



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

FOURTH SECTION

CASE OF AĞDAŞ v. TURKEY

(Application no. 34592/97)

JUDGMENT

STRASBOURG

27 July 2004

FINAL

27/10/2004

*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 Ağdaş v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr S. PAVLOVSKI,

Mr L. GARLICKI,

Mr J. BORRERO BORRERO, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 6 July 2004,

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

PROCEDURE

1. The case originated in an application (no. 34592/97) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Kemal Ağdaş ("the applicant"), on 4 December 1996.

2. The applicant was represented by Mr M. Narin, Mr A. Yüksel, Mr E. Bolaç, Ms F. Bozuoğlu and Mr B. Aşçı, lawyers practising in Istanbul. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that his brother İrfan Ağdaş was shot dead by police officers while walking in their neighbourhood and that the authorities failed to carry out an effective investigation following the incident. He also complained that he had no access to court. He invoked Articles 2 and 6 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 19 June 2001, the Court declared the application admissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*). The parties replied in writing to each other's observations.

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The facts of the case, in particular the circumstances surrounding the death of the applicant's brother İrfan Ağdaş on 13 May 1996, are disputed by the parties.

A. Events relating to the death of İrfan Ağdaş

1. Facts as presented by the applicant

10. On 13 May 1996, at about 7.00 p.m., the applicant's brother İrfan Ağdaş, aged 17, was walking through the Alibeyköy neighbourhood. Three plain-clothed police officers, who were patrolling the neighbourhood in an unmarked car, noticed the newspaper which İrfan was carrying in his hand and began to follow him. The newspaper was *Zafer Yolunda Kurtuluş* (*Salvation in the Path of Glory*) known for its leftist point of view. When İrfan noticed that he was being followed, he started to run. At that moment two of the police officers got out of the car and opened fire. İrfan was shot and he fell to the ground.

11. The police officers proceeded to kick him where he lay on the ground. A woman, A.B., a witness to the incident, ran to İrfan to help him. However, the police officers pushed her aside and put İrfan in the car. One of the police officers sat on him as they drove away. After an hour or so they left İrfan's body near the Eyüp SSK Hospital.

2. Facts as presented by the Government

12. On 13 May 1996, at about 8.00 p.m., three plain-clothed police officers from the anti-terrorist branch of the Istanbul Security Directorate,

who were patrolling the Alibeyköy neighbourhood in an unmarked car, approached four suspects in order to carry out an identity control and a body search. The suspects, among whom was the applicant's brother, İrfan Ağdaş, attempted to run away. During their flight, İrfan opened fire at the police officers. The police officers called them all to surrender and returned fire. The police officers did not aim at İrfan Ağdaş but fired warning shots. The other three suspects fled into the side streets and disappeared. During the exchange of fire, the applicant's brother was wounded and died after his transfer to hospital by the police officers.

13. The police found twenty-seven copies of the newspaper *Zafer Yolunda Kurtuluş* in the black plastic bag that İrfan had been carrying.

14. Another patrolling police squad, informed about the armed incident through the police radio communications, arrived at the scene of the shooting. The witnesses told them that İrfan had been taken to hospital by the police officers present during the incident.

B. The proceedings concerning the death of the applicant's brother

15. Upon the request of the Head of Eyüp Security Directorate, a doctor from the Eyüp SSK Hospital performed a post-mortem examination at 8.20 p.m. In the report drafted by the doctor, two bullet entry wounds were recorded. It was also stated in the report that İrfan was already dead when he was brought to the hospital.

16. At 8.50 p.m. the second police squad which arrived at the scene drafted an incident report and drew a sketch of the scene of the incident. The police squad directly involved in the alleged armed clash drafted an incident report at 9.20 p.m.

17. At around 9.30 p.m., the second police squad submitted to the police station the following items found at the scene of the incident: one 9 mm calibre Browning gun, six empty 9 mm calibre cartridges, seventeen empty 9 mm calibre cartridges, one cartridge clip and twenty-seven copies of the *Zafer Yolunda Kurtuluş* newspaper.

18. On 14 May 1996 the applicant's other brother Cemal Ağdaş identified the body in the morgue of the Forensic Institute. Subsequently, he lodged a complaint with the Eyüp Public Prosecutor, requesting that an on-site inspection of the scene of the incident be conducted and that the eyewitnesses be heard.

19. On the same day, the Fatih Public Prosecutor opened a criminal investigation into the death of İrfan Ağdaş. He requested the forensic department to carry out an autopsy on the body of the applicant's brother and send the autopsy report to his office.

20. At 11.00 a.m., a preliminary autopsy on İrfan Ağdaş was carried out by a forensic expert at the Fatih Forensic Medicine Institute. In the autopsy report it was recorded that there was one bullet wound to the left side of his

chest, two bullet wounds to his left elbow and one to his right scapula. It was concluded that a final autopsy should be carried out in order to determine the cause of death.

21. Later on the same day, the final autopsy was carried out by three forensic experts, in the presence of the Fatih Public Prosecutor. In the autopsy report which was drafted at a later date (5 July 1996) it was concluded that İrfan had died of a haemorrhage due to his bullet wounds. One bullet entry wound from the left elbow, one bullet exit wound from the left arm, one bullet entry wound from the left nipple and one bullet exit wound from the back were found on the body. Although it was not possible to establish the exact shooting range, the bullet wounds suggested that İrfan was not shot at close range which was considered to be within 30 to 40 cm. The chemical analysis indicated that neither alcohol nor any other narcotic substances had been found in his blood. Furthermore, no nitrate or nitrite ion was found on the skin samples taken from İrfan's hands.

22. Meanwhile, two eyewitnesses gave statements at the Istanbul branch of the Human Rights Association.

23. S.M. stated as follows:

"At around 7.00 p.m. I saw a young man walking in front of my house. [At that moment I saw] a white Toros car coming very fast towards the young man, from the top end of the street. The license plate of the car was 34 FT 322. There were three plain-clothed men in the car. One of them got out of the car and fired a few shots from 4 to 5 meters. I believe that the young man was hurt on the leg. He started to run down the street. One of the men, who was already out of the car, ran after him and continued shooting with a gun and an automatic weapon. At that moment there were many children on the street. They ran approximately 150 or 200 meters. Afterwards I saw the young man fall on the ground. He had been shot in the back. The three men kicked him as he was lying on the ground. They put him in the car and sat on him."

24. A.B. stated as follows:

"Everything took place before my eyes. I was walking on the street with my grandchild. When I heard some shots, first I thought the children were playing a game. Then I saw a young man lying on the street. He was bleeding. There was blood on his chest and on his back. When I saw two men kicking him in the head I bent down over him. However, they pushed me aside, put him in the car and drove away."

25. On the same day, the 9 mm calibre Browning gun together with its six cartridges, one cartridge clip and seventeen empty cartridges of 9 mm calibre were submitted to the Criminal Police Laboratory of Istanbul for a ballistics examination. The report concluded that seven of the bullets had been discharged from the Browning gun and that ten of the bullets had been fired from the weapons used by the police officers.

26. In a letter dated 14 May 1996, replying to an inquiry initiated by the Eyüp Security Directorate, Istanbul Security Directorate stated that a confiscation order had been pronounced by the Istanbul State Security Court in respect of the issue of the newspaper collected at the scene of the incident.

27. On 15 May 1996, upon the public prosecutor's request, the Eyüp Security Directorate drafted an incident report and submitted it, together with the newspapers and the weapons collected at the scene of the incident, to his office.

28. On 16 May 1996 the Eyüp Public Prosecutor issued a decision of non-jurisdiction. The public prosecutor stated that İrfan Ağdaş had opened fire on the police officers after they had requested to see his identity card. The police officers had returned fire in order to arrest him. However, as a result of their careless shooting, İrfan Ağdaş had been killed. The public prosecutor decided to transfer the case-file to the office of the Eyüp District Governor pursuant to the provisions of Law on Prosecution of Civil Servants since the alleged crime had been committed while the police officers were on duty.

29. On 20 May 1996 the Eyüp District Governor forwarded the case-file to the office of the Istanbul Governor.

30. On 23 May 1996 the applicant's other brother Cemal Ağdaş lodged an objection with the Eyüp Assize Court against the Eyüp Public Prosecutor's decision of non-jurisdiction. He stated that the public prosecutor had decided to transfer the case-file to the office of the Eyüp District Governor without conducting a serious investigation.

31. On the same day, Cemal Ağdaş also lodged a complaint with the Eyüp Magistrate's Court. He requested that an on-site inspection be conducted into his brother's death and that the eyewitnesses be heard by the court in accordance with Article 158 of the Law on Criminal Prosecution which provides that the Magistrate's Court can conduct a criminal investigation in cases where a delay may cause a setback in the investigation.

32. On 27 May 1996 the Eyüp Magistrate's Court rejected Cemal Ağdaş's complaint of 23 May 1996 on the grounds that the administrative and judicial authorities had already initiated an investigation into the matter. On 3 June 1996 Cemal Ağdaş lodged an objection with the Eyüp Assize Court against the Eyüp Magistrate's Court's decision of 27 May 1996, arguing that the Magistrates were entitled to conduct an *ex officio* investigation in urgent matters pursuant to Article 158 of the Law on Criminal Procedure. On 4 June 1996 Eyüp Assize Court decided that the decision of the Eyüp Magistrate's Court was in accordance with the law and dismissed Cemal Ağdaş's objection.

33. On 11 June 1996 the Eyüp Assize Court rejected the objection filed against the public prosecutor's decision of non-jurisdiction.

34. On 13 August 1996 the transcripts of police radio communications, recorded on the day of the incident, at approximately 8.00 p.m., were drafted. The following conversations are extracts from these records:

“(20.09 a.m.)

4032 : HQ

HQ : I am listening

4032 : there was a person carrying a plastic bag. We opened fire at him. We captured the wounded person. Now we are on our way to ...

HQ : indicate the address

4032 : it is up the Saya Hill. There is chaos in the neighbourhood. We shot the man.

(...)

(20.11 a.m.)

HQ : (...) our TEM team has captured a person in a mixed 502 situation. (...) the police squads which are nearby should provide help.

(20.14)

HQ : On Gülistan Street the TEM team opened fire without a 502 situation. A wounded person has been captured. Now all the patrolling squads are going back to their normal routine. We will only have to take some precautions at the hospital.”

35. On 17 August 1996 A.B. and two persons who did not want to disclose their names gave statements to the applicant’s representative. A.B. stated as follows:

“I was sitting, together with my neighbours, on Gülistan Street where the incident occurred. I saw two plain-clothed persons who were running after a 16-17 years old boy. It was starting to get dark. It was around 7.00 p.m. [...] They were shooting at the boy from behind. There were approximately 15 meters [between the two men and the boy]. As a result of the shooting the boy fell on the ground. When he was falling he turned himself around and fell on his face. There were 10 meters between me and the boy. When I ran and bent down over him in order to take him to a hospital, one of the men said “Lady! Stay back!” They immediately took him by his hands and legs, put him on the back seat of their white car and drove away. During the chase I saw very clearly that the boy did not possess any weapon or anything like it. I also saw very clearly that the boy was shot in the back. When they were putting him in the car he was still alive. I learned afterwards that he died at the hospital. I learned from the press that his name was İrfan Ağdaş.”

36. The two other witnesses, who wished to remain anonymous because of their fear of police, stated that they had heard shootings at around 7.00 p.m. on the day of the incident and that they saw two men in plain-clothes, holding large weapons, standing next to a boy who was lying on the ground. One of the witnesses stated that the boy was lying on his back. When the two men noticed the people were coming out of their houses, they immediately put him into their car and drove away. They further stated that they learned the identity of the boy and the profession of the two men from the press.

37. Between 22 August and 9 September 1996, police superintendent Sebahattin Hacıoğlu, in his capacity of investigator, took statements from the applicant, the applicant's wife, Cemal Ağdaş and the police officers, A.K., B.M. and A.Y. The police officers stated that when they were on patrol on 13 May 1996 in the Alibeyköy neighbourhood they had requested to see the identity cards of four suspicious individuals. Instead of complying with the request, the individuals started to run and one of them opened fire. When the police officers returned his fire in order to arrest him, he was wounded. They seized his gun and twenty-seven copies of a newspaper called *Zafer Yolunda Kurtuluş* that he had with him. They took the wounded man to the Eyüp SSK Hospital.

38. On 23 October 1996 the police superintendent drafted a recommendation report (*fezleke*) concerning the death of İrfan. In his report he concluded that the police officers had performed their duty with diligence and that no fault or negligence could be attributed to them. The use of force by the police officers was in accordance with the law. He suggested not to bring any prosecution or disciplinary proceedings against them.

39. On 14 November 1996, despite the police superintendent's submission, the Istanbul Provincial Administrative Council decided that the police officers A.K., B.M. and A.Y. should be prosecuted pursuant to Article 455 of the Criminal Code. It was further decided that the proceedings should be brought against the police officers before the Istanbul Criminal Court of First Instance.

40. On 3 February 1997 the Istanbul Criminal Court of First Instance decided that it had no jurisdiction to examine the case. It stated that although the incident concerned death due to negligence, as the real perpetrator of the killing was unknown, the matter should be examined by the Istanbul Assize Court. It therefore, transferred the case-file to the Istanbul Assize Court.

41. On 6 March 1997 the Istanbul Assize Court decided that it had no jurisdiction to examine the matter as it fell under the jurisdiction of the Eyüp Assize Court. It transferred the case-file to the office of the Eyüp Public Prosecutor.

42. On 3 April 1997 the Eyüp Public Prosecutor filed an indictment charging the three police officers with "intentional homicide" under Article 448 of the Criminal Code.

43. On 14 April 1997 the first hearing took place before the Eyüp Assize Court. The court summoned the police officers A.K., B.M. and A.Y. since they had not been present at the hearing. As A.K. had been appointed to a post at the Şırnak Security Directorate the court requested the Şırnak Assize Court to take his statement.

44. On 13 May 1997 the Şırnak Assize Court summoned A.K. As he did not attend the hearing of 30 May 1997, the court repeated its request.

45. On 17 June 1997 the second hearing took place. The court accepted requests from the applicant, his wife Şükran Ağdaş and his other brother Cemal Ağdaş to intervene in the proceedings. All three interveners and the eye-witness A.B. gave oral evidence before the court. They all refuted the allegation that there had been an armed clash.

46. A.B.'s statement given before the court was as follows:

“On the day of the incident, at around 5.00 or 6.00 p.m. I was sitting in front of my house. Children were playing on the street. When I heard the shootings I wanted to bring my grandchildren home. I saw two plain-clothed policemen. One of them was holding a gun in one hand and a big weapon in the other hand. The big weapon was almost half a meter long. He was shooting with both of them. He shot İrfan with the big weapon from a distance of approximately 10 meters. I was 3 to 4 meters away from İrfan. When he was wounded he fell to the ground. I went next to him. I asked the police officers why they had shot him. They did not let me [help him]. I went to inform the neighbours about what had happened. When I came back, the police officers had put İrfan into a white car. Only one of the bullets hit İrfan although they had fired a lot. I don't think that he was dead. I believe that they shot him again in the car and killed him. (...) I did not see any weapon in İrfan's hand.”

47. The police officers B.M. and A.Y. did not attend the hearing. The applicant requested the court to detain the accused police officers on remand. The court dismissed his request holding that it was not necessary to arrest them at that stage of the proceedings.

48. On 18 June, 18 July, 1 August and 1 September 1997 hearings were held before the Şırnak Assize Court in order to take A.K.'s statements. However, the latter failed to attend the hearings held on the afore-mentioned dates.

49. During the hearing of 9 September 1997 there was a big crowd in front of the court room, protesting about the incident. Moreover the case also attracted the attention of the media. The Eyüp Assize Court decided to ask the Court of Cassation's opinion on whether it was necessary to transfer the case-file to a different court for security reasons.

50. On 16 September 1997 A.K. appeared before the Şırnak Assize Court. He reiterated his statements given at the Security Directorate and pleaded not guilty.

51. On 17 December 1997 the Court of Cassation decided that the Eyüp Assize Court should continue with the proceedings.

52. On 4 March 1998 A.K. was called once again before the Şırnak Assize Court. He only reiterated his previous statements and made no further comments.

53. On 17 March 1998 the accused police officers B.M. and A.Y. testified before the Eyüp Assize Court for the first time. The summary of B.M.'s testimony is as follows:

“On the day of the incident I was on patrol with my colleagues on the Gülistan Street in the Karadolap neighbourhood where there are terrorist activities. At around 8.00 p.m. we saw three men and one woman who looked suspicious. One of them was

holding a bag. First I went out of the car, and then my colleagues followed me. We told them that we were police officers and that we wanted to make [an identity check and] a body search. We were standing within hearing range. At that moment one of the men and the woman started to run into the side streets. The other man ran towards Gülistan Street. He took out a gun. We were not running after him. I do not remember the distance between us. He opened fire. Actually I only heard shots. I knelt down [in order to protect myself]. My colleagues were behind me. When the man did not stop shooting I returned fire without really targeting. I noticed at that moment that my colleagues were shooting as well. After a while we realised that the man was wounded. We took the man to the hospital. As I stated before, the two men and the woman had run away. A crowded group of people began to come towards us. In order to protect ourselves from another possible attack, we quickly put the wounded person into the car and took him to hospital. I acted in accordance with the law [and used my right of self-defence]. He shot at us first. We did not intend to kill him. “

54. A.Y. reiterated B.M.’s testimony and added the following statement:

“(…) When I went close to the wounded person he told me that he was shot in the left arm. It did not seem to be a serious wound. I seized his gun. [Later on] I handed it over to my supervisor. I do not know if a fingerprint examination was conducted later on. We had no time to collect the empty cartridges. We informed headquarters about the incident and that we were taking him to hospital.”

55. At the same hearing the court decided that the officers who had collected the empty cartridges should be summoned to appear before the court. The court further requested the transcripts of the police radio communications which were recorded on the day of the incident.

56. On 22 April 1998 the Eyüp Police Headquarters submitted the verbatim transcripts of the police radio communications to the Eyüp Assize Court.

57. At the hearing of 28 May 1998, the police officers’ representative asked the court to request the Eyüp Police Headquarters to inform them whether the transcripts submitted on 22 April 1998 were the full version of the radio communications and whether the accused police officers had been part of the TEM team (*Terörle Mücadele – Struggle with Terrorism*) mentioned in the transcripts as the team present at the crime scene. The court also asked for the meaning of a “502” situation which was often referred to in the transcripts. Moreover, at the same hearing, the court dismissed once again the applicant’s request to detain the accused officers on remand. The officers who had collected the empty cartridges from the scene of the incident did not appear before the court to give their testimonies.

58. In the Eyüp Security Directorate’s reply to the court, dated 30 June 1998, it was stated that the transcripts were the full version of the radio communications and that a “502” situation indicated an armed conflict with policemen.

59. At the hearing dated 7 July 1998 the court again dismissed the applicant’s request to detain the accused police officers on remand.

Moreover it repeated its request to the Eyüp Police. The officers who had collected the empty cartridges did not appear before the court.

60. On 21 August 1998, the Eyüp Security Directorate confirmed that the three accused police officers were the TEM team mentioned in the transcripts.

61. At the hearing dated 10 September 1998 the Eyüp Assize Court ordered the accused policemen's detention on remand *in absentia* as they had not appeared before the court despite having been summoned to do so. Moreover, the court was unable to take statements from the members of the second police squad, as they also, once again, did not reply to the summons.

62. On 11 September 1998 the Istanbul Security Directorate informed the court that the accused police officers A.Y. and A.K. were doing their military service in Amasya and in Şırnak respectively, and that they were no longer attached to their directorate. However, as the accused police officer B.M. was still working at the Istanbul Security Directorate he would be able to appear before the court when necessary.

63. On 16 September 1998 B.M. appeared before the court to give his statement. He denied the authenticity of his signature on the bottom of the incident report drafted on 13 May 1996 at 8.50 p.m.

64. On 2 November 1998 A.K. appeared before the Şırnak Assize Court once again and repeated his previous statements, stressing that there had been an armed clash. He pleaded not guilty to the charges brought against him.

65. On 23 November 1998 the court repeated its call for the two police officers to testify before the court.

66. On 25 November 1998, following the Eyüp Assize Court's order of detention on remand *in absentia*, A.K. appeared before the Şırnak Assize Court once again. After reiterating his previous statements, he was released. The Şırnak Assize Court stated that as the only reason for issuing an order of detention on remand was to take A.K.'s statements, there was no need to detain him.

67. On 16 February 1999 E.A., who was one of the police officers who had collected the empty cartridges after the incident, testified before the Eyüp Assize Court. He maintained that upon hearing the radio communication on the armed clash, they had gone to the scene of the incident and collected seventeen empty cartridges at the crime scene.

68. On 19 April 1999 the court once again dismissed the applicant's persistent request to detain the accused policemen. It reaffirmed that as the court had taken the statements of all three accused there was no need to detain them at that stage of the proceedings. However, the applicant further alleged that the empty cartridges kept in the security directorate were not the same as those mentioned in the ballistics report. He therefore requested to see the empty cartridges. The court communicated this request to the Security Directorate.

69. At the hearing held on 23 June 1999 the Eyüp Security Directorate did not respond to the court's demand to obtain the empty cartridges. On 8 September 1999 the Eyüp Security Directorate informed the court that as the police station was under renovation they had been unable to find the requested cartridges.

70. On 27 October 1999 the court asked the Eyüp Public Prosecutor the identity and the address of the three people who were together with İrfan at the time of the incident. These people had allegedly been taken into police custody at a later date. The court again dismissed the applicant's request to detain the police officers on remand.

71. At the hearing dated 29 December 1999 both the Security Directorate and the Eyüp Public Prosecutor did not reply to the court's inquiry. The applicant and the Public Prosecutor repeated their request to detain on remand the accused police officers. The court dismissed their request.

72. On 24 February 2000 the Istanbul Security Directorate, informed the court about the identity of two of the individuals who were with İrfan at the time of the incident. According to this information, both 'terrorists' had been killed in an operation carried out on 20 August 1996 in Eyüp.

73. At the hearings which took place on 22 March 2000 and 15 May 2000 the Security Directorate failed once again to submit the requested items.

74. On 19 July 2000 the Eyüp Assize Court repeated its order to have a ballistics examination of the three weapons belonging to the accused policemen, in order to determine from which of these weapons the empty cartridges found at the scene of the incident had been discharged. On 7 August 2000 the ballistic exam was conducted by the experts at the Criminal Police Laboratory of Istanbul.

75. On 23 October 2000 the ballistic report was read out before the court. According to this report only four of the seventeen empty cartridges matched one of the identified weapons. Of the remaining cartridges, six came from a different weapon and seven yet another. However, none of these weapons were those submitted for the ballistics examination. During this hearing the applicant complained that despite his requests, both the Fatih Public Prosecutor and the Eyüp Magistrate's Court had not conducted an on-site inspection of the scene of the incident and he repeated the same request before the court. The Eyüp Assize Court dismissed the applicant's request considering that to carry out an on-site inspection almost five years after the incident would not shed light on the facts of the case.

76. On 22 January 2001 the applicant raised an objection to the ballistics report. He complained before the court that the report did not indicate from which weapon the empty cartridges had been discharged. Moreover, he stated that as there had been no examination of the weapon allegedly used by İrfan, it could be concluded that he had not used any arm.

77. At the same hearing the public prosecutor submitted his opinion. In view of the transcripts of the police radio communications recorded on the day of the incident, the public prosecutor advised the court to convict the accused police officers as charged. However, he also maintained that Law No. 4616 on the suspension of sentences regarding the offences committed before 23 April 1999 should be applicable to the accused.

78. On 19 February 2001, as the accused police officers and their lawyer were absent, the court requested the concluding remarks of the parties for the next hearing.

79. On 2 April 2001 the Eyüp Assize Court delivered its final judgment. By making reference to the ballistics reports dated 14 May 1996 and 7 August 2000, the autopsy report, the transcripts of the police radio communications and the statements of the accused police officers, the interveners and the witnesses, it concluded that İrfan Ağdaş had died in an armed clash. It consequently acquitted the police officers on the ground that they had acted in self defence.

In the detailed reasoning of the judgment, which was four pages long, the court held that A.B.'s testimony was not reliable as she failed to provide the exact time of the incident. Moreover it observed that according to A.B. when she saw İrfan he had only one bullet wound. She therefore testified that İrfan must have been shot dead in the car. However according to the autopsy report dated 5 July 1996, İrfan had more than one bullet wound on his body and although it was not possible to establish the exact shooting range, the wounds suggested that İrfan was not shot at close range defined as being between 30 to 40 cm. In the light of these considerations, the court did not find A.B.'s evidence convincing.

The court also held that although all three members of the deceased's family argued that there had been no armed clash between the accused and the victim, since they had not witnessed the incident, their arguments could not be sustained.

On the other hand, the court examined the statements of the accused police officers and concluded that they corresponded to the findings of the autopsy report. It maintained that as İrfan was carrying a plastic bag in his left hand and was shooting with his right hand, as described by the accused, it was logical that he was wounded on the left side of his chest and on his left elbow. Moreover it emphasized that, it was only in the heat of the moment that the police officers informed the headquarters that a mixed 502 situation had occurred.

80. Both the applicant and the Eyüp Public Prosecutor appealed against the decision of the Eyüp Assize Court. On 1 July 2002 the Court of Cassation upheld the decision of the assize court.

II. RELEVANT DOMESTIC LAW

81. The relevant domestic legislation is outlined in the Court's *Tepe v. Turkey* judgment (no. 27244/95, §§ 115-122, 9 May 2003).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

82. The Government submitted that the applicant had filed his application without awaiting the outcome of the domestic criminal investigation into the death of his brother.

83. The applicant alleged that he lodged his application with the Court without exhausting all the criminal remedies as he considered them to be ineffective. He argued that the national authorities failed to conduct an effective and adequate investigation into his brother's killing.

84. The Court recalls that, in its decision of 19 June 2001, it considered that the question whether the criminal investigation at issue can be regarded as effective under the Convention was closely linked to the substance of the applicant's complaints and that it should therefore be joined to the merits. The Court considers it appropriate to address this point in its examination of the substance of the applicant's complaint under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

85. The applicant submitted that his brother İrfan Ağdaş had been unjustifiably killed by the police officers and that there had been no adequate investigation into the circumstances of his death. He invoked Article 2 of the Convention which provides:

“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. Arguments before the Court

1. The applicant

86. The applicant submitted that his brother İrfan Ağdaş had been unjustifiably killed by the police officers.

87. As regards the alleged responsibility of the State for the death of İrfan Ağdaş, the applicant claimed that the court had failed to assess correctly the evidence contained in the case-file. He contended that there was no armed clash as concluded by the court. The fact that no nitrate or nitrite ion was found on İrfan’s hands in the autopsy proved that he had not fired a gun.

88. As regards the State’s procedural obligation under Article 2, the applicant contended that the preliminary investigation had been delayed by the unnecessary transfer of the case-file from one public office to the other. Furthermore, the proceedings before the court were flawed by the delays and the non-compellability of the accused or police witnesses. He maintained that, despite his persistent requests, the court did not carry out an on-site inspection of the scene of the incident. It refused to arrest the accused although, by being police officers, they had the ability to obscure the evidence. He believed that all this could only be described as an effort by the authorities to cover up for the police, rather than to investigate their acts. The inadequate investigations into this and other cases were the proof of official tolerance on the part of the State of the use of unlawful lethal force.

2. The Government

89. The Government refuted the applicant’s claims under Article 2 that his brother had been killed by any excessive or unjustified use of force. They submitted that the police officers warned and called on the applicant’s brother to surrender before opening fire. They acted in the honest belief that they were in danger of being shot by him.

90. The Government further denied that the domestic law in any way failed to comply with the requirements of Article 2. They argued that the procedural aspect of this provision was satisfied by the preliminary investigation and the criminal proceedings. The authorities had taken the steps available to them to secure the evidence concerning the incident. Witness testimonies were taken, autopsies, deciphering of the police radio communications and examining of forensic evidences were secured. These assured the fundamental purpose of the procedural obligation, in that they provided for effective accountability for the use of lethal force by State

agents. They submitted that the available procedures provided the necessary effectiveness, independence, and transparency by way of safeguards against abuse.

B. The Court's assessment

1. As to the killing of the applicant's brother

91. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of facts, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them. Though the Court is not bound by the findings of domestic authorities, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those authorities (see, *mutatis mutandis*, *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, p. 18, §§ 29-30). Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, § 32, and *Avşar v. Turkey*, no. 25657/94, § 283, ECHR 2001-VII) even if certain domestic proceedings and investigations have already taken place.

92. The Court notes that it is confronted with fundamentally divergent accounts of how the applicant's brother died. While the applicant maintained that his brother had been unjustifiably killed by the police officers, the Government asserted that he died during an armed clash which took place between him and the police officers, following his attempt to evade an identity check and body search by the police (see paragraph 12).

93. The Court considers that the factual circumstances surrounding the death of the applicant's brother are not clear. It notes first of all that the failure to carry out an on-site inspection at the scene of the incident hampered the assessment of the facts. The scene of the shooting was inspected only by another police squad which was informed about the armed clash by radio. These police officers collected the empty cartridges, the copies of the newspaper and a gun which allegedly belonged to Irfan. However as there was no finger print identification the Court cannot conclude with certainty if Irfan was actually in possession of that gun as alleged by the Government (see paragraphs 17 and 25).

Furthermore the Court notes that the applicant's version of facts is not corroborated in any persuasive manner by eyewitnesses or other evidence. The radio conversations were contradictory as the police headquarters first

defined the incident as a “mixed 502 situation” (armed conflict with policemen situation) and later on called it a “no 502 situation” (see paragraphs 34 and 58). Additionally the key statements of the only civilian witness who accepted to appear before the assize court were not consistent as they differed on points of detail at various stages of the procedure (see paragraphs 24, 35 and 46).

94. Against this background the Court consequently has serious doubts as to how the shooting took place. It considers that this is largely due to the manner in which the investigation at the scene of the incident, the post-mortem examination and the investigation by the criminal court had been conducted.

95. The Court reiterates that while the attainment of the required evidentiary standard may follow from the co-existence of sufficiently strong, clear and concordant inferences or un rebutted presumptions, their evidential value must be assessed in the light of the circumstances of the individual case and the seriousness and nature of the charge to which they give rise against the respondent State (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, § 96).

96. In view of all material before it, including the judgment of the Eyüp Assize Court dated 2 April 2001, the Court considers that there is an insufficient factual and evidentiary basis on which to conclude that the applicant’s brother was deprived of his life by the police officers as a result of the use of force which was more than absolutely necessary within the meaning of paragraph 2 of Article 2 of the Convention.

It follows that no violation of Article 2 has been established on that account

2. As to the alleged inadequacy of the investigation

97. 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, *mutatis mutandis*, *McCallum v. the United Kingdom*, judgment of 30 August 1990, Series A no. 183, p. 49, § 161, and the *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). 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. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to

lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

98. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

99. The investigation must also be 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 (*Kaya*, cited above, p. 324, § 87) and to the identification and punishment of those responsible (*Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see, concerning autopsies, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; concerning witnesses, *Tanrikulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; concerning forensic evidence, *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

100. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa*, cited above, pp. 2439-2440, §§ 102-104, *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV, *Tanrikulu*, cited above, § 109, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-107, ECHR 2000-III). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

101. The Court notes that an investigation into the incident was carried out by the Eyüp Public Prosecutor as well as by the police superintendent, in his capacity of investigator. Notwithstanding the seriousness of the incident however and the necessity to gather and record the evidence which

would help to shed light on the facts of the incident, there was a number of omissions. While a ballistic test was carried out on the Browning weapon to show that it matched some of the bullets allegedly found at the scene of the incident, there was no testing of the gun for İrfan's finger prints. These elements disclose considerable defects in the reliability and thoroughness of this part of the investigation. The Court has examined whether this was remedied by the investigation conducted by the Eyüp Assize Court during the proceedings.

102. The Court recalls that in the normal course of events a criminal trial, with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility (see *McKerr v. the United Kingdom*, no. 28883/95, § 134, ECHR 2001-III). Nonetheless, it cannot be excluded, for example, that defects in an investigation may fundamentally undermine the ability of a court to determine responsibility for a death (see *Salman*, cited above, §§ 106-109 concerning inadequate autopsy procedures and *Kılıç v. Turkey*, no. 22492/93, §§ 79-83, ECHR 2000-III, where there was no evidence presented to the trial court linking the suspect to the killing). Whereas in this case, suspects were prosecuted and consequently acquitted as the court concluded that they acted in self-defence. It cannot therefore ordinarily be claimed that the preliminary investigation did not prove capable of identifying and prosecuting the perpetrators.

103. A preliminary investigation was carried out and a criminal action was initiated, notwithstanding the police superintendent's recommendation report suggesting not bringing any prosecution or disciplinary proceedings against the police officers. Nevertheless the Court notes important shortcomings in the conduct of the criminal proceedings. In particular, it considers that once the case was before the criminal court, the steps taken by the court were dilatory and half-hearted. The Court notes the following in this regard:

(i) The criminal proceedings began on 3 April 1997 when the Eyüp Public Prosecutor filed an indictment with the court charging the three police officers with "intentional homicide". They ended on 1 July 2002 when the Court of Cassation upheld the decision of acquittal rendered by the first instance court. Thus, the criminal proceedings lasted more than five years. Moreover, including the period in which the case-file was transferred back and forth between the registries of the criminal courts due to the problem of jurisdiction, the total length of the entire criminal procedure exceeded six years.

(ii) On 14 May 1997, the accused police officers were summoned for the first time to give their statements. One of the accused appeared before the court after five hearings had taken place, on 16 September 1997, which is four months after the first summons. The other two officers gave their first

statements before the Eyüp Assize Court on 17 March 1998, which is nearly one year after they were first called.

(iii) On 17 March 1998 the court summoned the police officers who had collected the empty cartridges, to give their statements before the court. After almost a year, on 16 February 1999 only one of the police officers from the squad appeared before the court.

(iv) On 19 April 1999, upon the applicant's request the court asked to see the empty cartridges which were kept in safe storage at the security directorate. It was only after fifteen months that the court was provided with the requested items. Moreover, at the end of the ballistic examination carried out on these cartridges, it was concluded that they were not the same as those assessed in the first ballistic examination. However, the court did not attach any importance to this outcome.

(v) In its final decision the court completely disregarded the autopsy report which concluded that no nitrate or nitrite ion was found on İrfan's hands.

104. Having regard therefore to the duration and serious shortcomings of the criminal proceedings in this case, the Court finds that the defects in the preliminary investigation were not remedied by the investigation conducted by the Eyüp Assize Court.

105. The Court concludes that the domestic authorities did not provide a prompt and adequate investigation into the circumstances surrounding the killing of İrfan Ağdaş. It accordingly dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies (see paragraphs 82-84) and holds that there has been a violation of Article 2 in this respect.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

106. The applicant complained that he had been deprived of effective access to a court in breach of Article 6 § 1 of the Convention. He contended that the facts of the case demonstrated that there was no commitment to carry out an effective investigation into his brother's murder and that the domestic court was determined to acquit the police officers. Article 6 § 1 provides:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)”

107. The Government argued that the investigation into the incident and the prosecution of the police officers provided an effective remedy into the applicant's allegations.

108. The Court observes that the applicant's grievance under Article 6 § 1 of the Convention is inextricably bound up with his more general

complaint concerning the manner in which the investigating authorities treated the death of his brother and the repercussions which this had on access to effective remedies which would help redress the grievances he had as a result of the killing. It is accordingly appropriate to examine the applicant's Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention to provide an effective remedy in respect of violations of the Convention including Article 2 thereof, which, it is to be noted, cannot be remedied exclusively through an award of compensation to the relatives of the victim (see, *mutatis mutandis*, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, pp. 2285-86, §§ 93-94, and *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1894-96, §§ 100-103).

109. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see *Aksoy*, cited above, § 95, *Aydın*, cited above, § 103, *Menteş and Others v. Turkey*, judgment of 28 November 1997, *Reports* 1997-VIII, § 89, and *Kaya*, cited above, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, § 107).

110. On the basis of the evidence adduced in the present case, the Court has not found it proved beyond reasonable doubt that the applicant's brother had been unjustifiably killed by State agents. As it has held in previous cases, however, that does not preclude the complaint in relation to Article 2 from being an "arguable" one for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52, *Kaya*, cited above, § 107, and *Yaşa*, cited above, § 113).

111. The authorities thus had an obligation to carry out an effective investigation into the circumstances surrounding the death of the applicant's brother. For the reasons set out above (paragraphs 101-105), no effective

criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. 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

113. When submitting his application, the applicant claimed in general that a compensation be awarded to him. However he did not give any particulars of these claims, as required by Rule 60 of the Rules of Court, although he was requested to do so.

114. As regards pecuniary damage the Court notes that İrfan Ağdaş was still a high school student at the time of the incident. In the absence of any evidence that proves the contrary, the Court assumes that he did not have any income. Accordingly, it does not find it appropriate to award compensation for pecuniary damages.

115. The Court reiterates that it has found that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of the applicant’s brother contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In the light of its established case-law in similar cases (see *Tepe*, cited above, § 215, and *Ülkü Ekinci v. Turkey*, no. 27602/95, § 171, 16 July 2002) and having regard to the circumstances of the case the Court awards the applicant the sum of 15,000 Euros (EUR) for non-pecuniary damage.

B. Costs and expenses

116. The applicant did not seek the reimbursement of costs and expenses relating to the proceedings before the Court and this is not a matter which the Court has to examine of its own motion (see *Mehdi Zana v. Turkey*, no. 29851/96, § 25, 6 March 2001).

C. Default interest

117. The Court considers it appropriate that the default interest 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

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by 6 votes to 1 that there has been no violation of Article 2 of the Convention as regards the death of the applicant's brother;
3. *Holds* unanimously that there has been a violation of Article 2 of the Convention as regards the investigations carried out by the national authorities;
4. *Holds* unanimously that it is not necessary to consider the applicant's complaint under Article 6 § 1 of the Convention;
5. *Holds* unanimously that there has been a violation of Article 13 of the Convention;
6. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand Euros) in respect of non-pecuniary damage, to be converted into the national currency of the respondent State, at the rate applicable at the date of settlement plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Done in English, and notified in writing on 27 July 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate partly dissenting opinion of Sir Nicolas Bratza is annexed to this judgment.

N.B.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. While sharing the view of the majority of the Chamber that there was in the present case a violation of Article 2 of the Convention in its procedural aspect, I would have gone further and found that there was additionally a violation of the substantive provisions of that Article.

2. The case is materially different from a number of cases against Turkey which have been examined by both the former Commission and the Court, involving the killing of individuals by unknown perpetrators (see, for example, *Yaşa v. Turkey* judgment of 2 September 1998, Reports 1998-VI, *Tanrıkulu v. Turkey* [GC], no.23763/94 judgment of 8 July 1999, Reports 1999-IV; *Mahmut Kaya v. Turkey*, no.22535/93, judgment of 28 March 2000, Reports 2000-III; *Kılıç v. Turkey*, no.22492/93, judgment of 28 March 2000, Reports 2000-III; *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, judgment of 10 October 2000, Reports 2000-X). In each of these cases, it was found that it had not been established to the requisite standard of proof, that is “beyond reasonable doubt”, that police officers, members of the security forces or other agents of the State had been responsible for the deprivation of life of which complaint was made. By contrast, in the present case it is undisputed that police officers shot and killed the applicant’s brother, İrfan Ağdaş. In these circumstances, so far from the burden of proof resting on the applicant, it seems to me that it must in principle be for the respondent State to establish on the evidence before the Court that the deprivation of life resulted from the use of force which was no more than “absolutely necessary” for one or more of the legitimate purposes set out in paragraph 2 of Article 2 – in this case, the “defence of any person from unlawful violence”. This term indicates that a stricter and more compelling test of necessity must be employed than that applicable when determining whether State action is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention: the force used must be shown to be strictly proportionate to the achievement of the permitted aims (see *McCann and Others v. the United Kingdom* judgment of 27 September 1985, Series A no. 324, p. 46 §§ 148-149; *Gül v. Turkey*, no.22676/93, judgment of 14 December 2000, § 77).

3. In the present case, the death of İrfan Ağdaş was the subject of criminal proceedings for intentional homicide instituted against the three police officers concerned in November 1996. In April 2001 (some five years after the death and four and a half years after the filing of the indictment) the Eyüp Assize Court acquitted the police officers, finding them to have acted in self-defence when İrfan Ağdaş opened fire on them. The decision of the Assize Court was upheld on appeal by the Court of Cassation in July 2002.

4. I accept that in normal circumstances it would require cogent elements to lead the Court to depart from the reasoned findings of fact reached by national judicial authorities, particularly where, as in the present case, the Court has not itself had the benefit of seeing and examining the relevant witnesses and forming its own assessment of their credibility. However, as is pointed out in the judgment (§ 91) the central importance of the protection afforded under Article 2 is such that the Court is required to subject deprivations of life to the most careful scrutiny even where domestic proceedings and investigations have already taken place. Moreover, in view of the different burden of proof in criminal proceedings as well as the different standards applied in assessing criminal responsibility, the fact that such proceedings resulted in the acquittal of the police officers can in no sense be regarded as decisive of the issue which arises under the Convention, namely whether the use of force has been shown to be absolutely necessary.

5. In paragraph 94 of the judgment, the Court has noted its serious doubts as to how the shooting took place, these doubts stemming largely from the manner in which the investigation at the scene of the incident, the post-mortem examination and the investigation by the criminal court had been conducted. I not only share these doubts but consider that the serious deficiencies in the investigation and in the resulting proceedings were such that it has not been shown that the use of force was no more than absolutely necessary or that it was strictly proportionate to any of the aims permitted under Article 2. I would, in particular, highlight the following troubling features of the case.

- a) As noted above, the criminal proceedings against the police officers lasted more than 5 years. The accused police officers were summoned for the first time to give their statements before the Assize Court in May 1997, one year after the killing had taken place. One of the accused appeared before the court in September 1997, four months after the summons had been issued and after five hearings had already taken place; the other two officers appeared before the court to give their statements only in March 1998, nearly a year after the summons had been issued. On the same date, the Assize Court summoned the police officers who had collected the empty cartridges to give their statements before the court; in the result, only one of the police officers from the squad appeared before the court in February 1999, eleven months after the summons had been issued.
- b) It appears that the 9 mm Browning gun allegedly used by the applicant's brother and retrieved by the police officers was never subjected to any fingerprint analysis in order to establish whether it had ever been handled by him. This is the more remarkable having regard to the fact that no nitrate or nitrite ion traces were found in

the chemical analysis of the skin samples taken from İrfan's hands, even though the first ballistic report concluded that seven bullets had been discharged from the gun (see § 25). I note that in its judgment the Eyüp Assize Court does not appear to have remarked on either of these points.

- c) Although two ballistic examinations were carried out, there appear to have been significant contradictions between the results of the examinations. In the report of the examination carried out by the Criminal Police Laboratory of Istanbul on 14 May 1996, it is stated that of the seventeen empty 9 mm cartridges submitted for examination from the scene of the incident, seven of the bullets had been fired from the Browning gun and ten from the weapons used by the police officers (judgment, § 25). However, in response to the applicant's complaint that the empty cartridges kept in the Eyüp Security Directorate were not the same as those mentioned in the ballistics report, the Assize Court in April 1999 ordered that the cartridges be produced. The cartridges were not in fact produced until July 2000, some fifteen months later, the Security Directorate having claimed in September 1999 that the cartridges had been lost during renovations in the police station. On the order of the Assize Court, a further ballistic examination of the three weapons belonging to the accused police officers was conducted on 7 August 2000 by the same Criminal Police Laboratory. In its report of 23 October 2000 the Laboratory concluded that only four of the seventeen empty cartridges matched one of the weapons. Of the remaining cartridges, six came from a different weapon and seven from yet another weapon, neither of which weapons had been submitted for ballistic examination (judgment, § 75). This apparent inconsistency does not appear to have been commented on in the Assize Court's judgment.
- d) It was the accused officers' case that they had approached four suspects in order to carry out an identity check and body search, that the suspects had all run away and that during their flight İrfan had opened fire at the police officers. This account would appear difficult to reconcile with the contemporary radio communications in which there is no mention of any person other than İrfan (*"There was a person carrying a plastic bag. We opened fire at him, we captured the wounded person... we shot the man."*). In the same communication it is also far from clear that the police officers were responding to the opening of fire on them. As is noted in the judgment of the Assize Court, the police headquarters reported that the TEM team had captured a person "in a mixed 502 situation", that is in a situation of armed conflict with the police. The Assize Court explained this by saying that it was only in the heat of the

moment that the police officers had informed the headquarters that such a situation of conflict had occurred. But no explanation is offered for the fact that in the subsequent exchange the headquarters reported that the TEM team had opened fire “without a 502 situation”.

- e) It appears that at least two of the three persons alleged to have been with İrfan at the time of the incident were not only known to the authorities but had been taken into police custody at a later date. However, it does not appear that they were ever questioned about the alleged incident. When for the first time in February 2000 the Assize Court requested information about the identity and addresses of the three individuals, the Security Directorate reported that two of the individuals who were “terrorists” had been killed in an operation conducted on 20 August 1996 in Eyüp (judgment, §§ 70-72).
- f) Despite B.M.’s evidence that, immediately after the shooting, a crowd of people descended on the officers with the result that they had quickly to put İrfan in the car, the only independent eye-witness called to give evidence was A.B. There is nothing to suggest that any attempt was at any stage made by the authorities to trace and interview other eye-witnesses of the incident. A.B. gave evidence which contradicted the account of the accused police officers that İrfan had opened fire on them. The Assize Court’s conclusion that she had not in fact witnessed the incident and that her evidence was not sincere was based primarily on the fact that in her statement before the court she had placed the incident some two hours before it had in fact occurred and on the fact that she saw only one bullet wound in İrfan’s body and thus appeared to have assumed that the other bullet found to have struck İrfan must have been fired in the car – a fact which was disproved by the autopsy report. While accepting that the Assize Court was better placed to assess AB’s credibility, I do not find either of the grounds relied on by that court as affording convincing reasons for rejecting her evidence in its entirety. In this regard I note that in her statement to the applicant’s representative made a few months after the event, A.B. had given the time of the incident as “around 7 p.m.” when “it was starting to get dark”, an estimate which was closer to the actual time than that made nearly a year later. I also note that it appears that A.B. was not the only person who initially thought that İrfan had been struck by a single bullet: in his evidence to the Assize Court, A.Y., one of the accused police officers, stated that İrfan had told him that he had been shot in the left arm and that “it did not seem to be a serious wound”.

6. Notwithstanding their doubts about the circumstances in which İrfan lost his life, the majority of the Court find that there is an insufficient factual and evidentiary basis on which to conclude that he was deprived of his life as a result of the use of force which was more than absolutely necessary (judgment, § 96). But this to my mind is to apply the wrong test and to reverse the burden of proof. As noted above, the test to be applied is not whether there is a sufficient evidence to satisfy the Court that the use of force was more than absolutely necessary; rather, it is whether the evidence is such as to satisfy the Court that the use of force was no more than absolutely necessary in self-defence. On the basis of the material before the Court, I am not so satisfied and consequently do not find that the killing of İrfan was justified in terms of Article 2 of the Convention.