



RULE OF LAW(LESSNESS) IN ERDOĞAN'S TURKEY:

**Violation of the principle of legality
and no punishment without law in
post-coup trials**



About the Stockholm Center for Freedom

The Stockholm Center for Freedom (SCF) is a non-profit advocacy organization that promotes the rule of law, democracy and human rights with a special focus on Turkey.

SCF was set up by a group of journalists who were forced to live in self-exile in Sweden against the backdrop of a massive crackdown on press freedom in Turkey.

SCF is committed to serving as a reference source by providing a broader picture of rights violations in Turkey, monitoring daily developments, documenting individual cases of the infringement of fundamental rights and publishing comprehensive reports on human rights issues.

SCF is a member of the Alliance Against Genocide, an international coalition dedicated to creating the international institutions and the political will to prevent genocide.

Table of Contents

| | |
|---|-----------|
| 1. INTRODUCTION | 3 |
| 2. EXISTENCE OF A 'TERRORIST ORGANIZATION' UNDER TURKISH LAW | 6 |
| 2.1. Different Types of Criminal Organization | 6 |
| 2.2. Legal Characterization of a Structure as a 'Terrorist Organization' | 8 |
| 2.3. Existence of a Crime Involving Force and Violence Committed by the Organization | 10 |
| 2.4. Violation of Non Bis in Idem in the Post-2016 Coup Attempt Trials | 16 |
| 3. ELEMENTS OF THE CRIME OF MEMBERSHIP IN A TERRORIST ORGANIZATION | 20 |
| 3.1. Material element | 20 |
| 3.2. Mental Element | 22 |
| 4. VIOLATION OF THE PRINCIPLE OF LEGALITY AND NO PUNISHMENT WITHOUT LAW | 23 |
| 4.1. Material Element of the Crime of Membership in a Terrorist Organization | 23 |
| 4.2. Mental Element of the Crime of Membership in a Terrorist Organization | 28 |
| 5. INTERNATIONAL RESPONSE ON THE VIOLATION OF THE PRINCIPLE OF LEGALITY AND FORESEEABILITY | 33 |
| 5.1. United Nations Human Rights Committee, Working Group on Arbitrary Detention and Special Procedures | 33 |
| 5.2. Post-2016 Coup Attempt Cases before the European Court of Human Rights | 38 |
| 5.2.1. Tekin Akgün v Turkey | 39 |
| 5.2.2. Alparslan Altan v Turkey, Hakan Baş v Turkey and Turan and Others v Turkey | 40 |
| 5.2.3. Selahattin Demirtaş v Turkey (2) | 43 |
| 5.2.4. Osman Kavala v Turkey | 44 |
| 5.2.5. Yasin Özdemir v Turkey | 45 |
| 5.2.6. Ilıcak v Turkey (2) | 46 |
| 5.2.7. Gültekin Sağlam v Turkey (Pending Application) | 48 |
| 5.2.8. Yüksel Yalçınkaya v Turkey (Pending Application) | 49 |
| 6. CONCLUSION | 53 |

1. INTRODUCTION

The principle of 'legality' and 'no punishment without law' (*nulla poena sine lege*) is a peremptory norm and a universal principle of criminal justice systems. The principle aims at clearly ascertaining the conduct that constitutes a crime prior to its commission so that an individual knows which acts and omissions will make him criminally liable. It cannot be expected for an individual to foresee that an activity which was perfectly legal at the time of its commission will later become an illegal activity that can give rise to a criminal conviction. Thus, it is a violation of this principle to accept that an activity which was legal at the time of its commission later becomes a crime or evidence of a crime.

In addition to other international legal instruments, Article 7 of the European Convention on Human Rights (ECHR) provides that '*No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed*'. The principle is an essential component of the rule of law that may not be derogated from even in times of emergency under Article 15 of the ECHR as confirmed by the European Court of Human Rights (ECtHR) in S.W. v. the United Kingdom.¹ Any criminal offense and the associated sanctions must be clearly defined by law, and an individual must understand from the wording of the law, and with assistance from the courts, if necessary, the consequences of his actions and know which acts and omissions will make him criminally liable.

Further, under the case law of the ECtHR, any interference with the exercise and enjoyment of rights and freedoms must be 'prescribed by law'. For instance, in the case of Güler and Uğur v. Turkey, the ECtHR held in the context of freedom of religion (Article 9) that it was not possible to foresee that merely taking part in a religious service would be considered dissemination of terrorist propaganda under Article 7(2) of the Anti-Terrorism Law (Law No. 3713).² With regard to the wording of that section and its interpretation by the Turkish courts when

¹ The ECtHR underlined that '*The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.*': see S.W. v the United Kingdom, Application No. 20166/92, November 22, 1995, para 34, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-57965%22%7D>

² Güler and Uğur v. Turkey, Applications No. 31706/10 and 33088/10, December 2, 2014, para 55, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-148274%22%7D>

convicting the applicants of the dissemination of terrorist propaganda, the court considered that the interference in the applicants' freedom of religion had not been 'prescribed by law' because it had not met the requirements of 'clarity' and 'foreseeability' laid down by the ECHR.

The ECtHR also considers that one of the requirements flowing from the expression 'prescribed by law' is foreseeability. The court held in the context of Article 10 of the ECHR that a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable individuals to regulate their conduct; they must be able to foresee to a degree that is reasonable under the circumstances the consequences that an action may entail.³

Turkey experienced a controversial military coup attempt⁴ on the night of July 15, 2016 which, according to many, was a false flag aimed at entrenching the authoritarian rule of President Recep Tayyip Erdoğan by rooting out dissidents and eliminating powerful actors such as the military in his desire for absolute power. The abortive putsch killed 251 people and wounded more than a thousand others. The next morning, after announcing the coup had been suppressed, the Turkish government immediately started a wide-ranging purge of military officers, judges, police officers, teachers and other government officials that ultimately led to the dismissal of more than 130,000 civil servants from their jobs.

As part of the massive crackdown, 150 of the Turkish Armed Forces' (TSK) 326 generals and admirals, 4,156 judges and prosecutors and 29,444 members of the armed forces as well as more than 33,000 police officers and in excess of 5,000 academics were fired from their jobs for alleged membership in or relationships with 'terrorist organizations' by emergency decree-laws subject to neither judicial nor parliamentary scrutiny. One hundred sixty-four media outlets, 1,058 educational institutions and close to 2,000 NGOs were shut down without due process.

Erdoğan's campaign has primarily targeted people affiliated with the Gülen movement, a worldwide civic initiative inspired by the ideas of Muslim cleric Fethullah Gülen, which the government blames for the coup attempt. Turkey's Justice and Development Party (AKP) government has been waging a war

³ Selahattin Demirtaş v. Turkey (No. 2), Application No. 14305/17, December 22, 2020, para 250 at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-207173%22%7D>

⁴ For more information about the abortive putsch see: 'July 15: Erdoğan's Coup,' Stockholm Center for Freedom, https://stockholmcf.org/wp-content/uploads/2017/07/15_July_Erdogans_Coup_13.07.2017.pdf

against the Gülen movement since the corruption investigations of December 17-25, 2013 that implicated then-prime minister and current President Erdoğan's family members and inner circle. Dismissing the investigations as a Gülenist coup and conspiracy against his government, Erdoğan designated the movement as a terrorist organization and began to target its members. He locked up thousands including many prosecutors, judges and police officers involved in the investigations as well as journalists who reported on them. The government uses the derogatory acronym 'FETÖ' to refer to the Gülen movement as a terrorist organization.

The pretext of 'terrorism' has also been deployed by the judiciary under the dominant political mindset overwhelmingly influenced by the government's discourse. According to Ministry of Justice statistics, since the abortive putsch there has been a sharp increase in the use of so-called 'terrorism' charges under Article 314 of the Turkish Criminal Code (TCK).⁵ While 8,416 charges were filed under Article 314 in 2013, the number soared to 146,731 in 2017, 115,753 in 2018, 54,464 in 2019 and 33,885 in 2020.⁶ These statistics highlight that in total, Turkish prosecutors filed more than 420,000 charges under Article 314 between 2013 and 2020 and that more than 265,000 individuals were sentenced under the same article between 2016 and 2020. As a result, Turkey has the largest population of inmates convicted of terrorism-related offenses, 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 them are in Turkish prisons.⁷

This report argues that most, if not all, of the criminal prosecutions and trials conducted on alleged 'terrorism' charges since the abortive putsch in Turkey are devoid of any legal grounds because *inter alia* they are carried out in violation of the principle of legality and no punishment without law. To this end, this report first of all discusses the legal elements required for the existence of an 'armed

**⁵Armed Organization
Article 314**

(1) Any person who establishes or commands an armed organization with the purpose of committing the offenses 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 organization defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years.

(3) Other provisions relating to the forming of an organization in order to commit offenses shall also be applicable to this offense.

⁶ The Arrested Lawyers Initiative, Abuse of the Anti-Terrorism Provision by Turkey is steadily increasing (2013-2020), updated on July 6, 2021,

<https://arrestedlawyers.org/2021/06/10/abuse-of-the-anti-terrorism-laws-by-turkey-is-steadily-increasing/>

⁷ COE Annual Penal Statistics – Space I 2020, at

https://wp.unil.ch/space/files/2021/04/210330_FinalReport_SPACE_I_2020.pdf

terrorist organization' under Turkish law. It then considers the legal components for the existence of a membership relation between an individual and an armed terrorist organization. The report further elaborates how the principle of legality and no punishment without law is violated in the post-2016 coup attempt trials. The report then considers how United Nations human rights bodies and the ECtHR have responded to the post-2016 coup attempt trials in this context. The report concludes with a brief discussion of its main findings and the implications of this principle on the ongoing applications before the ECtHR.

2. EXISTENCE OF A 'TERRORIST ORGANIZATION' UNDER TURKISH LAW

2.1. Different Types of Criminal Organization

'Organization' as a criminal concept is regulated under three separate categories in Turkish criminal law:⁸ 'criminal organization' (Article 220 of the Turkish Criminal Code [TCK]);⁹ 'terrorist organization' (Article 7 of the Anti-Terrorism Law [TMK] No.

⁸ Gökhan Güneş, 'AİHM'in Terör ve Terör Örgütü Üyeliğiyle İlgili Suç ve Cezaların Yasallığı (AİHS m 7) Kapsamında Sorduğu Sorulara Cevaplar [Responses to the Questions Posed by the ECtHR within the Context of the Legality of the Crimes and Punishments in relation to the Terrorism and Membership of a Terrorist Organization (Article 7 of the ECHR)] [Legality of Crimes and Punishments], October 13, 2021, p. 2, see at

<https://www.drqokhangunes.com/makale/aihmin-teror-ve-teror-orgutu-uyeliqiyle-ilgili-suc-ve-cezalarin-yasalligi-aihs-m-7-kapsaminda-sorudugu-sorulara-cevap/>

⁹**Establishing Organizations for the Purpose of Committing Crimes**

Article 220

(1) Any person who establishes or manages an organization for the purposes of committing offenses proscribed by law shall be sentenced to imprisonment for a term of two to six years provided the structure of the organization, number of members and equipment and supplies are sufficient to commit the offenses intended. However, a minimum number of three persons is required for the existence of an organization.

(2) Any person who becomes a member of an organization established to commit offenses shall be sentenced to a penalty of imprisonment for a term of one to three years.

(3) If the organization is armed, the penalty stated in aforementioned paragraphs will be increased by between one fourth and one half.

(4) If an offense is committed in the course of the organization's activities, then an additional penalty shall be imposed for such offenses.

(5) Any leaders of such organizations shall also be sentenced as if they were the offenders in respect of any offense committed in the course of the organization's activities.

(6) (Amended on 2/7/2012 - By Article 85 of Law no. 6352) Any person who commits an offense on behalf of an organization, although he is not a member of that organization, shall also be sentenced for the offense of being a member of that organization. The sentence to be imposed for being a member of that organization may be decreased by half. (Additional Sentence: 11/4/2013 - By Article 11 of Law no. 6459) This provision shall only be applied in respect of armed organizations.

(7) (Amended on 2/7/2012 - By Article 85 of Law no. 6352) Any person who aids and abets an organization knowingly and willingly, although he does not belong to the structure of that organization, shall also be sentenced for the offense of being a member of that organization. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.

(8) A person who disseminates propaganda for an organization in a manner that would legitimize or praise the terrorist organization's methods including force, violence or threats or in a manner that would incite use of these methods shall be sentenced to a penalty of imprisonment for a term of one to

3713)¹⁰ and 'armed organization' (Article 314 of the TCK). 'Terrorist organization' (Article 7 of the TMK) and 'armed organization' (Article 314 of the TCK) as a matter of fact comprise different legal elements despite their often-common use which give rise to the same punishments. General acceptance under Turkish law supported by the case law of the Supreme Court of Appeals is that an 'organization' under Article 7 of the TMK is an 'unarmed terrorist organization' whereas an 'organization' under Article 314 of the TCK is an 'armed terrorist organization'.¹¹

The existence of a terrorist organization is a 'prerequisite' for the existence of terrorism offenses and the liability of offenders under Article 1 of the TMK.¹² A terrorism offender is an individual who is either a member of a terrorist

three years. If the said crime is committed through the press or broadcasting the penalty to be given shall be increased by half.

For the English text of the Turkish Criminal Code (TCC) see Council of Europe, Venice Commission, February 1, 2016, Opinion No. 831/2015, Penal Code of Turkey at https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf

¹⁰ **Terrorist Organizations**

Article 7 – Those who establish, lead, or are a member of a terrorist organization in order to commit crimes in furtherance of aims specified under article 1 through use of force and violence, by means of coercion, intimidation, suppression or threat, shall be punished according to the provisions of article 314 of the Turkish Penal Code. Persons who organise the activities of the organization shall be punished as leaders of the organization.

Any person making propaganda for a terrorist organization shall be punished with imprisonment from one to five years. If this crime is committed through means of mass media, the penalty shall be aggravated by one half. In addition, editors-in-chief (...) who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to fifteen thousand days' rates. However, the upper limit of this sentence for editors-in-chief is five thousand days' rates. The following actions and behaviours shall also be punished according to the provisions of this paragraph:

- a) Covering the face in part or in whole, with the intention of concealing identities, during public meetings and demonstrations that have been turned into a propaganda for a terrorist organization
- b) As to imply being a member or follower of a terrorist organization, carrying insignia and signs belonging to the organization, shouting slogans or making announcements using audio equipment or wearing a uniform of the terrorist organization imprinted with its insignia.

If the crimes indicated under paragraph 2 were committed within the buildings, locales, offices or their annexes belonging to associations, foundations, political parties, trade unions or professional organizations or their subsidiaries, within educational institutions, students' dormitories or their annexes, the penalty under this paragraph shall be doubled.

For the English text of Anti-Terrorism Law No. 3713 see

https://www.legislationline.org/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf

¹¹ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 10/4/2014, Case No. 2013/13273, Decision No. 2014/4290; 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/4/2017, Case No. 2015/3, Decision No. 2017/3.

¹² Article 1 – (Amended first paragraph: Article 20 of Law No 4928 dated 15/07/2003) Any criminal action conducted; by means of force and violence; through one of the methods of oppression, startling, intimidation, suppression or threat; by one or more persons belonging to an organization with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.

For a summary discussion of the terrorism criteria under the TMK see Committee of Experts on Terrorism (Codexter), Profiles on Counter-Terrorist Capacity, Turkey, May 2013, at

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064102d>, p. 2-3.

See Güneş, *Legality of Crimes and Punishments*, 2021, p. 1.

organization or someone committing offenses for and on behalf of a terrorist organization under Article 2 of the TMK.¹³ The TMK does not recognize the concept of ‘individual terrorism’ as its Article 1 expressly refers to the ‘person or persons belonging to an organization’ in its definition of terrorism. Therefore, there must be an organized structure in the form of a terrorist organization in order to convict an individual of membership in that terrorist organization.¹⁴

In every criminal prosecution, there are two main issues that need to be examined and resolved: ‘factual’ matter and ‘legal’ matter. Factual matter refers to ascertaining the facts of the perpetrator’s alleged conduct. Legal matter pertains to the legal characterization of the perpetrator’s alleged conduct. In organized crime, the legal nature of an illegal organization an individual has joined determines the criminal characterization of his alleged conduct. Depending on this characterization, an individual may be prosecuted on the grounds of joining a ‘criminal organization’ (Article 220 of the TCK); a ‘terrorist organization’ (Article 7 of the TMK); or an ‘armed organization’ (Article 314 of the TCK) as the case may be.

After ascertaining the nature of the organization, the criminal nature of the perpetrator’s conduct will be determined on the basis of his involvement with that illegal organization (as founder, leader, member or for aiding or committing a crime for the organization, etc.).¹⁵

2.2. Legal Characterization of a Structure as a ‘Terrorist Organization’

The power of ‘legal characterization’ or ‘ascertaining the criminal nature’ of conduct is a judicial function granted solely to ‘independent and impartial courts’ under Article 9 of the Turkish Constitution.¹⁶ Neither the executive nor the legislature may entertain the power of legal characterization in the specific

¹³ **Terrorist Offender**

Article 2 – Any person, who, being a member of organizations formed to achieve the aims specified under Article 1, in concert with others or individually, commits a crime in furtherance of these aims, or who, even though does not commit the targeted crime, is a member of the organizations, is defined as a terrorist offender. Persons who, not being a member of a terrorist organization, commit a crime in the name of the organization, are also considered as terrorist offenders and shall be punished as members of such organizations.

¹⁴ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 07/6/2013, Case No. 2012/7394, Decision No. 2013/8714; General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 01/02/1988, Case No. 1988/9, Decision No. 1988/422-1.

¹⁵ General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 19/10/1992, Case No. 1992/9-258, Decision No. 1992/281.

¹⁶ Gökhan Güneş, 2020, *Güncel Yargılamalar Işığında Silahlı Örgüt (Türk Ceza Kanununun 314. Maddesi) [Armed Terrorist Organization in the Light of Recent Prosecutions (Article 314 of the Turkish Criminal Code)]* [Armed Terrorist Organization], p. 93-97, at <https://play.google.com/books/reader?id=6r7yDwAAQBAJ&pg=GBS.PA92>

application of criminal law under Turkish law. Article 9 (as amended on April 16, 2017, Act No. 6771) provides that *‘Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation.’*¹⁷ That the legal characterization is a power vested in the judiciary is a well-established principle of Turkish criminal law as implemented by many judgments of the Turkish Supreme Court of Appeals.

For instance, in what is known as the *Ergenekon* case,¹⁸ a series of trials that exposed a clandestine criminal organization that sought to overthrow the Turkish government, the 16th Criminal Chamber of the Supreme Court of Appeals held that: *“In the course of the trial, where, when, by whom and for which purpose the organization that is the subject matter of the investigation or the prosecution is established will be determined by the judicial authorities on the basis of existing events and evidence after gathering in the case file all the information from state institutions regarding the conduct and activities of the organization that make it suitable to commit crimes for the realization of its aims across the country. Upon finalization of the judicial decision, it will be conclusively determined whether or not the organization is a criminal, terrorist or armed terrorist organization.”*¹⁹

In the Islamic State of Iraq and Syria (ISIS) case,²⁰ the 16th Criminal Chamber held that *“... the verdict is reversed ... as the verdict being delivered in its current format with insufficient examination violates ... the law, because the legal position of the suspect must have been considered and determined after inquiries were made by the Ministry of Interior and the relevant institutions about the organization’s establishment, founders, leader, aim, strategy, actions and whether or not the organization has carried out actions and activities inside and outside Turkey against Turkish nationals and the agencies and institutions of the Republic of Turkey and, if any, what these actions and activities consist of which demonstrate that the structure named the Islamic State of Iraq and al-Sham (ISIS) of which the suspect is a member is a terrorist organization or an armed terrorist organization as defined under Article 1, 7(1) of Law No. 3713 and Article*

¹⁷ For the English text of the Constitution of the Republic of Turkey, see https://global.tbmm.gov.tr/docs/constitution_en.pdf

¹⁸ Wikipedia, Ergenekon trials, https://en.wikipedia.org/wiki/Ergenekon_trials

¹⁹ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 21/4/2016, Case No. 2015/4672, Decision No. 2016/2330.

²⁰ Wikipedia, Islamic State, https://en.wikipedia.org/wiki/Islamic_State

314 of the TCK and after the nature of the organization has been ascertained beyond any doubt.”²¹

In another case concerning the outlawed Kurdistan Workers’ Party (PKK), the General Assembly of the Criminal Chambers of the Supreme Court of Appeals held that “... *The concept of terrorism is defined in detail in Article 1 of Anti-Terrorism Law No. 3713. As adopted in the judicial decisions as well, it is established that the PKK, whose connection is proven beyond any doubt in terms of its aims and methods with the terrorist actions as set out in the said article, is an armed terrorist organization and that many lives were lost in the terrorist actions it carried out and that it caused both the State and persons to sustain a large amount of material losses.*”²²

In a decision on *Hizb ut-Tahrir*,²³ the relevant part of the verdict rendered by the 9th Criminal Chamber reads that “... *the suspect being a member of an organization named Hizb ut-Tahrir, which is accepted as a terrorist organization under finalized judicial decisions ...*”²⁴

Thus, the legal characterization of a group as a terrorist organization and deciding on the nature of an individual’s relationship with that organization is a judicial function exercised by independent courts. There must first be a final and conclusive judicial decision (*res judicata*) that declares the structure, formation or group as an ‘armed terrorist organization’ before convicting a person of membership in that armed terrorist organization.

2.3. Existence of a Crime Involving Force and Violence Committed by the Organization

The material element of the crime of membership in a terrorist organization is to ‘become a member of the organization’. The examination of the existence of the material element of the crime is carried out in two stages.²⁵ The first stage consists of ascertaining whether or not a structure (formation or group) of which an individual has become a member is a terrorist organization. If the structure is

²¹ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 22/6/2015, Case No. 2015/4588, Decision No. 2015/2133.

²² General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 17/4/2007, Case No. 2007/9-69, Decision No. 2007/99.

²³ Wikipedia, Hizb ut-Tahrir, https://en.wikipedia.org/wiki/Hizb_ut-Tahrir

²⁴ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 16/02/2010, Case No. 2008/19839, Decision No. 2010/2059.

²⁵ Güneş, 2021, *Legality of Crimes and Punishments*, p. 3.

not characterized as a terrorist organization, that individual will not *ipso facto* be liable for membership in a terrorist organization. Only after conclusively determining the structure to be a terrorist organization with a final judicial decision, the second stage examination may be carried out as to whether or not an individual has become a member of that terrorist organization.

In armed terrorist organization trials, in principle, each court ought to carry out the first stage examination by itself and decide on the legal nature of the organization in which the suspect is accused of membership.²⁶ However, in practice, not every court carries out this legal examination of the organization by itself. For this reason, an initial legal characterization is required by an earlier court in relation to the terrorist nature of the organization in which the suspect is accused of membership, and this initial judicial decision may be relied upon by other courts in subsequent trials.

In accordance with Article 314 (3) of the TCK, an armed terrorist organization must possess the characteristics set out for criminal organizations in general under Article 220 of the TCK (such as the existence of a minimum of three persons, aiming to commit criminal acts, possessing a structure suitable to committing the offenses intended) and Article 1 and 7 of the TMK (possessing terrorist intent, using force and violence as a method and committing acts that constitute a crime) as well as those set out under Article 314 (aiming at committing the listed offenses, being armed). Only those structures possessing all these components may be considered an armed terrorist organization, and their members may be punished under Article 314 of the TCK. These components will be discussed further below.

In order to characterize a structure as a terrorist organization under Article 1 of the TMK, that structure '*must commit a criminal act by means of force and violence*' through one of the methods listed in the article in order to realize the aims specified in the same article.²⁷ Therefore, by virtue of Article 1 of the TMK, an organization that has not yet committed a crime involving force and violence may

²⁶ Güneş, 2021, *Legality of Crimes and Punishments*, p. 3.

²⁷ **Article 1 of the TMK** – (Amended first paragraph: Article 20 of Law No 4928 dated 15/07/2003) Any criminal action conducted; by means of force and violence; through one of the methods of oppression, startling, intimidation, suppression or threat; by one or more persons belonging to an organization with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.

not be characterized as a terrorist organization. While for the existence of an (ordinary) criminal organization, '*conspiring to commit a crime*' may be sufficient, for the existence of a terrorist organization (both according to statutory and case law), 'a criminal act involving force and violence' must be committed by that organization.²⁸

The characterization of a structure as a terrorist organization may only be made in a criminal trial concerning criminal conduct involving 'force' and 'violence'. Only in such a criminal trial can an accused be convicted of membership in a terrorist organization upon a prior determination that a crime involving force and violence has been committed by that structure. The courts that do not try a crime involving force and violence allegedly committed by that structure may not ascribe to that organization the characterization of a terrorist organization and therefore may not convict an individual of membership in that terrorist organization. Currently, in almost all the post-2016 coup attempt trials (save those relating to the coup attempt of July 15, 2016 itself), there is no allegation of 'a crime involving force and violence committed by the accused himself,' with the accused being solely tried for membership in a terrorist organization under Article 314(2) of the TCK.

Crimes involving force and violence allegedly committed by the so-called FETÖ (those relating to the coup attempt of July 15, 2016) are in fact the subject of other pending trials. Under Article 225(1) of the Code of Criminal Procedure (CMK), a judge's deliberation in a criminal trial shall only be confined to 'the perpetrator' and 'the conduct' in that indictment. A judge may not make a legal characterization about the generality of an organization by assuming that the crimes which are the subject of other pending trials are committed by this structure. In cases in which the courts do not try 'a crime involving force and violence committed by the accused,' there must exist a prior judicial decision determining that structure to be a terrorist organization upon which the court can rely.

²⁸ Güneş, 2021, *Legality of Crimes and Punishments*, p. 4.



The Supreme Court of Appeals

The Supreme Court of Appeals does not accept the characterization of a structure as a terrorist organization unless a lower court has ruled so in a trial that deals with criminal conduct involving force and violence.²⁹ It requires the existence of a final conclusive court decision previously delivered which determines that organization to be a terrorist organization. In cases where no such prior court decision exists, the Supreme Court of Appeals requires that a trial involving no force and violence be stayed pending other trials involving force and violence, or joined with such other trials. For instance, in the *Kürdistan Sosyalist Partisi* (Kurdistan Socialist Party-PSK) case,³⁰ the Supreme Court of Appeals ruled that it must first be decided whether or not the PSK is a terrorist organization by conducting a further examination of the actions committed by this organization that bear the characteristics listed in Article 1 of the TMK (involving force and violence and constituting a crime), since there was no prior judicial decision as to whether or not the PSK is a terrorist organization.

Almost all the so-called FETÖ trials (save those relating to the coup attempt of July 15, 2016 itself) do not relate to a crime involving force and violence allegedly committed by the said organization in which the suspect is accused of membership. In order to convict a suspect for being a member of that

²⁹ Güneş, 2021, *Legality of Crimes and Punishments*, p. 5.

³⁰ See General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 11/3/2003, Case No. 2003/9-39, Decision No. 2003/32.

organization under Article 314(2), the courts would need an initial judicial decision that characterizes the Gülen movement as a terrorist organization. It is generally accepted that the trials involving criminal conduct by use of force and violence allegedly committed by the Gülen movement relate to the events of the coup attempt of July 15, 2016. There is as of yet no such final judicial verdict resolving that a crime involving force and violence has been committed by this group. Therefore, the characterization of the Gülen movement as a terrorist organization may only be made in the pending trials in connection with the actual coup attempt, involving force and violence allegedly committed by members of the Gülen movement (e.g., the Akıncı Air Base, Army Aviation School Command and General Staff Command cases).

As a matter of fact, the Turkish government tacitly accepts in its defenses before the ECtHR that there must exist an initial judicial decision that establishes the Gülen movement as a terrorist organization in order to convict the accused of membership in a terrorist organization under Article 314(2). In that sense, it accepts that criminal courts of first instance may deliver convictions by relying on the decision of the 16th Criminal Chamber without carrying out a separate examination.³¹ In this case the 16th Criminal Chamber, acting as a court of first instance, convicted two senior judges -- Mustafa Başer and Metin Özçelik -- for rendering release decisions in respect of suspects who were for the most part the police officers who carried out the corruption investigations of December 2013. In the trial, these judges were not accused of criminal conduct that involved force and violence. They were assumed to be acting in solidarity with the suspects for whom they delivered release decisions. This was considered to be sufficient evidence to convict them of membership in a terrorist organization. In the subsequent trials, the criminal courts of first instance went on to convict alleged members of the Gülen movement of membership in an armed terrorist organization by merely relying on this verdict of the 16th Criminal Chamber.

³¹ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/4/2017, Case No. 2015/3, Decision No. 2017/3; see Güneş, 2021, *Legality of Crimes and Punishments*, p. 6.



The European Court of Human Rights

The above-mentioned ruling of the 16th Criminal Chamber which establishes the Gülen movement as a terrorist organization is stunningly erroneous.³² First of all, the ruling does not discuss the element of ‘action/conduct’ in terms of the characteristics of a terrorist organization. Although the decision mentions the ‘number of members’, ‘aim and motive’, ‘method’, ‘suitability’ and ‘means’ as the necessary components for the existence of a terrorist organization, it does not discuss the ‘commission of conduct that constitutes a crime’ as a component, so the ‘action/conduct’ element of a terrorist organization is missing in the legal reasoning of the court.

The 16th Criminal Chamber in fact determined the Gülen movement to be a terrorist organization by merely presuming that the armed actions on July 15, 2016 were carried out by this group, without actually conducting a criminal trial in relation to those actions involving force and violence. The July 15 coup attempt is the subject of other trials that were pending as of April 24, 2017 (the date of the 16th Criminal Chamber’s ruling) and September 26, 2017 (the date the General Assembly of Criminal Chambers upheld the ruling). As far as the author is aware, there is still no final judicial decision in those trials. Thus, the said ruling of the 16th Criminal Chamber violates the principle of presumption of innocence. It also

³² Güneş, 2021, *Legality of Crimes and Punishments*, p. 6-7.

violates Article 225(1) of the CMK as it delivered a verdict for the conduct and perpetrators falling outside its own case.

In the ECtHR case involving Atilla Taş,³³ a singer and columnist who had been arrested for participating in a peaceful demonstration against the appointment of government trustees to the now-closed Bugün daily, the ECtHR observed that at the material time there was no court ruling which found that the daily in question was controlled by a terrorist organization. In that respect, the court said Taş was merely participating in a peaceful assembly and therefore there were no circumstances that would convince an objective observer that the person in question was participating in terrorist activity.

2.4. Violation of Non Bis in Idem in the Post-2016 Coup Attempt Trials

The principle of *non bis in idem* is defined as ‘a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action’.³⁴ The ‘right not to be tried and punished twice’ is also enshrined in Article 4, Protocol No. 7, of the ECHR.³⁵ Article 223(7) of the CMK similarly orders the rejection of a second criminal case for the same conduct.³⁶

In order to deliver a conviction decision for membership in a terrorist organization under Article 314 of the TCK, the date of establishment of the terrorist organization must first be determined. The date of establishment is the date at which the creation of an armed terrorist organization is fully completed. Even though the crime of establishing an armed terrorist organization involves certain prior preparations such as recruiting members, providing arms, means and completion of the organizational structure, it is nevertheless a ‘sudden’ crime and

³³ *Atilla Tas v Turkey*, Application No. 72/17, 19/01/2021, para 134.

³⁴ See Oxford Public International Law, *Non bis in idem*, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e66>

³⁵ **‘Article 4 – Right not to be tried or punished twice**

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.”

For Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, European treaty Series, No. 117, Strasbourg, 22.XI.1984, see

https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETSI117E_ENG.pdf

³⁶ Article 223(7) of the CMK: ‘In cases where there is a previously rendered judgment or a pending case against the same accused for the same conduct, the case shall be declared inadmissible.’ For the English text of Turkish Criminal Procedure Code see https://www.legislationline.org/download/id/4257/file/Turkey_CPC_2009_en.pdf

not suitable for an 'attempt' under Turkish law.³⁷ An armed terrorist organization will be established and the crime committed only when all the components of the crime are fully completed. Prior to that moment, the organization may only be considered within the context of Article 220 of the TCK (criminal organization) and 316 of the TCK (agreement to commit an offense)³⁸ if the conditions are met but not within the context of Article 314 of the TCK.

In the case law of the Supreme Court of Appeals, the date of transformation of a structure into an armed terrorist organization is in principle accepted as the date of the first armed conduct engaged in by that structure. This is the date on which the 'imminent, serious and grave' danger occurred and the structure became able to realize its ultimate goals (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence), and thus the existence of the armed terrorist organization came into being.³⁹ The courts specify these dates in their deliberations.⁴⁰ For example, the *Ekim* (October) organization was originally described as an 'unarmed terrorist organization' within the context of Article 7(1) of the TMK but upon the organization transforming itself into an 'armed gang' (armed terrorist organization) under the former TCK (Law No. 765), the Supreme Court of Appeals expressly stated the date (7/27/1996) on which this organization was transformed into an 'armed gang' (armed terrorist organization) and clarified the start of liability of its members as members of an 'armed gang'.⁴¹

³⁷ Güneş, 2021, *Legality of Crimes and Punishments*, p. 7.

³⁸ **Agreement to Commit an Offense**
Article 316

(1) Where two or more persons make an agreement to commit any one of the offenses listed in parts four and five of this chapter by using appropriate means, a penalty of imprisonment for a term of three to twelve years shall be imposed, depending upon the gravity of the offense.

(2) No penalty shall be imposed upon any person who severs any alliance before the commission of an offense or commencement of an investigation.

³⁹ Güneş, 2020, *Armed Terrorist Organization*, p. 106-111.

⁴⁰ For the establishment of *Devrimci Halk Kurtuluş Partisi/Cephesi* (Revolutionary People's Salvation Party/Front) see 9th Chamber of the Supreme Court of Appeals, Date of Decision. 05/7/1996, Case No. 1996/1935, Decision No. 1996/4324; for the establishment of the Kurdistan Workers' Party (PKK), see 3rd Chamber of the Military Supreme Court, Date of Decision. 29/4/1986, Case No. 1986/98, Decision No. 1986/119; 9th Chamber of the Supreme Court of Appeals, Date of Decision. 21/6/1995, Case No. 1995/380, Decision No. 1995/431; 9th Chamber of the Supreme Court of Appeals, Date of Decision. 10/4/1995, Case No. 1995/1730, Decision No. 1995/2533.

⁴¹ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 05/4/1995, Case No. 1995/350, Decision No. 1995/221; 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 19/4/1999, Case No. 1999/2861, Decision No. 1999/1805.

The decision of the 16th Criminal Chamber⁴² determining the Gülen movement to be a terrorist organization states that the foundation of the organization was laid down in 1966 but does not clarify the date at which this structure named the Gülen movement was transformed into an 'armed terrorist organization' called FETÖ. In its subsequent decisions, even though the 16th Criminal Chamber mentions that the Gülen movement began its activities as a religious and educational movement promoting ethical values and later became an armed terrorist organization, it does not specify the date at which the Gülen movement became an 'armed terrorist organization.'⁴³ The 16th Criminal Chamber did state in one of its decisions that the criminal liability of the members of a criminal organization starts as of the date of its establishment or at the date on which it was transformed into a criminal organization.⁴⁴ However, it did not specify the date on which the structure it named FETÖ and determined to be a terrorist organization was established or transformed into a terrorist organization.

Although the 16th Criminal Chamber and General Assembly of Criminal Chambers agree that the coup attempt was committed by the so-called FETÖ, they nevertheless do not show any crimes involving force and violence committed by this structure prior to that date and do not clarify the starting date of its members' liability. If the first terrorist actions under Article 1 of the TMK were allegedly those that took place as part of the abortive putsch, the date of establishment of this organization would have to be accepted as July 15, 2016. The 16th Criminal Court wrote the decision in such a misguided and mistaken manner that one could take the date of establishment of the so-called FETÖ back to 1966. The lower criminal courts in response have just followed suit and considered past innocuous activities of the alleged members as a basis for convicting on grounds of membership in a terrorist organization.

For the reasons outlined above, an earlier acquittal decision delivered in 2008 concerning Fethullah Gülen on accusations of founding and managing an 'unarmed' terrorist organization under Article 7(1) of the TMK becomes all the more important.⁴⁵ The reasoning for the first instance court's acquittal decision

⁴² 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/4/2017, Case No. 2015/3, Decision No. 2017/3.

⁴³ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 11/6/2019, Case No. 2017/3139, Decision No. 2019/4111.

⁴⁴ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 18/7/2017, Case No. 2016/7162, Decision No. 2017/4786.

⁴⁵ See Judgment of General Assembly of Criminal Chambers of the Supreme Court of Appeals (Yargıtay Ceza Genel Kurulu) 24/6/2008 T., 2008/9-82 E., 2008/181 K.

may be summarized as follows:⁴⁶ *“In accordance with Article 1 of Law No. 3713 [Counterterrorism Law] as amended by Law No. 4928 on July 15, 2003, it is necessary to use force and violence and to engage in conduct that constitutes a crime for the crime of terrorism to have been committed. It is ruled that the suspect be acquitted of the alleged crime as no conduct constituting a crime has been determined and the material and other components of the crime have not occurred.”* The above reasoning of the criminal court of first instance was also upheld by the 9th Criminal Chamber of the Supreme Court of Appeals as the appellate court.

This acquittal decision concerning Fethullah Gülen became a final judicial decision (*res judicata*) in 2008 confirming that the movement inspired by Gülen did not use force and violence and did not engage in conduct constituting a crime up to that point in time. The structure characterized as a terrorist organization and named FETÖ by the 16th Criminal Chamber is the same as the one in the said acquittal decision. Therefore, it is simply impossible to accept that this structure was transformed into an armed terrorist organization prior to the date on which the acquittal decision became final. Taking the date of the alleged transformation of the Gülen movement into a terrorist organization to before the date of this acquittal decision is a violation of the ‘right not to be tried and punished twice’ as enshrined in Article 4, Protocol No. 7, of the ECHR.

By relying on the facts showing the engagement of individuals with this structure dating back to the 1980s, 1990s and 2000s, the individuals are punished for membership in a terrorist organization as if a terrorist organization named FETÖ had existed prior to 2008. It is not possible to accept an organization that had not yet committed a crime involving force and violence as a terrorist organization and to hold the alleged members of that organization accountable. The acquittal decision is also highly important in terms of the lack of mental element of the crime of membership in a terrorist organization. It must at least be accepted that those who followed the Gülen movement and participated in its activities in the relevant period believing it to be a legal organization by relying on this acquittal decision lack the mental element of the crime of membership. As a matter of fact, even the 16th Criminal Chamber opines that the said acquittal decision ought to

⁴⁶ Güneş, 2021, *Legality of Crimes and Punishments*, p. 9.

be taken into account in the examination of the 'mistake principle'⁴⁷ under Article 30 of the TCK, albeit to a very narrow extent.⁴⁸

3. ELEMENTS OF THE CRIME OF MEMBERSHIP IN A TERRORIST ORGANIZATION

For the existence of any criminal conduct, two elements must be shown to exist in order to convict an individual for the commission of a crime: the material (objective) element (*actus reus*) and the mental (subjective) element (*mens rea*).

⁴⁹ Material element refers to the action or conduct that is a constituent element of a crime, as opposed to the mental state of the accused. Mental element pertains to the intention or knowledge of the wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused. The following paragraphs discuss the existence of these two elements within the context of membership in a terrorist organization.

3.1. Material element

The material element of the crime of membership under Article 314(2) of the TCK is to 'become a member of a terrorist organization'. Article 314(2) does not specify the actions and conduct that constitute membership in a terrorist organization. Article 6(j)⁵⁰ and 220(7)⁵¹ of the TCK taken together demonstrate that the conduct which constitutes membership in a terrorist organization is to 'join the hierarchical structure of the organization'.⁵² That is to say, an individual becomes a

⁴⁷ **Mistake - Article 30**

(1) Any person who, while conducting an act, is unaware of matters which constitute the *actus reus* of an offense, is not considered to have acted intentionally. Culpability with respect to recklessness shall be preserved in relation to such mistake.

(2) Any person who is mistaken about matters which constitute an element of a qualified version of an offense, which requires an aggravated or mitigated sentence, shall benefit from such mistake.

(3) Any person who is inevitably mistaken about the conditions which, when satisfied, reduce or negate culpability shall benefit from such mistake.

(4) (Paragraph Added on 29 June 2005 - By Article 4 of Law no. 5377). Any person who makes an inevitable mistake about whether his act was unjust or not shall not be subject to penalty.

⁴⁸ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 11/6/2019, Case No. 2017/3139, Decision No. 2019/4111.

⁴⁹ The Elements of Crime, Britannica, <https://www.britannica.com/topic/criminal-law/The-elements-of-crime>

⁵⁰ Article 6(j) - Member of a Criminal Organization: any person who establishes, controls or joins a criminal organization; or any person who commits an offense in the name of a criminal organization, either by himself or with other persons.

⁵¹ Article 220(7) - (Amended on 2/7/2012 - By Article 85 of Law no. 6352) Any person who aids and abets an organization knowingly and willingly, although he does not belong to the hierarchical structure of that organization, shall also be sentenced for the offense of being a member of that organization. The sentence to be imposed for being a member of that organization may be decreased by one-third according to the assistance provided.

⁵² Güneş, *Legality of Crimes and Punishments*, p. 10.

member of a terrorist organization by 'becoming part of its organizational structure' by means of giving and receiving orders and assuming roles and responsibilities as part of the terrorist organization's activities.

A number of criteria have been developed by the Supreme Court of Appeals with a view to establishing whether a membership relation has been formed between an individual and an armed terrorist organization. These criteria are 'continuity, diversity and intensity' of their actions within the context of the terrorist organization's activities and 'participation within its hierarchical structure knowingly and willfully'.⁵³ The Supreme Court of Appeals examines the actions of the suspect, taking into account their 'continuity, diversity and intensity'⁵⁴ in order to see whether those actions prove that the suspect has any 'organic relationship'⁵⁵ with the organization or whether his actions may be considered to have been committed 'knowingly and willfully' within the 'hierarchical structure'⁵⁶ of the organization.

In relation to Article 314 of the TCK, the Venice Commission in 2016 highlighted that the domestic courts in many cases decide on the membership of a person in an armed terrorist organization on the basis of very weak evidence that would raise questions as to the 'foreseeability' of the application of Article 314.⁵⁷ The Venice Commission thus recommended that the aforementioned criteria be strictly applied and warned 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 of the ECHR.⁵⁸

Nevertheless, in the post-2016 coup attempt trials, the previously legal and routine activities of individuals are treated to have been carried out within the scope of a terrorist organization's activities on the grounds that they are 'continuous, diverse and intense' even though they do not themselves contain any criminal elements or intent. This erroneous judicial practice does not explain how these activities are 'continuous, diverse and intense' and on what grounds

⁵³ Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, Opinion No. 831/2015, [Venice Commission Opinion No. 831/2015] Strasbourg, March 15, 2016, para 100, at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e)

⁵⁴ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 14/03/2013, Case No. 2012/4191, Decision No. 2013/3971.

⁵⁵ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 13/11/2013, Case No. 2013/9229, Decision No. 2013/13608.

⁵⁶ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/04/2013, Case No. 2013/3018, Decision No. 2013/6315.

⁵⁷ Venice Commission Opinion No. 831/2015, 2015, para 102.

⁵⁸ Venice Commission Opinion No. 831/2015, 2015, para 106.

they are treated as criminal activities carried out within the context of a terrorist organization's activities. Effectively, the legal and routine activities of an individual that would normally fall within the scope of the exercise and enjoyment of fundamental rights are categorically used as evidence of his connection to the Gülen movement and hence of his alleged membership in FETÖ.

3.2. Mental Element

The mental element of the crime of membership in a terrorist organization under Article 314(2) is 'outright intent'. Outright intent means the willful commission of a crime knowing the elements of the legal definition of the crime (Article 21(1) of the TCK). The perpetrator must become a member of a structure 'knowingly' and 'willfully,' aware that the structure is an armed terrorist organization.⁵⁹ Nevertheless, the mental element of the crime of membership is virtually not discussed but only presumed in the post-2016 coup attempt trials. This presumption is based on the fact that these individuals have carried out certain activities that arguably demonstrate their connections to the Gülen movement. The prosecution and the courts merely presume that the individuals with such connections to the Gülen movement know that the movement is an armed terrorist organization. In short, the intent element of the crime of membership was not proved in any of the trials, the judgments having been passed entirely on the basis of presumptions.

Further, as discussed above, membership in a terrorist organization may be examined in two stages. The first stage relates to whether or not the structure an individual has joined is a terrorist organization. The second stage pertains to whether or not the suspect has become a member of this terrorist organization. The first stage examination in the post-2016 coup attempt trials is at fault because under settled case law, the structures attempting to overthrow the government are considered within the context of 'agreement to commit a crime' (Article 316 of the TCK), not within the context of a terrorist organization.⁶⁰ As the Gülen movement is considered by the Supreme Court of Appeals to be a structure attempting to overthrow the government, the legal characterization must have

⁵⁹ General Assembly of Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 04/3/2014, Case No. 2013/9-67, Decision No. 2014/110; Date of Decision. 19/6/2001, Case No. 2001/9-125, Decision No. 2001/128.

⁶⁰ Committee of Chambers of the Military Supreme Court, Date of Decision. 24/01/1964, Decision No. 12/1; Date of Decision 18/02/1988, Decision No. 7/15; 1st Criminal Chamber of the Supreme Court of Appeals, Date of Decision 25/4/1966, Case No. 975, Decision No. 975; 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision 09/10/2013, Case No. 2013/9110, Decision No. 2013/12351.

been made in accordance with Article 316, not Article 314. As this initial legal characterization is mistaken, the conviction of alleged members of the Gülen movement under Article 314 is also wrong.

4. VIOLATION OF THE PRINCIPLE OF LEGALITY AND NO PUNISHMENT WITHOUT LAW

The violations of the principle of legality and no punishment without law are the most devastating aspects of the post-2016 coup attempt trials in terms of the criminal consequences of individual conduct that would normally fall within the scope of innocuous and legal activities. As mentioned earlier, an individual would have to know which conduct and actions are prohibited and could entail his criminal liability if committed. This section discusses how the principle of legality and no punishment without law is violated in terms of both the material and the mental elements of the crime of membership in a terrorist organization.

4.1. Material Element of the Crime of Membership in a Terrorist Organization

The material element of the crime of membership under Article 314(2) is to 'become a member of a terrorist organization.' Nevertheless, Article 314 does not specify the actions and conduct that constitute membership in a terrorist organization. Therefore, the issue is entirely left to the discretion of the jurisprudence of the Supreme Court of Appeals. Yet there have been drastic changes in the way the Supreme Court of Appeals has been organized since 2011, and in one instance all the judges were removed from office and new judges were installed.⁶¹ This exacerbated the issue of 'foreseeability' in relation to the application of Article 314. The responsibility for dealing with terrorism-related trials (mostly as an appellate court), which had been within the purview of the 9th Chamber of the Supreme Court of Appeals, was transferred to the 16th Chamber in 2015. The new chamber set aside the case law that had been developed by the 9th Chamber over a period of many years. On July 1, 2021 the 3rd Criminal Chamber

⁶¹ FIDU – Federazione Italiana Diritti Umani (Italian Federation for Human Rights), 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 [*FIDU Third Party Intervention*], October 12, 2021, p. 3, at <https://fidu.it/wp-content/uploads/THIRD-PARTY-INTERVENTION-BY-FIDU-logo-12.10.2021.pdf>FIDU

was vested with the authority to deal with terrorism-related trials, hence opening another chapter of uncertainty.

There are now contradictory decisions in relation to the conduct that constitutes the crime of membership under Article 314 which vary depending on the different terrorist organizations. For instance, while under settled case law, becoming a member of a terrorist organization was possible upon the mutual will of the two sides (joining and accepting),⁶² 16th Criminal Chamber now opines that an individual may become a member of a terrorist organization by unilateral will without the acquiescence of the organization's leaders.⁶³ This would mean that there will be members outside the knowledge, supervision and control of the terrorist organization, which would itself be against the very idea of an organization.

Further, while under settled case law statements, written works, declarations, social media posts and press releases in favor of a terrorist organization were considered terrorist propaganda,⁶⁴ the 16th Criminal Chamber now regards those as evidence of membership in a terrorist organization.⁶⁵ Similarly, while the repetitive dissemination of terrorist propaganda was not considered to constitute membership,⁶⁶ the 16th Criminal Chamber now views such means of support as membership.⁶⁷

Moreover, while under the earlier case law activities carried out within the scope of a legal organization constituting the legitimate exercise and enjoyment of fundamental rights were entirely legal,⁶⁸ in the current trials such legal activities are treated as evidence of membership in a terrorist organization. Following the July 15, 2016 coup attempt, the judicial authorities have adopted a list of variables

⁶² General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 10/6/2008, Case No. 2007/9-270, Decision No. 2008/164.

⁶³ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 20/4/2015, Case No. 2015/1069, Decision No. 2015/840.

⁶⁴ General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision 12/2/2008, Case No. 2007/9-230, Decision No. 2008/23.

⁶⁵ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 05/7/2019, Case No. 2019/521, Decision No. 2019/4769.

⁶⁶ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 16/5/2013, Case No. 2012/11301, Decision No. 2013/7759.

⁶⁷ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 27.04.2015, Case No. 2015/1381, Decision No. 2015/930.

⁶⁸ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 07.03.2002, Case No. 2001/2894, Decision No. 2002/437.

by which they determine if an individual is a member of the Gülen movement and hence FETÖ.⁶⁹

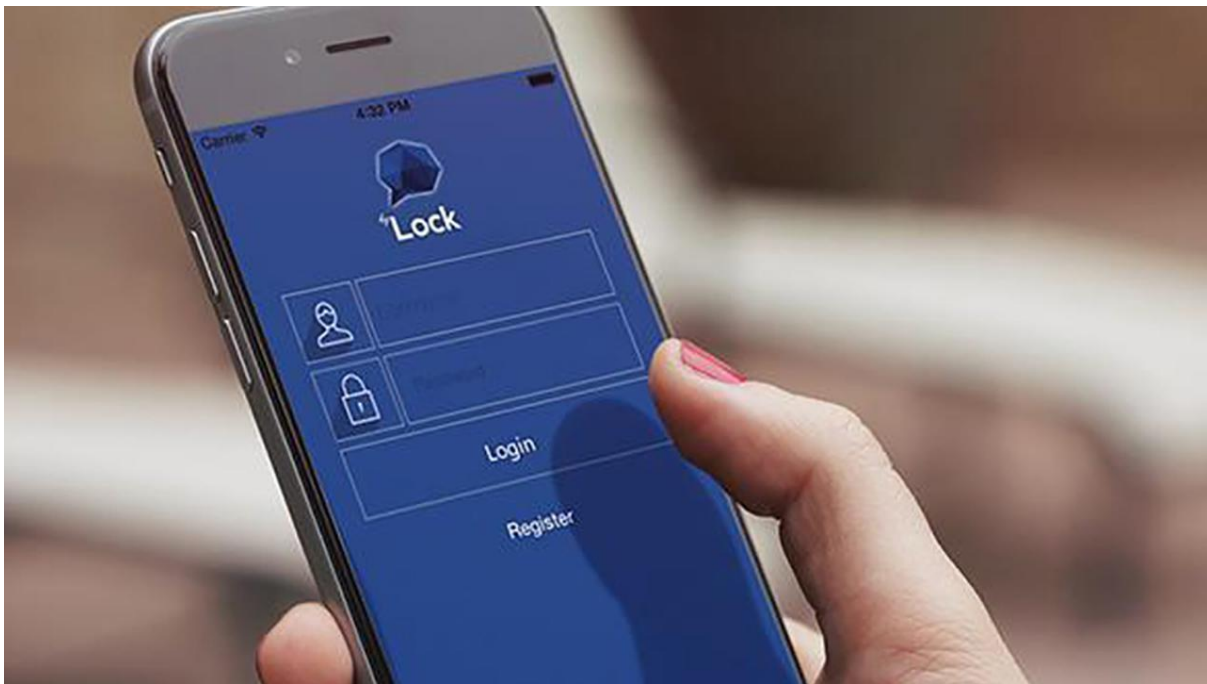
For instance, having an account at Bank Asya, one of Turkey's largest commercial banks at the time which was closed down due to its affiliation with the Gülen movement, is considered to be terrorist activity. The bank was opened in 1996 and operated under a duly issued government license until it was transferred to Turkey's Savings Deposit Insurance Fund (TMSF) in 2015. In fact, President Erdoğan, former president Abdullah Gül and the then-prime minister Tansu Çiller were all present at the bank's opening ceremony. The bank was operational and subject to supervision by the regulatory bodies when the deposits were made. It was simply not foreseeable for anyone that being a customer of the bank would one day constitute evidence of membership in a terrorist organization.

Similarly, since the July 15, 2016 coup attempt Turkish courts have been considering any of the following as a criterion for membership in a terrorist organization or aiding a terrorist organization: becoming a member of a trade union or association affiliated with the Gülen movement; sending children to schools affiliated with the movement; donating to the "Kimse yok mu" charity, which was officially designated as a tax exempt, not-for-profit organization; using the publicly available ByLock encrypted messaging app; cancelling a cable TV subscription during a specific period of time, when some subscribers were protesting the removal of certain TV networks from the platform; and working for certain companies and corporations affiliated with the Gülen movement. In other words, in the case of so-called FETÖ, the scope of membership in an armed terrorist organization has been extended in an unforeseeable manner.

It is well-established in the jurisprudence of the Supreme Court of Appeals that the information obtained by law enforcement officials as a result of intelligence work cannot be used as evidence in criminal prosecutions.⁷⁰ In fact, Turkey's National Intelligence Organization (MİT) is known to add a footnote to its external communications stating that the information in question is for intelligence purposes only and cannot be used as evidence.

⁶⁹ *FIDU Third Party Intervention*, 2021, p. 4.

⁷⁰ General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 17/05/2011, Case No. 2011/9-83, Decision No. 2011/95; Date of Decision. 21/10/2014, Case No. 2012/1283, Decision No. 2014/430.



ByLock is an encrypted messaging app used on smartphones and was available on Apple's App Store and Google Play

Nevertheless, the Supreme Court of Appeals now accepts ByLock data, which was acquired by MiT outside the relevant legal and forensic procedures, as evidence and considers using the ByLock app as proof of membership in a terrorist organization.⁷¹ ByLock is an encrypted messaging app that was once widely available online, including on Google Play and Apple's Appstore. The Turkish government claims that it is a secret messaging tool exclusively used by followers of the Gülen movement to ensure the privacy of their communications. In 2017 Turkey's Supreme Court of Appeals found the use of ByLock to be sufficient evidence of terrorist organization membership. Since then, the appeals court has upheld hundreds of sentences passed by local courts based mainly on ByLock use without checking to see if the user had any message content or if the messages had any criminal content. The Constitutional Court, too, found no violation of rights of the applicants who were sentenced merely based on ByLock use, which it had considered a strong indication for arrest.

Similarly, Turkish courts also use Historical Traffic Search (HTS) records (which show the caller, time and place of the call but not the content of the call) as evidence in terrorism-related cases. Yet, under the well-established case law of the Supreme Court of Appeals, HTS records alone do not meet the necessary

⁷¹ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/04/2017, Case No. 2015/3, Decision No. 2017/3; General Assembly of Criminal Chambers, Date of Decision. 26/9/2017, Case No 2017/16.MD-956, Decision No. 2017/370.

criterion to establish adequate suspicion that is necessary to file an indictment or the conclusive evidence that is required to deliver a conviction.⁷² Under this case law, HTS records must be supported by other concrete evidence, and in the absence of any other evidence, the suspect should benefit from the principle of *in dubio pro reo* (resolving doubts in favor of the accused). Nevertheless, the 16th Criminal Chamber upholds conviction decisions of the lower criminal courts based on undeleted HTS records (which should have been deleted according to the relevant regulations).⁷³

Use of ByLock or receiving a call from a payphone⁷⁴ alone does not establish that the suspect is in contact with a terrorist organization without determining the identity of the caller as well as the purpose and content of the call. Besides, for the commission of the crime of membership, contact with a terrorist organization is not sufficient -- it must be proven that the suspect has become a member of the terrorist organization. In order to rely on the ByLock data and the calls from land lines for membership in a terrorist organization, these records must be legally obtained and the communication content must contain criminal content that serves the ultimate aims of that terrorist organization (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence).

The spectrum of the criteria used for membership in a terrorist organization is so extensive that virtually anybody in the country could be convicted of membership in a terrorist organization. Although some individuals who carry out the same activities or have the same connections face no prosecution and even continue working in the civil service, other individuals are arrested and punished for the same activities and connections. The range of acts that may have been caught by Article 314 is so broad that it does not afford adequate protection against arbitrary interference by the national authorities. Likewise, the terrorism-related offenses as

⁷² General Assembly of Criminal Chambers, Date of Decision. 03/07/2007, Case No. 2007/5.MD-23, Decision No. 2007/167; Date of Decision. 22/01/2008, Case No. 2008/3-25, Decision No. 2008/3; 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 01/3/2018, Case No. 2018/18, Decision No. 2018/18.

⁷³ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 11/12/2019, Case No. 2019/5786, Decision No. 2019/7702.

⁷⁴ The so-called 'payphone investigations' are based on call records. The prosecutors assume that a member of the Gülen movement used the same payphone to call all his contacts consecutively. Based on that assumption, when an alleged member of the movement is found in call records, it is assumed that other numbers called right before or after that call also belong to people with Gülen links. Receiving calls from a payphone periodically is also considered a red flag. The authorities do not have the actual content of the phone calls in question and they do not know if there actually was a phone conversation or if the call was unanswered.

interpreted and applied by domestic courts under Article 314 are not foreseeable.

75

The activities of the Gülen movement were long supported openly by state institutions and the AKP governments until the corruption investigations of December 17-25, 2013 started. Therefore, it was simply not foreseeable for an individual that the movement could be labeled as a terrorist organization by the courts in the future. It was also not foreseeable for people that some of their legal activities would be one day interpreted as evidence of the crime of membership in a terrorist organization.

To sum up, application of Article 314(2) has widened the scope of criminal liability for membership in a terrorist organization in a manner that violates the principle of legality. The suspects in these trials are declared members of a terrorist organization on the basis of their legal and innocuous activities, which do not involve any participation in the coup attempt or any other violent act. The legal activities involving the exercise and enjoyment of fundamental rights are used to demonstrate the connection of the individuals to the Gülen movement. This real or perceived connection to the movement or participation in its activities is then categorically interpreted as evidence of membership in a terrorist organization.

The inherent purpose behind Article 314(2) of the TCK is to punish the members of a terrorist organization for their acts that are part of a terrorist organization's activities. These activities are those that serve the ultimate aims of that terrorist organization (e.g., (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence)). However, in the prosecutions in connection with Article 314, the suspects are arrested, convicted and punished entirely for their legal and innocuous activities.

4.2. Mental Element of the Crime of Membership in a Terrorist Organization

As pointed out above, the mental element of the crime of membership in a terrorist organization is 'outright intent'. To be held accountable, an individual

⁷⁵ Selahattin Demirtaş v. Turkey (No. 2), Application No. 14305/17, December 22, 2020, para 280 and 337, at <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-207173%22>].

must join the hierarchy of an organization 'willfully' and 'knowingly,' being aware that it is an armed terrorist organization.⁷⁶

The 16th Criminal Chamber described the mental element of the crime in its first decision in which it accepted the Gülen movement as an armed terrorist organization in the following manner:

*"The mental element of the crime is outright intent and 'aim/motive of committing crime'. The person joining the organization must know that the organization he has joined is an organization committing crime, aiming to commit crime. The member of the organization must join the organization knowingly and willfully, must know the nature and aims of the organization he has joined, must wish to become a part of the organization and his membership must be continuous. A person when joining the organization must act with the intention and will of becoming a member knowing that the organization is one that is set up to engage in conduct which is regulated as criminal by the law. While the intention of all the perpetrators must be to join an organization set up for the purpose of committing crime, it is not necessary for all of them to possess the aim of committing the same crimes. It is expected that a person joining a formation be aware that this formation has the purpose of committing crime."*⁷⁷

The suspect must therefore know that the organization he has joined is an armed terrorist organization and that the members of that organization have come together for the purpose of committing one of the crimes listed under Article 302, 309, 311 or 312 of the TCK and that the organization has adopted armed action to further its goals, possesses a sufficient number of members and arms, consists of at least three persons, has a hierarchical order and is a suitable and continuously existing structure using force and violence and committing crime.⁷⁸ In other words, the suspect must know that the organization of which he has become a member bears all the elements in Articles 220 and 314 of the TCK and Articles 1 and 7 of the TMK.

The crime of membership in a terrorist organization may only be committed with 'outright intent,' therefore 'oblique intent' is not sufficient. In other words, joining

⁷⁶ General Assembly of the Criminal Chambers of the Supreme Court of Appeals, Date of Decision. 04/3/2014, Case No. 2013/9-67, Decision No. 2014/110; Date of Decision. 19/6/2001, Case No. 2001/9-125, Decision No. 2001/128.

⁷⁷ 16th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 24/4/2017, Case No. 2015/3, Decision No. 2017/3.

⁷⁸ Güneş, 2021, *Legality of Crimes and Punishments*, p. 15.

an organization albeit foreseeing that it might be an armed terrorist organization is not sufficient to constitute the crime of membership. The suspect must know for sure that the organization he has joined is an armed terrorist organization. Missing or mistaken knowledge about one of the elements of an armed organization or a substantial error in believing that he is a member of a legal organization removes the element of 'intent'. For instance, an individual who thinks he is a member of a religious congregation or a civil society organization shall benefit from this mistake in accordance with Article 30 of the TCK. This person shall not be considered to have acted with outright intent and not be punished by Article 314 of the TCK. However, the post-2016 coup attempt trials do not examine whether or not the suspect knew about the ultimate aims of the organization and if he wanted to abolish or replace the constitutional order through force and violence (Article 309 of the TCK) and to abolish the government through force and violence (Article 312 of the TCK).

A proper assessment of the mental element of the crime of membership was almost never conducted in the post-2016 coup attempt trials. It is generically accepted that the abortive putsch was the first alleged armed conduct of the Gülen movement and that the first judicial decision determining the movement to be a terrorist organization was finalized on September 26, 2017, the date of the General Assembly of Criminal Chambers of the Supreme Court of Appeals' decision to uphold the 16th Chamber's ruling. Even if one was to agree on this assumption (albeit erroneous in many respects), this would mean that the ultimate aim of the organization (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence) was revealed only on July 15, 2016, which fact became judicially finalized on September 26, 2017. Yet, despite this, whether or not the suspect knew about the alleged terrorist nature of this structure prior to these dates is never examined. The criminal courts of first instance only examine whether or not the suspect is a follower of the Gülen movement but never assess if the suspect joined the organization knowingly and willingly, aware of its alleged terrorist nature.

Following objections to the absence of the mental element of the crime, the courts relied on some presumptions for demonstrating the elements of 'knowing' and 'willing'. The following presumptions have been used in purported judicial reasoning: 'he is presumed to know', 'he is in a position to know', 'he somehow

knows', 'impossible not to know', 'expected to know', 'he certainly knows'.⁷⁹ The criminal courts of first instance have accepted the existence of the mental element of the crime of membership by relying on such conjectural and speculative statements. However, in criminal proceedings the decisions shall be made on the basis of conclusive assessment, not on the basis of presumption, probability and analogy. The mental element and outright intent must be conclusively proved with material evidence.

As pointed out above a terrorist organization is established only after all the legal components necessary for its creation are fully completed. An armed terrorist organization will be established when it becomes a suitable structure for the realization of its ultimate aims (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence) in terms of its members, arms and structure. Suitability will be the ultimate test for the creation of an armed terrorist organization that will be constituted with the occurrence of the specific danger, the first armed conduct of the organization under Article 314 of the TCK. According to the Supreme Court of Appeals, the establishment of an armed terrorist organization is completed on the day of its first armed conduct, and the liability of the members of the organization starts from this date.⁸⁰

Following an organization's first 'grave action' involving use of force and violence (such as murder, assassination, bombing, causing bodily injury, etc.) to realize its ultimate aims, the structure will be characterized as an 'armed organization' upon finalization of the judgment.⁸¹ In other words, an armed terrorist organization is established with its first grave action, but its characterization as such becomes final and public after the finalization of the first court ruling to that effect. Therefore, the mental element of alleged membership in a terrorist organization may be assessed in three distinct periods.⁸²

First Period: This is the period prior to the first 'grave' conduct involving force and violence. Prior to the date of the first grave conduct, an armed terrorist

⁷⁹ Güneş, 2021, *Legality of Crimes and Punishments*, p. 16.

⁸⁰ 9th Criminal Chamber of the Supreme Court of Appeals, Date of Decision. 19/4/1999, Case No. 1999/2861, Decision No. 199/1805; Date of Decision. 05/7/1996, Case No. 1996/1935, Decision No. 1996/4324.

⁸¹ Gökhan Güneş, *Silahlı Örgüt Kabulünde En Önemli Unsur Olan 'Matuf (Vahim) Eylem' Bağlamında 15 Temmuz Yargılamaları* [15 July Trials within the Context of the 'Grave' Conduct, the Most Significant Element for the Proscription of an Armed Terrorist Organization], October 18, 2021, at <https://www.drgokhangunes.com/makale/silahlı-orgut-kabulunde-en-onemli-unsur-olan-matuf-vahim-eylem-baglamında-15-temmuz-yargılamaları/>

⁸² Güneş, 2021, *Legality of Crimes and Punishments*, p. 17-18.

organization is not yet established, the fact that all the other elements might have been completed notwithstanding, because the suitability and the specific danger are not yet constituted. It is not possible to become a member of an armed terrorist organization in a situation where the organization itself is not yet established. For this reason, the individuals who were within this structure prior to this date may not be held accountable under Article 314 of the TCK. If the conditions exist, their liability may be examined under Articles 316 (agreement to commit an offense) and 220 of the TCK (criminal organization).

Second Period: This is the period between the date of the first 'grave' conduct and the date of the Supreme Court of Appeals decision upholding a verdict that attested to the existence of an armed terrorist organization. Within this period, there is a pending allegation and a suspicion of the existence of an armed terrorist organization but not yet a final judicial verdict as to the nature of this organization. The individuals within the organization are considered to have acted in good faith and are presumed to not know the structure is an armed organization as the case is still pending. As oblique intent or conscious negligence is not sufficient for the mental element of the crime of membership, the suspect shall not be convicted on the ground that he might foresee or know that this structure is a terrorist organization.

Third Period: This is the period after which the Supreme Court of Appeals upheld a verdict purportedly determining the structure to be an armed terrorist organization. In this period, the existence of the armed terrorist organization may have been established, finalized and become public. The individuals joining or continuing to remain in the structure may be presumed to know the armed terrorist nature of this organization and so the mental element of the crime may be considered to exist. However, as discussed above, the said verdicts of the Supreme Court of Appeals purportedly determining FETÖ/PDY to be a terrorist organization are clearly erroneous. The trial leading to the convictions of the two former judges does not relate to any criminal conduct involving force and violence, let alone any 'grave' conduct such as murder, bombing, armed attack, bodily injury, etc. In the course of the trial and following the coup attempt of July 15, 2016, the 16th Criminal Chamber (as the court of first instance) and the General Assembly of the Criminal Chambers of the Supreme Court of Appeals (as the appellate court) assumed that the events of July 15, 2016 were carried out by

FETÖ, even though these events are the subject of other trials still pending as of the current day.

The date of the finalization of the verdict arguably determining the Gülen movement to be an armed terrorist organization is September 26, 2017, the date when the Supreme Court of Appeals upheld the lower court's ruling. However, none of the said trials has ever examined whether or not the suspect knew and shared this organization's alleged ultimate aims (to abolish or replace the constitutional order of the Republic of Turkey through force and violence and to abolish the government of Turkey through force and violence). Thus, the issue of the mental element of the crime is just ignored. None of the facts relied on as evidence in the trials demonstrates that the suspects knew about the coup attempt, let alone demonstrates that they were involved in the coup attempt in any manner. What the facts may do at best is show the suspect's connection to the Gülen movement. Having a connection or link to a group alone cannot make a person a member of an armed terrorist organization.

5. INTERNATIONAL RESPONSE ON THE VIOLATION OF THE PRINCIPLE OF LEGALITY AND FORESEEABILITY

5.1. United Nations Human Rights Committee, Working Group on Arbitrary Detention and Special Procedures

The United Nations Human Rights Committee and the Working Group on Arbitrary Detention (WGAD) have so far considered a total of 18 cases concerning individuals detained on the basis of their alleged links to the Gülen movement.⁸³ In 16 of those cases, WGAD found a Category V violation (deprivation of liberty, violation of international law, discrimination based on political or other opinion). The significance of these cases is that they point to a clear pattern of arbitrary detention and hence deprivation of liberty despite the absence of criminality on the part of the complainants. The cases also underline that the complainants are arbitrarily deprived of their liberty for the exercise and enjoyment of their fundamental rights.

In one of those applications launched by Turkish individuals who were unlawfully rendered from Malaysia to Turkey, the Human Rights Committee said the

⁸³ FIDU, p. 5.

applicants were arbitrarily detained and deprived of their right to a fair trial after they were transferred to Turkey on accusations of membership in an armed terrorist organization.⁸⁴ The committee held in May 2019 that: “... *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.*”⁸⁵

In another application filed concerning a detention based on the claimant’s attendance at gatherings called ‘sohbet’ organized by members of the Gülen movement, WGAD highlighted the absence of evidence demonstrating any illegal and criminal actions on the part of the complainant. WGAD stated in October 2018 that: “*The Working Group observes that the core of the allegations against Mr. Yayman is his alleged alliance with the Gülen group in 2013, which is said to have manifested itself through his attendance at meetings of the group at that time and his use of the ByLock communications application. However, the Government has failed to show any illegal actions in Mr. Yayman’s conduct which could be construed as Mr. Yayman being a supporter of a criminal organization. His attendance at the talks organized by the Gülen group in 2013 took place well before this organization was designated as a terrorist organization by the Turkish authorities some two years later, and the Government has not shown any evidence that Mr. Yayman’s attendance led to any criminal actions.*”⁸⁶

⁸⁴ Stockholm Center for Freedom (SCF), *Turkey’s Transnational Repression: Abduction, Rendition and Forcible Return of Erdoğan Critics*, October 2021, p. 8-10, at <https://stockholmcf.org/turkeys-transnational-repression-abduction-rendition-and-forcible-return-of-erdogan-critics/>

⁸⁵ Human Rights Committee, Views adopted by the committee under the Optional Protocol, concerning communication No. 2980/2017 (by İsmet Özçelik, Turgay Kahraman and I.A.), CCPR/C/125/D/2980/2017, May 28, 2019, para 9.4, at <https://atlas-of-torture.org/en/entity/bi9w0y3pd7q?page=4>

⁸⁶ Human Rights Council – Working Group on Arbitrary Detention, Opinion No. 42/2018 concerning Mesut Yayman (Turkey), A/HRC/WGAD/2018/42, October 18, 2018, para 86, at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session82/A_HRC_WGAD_2018_42_AEV.pdf



İsmet Özçelik

WGAD further underlined that *“In all those cases, the Working Group has found the detention of the individuals concerned to be arbitrary and it thus appears to the Working Group that a pattern is emerging whereby those who have been linked to the group are being targeted, despite never having been active members of the group or supporters of its criminal activities. The Working Group therefore considers that the detention of Mr. Yayman was arbitrary since it constitutes discrimination on the basis of political or other opinion or status and falls under category V.”*⁸⁷

In applications launched in connection with detention based on the use or downloading of the ByLock application, WGAD has consistently concluded that downloading and using ByLock represents the exercise of a person’s basic right to freedom of opinion and expression: *“Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and it includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audio visual as well as electronic and Internet-based modes of expression.”*⁸⁸ WGAD has repeatedly held

⁸⁷ Opinion No. 42/2018 concerning Mesut Yayman (Turkey), para 107.

⁸⁸ Human Rights Council – Working Group on Arbitrary Detention, Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey), A/HRC/WGAD/2020/30, June 12, 2020, para 86, at https://arrestedlawyers.files.wordpress.com/2019/10/a_hrc_wgad_2020_30_advance_edited_version.pdf

that “in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity by the individual concerned, the detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern.”⁸⁹ WGAD has continuously maintained “even if the [defendant] had used the ByLock application, he/she would merely have been exercising his right to freedom of expression.”⁹⁰

In another application in relation to detention on the basis of the complainant's membership in an association operating legally at the material time, WGAD noted in January 2021 that: “The source alleges, and the Government does not refute, that Ms. Yaşar has been arrested, tried and imprisoned for being a member of Empati Kadın ve İş Derneği (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.” WGAD thus concluded that “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.”⁹¹

In the two most recent applications in 2021, WGAD stated that “The Working Group notes that the present case is the most recent concerning individuals with alleged links to the Fethullah Terrorist Organization/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 Organization/Parallel State Structure (the Hizmet movement) on the discriminatory basis of their political or other opinion.”⁹²

⁸⁹ See for instance Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey), para 87; Opinion No. 74/2020 concerning Nermin Yasar (Turkey), para 66.

⁹⁰ See for instance Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey), para 85; Opinion No. 42/2018 concerning Mesut Yayman (Turkey), para 88.

⁹¹ Opinion No. 74/2020 concerning Nermin Yasar (Turkey), para 65.

⁹² Human Rights Council – Working Group on Arbitrary Detention, Opinion No. 84/2020 concerning Osman Karaca (Cambodia and Turkey), A/HRC/WGAD/2020/84, March 3, 2021, para 75, at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session89/A_HRC_WGAD_2020_84.pdf; Human Rights Council – Working Group on Arbitrary Detention, Opinion No. 66/2020 concerning Levent Kart (Turkey), A/HRC/WGAD/2020/66, February 2, 2021, para 65, at https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session89/A_HRC_WGAD_2020_66.pdf

WGAD also underlined that *“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.”*⁹³ WGAD also began to express its concern that these cases may establish a pattern amounting to crimes against humanity: *“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.”*⁹⁴

Additionally, the Special Procedures (Special Rapporteurs) of the Human Rights Council have repeatedly expressed concerns about the application of the anti-terrorism laws in Turkey through various communications.⁹⁵ For instance, in their communication on August 26, 2020 (Ref No. TUR 13/20), the Special Rapporteurs shared inter alia the following findings: *“...This definition appears to frame “terrorism” primarily by an organization’s political aims rather than the specific conduct of an offender. ... The definition of a “terrorist offender” under article 2 includes any member of an organization with a terrorist aim, even if he or she does not commit a crime in furtherance of the terrorist aim. ... Defining any individual who is deemed a member of a “terrorist organization” as a terrorist offender, regardless of their specific involvement in any criminal conduct, creates an unrestrained definition of a “terrorist offender” that is left open to arbitrary application and abuse.”*⁹⁶

Special Rapporteurs further indicated in their communication on November 10, 2020 (Ref No. TUR 20/2020) in which they requested information about allegations of arbitrary arrest, detention and/or prosecutions of individuals who are teachers, judges, lawyers, military cadets and police officers: *“The grounds and evidence which these accusations rely on consist of activities such as having a*

⁹³ Opinion No. 66/2020 concerning Levent Kart (Turkey), para 65.

⁹⁴ Opinion No. 66/2020 concerning Levent Kart (Turkey), para 67; Opinion No. 84/2020 concerning Osman Karaca (Cambodia and Turkey), para 76.

⁹⁵ Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. Special Procedures have sent the following communications in respect of the anti-terrorism law in Turkey: 11 December 2017 (Ref No. 13/2017); 26 October 2017 (Ref No. TUR 11/2017); 22 February 2018 (Ref No. TUR 3/2018); 4 May 2018 (Ref No. TUR 7/2018); 1 October 2018 (Ref No. TUR 14/2018); 22 October 2018 (Ref No. 15/2018); 23 April 2020 (Ref No. 4/2020); 26 August 2020 (Ref No. TUR 13/20). For Special Procedures of the Human Rights Council see

<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>; for communication report and search see <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>

⁹⁶ Special Rapporteurs’ Communication Reference OL TUR 13/2020, August 26, 2020, at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25482>, p. 5.

bank account at Bank Asya; subscribing to Gülenist affiliated newspapers, journals or magazines; downloading and/or using an application called ByLock; sending their children to schools run by the Gülen Movement; attending religious sermons; participating in diverse activities and events related to the Gülen Movement and similar acts. It appears that none of these activities, in themselves, constitute criminal acts but are rather exercise of rights protected by the International Covenant on Civil and Political Rights (the “ICCPR”).”⁹⁷

UN human rights bodies, namely the Human Rights Committee and WGAD as well as the Special Rapporteurs, have put forward very strong and clear opinions in relation to the applications filed by the complainants who are accused of terrorist links due to their ties to the Gülen movement. These opinions plainly conclude that the government may not justify deprivation of liberty due to the absence of criminality in these cases on the part of the complainants. Therefore, the deprivation of liberty on the basis of alleged membership in an armed terrorist organization is arbitrary as there is no criminal conduct. These opinions further confirm that the complainants are simply deprived of their liberty for the exercise and enjoyment of their rights and on a discriminatory basis on the grounds of political and other opinions. These conclusions support the main thesis of this report that the application of the anti-terrorism law in Turkey in the post-2016 coup attempt trials constitute a clear violation of the principle of legality and no punishment without law. WGAD even goes so far as to state in the recent cases that this pattern of widespread or systematic imprisonment or other severe deprivation of liberty may constitute ‘crimes against humanity’.

5.2. Post-2016 Coup Attempt Cases before the European Court of Human Rights

The violation of the principle of legality and no punishment without law has not yet been specifically and independently addressed by the ECtHR in the post-2016 coup attempt cases. There are, however, a number of ECtHR judgments in which the court has discussed legal issues connected to this principle that may shed light on its prospective approach in pending applications. There are also a good number of existing cases in which the court has dealt with the principle of legality and no punishment without law under Article 7 of the convention.

⁹⁷ Special Rapporteurs’ Communication Reference AL TUR 20/2020, November 10, 2020, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25660>, p. 3.

5.2.1. Tekin Akgün v Turkey⁹⁸

This case concerns the pretrial detention of an applicant suspected of membership in the so-called FETÖ due to his use of the ByLock messaging application. The ECtHR considered that in the absence of other evidence or information, the document in question, which merely states that the applicant was a ByLock user, could not in itself indicate that there were 'reasonable suspicions' that could satisfy an objective observer that he indeed used ByLock in a manner that could amount to the alleged offenses (para 181).

The ECtHR concluded that the evidence available to the judges did not meet the standard of 'reasonable suspicion' required by Article 5 of the convention so as to satisfy an objective observer that the applicant could have committed the offenses for which he was detained (para 182). The court thus held that there had been a violation of Article 5(1) of the convention on account of the absence of 'reasonable suspicion' of the suspect having committed an offense at the time of the applicant's pretrial detention (para 185).

⁹⁸ Tekin Akgün v. Turkey, Application No. 19699/18, July 20, 2021, available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-211233%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-211233%22]})

5.2.2. Alparslan Altan v Turkey,⁹⁹ Hakan Baş v Turkey¹⁰⁰ and Turan and Others v Turkey¹⁰¹



Alparslan Altan shaking hands with then-President Abdullah Gül

The *Alparslan Altan v Turkey* case, among others, concerns the pretrial detention of Alparslan Altan, a member of the Turkish Constitutional Court at the time of his arrest, in violation of the guarantees afforded to all the judges against arrest in order to safeguard the independent exercise of judicial function. The ECtHR considered that *“in general, the principle of legal certainty may be compromised if domestic courts introduce exceptions in their case-law which run counter to the wording of the applicable statutory provisions. In this connection, the Court observes that Article 2 of the [TCK] provides a conventional definition of the concept of in flagrante delicto, which is linked to the discovery of an offense while or immediately after it is committed. However, according to the case-law of the Court of Cassation as cited above, a suspicion – within the meaning of Article 100 of the CMK – of membership of a criminal organization may be sufficient to characterize a case of discovery in flagrante delicto without the need to establish*

⁹⁹ *Alparslan Altan v Turkey*, Application No. 12778/17, April 16, 2019, at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-192804%22%7D>

¹⁰⁰ *Hakan Baş v Turkey*, Application No. 66448/17, March 3, 2020, at <https://hudoc.echr.coe.int/fre#%7B%22documentcollectionid%22%3A%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22%3A%22001-201761%22%7D>

¹⁰¹ *Turan and Others v. Turkey*, Application No. 75805/16 (426 Others), November 23, 2021, at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-213369%22%7D>

any current factual element or any other indication of an ongoing criminal act.” (para 111).

The court concluded that *“the national courts’ extension of the scope of the concept of in flagrante delicto and their application of domestic law in the present case are not only problematic in terms of legal certainty (see paragraph 103 above), but also appear manifestly unreasonable. Accordingly, the applicant’s detention, ordered on the basis of Article 100 of the [TCK] in conditions depriving him of the procedural safeguards afforded to members of the Constitutional Court, did not take place in accordance with a procedure prescribed by law, as required by Article 5 § 1 of the Convention”* (para 115).

The Hakan Baş v Turkey case, among others, concerns the pretrial detention of a judge on the basis of an unreasonable extension of the concept of *in flagrante delicto* and on mere suspicion of membership in an armed terrorist organization without any specific incriminating evidence. The ECtHR considered that *“a crucial factor for the purposes of its assessment as to the lawfulness of the measure in question is that the magistrate’s application of the concept of in flagrante delicto, within the meaning of section 94 of Law no. 2802, was decisive for depriving the applicant of the safeguards afforded to all judges by Law no. 2802. Therefore, taking account of the reasoning adduced by the magistrate in detaining the applicant, the Court does not accept the Government’s argument that the only consequence of applying section 94 was that the decision to detain him was taken by a magistrate’s court lacking territorial jurisdiction. It must be emphasized that it is not for the Court to determine into which category of offenses the applicant’s alleged conduct falls. However, the Court observes that the requirements of legal certainty become even more paramount when it reviews “the manner in which a detention order was implemented from the standpoint of the provisions of the Convention” (see paragraph 144 above), where a judge has been deprived of his liberty”* (para 158).

The court concluded that *“in view of its previous finding that the extensive interpretation of the concept of in flagrante delicto, as applied by the domestic courts, was not in conformity with the requirements of the Convention, the mere application of that concept and the reference to section 94 of Law no. 2802 in the magistrate’s detention order of 20 July 2016 did not, in the circumstances of the present case, fulfil the requirements of Article 5 § 1 of the Convention”* (para

158). The court further held that *“the evidence before it is insufficient to support the conclusion that there was a reasonable suspicion against the applicant at the time of his initial detention. Since the Government have not provided any other indications, “facts” or “information” capable of satisfying it that the applicant was “reasonably suspected”, at the time of his initial detention, of having committed the alleged offense, it finds that the requirements of Article 5 § 1 (c) regarding the “reasonableness” of a suspicion justifying detention have not been satisfied”* (para 195).

The Turan and Others v Turkey case, among others, again relates to the pretrial detention of 427 judges¹⁰² suspected of membership in an armed terrorist organization on the basis of an unreasonable extension of the concept of *in flagrante delicto*. In relation to the ordinary judges and prosecutors, with regard to its considerations in the Hakan Baş case, the court stated that it *“cannot conclude that the pre-trial detention of the applicants who were subject to Law no. 2802 took place in accordance with a procedure prescribed by law within the meaning of Article 5 § 1 of the Convention. Moreover, for the reasons set out above, the Court considers that the measure at issue cannot be said to have been strictly required by the exigencies of the situation (ibid., §§ 159-162)”* (para 91). The court thus held that *“There has therefore been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the pre-trial detention of the applicants who were ordinary judges or prosecutors subject to Law no. 2802 at the time of their detention”* (para 92).

As regards the members of the Supreme Court of Appeals (Court of Cassation) and the Supreme Administrative Court, the court noted that *“the extensive application of the notion of “in flagrante delicto” resulted in the finding of violation of Article 5 § 1 in the aforementioned case of Alparslan Altan (ibid., §§ 104-115). Having regard to the information and documents before it ... the Court sees no reason to depart from its findings in Alparslan Altan (cited above). It finds accordingly that the applicants who were members of the Court of Cassation or the Supreme Administrative Court at the time of their pre-trial detention were similarly not deprived of their liberty in accordance with a procedure prescribed by law, as required under Article 5 § 1. The decision to place these applicants in*

¹⁰² Turan and Others v. Turkey, Application No. 75805/16 (426 Others), November 23, 2021, see Appendix for the list of the applicants who were all judges and prosecutors sitting on the courts of first instance and the Supreme Court of Appeals at the time of their arrest, at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-213369%22%7D>

pre-trial detention may not, moreover, be said to have been strictly required by the exigencies of the situation (*ibid.*, §§ 116-119)” (para 95). The court thus held that “There has therefore been a violation of Article 5 § 1 of the Convention on account of the unlawfulness of the pre-trial detention of the applicants who were members of the Court of Cassation or the Supreme Administrative Court subject to Law no. 2797 or Law no. 2575 at the time of their detention” (para 96).

5.2.3. Selahattin Demirtaş v Turkey (2)¹⁰³

In *Selahattin Demirtaş v. Turkey (2)*, the ECtHR observed 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 offenses within the hierarchical structure of the terrorist organization in question, as required by the case-law of the Court of Cassation” (para 278). The court further considered that “The range of acts that may have justified the applicant’s pre-trial detention in connection with serious offenses 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.” (para 280).



Selahattin Demirtaş

¹⁰³ *Selahattin Demirtaş v. Turkey (No. 2)*, Application No. 14305/17, December 22, 2020, at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-207173%22%7D>

The court further concluded that “... the present case confirms the tendency of the domestic courts to decide on a person’s membership of an armed organization on the basis of very weak evidence ... 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.” (para 337). On that account, the ECtHR held that the terrorism-related offenses at issue as interpreted and applied in the present case were not properly ‘foreseeable.’

5.2.4. Osman Kavala v Turkey¹⁰⁴



Osman Kavala

As regards the Article 5 complaint in this case, the ECtHR observed that the authorities were unable to demonstrate that the applicant’s detentions were justified by reasonable suspicions based on an objective assessment of the acts in question and noted that “the measures were essentially based not only on facts that cannot be reasonably considered as behavior criminalized under domestic law, but also on facts which were largely related to the exercise of Convention rights. The very fact that such acts were included in the bill of indictment as the constituent elements of an offense in itself diminishes the reasonableness of the suspicions in question.” (para 157). The ECtHR therefore concluded that there had

¹⁰⁴ Osman Kavala v Turkey, Application No. 28749/18, December 10, 2019, at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-199515%22%7D>

been a violation of Article 5(1) of the convention *“on account of the lack of reasonable suspicion that the applicant had committed an offense”* (para 159).

As regards the Article 18 complaint in light of the elements in Kavala’s case as a whole, the ECtHR concluded that *“the Court considers it to have been established beyond reasonable doubt that the measures complained of in the present case pursued an ulterior purpose, contrary to Article 18 of the Convention, namely that of reducing the applicant to silence. Further, in view of the charges that were brought against the applicant, it considers that the contested measures were likely to have a dissuasive effect on the work of human-rights defenders. In consequence, it concludes that the restriction of the applicant’s liberty was applied for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offense, as prescribed by Article 5(1)(c) of the Convention. In view of the foregoing, the Court concludes that there has been a violation of Article 18 in conjunction with Article 5 § 1 of the Convention”* (para 232).

5.2.5. Yasin Özdemir v Turkey¹⁰⁵

The Yasin Özdemir v Turkey case concerns the criminal conviction of the applicant for posting comments on social media in April 2015 that were viewed as critical of the government and supportive of the Gülen movement. The ECtHR observed that at the material time no members of the Gülen movement had been finally convicted of being leaders or members of an illegal or terrorist organization, even though the group had been considered dangerous by some parts of the executive (para 40).

The court further noted that Article 215(1) of the TCK provided safeguards against overly broad interpretation of the law to the detriment of accused persons, in particular making the criminalization of statements considered to be praising crime or criminals subject to the condition that those comments gave rise to a clear and present danger to the public order (para 41). The court also observed that the criminal court which had convicted the applicant had considered that the failed military coup which took place in July 2016 long after the applicant had posted his comments in April 2015 had amounted to just such a danger. The court further considered that the applicant could not reasonably be expected to have

¹⁰⁵ Yasin Özdemir v Turkey, Application No. 14606/18, December 7, 2021, at <https://hudoc.echr.coe.int/eng#%5B%22itemid%22%3A%22001-213773%22%5D>

foreseen that the impugned comments, which had opposed the government line but which had constituted peaceful contributions to a public debate and had incited no one to revolt, might give rise to a real and immediate risk of disorder, such as an attempted military coup, over one year later (para 41).

According to the ECtHR, the fact of basing a conviction on circular reasoning, as the court of first instance in question had done, amounted to an excessively broad interpretation of the law and a circumvention by that court of the obstacle set up by the legislature to ambiguous accusations punishing the expression of peaceful opinions in a public debate (para 41). The court consequently concluded that such a broad interpretation of the relevant provision of criminal law (Article 215 of the TCK) had been 'unforeseeable' for the applicant at the material time (para 42). Having established that the interference with the applicant's exercise of his right to freedom of expression had failed to meet the 'quality of the law', the court found that there had been a violation of Article 10 of the convention (para 44).

5.2.6. Ilıcak v Turkey (2)¹⁰⁶

The *Ilıcak v Turkey (2)* case concerns the arrest and pretrial detention of Nazlı Ilıcak, a prominent journalist known for her critical views on the policies of the Turkish government, following the attempted coup of July 15, 2016. The ECtHR considered that at the time of her detention there was no plausible reason to suspect the applicant of having committed the offenses of belonging to a terrorist organization or of attempting to overthrow the government or hindering the exercise of its functions. In other words, the facts of the case do not support the conclusion that there was a plausible suspicion against the applicant. As a result, the suspicions did not reach the minimum level of plausibility required. Although imposed under the control of the judicial system, the disputed measures were therefore based on mere suspicion (para 159).

The court further noted that the writings on which the accusations against the applicant and her pretrial detention had been based concerned debates of public interest relating to facts and events already known, related to the use of the convention freedoms, and neither supported nor promoted the use of violence in the political domain. Nor did they reflect any intention on the applicant's part to

¹⁰⁶ *Ilıcak v Turkey (2)*, Application No. 1210/17, December 14, 2021, at <https://hudoc.echr.coe.int/eng#%5B%22itemid%22%3A%22001-214483%22%5D>

contribute to the illegal aims of terrorist organizations, namely to resort to violence and terror for political ends or to overthrow the government or the constitutional order (para 161).

As regards the applicant's telephone calls to persons working in the press who were subsequently the subject of criminal proceedings, the court considered that these facts could not be regarded as relevant to a finding that there were plausible grounds for suspecting the applicant of belonging to a terrorist organization or of attempting to abolish the constitutional order. In the absence of any incriminating elements in their content, these facts could not be distinguished from the legitimate activities of a journalist of a political opponent (para 152).

The court further considered that the financial documents corresponding to the payment of the applicant's salary by the media for which she worked as a journalist or as a producer of television programs cannot attest, given the usual and common nature of their amount, the existence of a commitment other than that binding a professional journalist to their employers (para 153).



Nazlı Ilıcak

The court also concluded that it could not be considered acceptable for the authorities in the present case to have based their accusations of terrorist activities merely on the applicant's work as a journalist in certain media outlets and in particular on her tweets expressing doubts about the possible perpetrators of the attempted coup (para 143). The court thus found that there had been a violation of Article 5(1) of the convention on account of a lack of plausible reasons to suspect the applicant of having committed a criminal offense (para 163).

5.2.7. Gültekin Sağlam v Turkey¹⁰⁷ (Pending Application)

In the pending case of Gültekin Sağlam v. Turkey, the Italian Federation for Human Rights (FIDU), which presented an expert opinion, stated in October 2021 that the overly broad and vague wording of Turkey's anti-terror legislation 'does not satisfy the quality of law' and therefore is prone to arbitrary use.¹⁰⁸ FIDU maintained that the application of Article 314 of the TCK, which is used to press terrorism charges in the post-2016 coup attempt cases, is 'not foreseeable by any reasonable individual'. In the case referred to, Sağlam's use of the ByLock messaging application, his deposits into his bank account at Bank Asya, which was closed by the government following the coup attempt due to its links to the Gülen movement, and mobile phone records showing that he had been communicating with 24 individuals who had also been prosecuted for membership in the Gülen movement were presented as evidence.

FIDU's expert opinion concluded that *"The list of variables that is being used to ascertain whether the individual concerned is a member of an armed terrorist organization (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"*.¹⁰⁹ Eleonora Mongelli, vice president of FIDU, underlined that *"The principle of no punishment without law requires that the legal provisions be concrete and that any reasonable individual can understand what is forbidden and what would happen if he commits an offense."* Mongelli further maintained

¹⁰⁷ Gültekin Sağlam v Turkey, Application No. 14894/20.

¹⁰⁸ Stockholm Center for Freedom (SCF), Turkey's anti-terrorism legislation lacks quality of law, Italian NGO tells ECtHR: report, October 20, 2021, <https://stockholmcf.org/turkeys-anti-terrorism-legislation-lacks-quality-of-law-italian-ngo-tells-ecthr-report/>; FIDU – Federazione Italiana Diritti Umani (Italian Federation for Human Rights), 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, <https://fidu.it/wp-content/uploads/THIRD-PARTY-INTERVENTION-BY-FIDU-logo-12.10.2021.pdf>

¹⁰⁹ FIDU, para 40.

that “Turkish law is vague, unforeseeable, and its application is not consistent. When it is coupled with the government’s control of the judiciary, its application changes according to political trends. So, yes, it may not be considered legal.”

5.2.8. Yüksel Yalçınkaya v Turkey¹¹⁰ (Pending Application)

In the pending case of Yüksel Yalçınkaya v Turkey, which concerns the conviction of the applicant for membership in a terrorist organization, namely FETÖ/PDY, the ECtHR has posed a series of questions to the Turkish government in relation to the principle of legality and no punishment without law under Article 7 of the ECHR, among other things. The list of questions posed by the ECtHR is as follows:

111

Did the conviction for membership in a terrorist organization hinge upon the existence of a prior judicial decision declaring FETÖ/PDY as a terrorist organization (see Parmak and Bakır v. Turkey, nos. 22429/07 and 25195/07, § 71, 3 December 2019; and compare and contrast Kasymakhunov and Saybatalov v. Russia, nos. 26261/05 and 26377/06, §§84 and 90 14 March 2013)? In this respect, what, if any, is the relevance of the Supreme Court’s judgment dated 24 June 2008, whereby it acquitted Fethullah Gülen of the charges of founding or leading a terrorist organization, from the perspective of the applicant’s complaint under Article 7?

Was the applicant’s conviction for membership in a terrorist organization compatible with the requirements of Article 7 of the Convention? In particular:

Were the domestic legal provisions, on the basis of which the applicant had been convicted, foreseeable in their application? In that connection, could the domestic courts’ interpretation of FETÖ/PDY as a terrorist organization be reasonably foreseen by the applicant at the time of the acts on which his conviction rested?

What are the elements of the offense of membership in a terrorist organization set out under Article 314 § 2 of the Criminal Code, and were those elements present in the applicant’s case? In particular, did the domestic courts duly establish whether the mental element of the relevant offense, as laid down in the case-law of the Court of Cassation, had materialized in the applicant’s case,

¹¹⁰ Yüksel Yalçınkaya v Turkey, Application No. 15669/20, Application Date: March 17, 2020.

¹¹¹ Güneş, *Legality of Crimes and Punishments*.

as required under Article 7 of the Convention (see, for instance, G.I.E.M. S.R.L. and Others v. Italy [GC], nos. 1828/06 and 2 others, §§ 242 and 246, 28 June 2018)?

Was the conviction in question imposed in the absence of any criminally reprehensible conduct on the part of the applicant, as argued by him?

Could the applicant have reasonably foreseen at the material time that the acts attributed to him (i.e., use of ByLock, depositing money in Bank Asya, and membership in a legally recognized trade union and association) would be construed as evidence of the offense of “membership in an armed organization” under Article 314 § 2 of the Criminal Code? Did the application of that provision in the circumstances of the applicant’s case extend the scope of criminal liability for the offense in question in breach of the principle of legality? In any event, was the national courts’ interpretation of Article 314 § 2 of the Criminal Code to the facts of the applicant’s case consistent with the essence of that offense and could it be reasonably foreseen (see, S.W. v. the United Kingdom, 22 November 1995, § 36, Series A no. 335-B; Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; Jorgic v. Germany, no. 74613/01, § 109, ECHR 2007-III and Vasiliauskas v. Lithuania [GC], no. 35343/05, § 155, ECHR 2015)?

These are very critical questions that this report has attempted to address mainly from the perspective of the application of domestic criminal law. Some of these questions have already been addressed by the UN human rights bodies in their recent deliberations. The ECtHR has implied in connection with the list of questions above that it will seek guidance from its earlier case law on Article 7 of the convention. These questions sit at the core of almost all the post-2016 coup attempt cases that should have been addressed by the ECtHR long ago. The succeeding paragraphs provide a snapshot of the court’s responses in similar cases on Article 7.

In Parmak and Bakir v. Turkey,¹¹² the court held that “The Court observes that, in the Turkish legal system, conviction for membership of a terrorist organisation is not made conditional on the existence of a prior judicial decision declaring the same organisation terrorist. More generally, there appear to be no clear rules or

¹¹² Parmak and Bakir v. Turkey, Application Nos. 22429/07 and 25195/07, 3 December 2019, para 71, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-199075%22%7D>

administrative practices for designating an organisation as a terrorist organisation (see paragraph 50 above). Nevertheless, the Court finds relevant the case-law of the Court of Cassation that, where domestic courts are confronted with the task of assessing for the first time whether an organisation can be classified as terrorist, they must carry out a thorough investigation and examine the nature of the organisation by scrutinising its purpose, whether it has adopted an action plan or similar operational measures, and whether it has resorted to violence or a credible threat to use violence in pursuing that action plan (see paragraphs 42 and 45 above)”.

In Kasymakhunov and Saybatalov v. Russia,¹¹³ the court noted that *“It is significant that a conviction for incitement to participate in the activities of a terrorist organisation under Article 205.1 or for founding a criminal organisation under Article 210 has not been made conditional on the existence of a prior judicial decision banning that organisation on the ground of its terrorist, extremist or otherwise criminal nature. It is sufficient for the trial court to establish, on the basis of the evidence provided by the parties, that the organisation in question possesses all the characteristics of a terrorist or criminal organisation as defined by the above-mentioned provisions of the Criminal Code and the Anti-Terrorism Act”* (para 84). The court also observed that *“... under Article 282.2 of the Criminal Code, the founding or membership of an extremist organisation constitutes a criminal offence only if that organisation has been previously dissolved or banned by a final judicial decision on the ground of its extremist activities (see paragraph 58 above). Such a judicial decision was therefore an essential element for a conviction under Article 282.2”* (para 90).

In G.I.E.M. S.R.L. and Others v. Italy [GC],¹¹⁴ the Grand Chamber of the ECtHR concluded that: *“The Grand Chamber endorses the analysis to the effect that the rationale of the sentence and punishment, and the ‘guilty’ concept (in the English version) with the corresponding notion of ‘personne coupable’ (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, a mental link. As is explained in the Sud Fondi S.r.l. and Others judgment (merits, cited above), the principle that offences and sanctions*

¹¹³ Kasymakhunov and Saybatalov v. Russia, Application Nos. 26261/05 and 26377/06, 14 March 2013, paras 84 and 90, at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-117127%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-117127%22]})

¹¹⁴ G.I.E.M. S.R.L. and Others v. Italy [GC], Application Nos. 1828/06 and 2 others, 28 June 2018, paras 242 and 246, at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-184525%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-184525%22]})

must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. This also means that, in principle, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established. There is certainly, as the Italian Court of Cassation noted in the case of *Sud Fondi S.r.l. and Others* (see paragraph 112 of the Court's judgment in that case, *ibid.*), a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. The Grand Chamber thus shares the Chamber's findings in that case to the effect that punishment under Article 7 requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (*ibid.*, § 116)" (para 242).

In *S.W. v the United Kingdom*,¹¹⁵ the court noted that: "Accordingly, as the Court held in its *Kokkinakis v. Greece* judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 (art. 7) is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles, it follows that an offence must be clearly defined in the law. In its aforementioned judgment, the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability." (para 35).

¹¹⁵ *S.W. v the United Kingdom*, Application No. 20166/92, 22 November 1995, para 36, at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57965%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57965%22]})

The court further concluded in S.W. v the United Kingdom that “However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.” (para 36).

In some other cases referred to by the ECtHR in the above-cited list of questions, the references to the earlier case law were repeated. For instance, in Streletz, Kessler and Krenz v. Germany [GC],¹¹⁶ the court reiterated the fundamental principles laid down in its case law on Article 7 of the convention, particularly in S.W. v. the United Kingdom cited above. In Jorgic v. Germany,¹¹⁷ the court repeated its reference to its case law on Article 7 particularly in S.W. v. the United Kingdom and Streletz, Kessler and Krenz v. Germany [GC] cited above. In Vasiliauskas v. Lithuania [GC],¹¹⁸ the court further referred to its case law on Article 7 particularly in S.W. v. the United Kingdom and Streletz, Kessler and Krenz v. Germany [GC] and Jorgic v. Germany cited above. It will be a critical test for the ECtHR to apply the aforementioned principles established in connection with Article 7 to the pending post-2016 coup attempt cases.

6. CONCLUSION

The principle of ‘legality’ and ‘no punishment without law’ aims to determine the conduct that constitutes a crime and the prohibited actions that may entail criminal liability prior to their commission. It is a violation of this principle to accuse an individual of activities that were considered legal at the time of their commission by retrospectively regarding the same activities as a crime or evidence of a crime. This report has convincingly argued that almost all the

¹¹⁶ Streletz, Kessler and Krenz v. Germany [GC], Application Nos. 34044/96, 35532/97 and 44801/98, 22 March 2001 para 50, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-59353%22%7D>

¹¹⁷ Jorgic v. Germany, Application No. 74613/01, 12 July 2007, paras 100-102, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-81608%22%7D>

¹¹⁸ Vasiliauskas v. Lithuania [GC], Application No. 35343/05, 20 October 2015, para 155, at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-158290%22%7D>

criminal trials conducted on alleged 'terrorism' charges since the coup attempt of July 15, 2016 in Turkey are devoid of any legal grounds because, *inter alia*, they are carried out in violation of this principle.

Under the settled case law of the Supreme Court of Appeals, there must be a final judicial decision (*res judicata*) that declares a structure an armed terrorist organization before convicting a person of membership in that armed terrorist organization. The characterization of a structure as a terrorist organization must be carried out in trials dealing with criminal conduct that involves force and violence. Yet the 16th Criminal Chamber has determined the Gülen movement to be an armed terrorist organization by merely presuming that the armed actions on July 15, 2016 were carried out by this group without actually undertaking a criminal trial in relation to these actions. This erroneous acceptance, which is also in violation of the principle of presumption of innocence, is nevertheless relied upon by criminal courts across the country.

The suspects in these criminal proceedings are declared to be members of an armed terrorist organization (FETÖ) on the basis of their legal and innocuous activities that did not involve any participation in the coup attempt of July 15, 2016 or any violent acts under Article 314 of the TCK. The legal and routine activities involving the exercise and enjoyment of fundamental rights are used by the judicial authorities to demonstrate the connection of the individuals to the Gülen movement. Consequently, this real or presumed connection to the Gülen movement or participation in its activities is then categorically interpreted as evidence of membership in an armed terrorist organization (FETÖ).

The abortive putsch of July 15, 2016 is considered to be the first alleged armed conduct of the so-called FETÖ by the Supreme Court of Appeals (albeit erroneously in many respects), and the first judicial decision purportedly determining the movement to be a terrorist organization is considered to have been finalized on September 26, 2017. Despite this arguable acceptance, the legal and routine conduct of alleged members of the Gülen movement preceding the above-mentioned dates was taken as evidence of membership in FETÖ. Whether or not the suspect knew about the alleged terrorist nature of this structure prior to these dates was never examined. The criminal courts only examined whether or not the suspect was a member of the Gülen movement but did not assess if

the suspect then knew about the alleged armed terrorist nature of the organization.

It has been very clear from the outset that the purges and prosecutions carried out by the government in the aftermath of the July 15, 2016 coup attempt and endorsed by the judiciary on allegations of membership in an armed terrorist organization (the so-called FETÖ) have been erroneous and malicious. The absence of legality and criminality in the post-2016 coup attempt prosecutions and trials had been raised by some international institutions as early as 2016. For instance, the Venice Commission¹¹⁹ and European Human Rights Commissioner Nils Muižnieks¹²⁰ had underlined the absence of criminality and the violation of the principle of legality in their reports.

UN human rights bodies, namely the UN Human Rights Committee and WGAD as well as Special Rapporteurs have been particularly prompt to pick up some of these defects and anomalies in judicial practice exacerbated by the continuing political atmosphere since the coup attempt. In particular, WGAD has drawn very strong and plain conclusions in relation to the applications involving the complainants accused of membership in the so-called FETÖ. It has concluded in many applications that the deprivation of liberty on the basis of alleged membership in the Gülen movement is arbitrary because there was no criminal conduct or criminality on the part of the complainants. The complainants were simply deprived of their liberty for the exercise and enjoyment of their fundamental rights. WGAD even went as far as to state that this pattern of widespread or systematic imprisonment or other severe deprivation of liberty may constitute 'crimes against humanity'.

The principle of legality and no punishment without law under Article 7 of the ECHR has not yet been specifically and independently addressed by the ECtHR in the post-2016 coup attempt cases, even though some of its constituents have been partly examined in recent cases. The ECtHR has been too slow to address the most vital questions in the post-2016 coup attempt cases on alleged membership in FETÖ/PDY. Despite the positive signs in some of its recent cases as outlined above, the most fundamental issues in the post-2016 coup attempt

¹¹⁹ Venice Commission Opinion No. 831/2015, para 106.

¹²⁰ Commissioner for Human Rights, *Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey*, CommDH(2016)35, Strasbourg, October 7, 2016, para 20-21, at [https://rm.coe.int/ref/CommDH\(2016\)35](https://rm.coe.int/ref/CommDH(2016)35)

cases, i.e., the absence of criminality and criminal conduct, the non-existence of an armed terrorist organization and membership in an armed terrorist organization at least at the material time, have yet to be properly and comprehensively addressed by the ECtHR.

It will be a key moment for the many seemingly 'terrorism' related charges and prosecutions in Turkey that the absence of criminality and of membership in an armed terrorist organization are addressed promptly and properly in line with the principle of legality and no punishment without law. This report has brought together both the domestic and the international law aspects of the principle together with a snapshot of the ECtHR's case law on Article 7. The extra time afforded the ECtHR to address the core questions in the post-2016 coup attempt cases has long since passed. It is now high time for the ECtHR to examine the said core issues in connection with Article 7 in these cases. The court does not need to create new jurisprudence or be innovative in addressing the issue. All that is required from the court is to look at its own case law but to do that promptly and apply the principle as enshrined under Article 7 of the convention to the particular circumstances of the pending cases.