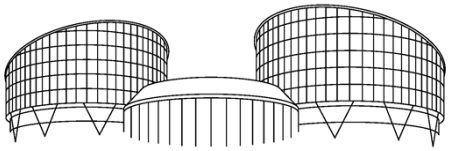


EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FORMER SECOND SECTION

CASE OF SELAHATTİN DEMİRTAŞ v. TURKEY

(Application no. 15028/09)

JUDGMENT

STRASBOURG

23 June 2015

FINAL

23/09/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Selahattin Demirtaş v. Turkey,

The European Court of Human Rights (Former Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Egidijus Kūris,
Robert Spano, *judges,*
and Abel Campos, *Deputy Section Registrar,*

Having deliberated in private on 19 May 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 15028/09) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Selahattin Demirtaş ("the applicant"), on 13 February 2009.

2. The applicant was represented by Mr F. Duran, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 18 March 2013 the application was communicated to the Government.

4. On 25 September 2013 the Government submitted their observations in response to the question put to them under Article 8 of the Convention.

5. By a letter dated 8 November 2013, the Government informed the Court that they wished to withdraw their observations of 25 September 2013 on the admissibility and merits of the application.

6. On 3 December 2013 the parties were informed that the President of the Section had accepted the Government's request to withdraw the aforementioned observations.

7. On 8 July 2014 the Chamber decided, under Rule 54 § 2 (c) of the Rules of Court, to invite Government to submit further written observations under Articles 2 and 13 of the Convention.

8. On 15 September 2014 the Government submitted their further observations. The applicant made no submissions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1973 and lives in Diyarbakır. At the time of the events giving rise to the present application, the applicant was a member of the DTP (Party for a Democratic Society), a pro-Kurdish political party whose dissolution was ordered by the Constitutional Court in 2009, and a member of the Parliament of Turkey. The applicant is currently the co-chair of the HDP (People's Democratic Party).

10. In 11 October 2007 an article entitled "Turk, here is your enemy" *(Türk, işte karşında düşmanın)* was published in a Bolu local newspaper, the *Bolu Express*. The article in question was also published on the newspaper's website. In it, the author, Mr I.E., made the following statements:

"TURK, HERE IS YOUR ENEMY

Here are some newspaper titles from the last few days:

- A landmine exploded in Diyarbakır. One non-commissioned officer was martyred and three privates were injured.

- Twelve village guards were killed while returning to their village in Beytüşşebap.

- Attack on a military unit with a rocket-propelled grenade in the Başkale district of Van. A soldier was martyred.

- A landmine exploded in the region of Namaz mountain, in Şırnak. A specialist sergeant was martyred.

- Ambush in the region of Gabar mountain, in Şırnak. 13 soldiers were martyred.

These are news articles which we have come across by chance over the last week or ten days.

I would not be surprised if, after research, we found other similar news stories.

For almost 25 years, you have deceived us with statements such as 'they will be avenged', 'we are more determined than ever' or 'we will eradicate it'.

We have had enough of your lies and fairy tales.

Civilians and the military, are you fooling children?

Or are you mocking the nation?

Can there be a State or an army which cannot defeat three to five thousand 'looters'?

Shame on you, since you cannot defeat them.

If you are a State, be a State. If you are the Legislature, act as one. If you are the Government, govern. If you are the Judiciary, do what you have to do.

It is enough. This has been the last straw!

We went crazy when we heard that thirteen soldiers from the Bolu Commando Brigade had been killed last Sunday.

How can one preserve one's sanity?

While the instigators of the terrorists who kill our soldiers, policemen, civilians and our protectors without hesitation are under the roof of the Grand National Assembly of Turkey,

While there are DTP mayors and provincial and district administrators who call these terrorist murderers 'my brothers/my sisters' and who wash the carcasses of terrorists who die like dogs,

Is it right to chase those who are in the mountains? Are the hit men the real murderers?

Do you know who the real murderers are?

The real murderers are those who use yellow, green and red, the colours of the PKK[1], in their political party's flag. They are those who back the bullets of the members of the PKK, murdering bastards, and who call them their brothers and sisters. The real murderers are those who instigate murder.

They are: the President of the DTP (Party for a Democratic Society) A.T; the DTP's Members of Parliament, namely A.A.A., B.Y., M.N.K., A.B., Selahattin Demirtaş, G.K., A.T., P.B., S.T., E.A., S.S., M.N.Y., O.Ö., İ.B., S.B., H.K., Ş.H., F.K., Ö.Ü.; the members of the DTP's executive council ... and all DTP mayors and presidents of DTP provincial and district branches.

Great Turkish Nation, here is your enemy.

These persons will be the target of 'civilian patriots' as the enemies of Turks, if they do not state that the PKK is a separatist terrorist organisation and that its members are traitors.

Instead of chasing the terrorists in the mountains, a few microbes should be 'wiped out' and the question should be put to them – 'one from us, five from you: do you still wish to continue?' Of course, there will be patriots who will be able to do this. This is society's intense desire.

It is now the majority's wish that for every security officer who is killed, one of these people should share the same fate. It is time to cut out those organs which suffer from necrosis.

...

May God rest the souls of our martyrs and give patience to their families. We sincerely share their pain. We also offer our condolences to the Bolu Commando Brigade.

Tomorrow is the sacred Eid. Could you celebrate if you were the parents or siblings of one of the thirteen brave soldiers who lost their lives for their country in the region of Gabar mountain, in Şırnak? Think about it. May your Eid be blessed although it is sad and painful."

11. On 2 November 2007 the applicant's lawyer filed a petition with the Bolu public prosecutor's office, requesting that a criminal investigation be initiated and that Mr I.E. be punished for incitement to commit a crime and incitement to disrespect the law, and for insulting his client. The lawyer also

1. An illegal armed organisation.

noted that Mr I.E. had committed these offences through the press. In his petition, the applicant's lawyer stressed that two recent murders (those of Andrea Santoro, a Catholic priest, and Hrant Dink, the editor-in-chief of AGOS, a bilingual Turkish-Armenian newspaper published in Istanbul) had been committed subsequent to publication of articles on the Internet. He stated that the content of the article openly incited society to kill the persons listed in it, including the applicant, and that by using the expression "murderer" in respect of the applicant, the author had insulted him.

12. On an unspecified date Mr I.E. sent a petition to the Bolu public prosecutor containing his defence submissions. He maintained at the outset that he had defended the Turkish Republic and the Turkish military forces throughout his life. He further contended that, had he committed an offence in his article as alleged by the complainant, then he had committed it under severe provocation. He submitted that the complainant had never condemned the PKK's activities and that he had referred to PKK members as "brothers and sisters". Mr I.E. noted that he had been demonstrating solidarity with the families of the martyrs killed by the terrorists and that, were his solidarity to be regarded as an offence, then as a Turkish nationalist he was proud of committing the offence in question. He also claimed that he had criticised the DTP's ideology and activities in his article and had intended to inform society. He contended that a case had been brought before the Constitutional Court for the DTP's dissolution, and that the content of his article had been similar to the indictment brought by the Chief Public Prosecutor at the Court of Cassation in that case. He had not used the word "Kurdish" in his article, since he accepted all citizens of Turkey as Turkish. Until the complainant stated "How happy is he who says 'I am a Turk'", he would struggle against him. He also maintained that in view of the hundreds of cases brought against DTP members on charges of separatism, aiding and abetting the PKK and hostility towards the State, the complainant had been shameless in daring to file a complaint against him. He further noted that he had targeted those who were terrorists, that is, PKK members, and if the complainant considered himself the subject of the article, then he (Mr I.E.) had been right to identify him as a target. Mr I.E. maintained that nobody had been hurt as a result of his article, but that many people had died as a result of terrorism. At the end of his submissions, he again noted that the applicant had been unable to say "How happy is he who says 'I am a Turk'" and that, therefore, the applicant's Turkishness was open to doubt.

13. On 7 December 2007 the Bolu public prosecutor decided not to bring criminal proceedings against Mr I.E. In his decision, the public prosecutor stated that the article had been drafted as a reaction to the PKK, an organisation recognised internationally as a terrorist organisation, which had carried out acts of terrorism and killed both civilians and soldiers. According to the public prosecutor, after listing the killings committed by

the PKK, the author had stated his opinion as to why society and the State should act together against the killings committed by the PKK and had articulated public reaction and anger in the face of those killings. The author had even criticised the State's activities in relation to acts of terrorism. The Bolu public prosecutor held that Mr I.E. had severely criticised the DTP, which had not condemned the PKK's illegal activities and which was considered to have failed to act side by side with society and the State. The public prosecutor considered that the article expressed the author's opinions and offered a number of proposals with a view to eradicating the terrorist organisation in issue.

14. The Bolu public prosecutor further noted that the PKK's supporters had described the organisation's so-called political aims in the press and elsewhere, although its activities had created great anger and hatred in society. The public prosecutor maintained that articles had also appeared in the press expressing society's anger and hatred. In spite of all these publications, there had been no armed conflict between different ethnic groups in Turkey, due to the culture of tolerance, respect and understanding which existed in the country. The Bolu public prosecutor stated that in the light of the aforementioned sociological and political background in Turkey, the article should be considered as using freedom to disseminate information, to criticise and to comment within the context of freedom of the media, given that it contained somewhat exaggerated criticism of a political party, its members and activities.

15. In his decision, the public prosecutor considered that the case was comparable to another case. According to the judgment in that case, which contained a reference to the Court's judgment in *Prager and Oberschlick v. Austria* (26 April 1995, Series A no. 313), in cases concerning defamation, if a factual basis existed, then certain expressions could not be regarded as extreme. Considering that freedom of the media included the expression of social reactions and opinions using strong language, and referring to the above-mentioned domestic judgment, the public prosecutor concluded that there was no reason to bring a case against Mr I.E.

16. On 30 July 2008 the applicant's lawyer objected to the decision of 7 December 2007. In his pleadings, the lawyer reiterated the arguments contained in the submissions of 2 November 2007. He further maintained that the content of Mr I.E.'s article had been alarming and that the DTP members who were named in the article had been marked as targets on account of their adherence to a political opinion. He also noted that the applicant had not been alone in being affected by the article's content; it posed a further threat to society as a whole. Lastly, the applicant's lawyer contended that the public prosecutor's finding that there had been a factual basis for the author's expressions in the article demonstrated that he had taken the applicant's political identity into account in issuing his decision.

17. On 21 August 2008 the Düzce Assize Court dismissed the applicant's objection, holding that the decision of 7 December 2007 had been correct. On 18 September 2008 this decision was served on the applicant's lawyer.

18. In October 2008 a number of news reports were published in the national press and on the Internet, according to which Mr Mehmet Ali Şahin, Minister of Justice at the relevant time, had set out his position with regard to the investigation into Mr I.E. Mr Şahin stated that, in his view, the content of the article in issue should not have been protected within the scope of the right to freedom of thought and expression. The Ministry of Justice would therefore apply to the Court of Cassation and request that the decision of 21 August 2008 be quashed.

19. On 15 October 2008, through the public prosecutor's office at the Court of Cassation, the Ministry of Justice applied to the Court of Cassation.

20. On 30 September 2009 the Court of Cassation issued its decision on the Ministry's request. It noted that the applicant had lodged his objection to the decision of 7 December 2007 outside the relevant time-limit and that the Düzce Assize Court had incorrectly examined the decision on the merits. Considering that the Düzce Assize Court's decision had nevertheless brought about the correct result, namely dismissal of the objection, the Court of Cassation dismissed the Ministry's request.

II. RELEVANT DOMESTIC LAW

21. Articles 125, 214 and 217 of the Criminal Code provide, in so far as relevant, as follows:

Article 125
Defamation

"(1) A person who acts with intent to harm the honour, reputation or dignity of another person through specific conduct or by giving the impression of intent, shall be sentenced to a term of imprisonment ranging from three months to two years, or to a judicial fine ...

(2) Where the offence is committed through a written, audio or visual message directed to the aggrieved party, the offender shall be subject to the aforementioned sentence.

...

(4) Where the defamation is public, the sentence shall be increased by one sixth.

..."

Article 214
Incitement to commit an offence

"(1) A person who openly incites another person to commit an offence shall be sentenced to a term of imprisonment ranging from six months to five years.

(2) A person who arms one section of the public against another part and incites them to kill each other shall be sentenced to a term of imprisonment ranging from fifteen to twenty-four years.

(3) If the offences which were incited are actually committed, the inciting person shall be sentenced as an instigator."

Article 217
Incitement to disobey the law

"Anyone who openly incites the population to disobey the laws shall be sentenced to a term of imprisonment ranging from six months to two years or to a judicial fine, provided that the incitement is capable of breaching public order."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

22. The applicant complained under Articles 2 and 13 of the Convention that although he had been exposed to a risk of death on account of the content of the article published in the *Bolu Express* on 11 October 2007, which had contained an invitation to kill him and a number of other members of the DTP, the domestic authorities had failed to punish Mr I.E., the author of the article in question, and to inform him of their decision in a timely manner.

The Court considers that these complaints should be examined solely from the standpoint of Article 2 of the Convention (see *Opuz v. Turkey*, no. 33401/02, § 205, ECHR 2009), which reads as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

23. The Government contested the applicant's arguments.

A. Admissibility

24. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

25. The applicant contended that the author of the impugned article had claimed that the killing of the persons listed, including himself, would maintain the country's security and that the domestic authorities had failed to punish the author of the article, despite the dangerous nature of the text. He submitted that a number of murders and massacres had occurred in Turkey in the past following the publication of press articles inciting people to violence. In this connection, the applicant referred to the 1955 "Istanbul Pogrom", which resulted in the killing of more than 20 members of Istanbul's Greek and Armenian communities, the killing of 150 Alevi adherents in Kahramanmaraş in 1978, and of 37 persons, including prominent Alevi intellectuals, in Sivas in 1993; most recently, Hrant Dink had been murdered in the same year as Mr I.E.'s article had been published. The applicant therefore considered that he had run the risk of being targeted following the article's publication. The applicant further submitted that by concluding that there had been a factual basis for the article's content and that it had remained within the boundaries of acceptable criticism, the domestic authorities had failed to protect him and had even penalised him for his political stance.

26. The Government submitted that the applicant had not been subject to any physical or verbal violence subsequent to the publication of the article. They further maintained that the applicant had requested the public prosecutor's office to punish the author of the article published in the *Bolu Express* and had not requested security protection. The Government therefore considered that there had been no violation of Articles 2 and 13 of the Convention in the present case. They stated, however, that the applicant's complaints under this head should be examined under Article 8 of the Convention. At the same time, the Government did not submit any observations under Article 8 and left it to the Court's discretion to rule on the applicant's complaints under this head.

2. The Court's assessment

27. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life,

but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports of Judgments and Decisions* 1998-III). The State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII; *Opuz*, cited above, § 128; and *R.R. and Others v. Hungary*, no. 19400/11, § 28, 4 December 2012).

28. That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision (see *Tanrıbilir v. Turkey*, no. 21422/93, § 71, 16 November 2000, and *Choreftakis and Choreftaki v. Greece*, no. 46846/08, § 46, 17 January 2012). For the Court, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case (see *Osman*, cited above, § 116, and *R.R. and Others,* cited above, § 29).

29. So far the Court has dealt with various situations engaging the States' positive obligations to protect the right to life under Article 2 of the Convention from the criminal acts of a third party. It has thus, by applying the test set out in the *Osman* judgment, defined the scope of these obligations in instances concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential targets of a lethal act as entailing the necessary analysis of whether there was any

decisive stage in the sequence of events leading up to the deprivation of life when it could be said that the authorities knew, or ought to have known, of a real and immediate risk to the life of the individual, and whether they failed to take the necessary measures to avoid that risk (see, for example, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 57, ECHR 2002–II (murder of a prisoner); *Branko Tomašić and Others v. Croatia*, no. 46598/06, §§ 52-53, 15 January 2009; and *Opuz*, cited above, § 129, (killings in the context of domestic violence); *Van Colle v. the United Kingdom*, no. 7678/09, § 88, 13 November 2012 (killing of a witness); *Kılıç v. Turkey*, no. 22492/93, § 63, ECHR 2000‑III; and *Mahmut Kaya v. Turkey*, no. 22535/93, § 88, ECHR 2000‑III (killing of an individual in a conflict zone); and *Yabansu and Others v. Turkey*, no. 43903/09, § 91, 12 November 2013 (killing of an individual by a third party during military service), cited in *Bljakaj and Others v. Croatia*, no. 74448/12, § 107, 18 September 2014).

30. The Court further notes that Article 2 of the Convention may come into play even though the person whose right to life was allegedly breached did not die. For example, in the above-mentioned case of *L.C.B. v. the United Kingdom*, the Court examined, on the merits, the allegations made under Article 2 by the applicant, who was suffering from leukaemia and complained about the State's failure to warn her parents of the possible risk to her health caused by her father's participation in nuclear tests (see *L.C.B.,* cited above, §§ 36-41). Similarly, in the *Osman* case, the Court examined the State's obligation to protect the right to life of Ali and Ahmet Osman, although the latter had not lost his life but was wounded in a shooting incident (see *Osman*, cited above, §§ 115-122). In a number of other cases, the Court considered that Article 2 was applicable to non-fatal shootings where the applicants' lives had been put at serious risk as a result of the conduct of the security forces or third persons (see, for example, *Makaratzis v. Greece* [GC], no. 50385/99, § 49-55, ECHR 2004-XI; *Soare and Others v. Romania*, no. 24329/02, §§ 108-109, 22 February 2011; *Trévalec v. Belgium*, no. 30812/07, §§ 55-61, 14 June 2011; *Sašo Gorgiev v. the former Yugoslav Republic of Macedonia*, no. 49382/06, § 29, ECHR 2012 (extracts); and *Yotova v. Bulgaria*, no. 43606/04, § 69, 23 October 2012).

31. Most recently, in the aforementioned judgment in the case of *R.R. and Others v. Hungary* (cited above, §§ 26-32), the Court considered that the removal of four of the five applicants from the witness protection scheme in Hungary had constituted a breach of the State's positive obligation to protect their right to lives, although they did not lose their lives, since there had been a real and immediate risk (known to the national authorities) to the lives of those individuals, necessitating protection of the applicants within the witness protection scheme. Noting the Government's failure to show in a persuasive manner that the risk in question had ceased

to exist and the inadequacy of the measures taken to protect the applicants' lives subsequent to their removal from the witness protection scheme, the Court concluded that the Hungarian authorities' actions fell short of the requirements of Article 2 of the Convention.

32. In the present case, the Court must determine whether the applicant's complaints raise an issue under Article 2 of the Convention in the light of the principles enunciated in its above-mentioned case-law. To this end, the Court must examine the questions of whether there was a real and immediate risk to the applicant's life, known or ought to be known to the authorities, and whether the national authorities did all that could be reasonably expected of them to avoid that risk.

33. In this connection, the Court observes that in the petition dated 2 November 2007 and submitted to the Bolu public prosecutor's office, the applicant's lawyer requested that Mr I.E. be punished for incitement to commit a crime and incitement to disrespect the law, and for insulting his client (see paragraph 11 above). The applicant's representative did not allege in his petition that his client faced a real and immediate risk to his life. Nor did he claim, before the national authorities or the Court, that the applicant had received actual threats from third persons following the publication of the article of 11 October 2007. The applicant and his representative did not allege that the applicant had become the victim of a campaign of violence and intimidation and that the national authorities had failed to take measures for his protection although they were aware of this campaign. Similarly, the applicant did not allege, before the Court, that there had been actual or attempted physical violence against him which had or could have placed his life in danger in a manner comparable to the cases mentioned in paragraph 31 above.

34. Moreover, there is nothing in the case file to indicate that the national authorities should have taken operational measures to protect the applicant on account of an intimidation campaign, even though he did not request such protection (compare with *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, §§ 73-74, 14 September 2010). In fact, the Court does not know whether the applicant was afforded protection by the State authorities subsequent to the publication of the article of 11 October 2007 and, if so, whether those protective measures were adequate, given that these issues were neither the subject matter of the domestic proceedings which constituted the basis of the present application nor discussed by the parties before the Court.

35. Lastly, the Court recalls that the applicant's complaint is limited to the domestic authorities having failed to punish Mr. I.E. and is not directed at their inaction in taking operational measures to prevent a real and immediate risk to his life. Against this background and in the particular circumstances of the present case, the Court considers that the applicant has not shown that there was a real and immediate risk to his life and that the

national authorities were aware of that risk and failed to take the necessary operational measures to avoid it. The circumstances of the present case do not therefore engage the State's positive obligation under Article 2 of the Convention. The Court however emphasises that this conclusion should not be interpreted as an endorsement of the decisions of the domestic judicial authorities, namely the Bolu public prosecutor, the Düzce Assize Court and the Court of Cassation.

36. There has accordingly been no violation of Article 2 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 9, 10 AND 14 OF THE CONVENTION

37. The applicant complained under Articles 9 and 10 of the Convention about the Bolu public prosecutor's assessment that there had existed a factual basis for the content of the article. In this connection, the applicant contended that the domestic authorities had refrained from providing judicial protection on account of his political opinions. He further alleged under Article 14 of the Convention that he had been discriminated against on the basis of his political opinions on account of the domestic authorities' decisions.

38. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that these complaints do not disclose any appearance of a violation of any of the above Articles of the Convention. It follows that this part of the application is inadmissible as manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares,* unanimously, the complaints under Articles 2 and 13 of the Convention concerning the domestic authorities' alleged failure to punish the author of the article published in the *Bolu Express* on 11 October 2007 admissible and the remainder of the application inadmissible;

2. *Holds,* by six votes to one, that there has been no violation of Article 2 of the Convention.

Done in English, and notified in writing on 23 June 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Karakaş;

(b) Dissenting opinion of Judge Kuris.

G.R.
A.C.

CONCURRING OPINION OF JUDGE KARAKAŞ

I voted with the majority in finding no violation of Article 2 of the Convention given that within the framework of the existing case-law of the Court, it could not be concluded that there had been a real and immediate risk to the applicant's life. I consider that only the Grand Chamber could adopt a new approach *vis-à-vis* the positive obligations under Article 2 of the Convention in the context of the present case.

Nevertheless, in my opinion, the applicant's submissions under Articles 2 and 13 of the Convention could also have been examined from the standpoint of Article 8 of the Convention as they concerned the alleged failure of the domestic authorities to fulfil their positive obligation to secure respect for the applicant's personal integrity in the face of the allegedly gratuitous personal attacks contained in the article of 11 October 2007 and to issue decisions with a deterrent effect with regard to incitement to violence (see, *mutatis mutandis*, *A. v. Croatia*, no. 55164/08, § 57, 14 October 2010, and *Hajduová v. Slovakia*, no. 2660/03, § 49, 30 November 2010). Indeed, the respondent Government were requested to reply to a question put under Article 8 of the Convention at the communication stage. I also consider that the Chamber should have found a breach of Article 8, for the following reasons.

According to the Court's case-law, the physical and psychological integrity of an individual is covered by the concept of private life within the meaning of Article 8 of the Convention (see *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 65, 12 June 2008). While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective "respect" for private and family life, and these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves (see *Sandra Janković v. Croatia*, no. 38478/05, § 44, 5 March 2009; *A. v. Croatia*, cited above, § 59; *Hajduová*, cited above, § 45; *Kalucza v. Hungary*, no. 57693/10, § 58, 24 April 2012; and *Eremia v. the Republic of Moldova*, no. 3564/11, § 72, 28 May 2013).

I consider that in the instant case, the Court should have examined whether the content of the above-mentioned article could have created a well-founded and genuine fear on the part of the applicant and, if so, whether the Government succeeded in adopting measures designed to secure respect for the applicant's psychological integrity with a view to determining whether the national authorities fulfilled their positive obligation under Article 8 of the Convention.

In the case at hand, Mr I.E.'s article was published in the *Bolu Express* on 11 October 2007 and was also made available on the Internet. It was written following the killing of a number of security officers and, in particular, thirteen soldiers from the Bolu Commando Brigade, allegedly by

the PKK. Given that serious disturbances had raged between the security forces and the members of the PKK since approximately 1984, resulting in very heavy loss of life, it can be concluded that there was a public interest in addressing the issue of the killing of members of the security forces.

However, the article in question listed the names of a number of well-known DTP members, including Mr Selahattin Demirtaş, referring to them as "the real murderers". In addition, the author explicitly stated that some members of Parliament were "the instigators of the terrorists" (see paragraph 10 of the judgment). Although in his statements to the Bolu public prosecutor Mr I.E. maintained that he had been referring to PKK members in his article, he also stated that if the complainant considered himself the subject of the article, then he had been right to identify him as a target. Mr I.E. further noted that the DTP had been the object of many sets of criminal proceedings and that its members had failed to condemn terrorist attacks (see paragraph 12 of the judgment). He maintained that as a Turkish nationalist he would be proud of committing an offence against the applicant if his words were to be seen as an offence. It appears from both his article and Mr I.E.'s statements to the Bolu public prosecutor that the author held the DTP members listed in the article, including the applicant, responsible for the killing of security forces in the context of the conflict in south-east Turkey, since, in the author's view, they had not condemned the killings of the security officers. Moreover, after listing the names of the applicant and other well-known members of the DTP, Mr I.E. stated that those persons were the enemy of the Turkish nation and invited "civilian patriots" to target them. He claimed that it was the majority's desire to see that, for every security officer who was killed, one of those people should share the same fate (see paragraph 10 of the judgment).

In my view, the principal message to the reader was that recourse to violence towards the DTP members was a necessary and justified measure. By describing the applicant and the other members of the DTP as the enemy who ought to be targeted by patriots, Mr I.E. stirred up hatred for them and exposed them to a possible risk of physical violence at the hands of others. I therefore consider that Mr I.E.'s article contained incitement to hatred and violence against a group of persons, including the applicant, on account of their political identity and expressed intolerance towards them through aggressive nationalism. The expressions contained in the article may even be described as hate speech in the light of the definition set out in the Appendix to Recommendation no. R (97) 20 of the Committee of Ministers to member States of the Council of Europe.

Statements which constitute incitement to violence not only arouse a well-founded fear and render the persons in question vulnerable to violence, but also run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention, as well as to the founding principles of a pluralist democracy (see *Gündüz v. Turkey* (dec.), no. 59745/00, ECHR

2003-XI (extracts)). The States Parties therefore have a duty to protect the psychological integrity of those who become the target of expressions which contain incitement to violence and who have a well-founded fear. Thus, in its judgment in the case of *Cumpănă and Mazăre v. Romania* [GC] (no. 33348/96, § 115, ECHR 2004-XI), the Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights were seriously impaired, as, for example, in the case of hate speech or incitement to violence.

I consider that the applicant had a well-founded and genuine fear of being a target of potential acts of violence and, therefore, the Government's positive obligation to secure respect for his moral integrity was engaged. Thus, the national authorities should have conducted an effective investigation into the applicant's complaints and the Court should have examined whether the investigation conducted by the national authorities complied with the requirements of Article 8 of the Convention (compare with *Karaahmed v. Bulgaria*, no. 30587/13, § 110, 24 February 2015).

In this regard, it should be noted that Articles 214 and 217 of the Criminal Code appear to provide an adequate legal framework for imposing a sanction against incitement to violence in Turkey (see paragraph 21 of the judgment). However, the national authorities' decisions fell foul of the requirements of Article 8 of the Convention. In particular, there is nothing in the Bolu public prosecutor's and the Düzce Assize Court's decisions of 7 December 2007 and 21 August 2008 to indicate that the applicant had been involved in or committed any offence, in particular the killing of security officers. The Bolu public prosecutor considered that the DTP had not condemned the PKK's activities and had failed to share the view of society and the State (see paragraph 13 of the judgment). It appears that the Bolu public prosecutor's conclusion that there was a factual basis for Mr I.E.'s statements in his article was founded on this perceived failure by the DTP members to react to the PKK's activities. In my view, this could not serve as the basis of statements such as "the real murderers" or "the instigators of the terrorists". I therefore consider that the public prosecutor did not attempt to distinguish between criticism of the political stance of DTP members, including the applicant, and marking them as targets in his decision. Nor did he examine whether Mr I.E. had acted in accordance with the ethics of journalism.

More importantly, the Bolu public prosecutor, the Düzce Assize Court and the Court of Cassation did not give due consideration to the applicant's rights to respect for his psychological integrity and to freedom from fear. In particular, the national authorities failed to carry out an adequate assessment of the possible impact on the applicant's personal integrity of the extremely alarming expressions contained in the article, such as those marking

Mr Selahattin Demirtaş and the other DTP members as "the enemy of the Turkish nation" and targets for "civilian patriots", and those referring to "wiping out of microbes".

Furthermore, as noted above, at the time of the publication of Mr I.E.'s article, armed clashes between the security forces and PKK members, which had caused the deaths of thousands of people, had been continuing for more than twenty years. Moreover, as the applicant submitted, on 19 January 2007, – that is, at the beginning of the same year – Hrant Dink was assassinated after an intimidation campaign carried out by ultra-nationalists (see *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010). In such a context the content of Mr I.E.'s article could have incited violence and hatred, and the applicant's fear of potential violence was particularly justified. In this regard, I appreciate the efforts of the Ministry of Justice to bring criminal proceedings with regard to the statements in question. The Bolu public prosecutor, the Düzce Assize Court and subsequently the Court of Cassation should therefore have had particular regard to the context in question.

In the light of the foregoing, I find that the Government failed to fulfil their positive obligation to secure to the applicant respect for his private life and that therefore there was a breach of Article 8 of the Convention.

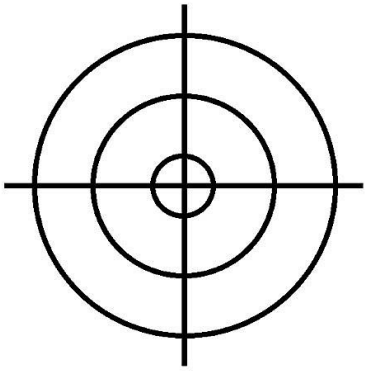
DISSENTING OPINION OF JUDGE KŪRIS

1. Let us call a spade a spade.

Mr I.E. published an article entitled "Turk, here is your enemy". In it, he listed, by name and surname, as many as twenty Members of Parliament, including the applicant. The author did not hesitate to describe them as "[t]he real murderers" because, in his assertion, they "instigate murder". He also expressed his belief that, "[o]f course, there will be patriots who will be able to do this". By "doing this" he meant, in his own words, "wiping out" "a few microbes". And to ensure that no one had any doubts as to the meaning of "wiping out", Mr I.E. explained in arithmetical terms: "one from us, five from you". "You", or the "microbes", are the twenty Members of Parliament who "instigate murder" (see paragraph 10 of the judgment). Should you "instigate [the] murder" of "one from us" – then "five from you" must meet the same fate.

In his article, Mr. I.E. mentioned forty-one victims on the "us" side, not including those injured (*ibid.*). This is where the author overstepped the mark. If the formula "one from us, five from you" is applied, four "of us" would be enough to "wipe out" all these twenty people... sorry, "microbes".

Visually, the message sent by Mr I.E. is the following:



So simple. Even primitive. Through Mr I.E.'s obligingness, this geometrical symbol was placed on the forehead and the chest and the back of every one of the twenty whom the author took pains to identify. For the convenience of certain "patriots", who, "of course", would have to show up "to do this", having been awakened by Mr I.E.'s article.

This is hate speech. No less. This is instigation to lynching. Incitement to kill. Provocation *par excellence*.

2. I am mindful of the fact that much innocent blood has been spilled on the "us" side. Nonetheless, I shall not enter into any discussion as to whether anything specific in the activities of the twenty 'human targets', as selected by Mr I.E., allowed them to be called "instigators of murder". I shall not pronounce any opinion as to whether any of those twenty persons

had actually and personally done anything to prompt such a reaction on the part of Mr I.E. Maybe they had, maybe they had not. I do not know. It is not my business and not this Court's business to make any judgments on this point. All States have intelligence services, prosecution authorities, courts, law-enforcement agencies, and all their apparatus, to deal with anyone who instigates murder. Under the Convention, Member States have such an obligation under Article 2.

Mr I.E. seems to hold a different view, at least with regard to Turkey. "If you are a State, be a State," claims he. But since the State, in his verdict, is not – or is no longer – "a State", he concludes: "It is enough. This has been the last straw!" (see paragraph 10 of the judgment). Put the State aside. Now it is time for "patriots" to step in and "to do this".

3. The Bolu public prosecutor decided that "the author stated his opinion as to why society and State should act together against the killings committed by the PKK and had articulated public reaction and anger in the face of those killings" (see paragraph 13 of the judgment). True, "anger" is there, a lot of it. And there is "opinion", too, and "reaction". What is not there is the urging of society and the State to "act together", because the State, as Mr I.E. has made it clear, is not – or is no longer – "a State". Hence, society, or, more precisely, the "patriots", whoever they may be, will have to manage without the State. They will have "to do this" on their own.

One postulate of the Bolu public prosecutor's decision is especially stunning. He considered that the author of the article "offered a number of proposals with a view to eradicating the terrorist organisation in issue" (*ibid.*). Let us not speculate as to what other "proposals" the public prosecutor had discovered in that "number", but it seems that he was not at all concerned even about noticing the undisguised "proposal" for the "patriots" to take matters into their own hands. A "proposal" of physical revenge. Of elimination. A final solution.

The Düzce Assize Court and later the Court of Cassation followed suit (see paragraphs 17 and 20 of the judgment). The latter even held that the public prosecutor's decision "brought about the correct result" by not taking any action against Mr I.E. Fortunately enough, the notion of "correct result" seems to have only a legal procedural sense here and does not encompass a physical activity. So far.

4. It is difficult for me to comprehend how the Court can treat such findings by the domestic authorities as something which falls within the limits of permissibility. For if that which was written so eloquently and with genuine passion by Mr I.E. is an "opinion" protected by Article 10 of the Convention, then any call to violence is an "opinion". In such a scenario, a hypothetical opponent of Mr I.E. also has a Convention-protected right to point at Mr I.E. himself as a live target. If "patriots" who believe that the Turkish State is not performing its functions and in this sense is no longer

"a State" can be urged to set to lynching, so can the "anti-patriots", whoever they might be.

A Court-endorsed multiplier effect such as this, a slippery slope of this nature, would make the "no man – no problem" model a very peculiar way to achieve social concord and problem-solving in the spirit of the rule of law.

5. I have no doubt whatsoever that the Turkish State violated Article 2 of the Convention by not conducting a proper investigation into Mr I.E.'s call for violence that would have led to at least some decision whereby individuals were discouraged from similar "initiatives". Here, I concur with the Turkish Minister of Justice at the relevant time (see paragraph 18 of the judgment). I do not hint as to the manner in which way Mr I.E. ought to be held liable and what sanction – criminal or other – ought to be imposed on him. I am merely aware, from the experience obtained in deciding the Court's cases against Turkey, that that country's legal system has no shortage of means, including a variety of sanctions, when it comes to prosecuting incitements to violence, not only those which are taken at face value but also those which are merely implied.

6. However, the heart of the issue is not so much about sanctions. Nor is it about a requirement on the authorities to take or not to take "operational measures" to protect the applicant from a "real and immediate risk to [his] life" (see paragraph 37 of the judgment), although importance could also be attached to such "measures". It is, first and foremost, about the Member State's attitude towards incitements to kill any human being, however reproachable that person's activities may be and however well-grounded society's anger against him or her may be.

The majority were satisfied that the applicant has not shown that "there was a real and immediate risk to [his] life" which the authorities would have had to prevent. This satisfaction illustrates that there is nothing new under the Sun and the perpetual nature of the problem, observed even by Plato in his day, that courts care not about truth but about proof. Still, it is not at all clear as to how the applicant could "show" i.e. prove, that his concerns were not the product of a fertile imagination but something realistic, because Mr I.E. did not provide him (or anyone else) with the list of "patriots" who, "of course", had "to do this" and did not indicate the location of the ambush where some "patriot" will lurk for the applicant.

The requirement that a potential victim of assassination must always prove that the risk to his life is "real" and "immediate" places far too heavy a burden of proof on a person who has been turned into what can probably be described as a human target at large.

The phrase "real and immediate risk", so extensively used in the Court's case-law following the formulation of the so-called "Osman test" (see *Osman v. The United Kingdom* [GC], no. 23452/94, Reports 1998-VIII), is

not the best choice of words, at least if the words "real" and especially "immediate" are interpreted literally and hereby narrowly, as is sometimes the case. (On the need to review the "Osman text" in the context of cases related to domestic violence, see the concurring opinion of Judge Pinto de Albuquerque in *Valiulienė v. Lithuania* (no. 33234/07, 26 March 2013), wherein it is stated that "the duty to act arises for public authorities when the risk is already present, although not imminent".) In my opinion, this phrase's American counterpart, a "clear and present danger", is more felicitous.

For, as dictionaries expound, "real" is not all that can (*sic!*) happen, i.e. not everything that is "realistic". "Real" is something very restrictive: this word means something which is "not false or artificial" but "exists in the physical world, not just in someone's imagination or stories", whereas "realistic" is a somewhat broader term which means "based on facts and situations as they really are" (see, for example, *Macmillan Dictionary*). "Real risk", if this notion is dogmatically taken word for word, is an oxymoron: "risk", by definition, is always a probability, even if a high one. So "risk" cannot be "real", it can be only "realistic", or, to borrow from the U.S. Supreme Court lexicon, "present".

As to the word "immediate", i.e. the second element of the "real and immediate risk", this word, as juxtaposed to "clear", means "instant", or "occurring at once". However, even Mr I.E. probably did not expect that the "patriots" would show up and "do this" on the following day or even the following month after publication. Hence, this showing up did not necessarily have to be "immediate" in order to be "real", that is, to "materialise", to use the *Osman* language (cited above, § 116). The clock is ticking.

In general, are killings incited by publications only a fictional reality, a mere fantasy? Or are they, at least to a considerable extent, realistic? In the Turkish context, if an article could trigger the assassination of an author or an editor (compare *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14 September 2010), why, in principle, can a publication not trigger the assassination of someone against whom that publication is directed and who is singled out by the statement: "Turk, here is your enemy"?!

I repeat: the clock is ticking. It will continue to tick, until the "correct result" (alas, not in a legal procedural sense) which Mr I.E. did his best to imply that he hoped for is brought about. If there is no danger to the applicant's life, and to the lives of the other nineteen persons listed by Mr I.E., why was there a need (in my opinion, a genuine need!) to anonymise, by citing only initials, the names of those nineteen persons in the judgment when reproducing the text of Mr I.E.'s article (see paragraph 10 of the judgment)?

7. The majority, while finding that there was no violation of Article 2 of the Convention, nevertheless found it important, in paragraph 35 of the judgment, to insert the caveat that the conclusion that "[t]he circumstances of the present case do not ... engage the State's positive obligation under Article 2 of the Convention ... should not be interpreted as an endorsement of the decisions of the domestic judicial authorities, namely the Bolu public prosecutor, the Düzce Assize Court and the Court of Cassation".

This is nothing less than an acknowledgment that something is wrong with these decisions. Not only morally, but legally wrong, otherwise why should it be included in the Court's judgment, a legal text?

So what? This non-endorsement caveat is a *dictum*. Nothing more. Use the Wambaugh's Inversion Test – remove the caveat, and the operative part of the judgment will be the same: no violation. In an analogous forthcoming case a similar caveat can be added again, and in yet another one – one more, and so on... until some human target will be able to "show", by losing his or her life, that the danger was "real". *Post factum.*

Because what the caveat claims not to endorse, the operative part of the judgment in fact does endorse.

By this judgment the lamp has been rubbed, and the genie is about to appear. This is by no means a good genie from a fairy-tale. This is the genie of venom and hatred, one who suggests to a self-proclaimed "patriot" that he, as well as his like-minded compatriots, have been deprived of what used to be but is no longer "a State", and hands over to them a license to kill.

8. Many of Bob Dylan's stanzas are polysemantic, including probably this one ("License to Kill", from "Infidels", 1983, Columbia Records):

Now, he's hell-bent for destruction, he's afraid and confused
And his brain has been mismanaged with great skill
All he believes are his eyes
And his eyes, they just tell him lies.
But there's a woman on my block
Sitting there in a cold chill
She say who gonna take away his license to kill?

The Turkish public prosecutor, then the two courts in that State, and now this Court have had the opportunity to "take away" this license, by ruling against the "mismanagement of brains" of a person (and potentially more than one person!) who, upon incitement, may feel that it is he who must do what Mr I.E. suggested a "patriot" should do. "To do this".

That opportunity has been missed. Instead, "great skill" has been employed to convince us that nothing happened, either in law or in life, merely that an "opinion" has been expressed.

I am not convinced.

As always in life, nothing happens until it happens.

"In the beginning was the Word" (John 1:1). The sentence is about creation. But it appears that the same can equally be said about destruction. A "word" which calls for the destruction of persons must not be considered as an "opinion" which is protected by the Convention. And the State has an obligation to do its utmost not to allow such "opinions" to materialise. Which means, as a *conditio sine qua non*, that it must not tolerate them.

As long ago as 1170, long before the Convention came into existence and before the "freedom to hold opinions and to receive and impart information" (Article 10 of the Convention) had been invented, the effects of the destructive power of a word were experienced by one Thomas Becket. King Henry II allegedly asked: "Who will rid me of this troublesome priest?" (although historians disagree as to the exact wording of what was said). There were some present who listened and heard – and who took the rhetorical (?!) question seriously. And Becket was no more.

9. To sum up, I sincerely hope that the applicant requests, under Article 43 of the Convention, that this case be referred to the Grand Chamber. This case raises not only "a question affecting the application or interpretation of the Convention", but also "a serious issue of general importance". It is in fact the most "serious issue of general importance" not only to block the route which would lead to the lynching of a specific individual, but, more broadly, in order to signal disapproval of lynch-urging language in general, which cannot and does not enjoy protection under the Convention. The non-endorsement caveat (see paragraph 7 above), toothless and pussyfoot, is no barrier at all on this route. If the judgment in the present case remains as it stands now, those who think of themselves as of having a right to decide who has to be labelled the next human target will not be stopped. Nor will those whose brains they mismanage.