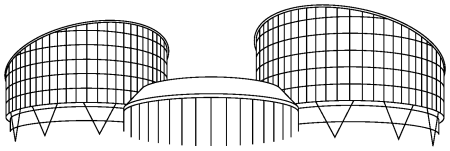

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ATAYKAYA v. TURKEY

(Application no. 50275/08)

JUDGMENT

STRASBOURG

22 July 2014

This judgment is final but may be subject to editorial revision.

In the case of Ataykaya v. Turkey,

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

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

Having deliberated in private on 1 July 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 50275/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Mehmet Nesip Ataykaya ("the applicant"), on 17 October 2008.

2. The applicant was represented by Ms R. Yalçındağ Baydemir, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. Relying on Articles 2, 3, 13, 14 and 17 of the Convention, the applicant alleged that the police had used excessive force against his son, leading to his death.

4. Notice of the application was given to the Government on 23 November 2010.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1951 and lives in Diyarbakır. He is the father of Tarık Ataykaya, born on 25 September 1983, who died on 29 March 2006.

A. Incident of 29 March 2006

6. Following the death of fourteen members of the PKK (Kurdistan Workers' Party, an illegal armed organisation) in an armed clash on 24 March 2006, many illegal demonstrations took place in Diyarbakır between 28 and 31 March 2006, during which a number of demonstrators were killed. According to the Government, some 2,000 individuals took part in those demonstrations, in which the police headquarters was bombarded with stones, sticks and petrol bombs, with the police and their vehicles coming under attack around the city. It was reported that, during those incidents, nine people died and over 200 members of the police force and 214 higher-ranking officers, a doctor, a nurse, two journalists and an ambulance driver were wounded. Similarly, a number of offices and public buildings, including the school of medicine of Dicle University and police premises, were damaged.

7. On 29 March 2006, at around 13.30 p.m. to 2 p.m., on leaving his workplace, Tarık Ataykaya found himself in the middle of a demonstration. The Government accepted the argument that Tarık Ataykaya had not taken part in the demonstration but had just been passing by, and explained that the police had fired a large number of tear-gas grenades to disperse the demonstrators. Tarık Ataykaya was struck on the head by one of the grenades and died a few minutes later.

8. On 30 March 2006, at 11.15 a.m., an autopsy was carried out at the public hospital of Diyarbakır. The report's conclusions read as follows:

> "1. Death was caused by a haemorrhage and brain damage inflicted by a firearm projectile (tear-gas grenade – *gaz fişeği*).
>
> 2. The characteristics of the projectile's point of entry show that it had not been fired from a short distance ..."

9. On 3 April 2006, I.D., an eyewitness and colleague of Tarık Ataykaya, went with M.S.D., another eyewitness and colleague of the latter, to the office of the Human Rights Association in Diyarbakır. I.D. stated in particular as follows:

> "... On 29 March 2006, at around 1.30 p.m. to 2 p.m., we closed the workshop with Tarık Ataykaya, one of the workers, and returned home on foot. We saw tanks go past. People were very worried. Six or seven members of the security forces, armed and wearing the uniform of special teams (they were wearing special military uniforms with mixed colours, they were not ordinary policemen or soldiers), arrived. They started shooting at random. There was a great pandemonium. While we were running we heard gunfire ... We saw Tarık Ataykaya fall to the ground unconscious (the security force personnel were firing with one knee on the ground and taking aim. That means they were not firing in the air but towards people). ... I realised that [Tarık Ataykaya] was wounded in the head. M.S.D. also realised this. We carried Tarık Ataykaya to an empty space near a building and called an ambulance ..."

10. Following a request by the Diyarbakır public prosecutor's office on 4 April 2006, a forensic report was drawn up on 12 April 2006 by the presidency of the criminal investigation department's forensic laboratories attached to the Diyarbakır police headquarters. It showed that the object extracted from Tarık Ataykaya's head was a plastic cartridge (*muhimmat*) from a tear-gas grenade of type no. 12. The report also stated that the cartridge did not bear any characteristic markings from which the firearm in question could have been identified.

B. Administrative and criminal investigations

1. The applicant's complaint

11. On 19 April 2006 the applicant filed a criminal complaint. Referring to the statements of I.D. and M.S.D. to the Human Rights Association in Diyarbakır (see paragraph 9 above), he asked the public prosecutor of Diyarbakır to identify the police officer who had fired at his son and to bring criminal proceedings against him for murder. He also asked that the object extracted from the deceased's head be examined by a panel of experts from the forensic institute.

2. Attempts by the public prosecutor's office to determine the identity and number of members of the security forces authorised to use grenade launchers

12. On 3 May 2006 the Diyarbakır public prosecutor's office responsible for investigating organised crime declined jurisdiction to examine the case. It stated, *inter alia*, as follows:

> "... the autopsy carried out on the deceased showed that death had been caused by a cartridge striking [the deceased's head]. [Subsequently], the forensic report established that this cartridge came from a tear-gas grenade of type no. 12, a type used by the security forces ... Consequently, the investigation must be carried out by the public prosecutor [responsible for investigating ordinary crimes]."

13. On 23 May 2006 the public prosecutor of Diyarbakır dealing with the case, following the decision to decline jurisdiction on 3 May 2006, sent a letter to the Diyarbakır police headquarters. He asked for information on the police units which had been equipped with tear-gas grenade launchers during the incident of 29 March 2006 and for the identification numbers of the personnel who had used them. However, it can be seen from the answers given by the Diyarbakır police headquarters, as summarised below, that it was not possible to establish with certainty the identity or number of all the members of the security forces who had been authorised to use that type of weapon.

14. First, in June 2006, the Diyarbakır police informed the Diyarbakır public prosecutor that during the incident in question three police officers

from the special forces (*özel harekat*), whose identification numbers were indicated in the letter, had used grenade launchers in order, according to them, to disperse demonstrators who had been throwing stones and petrol bombs at the security forces.

15. In a letter of 13 July 2006 the head of the Anti-Terrorist Branch of the Diyarbakır police informed the Diyarbakır public prosecutor that it had not been possible to identify the individuals responsible for the death of Tarık Ataykaya.

16. On 30 October 2006 the Diyarbakır public prosecutor asked the Diyarbakır police headquarters to inform him of the positions to which the three police officers concerned had been assigned on the date of the incident in question.

17. On 1 December 2006 a document concerning the assignment of the three police officers was added to the file. It showed that these officers had been assigned to various zones during the incident.

18. In a letter of 10 April 2007, the head of the Anti-Terrorist Branch of the Diyarbakır police in turn informed the Diyarbakır public prosecutor's office that twelve tear-gas grenade launchers had been listed in the names of twelve officers of the special forces, that those officers had not been posted to Goral avenue (near the site of the incident) and that, in the course of the incident, those teams had been assigned to various zones on the instructions of the police chiefs. In addition, it stated that eleven other police officers of the Rapid Response Force (*çevik kuvvet*) had used grenade launchers and that they had been assigned to different zones during the incident. He lastly concluded that grenade launchers had been used by a total of twenty-three police officers attached to the Anti-Terrorist Branch.

3. Testimony obtained by the public prosecutor's office

19. On 1 November 2006 the applicant was heard by the public prosecutor's office. He requested the identification and punishment of those responsible for his son's death.

20. On 14 February 2007, B.A., one of the three police officers whose identification numbers had been communicated previously (see paragraph 14 above), gave evidence to the public prosecutor's office. He stated that, on the day of the incident, some 500 police officers and soldiers had used tear-gas grenade launchers and that, if Tarık Ataykaya had died as a result of a tear-gas grenade fired by the security forces, any one of those 500 police officers and soldiers could have fired it. He added that, during the incident, some 4,000 to 5,000 tear-gas grenades had been used by police officers from the special forces in order to disperse the demonstrators.

21. On 5 November 2007 the applicant was again heard by the public prosecutor's office. He repeated his request for the identification and punishment of those responsible for his son's death.

22. On 15 November 2007, I.D., an eyewitness and a colleague of Tarık Ataykaya, gave evidence to the public prosecutor's office. He stated in particular as follows:

> "... On 29 March 2006 we were working with Tarık Ataykaya in the joinery workshop on Medine boulevard in Bağlar. Around noon, a large crowd had gathered on Medine boulevard because of the demonstrations ... We had to close the workshop. There were about 50-60 demonstrators and 5-6 police officers, wearing camouflage clothing and balaclavas. As we were locking up the workshop, I saw that masked policemen, with one knee on the ground (*yere diz çökerek*), were firing guns unremittingly towards the demonstrators. Tarık Ataykaya was with us. He did not take part in the demonstrations. After leaving the workshop Tarık Ataykaya went back there because the demonstrators were heading towards us. [At that moment], Tarık Ataykaya, hit by a bullet fired by one of the policemen, fell to the ground, which means that he was shot by police gunfire. Supporting him, we took him to an empty space near a building and called an ambulance. Tarık Ataykaya had been struck on the head and small pieces of his brain had come out. We took Tarık Ataykaya to hospital with a pick-up truck as there was no sign of the ambulance. As the policemen were masked, I am unable to identify them."

I.D. added that, on the day of the incident, some of his friends had said that they had seen footage of the incident, probably on the private television channel NTV.

23. On the same day, M.S.D., an eyewitness and colleague of Tarık Ataykaya, also gave evidence to the public prosecutor's office. He confirmed I.D.'s statements.

24. Also on 15 November 2007, R.K., a resident of the district where the incident had taken place was interviewed by the Diyarbakır public prosecutor's office. She stated in particular:

> "... on 29 March 2006, at my home on Medine boulevard, I was waiting for my son to come home from school. It was about 1 p.m. The demonstrations had begun in the streets. My son was late and I went to look for him on Medine boulevard. I saw my son coming back from school. Tarık Ataykaya, with three of his colleagues, had closed the workshop and I think he was on his way home. The street was full of people. The policemen were advancing in our direction. They were firing their guns continuously towards the demonstrators. When I got home with my son, I saw that a masked policeman, with one knee on the ground, was firing towards Tarık Ataykaya, who had his back to the policeman. I saw Tarık Ataykaya fall to the ground. He was carried to the door of a building. An ambulance was called. When I checked Tarık Ataykaya's heart, I realised that he was dead. The policemen who had come towards us were masked, so I would not be able to identify them. As my attention was totally focussed on Tarık Ataykaya, I did not see what the policeman was doing. The individuals present during the incident were I.D. and M.S.D. ..."

25. On 21 January 2008 the Diyarbakır public prosecutor asked the Ankara public prosecutor's office to take testimony from police officers N.O. and H.A., to establish whether they had been present on Medine boulevard or Goral avenue during the incident.

26. On 18 February 2008 N.O. and H.A. were interviewed by the public prosecutor's office. They stated that they had not been assigned to those two places at the time the incident had taken place and had not witnessed it.

4. Administrative investigation

27. In the meantime, in a letter of 2 November 2007, the public prosecutor asked the Diyarbakır provincial governor's office to open an administrative investigation and to transmit the relevant file to the public prosecutor's office. He pointed out that in the context of that investigation it would be appropriate to take statements from the eleven police officers of the Rapid Response Force and the three police officers of the special forces.

28. It can be seen from the file that an administrative investigation was opened by the Diyarbakır provincial governor's office in order to determine the responsibility of fourteen police officers in the incident. Following that investigation, on 30 January 2008, the police disciplinary board of the provincial governor's office made up of the governor, the head of the health department and three police superintendents, decided not to impose any sanction on the police officers who had used tear gas during the demonstration of 29 March 2006. The board made the following observations in particular:

> "... It is appropriate to close the case having regard [to the following points:] it was a major incident. According to the witness statements, the face of the officer who fired the tear-gas grenade which caused the death of the deceased was not visible because he was wearing a balaclava. All officers have undergone training in which they learned that the firing [of grenades] must be carried out in such a way as not to hit the target directly. There is no document, evidence, sign or circumstantial evidence (*emare*) from which it could be established that the officers under investigation committed the offence in question ..."

5. Permanent search notice

29. On 3 April 2008 the Diyarbakır public prosecutor's office issued a permanent search notice for the purposes of tracing the person who fired the grenade in question, with effect until 29 March 2021, when the offence would become time-barred. Referring, *inter alia*, to the decision taken by the police disciplinary board to close the case, it found in particular as follows:

> "... The autopsy carried out on 30 March 2006 showed that the death was caused by a tear-gas grenade of type no. 12 which struck [the deceased's head] ... This projectile was used by the forces on duty at the time of the incident ...
>
> ... Under Article 6 appended to Law no. 2559 on the duties and powers of the police, the police are entitled to use physical force, material force and weapons in order to immobilise offenders, in a gradual manner and in proportion to the particularities and degree of resistance and aggressiveness of the offender. In those circumstances, it will be for the superior to determine the degree of force to be used ... [Moreover], under Article 24 of the Criminal Code, a person who complies with statutory obligations

cannot be punished and a person who obeys an order given by a competent authority in the exercise of its power cannot be held responsible for his action.

In the registers of the security forces, there is no information concerning the manner in which the death occurred.

...

The deceased Tarık Ataykaya found himself among the demonstrators during the social demonstrations which took place on 29 March 2006 in the centre of Diyarbakır, either because he was taking part in those demonstrations or because he had just left the workshop where he was working. During the incidents, demonstrators were clashing with the police and throwing sticks and stones. The police intervened against the demonstrators using tear-gas grenades and rubber bullets. The casing of a tear-gas grenade thrown against the moving demonstrators struck the head [of Tarık Ataykaya] and caused his death. This incident is not mentioned in the police documents. The witnesses to the incident stated that they could not identify the person who had fired it because his face was masked. It was not possible to determine which weapon had been used. The casing did not bear any characteristic mark of the weapon from which it was fired. Even though there is no tangible evidence to show that the person who fired was definitely a police officer, as no register suggested that other armed individuals had used tear-gas grenades [it can be concluded that] this grenade was probably used by the security forces which were operating at that time. [However,] it is not possible to identify the perpetrator, whether from the autopsy report, the statements of the complainant and witnesses, the forensic report or the case file as a whole ..."

This decision was notified to the applicant on 17 April 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The relevant part, in the present case, of section 16 of Law no. 2559 on the powers and duties of the police, enacted on 4 July 1934 and published in the Official Gazette on 14 July 1934, as in force at the relevant time, read as follows:

"... Police officers are entitled to use their weapons only in the following situations:

(a) in self-defence;

...

(h) or where a person or group shows resistance to the police and prevents it from discharging its duties, or where there is an attack against the police. ..."

31. Section 16 of Law no. 2559 was amended by Law no. 5681, published in the Official Gazette on 14 June 2007. That provision now reads as follows:

"The police

...

(c) may use firearms for the purposes of arresting a person against whom an arrest or custody warrant has been issued ... or a suspect in the act of committing an offence, within limits that are commensurate with the fulfilment of that purpose.

Before making use of firearms, the police ... must first call out 'stop!' ... If the person continues to flee, the police may fire a warning shot. If, despite those warnings, the person still continues to flee, and if no other means of stopping the person can be envisaged, the police may use firearms for the purposes of stopping the person, within limits that are commensurate with the fulfilment of that purpose (*kişinin yakalanmasını sağlamak amacıyla ve sağlayacak ölçüde silahla ateş edilebilir*) ..."

32. Under section 24 of Law no. 2911 on gatherings and demonstrations:

"Where a gathering or a demonstration that has begun in compliance with the law ... turns into a gathering or demonstration that is in breach of the law:

...

(b) The highest local civilian authority ... will send [one or more] local commanding officer of the security forces to the scene of the incident.

That commanding officer will order the crowd to disperse in accordance with the law and will warn it that, in the event of refusal to comply, force will be used. If the crowd does not disperse, it will be dispersed by the use of force ...

In the situations described ..., in the event of an attack on the security forces or on the property or individuals they are protecting; or where there is effective resistance, force will be used without any need [to issue] an order.

...

Where a gathering or a demonstration has begun in breach of the law ..., the security forces ... must take the necessary precautions. The commanding officer of the forces will order the crowd to disperse in accordance with the law and will warn it that, in the event of refusal to comply, force will be used. If the crowd does not disperse, it will be dispersed by the use of force."

33. Section 6 annexed to Law no. 2559 on the duties and powers of the police, as in force at the relevant time, read as follows:

"The term 'use of force' shall mean the use of physical force, material force and weapons in order to immobilise offenders, in a gradual manner and in proportion to the particularities and degree of resistance and aggressiveness [of the offender].

Where the action is taken against a group, the degree of force used and the requisite quantity of weaponry (*zor kullanmanın derecesi ile kullanılacak araç ve gereçler*) will be determined by the supervisor of the intervening unit."

34. Article 25 of the directive of 30 December 1982 on the Rapid Response Forces (*Polis Çevik Kuvvet Yönetmeliği*) lays down the principles governing the supervision, control and intervention of those forces during demonstrations (for the text, see *Abdullah Yaşa and Others v. Turkey*, no. 44827/08, § 27, 16 July 2013).

35. On 15 February 2008 the director of the general police force (*Emniyet Genel Müdürü*) sent all the security services a circular stating the conditions for the use of tear-gas (*E.G.M. Genelge No.: 19*). It referred to a directive concerning the use of weapons emitting tear-gas (*Göz Yaşartıcı Gaz Silahları ve Mühimmatları Kullanım Talimatı*) issued in February 2008.

This directive describes the features of tear-gas-based weapons and the physiological effects of the gas used (for the text of the circular, see ibid., § 28).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

36. The applicant alleged that the death of his son had been caused by an excessive use of force. In his view, domestic law did not regulate, in a manner that was compatible with the Convention, the use of firearms by State agents. The latter had allegedly been authorised to use lethal force against his son without it being absolutely necessary. He further complained that the authorities had not carried out an effective investigation into the death. He relied in this connection on Article 2 of the Convention, 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."

37. The Government disputed his arguments.

A. Admissibility

38. The Government objected that the applicant had not complied with the six-month time-limit under Article 35 § 1 of the Convention. In particular, they argued that he should have lodged his application, in accordance with the Court's case-law, within a period of six months which ran, according to them, either from the date of the act complained of or from the date on which he had allegedly become aware of the ineffectiveness of domestic remedies. The Government stated that, if the applicant considered that the decision of the public prosecutor's office, adopted on 3 April 2008, constituted the final domestic decision, he should have lodged his application by 3 October 2008. Consequently, they argued that the application of 17 October 2008 was out of time and had to be rejected.

39. The applicant contested those arguments.

40. The Court would observe that the decision of the public prosecutor's office adopted on 3 April 2008, being the final domestic decision, was notified to the applicant on 17 April 2008. The period laid down by Article 35 § 1 of the Convention thus ran from the next day, 18 April 2008, and expired on 17 October 2008, at midnight (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 60, 29 June 2012). The application was lodged on that latter date, before midnight, and therefore before the end of the above-mentioned period.

Consequently, the Court dismisses the Government's objection that the applicant failed to comply with the six-month rule. It finds that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

41. The applicant contended that his son, who had not taken part in the demonstrations in question and had found himself by chance between the demonstrators and the security forces, had been killed deliberately by the latter, which had used a degree of force that was unnecessary and manifestly arbitrary and disproportionate. In addition, domestic law did not regulate, in a manner that was compatible with the Convention, the use of firearms by State agents. The latter had allegedly been authorised to use lethal force against his son in a manifestly inappropriate manner without it being absolutely necessary, in his view. He added that numerous violations of human rights had been committed during the incidents in question and, lastly, that the Government were not able to provide the slightest explanation capable of justifying the degree of force used. In addition, the applicant contended that the investigation had not been conducted in accordance with the procedural requirements under Article 2 of the Convention.

42. The Government accepted the argument that the applicant's son had not taken part in the demonstrations in question and had found himself by chance between the demonstrators and the security forces. They further admitted that Tarık Ataykaya had been struck by a cartridge fired from a weapon used by the security forces during their intervention against the demonstrators. They argued, however, that the use of force in the present case had been compliant with the law, namely section 16 of Law no. 2559 and section 6 appended to that law, and that the fatal incident had been unforeseeable.

43. They added in this connection that the use of force by the security forces had been proportionate because they had been instructed to fire the tear-gas grenades into the air and had followed training for that purpose.

44. The Government further argued that the investigation into the death of Tarık Ataykaya had been comprehensive. They explained that the authorities had immediately opened an investigation to determine the responsibility of the security forces for the death in question and had undertaken all the necessary research to identify the members of the security forces who had used grenade launchers of the relevant type on the day of the incident, but that the investigations had been unsuccessful because the personnel in question had been masked. They further stated that the public prosecutor's office had issued a permanent search notice in order to find the person who had fired the shot in question. Moreover, referring to the decision of 30 January 2008 by the police disciplinary board, they argued that there was no evidence to suggest that the personnel in respect of which the investigation had been carried out were responsible for the death of the applicant's son. Lastly, they submitted that there was no evidence that the security forces had acted with the intention of killing the applicant's son.

2. The Court's assessment

45. The Court reiterates that the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to have recourse to the "use of force", which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than is "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (see *McCann and Others v. the United Kingdom*, 27 September 1995, § 148, Series A no. 324, and *Solomou and Others v. Turkey*, no. 36832/97, § 64, 24 June 2008).

The Court further reiterates that the use of the term "absolutely necessary" indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. Furthermore, in keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 176, ECHR 2011).

46. The Court finds it appropriate to begin its analysis with facts which have not given rise to any dispute between the parties. First of all, it is not disputed that the applicant's son, Tarık Ataykaya, was killed on 29 March 2006 by a tear-gas grenade fired by the security forces. Nor is it disputed that he was part of a group of violent demonstrators and found himself by chance between the demonstrators and the police. The Court would further observe that Tarık Ataykaya was killed by a member of the security forces who was masked at the time of the incident. It has thus been established "beyond any reasonable doubt" that a member of the security forces fired a tear-gas grenade towards Tarık Ataykaya, injuring him in the head and causing his death. It follows that the burden of proof is on the authorities, which have a duty to show that the use of lethal force in question was made absolutely necessary by the situation and that it was not excessive or unjustified within the meaning of Article 2 § 2 of the Convention (see *Bektaş and Özalp v. Turkey*, no. 10036/03, § 57, 20 April 2010). Against this background, the Court must examine in the present case not only whether the use of potentially lethal force against the applicant's son was legitimate but also whether the operation was regulated and organised in such a way as to minimise to the greatest extent possible any risk to his life (see *Makaratzis v. Greece* [GC], no. 50385/99, § 60, ECHR 2004-XI). It must also verify that the authorities did not act negligently in their choice of measures (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 95, ECHR 2005-VII).

47. The Court reiterates that it is aware of the subsidiary nature of its role and that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see *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 the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, among many other authorities, *Edwards v. the United Kingdom,* 16 December 1992, § 34, Series A no. 247-B, and *Klaas v. Germany,* 22 September 1993, § 29, Series A no. 269). Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to eschew the findings of fact reached by the domestic courts (see *Aydan v. Turkey*, no. 16281/10, § 69, 12 March 2013).

48. That being said, and in view of the fact that the burden of proof is on the Government, the Court will first ascertain whether the investigation carried out at the domestic level was effective, in the sense that it was capable of leading to the determination of whether the force used was or was not justified in the circumstances (see *Gülbahar Özer and Others v. Turkey*, no. 44125/06, § 59, 2 July 2013). Furthermore, it will examine

whether there was a legal and administrative framework defining the limited circumstances in which law-enforcement officials were entitled to use force and firearms (see *Makaratzis*, cited above, § 59).

49. The Court notes that an investigation was indeed opened following a complaint by the applicant in March 2006, but that the investigation raised issues at a number of levels.

50. First, it must be said that the investigative authorities failed to identify – and therefore to question – the member of the security forces who fired at Tarık Ataykaya, on the ground that his face had been concealed by a balaclava. Nor were they able to establish with certainty the number of security force members who had been authorised to use the type of weapon in question at the time of the incident. Initially, in a letter of June 2006, the Diyarbakır police headquarters informed the public prosecutor's office that three police officers had used the weapons in question (see paragraph 14 above). Subsequently, in a letter of 10 April 2007, the public prosecutor's office was informed that twelve other members of the special forces and eleven other members of the rapid intervention force, making a total of twenty-three police officers from the Anti-Terrorist Branch, had also been authorised to use such weapons at the time of the incident (see paragraph 18 above). However, there is no evidence in the case file that the identities of all these officers were notified to the appropriate public prosecutor's office, which confined itself, moreover, to interviewing only a few of the police officers (see paragraphs 20 and 26 above). Similarly, according to the information in the file, as regards the public prosecutor's request concerning the places where the officers were stationed, the reply of the police authorities was imprecise, providing vague information and simply indicating that the officers had been posted to different areas at the time of the incident (see paragraph 17 above). In the Court's view, that lack of cooperation by the police authorities with the public prosecutor's office responsible for the investigation is all the more inexplicable as the latter's sole purpose was to obtain official information from a State department.

51. Moreover, it can be seen from the file that the administrative investigation conducted by the police disciplinary board concerned only fourteen police officers and that it was no more successful in identifying the officer who fired the lethal shot (see paragraph 27-28 above). In this connection it is noteworthy that, once again, the main obstacle to identifying that officer was the fact that the policemen were wearing balaclavas at the time of the incident.

52. The Court takes the view that it is not necessary to assess in general terms whether it is compatible with the Convention for balaclavas to be worn by security forces whose task it is to confront demonstrators. It is obvious, however, that this practice has had, in the present case, the direct consequence of giving those responsible immunity from prosecution. On account of that practice, the eyewitnesses were not able to identify the

officer who fired at Tarık Ataykaya (see paragraphs 22-24 above) and it was not possible to interview, as suspects or witnesses, all the officers who had used grenade launchers that day.

53. The Court finds that this circumstance, namely the inability of eyewitnesses to identify the officer who fired the shot because he was wearing a balaclava, is in itself a matter of concern. In this connection it would refer to its previous finding, under Article 3 of the Convention, to the effect that any inability to determine the identity of members of the security forces, when they are alleged to have committed acts that are incompatible with the Convention, breaches that provision (see, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, §§ 59 and 60, 30 September 2004, and *Rashid v. Bulgaria*, no. 47905/99, §§ 63-65, 18 January 2007). Similarly, the Court has already stated that where the competent national authorities deploy masked police officers to maintain law and order or to make an arrest, those officers should be required to visibly display some distinctive insignia – for example a warrant number – thus, while ensuring their anonymity, enabling their identification and questioning in the event of challenges to the manner in which the operation was conducted (see *Hristovi v. Bulgaria*, no. 42697/05, § 92, 11 October 2011, and *Özalp Ulusoy v. Turkey*, no. 9049/06, § 54, 4 June 2013). Those considerations are all the more valid in the present case as it concerns a death following a shot fired by a member of the security forces who was wearing a balaclava.

54. The Court thus finds that the domestic authorities deliberately created a situation of impunity which made it impossible to identify members of the security forces who were suspected of inappropriately firing tear-gas grenades and to establish the responsibilities of the senior officers, thus preventing any effective investigation (see, *mutatis mutandis*, *Dedovski and Others v. Russia*, no. 7178/03, § 91, ECHR 2008). In addition, it is troubling that no information on the incident which caused Tarık Ataykaya's death was mentioned in the records of the security forces (see paragraph 29 above).

55. The Court further observes that in the first year following the incident practically no progress was made in the investigation. The public prosecutor admittedly attempted on a number of occasions to identify the members of the security forces who had had recourse to tear-gas grenades (paragraph 13 above). Those attempts were not, however, followed up, or they were only partly successful and after an unacceptable delay. Moreover, the public prosecutor's officer proceeded only belatedly to hear evidence from the complainant, from a few police officers whose identities had been disclosed and from eyewitnesses. For example, B.A., one of the police officers who had used tear-gas grenades, was not interviewed until 14 February 2007 – more than ten months after the incident (see paragraph 20 above). Two other police officers were not interviewed until about two years after the event (see paragraph 26 above). In this connection, the Court

would reiterate its findings in *Bektaş and Özalp* (cited above, § 65 – police officers questioned seven days after the incident), and in *Ramsahai and Others* ([GC], no. 52391/99, § 330, ECHR 2007-II – police officers questioned three days after the incident), to the effect that such delays not only create an appearance of collusion between the investigative authorities and the police, they could also lead the victim's family – and the public in general – to believe that the members of the security forces are not accountable for their acts to the judicial authorities. In the present case, although there is no evidence that they colluded with each other or with their colleagues in the Mardin police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation (see *Ramsahai and Others*, cited above, § 330).

56. Furthermore, the Court observes that, notwithstanding the applicant's request (see paragraph 11 above), no expert opinion was ordered to establish how the grenade had been fired, especially as, in view of its impact and the injuries caused, it seems that the shot, as stated by an eyewitness (see paragraph 9 above), had been direct, following a flat trajectory, rather than a high-angle shot. The Court has already had occasion to observe that "firing a tear-gas grenade along a direct, flat trajectory by means of a launcher cannot be regarded as an appropriate police action as it could potentially cause serious, or indeed fatal injuries, whereas a high-angle shot would generally constitute the appropriate approach, since it prevents people from being injured or killed in the event of an impact" (see *Abdullah Yaşa and Others*, cited above, § 48).

57. As regards, lastly, the regulatory framework for the use of non-lethal weapons, such as tear-gas grenades, the Court would point out that, in the case of *Abdullah Yaşa and Others* (cited above), which concerned an injury caused by the firing of a tear-gas grenade during the same incidents as those which gave rise to the present case, it examined the regulations on the use of tear-gas grenades. It found that at the relevant time Turkish law contained no specific provisions regulating the use of such equipment during demonstrations or any instructions in that connection. Given that during the events in Diyarbakır between 28 and 31 March 2006 two individuals, one of whom was Tarık Ataykaya, were killed by tear-gas grenades, it may be concluded that the police officers were able to act with considerable autonomy and take ill-considered initiatives, as would probably not have been the case if they had been given appropriate training and instructions. In the Court's view, such a situation is not sufficient to provide the level of protection "by law" of the right to life that is required in present-day democratic societies in Europe (see, *mutatis mutandis*, *Makaratzis*, cited above, § 62, and *Abdullah Yaşa and Others*, cited above, § 49).

58. In the light of the foregoing, the Court finds that no serious investigation capable of establishing the circumstances surrounding the

death of Tarık Ataykaya has been conducted at the national level and that the Government have not shown satisfactorily that the use of lethal force against the applicant's son was absolutely necessary and proportionate. The same is true for the preparation and supervision of the operation; the Government have not adduced any evidence to suggest that the security forces deployed the requisite vigilance to ensure that any risk to life was reduced to a minimum. In addition, the Court takes the view that, as far as their positive obligation under the first sentence of Article 2 § 1 to put in place an appropriate legislative and administrative framework was concerned, the Turkish authorities had not done all that could be reasonably expected of them, first, to afford to citizens the requisite level of protection, particularly where –as in the present case –potentially lethal force was to be used, and, secondly, to avoid any real and immediate risk to life which might arise in the context of police operations dealing with violent demonstrations (see, *mutatis mutandis*, *Makaratzis*, cited above, § 71).

59. Having regard to the foregoing, it has clearly not been established that the lethal force used against the applicant's son did not go beyond what was "absolutely necessary". In addition, the Court takes the view that the investigation into the incident of 29 March 2006 lacked the effectiveness required by Article 2 of the Convention.

Accordingly, there has been a violation of this provision under its substantive and procedural heads.

II. THE OTHER ALLEGED VIOLATIONS

60. The applicant submitted that the death of his son and the failure to prosecute the police officers concerned had constituted, for himself, inhuman and degrading treatment in breach of Article 3 of the Convention.

Relying on Article 13 of the Convention, he argued that he had no effective remedy in domestic law by which to bring proceedings against the perpetrator of the lethal shot. In that connection, he complained that the judicial authorities had not carried out a sufficiently comprehensive investigation in order to identify the person responsible for the death. He further argued that the police disciplinary board, which had conducted the disciplinary investigation, could not be regarded as independent and impartial.

Further relying on Article 14 of the Convention, he argued that his son had been murdered on account of his Kurdish origin.

Based on the same facts, the applicant lastly relied on Article 17 of the Convention.

61. The Government disputed those arguments.

62. As regards the complaint under Article 3 of the Convention, having regard to the criteria laid down in its case-law (see *Aydan*, cited above, § 131), the Court is of the view that the present case does not contain a

sufficient number of special factors which could have caused the applicant suffering of such dimension and nature that it exceeded the emotional distress inevitably sustained by relatives of a victim of a serious human rights violation (compare *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, §§ 179-181, ECHR 2013; see also *Perişan and Others v. Turkey*, no. 12336/03, § 99, 20 May 2010; and *Makbule Akbaba and Others v. Turkey*, no. 48887/06, § 46, 10 July 2012). Accordingly, there is nothing to justify finding a violation of Article 3 of the Convention in respect of the applicant.

It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

63. As to the complaint under Articles 14 and 17, the Court notes that it is not substantiated. It is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

64. As to the complaint under Article 13, given that this complaint is in reality identical to that submitted by the applicant under the procedural head of Article 2, and in view of the conclusion it has reached in respect of the latter Article (see paragraph 59 above), the Court declares the complaint under Article 13 admissible but finds that it does not need to examine it separately on the merits.

III. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

65. 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."

66. The relevant part of Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

A. Indication of general and individual measures

67. The applicant expressed the wish that the Court's findings in the present case should lead, at national level, to the taking of measures necessary for the prevention of such violations of the Convention in the future.

1. General principles

68. The Court reiterates that, having regard to Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not only to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order (see *Del Rio Prada v. Spain* [GC], no. 42750/09, § 137, ECHR 2013; *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Assanidzé v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII).

69. The Court further reiterates that its judgments are essentially declaratory in nature and that in general, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV). This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (*Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

70. However, in exceptional cases, with a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court seeks to indicate the type of measure that might be taken in order to put an end to the systemic situation identified. It may put forward a number of options and leave the choice and manner of implementation to the discretion of the State concerned (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In certain cases the very nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see, for example, *Del Rio Prada*, cited above, § 138; *Assanidzé*, cited above, §§ 202 and 203; *Alexanian v. Russia*, no. 46468/06, § 240,

22 December 2008; *Fatullayev v. Azerbaijan*, no. 40984/07, §§ 176 and 177, 22 April 2010; and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 208, 9 January 2013).

2. Application of those principles to the present case

71. As regards the general measures that the State should adopt in order to implement the present judgment, the Court refers back to its findings in the *Abdullah Yaşa and Others* judgment (cited above, § 61):

> "... Moreover, [the Court] noted that at the time of the events, Turkish law lacked any specific provisions governing the use of tear-gas grenades during demonstrations and did not lay down any instructions for their utilisation by the police forces ... The Court notes that on 15 February 2008 ... a circular setting out the conditions for the use of tear gas was issued to all national security services by the Director General of Security. Nevertheless, the Court considers it necessary to reinforce the guarantees on proper use of tear-gas grenades in order to minimise the risks of death and injury stemming from their use, by adopting more detailed legislative and/or statutory instruments, in accordance with the principles set out in paragraph 48 above."

72. These findings have been supplemented by those in the *İzci v. Turkey* judgment (no. 42606/05, § 99, 23 July 2013), where the Court stated that it was crucial that a clearer set of rules be adopted in such matters and that a system be put in place guaranteeing appropriate training of personnel and control and supervision of such personnel during demonstrations, together with an effective *ex post facto* review of the necessity, proportionality and reasonableness of any use of force, especially against people who showed no violent resistance towards the security forces.

73. The considerations reiterated above, calling upon the Government to take general measures, are also valid in the present case. The Court notes that the violation of the right to life of the applicant's son, as guaranteed by Article 2 of the Convention, originates once again in a problem stemming from the absence of guarantees as to the proper use of tear-gas grenades. Consequently, the Court emphasises the need to strengthen those guarantees, without delay, in order to minimise the risks of death and injury related to the use of tear-gas grenades (see, to that effect, *Abdullah Yaşa*, cited above, § 61). It would point out, in that connection, that there is a risk that the inappropriate use of such potentially lethal weapons during demonstrations, for as long as the Turkish system fails to comply with the Convention requirements, may lead to other violations of a similar nature to those observed in the present case.

74. As regards individual measures, the Court has found that the applicant's son died following the firing of a tear-gas grenade and that, on that account, there has been a violation of Article 2 of the Convention. It also found that no effective investigation into the incident had been conducted (see paragraph 59 above).

75. In view of the fact that the investigation is still open at national level (see paragraph 29 above) and in the light of the documents in the file, the Court finds that in executing the present judgment new investigative measures should be taken under the supervision of the Committee of Ministers. In particular, the measures that the national authorities will have to take in order to prevent impunity must include an effective criminal investigation aimed at the identification and, if appropriate, the punishment of those responsible for the death of the applicant's son. In that connection the Court refers again to the *İzci* judgment (cited above, §§ 98-99), where it found that an effective investigation also had to seek to establish the responsibility of the senior police officers.

B. Article 41

1. Damage

76. The applicant claimed 25,000 euros (EUR) in respect of pecuniary damage and EUR 80,000 for non-pecuniary damage.

77. The Government disputed those claims.

78. The Court does not find any causal link between the violation found and the pecuniary damage alleged, and rejects that claim. It is of the view, however, that the applicant should be awarded EUR 65,000 for non-pecuniary damage.

2. Costs and expenses

79. The applicant also claimed EUR 6,603 for the costs and expenses he had incurred in the proceedings before the Court. A statement provided by his lawyer gave the following breakdown:

– lawyer's fees: EUR 6,125,

– administrative expenses (telephone calls, postal costs, photocopying) and translation fees: EUR 478.

80. The Government submitted that those claims were excessive and not substantiated by any document.

81. The Court would point out that in order for costs to be included in an award under Article 41 of the Convention, it must be established that they were actually and necessarily incurred and are reasonable as to quantum (see *Nikolova v Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). In the present case, having regard to the documents at its disposal and the above-mentioned criteria, the Court finds it reasonable to award the applicant the sum of EUR 5,000 for all costs and expenses.

C. Default interest

82. 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. *Declares* the application admissible as to the complaint under Articles 2 and 13 of the Convention;

2. *Declares* the application inadmissible as to the complaints under Articles 3, 14 and 17 of the Convention;

3. *Holds* that there has been a violation of Article 2 of the Convention under its substantive and procedural heads;

4. *Holds* that it is not necessary to examine separately the merits of the complaint under Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, 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 payment:
      (i) EUR 65,000 (sixty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until payment 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;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 22 July 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Guido Raimondi
Deputy Registrar	President