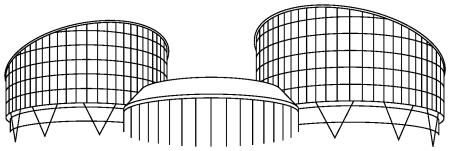

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ATİMAN v. TURKEY

(Application no. 62279/09)

JUDGMENT

STRASBOURG

23 September 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Atiman v. Turkey,

The European Court of Human Rights (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 2 September 2014,

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

PROCEDURE

1. The case originated in an application (no. 62279/09) 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 Hamdi Atiman ("the applicant"), on 17 November 2009.

2. The applicant was represented by Mr A. Kiran, a lawyer practising in Van. The Turkish Government ("the Government") were represented by their Agent.

3. On 27 September 2011 the complaint concerning Article 2 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible.

4. Following the communication of the application, the Government, but not the applicant, filed further written observations (Rule 54 § 2). However, the applicant indicated his wish to pursue his application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1974 and lives in Van.

6. According to the incident and the crime scene investigation reports, upon receipt of intelligence that terrorists were hiding in the area, on 24 June 2008 a large group of gendarme officers from the Hakkari Mountain Commando Brigade blocked the road near the village of

Armutdüzü in the Yüksekova district. At about 1.30 a.m. the gendarme officers stopped a lorry on suspicion of fuel smuggling. Subsequently, another lorry approached the gendarme officers. The applicant was travelling in this vehicle and it was being driven by his cousin, N.A. The soldiers ordered them to stop, but N.A. continued to drive. According to the report drafted by the gendarme officers, the driver attempted to escape and the gendarme officers fired a warning shot in the air and then fired at the tyres of the lorry to stop it. According to the applicant, they were driving down a steep hill at high speed, and as the brakes had failed, they could not stop. They maintained that they had shouted from the window that the brakes were not working and N.A. had tried to avoid hitting the other lorry, which was parked in the middle of the street, by trying to pass it on the right. He then headed towards the hills, where there was a group of gendarme officers. The gendarme officers opened fire, first in the air and then at the vehicle. The applicant was wounded in the hip and his cousin in the leg during the incident as a result of ricochet bullets.

7. The crime scene investigation report revealed that there were no bullet holes on the left side or the back of the lorry. Three of the tyres were flat, namely the two front tyres and the rear right tyre. Eight bullet holes were observed on the right wing over the tyres, three bullet holes in the petrol tank, a bullet entry and exit hole on the front right door, and another bullet hole on the right wheel rim. The gendarme officers further collected a total of nine bullet cases from the scene of the incident.

8. On the same day, a major from the District Gendarmerie wrote to the Yüksekova Public Prosecutor and requested authorisation to search the two vehicles which had been stopped by the gendarmes. Upon receipt of authorisation, the gendarme officers searched the two lorries. They found sixty-six barrels of smuggled fuel in the first lorry and forty-five barrels in the applicant's cousin's lorry. No other illegal items were found in the vehicles. The applicant's cousin, N.A., declined to sign the search report.

9. Also on the same day, two gendarme officers tested the lorry belonging to the applicant's cousin in the presence of the village mayor. They reported that the vehicle had three flat tyres, that there were four bullet holes in the petrol tank, that the engine was working correctly and that the brake system was intact.

10. Subsequently, on the same day, the applicant's cousin gave a statement to the Yüksekova Public Prosecutor and stated that the applicant had been taken to Van Hospital. He requested that criminal proceedings be initiated against the gendarme officers who had used force against them. He emphasised that when he had been told to stop he had been driving down a steep hill at high speed, and when he could not stop, he had shouted from the window that the brakes were not working. He had had no intention of escaping from the gendarmes. He further denied that he had been

transporting smuggled fuel and maintained that the barrels found by the gendarmes must have been from the other vehicle.

11. The public prosecutor also took statements from two eyewitnesses to the incident. These two individuals had also been in the lorry which had been stopped by the gendarmes on suspicion of fuel smuggling. According to their statements, while they were being questioned by the gendarme officers about the barrels found in their lorry, they saw another vehicle approaching. The gendarmes ordered the driver to stop but the driver failed to obey, shouting from the window that the brakes had failed. The driver then tried to pass their vehicle, which was blocking the road, on the right. The gendarmes opened fire, first into the air and then at the tyres. Both witnesses stated that the driver had no intention of escaping and was shouting that he was unable to stop.

12. On 15 December 2008, the applicant's cousin, N.A., gave a statement to the Hakkari Public Prosecutor. He explained that on the day of the incident, while he was driving down a steep hill, the gendarme officers ordered him to stop. He called out that he would stop, but the gendarmes opened fire and he was shot in the leg. He was able to stop the vehicle by using the handbrake. He stated that he had had no intention or reason to escape.

13. On 20 February 2009 a statement was taken from the applicant at Iskele police station. He explained that on the day of the incident he had been travelling in his cousin's lorry. His cousin had told him that there was a problem with the brake system of the vehicle. When they approached the checkpoint, a gendarme officer ordered them to stop, and they shouted out that there was a problem with the brakes and that they were not able to stop. The gendarme thought that they were trying to escape and fired a shot in the air and then started shooting at them. The applicant was shot in the hip. He concluded that the gendarme who had shot at them was not at fault, as he must have thought that they were trying to escape.

14. On 22 July 2008 statements were taken from the accused gendarme officers by a sergeant from the Yeniköprü Gendarme Command. They all stated that they had ordered the driver of the lorry to stop on suspicion of fuel smuggling. The driver initially stopped the vehicle. When the officers asked about the load of the lorry, he started driving away in an attempt to escape. The officers explained that they first fired warning shots in the air and then shot at the tyres to stop the lorry. They considered that the force they had used had been proportionate as they had only used their guns, whereas they were also equipped with heavy machine guns and hand grenades.

15. Based on the evidence in the file, on 26 April 2009 the Yüsekova Public Prosecutor delivered a decision not to prosecute. He concluded that the use of force had been legal pursuant to Article 11 of Law no. 2803 on the establishment, duties and jurisdiction of the gendarmerie and

section 39 (i) of the Regulation on the Duties and Powers of the Gendarmerie. He found it established that the driver of the vehicle in which the applicant was travelling had disobeyed the order to stop and had continued driving. He further pointed out that the lorry had not stopped and that the officers had first fired warning shots in the air and had then shot at the tyres of the lorry.

16. On 4 June 2009 the Van Assize Court dismissed the applicant's appeal, finding the decision of the Yüksekova Public Prosecutor to be in line with domestic law.

II. RELEVANT DOMESTIC LAW

A. Domestic law

Regarding use of firearms by gendarme officers

17. Article 11 of Law no. 2803 on the Establishment, duties and jurisdiction of the gendarmerie states that gendarme officers have the authority to use firearms in the course of their duties, where necessary.

18. Section 39 of the Regulation on the Duties and Powers of the Gendarmerie provides, in so far as relevant:

> "Gendarme officers are entitled to use firearms
>
> (a) in cases of self-defence,
>
> ...
>
> (i) when smugglers disobey an order to stop and disregard a warning shot in the air."

Regarding the Law on the Prevention of Smuggling

19. A description of the relevant domestic law may be found in *Halis Akın v. Turkey* (no. 30304/02, §§ 15-17, 13 January 2009).

B. International law

United Nations principles on the use of force

20. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

21. Paragraph 9 provides:

> "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent

his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

22. According to other provisions of the Principles, law enforcement officials must "act in proportion to the seriousness of the offence and the legitimate objective to be achieved". Also, Governments must "ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law" (paragraph 7). National rules and regulations on the use of firearms should "ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm".

23. Paragraph 23 of the Principles states that victims or their families should have access to an independent process, "including a judicial process". Further, paragraph 24 provides:

"Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

24. The applicant complained under the substantive limb of Article 2 of the Convention that the use of force by the security forces had not been absolutely necessary. He further stated that the ensuing criminal investigation had been flawed and ineffective.

Article 2 of the Convention reads as follows:

"1. Everyone's right to life shall be protected 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."

25. The Government contested the arguments of the applicant.

A. Admissibility

26. The Court notes that the remainder 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. Applicability

27. The Court observes at the outset that in the present case, the force used against the applicant was not in the end fatal. This, however, does not exclude in principle an examination of the applicant's complaints under Article 2, the text of which, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life (see *İlhan v. Turkey* [GC], no. 22277/93, § 75, ECHR 2000-VII, and *Makaratzis v. Greece* [GC], no. 50385/99, § 49, ECHR 2004-XI). In fact, the Court has already examined complaints under this provision where the alleged victim had not died as a result of the impugned conduct (see *Camekan v. Turkey*, no. 54241/08, §§ 37-40, 28 January 2014; *Taydaş v. Turkey*, no. 52534/09, §§ 25, 26 November 2013; and *Peker v. Turkey (no. 2)*, no. 42136/06, §§ 39-43, 12 April 2011 and the cases cited therein).

28. In the light of the aforementioned case-law, the Court considers that Article 2 of the Convention is applicable in the instant case.

2. General principles

29. Article 2, which safeguards the right to life, ranks as one of the most fundamental provisions of the Convention and enshrines one of the basic values of the democratic societies making up the Council of Europe. The Court must subject allegations of a breach of this provision to the most careful scrutiny. In cases concerning the use of force by State agents, it must take into consideration not only the actions of the agents of the State who actually administered the force but also all the surrounding circumstances, including such matters as the relevant legal or regulatory framework in place and the planning and control of the actions under examination. As the text of Article 2 § 2 itself shows, the use of lethal force by police officers may be justified in certain circumstances. However, any use of force must be "no more than absolutely necessary", that is to say it must be strictly proportionate in the circumstances. In view of the fundamental nature of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed (*Nachova and Others v. Bulgaria* [GC],

nos. 43577/98 and 43579/98, §§ 93-94, ECHR 2005-VII; see also *Makaratzis*, cited above, §§ 56-59).

30. In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards (see *Makaratzis*, cited above, §§ 57-59, and the relevant provisions of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, paragraphs 20-23 above). In line with the above-mentioned principle of strict proportionality inherent in Article 2, the national legal framework regulating arrest operations must make recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed (see *Nachova*, cited above, § 96).

31. Furthermore, the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 220, ECHR 2004-III). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001, and *Tahsin Acar*, cited above, §§ 222-224). The same reasoning applies in the case under consideration, where the Court has found that the force used by the gendarmerie against the applicant endangered his life (see *Makaratzis*, cited above, § 73).

3. The substantive limb of Article 2 of the Convention

32. The Government submitted that it had been absolutely necessary for the gendarmes to resort to use of force against the applicant, because he had attempted to escape from the gendarmes at a checkpoint. They further considered that the force used had been proportionate, because the gendarmes, who were equipped with heavy machine guns and hand

grenades, had only used their firearms. They further pointed out that the gendarme officers had been trained in human rights and that there had been no flaw in the conduct of the operation.

33. The applicant did not submit any further comments on the merits of the case.

34. The Court observes that the applicant was shot and wounded by gendarme officers, who had decided to stop the vehicle in which he was travelling, on suspicion of fuel smuggling. The public prosecutor, who investigated the incident, assessed the case under section 39 (i) of the Regulation of the Duties and Powers of the Gendarmerie, which provides that if smugglers do not obey an order to stop and disregard a warning shot, the gendarme officers have the right to fire at the suspects. In this connection, the Court notes that this provision corresponds to Article 11 of Law no. 1918 (Law on the Prevention of Smuggling –Kacakciligin men ve takibine dair kanun), which is now defunct. The Court would further underline the fact that it has already held that Article 11 of Law no. 1918 fell short of the level of protection that is required "by law" of the right to life under the Convention (see *Halis Akın*, cited above, §§ 31-33, and *Beyazgül v. Turkey*, no. 27849/03, §§ 50-57, 22 September 2009). The Court observes that in 2007 Law no. 1918 was amended, and Law no. 5607 entered into force. This new law gives a detailed description of when and how a law enforcement officer may use firearms when dealing with smugglers. Pursuant to Law no. 5607, firearms may only be used in self-defence when a suspect uses firearms.

35. In view of the foregoing, the Court observes that section 39 (i) of the Regulation of the Duties and Powers of the Gendarmerie was not brought in line with Law no. 5607 and the existence of two different laws on the use of firearms engendered legal uncertainty. As a result, it cannot be said that the gendarme officers were provided with clear and detailed instructions as to when and how they should use firearms. Accordingly, the Court considers that there is an absence of a clear legal and regulatory framework defining the circumstances in which gendarme officers may have recourse to potentially lethal force. The regulation, as in force, permits the use of lethal force should the gendarme officers become suspicious that the persons concerned are involved in smuggling. Under these regulations, it is lawful to shoot anyone who does not surrender immediately in response to an oral warning and the firing of a warning shot in the air.

36. The Court further observes that in the present case, it is undisputed between the parties that the applicant and his cousin were unarmed and the gendarme officers tried to stop them on suspicion of fuel smuggling. It is also clear from the submissions of the gendarme officers that they were well-prepared for a confrontation with a terrorist group and that there were several officers at the checkpoint, all of whom were equipped with heavy machine guns and hand grenades. The Court considers that the regulation,

which is still in force today, does not make use of firearms dependent on an assessment of the surrounding circumstances, and, most importantly, does not require an evaluation of the nature of the offence committed by the fugitive and of the threat he or she poses.

37. In view of the foregoing, the Court considers that the relevant legal framework on the use of force is fundamentally flawed and that the applicant was wounded in circumstances in which the use of firearms was incompatible with Article 2 of the Convention.

38. There has therefore been a violation of Article 2 of the Convention under its substantive limb.

4. The procedural limb of Article 2 of the Convention

39. The Court notes at the outset that the initial and critical phases of the investigation were carried out by members of the military, without the presence of a prosecutor (see paragraphs 8-9 above). While the local public prosecutor was immediately informed about the incident, he instructed the gendarmerie to search the vehicles and to collect relevant evidence. It is clear from the documents in the case-file that no investigating authority independent from the military, such as a prosecutor, went to the scene of incident. The Court observes that the scene of the incident and the vehicle in question were examined by gendarme officers from the same unit and that no independent expert was involved in the investigation for the purposes of providing a ballistic analysis or a reconstruction of the events, taking into account a possible malfunctioning of the brake system, as well as the road conditions. In this connection, the Court observes that this was all the more important, given that the applicant and his cousin repeatedly stated before the public prosecutor that they had been unable to stop because there was a problem with the braking system of the vehicle and that they had been driving down a steep hill at high speed. Furthermore, two witnesses had also confirmed that the applicant and his cousin had shouted from the window that they had been unable to stop. Moreover, according to the documents in the case-file, the public prosecutor did not attach any weight to that allegation and failed to examine the matter any further.

40. The Court also observes that the prosecutor was not involved in the questioning of the accused gendarme officers. Their statements were taken by sergeants from the Yeniköprü district Gendarme Command and at no stage was an independent authority involved in their questioning.

41. The Court considers that allowing soldiers from the same unit to take such an active part in the investigation into the wounding of two people was not only serious enough to taint the independence of the entirety of the proceedings, but also entailed the risk that crucial evidence implicating the soldiers in the wounding of two people would be destroyed or ignored (see *Gülbahar Özer and Others v. Turkey*, no. 44125/06, § 63, 2 July 2013).

42. Having regard to the foregoing, the Court finds that these omissions are sufficient to conclude that the investigation in the present case was inadequate and deficient. There has therefore been a violation of Article 2 of the Convention under its procedural limb.

II. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

43. Articles 41 and 46 of the Convention provide:

Article 41

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Article 46

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

..."

A. Article 41

44. The applicant did not submit any just satisfaction claim. Accordingly, the Court considers that there is no call to award him any sum on that account.

B. Article 46

45. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports of Judgments and Decisions* 1998-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I).

The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

46. With a view, however, to helping the respondent State fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, 17 September 2009; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, ECHR-2012).

47. Having regard to its finding above (see paragraphs 35-48 above), the Court considers that in order to execute the present judgment, in accordance with its obligations under Article 46 of the Convention, the respondent State will have to make the relevant legislative amendments to prevent similar violations in the future. To that end, the Court considers that section 39 of the Regulation on the Powers and Duties of the Gendarmerie should be amended to ensure that the relevant provisions are in compliance with Article 22 of Law no. 5607 on the Prevention of Smuggling.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 2 of the Convention both under its substantive and procedural aspects.

Done in English, and notified in writing on 23 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Deputy Registrar	Guido Raimondi President