed to them. Nonetheless, the Kayseri court's reasoning did not address at all why the "parts concerning the applicant" were not disclosed. Moreover, the data requested by the applicant were not the "processed" data but the "raw" data, and providing the image of these data to the applicant would not compromise their integrity. Therefore, the reasoning for not providing the data to the applicant lacks legal merit.

In summary, the arguments previously submitted by the Government to the ECtHR, which were not found convincing by the Court, have now been used by the Kayseri court to justify a conviction in the retrial of the Yalçınkaya case, despite no new evidence, knowledge, or information being added to the case file.

The Turkish judiciary, including the Constitutional Court, has ignored the *Yalçınkaya* judgment for over a year, neither acknowledging nor applying its principles in their rulings, and persisting in their practices as if the judgment held no relevance. It is worth emphasizing that even Yüksel Yalçınkaya, the very applicant in the landmark Yalçınkaya case, was unable to benefit from the authoritative judgment of the Grand Chamber.

Unlike the **Kavala and Demirtaş judgments**, which have been on the regular agenda of the Committee of Ministers and which Türkiye has consistently refused to implement, the disregard of the Yüksel Yalçınkaya judgment by both the Turkish judiciary and the executive affects tens of thousands of people, with violations continuing daily, as reported in our previous

communications. The Committee of Ministers must therefore take urgent and strong action to ensure the implementation of the Grand Chamber's Yüksel Yalçınkaya 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:

- **Revisit its *"Consolidated List of Cases for the 1521st Meeting (March 2025) (DH)",* adopted during the 1514th meeting, and include the Yuksel Yalcinkaya judgment in that list and include the Yüksel Yalçınkaya v. Turkey (no. 15669/20) case on the agenda of its March 2025 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: **Copy of the Kayseri Assize Court's decision and its Unofficial translation**

**Co-signatories:**

- **Justice Square Foundation (Netherlands)**
- **Italian Federation for Human Rights (Rome)**
- **Cross Border Jurists Association (Germany)**
- **The Arrested Lawyers Initiative (Belgium)**
- **Solidarity with OTHERS (Belgium)**
- **Human Rights Solidarity (United Kingdom)**
- **Human Rights Defenders (Germany)**