



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

SECOND SECTION

CASE OF BİŞAR AYHAN AND OTHERS v. TURKEY

(Applications nos. 42329/11 and 47319 /11)

JUDGMENT

Art 2 (procedural) • Inadequate investigation into the wounding of the first applicant and the death of the remaining applicants' relative from the firing of mortars by soldiers near the border with Iran at people who had illegally crossed over through prohibited military area
Art 2 (substantive) • Use of force neither “absolutely necessary” nor strictly proportionate

STRASBOURG

18 May 2021

FINAL

18/08/2021

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

In the case of Bişar Ayhan and Others v. Turkey,

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

Jon Fridrik Kjölbrot, *President*,

Marko Bošnjak,

Aleš Pejchal,

Valeriu Griţco,

Carlo Ranzoni,

Pauliine Koskelo,

Saadet Yüksel, *judges*,

and Stanley Naismith, *Section Registrar*,

Having regard to:

the applications (nos. 42329/11 and 47319/11) 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 ten Turkish nationals, Mr Bişar Ayhan, Ms Nürgül Yılmaz, Ms Elmas Yılmaz, Ms Leyla Yılmaz, Mr Özgür Yılmaz, Ms Yeşim Yılmaz, Mr Ömer Yılmaz, Ms Gümüş Yılmaz, Ms Şadiye Yılmaz and Mr İsa Yılmaz (“the applicants”), on 23 May 2011;

the decision to give notice to the Turkish Government (“the Government”) of the complaint concerning Article 2 of the Convention and to declare inadmissible the remainder of the application no. 42329/11;

the decision to give notice to the Government of application no. 47319/11;

the parties’ observations;

Having deliberated in private on 13 April 2021,

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

INTRODUCTION

1. The case concerns two applications arising out of the same incident. Relying, in particular, on Article 2 of the Convention, the applicants complained that the authorities had used excessive force and had failed to conduct an effective investigation into the wounding of the first applicant (application no. 42329/11) and the death of the relative of the remaining applicants (application no. 47319/11).

THE FACTS

2. The applicants, whose details are set out in the appendix, are Turkish nationals. They were represented by Mr M. Çakır, a lawyer practising in Mersin.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND

5. At the beginning of 2009, the authorities received intelligence reports that terrorist groups from camps located near the Iranian border would enter Turkey illegally to carry out attacks. According to the information received, terrorists would be hiding amongst and in the guise of smugglers in order to cross the border illegally. The information revealed that terrorists would be attempting to install landmines on roads, that they would attack soldiers who were providing road security and searching for mines, that they would be involved in obtaining firearms and other logistical supplies for the terrorist organisation, and that they would be organising terrorist attacks in the area before the local elections that would take place on 29 March 2009.

6. Accordingly, in February 2009, certain border areas in the Başkale District of Van Province were declared first-degree prohibited military zones and the neighbouring villages were duly notified that for security reasons no civilians would be allowed in the designated areas. The notification also included a warning which pointed out that in the event of an attempt to enter the prohibited areas by terrorists, smugglers or civilians, the authorities were entitled to use firearms pursuant to domestic law.

II. THE INCIDENT

7. On 11 March 2009 at around 7 p.m., two military battalions (Koru and Koçdağı) near the Iranian border observed on night vision thermal cameras that a large group of people on horseback was illegally crossing the border in the prohibited military zone. The rocky area was planted with landmines and both battalion stations were located approximately six kilometres away from the group. The soldiers from both battalions opened fire, as a result of which the first applicant, Mr Bişar Ayhan, was seriously injured and Mr Murat Yılmaz (hereinafter referred to as M.Y.), who was a relative of the remaining applicants, died. According to the information in the case file, the first applicant was taken to Başkale Hospital, approximately 25 km away, with the help of the other people in the group.

8. The incident report, drafted by both battalions, noted that one of the battalions had fired two 120 mm mortars at 7.30 p.m. and the other had fired three 120 mm mortars at 7.40 p.m. in the direction of the group.

III. THE INVESTIGATION

A. Official reports

9. According to an investigation report dated 12 March 2009, on 11 March 2009 at about 10.30 p.m. the Başkale Gendarmerie was informed by the hospital that it had received one deceased and one injured person, both victims of gunfire. The soldiers who went to Başkale Hospital at 11 p.m. reported that clothes belonging to the first applicant and M.Y. had been removed and placed under seal as evidence. Furthermore, blood samples and swabs from the face and hands of the deceased had been taken. It was indicated that due to mines and for geographical reasons, the incident area was not suitable for an examination from the land.

10. On 12 March 2009 an on-site inspection was carried out by a helicopter. Because the area was rocky and covered with snow, it was not possible to determine the exact location of the incident. However, traces of the mortars and several footsteps were observed on the snow. There was no trace of blood or any dead body or wounded person.

11. On the same day, the Van Military Prosecutor issued an on-site inspection report, and stated that on 11 March 2009 the Van Başkale Border Battalion had observed on night vision thermal cameras that a large group of people was illegally crossing the border in the prohibited military zone. Assuming that it was a group of terrorists, and due to the long distance between the group and the nearest battalion, they had fired warning shots with anti-aircraft machine guns. As the group had continued to walk, mortars had been fired. During the incident, one person had died and another one had been injured.

12. On the same day, at about 6.30 a.m., an autopsy was conducted on the body of M.Y. The report indicated that death had been caused by respiratory problems and blood loss as a result of severe damage to the lungs. It was indicated that shells had entered the front of the body and followed a trajectory from front to back, left to right and from the upper part of the body to the lower part. Death had occurred about ten to twelve hours before the autopsy. It was further concluded that in order to determine the range from which the mortars had been fired, the clothes of the deceased should be sent for a ballistics examination.

13. On 1 September 2009 an experts' report was issued at the Gendarmerie Command, where the swabs that had been taken from the hands and faces of the first applicant and M.Y. and their clothes had been examined for gun powder residue and explosives to determine the firing range. The experts noted that the presence of antimony on the hand swabs taken from both victims could be regarded as gunshot residue. Furthermore, based on the holes observed in the clothes, the experts concluded that the fire was from long distance. No traces of explosive material were noted.

B. Statements taken during the investigation

14. In the course of the investigation, several witness statements were taken.

1. Statement of the first applicant

15. On 13 March 2009 police officers took the statement of the first applicant at the hospital. He explained that on 11 March 2009, together with a group of ten to twelve persons and seventy horses, he had crossed the Iranian border to smuggle fuel. Then mortars had been fired from the Koru and Koçdağı battalions. According to his recollection, one of the mortars had fallen between M.Y. and himself. Their horses had died and they had both fallen to the ground. He stated that it had been dark but there had been moonlight. Following the incident, his friends had taken him to the village on horseback. The first applicant also stated that the soldiers had known that they had been smuggling fuel, and they had not seen any terrorists on their way.

16. Subsequently, on 2 April 2009 the first applicant gave a further statement to the police. He explained that on the date of the incident, together with a group of ten to twelve persons and about seventy horses, he had been smuggling fuel from Iran to Turkey. According to his recollection, warning shots had been fired from a nearby hill by the Koru Station which was in front of the group and also by the Koçdağı Station which was behind them. As the group thought that the soldiers were only trying to scare them, they had continued to march. About two minutes later, when the soldiers had understood that the group was not stopping, they had started firing at them. M.Y. and himself had been hit and the others had run away. The first applicant indicated that M.Y. had not moved after he fell to the ground. About ten minutes later people from the group had come back to take them to a neighbouring village. He also stated that he would like to file a complaint against those responsible for the incident.

2. Statements of the military officers

17. On 12 March 2009 the soldiers attached to the Koçdağı station gave statements to two soldiers from the same station, one of whom was the infantry captain, F.D.

18. In his statement, Sergeant Z.U. explained that at the material time, he had been the acting commander of the Koçdağı Station. On 11 March 2009 at about 7 p.m. a group of persons on horseback had been seen by a thermal camera in the area of Mount Arık. The group was entering Turkish territory and the infantry commander, Captain F.D., had been notified of the border violation. Sergeant Z.U. had been with Captain F.D. at the time. Subsequently, Captain F.D. had obtained authorisation from the Regiment

Commander and then transmitted the authorisation to the stations of Koçdağı and Koru, ordering them to fire. As a result, warning shots had been fired with anti-aircraft machine guns in the direction of the area where the group was riding. The area concerned had been placed under surveillance. As the violation of the frontier zone had not ceased, the artillery had been ordered to fire. Subsequently, three 120 mm mortars were fired and after these shots, the group had retreated.

19. Sergeants H.Ş., O.G., İ.U., Ö.B., T.D., and F.Ö. were also heard on the same day and they provided statements along the same lines as Sergeant Z.U. They explained that upon the order received from their supervisors, they had initially fired warning shots with anti-aircraft machine guns, totalling nine shots with each burst limited to three shots. Subsequently, when the group had continued to walk, three mortars had been fired.

20. On the same day, the soldiers (Sergeants A.Y., M.Y., G.A., H.Ç., M.A., S.K. and M.Ç.) attached to the Koru station gave statements to their commanding officers about the incident. They stated that a group of ten to twelve persons and several horses had been seen by a thermal camera and subsequently warning shots had been fired using anti-aircraft machine guns, a total of five shots with each burst limited to eight to ten shots. When the group had not stopped, the infantry commander had been notified and they had received the order to fire two mortars following the mortars fired by the Koçdağı Station. They had followed the order, and immediately after the three mortars fired from the other station, they had fired two mortars. One of the mortars had fallen right in front of the horses and the group had dispersed.

21. On 25 March 2009 the military prosecutor heard Sergeant O.G, who was the soldier responsible for mortars at the Koçdağı Station on the day of the incident. He explained that he had been told that there was a large group illegally crossing the border and he had been ordered to fire three mortars following anti-aircraft machine gun fire. He had done as he was ordered and had calculated the coordinates where the mortars should fall and fired three mortars. He stated that subsequently mortars had also been fired from the Koru Station.

22. Also on 25 March 2009, the military prosecutor heard Sergeant M.Ç., who had been responsible for mortars at the Koru Station on the day of the incident. He stated that he had been ordered by his commander to fire two mortars towards the points that had been indicated.

23. On 2 April 2009 the military prosecutor heard Sergeant H.Ş. from the Koçdağı Station, who, by using a thermal camera, had identified about two hundred horses moving from Iran. He had assumed that the group was heading towards the village of Mahmutabat (Turkey). He had informed the infantry commander, Captain F.D., who had in turn informed the battalion commander. Orders had subsequently been received from the Regiment commander and warning shots had been fired by anti-aircraft machine guns

from the Koçdağı Station as well as the Koru Station. However, the group had not stopped and Sergeant H.Ş. had informed Captain F.D. that the illegal crossing continued. Orders had been received to fire mortars and accordingly two or three mortars of 120 mm had been fired from the Koçdağı station. The group had then dispersed; a part of them had headed towards Iran and most of the group had headed towards Turkey.

24. On the same day, Sergeant İ.U. also stated before the military public prosecutor that he had fired three rounds of nine shots with the anti-aircraft machine gun upon the order of his commander, Captain F.D. He further explained that as the group had not stopped, subsequently mortars had been fired.

25. On 28 April 2010 the military prosecutor heard the commander of the Regiment, Colonel M.H. He stated that on the day of the incident, they had received information that terrorists intended to cross the border and groups in Iran would be using this crossing point. They were also informed that the terrorists had placed anti-personnel mines in this area. He recalled that previously soldiers had been injured in the same area. Due to harsh winter conditions and the fact that the area was snow-covered, it had been considered that this group could be terrorists. He had thus given the order to fire warning shots; as the group had continued to move, he had ordered the Koçdağı and Koru Stations to fire further warning mortar shots, and warned that shots should be fired on the road and should not be directed towards the group of people in question. After the mortars had been fired, the group of people had dispersed. The following day he had learned that one person had died. He explained that the aim had been to stop the border crossing. He also stated that he did not know if the person had been killed by shooting from Iran or by mortars. He maintained that before the shooting from the Turkish stations, there had also been shootings from the Iranian side.

26. On 27 May 2009 the military prosecutor heard the commander of the infantry, Captain F.D. He stated that on the ground it was very difficult to distinguish between terrorists and smugglers because, during the month of March, in particular, terrorists often entered the country. Sometimes smugglers would include terrorists who would take advantage of them to cross the border. He explained that on the day of the incident, he had been informed by Sergeant H.Ş. that a group of persons with horses was illegally crossing the border. He had then informed the battalion commander, who in turn had sought orders from the Regiment commander. They had received orders to fire mortars. He had then ordered the Koçdağı and Koru Stations to fire mortars of 120 mm. Before firing the mortars, warning shots had been fired with anti-aircraft machine guns. Three mortars had been fired from the Koçdağı Station and two from the Koru Station.

27. On 11 June 2009 the military prosecutor heard Major M.B., who had been the officer on duty at the Regiment Operation Centre on the day of the incident. He stated that he was the one who had transmitted the Regiment

commander's order to the battalion commander and following this transmission, shots had been fired from the Koçdağı and Koru Stations.

3. Statements of the civilians

28. On 3 September and 13 November 2009, respectively, the Başkale public prosecutor heard K.Y., who was an eyewitness to the incident. He testified that on the day of the incident, they had been smuggling fuel from Iran. According to his recollection, three mortars had been fired from the Koçdağı station, but no one had been hurt. Afterwards, two more mortars had been fired from the Koru station, as a result of which the first applicant had fallen to the ground. The witness stated that thereafter gunfire had started with long barrelled pistols and M.Y. had been hit and killed. The witness further stated that in the group they were about twenty persons, and he gave their names to the prosecutor.

29. On 14 May 2010 the Başkale Public Prosecutor took statements from İ.Y. and Z.A., who were also amongst the group that had been smuggling fuel on the day of the incident. They stated that without any prior warning first shots had been fired from the Koçdağı Station and then from the Koru Station. When the firing had ceased, they had seen that the first applicant and M.Y. had been hit and that the latter had died on the spot.

30. Furthermore, on 23 June 2010 the prosecutor also heard F.S., who stated that he had been amongst the group of smugglers when mortars had been fired from the Koru Station. He explained that as a result of the firing, M.Y. had died at the scene of the incident and the first applicant had been injured.

C. Subsequent steps in the investigation

31. On 13 August 2009 the Başkale Public Prosecutor declared lack of jurisdiction and transferred the file to the Van Military Prosecutor.

32. On 11 March 2010 the Van Military Prosecutor requested that access to the investigation file be restricted on the ground that the case file contained secret information about the personal details of the security officers who had been involved in the military operations. Subsequently, on 17 March 2010 the Van Military Court granted this request.

33. On 10 August 2010 the Van Military Prosecutor issued a decision of non-prosecution. In his decision, the prosecutor first gave a detailed description of the facts of the case. He then referred to domestic legislation regarding the use of firearms by the military. In this regard, he mainly relied on Article 22 of Law no. 5607 on Prevention of Smuggling, on Law no. 3497 which assigned the duty of protecting land borders and ensuring the security of borders to the Land Forces Command, and on Additional Article 2 of Law no. 3713 which authorised the use of firearms.

34. The Military Public Prosecutor emphasized that in the present case the crucial point was whether the order to fire could be considered as a proportionate and necessary measure. He found it apparent from the material in the file - namely the assessment of intelligence, activity reports, denunciations and terrorist activities already observed in the area - that the military stations could be attacked by terrorists who would cross the border illegally. Moreover, following the incident, intelligence had been received confirming that members of the PKK (Kurdish Workers' Party) terrorist organisation had exchanged information by radio, suggesting that anti-personnel mines had been planted in the vicinity of the scene of the incident for a possible on-site inspection by the military and judicial authorities. The prosecutor therefore pointed out that, in the context of the fight against the terrorist organisation PKK, the officials had been authorised to use weapons in the units, and indicated that the power to use weapons was broader in the context of the fight against terrorism. The prosecutor further explained that the soldiers knew by experience that when faced with doubt as to whether a group was composed of terrorists or of civilians, it was highly possible that such hesitations had resulted in the death of the soldiers. Given the situation in the region, the law-enforcement agencies did not thus have more objective criteria for action but had to rely on subjective criteria.

35. The prosecutor noted that faced with a possible terrorist attack, the accused soldiers had fired anti-aircraft machine guns. However, in the prosecutor's view, when the group had not complied but had continued to walk, it could have been possible to intervene by means of parabolic firearms to compel them to stop. Since the accused officers were military staff and they had used their weapons, they had therefore committed involuntary manslaughter resulting from an act exceeding the limits of self-defence, in accordance with Article 27 § 1 of the Criminal Code. Nevertheless, in the opinion of the prosecutor, the accused soldiers had used their weapons within the scope of the jurisdiction conferred on them by law and had not disregarded the legal conditions of use. He accordingly issued a decision of non-prosecution.

36. On 1 September 2010 the applicants filed an objection against this decision with the Ağrı Military Court. They argued that they had not been notified of the Başkale Public Prosecutor's decision of 13 August 2009 and challenged the decision to restrict access to the file of the investigation. They pointed out that there had been no on-site examination of the scene of the incident and that the collection of evidence had been incomplete.

37. On 28 September 2010 the Ağrı Military Court ordered the Van Military Public Prosecutor to conduct a more extensive investigation. In this respect, the court recalled that an expert's report should be obtained when technical expertise was required to determine a case. In the court's view, the facts of the present case required a full analysis of the field conditions at the material time. The court therefore considered that three military experts

should be appointed to determine firstly whether the firing of mortars had been carried out in a measured and proportionate manner and secondly whether the execution of the order given to the soldiers had been carried out within the limits set by domestic law. The Military Court further noted that there was a contradiction in the non-prosecution decision as if the soldiers had used excessive force, they could still be charged with negligence. The experts were therefore asked to clarify this point as well.

38. The experts' report, issued on 10 December 2010 by a committee of three experts composed of military officials, concluded that the use of weapons by the military personnel at the checkpoints at Koçdağı and Koru on the orders of the commanding officer had been in accordance with the powers conferred on them by law. In view of the area's geographical situation, configuration, the presence of mines and the distance, it would not have been possible to apprehend the potential terrorist group without the use of firearms. Consequently, the military personnel had acted within the scope of their authorisation. In their decision, the experts relied on the incident reports prepared by the military and did not take into account the statements of the civilians.

39. On 27 January 2011, the Ağrı Military Court upheld the non-prosecution decision delivered by the Van Military Prosecutor on 10 August 2010.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

40. Article 2 of Law no. 3497 on the Protection and Security of Land Borders reads:

“The responsibility to protect and ensure the security of the land borders belongs to Land Forces Command and this duty shall be fulfilled by the border troops by

1. Protecting the borders within their zone of responsibility and ensure their security.

2. Preventing illegal entrances and exits on the custom borders and the actions constituting an offence within the first degree prohibited military zone that is established on the land borderline, and arrest the criminals, ...,

...

In the fulfilment of these duties given to the members of the border troops by Law, they are given all powers given to the security forces by other laws, including the power to use arms.

...”

41. A description of the domestic law regarding the Law on the Prevention of Smuggling may be found in *Halis Akın v. Turkey* (no. 30304/02, § 17 and § 30, 13 January 2009).

42. Moreover, Additional Article of Law No. 3713 on Anti-Terror Law provides that within the context of operations against terrorist organisations,

if there is a disobedience despite a warning to surrender, or an attempt to use firearms, the police or the soldiers shall be empowered directly and without hesitation to use arms for the purpose and in proportion of overcoming such resistance.

THE LAW

I. JOINDER OF THE APPLICATIONS

43. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

44. The applicants alleged that the wounding of the first applicant and the death of M.Y., the relative of the remaining applicants, constituted a violation of Article 2 of the Convention. In application no. 47319/11, the applicants further alleged that M.Y. had not died immediately after the shooting and as he had not been promptly transferred to a hospital, he had died due to the negligence of the authorities.

45. The Court notes at the outset that in the present case, the force used against the first 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 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 *Atıman v. Turkey*, no. 62279/09, § 27, 23 September 2014). The Court therefore considers that the applicants' complaints raised under Articles 2, 3, 5 (in application no. 47319/11) and 13 of the Convention should be examined from the standpoint of Article 2 of the Convention alone, 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.”

A. Admissibility

46. As to the allegation raised in application no. 47319/11, about the lack of prompt medical help provided to M.Y., the Court notes that this allegation was never raised before the domestic authorities. Furthermore, witness statements indicated that M.Y. had died on the spot and this fact was further confirmed by the autopsy report which stated that death had occurred ten to twelve hours before the autopsy had commenced at 6.30 a.m., which corresponds to the time of the incident, namely around 7 p.m. on 11 March 2009. Accordingly, this part of the application must be declared inadmissible as being manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

47. The Court notes that the remainder of the complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. General principles

48. 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 (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 93-94, ECHR 2005-VII; see also *Makaratzis*, cited above, §§ 56-59).

49. 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).

50. 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).

2. Application of these principles to the instant case

51. The Court notes that it is common ground between the Parties that the first applicant was injured and the remaining applicants’ relative was killed due to the use of lethal force by soldiers of the respondent State. The Court will therefore examine whether the Government have discharged their burden of justifying the use of lethal force against the two men. In doing so, it will consider in particular the investigation carried out at the domestic level, since in cases such as the present one where the respondent Government bear the burden of justifying a killing, the examination of the steps taken in an investigation does not only serve the purpose of assessing whether the investigation was in compliance with the requirements of the procedural obligation, but also of deciding whether it was capable of leading to the establishment of whether the force used was or was not justified in the circumstances and whether the Government have thus satisfactorily discharged their burden to justify the killing (see *Cangöz and Others v. Turkey*, no. 7469/06, § 115, 26 April 2016; *Karataş and Others v. Turkey*, no. 46820/09, § 69, 12 September 2017).

(a) Procedural aspect of Article 2

52. Alleging that the domestic investigation was not effective, the applicants complained about the absence of an on-site investigation. They further claimed that the restriction placed on the investigation file had imposed on them an excessive burden and affected their participation in the criminal investigation. The applicants also maintained that the investigative steps had fallen short of establishing the real facts surrounding the incident

and stated that the investigation had not been conducted by an independent and impartial authority.

53. The Government stated that the investigation in the present case had been in line with the requirements of Article 2 of the Convention. They pointed out that in the course of the investigation all witnesses had been heard, relevant ballistic reports had been issued, expert opinions were obtained and all other necessary steps had been followed.

54. The Court notes at the outset that the applicants firstly complained about the absence of an on-site inspection following the incident on 11 March 2009. It observes that due to severe winter weather conditions and the presence of mines in the area, an on-site land examination could not be conducted. It therefore considers that due to security concerns, the absence of an on-site land inspection cannot be regarded as a shortcoming in the conduct of the investigation. Moreover, the following morning an on-site inspection was carried out by helicopter in the presence of the Van Military Prosecutor, and several footprint traces as well as places where the mortars had fallen were noted.

55. Furthermore, with regard to the applicants' complaint about the restriction of their access to the investigation file, the Court finds little substance in the applicants' claims. It observes that the investigation was classified by the Van Military Court on 11 March 2010, almost one year after the incident, because the case file contained sensitive information about the personal details of the military personnel who had taken part in the operation. Moreover, the Court notes that the applicants had been able to take cognisance of the materials in the file until that day and that they had been successful in their appeal against the non-prosecution decision. Accordingly, it cannot be considered that the applicants were unable to exercise their rights effectively.

56. Nevertheless, there were important shortcomings in the investigation.

57. Firstly, as to the complaint about the independence of the investigation, the Court reiterates once again that for an investigation to be effective, it may generally be regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events (see *Hugh Jordan*, cited above, § 106). In this connection, it must be noted that in the present case, members of the military who had been closely involved in the events took an active part in the initial and critical phases of the investigation. In particular, the statements of the soldiers from the Koçdağı Station were taken by their hierarchical superior, namely by the captain of the infantry, F.D., who himself had been involved in the planning and control of the operation and who had transmitted to the soldiers the order to use weapons. The Court considers that allowing soldiers from the same unit to take such an active part in the investigation 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 would be destroyed or ignored (see *Atıman*, cited above, § 41). The Court notes in this context that the Government have not provided any information capable of demonstrating that it would not have been possible in practice, due to the situation and conditions in the area, to entrust the initial and crucial part of the investigation to an authority or officers independent from the military units responsible for the incident (see, *a contrario*, *Hanan v. Germany* [GC], no. 4871/16, § 181, 16 February 2021).

58. Secondly, as to the applicants' allegation that the investigation was not capable of leading to a determination of whether the force used in the present case had been justified, the Court finds that the investigation failed to address various inconsistencies in the evidence. In that respect, the Court notes that during the domestic proceedings, the question regarding whether the firing of the mortars had been carried out in a measured and proportionate manner, and whether the execution of the order given to the soldiers had been carried out within the limits set by domestic law and in line with the terms of that order remained unanswered. In this respect, the Court notes that although one of the witnesses stated that gunfire had started following the launching of the mortars and that M.Y. had been shot, it appears that no attempt was made by the authorities to clarify this (see paragraph 28 above). Moreover, it also appears that the Military Public Prosecutor confined himself to the statements and reports of the soldiers and their assumption that it was a terrorist group and did not take into consideration the possibility that at least some of the group members were not terrorists or the possibility that they could be unarmed. In particular, although in his statement of 3 September 2009 one of the witnesses, namely K.Y., gave the names of the twenty persons who were in the group, it seems that no steps were taken to interrogate them, nor was this statement taken as an indication that the group did not involve any terrorists (see paragraph 28 above). Furthermore, even though the expert report of 1 September 2009 revealed the presence of antimony on the hand swabs taken from both victims, and stated that this could be regarded as gunshot residue, the authorities did not elaborate on this matter to investigate whether the group was armed or not. Indeed, there is no evidence to suggest that any shots were fired by the group during the incident.

59. Thirdly, as to the expert report which was issued upon the order of the Ağrı Military Court, the Court agrees that the report failed to illuminate the facts of the case. The report merely stated that in view of the area's geographical situation, configuration, the presence of mines and the distance, it would not have been possible to apprehend the potential terrorist group without the use of weapons and that the military personnel had acted within the scope of their powers to use firearms.

60. In conclusion, the Court finds that the foregoing is sufficient to conclude that the investigation conducted at the national level was inadequate and left so many obvious questions unanswered that it is not capable of establishing the true facts surrounding the incident and it is unable to rely on the conclusion reached at the end of that investigation (see *Beker v. Turkey*, no. 27866/03, § 53, 24 March 2009; *Özcan and Others v. Turkey*, no. 18893/05, § 73, 20 April 2010; and *Gülbahar Özer and Others v. Turkey*, no. 44125/06, §§ 74-75, 2 July 2013).

61. It follows that there has been a violation of Article 2 of the Convention in its procedural aspect.

(b) The substantive aspect of Article 2

62. The applicants alleged that the circumstances in which the first applicant was injured and M.Y. died suggested that those who had fired at them had intended to kill them. According to the applicants, the acts went beyond anything that might have been justified under Article 2 § 2, if indeed any use of force at all could have been absolutely necessary in those circumstances.

63. The Government submitted that in the present case it had been absolutely necessary for the soldiers to resort to the use of force against the applicants, because they had been considered as terrorists who were illegally crossing the border. They further considered that the force used had been proportionate in view of the fact that no other way of intervention had been possible due to severe winter conditions, the rocky area and the presence of landmines. The Government also submitted copies of intelligence reports that they had received, which had noted that a terrorist attack was possible by those who would be crossing the border illegally in the guise of smugglers.

64. At the outset, the Court observes that the applicants do not raise any complaint about the alleged presence of mines in the area in question and therefore it is not called on to examine this issue.

65. The Court notes that the incident giving rise to the present case took place when the first applicant and the deceased relative of the remaining applicants crossed the border from Iran and entered Turkey illegally and through a prohibited military area. The Court recalls in this context that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control, *inter alia*, the entry of persons to their territory (see *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 167, 13 February 2020). The Court also stresses the importance of managing and protecting borders and of the role played in that regard by the State (see *ibid.*, § 168). In that respect, it considers that Contracting States may, in principle, put arrangements in place at their borders designed to prevent unauthorised entry into the territory and they may also use force necessary

to prevent illegal entry to the territory. That being said, the need for border control cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto (see, *mutatis mutandis*, *ibid.*, § 170). Therefore, when Contracting States deem it necessary to have recourse to physical force, in particular lethal force, the use of such force, assessed in the specific circumstances of the case, has to be “absolutely necessary” and “strictly proportionate” (see § 48 above).

66. The Court recalls that in the present case, the Government bear the burden of proving that the force used by the soldiers was no more than absolutely necessary and strictly proportionate to the achievement of the aims set out in the sub-paragraphs of Article 2 § 2 of the Convention. In examining whether the Government have discharged their burden, the Court will not only examine whether the resort to the use of lethal force by the soldiers was no more than absolutely necessary and was strictly proportionate to the achievement of the aims set out in the subparagraphs of Article 2 § 2 of the Convention, but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to life (see *Makaratzis*, cited above, § 60).

67. To this end, the Court has been provided with documents which describe the planning and conduct of the operation in question. However, as will be explained below, this material contains a number of contradictions. It will therefore make its own assessment based on the material available.

68. At the outset, as regards the legal framework defining the circumstances in which law enforcement officials may use force and firearms, the Court notes that the non-prosecution decision of the Military Prosecutor was delivered on the basis of Article 22 of Law no. 5607 on Prevention of Smuggling. At this point, the Court recalls that it has already examined cases which concerned the use of force against smugglers on borders (see *Halis Akın v. Turkey*, no. 30304/02, 13 January 2009; *Beyazgül v. Turkey*, no. 27849/03, 22 September 2009; *Ölmez and Others v. Turkey*, no. 22746/03, 9 November 2010; and *Atıman*, cited above). However, in those cases, the use of force was based on the former legislation, namely Law no. 1918, which was found not to be in compliance with the Convention standards. However, in 2007 Law no. 1918 was replaced by Law no. 5607. The 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 or when a suspect uses firearms. It also makes use of firearms dependent on an assessment of the surrounding circumstances. The Court therefore considers that Law no. 5607, as it was in force at the material time, cannot be regarded as fundamentally flawed (see *Halis Akın*, cited above, § 30).

69. As regards the planning and control phase of the military operation from the standpoint of Article 2 of the Convention, the Court must have

particular regard to the context in which the incident occurred as well as to the way in which the situation developed.

70. In that connection, the Court observes that the Government have provided copies of intelligence reports indicating that terrorists from the camps located near the Iranian border would enter Turkey illegally to carry out attacks (see paragraph 5 above). The case file also includes documents stating that the area in question had been declared a first degree prohibited military zone and the neighbouring villages had been duly notified that for security reasons no civilians would be allowed in the designated areas. The notification also included a warning which pointed out that in the event of an attempt to enter prohibited zones, the authorities were entitled to have recourse to firearms (see paragraph 6 above). The Court also notes from the documents in the file that terrorist attacks had been frequent in the area and field conditions were difficult due to harsh winter weather, rocky areas and in particular the fact that the land in question had been planted with mines.

71. The Court further observes that in the investigation report dated 12 March 2009, the Van Military Public Prosecutor stated that assuming that it was a group of terrorists, and due to the long distance between the group and the nearest battalion, the soldiers had fired warning shots with anti-aircraft machine guns (see paragraph 11 above). Moreover, in his statement dated 28 April 2010, the Regiment commander stated that they had received information that terrorists intended to cross the border (see paragraph 25 above). Nevertheless, the information presented to the Court does not show any concrete attempt on the part of the soldiers or the commanding officers to clarify whether the group in question had indeed included terrorists or whether any members of the group were armed or otherwise posed a threat. The Court also notes in this context that there is no indication of the use of firearms on the part of the group which was illegally crossing the border. Moreover, there is no basis in the subsequently conducted investigation into the incident to support the conclusion that the soldiers or commanding officers took any concrete steps to assess if the group actually included terrorists or was in possession of weapons. In particular, the case file does not contain any detailed and precise information to determine whether the execution of the order given to the soldiers had been carried out within the limits set by domestic law. There therefore seems to be no concrete evidence or information linking the group to the terrorist activities mentioned in the intelligence reports.

72. Even assuming that the military had a sufficient basis for assuming that the group included terrorists attempting to cross the border illegally, the Court is not convinced that the Government have sufficiently proven that the use of force, in particular the use of mortars, had been “absolutely and strictly proportionate” in the specific circumstances of the case.

73. In any event, the Court notes that the purpose of the initial warning shots was to compel the group to retreat and that when the Regiment

commander ultimately gave the order to fire mortars, it was, according to his testimony, still for the purpose of warning and he specifically gave instructions not to fire in the direction of the group. In that connection, the soldier responsible for firing the mortars from the Koçdağı Station maintained that he had calculated the coordinates for the targets. Nevertheless, a mortar shell fired from one of the stations exploded close to the group, injuring the first applicant and killing M.Y. In these circumstances, while it cannot speculate on whether this was the result of disobedience to orders or to negligence, the Court finds that the use of force cannot be regarded as having been “absolutely necessary” and strictly proportionate.

74. In the light of the foregoing, and bearing in mind the shortcomings in the domestic investigation (see paragraphs 56-61 above) the Court finds that the Government have failed to discharge their burden of proving that the wounding of the first applicant and killing of the remaining applicants’ relative constituted a use of force which was no more than absolutely necessary or that it was a proportionate means of achieving the purposes advanced by them.

75. It follows that there has been a violation of Article 2 of the Convention in its substantive aspect.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN RESPECT OF APPLICATION NO. 47319/11

76. In application no. 47319/11, relying on Article 14 of the Convention, the applicants alleged that their relative had been killed on account of his Kurdish origin.

77. Having regard to the documents in its possession, the Court finds that this part of the application does not disclose any appearance of a violation of the Convention’s provisions. It follows that this part of the application is manifestly ill-founded and should be rejected, in accordance with Article 35 § 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

“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.”

A. Damage

79. In application no. 42329/11, the first applicant claimed 150,000 Euros (EUR) in respect of pecuniary damage and EUR 150,000 in

respect of non-pecuniary damage. In application no. 47319/11, the applicants claimed a total of EUR 800,000 in respect of non-pecuniary damage and EUR 800,000 in respect of non-pecuniary damage.

80. The Government contested the claims.

81. The Court notes that in both applications, the applicants' pecuniary claims were not substantiated. It therefore rejects that claim. However, the Court recalls that it has found that the authorities were accountable for the injury caused to the first applicant and the death of M.Y. It thus accepts that the applicants have suffered non-pecuniary damage and awards the first applicant (application no. 42329/11) EUR 65,000 and the remaining applicants (application no 47319/11) jointly EUR 65,000 in respect of non-pecuniary damage.

B. Costs and expenses

82. In application no. 42329/11, referring to a contingency fee agreement, the applicant's representative stated that the applicant would have to pay him 25% of the total amount of compensation awarded by the Court. A copy of this agreement was not submitted to the Court. The applicant's representative further claimed EUR 4,500 in respect of costs and expenses. In this connection, he referred to the Van Bar Association's schedule of costs and stated that he had spent 16 hours on preparing the case file. He also submitted an invoice dated 29 December 2017 corresponding to 1,091.54 Turkish liras (TRY) (approximately EUR 250) for translation expenses.

83. In application no. 47319/11, the applicants' lawyer referred to a contingency fee agreement, and stated that the applicants would have to pay him 25% of the total amount of compensation awarded by the Court. A copy of this agreement was not submitted to the Court.

84. The Government contested the claims.

85. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

86. The Court notes that in both applications, the claim for legal expenses is based on the reference to a contingency fee agreement, according to which the applicants were obliged to pay their representative 25% of the total amount of compensation awarded by the Court. The Court recalls that agreements of this nature -giving rise to obligations solely between lawyer and client – cannot bind the Court. Accordingly, the Court must as a basis for its assessment examine the other information provided by the applicants in support of their claim (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, § 234, 10 September 2019).

87. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award EUR 1,000 in respect of costs and expenses in application no. 42329/11. As to application no. 47319/11, the Court notes that the applicants have not substantiated their claim for costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the complaints raised in application no. 47319/11 under Article 2 of the Convention regarding failure of the authorities to provide prompt medical assistance to the relative of the applicants and Article 14 of the Convention inadmissible, and the remainder of the application, as well as application no. 42329/11, admissible;
3. *Holds* that there has been a violation of Article 2 of the Convention under its substantive and procedural aspects;
4. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State, at the rate applicable at the date of settlement:
 - (i) EUR 65,000 (sixty-five thousand euros), plus any tax that may be chargeable, to the first applicant (application no. 42329/11) in respect of non-pecuniary damage;
 - (ii) EUR 65,000 (sixty-five thousand euros) jointly, plus any tax that may be chargeable, to the applicants in application no. 47319/11 in respect of non-pecuniary damage;
 - (iii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, to the first applicant (application no. 42329/11) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 May 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President

Appendix

No.	Application no.	Applicant Year of Birth Place of Residence
1.	42329/11	Bişar AYHAN 1987 Van
2.	47319/11	Nürgül YILMAZ 1979 Van Elmas YILMAZ 2002 Van Leyla YILMAZ 2003 Van Özgür YILMAZ 2004 Van Yeşim YILMAZ 2005 Van Ömer YILMAZ 2006 Van Gümüş YILMAZ 2009 Van Şadiye YILMAZ 1956 Van İsa YILMAZ 1959 Van