# THIRD-PARTY INTERVENTION BY THE ITALIAN FEDERATION FOR HUMAN RIGHTS IN THE CASE OF YASAK v. TURKEY (App. No: 17389/20)

## 1. INTRODUCTION AND THE CONTEXT OF THE CASE

1. The Italian Federation for Human Rights (FIDU) submits this third-party intervention under Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 3 of the Rules of Court, following leave granted by the President of the European Court of Human Rights ("the Court").
2. FIDU, founded in 1987, advocates for human rights, democracy, and the rule of law. It has contributed expertise on judicial independence and counterterrorism laws in cases like *Altıntaş v. Turkey* and the execution of the *Yüksel Yalçınkaya* judgment[1]. FIDU has analyzed numerous court rulings on Turkey's counterterrorism practices and closely monitored high-profile trials, including the "young girls' case" in Istanbul.[2] Through courtroom observations and consultations with legal experts and civil society, FIDU has gained critical insights into terrorism-related trials in Turkey. The following observations stem from its extensive experience in this field. This submission aims to assist the Court in its examination of the case *Yasak v. Turkey* by providing an expert analysis of the legal and factual context surrounding the application of Turkey's anti-terror legislation, particularly Article 314 of the Turkish Penal Code and Anti-Terror Law No. 3713, in light of the requirements of foreseeability and legal certainty under Article 7 of the Convention.
3. FIDU's submission highlights critical legal issues raised by this case, including:
    - The assessment of "membership in a terrorist organization" by Turkish courts and its compliance with the foreseeability criterion under Article 7 of the Convention.
    - The problematic designation of the Gülen Movement as a terrorist organization, as noted in the UN Special Rapporteurs' allegation letter (ALTUR 5/2024), and its far-reaching implications for criminal liability under Article 314 of the Turkish Penal Code.
4. Considering the specific circumstances of the case, the Court is faced with a highly significant and complex new case that may extend beyond the Turkish context. While the Court made certain findings in *Yüksel Yalçınkaya* judgment, the fact that, since that decision, Turkey has not implemented general measures even within the narrowest interpretation of that ruling—nor has it taken general measures to apply it—necessitates further clarification of the principles established in *Yüksel Yalçınkaya*. Additionally, despite the apparent lack of any difference from the *Yüksel Yalçınkaya* case, individuals have continued to be convicted daily for actions that do not constitute a criminal offense and cannot be associated with terrorism-related crimes. Since the Court found a violation in *Yüksel Yalçınkaya*, the relatively narrower scope of review conducted in that case might have been regarded as tolerable at the time. However, it now appears insufficient to provide an adequate solution for complex cases such as the present one, as well as for future cases the Court may examine. FIDU respectfully suggests that the Court may wish to refine the principles outlined in the Yüksel Yalçınkaya judgment to enhance their comprehensibility for the respondent state.
5. FIDU submits this intervention to support a fair decision in *Yasak v. Turkey*, reinforcing the rule of law and ensuring counter-terrorism measures align with human rights standards.

[1] Yüksel Yalçınkaya v. Türkiye [GC], 15669/20, 26.9.2023.
[2] See FIDU's Interim Trial Monitoring report on the Girls' Case, here.

## 2. LEGAL AND FACTUAL ANALYSIS OF THE CASE

6. The trial court sentenced the applicant under Article 314/2 of the Criminal Code and Article 5/1 of Law No. 3713 based on the definition of terrorism set out in the Anti-terror law. The Chamber's judgment of 26 August 2024 reveals that none of the evidence used to convict the applicant demonstrates involvement in any act of violence or coercion. The applicant was not accused of being responsible for terrorists in training camps or the armed ranks of a violent terrorist organization. As far as understood from the Chamber's judgment, at no point does the first trier decision include any accusation that the applicant contributed to a terrorist organization through acts of violence or any other criminal conduct. Despite this, the trial court convicted the applicant of the serious charge of membership in a terrorist organization. This case raises serious concerns about the application of counterterrorism laws in relation to the principle of legality under international human rights standards. These concerns include the criminalization of lawful, ordinary, and non-violent conduct; multiple violations of the principle of legality; guilt by association; the broad and expansive interpretation of membership in a terrorist organization; and the retrospective application of terrorism laws.

## 3. VIOLATION OF THE PRINCIPLE OF THE LEGAL FORESEEABILITY

7. The applicant claimed that he was convicted of being a member of a terrorist organization for engaging in legitimate activities within an organization that, at the time of his actions, had not been designated as a terrorist organization by the Turkish government or judiciary. On the contrary, its activities were praised and supported by high-ranking politicians. Even today, this organization is not recognized as a terrorist organization by any rule-of-law country outside of Turkey.

8. As noted by the Council of Europe Commissioner for Human Rights, the Gülen movement's *"readiness to use violence, a sine qua non component of the definition of terrorism, had not become apparent to Turkish society at large until the coup attempt. (…) the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organisations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another".*[3]

9. The Court's findings in several judgments[4] reinforce the argument that individuals engaging in activities within the Gülen movement before its formal designation as a terrorist organization could not have reasonably foreseen that their actions would later be criminalized. In particular, the Court noted that as of 2015, there was no final conviction of members of the movement for being leaders or members of an illegal or terrorist organization, despite the group's classification as dangerous by certain executive bodies. The Court further emphasized that the nature of the movement—whether it was merely an educational and religious community or an entity engaged in illegal infiltration of state institutions—was still a subject of intense public debate at that time (Yasin Özdemir v. Türkiye, ECtHR, § 40). Given that even in 2015, the Court rejected the argument that the Gülen movement should have been regarded as a terrorist organization, it is untenable to assert that a person was aware of such a designation and willingly engaged in activities with

[3] Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, 7 October 2016 CommDH(2016)35, § 20.

[4] Yasin Özdemir v. Türkiye, 7 December 2021, No. 18980/20, § 40; Atilla Tas v. Türkiye, 19 January 2021, No. 72/17, § 134; Ilicak v. Türkiye, 14 December 2021, No. 1210/17, § 141.

criminal intent during a period even before 2015. Under these circumstances, it would be impossible to conclude that their prosecution and conviction for the alleged offense were foreseeable in accordance with the principle of legality.

10. The approach adopted in *Kasymakhunov and Saybatalov v. Russia*[5] (Applications Nos. 26261/05, 26377/06, 14 March 2013) should likewise be applied to this case. In that judgment, the Court emphasized the requirement of clear and reasoned legal justifications when classifying an organization as a terrorist entity and imposing criminal liability based on such classification. Similarly, in the Gülen movement cases, the National Security Council (NSC) press statements cannot serve as a legitimate basis for establishing criminal liability, as they lacked any reasoning, substantive legal analysis, or details about the deliberations and decisions reached. These statements were issued after each session without disclosing the factual or legal grounds supporting the conclusions drawn. Furthermore, the Law on the National Security Council (Law no. 2945, Art.3) does not empower the NSC to designate a group as a terrorist organization, nor as a group performing activities against the national security of the State. The authority to designate an organization, a structure, a body, etc., as a terrorist organization, is exclusively vested in the judiciary by Article 138 of the Constitution. Relying on such vague and politically driven statements as proof of an individual's criminal intent contravenes the fundamental principles of legal certainty, foreseeability, and due process, as established in *Kasymakhunov and Saybatalov v. Russia*.

11. A government's unilateral political designation of a group as a terrorist organization must not override the fundamental principle of individual criminal liability. The absence of substantive judicial scrutiny in that process highlights the dangers of allowing political narratives to dictate judicial outcomes, violating international standards on the rule of law. The Turkish courts' approach in Gülen movement cases—treating any association with the movement after 2013 as evidence of terrorist membership—amounts to criminalizing lawful social, professional, and educational engagements solely based on a political shift in government policy.

## 4. VAGUENESS OF THE TURKEY'S ANTI TERROR LEGISLATION

12. The trial court convicted the applicant under Article 314/2 of the Turkish Criminal Code and Article 5/1 of Law No. 3713, based on the definition of terrorism in the Anti-Terror Law. Article 314 §§ 1 and 2 of the Criminal Code criminalizes forming, leading, or being a member of an armed organization, yet neither the Code nor Article 314 defines the terms 'armed organisation' or 'armed group.' As the Venice Commission has observed, the Turkish Court of Cassation determines 'membership' based on the continuity, diversity, and intensity of a suspect's acts to establish an 'organic relationship' or participation within the hierarchical structure of the organization[6].

13. Article 1 of the Anti-Terror Law defines terrorist conduct broadly, encompassing any act committed by one or more persons belonging to an organization with the aim of "changing the characteristics of the Republic" or "weakening, destroying, or seizing authority of the State" through "pressure, force, violence, terror, intimidation, oppression, or threat." Under Article 2, an individual is classified as a "terrorist offender" solely by virtue of his/her membership in an organization with a terrorist aim, regardless of whether he/she has personally committed any criminal act in furtherance of that aim. UN Special Rapporteurs have expressed concerns that such an expansive definition leads to arbitrary application and abuse, as it criminalizes mere

[5] Kasymakhunov and Saybatalov v. Russia (Applications Nos. 26261/05, 26377/06, 14 March 2013.

[6] Venice Commission Opinion on Articles 216, 299, 301 and 314 of the penal Code of Turkey, adopted at its 106th Plenary Session, 11-12 March 2016. No. 831/2015, §§ 98-100.

association with an organization without requiring any specific criminal conduct.[7] UN Human Rights Committee[8] has criticized the broad and ambiguous definitions of "terrorism" and "terrorist offender" in Articles 1 and 2 of Law No. 3713, recommending that Türkiye align its counter-terrorism legislation with the principles of legality and legal certainty by narrowing and clarifying these definitions.[9]

14. The principle of legality requires the offences and corresponding penalties to be clearly defined by law. The concept of "law" within the meaning of Article 7, comprises qualitative requirements, in particular those of accessibility and foreseeability.[10] These qualitative requirements must also be satisfied as regards the definition of the offence.[11] A legal provision that lacks sufficient precision to enable individuals to foresee the legal consequences of their actions constitutes a breach of Article 7 of the Convention.[12] In *Parmak and Bakır v. Turkey*, this Court has already identified concerns regarding the vague and unpredictable interpretation of Article 7/1 of Law No. 3713. The judgment specifically noted that the provision refers to "using force and violence" separately from the methods of terrorism, reaffirming that force and violence are core elements of terrorism-related offences (§63) However, the Turkish judiciary has consistently applied this article in an overly broad manner, leading to arbitrary prosecutions.

15. Unless the Court addresses the fundamental deficiencies in the wording of Article 7/1 of Law No. 3713 and Article 314 of the Turkish Criminal Code, this issue will persist not only in cases related to individuals accused of links with the Gülen movement but also in all other contexts where the Turkish judiciary continues to enforce this provision in a manner that is neither foreseeable nor in line with the principle of legal certainty. The approach taken in *Yüksel Yalçınkaya*—which held that Article 314 of the Turkish Penal Code, together with the established jurisprudence of the Turkish authorities in conventional terrorism trials, was sufficiently clear and foreseeable in the context of prosecutions related to the Gülen movement—should be reconsidered. The problem is not only limited to misinterpretation by domestic courts; it is also embedded in the legislative framework itself, which fails to provide clear, precise, and predictable criteria for criminal liability.

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[7] Joint letter of the UN Special Procedures, OL TUR 13/2020, 26 August 2020.

[8] CCPR/TUR/CO/2 (CCPR 2024), paras. 17–18.

[9] **In the case of Mukadder Alakuş v. Türkiye, the UN Human Rights Committee ('HRC')** found: "… the principle of legality in the field of criminal law … requires both criminal liability and punishment to be limited to clear and precise provisions in the law at the time the act or omission took place. … The Committee observes that Article 314, paragraph 1 of the Turkish Penal Code, defines the crime of membership of an armed terrorist organisation as "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". In light of this broad definition, and in the absence of information from the State party regarding the existence of domestic legal provisions that clarify the criteria used to establish the acts constitutive of the crime defined under article 314, paragraph 1, of the Penal Code, the Committee cannot conclude that the author's alleged use of the Bylock application and Bank Asya account amounted to sufficiently clear and predictable criminal offences at the time that the acts were put in place. The Committee considers that, as a matter of principle, the mere use or downloading of a means of encrypted communication, or the holding of a bank account, cannot indicate, in itself, evidence of membership of an illegal armed organisation, unless supported by other evidence, such as conversation records. In the absence of documentary evidence provided by the State party, the Committee finds, in these circumstances, that the rights of the author, under Article 15(1) have been violated." (CCPR/C/135/D/3736/2020, 26 July 2022)

[10] G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], 2018, §§ 242; Cantoni v. France, 1996, § 29; Kafkaris v. Cyprus [GC], 2008, § 140; Del Río Prada v. Spain [GC], 2013, § 91; Perinçek v. Switzerland [GC], 2015, § 134.

[11] Jorgic v. Germany, 2007, §§ 103-114.

[12] Kafkaris v. Cyprus [GC], 2008, §§ 150 and 152.

The lack of specificity in these provisions undermines the rule of law and enables their arbitrary use against various groups, thereby violating fundamental rights under the Convention.

## 5. ARBITARY AND SELECTIVE PROSECUTION UNDER TURKEY'S ANTI-TERROR LAWS

16. In trials related to the Gülen movement, Turkish courts primarily focus on determining whether an individual is a member of the movement. This determination is largely based on the person's position within the hierarchical structure (pyramid) outlined in the 2017 Court of Cassation decision. Individuals in lower tiers are not automatically presumed guilty unless it is demonstrated that they were aware of the organization's ultimate objective. However, such awareness is assumed based on non-criminal acts, such as using ByLock, depositing money in Bank Asya after a certain date, or working in institutions linked to the movement. If there is even minimal evidence indicating that an individual maintained ties with the movement after specific events, such as the 17/25 December 2013 corruption investigations or January 2014, the courts dismiss any defense that could exonerate them from criminal liability. In some cases, individuals with similar connections predating these critical dates may benefit from the legal concept of mistake and avoid conviction. However, courts apply this selectively, without clear or objective criteria. Those in higher tiers are classified as terrorist organization members based on any activity they conducted within the movement, regardless of the timeframe and the activities they carried out.[13] Exceptions to criminal liability are rare and generally apply only if the individual can demonstrate that they severed ties with the movement after the critical investigations—for instance, by actively engaging in political activities within the ruling party bloc or maintaining specific relationships that indicate a break from the movement. For instance, while the courts sentenced Şaban Yasak, a university student, for his alleged connections and actions, which were known at the latest by June 2014, they acquitted Mr. Birol Erdem, the former Undersecretary of the Ministry of Justice and Member of the High Council of Judges and Prosecutors (HCJP), despite him being prosecuted for managing the same organization due to his activities within the so-called judicial structure of the Gülen movement. The 9th Chamber of the Court of Cassation[14] acquitted Erdem, not only of the charge of managing a terrorist organization but also of membership, citing his collaboration with the National Intelligence Organization and his support for government-backed candidates in the HCJP elections held in October 2014. The court applied the legal provisions on mistake, considering that he had misunderstood the nature of his involvement. Taking this reasoning further, the Criminal General Assembly[15] overturned the Chamber's decision, ruling that Erdem had not committed the offense at all, as he lacked the requisite mental element *(mens rea)* for the crime.

17. It follows that in principle, there can only be a "penalty" within the meaning of Article 7 if an element of personal liability has been established in respect of the perpetrator of the offence. There is a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. Thus, Article 7 requires a mental link disclosing an element of liability in the conduct of the actual perpetrator of the offence if a penalty is to be imposed.[16] There may, however, be certain forms of objective liability stemming from presumptions of liability, provided they comply with the Convention, particularly Article 6 § 2.[17]

[13] Constitutional Court, Bilal Celalettin Sasmaz, dated 18 October 2022.
[14] 9th Chamber of the Court of Cassation, 01/02/2021. 2019/11 E., 2021/5K.
[15] General Assembly of the Criminal Chambers of the Court of Cassation, 01/12/2022, 2021/332 E., 2022/750.
[16] G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], 2018, §§ 242 and 246; Yüksel Yalçınkaya v. Türkiye [GC], 2023, § 242.
[17] G.I.E.M. S.R.L. and Others v. Italy (merits) [GC], 2018, § 243.

18. The Yüksel Yalçınkaya judgment emphasized that mere connection with the Gülen movement does not constitute an automatic membership in an armed terrorist organization under Article 314/2 of the TCC, which requires both objective and subjective elements of intent. Referring to domestic jurisprudence, the Court stated that the requisite mental element involves "direct intent and the aim or objective of committing a crime." (§ 248) This means that a person participating in an organization must know that it (the organization) commits or aims to commit crimes and must possess a specific intent to realize that purpose. Turkish case law traditionally required direct intent and active participation in a terrorist group's criminal activities.[18] The *Yasak* case mirrors *Yalçınkaya case*, where conviction for terrorist organization membership was based solely on ByLock use, without proving the offense's constituent elements. Likewise, in Saban *Yasak's case*, courts relied on the defendant's role as a regional student coordinator to convict him, failing to establish the requisite legal criteria. In the Gülen movement cases, as in the applicant's case, the Court of Cassation expanded intent criteria to include indirect elements and retrospective inferences such as being in contact with individuals linked to the organization, being in a certain layer[19] of the pyramid or carrying out activities within the organization before or after certain periods (namely 17/25 December 2013 corruption operations), without proving that the accused was aware of or supported any unlawful purpose. Courts prioritize establishing individuals' ties to the movement. Once a connection is identified or inferred, they overlook the material and moral elements of the offense, leading to automatic convictions for terrorist organization membership. This shift lacks clear legal grounding, making it difficult for individuals to foresee whether their past conduct (e.g., participating in legal activities of an organization later designated as a terrorist group) could be criminalized retroactively —a retroactive and ambiguous approach that violates Article 7 of the ECHR on legal foreseeability and non-retroactivity of criminal law. The approach of the Turkish judiciary made it impossible for the applicant to exonerate himself from the accusations against him. The Court must assess whether such a presumption-based approach that exceeds the presumption of innocence of the applicant and results in automatic conviction aligns with its established case law, which holds that criminal liability cannot be imposed without proving the subjective elements of an offense.[20]

19. The lack of individual assessment in Yasak's case is a reflection of this broader judicial practice. The Turkish courts have frequently relied on speculative and indirect evidence, often shifting the burden of proof onto the accused. In these cases, the courts presumed guilt based on broad associations rather than specific criminal acts, denying persons a fair trial and violating their right to the presumption of innocence.

20. The retrial of Yüksel Yalçınkaya serves as further evidence of the deeply problematic nature of the Gülen movement trials. Despite the ECtHR's violation ruling, the Kayseri Assize Court upheld its 2017 conviction, imposed a travel ban, and relied on disputed messages to assert ByLock use—contradicting the fact that these messages lacked criminal elements as noted by the Grand Chamber (Yalçınkaya v. Turkey, § 107). While courts ignore the Yalçınkaya judgment, the Chamber's non-final Yasak ruling is already being misused to justify convictions based on lawful activities. Yasak ruling would further entrench arbitrary prosecutions if finalized similarly, defying universal legal principles.

## 6. RETROSPECTIVE CRIMINALIZATION: A BREACH OF ARTICLE 7 OF THE CONVENTION

21. The deficiencies in Turkey's judicial approach are further highlighted by the findings of international human rights bodies. The United Nations Special Rapporteurs, in their recent

[18] Constitutional Court, Metin Birdal, §§ 62, 67; İlhami Aksu, App. No: 2018/36918, 15/6/2022, § 32.
[19] Court of Cassation, General Assembly of the Criminal Chambers, 26/9/2017, E.2017/16.MD-956, K.2017/370.
[20] *G.I.E.M. S.R.L. and Others v. Italy [GC], nos. 1828/06 and others, §§ 242 and 246, 28 June 2018*.

communication (ALTUR 5/2024[21]), criticized Turkey's classification of the Gülen movement as a terrorist organization, noting that it fails "**to meet the requirements of due process or satisfy the criteria outlined in the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/51, para. 28).**"

22. The applicant was convicted for activities undertaken during his university years while staying in residences linked to the Gülen movement—activities that were then openly recognized and supported by the state. The applicant was not accused of any illegal act but solely of membership in a terrorist organization—an organization that was only retrospectively designated as such by Turkish authorities. Notably, the movement's leader had been tried on and acquitted of similar charges, including infiltration in state institutions, in 2008. The allegations at that trial had been based on his certain public statements that were misinterpreted and also misused by the courts in the post-coup attempt trials. The applicant's conviction is thus based on activities that were neither criminal nor clandestine at the time, but were later reinterpreted under a legal framework developed after the fact. The concept of a *sui generis* terrorist organization—introduced by Turkish authorities—was neither known in Turkish law at the time nor recognized anywhere in the world today. There is not yet a universally accepted definition of terrorism. However, Turkish authorities have arbitrarily rebranded the Gülen movement as a *sui generis* terrorist group, citing corruption investigations conducted by law enforcement and judicial officials allegedly linked to the movement as an attempt to overthrow the government—an approach that lacks any credible basis in established counterterrorism principles.

23. In *Parmak and Bakır v. Turkey*, the Court recognized the lack of clear rules or administrative procedures for designating an organization as a terrorist entity. It emphasized that, according to the case-law of the Court of Cassation, when domestic courts assess for the first time whether an organization qualifies as terrorist, they must conduct a thorough investigation, examining the organization's objectives and purpose, whether it has adopted an action plan or operational measures, and whether it has resorted to violence or posed a credible threat of violence in pursuit of its objectives.[22]

24. At the time of the applicant's activities—and even afterward—the Gülen Movement had never engaged in armed attacks or violent actions, nor had any operational measures for such acts been known to the public. Setting aside the July 2016 coup attempt—whose planning and execution remain unresolved independently and impartially to this day, and for which the late leader of the Gulen movement consistently denied any involvement—there has never been any evidence indicating that the movement sought to employ violence or seize power through force. The writings and statements of its late leader, Fethullah Gülen, not only reveal no indication of any such intent whatsoever but also demonstrate an unequivocal and consistent stance against terrorism and violence.

25. In the absence of any evidence of violence or coercion, it is unreasonable to expect persons affiliated with the Gulen Movement to have foreseen that their lawful activities, such as

[21] "We reiterate the general concerns raised in communication OL TUR 13/2020 that the Anti-Terror Law No. 3713 and the Turkish Penal Code are drafted with overly broad language that permits their systematic misapplication towards political dissidents, journalists, and people who are affiliated, or suspected to be affiliated, with the Gülen Movement. Moreover, we maintain our concern that the designation of the Gülen Movement as a terrorist organization does not appear to meet the requirements of due process or satisfy the criteria outlined in the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/16/51, para. 28). We further note that there appears to be an observable trend in Türkiye where individuals and groups who have been linked to the Gülen Movement experience significant risks to their safety, arbitrary detention, and invasions of their privacy."

[22] Parmak and Bakir v. Turkey, 2019, § 71.

supervising students could later be reinterpreted as a terrorist offense solely because the Executive subsequently declared the Gülen Movement a terrorist organization. It is also critical to note that the applicant in the instant case was not prosecuted for any specific criminal act but rather for membership in a terrorist organization, despite the lack of a clear legal basis at the time of his alleged involvement.

26. Under these circumstances, it is unreasonable to suggest that any person could have foreseen that his/her voluntary participation in a peaceful, charitable religious community—fully legitimate at the time—would later be retroactively criminalized through judicial reinterpretations aligned with the ruling political party's interests, following corruption investigations targeting its circles.

27. Article 7 of the Convention requires the existence of a legal basis to impose a sentence or a penalty. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted, there was in force a legal provision which made that act punishable.[23] An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission.[24] The concept of "law" as used in Article 7 covers both domestic legislation and case law[25]. Foreseeability must be appraised from the angle of the convicted person (possibly after the latter has taken appropriate legal advice) at the time of the commission of the offence charged. At the time the applicant engaged in these activities, no case law existed on the concept of a *sui generis* terrorist organization. How could a university student possibly anticipate that such a concept would later emerge, rooted in corruption investigations targeting the ruling party's circles? Likewise, how could he be expected to immediately sever ties with his social environment when the government first began politically targeting the Gülen movement, foreseeing that it would one day be outlawed and its members or supporters prosecuted as terrorists? Such an expectation defies reason and legal foreseeability. The Court must assess in this case whether the trial courts' expansive and unforeseeable interpretation and application of the offense, to the applicant's detriment, is compatible with the fundamental principle that an offense must retain its essential elements.[26]

28. The Court must assess whether the vague concepts and criteria used to define the layered structure of the Gülen movement have led to an arbitrary and unforeseeable application of the law in the applicant's case. The *Yüksel Yalçınkaya* (para. 162) judgment reproduced this hierarchical classification, and it appears that the applicant was convicted as he was regarded as being in one of the upper levels of this structure. However, overly vague legal provisions and interpretative criteria can undermine the clarity and foreseeability required by law, rendering their application incompatible with fundamental legal principles.[27]

## 7. MISINTERPRETATION OF INTENT REQUIREMENT UNDER ARTICLE 314/2

29. Under Article 314(2) of the Turkish Criminal Code, direct intent (mens rea) is a fundamental requirement for establishing membership in an armed terrorist organization. This means the accused must knowingly and willingly join an organization with a criminal purpose, understanding its ultimate goals, armed struggle, hierarchical structure, and intent to use violence. Courts must

[23] Coëme and Others v. Belgium, 2000, § 145; Del Río Prada v. Spain [GC], 2013, § 80.
[24] Cantoni v. France, 1996, § 29; Kafkaris v. Cyprus [GC], 2008, § 140; Del Río Prada v. Spain [GC], 2013, § 79; Jorgic v. Germany, 2007, § 113.
[25] Del Río Prada v. Spain [GC], 2013, § 91; S.W. v. the United Kingdom, 1995, § 35.
[26] Yüksel Yalçınkaya v. Türkiye [GC], 2023, § 271; Navalnyye v. Russia, 2017, § 68; Parmak and Bakır v. Turkey, 2019, § 76.
[27] *Liivik v. Estonia*, 2009, §§ 96-104.

prove both the knowledge (awareness of the organization's criminal nature) and will (intentional participation in its activities).

30. However, in cases related to the Gülen movement the Turkish judiciary has significantly broadened the application of Article 314(2) since the 2016 coup attempt, eliminating the need to prove intent. Instead, courts have presumed intent based on indirect factors such as employment at Gülen-affiliated institutions, the use of a nickname, or financial transactions through a legally operating bank—none of which demonstrate an intent to engage in violence or terrorism. The 16th Criminal Chamber of the Court of Cassation has ruled that defendants "should have known" the movement was a terrorist organization, relying on hypothetical reasoning rather than factual proof of intent. This approach has effectively turned a specific-intent crime into a strict liability offense, contradicting the presumption of innocence and established criminal law principles.

31. In the Yalçınkaya judgment, the Grand Chamber of the ECtHR criticized Turkish courts for their broad and unpredictable interpretation of anti-terror laws, highlighting that they imposed objective liability without proving intent. The same flawed reasoning seems to have been applied in the present case, where the applicant's non-violent or non-coercive activities were reinterpreted as evidence of criminal intent without any inquiry into his actual state of mind.

## 8. CONCLUDING REMARKS

32. This case presents broader concerns regarding the application of counterterrorism laws and their compatibility with the principle of legality under international human rights standards. The applicant's conviction exemplifies a pattern of prosecutions based on retroactive and expansive interpretations of terrorist organization membership, raising serious issues related to legal foreseeability, certainty, and proportionality.

33. The principle of legality under Article 7 of the Convention requires that criminal offenses be clearly defined by law in a manner that allows individuals to regulate their conduct accordingly. The case at hand illustrates how the broad and ambiguous application of counterterrorism laws may have resulted in individuals being convicted for actions that were lawful and widely accepted at the time they were undertaken. The absence of clear, predictable criteria in Turkey's anti-terror legislation has led to arbitrary prosecutions and convictions, reinforcing concerns over selective enforcement and the use of criminal law as a tool for repression.

34. The foreseeability requirement demands that individuals be able to reasonably anticipate, based on the applicable law and judicial interpretation at the time, whether their actions may lead to criminal liability. The reclassification of a previously lawful movement as a terrorist organization—without prior warning, substantive changes in conduct, or involvement in violent activities—raises serious questions regarding whether persons could have foreseen the legal consequences of their actions**.**

35. Moreover, the concept of "membership in a terrorist organization" must be applied in a manner consistent with international legal standards**,** ensuring that mere association or indirect ties do not automatically result in criminal liability without proof of intent, participation in criminal acts, or a clear link to violent or coercive activities. The Court should consider whether the domestic courts in this case adhered to these essential principles in their assessment of criminal liability.

36. The absence of individualized assessment and the reliance on indirect or speculative evidence, without establishing defendants' intent or direct involvement in criminal acts, further highlight the risk of arbitrary prosecutions and violations of due process rights. The Court may need to provide further guidance on the necessity of establishing both objective and subjective elements of intent when assessing membership in a terrorist organization, particularly in cases involving retrospective classifications.

37. In adjudicating cases under Article 314(2) of the Turkish Criminal Code, it is imperative that domestic courts apply clear and objective legal standards to establish the direct intent required for a conviction of membership in an armed terrorist organization. To ensure compliance with the principles of legality, foreseeability, and individual criminal responsibility under Article 7 of the Convention, the following elements must be strictly observed: The prosecution must demonstrate that the accused knowingly and willingly supported the organization's criminal aims. Courts must not infer intent solely from lawful association or engagement in activities that were legally permissible at the time. It must be proven that the accused was aware of the organization's objectives, its intent to commit crimes, and its use of force or coercion. The burden of proof rests entirely on the prosecution to provide concrete and verifiable evidence of such awareness. Courts must differentiate between legal activities and actual membership in a terrorist organization. Mere affiliation or participation in non-criminal activities cannot be equated with terrorist intent. The prosecution must not rely on indirect or circumstantial factors to establish intent. Instead, there must be tangible, individualized evidence linking the accused to acts of violence, coercion, or organizational crimes. In light of these concerns, we respectfully urge the Court to reaffirm that criminal liability under Article 314(2) TCC must be based on verifiable intent, rather than political classifications, broad assumptions, or retroactive legal interpretations.

38. Approving the approach taken by the Turkish judiciary as applied in the cases of the persons allegedly affiliated with Gulen movement would establish a dangerous precedent, effectively allowing any political designation of a group as a "terrorist organization" to serve as the sole basis for criminal liability. This would eliminate the crucial distinction between lawful association and actual criminal conduct, resulting in arbitrary prosecutions driven by state narratives rather than objective legal standards. If such reasoning were upheld, any individual with past or present ties to an organization later classified as "terrorist" could be convicted of membership, irrespective of intent or involvement in criminal acts. This would violate the principle of individual criminal responsibility, erode legal foreseeability, and turn counterterrorism laws into tools of political persecution rather than legitimate legal enforcement. The broader implications of the Court's ruling in this case therefore extend beyond the applicant's individual circumstances. The continued prosecution of individuals under similarly vague and unpredictable legal standards in Türkiye underscores the need for the Court to refine and reinforce its principles on the legality and foreseeability of criminal law under Article 7. Clarity in defining membership in a terrorist organization and ensuring that legal provisions are not applied retroactively or arbitrarily is crucial to upholding the rule of law and preventing further miscarriages of justice.

39. In adjudicating this case, the Court has the opportunity to reaffirm that counterterrorism measures must comply with the fundamental principles of legality, foreseeability, and legal certainty under the Convention. Any further clarification of the principles established in *Yüksel Yalçınkaya v. Turkey* could provide essential guidance to ensure that anti-terror laws are applied in a manner consistent with international human rights norms, preventing their misuse in future cases.

On behalf of the Italian Federation for Human Rights

President

Antonio Stango