Third party intervention by Italian Federation for Human Rights under Article 36 of the European Convention on Human Rights **('ECHR')**
Application no. 14894/20, Gültekin Sağlam against Turkey

I. Introduction

1. These submissions are made pursuant to the leave to intervene granted by the President of the Section on 7th September, 2021, under Rule 44 § 3 of the Rules of Court **('ECtHR').**

2. These submissions consist of two sections, namely, the use of the anti-terror provision (Art. 314 of the **Turkish Penal Code ('TPC')** by the Turkish authorities, and the criminalization of the use of instant messaging application Bylock. These two issues are of significance as a total of 420,000 charges were filed under Art. 314 TPC between 2013 and 2020 and 265,000 individuals to date have been sentenced under this Article, whilst [1] 92,769 individuals have been prosecuted for allegedly using the Bylock app.[2]

3. **The Gülen Movement ('GM')** is regarded by the Turkish Government as being an armed terrorist organisation and is referred to by it as 'FETO/PDY'. Other than Turkey, no State party to the **ECHR** has designated GM a terrorist organisation. The leader of GM is Fethullah Gülen and the Ankara 11th Heavy Penal Court acquitted him in 2006 of charges of seeking to change the constitutional order. In 2008, this acquittal was upheld in Turkey by the 9th Criminal Chamber of the Court of Cassation and the Plenary / General Assembly of the Criminal Chambers of the Court of Cassation. [3]

4. Following these judgments, GM's influence on society, the political sphere and the government increased and President Erdogan, then the Turkish Prime Minister, stated on 24.03.2014 that GM was granted all that it sought, saying "*They came to found seventeen universities, I approved them all. They asked for land for their schools, we granted it. They invited us [to their meetings in] the international community, and we presented them to heads of states or governments. They mentioned a Turkish Language Olympics, we provided all sorts of support*"[4] This may be of significance for the issues before the Court as GM was regarded as lawful and legitimate organisation at that time. After the attempted coup in 2016, however, President Erdogan said "*I am in pain for not having previously exposed this organisation's real face. May Allah and my nation forgive me*."[5]

5. Designation of the GM as a terrorist organisation: Under Turkish law, the authority to designate a group as a terrorist organisation is exclusively vested in the judiciary, as per Art. 138 of the Constitution. Although the Turkish Government argues[6] that the **National Security Council ('NSC')** designated the GM a terrorist organisation back on 26th May 2016, before the coup attempt, this is incorrect as Law no. 2945 does not empower the NSC to so do and, in any event; its decisions are classified, and the said NSC's declaration did not explicitly mention GM.[7]

6. Mehmet Yilmaz, the President of the Turkish Council of Judges and Prosecutors, in statements dated 22/9/2016, 21/10/2016 and 22/11/2016, acknowledged that there were both doubts and controversy in judicial circles regarding how to define GM. His remarks can be paraphrased as: *"There*

[1] Abuse of the Anti-Terrorism Provision by Turkey is steadily increasing (2013-2020) https://arrestedlawyers.org/2021/06/10/abuse-of-the-anti-terrorism-laws-by-turkey-is-steadily-increasing/
[2] FETÖ'den 612 bin kişiye işlem (Yeni Safak), https://www.yenisafak.com/gundem/fetoden-612-bin-kisiye-islem-3587006
[3] Docket No. 2008/9-82, Decision No. 2008/181, Date. 24.6.2008. The Courts said: "a decision was required to acquit the defendant, as an act which would constitute an offence on his part, was not identified, the *actus reus* of which has not been substantiated, and of which all the elements were non-existent ."
[4] Erdoğan Trabzon'da konuştu (Hürriyet), https://www.hurriyet.com.tr/gundem/erdogan-trabzonda-konustu-26075452
[5] Rabbim de milletim de bizi affetsin (NTV), https://www.ntv.com.tr/turkiye/rabbim-de-milletim-de-bizi-affetsin,a-10dDB6SEucoS9ZT8sSmQ
[6] Turkey - Memorandum prepared by the Ministry of Justice of Turkey, CDL-REF(2016)067-e, https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2016)067-e
[7] Turkey's Recent Emergency Rule (2016-2018) and its Legality Under the European Convention on Human Rights and the International Covenant on Civil and Political Rights (April 29, 2019). Institute for European Studies, 2019, https://ssrn.com/abstract=3567095.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

were doubts and controversy as to whether or not the GM was an armed terrorist organisation. On July 15th, it was clearly manifested that it was an armed terrorist organisation."[8] [9]

7. The first clearly-worded judgment designating GM an armed terrorist organisation was made by the Plenary of the Criminal Chambers of the Court of Cassation on 26/09/2017.

8. On 20th February, 2021, Minister of the Interior, Süleyman Soylu stated that 622,646 people have been subjected to criminal investigation over alleged membership of an armed terrorist organisation because of their links with GM and 301,932 of these have been arrested by the police (***gözaltı*** in Turkish).[10]

II. The use of the anti-terror provisions by the Turkish authorities

(1) Scope: Article 314 of the Turkish Penal Code ('TPC')

9. This scope of this submission concerns Art. 314 TPC, which is Turkey's primary, and most frequently invoked, anti-terrorism provision. Art. 314 §1-2 TPC criminalises the establishment, command or membership of an armed organisation and carries penalty of up to 22.5 years' imprisonment.[11] The provision reads as follows:

> *(1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.*
>
> *(2) Any person who becomes a member of the organisation, defined in paragraph one, shall be sentenced to a penalty of imprisonment for a term of five to ten years.*

(2) Statistics regarding prosecutions under Art. 314

10. According to the Turkish Justice Ministry's statistics, there has been a steady increase in the use by public prosecutors of Art. 314 TPC; 8,416 charges were filed under Art. 314 TPC in 2013, 146,731 in 2017, 115,753 in 2018, 54,464 in 2019 and 33,885 in 2020. These statistics highlight that, in total, Turkish prosecutors filed more than 420,000 charges under Art. 314 TPC between 2013 and 2020 and more than 265,000 individuals were sentenced under the same Article between 2016 and 2020. [12]

11. These findings correspond with the statement of the Minister of the Interior, as mentioned in §8. Consequently, Turkey has the largest population of inmates convicted of terrorism-related offences, according to a **Council of Europe ('COE')** report showing that, of a current total of 30,524 inmates in COE member states sentenced for terrorism, 29,827 of these are in Turkish prisons. [13]

(3) Issues regarding the principles of no punishment without law, the prohibition of retrospective punishment, the criterion of foreseeability and the quality of law

12. According to the ECtHR's case-law, Article 7 embodies, *inter alia,* the principle that only the law can define a crime and prescribe a penalty, as well as the principle that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy. An offence, and the sanctions provided for it, must be clearly defined in law. An individual can know from the wording of the relevant provision and, if needs be, with the assistance of the courts' interpretation of it, what acts and omissions will make him/her criminally liable.

13. Having something "prescribed by law" requires foreseeability. In the ECtHR's view, a norm cannot be regarded as a "law", unless it is formulated with enough precision to enable people to regulate their conduct. They must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The quality of the law implies that domestic law must

---

[8] https://www.sabah.com.tr/gundem/2016/11/22/itirafcilar-icin-ozel-ekip-kurduk
https://www.haberturk.com/gundem/haber/1313309-hsyk-baskanvekili-mehmet-yilmaz-fetoyu-itiraf-etsinler-ihrac-etmeyecegiz
https://www.cumhuriyet.com.tr/haber/hsyk-ihraclarin-neden-darbeyi-bekledigini-acikladi-604177

[9] The Turkish Judiciary's Violations of Human Rights Guarantees, VerfBlog, https://verfassungsblog.de/the-turkish-judiciarys-violations-of-human-rights-guarantees/

[10] Anadolu Ajansı, https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784

[11] The sentence given under Art, 314 TPC shall be aggravated by half under Art. 5 of the Anti-Terrorism Law (3713).

[12] See, Footnote.1

[13] COE Annual Penal Statistics – SPACE I 2020, https://wp.unil.ch/space/files/2021/04/210330_FinalReport_SPACE_I_2020.pdf

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

be sufficiently foreseeable in its terms that it can give individuals an adequate indication of the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures that will affect their rights under the Convention. (*Güler and Uğurov. Turkey*, nos. 31706/10 & 33088/10).[14]

14. The Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism require lawfulness and a precise definition of anti-terrorist measures, and prohibit arbitrariness. [15]

15. **Lack of legal definition**: Neither Art. 314 TPC, nor any other legal provision, provide a clear definition of the 'membership of an armed terrorist organisation'. As **the Venice Commission ('VC')** reported, the Turkish Court of Cassation sought to adopt criteria through which to establish whether a membership relation has been formed between an individual and the armed organisation in question.[16] These criteria are *'continuity, diversity and intensity'* and *'participation within the "hierarchical structure" knowingly and willfully'*.[17] However, these terms have not yet been clearly defined by either law or any judicial authorities.

16. **Are the criteria applied by the Court of Cassation able to remedy the lack of legal definition?**: In its opinion dated 15th March, 2016 regarding Art.314 TPC, the VC stated: *"According to non-governmental sources, in the application of Article 314, the domestic courts in many cases decide on the membership of a person in an armed organisation on the basis of very weak evidence, which would raise questions as to foreseeability the application of Article 314."*[18] and recommended that: *"first, ... the established criteria in the case law of the Court of Cassation: that acts attributed to a defendant, should show "in their continuity, diversity and intensity", his/her "organic relationship" to an organisation, or they should prove that he/she acted knowingly and willingly within the "hierarchical structure" of the organisation, should be applied strictly.", and concluded that, "The loose application of these criteria may give rise to issues concerning, in particular, the principle of legality within the meaning of Article 7 ECHR."*[19]

17. This opinion however was prior to the 2016 attempted coup and the subsequent upheaval of Turkey's legal and judicial landscape and, since then, the application of the above criteria has become broader and more arbitrary. We will delve into this problem below.

18. **The reorganisation of the Court of Cassation:** Since 2011, the Court of Cassation has been reorganised several times and, in one instance, all of the judges of the court were removed and new judges assigned.

The number of the member justices of the Court of Cassation[20]

Year	Number	Year	Number	Year	Number
2009	217	**2014**	530*	**2018**	384***
2010	239	**2015**	482	**2019**	389
2012	384	**2016**	300**	**2020**	377
2013	387	**2017**	304	**2021**	373

*With the Law No. 6110, 169 new justices were assigned.
** With Law No. 6723, the tenures of all of the justices were terminated, and 300 new justices were assigned. According to the same law, the number will gradually be reduced to 200.
*** In contravention of Law 6723, which requires the number of justices to be reduced to 200, with Emergency Decree No. 696, 100 new justices were assigned.

19. Having been reorganised several times over the last ten years, the Court of Cassation's institutional culture, traditions and jurisdictions of the chambers have radically changed. For instance, between 2014 and 2021, the Court of Cassation's 9th and 16th Chambers were involved in considering terrorism-related cases, but on 1st July 2021 the 16th Chamber was closed and the jurisdiction of the 9th Chamber was changed and the 3rd Chamber has now been vested with the authority to consider these cases. In addition to issues related to the lack of clear definition of the offence of membership of an armed terrorist organisation, therefore, the never-ending reorganisation of the Court of Cassation has effectively voided any possibility of ensuring the required foreseeability in relation to Art. 314 TPC.

[14] Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17, §250
[15] Guidelines on Human Rights and the Fight Against Terrorism , https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf
[16] Venice Commission Opinion on Articles 216, 299, 301 and 314 of The Penal Code Of Turkey (CDL-AD(2016)002).
[17] Ibid.
[18] Ibid, para. 102.
[19] Ibid, para. 106.
[20] Annual Activity Reports of the Turkish Court of Cassation (YARGITAY), https://www.yargitay.gov.tr/kategori/86/faaliyet-raporu

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

20. **Variables used in cases concerning the Gülen Movement ('GM') regarding whether the criteria of 'variety, continuity and intensity' are met:** More than 300,000 individuals have now been arrested by the police, and more than 96,000 of them remanded into pre-trial detention, over alleged links to GM [21] and the Applicant is amongst them.

21. After the 2016 coup attempt, public prosecutors and courts across the country adopted a list of variables through which to determine whether an individual is a member of GM. (Appendices: 1-2). Although the wording used in different cases varies, the factors are usually as follows:

(i) being a depositor at Bank Asya;
(ii) using or downloading the Bylock messaging application;
(iii) analysis of social media activity and the websites visited;
(iv) donations made to relief organisations with alleged GM links, i.e., Kimse Yok Mu;
(v) being a resident or student in those schools, universities and dormitories that have been closed under the state of emergency as a result of alleged GM links, or sending children to those educational institutions;
(vi) subscription to GM periodicals;
(vii) cancelling their subscription to DIGITURK, a satellite television provider, as a result of its decision to end the broadcasting of seven television channels critical of the AKP government;
(viii) being a shareholder in companies that have been dissolved/seized under the state of emergency as a result of alleged GM links;
(ix) being a manager, employee, or member of a trade union, association, foundation or company that has been closed/dissolved/seized under the state of emergency as a result of its alleged GM links.

22. At this point, it worth noting that all of those conducting such activity as described above where all participating in/transacting with organisations that were, at the material time, legal and operating under government licence/status or authorisation: TV channels, Bank Asya[22] [23], Kimse Yok Mu[24], schools[25], universities[26] and foundations[27], and/or operating under the authorisation and inspection of the Ministry of the Interior or Ministry of Work and Employment. Moreover, most of those organisations had been given special titles and privileges, such as tax exemption[28], public benefit association[29], government subsidy, or an outstanding public service award.[30] In other words, this was all lawful activity in exercise of rights protected by ECHR.

23. **Is the judgment of a Chamber of the Court of Cassation binding upon lower courts?** In Civil Law systems such as Turkey, court judgments generally do not set a precedent for other courts of the same or of a lower tier and even the same court is not bound by its previous judgments. Similarly, a court is not obliged to accept as precedent prior judgments from higher courts. Court decisions are, therefore, not a primary source of law in Civil Law systems such as Turkey's.

24. In Turkish law, the only court whose judgments are binding upon lower courts is the Court of Cassation's Plenary for the Unification of Case Laws ('*İçtihadı Birleştirme Genel Kurulu*')[31], whereas decisions of, for instance, the Plenary of Criminal or Civil Chambers, are not binding in the same way. No matter how similar the subject matter may be, the courts, including the Chambers of the Court of

[21] Anadolu Agency, https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784
[22] Under Turkish law, banks are founded by a special license that is issued by a regulatory public authority.
[23] Asya Finance Kurumu A.S. (Bank Asya Participation Bank) was established with the approval and permission of the Council of Ministers on 11th April, 1996. Its opening ceremony was carried out with the participation of the then Prime Minister, Tansu Ciler, President Recep Tayyip Erdogan, former President Abdullah Gul, and others members of the political and social elites. It has a license to collect taxes, and other public financial obligations, such as social security premiums, fines, etc. On 3rd May, 2015, the Banking Regulation and Supervision Board (BRSA) decided that 63 percent of the privileged share, which determines the Board of Directors of Bank Asya, would be used by the Saving Deposit Insurance Fund (SDIF), afterwards, with the decision of the funding board's announcement in the *Official Gazette*, dated 23rd July, 2016, and numbered 29779, the Bank's operating permit was canceled, its operations stopped and the bank closed.
[24] Given by Parliament.
[25] Under Turkish law, private schools are licensed and are inspected by the Ministry of Education.
[26] Under Turkish law, private universities are founded by a law that is enacted by Parliament, and therefore they have the status of being a public entity.
[27] Under Turkish law, foundations are established through an order of authorisation that is adopted by a court.
[28] Given by the Cabinet of Ministers.
[29] Given by the Cabinet of Ministers.
[30] Kimse Yok Mu relief organisation was given statuses relating to tax exemption, public benefit associations, and were also give an outstanding public service award by the Turkish Parliament.
[31] Art. 45 of the Law on the Court of Cassation.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

Cassation, are not obliged to follow the decisions of either the Civil or the Criminal Plenary. Finally, the Court of Cassation's Plenary for the Unification of Case Laws ('*İçtihadı Birleştirme Genel Kurulu*') has not rendered any decision on Art. 314 TPC.

25. The Court of Cassation's Chambers thus do not have the necessary prerogative to ensure the required foreseeability of Art. 314 of TPC, regardless of whether the criteria adopted by those Chambers are capable of being applied consistently, which is, in any event, not the case in the Turkish example.

26. In the case of Demirtas v. Turkey (2), for example, the European Court of Human Rights (ECtHR) found at §278 that *"national courts do not appear to have taken into account the 'continuity, diversity and intensity' of the applicant's acts, nor to have examined whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation"*. This finding therefore would support our submissions at §§16-18 and §§24-25 that the precedents of the Court of Cassation are not binding upon lower courts and, therefore, cannot ensure the required foreseeability of Art. 314 TPC.

27. **Sub-conclusion:** (i) The Court of Cassation's judgments are not binding upon lower courts, and it therefore does not have the power to remedy the deficiencies of the broad and vague wording of Art. 314 TPC; (ii) In fact, national courts do not effectively take into account the said criterion, namely the 'continuity, diversity and intensity', while applying of Art. 314 TPC; (iii) The never-ending reorganisation of the Court of Cassation prevents foreseeable and consistent application of Art. 314 TPC.

(4) The Case of Demirtas v. Turkey (2) Application no. 14305/17[32]

28. As mentioned above, in the case of *Demirtas v. Turkey* (2), ECtHR observed at §278 that the *"national courts do not appear to have taken into account the 'continuity, diversity and intensity' of the applicant's acts, nor to have examined whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation"*

29. Subsequently, the Grand Chamber said at §280 that *"The range of acts that may have justified the applicant's pre-trial detention in connection with serious offences that are punishable under Article 314 of the Criminal Code, is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities."*

30. Later, with regard to the right to liberty, the Grand Chamber said at §337 that *"... the present case confirms the tendency of the domestic courts to decide on a person's membership of an armed organisation on the basis of very weak evidence." It concluded "... the content of that provision, coupled with its interpretation by the domestic courts, did not afford adequate protection against arbitrary interference by the national authorities."* On that account, it found that the terrorism-related offences at issue, as interpreted and applied in the present case, were not properly *'foreseeable'*. [33]

(5) Opinions of the UN Human Rights Committee ('HRC') and the Working Group on Arbitrary Detention's ('WGAD')

31. In recent years, HRC and WGAD have considered a total of 18 cases filed by those detained as a result of their alleged links with GM. HRC's opinions and the summaries of those of WGAD are annexed to this intervention. (Appendices: 3-4). In 16 of those cases, WGAD found a Category V violation (a deprivation of liberty, a violation of international law, on the grounds of discrimination that is based on political or other opinion). In the two most recent cases, WGAD said: *"The Working Group notes that the present case is the most recent concerning individuals with alleged links to the Fethullah Terrorist Organisation/the Parallel State Structure (the Hizmet Movement) that have come before the Working Group in the past three years. In all these cases, the Working Group has found that the detention of the individuals concerned was arbitrary. It notes a pattern of targeting those with alleged links to the Fethullah Terrorist Organisation/Parallel State Structure (the Hizmet Movement) on the*

[32] Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17, http://hudoc.echr.coe.int/fre?i=001-207173
[33] Ibid.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

discriminatory basis of their political or other opinion."[34] And *"A pattern is emerging whereby those with alleged links to the Hizmet Movement are being targeted on the basis of their political or other opinion, in violation of Article 26 of the Covenant."*[35]

32. In two cases, WGAD expressed its concern that these cases may establish a pattern amounting to crimes against humanity. The WGAD said the following: *"The Working Group expresses its concern over the pattern that all these cases follow and recalls that, under certain circumstances, widespread or systematic imprisonment, or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity."*[36]

33. In an instance where the complainant was accused of membership of an armed terrorist organisation on the basis of having a deposit account in Bank Asya and for downloading Bylock, the Human Rights Committee said: *"... the only evidence held against İsmet Özçelik is the use of the Bylock application and the deposition of funds in the Bank Asya. In these circumstances, the Committee considers that the State party has not established that the authors were promptly informed of the charges against them and the reason for their arrest, nor was it substantiated that their detention meets the criteria of reasonability and necessity. It recalls that a derogation under Article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary. The Committee therefore finds that the authors' detention amounted to a violation of their rights under Article 9 (1-2) of the Covenant."* [37]

34. In relation to detention based on a complainant's membership of a certain association, which was operating legally at the material time, WGAD said: *"The source alleges, and the Government does not refute, that Ms. Yasar has been arrested, tried and imprisoned for being a member of Empati Kadın ve İş Derneği (the Empathy Women and Business Association), attending social events and trips organized by the Hizmet Movement, and installing and using the Bylock mobile application for communication. … The Working Group finds no legitimate aim or objective, in a free and democratic society, to justify her deprivation of liberty as a result of her exercise of freedom of opinion and expression, freedom of association and freedom to take part in the conduct of public affairs.* ***Her detention was therefore neither necessary nor proportionate."***[38]

35. In relation to a complainant's detention based on his attendance at gatherings called *'sohbet'*, and that are organized by members of GM, WGAD said: *"In relation to Mr. Yayman's attendance at the meetings of the Gülen group in 2013, the Working Group once again observes the failure of the Government to specify how mere attendance at peaceful and, at that time, legitimate meetings, breached the right to the freedom of peaceful assembly and association, and was contrary to Articles 21 and 22 of the Covenant*[39]*"*

36. In relation to detentions based on the use or downloading of the Bylock app, WGAD has consistently said "*even if the [defendant] had used the Bylock application, he/she would merely have been exercising his right to freedom of expression."* [40]

(6) Concluding observations

37. The overly broad and vague wording of Art. 314 TPC does not satisfy the quality of law.

38. The Court of Cassation's judgments are not binding upon lower courts, and it therefore does not have the power to remedy the deficiencies of the broad and vague wording of Art. 314 TPC.

39. The overly broad and vague wording of Art. 314 TPC, coupled with its application in post-2016 coup attempt cases, are not foreseeable by any reasonable individual.

[34] Osman Karaca v. Cambodia and Turkey, A/HRC/WGAD/2020/84.
[35] Levent Kart v. Turkey, A/HRC/WGAD/2020/66.
[36] Osman Karaca v. Cambodia and Turkey, A/HRC/WGAD/2020/84, Levent Kart v. Turkey, A/HRC/WGAD/2020/66.
[37] İsmet Özçelik et. al. , CCPR/C/125/D/2980/2017.
[38] Nermin Yasar v. Turkey, A/HRC/WGAD/2020/74.
[39] Mestan Yayman v. Turkey, A/HRC/WGAD/2018/42.
[40] Melike Göksan & Mehmet Fatih Göksan v. Turkey, A/HRC/WGAD/2019/53; Mestan Yayman v. Turkey, A/HRC/WGAD/2018/42; Levent Kart v. Turkey, A/HRC/WGAD/2020/66; Kahraman Demirez et. al v. Turkey and Kosovo, A/HRC/WGAD/2020/47; Arif Komiş et. al v. Malaysia and Turkey, A/HRC/WGAD/2020/51; Akif Oruç v. Turkey, A/HRC/WGAD/2020/29; Faruk Serdar Köse v. Turkey, A/HRC/WGAD/2020/30; Ercan Demir v. Turkey, A/HRC/WGAD/2019/79.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

40. The list of variables that is being used to ascertain whether the individual concerned is a member of an armed terrorist organisation (GM/FETO-PDY) consists solely and exclusively of either lawful activity and/or interactions with legally instituted entities, and/or in exercise of the rights and freedoms that are enshrined under the Turkish Constitution and the ECHR.

41. The never-ending reorganisation of the Court of Cassation prevents foreseeable and consistent application of Art. 314 TPC.

42. Considering all of this, the Court may ask itself whether, before the 2016 coup attempt, anybody could have reasonably foreseen the speedy twists and turns of the political and judicial opinions on GM that would render such, ostensibly legal, activity illegal, nor that one day any slight hint of an association with GM would be regarded as being sufficient to legally press terrorism charges.[41]

43. **The domestic law, Art. 314 TPC, as interpreted and applied in the present case, would not have been legally foreseeable by anyone in the Applicant's (or anyone's) position at the time of the Applicant (or anyone's) actions in question.**

III. The criminalisation of the use of the Bylock messaging application

(1) Information regarding the Bylock app and its use in criminal proceedings

44. **What is Bylock:** Bylock is an encrypted instant messaging app that provides written and voiced communication between its users, formerly downloadable via the Google Play Store, Apple Store, and some other online markets. According to a report prepared by FOX-IT, a prominent Netherlands based forensic IT company**,** the app was downloaded over 100,000 times from the Google Play Store alone**.**[42] According to the report, Bylock was operative between 14th March 2014, and 19th February 2016.

45. **The Turkish judiciary's position on Bylock:** The Court of Cassation have ruled that using or downloading Bylock constituted sufficient evidence to convict a person of membership of an armed terrorist organisation, even in the absence of any other supporting evidence. The Plenary of Criminal Chambers of the Court of Cassation ruled on 26.09.2017, that: *"Since the Bylock messaging app is a communication network, exclusively designed and developed to fulfill the communication needs of the FETÖ terrorist organisation, the detection, through technical means, of the involvement of any individual within this network proves, beyond any doubt, the link between the individual and the terrorist organisation." and "... the content of the correspondence circulated within the Bylock network is irrelevant in this regard."*[43] [44]

46. ***Akgün v. Turkey*:** In a complaint to the Court arising a result of applicant being detained on the basis of downloading/using Bylock, ECtHR found that the mere fact of downloading, or using, a means of encrypted communication or, indeed, the use of any other method of safeguarding the private nature of exchanged messages, could not *in itself* amount to evidence capable of satisfying an objective observer that illegal or criminal activity was being engaged in. It was only when the use of an encrypted communication tool was supported by other evidence about its use, such as, for example, the content of the exchanged messages, or the context of such exchanges, that the evidence was capable of satisfying an objective observer of reasonable grounds to suspect the individual using that communication tool of being a member of a criminal organisation.[45]

47. **UN WGAD opinion:** UN WGAD have consistently concluded that downloading and using Bylock represents the exercise of a person's basic rights of freedom of opinion and expression.[46] Indeed, that rights of freedom of opinion and expression protect all *forms* of expression as well as the means

[41] The Turkish Judiciary's Violations of Human Rights Guarantees, VerfBlog, https://verfassungsblog.de/the-turkish-judiciarys-violations-of-human-rights-guarantees/
[42] Expert Witness Report on Bylock Investigation, https://foxitsecurity.files.wordpress.com/2017/09/Bylock-fox-it-expert-witness-report-english.pdf
[43] Court of Cassation, E. 2017/16-956, K. 2017/370.
[44] The Constitutional Court endorses the conclusion of the Court of Cassation without any further inquiry. (Ferhat Kara, B. No: 2018/15231).
[45] Akgün v. Turkey, application no. 19699/18.
[46] Faruk Serdar Köse vs Turkey, Kahraman Demirez et. al v. Turkey and Kosovo, Nermin Yasar v. Turkey, WGAD/2020/30,47,74.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

of their dissemination, including all forms of audio-visual, electronic and internet-based modes of expression.[47]

(2) Observations on the criminalisation of Bylock:

48. The Turkish judiciary's rulings regarding Bylock are in contravention of the Court of Cassation's own precedents, as indicated in Part 1 of these submissions, which require evidence of 'continuity, diversity and intensity' and 'participation within the "hierarchical structure" knowingly and willfully', to establish membership of an armed terrorist organisation. The reality, however, in cases involving Bylock is that:
i. downloading Bylock routinely suffices for them to be convicted, without either the defendant's or any other person's actions, or any other evidence showing a defendant is linked to the organisation in question. This is in contravention with the requirement for 'diversity', as above;
ii. downloading Bylock, or using it for a very short period of time, even one time, is sufficient for conviction, in contravention with the requirement for 'density and continuity' as above, again indicating that even the Court of Cassation does not follow its own precedents, as indicated above, in §§16-18 and §§24-25.

49. **Exclusivity:** The Court of Cassation has ruled that the 'Bylock messaging App is a communication network, *exclusively* designed by and developed to fulfill the communication needs of the FETÖ terrorist organisation'[48] [49], but this has been shown to be incorrect as is explained below at §.50

50. **International Reports:** Three separate digital forensic reports, by Fox IT, Jason Frankovitz and Thomas Kevin Moore, have established the 'exclusivity claim' to be factually incorrect. (**Appendices 5, 6, and 7**). These verifiable reports, attached to this submission, are commended to the Court and include:

> "… Bylock was available on the Google Play and Apple App stores… the Bylock App was ranked in the top 100 applications in 12 countries and in the top 500 apps in 47 countries. This would seem to demolish the claim that only those who were members of FETO/PDY were users of the App… It is ridiculous to suggest that all those users were members of the Gülen Movement.'[50]
>
> "Examples of the platforms that hosted Bylock are the Google Play Store, Apple Store, apk-dl.com, apkpure.com and downloadatoz.com. … MIT considers the Bylock application to have been unknown to the public before 15th July, 2016. Fox-IT has attempted to verify this statement with the statistics that are available. … Historical download and install statistics from the Google Play store indicate that there were Bylock installations from at least April, 2014, and these reached 100,000 installation on 19th January, 2015. These observations suggest that the public had actually known and used Bylock in the years leading up to 15th July, 2016."[51]
>
> "During the time the Bylock application was available on Google Play, it could have been downloaded by anyone with an Android device and a Google account. After an App is removed from its app marketplace, it is still possible to download and install the app from other websites that have a copy… Not only can the Bylock App be downloaded by anyone, but once it has been downloaded, the person who downloaded it could create their own Bylock account and start sending messages to other users… I found nothing in my examination of the Bylock App indicating that the App was able to enforce a specific group membership as a condition of use.'[52]

51. The quality, reliability and authenticity of Bylock evidence: Generally, the Turkish police and judicial authorities exclusively rely on the findings of the Turkish National Intelligence Agency (MİT) in relation to investigations and prosecutions concerning Bylock, relying upon MİT's report 'A Technical Report on the Bylock Application'. FOX IT, a Netherlands-based, leading digital forensic company, however, concluded that [parts in bold for emphasis]:

[47] Human Rights Committee, General comment No. 34, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf
[48] Court of Cassation, E. 2017/16-956, K. 2017/370.
[49] The Constitutional Court endorses the conclusion of the Court of Cassation without any further inquiry. (Ferhat Kara, B. No: 2018/15231).
[50] Enjoined expert witness reports by UK lawyers William Clegg Q.C. and Simon Baker, and forensic expert Thomas Kevin Moore, (Appendix.7).
[51] Expert Witness Report on Bylock Investigation, (Appendix.5).
[52] Expert Report of Jason Frankovitz dated 9/8/2017 (Appendix 6).

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

> **"Fox-IT encountered inconsistencies in the MİT report that indicate the manipulation of results and/or screenshots by MİT.** This is very problematic, since it is not clear which of the information in the report stems from original data, and which information was modified by MİT (and to what end). This raises questions as to what part of the information available to MİT was altered before presentation, why it was altered, and what exactly was left out or changed. When presenting information as evidence, transparency is crucial in differentiating between original data (the actual evidence) and data added or modified by the analyst. Furthermore, Fox-IT finds the MİT report implicit, not well-structured and lacking in essential details. Bad reporting is not merely a formatting issue. Writing an unreadable report that omits essential details reduces the ability of the reader to scrutinize the investigation that lead to the conclusions. When a report is used as a basis for serious legal consequences, the author should be thorough and concise in the report so as to leave no questions regarding the investigation. **Fox-IT has read and written many digital investigation reports over the last 15 years. Based on this experience, Fox-IT finds the quality of the MİT report very low, especially when weighed against the consequences of the conclusions**."[53]

52. Likewise, an expert report prepared (Appendix:8) by two Turkish digital forensic experts Koray Peksayar and Levent Mazılıgüney, concluded that; (i) Data obtained by MIT from ByLock's server is corrupted; (ii) Understanding the reason for inconsistencies found would only be possible through provision of the *original* evidence, the uncorrupted digital data itself and by the examination of such by all parties in the criminal case: (iii) Corrupted digital data cannot provide acceptable, admissible evidence for criminal cases.[54]
53. **Issues of admissibility stemming through non-compliance with procedural rules**: The Court should also consider procedural defects in the obtaining of Bylock data, such that they are inadmissible in criminal proceedings.
54. Procedural requirements for the obtaining / gathering, processing and examination of digital data stipulated in the Criminal Procedure Law (CMK – No:5271). The Court of Cassation has ruled on the procedural requirements in relation to digital data, such as that of Bylock, that:

> "In criminal proceedings, evidence must be obtained in accordance with the law and must be obtained using methods sanctioned by the law. In order to be able to conduct a fair trial, and to be able to evaluate the findings collected during the investigation (and prosecution) as evidence; the digital data obtained from suspects (or defendants) must be collected in accordance with the technical requirements that are set by the law, and must be submitted to the judicial authorities in a complete, uncorrupted state. It is the purpose of the Legislator while enacting Art. 134 of the Criminal Procedure Law (CMK) in detail. Since the fact that external intervention in the digital evidence is technically feasible, and that it is often not possible to determine by whom the intervention was made, it is necessary for safe confiscation and examination to leave the original media to the suspect after its image has been taken *in situ*…Under Articles 2/e and 161 of the Criminal Procedure Law (CMK – No:5271) and the Article of Annexe-6 of the Law in regard to the Duties and Authorities of the Police, the law enforcement agent who learns of a situation that implies that a crime was, or is, being committed, should immediately inform the Public Prosecutor and proceed with the investigation under his/her orders. Proceedings without a legal search warrant or proper judicial order are considered illegal."[55]

55. **Application of the requirements explained above to the way that Bylock data obtained and processed:** In its press statement dated 06th April 2017 MİT stated that all of the findings about the Bylock and the raw data compiled through intelligence initiatives were shared with judicial, security and other authorities in May, 2016. [56] Likewise, a Turkish government official, who spoke to Agence France-Presse said MİT began decrypting messages sent on Bylock in May, 2016.[57] However, the Ankara Chief Public Prosecutor's Office subsequently challenged this statement and said "*we were not given Bylock data by MİT at that time. We became aware of Bylock after July 15 [2016].*"[58]

[53] Expert Witness Report on Bylock Investigation by Fox IT (Appendix 5).
[54] Expert Opinion on the Accuracy and Reliability of the Digital Data Obtained from the Bylock Server in Lithuania (Appendix 8).
[55] 16th Chamber of the Turkish Court of Cassation, 21.04.2016, 2015/4672 E. 2016/2330 K.
[56] Press Statement of MİT, https://www.mit.gov.tr/basin60.html
https://www.cumhuriyet.com.tr/haber/mitin-Bylock-celiskisi-717302
https://www.bbc.com/turkce/haberler-dunya-39513263
[57] https://www.middleeasteye.net/news/turkey-tracked-thousands-Gülenists-encrypted-messages
[58] Ankara Başsavcılığı kaynakları, "O tarihte bize MİT'ten Bylock kayıtları gönderilmedi. Biz Bylock'u 15 Temmuz'dan sonra öğrendik" dedi.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

56. In September, 2016, Faruk Özlü, the then Minister of Science and Technology, said that there were 215,000 Bylock users[59] and on 6th October 2016, Veysi Kaynak, then Deputy Prime Minister, said that 18 million messages had been obtained and that the process of decrypting each and every one of these messages was underway.[60] Further, it was reported on 11th November 2016 that an indictment presented by the Izmir Prosecutor Ayhan Yilmaz to the Izmir 13th Heavy Penal Court, stated that MİT had already decrypted 17 million out of 18 million text messages, plus 2.5 million out of 3,5 million e-mails.
57. **The first judicial order to authenticate (digital image taking) digital Bylock data was made on 9th December 2016 by the Ankara 4th Criminal Peace Judgeship.[61]** This order explicitly mentioned that a hard disk and a USB stick containing digital data on Bylock were passed to the Ankara Chief Public Prosecutor's Office and, on 9th December 2016, the Ankara Chief Public Prosecutor's Office asked for an order to authenticate the digital data and subsequently examine these devices.
58. The statement of the Deputy PM and the indictment of the Izmir Prosecutor together provide a strong inference that data from Bylock had been examined and processed by MİT a long time *before* it was passed to judicial authorities, as the date of first judicial order to authenticate (digital image taking) digital Bylock data was 9th December 2016.[62]
59. In accordance with procedure (as outlined above §54), MİT should have immediately passed this data and these devices to the judiciary as they were, *without delay* so as to enable the latter to carry out the first authentication/image taking process under the ambit of a judicial order and then carry out an examination under the Code of Criminal Procedure. MİT does not have any authority to examine and process it. Given concerns about the corruption of the data (as referred to above at §51-52) the Court may consider the defect to be a serious rather than technical one.
60. The processing of the data by MİT without judicial oversight**,** and its consequent late delivery to the authorities, raise serious questions for the Court as to the integrity and authenticity of Bylock evidence. Likewise, another serious issue concerning the integrity of Bylock evidence is the disintegration of the digital evidence and the conducting of the forensic examination (forensic image taking) as two separate processes took place on two separate dates, 9th December, 2016, and 24th March, 2017. (Appendices: 9-10)
61. Indeed, another hard disk was passed by the MİT to the Ankara Chief Public Prosecutors and, subsequently, a separate image taking and forensic examination authorisation order was given on 24/3/2017.[63] It shows MİT did not preserve the integrity of the digital data, divided it into the parts and passed to the judicial authorities in two parts, one in December, 2016 and the latter in March 2017.
62. MİT's failure to comply with the law and the Ankara Chief Public Prosecutor's Office's ignorance of this failure, warrants an independent expert's forensic examination of all of the digital data and devices relating to Bylock. However, without exception, defendants have been denied this by the Turkish Courts, which raises for the Court the principle of the requirement for equality of arms.
63. **The Turkish Constitutional Court's (TCC) inconsistent rulings in Bylock cases**: In Bylock cases, including the Applicant's, the Turkish courts have denied defendants the possibility of effectively challenging Bylock evidence and, in particular, have dismissed defence requests that i) digital data about Bylock should be given to the defense for examination purposes and/or ii) that the Court should commission an independent panel of experts to examine the Bylock data.

https://www.cumhuriyet.com.tr/haber/mitin-Bylock-celiskisi-717302
[59] Faruk Özlü: ByLock'u TÜBİTAK'taki FETÖ'cüler geliştirdi (Habertürk), https://www.haberturk.com/ekonomi/teknoloji/haber/1294035-faruk-ozlu-by-locku-tubitaktaki-fetoculer-gelistirdi
[60] Bakan Veysi Kaynak: '18 milyon ByLock mesaj var, tek tek inceleniyor' (Yeniçag), https://www.yenicaggazetesi.com.tr/bakan-veysi-kaynak-18-milyon-Bylock-mesaj-var-tek-tek-inceleniyor-147602h.htm
[61] Ankara 4th Criminal Peace Judgeship, 9/12/2016, 2016/6774.
[62] Ibid.
[63] Ankara 5th Criminal Peace Judgeship, 24/3/2017, 2017/2056.

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

64. Another problematic issue is the Courts do not themselves have possession of the Bylock data, so they can only ask for the police for this data (partially) in relation to defendant. The police respond by sending a document, which is called the *Bylock Determination and Evaluation Report*, to the Court. This documents often include a disclaimer to the effect that the police's involvement is solely limited to the printing out of the response from the Bylock database module, for which the police do not accept any liability. (Appendix:11)
65. The Court may consider whether this represents a basic violation of the principle of the equality of arms. Indeed**,** in three separate judgments (***Yavuz Pehlivan and others*** [GK], B. No: 2013/2312, ***Yankı Bağcıoğlu and others*** [GK], B. No: 2014/253, ***Sencer Başat and others*** [GK], B. No: 2013/7800, Appendices.12,13,14**)**, the TCC concluded that the defendant should be given an opportunity to conduct a technical examination of the relevant digital materials, otherwise the principle of the equality of arms would be violated:

> "In the present case, the evidence which was given as the basis for the crimes that the Applicants were charged with is not evidence that was seized from the Applicants, but digital materials seized from third parties, and it has been demonstrated that the judicial authorities did not let the Applicants, who were tried while under detention, examine this evidence and conduct a technical examination of them. … It is concluded, therefore, that the Applicants did not have sufficient information regarding the content of the digital materials and documents, and did not have the opportunity to conduct a technical examination of the relevant digital materials either, and therefore, the principle of the equality of arms was violated. **[*Yavuz Pehlivan and others* [GK], B. No: 2013/2312, 4/6/2015, § 80]**
>
> In the present case, the Applicants were sentenced as a result of relying on the information and documents that were contained within the digital evidence. The request of the Applicants that an expert examination be commissioned on this evidence, in order to investigate their allegations that the digital data did not reflect the reality, or that their images be submitted, was dismissed. … the Court delivered its judgment to convict the Applicants by making an assessment, based on this digital evidence, and the judgment was upheld by the Court of Cassation for the same reasons. … It is clear that the procedure and method pursued by the Court under these kinds of circumstances are not in compliance with the principle of equality of arms, and do not contain a guarantee that sufficiently protects the Applicant's interests. … [therefore] the principle of the "*equality of arms*" … was violated. **[*Yankı Bağcıoğlu and others* [GK], B. No: 2014/253, 9/1/2015, § 74-77]**
>
> In terms of the complaints in relation to the evaluation of the digital data, since the fact that the expert reports and expert opinions that the Applicants presented were not accepted by the Court of First Instance, and the dismissal of their requests to have an expert examination undertaken on these issues, by the Court, and with insufficient justifications, were contrary to "*the right to a reasoned decision*" and to the principle of "*equality of arms*; the right to a fair trial … was violated". **[*Sencer Başat and others* [GK], B. No: 2013/7800, 18/6/2014, § 72]"**

66. However, in contradiction to the above rulings of the Court, in Bylock cases the TCC have found no violations.

67. **Conclusion**: In conclusion,
    a) Conviction for Art. 314 TPC for the mere fact of using or downloading Bylock may be considered in clear violation of basic rights of freedom of expression and the right to respect for private life;
    b) The consistent convictions of defendants in Turkish courts on the basis solely or mainly of the mere use of, or downloading of, Bylock establishes that the application in Turkey of Art. 314 TPC lacks of the quality of law and is prone to arbitrary invocation;
    c) Processing the Bylock data by MİT without judicial oversight may be considered in clear violation of both Turkish Code of Criminal Procedure and the Court of Cassation's own rulings;
    d) There are no guarantees for the Court that Bylock data has not been corrupted (inadvertently or otherwise). On the contrary, there are at least two experts report establishing serious concerns about the integrity of this data;

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma

e) Under the TCC's precedents, the procedures and methods used by the Turkish courts in Bylock cases are not in compliance with the principle of the equality of arms, and/or do not contain a guarantee that sufficiently protects any applicant's rights to a fair trial. The Court will, therefore, ask itself whether the principle of the equality of arms would be violated in the Applicant's, or indeed, any similar defendant's case.

Italian Federation for Human Rights

(+39)0645493487
segreteria@fidu.it
Via Boezio, 14 - 00193 Roma