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

Communication from an NGO (ASSEDEL (Association européenne pour la défense des droits et des libertés)) (14/01/2025) 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 : 1521^e réunion (mars 2025) (DH)

Communication d'une ONG (ASSEDEL (Association européenne pour la défense des droits et des libertés)) (14/01/2025) 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.



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RULE 9.2 COMMUNICATION

**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)**

ASSEDEL

(L'Association européenne pour la défense des droits et des libertés)

INTRODUCTION

1. This 9.2 concerns Türkiye's non-compliance with the European Court of Human Rights judgment on *Yüksel Yalçinkaya v. Türkiye*. The submission is initiated by ASSEDEL (Association européenne pour la défense des droits et des libertés). ASSEDEL is a Strasbourg-based non-governmental organization, whose objective is to disseminate, promote, and defend human rights and fundamental freedoms in the spirit of the European Convention on Human Rights, both within the Council of Europe system and at the local, national, and international levels.
2. Following the retrial of Mr. Yalçinkaya, the judgment of the Kayseri Second Assize Court reveals that the Turkish judiciary is hesitant to enforce the Court's judgment. Considering the importance of the nature of the case pointing out systemic unjust practices by the Turkish judiciary which affect more than 8000¹ people, the Committee should prioritize the urgency of this matter by including it on its agenda at its earliest convenience.

¹European Court of Human Rights. 2023. *Yüksel Yalçinkaya v. Türkiye*, Grand Chamber, Application no. 15669/20, para. 414.

Without prompt general measures to address this systemic issue, the heavy workload the Court already faces due to similar applications will only increase in the future.

3. The submission provides information on the individual measures, the approach of the Turkish domestic courts concerning necessary general measures, and comments on the action plan submitted by *Türkiye*.

CASE SUMMARY

4. *Yüksel Yalçinkaya* was working as a teacher before the 15 July 2016 coup attempt. On account of his suspected affiliation with the Gülen Movement, he was first dismissed from service by Legislative Decree no. 672, and later, on the 6th of October 2016, he was arrested. Upon his arrest, based on his alleged use of the ByLock application, his transaction activity at Bank Asya - a legal bank at the relevant time - and his membership to a teacher's union named Aktif Eğitim- Sen and a voluntary education center- which was later closed by a decree law-, a bill of indictment was issued on 6th of January 2017. The same year, under Article 314/2 of the Turkish Penal Code, he was sentenced by the Kayseri Second Assize Court to 6 years and 3 months in prison under the charge of being a member of an armed terrorist organization. The higher courts and the Constitutional Court rejected the applicant's appeals against his conviction.

5. The 2023 Grand Chamber judgment found violations of Article 6(1), Article 7, and Article 11 of the European Convention on Human Rights. The judgment indicated that claims by the Turkish state that alleged crimes committed by Mr. Yalçinkaya lacked legality and foreseeability², thus constituting a violation of Article 7 (*nullum crimen, nulla poena sine lege*). The allegations against the applicant were based on his alleged online activity on the ByLock application, linking him directly to membership in an armed terrorist organization and involvement in the hierarchical structure of FETÖ/PDY, claims which the applicant consistently denied, stating that he never downloaded the app.

6. The Court found a violation of Article 6(1) of the ECtHR on account of the use of ByLock application data against the applicant by the Turkish government. The raw data obtained by MIT, the Turkish Intelligence Services, and presented at the domestic courts were not made available to the defendant's lawyer, which is contrary to the principle of fair legal representation. The applicant was deprived of his right secured under the Convention to have a fair trial.

7. The Court also found a violation of Article 11 of the Convention. Mr. Yalçinkaya's membership in a teacher' union Aktif Eğitim- Sen, and his voluntary activity at Kayseri Gönüllü Eğitimciler Derneği as a chess instructor were deemed criminal and were interpreted to accuse him of being a member of the FETÖ/PDY by the Turkish judiciary. Although the associations were closed by a law decree later after the 15th of July 2016, the defendant had cut all his ties with both before the legislation entered into force.

8. The Court emphasized *Türkiye*'s obligation to address general measures on a larger scale since there was evidence that the case is not unique but is a result of a systemic problem concerning the approach of the Turkish judiciary in similar cases. Approximately 8000

² European Court of Human Rights. 2023. *Yüksel Yalçinkaya v. Türkiye*, Grand Chamber, Application no. 15669/20, para. 254.

similar applications were, at the time, pending before the Court, and there are almost 100.000 identified ByLock users in Türkiye. Under Article 46, Türkiye must draw the necessary conclusions from the present judgment, particularly in respect of, but not limited to, the cases currently pending before the domestic courts, and to take any other general measures as appropriate to resolve the problem.

INDIVIDUAL MEASURES

9. Following the ECtHR's judgment, Kayseri 2nd Assize Court acknowledged the request to re-open Mr. Yalçinkaya's case and decided to adjourn the hearing on 02 April 2024, with a scheduling order dated 28 November 2023.

10. Firstly, the Kayseri Second Assize Court included matters related to the investigation that were not investigated during the first trial. To illustrate, the witness Tuğba Avcı was not heard in the first trial. However, she gave a statement during the first session of the court on 2 April 2024. Her statement included the fact that she constantly saw a newspaper, the name of which she could not remember, in front of the family house of Mr. Yalçinkaya.

11. Secondly, in the first instance court, the grounds of violations found by the ECtHR regarding Article 6 were taken into consideration and the Assize Court requested the raw data on the ByLock content that allegedly belonged to Mr. Yalçinkaya from the Ankara Chief Police Prosecutor's Office. Nevertheless, the request was denied. Through their field research, Justice Square and some other NGOs have gathered valuable information about the current practice of the Turkish judiciary following the Yalcinkaya judgment of the ECtHR, which shows that such requests concerning ByLock data are denied or disregarded. *For instance, R.U. was convicted by the Izmir 18th Assize Court, based on his alleged use of the ByLock application. This conviction was upheld by the Court of Cassation on April 25, 2024. His repeated requests during the trial phase for obtaining an expert report regarding both the job posting allegations and the ByLock application, as well as the requests for witness testimony, were disregarded by the court*³. Contrary to the ECtHR judgment, the Turkish state still fails to establish "equality of arms" and overturns any request related to the ByLock data.

12. Thirdly, the Kayseri Second Assize Court wanted further to investigate the Bank Asya banking activities of Mr. Yalçinkaya. The investigation focused on his subscription to a streaming platform, Digitürk, on whether he had canceled his Digitürk subscription. However, the request contradicts the Court's assessment, as these actions were legal and enjoyed the presumption of legality⁴. By looking at similar factors (such as the Digitürk subscription) as

³ Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, & Solidarity with OTHERS. (2024, September 17). *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 Yalcinkaya v. Türkiye (Application no. 15669/20)*, para. 64.

⁴ European Court of Human Rights. 2023. *Yüksel Yalcinkaya v. Türkiye*, Grand Chamber, Application no. 15669/20, para. 343, as follows: "Nevertheless, the Court cannot but note the lack of any meaningful discussion in the domestic courts' judgments as to how those acts could be evidence of criminal conduct, even in an ancillary manner. It observes in this regard that, at the time they were undertaken, the acts in question were all seemingly lawful acts that benefited from the presumption of legality (see Taner Kılıç, cited above, § 105) and that moreover pertained to the applicant's exercise of his Convention rights, in so far as the membership of a trade union and an association were concerned (see the further discussions within the framework of Article 11 of the Convention in paragraphs 385-397 below). The domestic courts were therefore required to clarify how these acts had reinforced the finding regarding the applicant's membership of an armed

incriminatory and refusing to grant access to the Bylock content, the domestic authorities are on the path of repeating the same violations against Mr. Yalçinkaya.

13. The first assize court scheduled a second hearing on the 12th of September 2024. As a result of all these requests and the first session of Yalçinkaya's re-trial, our initial observation is that the Kayseri 2nd Assize Court did not understand and interpret the ECtHR's findings correctly.

14. At the second hearing, two new witnesses were brought: A. V., and K. Ş. In his statement, A. V. explained their acquaintance with Mr. Yalçinkaya and said that they had been teachers at the same high school for over 20 years. However, he never once saw Mr. Yalçinkaya at the meetings (Sohbet⁵). He only knew him through high school which they were teaching back. As for the other witness, K. Ş., he said that he did not know Mr. Yalçinkaya.

15. Later during the hearing, the defendant's lawyer emphasized that the ByLock data was unreliable, as the memory sticks examined by the two experts from the Ankara Chief Public Prosecutor's Office and the one that the same office has did not contain the same data. The values do not match, since the volume of the memory sticks are different. However, arguing that the stage the trial has reached and the evaluated evidence, the Second Assize Court denied this request made by the defendant.

16. As regards the latter point, the Court noted that, as the raw data obtained from the ByLock server had not been disclosed to the applicant, he had been unable to test first-hand the integrity and reliability of that evidence and to challenge the relevance and significance attributed to it. Therefore, the prejudice to the defense on that account had not been counterbalanced by adequate procedural safeguards ensuring that the applicant had had a genuine opportunity to challenge the evidence against him and conduct his defense in an effective manner and on an equal footing with the prosecution. It appears this will continue to be the case during the retrial.

17. On 12 September 2024, following the re-opening of the case at the first instance court at the Kayseri Second Assize Court, the conviction of the defendant was maintained. Thus, it is not compliant with the Court's judgment⁶. The judgment is not yet final, as the applicant may exhaust further domestic remedies.

RESPONSE TO ACTION PLAN

18. The Turkish government published an action plan on the 6th of August 2024. However, the action plan lacks tangible solutions to undo the injustice done. The plan focused on a selective presentation of certain cases where some first instances courts found the ByLock data insufficient for the accused persons' incarceration.

19. The action plan demonstrates the established case law of the Court of Cassation for a person to be convicted of membership in a terrorist organization. According to these, *(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*

terrorist organization. The Court notes in particular that the explanation provided by the applicant to account for his Bank Asya transactions was never verified or otherwise addressed by the domestic courts."

⁵ Conversational meetings that took place regularly where various religious and social topics were discussed. The term "Sohbet" was exclusively used by the Gülen Movement.

⁶ Please find the official document in Annex 1.

*hierarchical structure of the organisation*⁷. The person must take part in the hierachal structure of the organization and must be ready to discharge duties that they ordered without any hesitation. *The organic link must be established between the person and the organization. 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*⁸. Thus, they try to demonstrate with evidence that people in similar situations are being acquitted and the Constitutional Court is an effective remedy.

20. The source of the Turkish government's claims lie in the interpretation of the ByLock data, noting however that: *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.*⁹. Nevertheless, this statement contradicts the systemic incarceration of people who have been tried only for downloading the ByLock application, as there are approximately 8000 of them.

21. The Turkish government interprets the relevant violation of Article 6 of the Convention on account of the Turkish courts' non-disclosure of the relevant ByLock data to the applicant¹⁰. According to the action plan, *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*¹¹. Nonetheless, this reflection is not accurate. In fact, the Court had raised its concerns over the data not being made available for an independent expert search¹² and over the fact he had been unable to test first-hand the integrity and reliability of that evidence and to challenge the relevance and significance attributed to it. The domestic courts continue to fail to consider that the ByLock data had already been processed and used not only for intelligence purposes but also as criminal evidence to initiate investigations and arrests, including that of the applicant, before the magistrate's court's order for their examination¹³.

GENERAL MEASURES

22. In the wake of the Court's judgment, the Turkish Minister of Justice, Tunç Yılmaz, said that the ECtHR judgment does not set a precedent for similar cases¹⁴. In addition, following the judgment, several other people were detained with similar claims over the alleged use of the ByLock application. For instance, on the 20th of May 2024, as part of the investigation done by Izmir Chief Public Prosecutor's Office, 14 people were detained in Istanbul and Izmir by the

⁷ *Communication concerning the case of Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, para. 26.

⁸ *Communication concerning the case of Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, para. 27.

⁹ *Communication concerning the case of Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, para. 57.

¹⁰ *Communication concerning the case of Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, para. 69.

¹¹ *Communication concerning the case of Yüksel Yalçinkaya v. Türkiye*, Application No. 15669/20, para. 73.

¹² Şirin, Tolga. *Yüksel Yalçinkaya Kararı ve Sonuçlarına Dair Uzman Görüşü*.

¹³ Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, & Solidarity with OTHERS. (2024, September 17). *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)*, para.61.

¹⁴ Turkish Minute, (2023, September 29), *Turkish justice minister signals unwillingness to interpret ECtHR ruling as precedent, defying expectation*, <https://www.turkishminute.com/2023/09/29/turkish-justice-minister-signals-unwillingness-to-interpret-ecthru-ruling-as-precedent-defying-expectations/>

police¹⁵. It is evident that, after the decision of the Second Kayseri Assize Court, the Turkish authorities are not willing to implement the judgment, not only in the case of Mr. Yalçınkaya but also for others facing similar accusations. Such cases were highlighted through field research conducted by Justice Square. On February 7, 2024, more than a year after the ECtHR judgment, the 3rd Criminal Court of Cassation upheld the decision of the Istanbul 25th High Criminal Court, convicting an individual accused of using the ByLock application. Back on January 25th, 2024, the 23rd Istanbul High Criminal Court convicted an accused person on alleged ByLock app activities. Furthermore, contrary to the claims of the Turkish state over the Constitutional Court being an effective remedy, *the Diyarbakır 8th High Criminal Court convicted the accused on February 14, 2024, for using the ByLock application despite the absence of message contents. The Constitutional Court had previously issued a violation ruling on the individual application, but it did not change the outcome. The court accepted the "data analysis report and ByLock detection and evaluation report" as sufficient evidence, even though the people on the friend's list were not heard as witnesses*¹⁶.

23. Turkey is still detaining people over alleged activity related to the ByLock application. Following the death of Islamic cleric and faith-led community leader Fethullah Gülen on October 20, *Turkish Minute* reported in a news article that more than 400 people have been detained by Turkish police since then¹⁷.

24. Even though the Court's judgment should have set a precedent for similar cases pending before domestic courts, the Turkish judiciary has been systemically refusing to implement the judgment of the Court for the criminal proceedings in similar cases to Mr. Yalçınkaya. To illustrate, in their decision back on the 9th of December 2024, the Constitutional Court rejected the applications submitted following the refusal of retrial requests (Annex 2). Hence, the Committee of Ministers should intensify the talks with the Turkish government and monitor closely the implementation process, requesting an exhaustive periodic review of the relevant case law from Türkiye.

25. Turkey should allow the reopening of similar cases both before and after the Yalçınkaya judgment in order to ensure full compliance with the ECtHR judgment. Domestic courts must apply terrorism laws with heightened scrutiny, considering the identified violations of Articles 6 and 7. Effective safeguards against arbitrary prosecution, addressing the systemic nature of these violations, must also be established.

26. Lastly, the Turkish judiciary's intentions regarding the Yalçınkaya case have become evident following the Kayseri Second Assize Court's reasoned decision. The court's reasoning referenced the *Yasak v. Turkey* (no. 17389/20) judgment of the European Court of Human Rights' Second Chamber but made no mention of the Grand Chamber's judgment in

¹⁵ Stockholm Center for Freedom, *14 detained in Turkey over use of ByLock messaging app despite ECtHR rulings*, <https://stockholmcf.org/14-detained-in-turkey-over-use-of-byllock-messaging-app-despite-echr-rulings/>

¹⁶ Justice Square Foundation, Italian Federation for Human Rights, Cross Border Jurists Association, The Arrested Lawyers Initiative, & Solidarity with OTHERS. (2024, September 17). *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), para.26.

¹⁷ Turkish Minute, (2024, November 19), *Turkey detains 459 over alleged Gülen links in largest operation since cleric's death*, <https://www.turkishminute.com/2024/11/19/turkey-detain-459-over-alleged-gulen-links-i-largest-operation-since-clerics-death/>

Yalçinkaya. By prioritizing Yasak, where the Second Chamber did not find a violation of Article 7, the Turkish judiciary has effectively given precedence to a ruling that allows the retrospective application of criminal law. This sets a concerning precedent, enabling the prosecution of individuals in similar cases. To prevent such a development, Turkey's non-compliance with the Grand Chamber's judgment must be addressed in the upcoming meetings of the Committee of Ministers.

CONCLUSIONS and RECOMMENDATIONS

28. The action plan submitted by Türkiye aimed to portray the violations as non-systemic. However, the ECtHR has notified Turkey of another 1,000 applications over Gülen-linked convictions after the Yalcinkaya ruling¹⁸, such as Halil Turkhan against Türkiye and 199 other applications, and Ali Geldim against Türkiye and 199 other applications. The Turkish judiciary must have the remedies to effectively address individual measures in such cases.

Having in mind the information set out above, ASSEDEL requests the Committee of Ministers to:

- Schedule the Yuksel Yalçinkaya v. Türkiye judgment for examination at its' earliest convenience.
- Request Türkiye to submit an action plan dedicated to Mr. Yalçinkaya's retrial proceedings.
- Call on Turkey to implement substantial and effective actions, including any required legislative changes, judicial training, and creation of effective remedies, to resolve similar ongoing criminal proceedings and retry similar cases with final convictions in a Convention-compliant manner.
- Revise the substantive principles implemented in proceedings and investigations carried out in cases similar to the ECtHR Yalçinkaya Grand Chamber judgment.
- Consider introducing a procedure for initiating the re-opening of the criminal proceedings for all similar cases by carrying out legal amendments to subparagraphs e and f of Article 311 of the Code of Criminal Procedure (New trial - Grounds for a new trial in favor of the convicted individual).

ASSEDE

¹⁸ Turkish Minute, (2024, April 29). ECtHR notified Turkey of another 1,000 applications over Gülen-linked convictions after landmark ruling, <https://www.turkishminute.com/2024/04/29/ecthr-notified-turkey-of-another-1000-application-over-gulen-linked-convictions-after-landmark-ruling/>