



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

FOURTH SECTION

CASE OF ACAR AND OTHERS v. TURKEY

(Applications nos. 36088/97 and 38417/97)

JUDGMENT

STRASBOURG

24 May 2005

FINAL

12/10/2005

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 Acar and Others v. Turkey,

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

Sir Nicolas BRATZA, *President*,

Mr J. CASADEVALL,

Mr M. PELLONPÄÄ,

Mr R. MARUSTE,

Mr K. TRAJA,

Mr J. ŠIKUTA, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

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

Having deliberated in private on 3 May 2005,

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

PROCEDURE

1. The case originated in two applications (nos. 36088/97 and 38417/97) 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 ten Turkish nationals, i.e. (application no. 36088/97) Mr Osman Acar (born in 1938 and brother of İsmet Acar), Mr Hüseyin Akan (born in 1950 and son of Mehmet Akan and brother of Abdülkadir Akan), Mr Mehmet Ali Akan (born in 1978 and son of Mehmet Akan and brother of Abdülkadir Akan), Mr İbrahim Akan (born in 1933 and *muhtar* of the Çalpınar village) and Mrs Elife Akalan (Acar) (born in 1976 and daughter of Mehmet Emin Acar); and (application no. 38417/97) Mrs Selime Akay (born in 1958 and wife of Hasan Akay), Mrs Hanime Ağırman (born in 1960 and wife of Mehmet Ağırman), Mrs Cihan Akan (born in 1976 and wife of Abdülkadir Akan), Mr Mehmet Akay (born in 1954 and brother of Hasan Akay) and Mr Reşit Acar (born in 1949).

2. The applicants, who had been granted legal aid, were represented by Mr M.N. Terzi, a lawyer practising in İzmir. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicants complained about the alleged killing of the applicants' relatives by village guards in the state of emergency region. They relied on Articles 2, 6 and 8 of the Convention. The applicants in application no. 38417/97 also relied on Article 13 in conjunction with Article 2 of the Convention.

4. The applications were 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 applications were allocated to the Fourth 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 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 27 November 2001, the Court decided to join the proceedings in the applications (Rule 42 § 1) and declared the applications partly admissible.

7. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

8. On 1 November 2004 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, as submitted by the parties, may be summarised as follows.

10. At the time of the events at issue, the applicants resided in Çalpınar, a village attached to the district of Midyat in the Mardin province of south-east Turkey.

11. On 20 April 1992, at around 7 a.m., a group of villagers set out from the village of Çalpınar for the district of Midyat, by a minibus and a truck. On the way to Midyat, an armed group of people stopped the villagers one kilometre away from the village of Çalpınar. They forced the villagers to get out of the vehicles and ordered them to line up near the road. They fired at the villagers and fled. According to the applicants, the armed group consisted of village guards.

12. The gendarmes drew a sketch map of the crime scene and drafted an incident report addressed to the Midyat public prosecutor. It was stated in the report that a group of terrorists wearing military uniforms stopped a minibus and a truck near the hamlet of Kuyubaşı attached to the village of Çalpınar. They killed six villagers, namely Hasan Akay, İsmet Acar, Mehmet Ağırman, Abdülkadir Akan, Süleyman Acar and Mehmet Akan.

Nine villagers, namely Reşit Acar, Mehmet Emin Acar, Sabri Acar, Ahmet Acar, İbrahim Akan, Yusuf Acar, Erdal Acar, Salih Acar, Süleyman Acar and Semra Akan, were wounded. Furthermore, the gendarmes found 66 empty cartridges of 7.62 mm which had been discharged from Kalashnikov rifles. The report concluded that the incident was an ideologically motivated killing by members of the PKK.

13. On the same day the Midyat Public Prosecutor and a forensic doctor conducted an autopsy at the scene of the incident. They concluded that the persons killed in the incident had died of bullet wounds. The autopsy report recorded the following injuries:

İsmet Acar: One bullet entry on the right ear, one bullet exit on the upper part of the head, one bullet entry on the right armpit, one bullet exit on the right shoulder, one bullet wound on the abdomen, one bullet entry on the upper abdomen, one bullet exit on the waist, one bullet entry on the right upper abdomen, one bullet exit on the right upper hip, one bullet entry on the right thigh and one bullet exit on the front hip.

Hasan Akay: One bullet entry on the forehead, one bullet exit on the right part of the head, one bullet entry between the 10th and 11th ribs, one bullet exit on the right front ribs, one bullet entry on the inner right elbow, one bullet exit on the outer right elbow, one bullet entry on the left upper 12th rib, one bullet exit on the left part of the chest, one bullet wound on the left shoulder, one bullet entry on the inner left leg and one bullet exit on the outer left leg.

Mehmet Ağırman: One bullet entry on the left shoulder blade, one bullet exit on the right shoulder blade, one bullet entry on the inner right elbow, one bullet exit on the outer left elbow and one bullet wound on the right calf.

Süleyman Acar: One bullet wound on the left temple, one bullet entry on the left shoulder, one bullet exit on the left shoulder blade, one bullet entry on the right part of the right wrist, one bullet exit on the left part of the right wrist and one bullet entry on the left calf.

Mehmet Akan: One bullet entry on the left hip, one bullet exit on the upper left hip, one bullet entry on the waist, one bullet exit on the scrotum, one bullet entry between the 9th and 10th ribs, one bullet exit on the upper right hip and one bullet exit between the 9th and 10th ribs.

Abdülkadir Akan: One bullet entry on the forehead, one bullet exit on the left temple, one bullet entry between the 6th and 7th ribs, one bullet exit between the 7th and 8th ribs, one bullet entry on the right hip, one bullet exit on the abdomen, one bullet entry on the right upper hip, one bullet exit on the pubis, one bullet entry on the 12th rib and one bullet exit on the chest.

The estimated time of death was given in the autopsy report as 5 or 6 hours before the autopsy had been carried out. The doctor concluded that it was unnecessary to conduct further autopsies of the bodies.

14. On the same day the witnesses Süleyman Acar¹, Yusuf Acar and Salih Acar were questioned by the police officer Hüseyin Coşar. Moreover the Midyat Public Prosecutor took the statements of the applicants Mehmet Akay, Hüseyin Akan and five other witnesses.

Mehmet Akay stated as follows:

“This morning at around 7 a.m. we set out for Midyat. There were five or six of us in Hasan Akay’s truck. When we were one kilometre away from the village, a group of fifteen men appeared from both the left and the right side of the road. They came out from a cave near the road. They stopped us. They were wearing military uniforms. We thought that they were soldiers. There was a minibus that was following us. They also stopped the minibus. They told us to get out of the vehicles and hold our arms up. We did as we were told. Then, they took İsmet [Acar], Hasan [Akay], Hacı Mehmet [Akan], Mehmet Emin Acar, Ahmet Acar and Mehmet Ağırman to the other side of the road and started shooting at them with Kalashnikov rifles. The others ran away. I ran away as well. They also shot at us. Some of us died and some of us were wounded. Then, they ran rapidly towards the village of Kutlubey. Those people were village guards from the village of Kutlubey. Their faces were half covered but I identified Cengiz and Ethem. I do not know their surnames. I could recognise their voices because I knew them before. They are from the neighbouring village.”

Süleyman Acar stated as follows:

“... When we were passing by the Mythike cave, ten or twenty people came out of it. They were armed and were speaking in Kurdish. They told us to line up. We did as we were told. They also stopped the minibus that was following us. I knew two people among the group. One of them is called Ethem and the other is called Cengiz. They opened fire at us. I was wounded. They took me to Midyat State Hospital.”

Salih Acar stated as follows:

“... They had already taken the people out from the truck. They told us to get out of the minibus. They took five of us and killed them. When we started to run, they opened fire on us. I was wounded. It was Ethem and Cengiz who made us line up.”

15. On 21 April 1992 Sabri Acar and Mehmet Emin Acar, who had been wounded in the incident, died in Mardin State Hospital. A bullet was removed from the deceased Sabri Acar’s body. Moreover, on the same day the applicant Reşit Acar was operated on and a bullet was removed from his body.

16. On 13 May 1992 the applicant İbrahim Akan gave the following statement to the Midyat Public Prosecutor:

“... A group of twenty five or thirty armed people stopped our truck. They also stopped the minibus that was following us. I recognised İsmail (his mother is called Güle), Cengiz and Ethem. I do not know their surnames. I know them very well because they are our neighbours. İsmail and Ethem had not covered their faces. Sorry, I made a mistake. It was Cengiz’s face which was uncovered. İsmail and Ethem had covered their mouths but not their eyes. They were wearing conical hats like soldiers.

1. According to the official reports there are two persons called Süleyman Acar; Süleyman Acar (son of Hüseyin), who died in the incident, and Süleyman Acar (son of Hasan), who was wounded in the incident.

They were also wearing commando uniforms. They were holding Kalashnikov rifles. Cengiz was also holding a gun. They shouted at us in Turkish and ordered us to get out of the vehicles one by one. When we gathered near the vehicles they told us in Kurdish to line up. I told them that they could search us and check our identity cards. Then I asked them to let us go. I told them that we had a long way to travel. When they heard this they opened fire. We ran away. Seven people died. I was wounded in the back. These people ran away towards the village of Kutlubey. I know them very well. I can identify them. Kutlubey is not far away from our village. There is no vendetta between the villages. The only reason for this incident could be that they have village guards but we do not. According to the rumours, the members of the organisation [PKK] had killed a village guard from the village of Kutlubey. The Kutlubey villagers had thought that it was us who had killed him. We celebrated Nevruz but they did not. For that reason we were their enemies.”

17. On 3 June 1992 Salih Acar and Ahmet Acar also gave statements to the Midyat Public Prosecutor. They reiterated that the village guards Ethem and Cengiz from the village of Kutlubey were among the group of people who had attacked them. Salih Acar further stated that although the attackers had covered their faces he had been able to identify Cengiz and Ethem.

18. In a ballistic report by the Diyarbakır Provincial Criminal Police Laboratory, dated 23 June 1992, it was recorded that sixty-six cartridges of 7.62 x 39mm calibre had been submitted for examination. In carrying out the ballistic examination, the laboratory fired the weapons belonging to the village guards from Kutlubey and compared the empty cartridges with those found at the site of the incident. The report found that twelve of the examined cartridges had been fired from Tacettin Sakan’s weapon, twelve from Nevaf Aydın’s weapon, nine from Şehmuz Seyda’s weapon, six from Halit Aktan’s weapon, six from Rahmi Kaçmaz’s weapon, six from Mihdi Özbay’s weapon, five from Ethem Seyhan’s weapon, four from Tevfik Akbay’s weapon, two from Abbas Taş’s weapon and finally one from Mehmet Seyhan’s weapon. The report further stated that three cartridges bore no resemblance to the cartridges examined by the laboratory. Following the examination the weapons were deposited in safe storage at the Nusaybin Gendermarie Command.

19. On 30 June 1992 the judge at the Midyat Assize Court took statements from the ten village guards, whose names were mentioned in the ballistic report, and ordered their detention on remand.

20. On 8 July 1992 the Midyat public prosecutor filed a bill of indictment with the Midyat Assize Court against the twenty-seven village guards of Kutlubey. He accused them of the murder and attempted murder of more than one person.

21. On 20 July 1992 the Midyat Assize Court ordered that the village guards Cengiz Kaçmaz and İsmail Taş be detained on remand. After three days İsmail Taş was released pending trial.

22. On 4 August 1992, at the first hearing, the Midyat Assize Court requested the ballistic examination of the bullet which had been removed

from Hasan Akay's corpse by the Midyat Public Prosecutor, during the autopsy.

23. On 10 August 1992, the Midyat public prosecutor requested the Diyarbakır Provincial Criminal Police Laboratory to determine whether or not the bullet removed from Sabri Acar's body had been fired from the weapons belonging to the village guards. On 25 August 1992 the laboratory informed the public prosecutor that it was not possible to comply with these requests as they were only in possession of the empty cartridges found at the scene of the incident and not the weapons themselves.

24. On 1 September 1992 the court requested the Nusaybin Gendarmerie Command to hand over the accused village guards' weapons so that a ballistic examination of the bullets removed from the corpses of deceased Sabri Acar and Hasan Akay could be carried out. Moreover it sent a notice to the Midyat Public Prosecutor to ascertain the address of the victim Erdal Acar, who possibly still had a bullet in his body, and to have him medically examined.

25. At a hearing on 29 September 1992 Salih Acar, Yusuf Acar and the applicant İbrahim Akan appeared before the Midyat Assize Court. Salih Acar and Yusuf Acar identified the village guards Ethem Seyhan and Cengiz Kaçmaz, who were present in the courtroom, as the perpetrators of the incident. İbrahim Akan identified Ethem Seyhan, Cengiz Kaçmaz as well as Tacettin Sakan who were present in the court room and accused them of having opened fire.

26. On 22 December 1992, the village guards Cengiz Kaçmaz, Mehdi Özbay, Şehmus Seyda, Tacettin Sakan, Nevaf Aydın, Mehmet Seyhan, Halil Aktan, Ethem Seyhan, Tevfik Akbay, Rahmi Kaçmaz and Abbas Taş appeared before the Midyat Assize Court. They denied the allegations against them and stated that the empty cartridges found at the scene of the crime had been placed there by their enemies in order to implicate them in the crime. They maintained that on two previous occasions they had to use their weapons in the Ziyaret region. On 21 March 1992 a group of between 1000 and 1500 villagers, including the Çalpınar residents, demonstrated during the Nevroz celebrations by marching towards the village of Kutlubey. When the villagers arrived in the vicinity of Hazzaze, the gendarmes and the village guards from Kutlubey intervened and fired warning shots in order to disperse the crowd. Moreover on 13 April 1992 there had been an armed clash between the village guards and the members of the PKK in the Ziyaret region, near the village of Kutlubey. According to an incident report drafted by the gendarmes on the following day, although the village guards fired 447 bullets the gendarmes were only able to collect 215 empty cartridges due to the rain and the crowd of villagers who gathered at the place of incident.

27. At the same hearing the court heard the non-commissioned officer Ali Kılıç. Mr Kılıç had been on duty at the Gendarmerie Command in Kutlubey on the day of the incident. He stated as follows:

“I have been serving at the Kutlubey Gendarmerie Command for one and a half years. Kutlubey is a big village. I know the accused village guards. They are from Kutlubey and they support the State. We perform our duties together. I remember the day [of the incident]. I was keeping guard at night because we were expecting an attack. ... I was with three other soldiers and three village guards. The names of the village guards were Tevfik Akbay, Rahmi Kaçmaz and Halit Aktan. ... The village guards Hasan Kaçmaz, Nevaf Aydın and Mahmut Başak were together with my colleague, Arif Güner. The village guards Cengiz Kaçmaz, İsmail Kaçmaz and Tacettin Sakan were with Sergeant Kazım Demirbaş. The rest of the village guards were keeping guard near the village. We were on duty until 6 a.m. No incident took place that night. Then, I went to the command. [At the command] they told me that the Midyat commander had announced the occurrence of the incident on the radio. It took place at the border with the province of Midyat. Our command and the village of Kutlubey are in the province of Nusaybin. The district gendarmerie commander ordered the village guards to gather at the command. All the village guards had gathered at the command within 15 minutes. I waited for the commander, but he did not come. In the meantime, I checked all the weapons of the village guards in order to see whether or not they had been used. The village guards had previously been ordered to leave their weapons after their shifts of duty. It was obligatory to clean the weapons with a ramrod. I checked all the weapons of the village guards one by one. Some of the weapons had been kept in good order. Some of them, however, were dusty. I checked these weapons just after the incident took place. I did not observe a mark or a smell of gunpowder.

We had been informed that the villagers would march towards the village of Kutlubey during the Nevruz celebrations. In fact they had lit a fire in the neighbouring villages one night before Nevruz. Kutlubey is the only village in that region that has village guards. The other villages do not have village guards. ... [During the Nevruz celebrations] twelve members of the PKK forced the villagers to march towards Kutlubey. They alleged that they had their martyrs there. I tried to stop the group and told them that what they had been doing was illegal. I asked the village guards to repeat the same things in Kurdish. However, the militants continued to force the villagers to march. Then I shot warning shots. The helicopters arrived later. [The helicopters] should not have fired. [When they opened fire] the people ran away. ... On 14 April 1992 the PKK militants attacked the Kutlubey village. A village guard called Muhittin died. The village guards and our forces opened fire. The terrorists went away. In these kinds of attacks it is impossible to collect all the cartridges. Some of them can be collected but not all. The village guards have Kalashnikov rifles. We have G-3s or MG-3s. The bullets [for these rifles] are 7.62 calibres. However, the structure of those bullets is different. You can tell which bullet matches which rifle.”

28. On 19 January 1993 several weapons were submitted to the court. However they were sent back as none of these were the village guards' weapons which were previously submitted for ballistics examination.

29. On 2 February 1993 the Midyat Assize Court ordered the release of the village guard Abbas Taş pending trial.

30. On 9 February 1993, upon the requests of the Midyat Public Prosecutor, the Governor and the director of the Midyat prison, the Midyat

Assize Court decided to transfer the case to Denizli Assize Court in order to maintain public security in the area. It held that it was necessary to transfer the case due to the hostility that the parties had shown to each other, the difficulty that they had in travelling to the court house and the tension created in Midyat on the day of the hearings. It further held that the situation had served to encourage the PKK to increase its terrorist activities in the region.

31. On 1 March 1993, at the first hearing held before the Denizli Assize Court, the court requested to have all the accused transferred to Denizli prison. It sent letters rogatory to the Midyat Assize Court and the Nusaybin Assize Court to take the statements of fifteen accused who had been released pending trial. It also sent a notice to various regional authorities requesting to be informed of the addresses of several witnesses. Furthermore it requested the removal of the bullet found in Süleyman Acar's body. The court also repeated the Midyat Assize Court's request to have the village guards' weapons which were deposited in safe storage at the Nusaybin Gendarmerie Command.

32. On 2 March 1993 the Denizli Assize Court requested the Midyat Assize Court to take Süleyman Acar's statement. On 12 March 1993 the Midyat Public Prosecutor filed an additional bill of indictment against the twenty-seven guards for the attempted murder of Süleyman Acar.

33. On 29 March 1993 Süleyman Acar appeared before the Midyat Assize Court and stated as follows:

"I was taken to Diyarbakır State Hospital. I was operated on there. I do not know whether they removed a bullet from my body. I was unconscious. I was not told that a bullet had been removed from my body. I was wounded in the calf. There was a bullet exit wound on my knee. It is probable that the bullet had not remained in my leg."

34. On 5 April 1993 the applicant Hüseyin Akan gave the following statement before the Midyat Assize Court:

"On the day of the incident, the minibus that I was in was stopped by a group of armed people. They made us get out of the vehicles and line up. The person called Ethem gave his gun to Cengiz Kaçmaz. Cengiz Kaçmaz signalled with the gun to the others and they all fired at us. I have identified them because Cengiz's face was only partially covered and Ethem's face was completely uncovered. During the incident my brother Abdülkadir and my father Mehmet died."

35. On 20 April 1993 Sergeants Arif Güner and Kazım Demirbaş appeared before the Denizli Assize Court. Arif Güner stated as follows:

"On the day of the incident I was keeping guard with the village guards from 6 a.m. to 5 p.m. As far as I remember I was with Tacettin Sakan, Nevaf Aydın and Mahmut Başak. ... The place where we were keeping guard is two hours' walking distance from where the incident took place. The other accused village guards were keeping guard with the other soldiers. ... I went back to the command with the village guards. All the accused village guards were with us. We stayed at the command for an hour and a half in order to have breakfast. As a result it is impossible that the accused were involved in the incident. ... On the Nevruz day the villagers marched to the village of

[Kutlubey]. We fired warning shots that day. It was raining, therefore we could not collect the cartridges. It is probable that someone else collected the cartridges. ... We always clean the weapons when we return to the command. On that day the weapons were clean. There was no mark or smell of gunpowder. It is impossible that the village guards killed or wounded the villagers. The three of them were with me and the others were with their commander. Some of them were keeping guard near the village.”

36. Sergeant Kazım Demirbaş reiterated his colleague’s statement and said that the village guards Cengiz Kaçmaz, Bedran Göktekin and İsmail Kaçmaz had accompanied him on the day of the incident.

37. At the hearing held on 26 April 1993 the court requested the removal of the bullets found the bodies of Süleyman Acar, İbrahim Akan and Salih Acar’s bodies, if this operation would not cause a threat to their health.

38. On 20 May 1993 the Denizli Assize Court ordered the release of the village guard Cengiz Kaçmaz pending trial.

39. On 17 June 1993 the court requested to have an interpreter since some of the accused and the interveners did not know Turkish. Furthermore it once again repeated its request concerning the submission of the weapons. It sent a notice to the State of Emergency Region Governor and the Mardin Governor in this regard, emphasising the decisive role of this evidence for the case.

40. On 25 June 1993 Mardin State Hospital informed the court that it was too risky to remove the bullet from İbrahim Akan’s leg since it was too close to the nerves.

41. On 7 July 1993 the Midyat Public Prosecutor made the following statement before the Assize Court in Rize at the request of the Denizli Assize Court:

“At the material time I was the public prosecutor in Midyat. ... The gendarmes and soldiers were at the scene of the incident when I arrived. I saw 7 or 8 dead bodies lying on the right and the left side of the road. It seemed that they had been shot at close range. ... I told the soldiers to collect the empty cartridges. ... While I was carrying out the autopsies, I realised that the soldiers were not collecting the empty cartridges. I personally collected the empty cartridges that were near the dead bodies with the help of my assistant. I drafted a report. More empty cartridges could have been collected. I collected as many as I could. It seemed that the cartridges had been fired recently. There was a smell of gunpowder. It was obvious that they had been fired recently. The base of the cartridges (*mermi dip çukurları*) had not oxidised. There were no rifles around, only empty cartridges. ... In my opinion the empty cartridges had been fired from the weapons that killed the villagers. ... There were traces of newly extinguished fire and human excrement in a cave near the road. In my opinion this shows that the murderers laid an ambush before the attack.”

42. On 14 July 1993 twenty eight Kalashnikov rifles which belonged to the accused were deposited in safe storage at the Denizli Assize Court. The following day the bullet removed from Reşit Acar’s leg was also deposited in safe storage at the court.

43. In a report dated 20 July 1993, issued by the Diyarbakır State Hospital, the court was informed that there were fragments of bullet in Süleyman Acar's body but that it was not possible to remove them.

44. On 7 September 1993 the Denizli Assize Court requested the Forensic Medicine Institute in Istanbul to examine whether or not the 66 empty cartridges found at the scene of the crime and the bullets removed from the applicant Reşit Acar and from the body of Sabri Acar had been fired from the weapons of the village guards. The court further requested that Süleyman Acar's medical situation be reassessed and that the court be informed whether the fragments of bullet could be removed from his body.

45. In a ballistic report dated 28 October 1993, the Forensic Medicine Institute confirmed the findings in the Diyarbakır Provincial Criminal Police Laboratory's report. Additionally it stated that three cartridges had been fired from a "Nato-type" rifle of 7.62-mm calibre. As regards the two bullets removed from the bodies of Sabri Acar and Reşit Acar, the report stated that the bullets in question had oxidised and, consequently, could no longer be used for comparative tests. It could not therefore be determined whether or not the two bullets had been fired from the weapons belonging to the village guards.

46. In its report dated 8 November 1993 the Forensic Medicine Institute informed the court that it was possible from a medical perspective to remove the fragments of bullet found in Süleyman Acar's body. At the following hearing the court decided not to carry out an operation on Süleyman Acar as a ballistic examination of these fragments would not yield any positive results. Furthermore it ordered the release of the village guards Mihdi Özbay, Şehmus Seyda, Tacettin Sakan, Nevaf Aydın, Mehmet Seyhan, Halit Aktan, Rahmi Kaçmaz, Ethem Seyhan and Tefik Akbay pending trial.

47. In their statements given before the court on 20 December 1993 all the accused denied the charges against them and requested to be acquitted.

48. Between 1994 and 1996, during the seventeen hearings that were held before the Denizli Assize Court, the court took the statements of witnesses by sending letters rogatory to the courts where they resided, since most of them had moved to different parts of Turkey and in some cases their addresses were not known to the court.

49. On 2 July 1996 a report describing Erdal Acar's medical history was submitted to the court. However as the report did not contain any remark concerning the bullet in his body, the court sent a letter rogatory to the Antalya Assize Court re-formulating its request regarding the removal of the bullet.

50. In a petition dated 17 February 1997, the applicant İbrahim Akan informed the Denizli Assize Court that he had already been told three times at Mardin State Hospital that the bullet in his leg could not be removed. Mr Akan also stated that he did not have the financial means to travel to

Denizli and have his leg operated on in a hospital there. On 27 February 1997 the court sent a note to the Denizli Public Prosecutor requesting that an operation be carried out on İbrahim Akan in a hospital in Izmir to remove the bullet in his leg, if this operation would not pose a threat to his health.

51. On 12 August 1998, after several attempts to track down İbrahim Akan who had moved without informing the authorities of his new address, he was found and was sent to the Atatürk Eğitim Hospital in Izmir for examination. According to the medical report drafted on 31 August 1998, although there were some medical risks involved, it was possible to remove the bullet.

52. Following the applicants' allegations concerning pressure and intimidation exerted by the security forces an investigation was initiated by the domestic authorities. On 8 February 1999 Selim Acar gave the following statement to the public prosecutor:

“Osman Acar and İsmet Acar are my brothers. İsmet was killed in the incident that took place in 1992. Osman Acar has been living in İzmir for 30 years. He rarely comes to the village. The last time he came to the village was in 1993 on the occasion of our mother's funeral. I have not seen him since then. Nobody has threatened me in connection with my brother's killing. On several occasions I have been taken into custody during the operations against the PKK because of my alleged involvement in the activities of the terrorist organisation. My relatives and I have not been threatened. The head of the Kutlubey village guards, Cengiz Kaçmaz, has not threatened us. We are on perfectly reasonable terms. We stay at his house when we visit the village of Kutlubey.”

53. In a petition dated 21 February 1999, the applicant Osman Acar informed the Denizli Assize Court that village guards, including Cengiz Kaçmaz, had threatened members of his family, in particular his brother Selim Acar and his wife Halime Acar.

54. On 17 November 1998 the court sent an order to the İzmir Assize Court to ask for İbrahim Akan's permission to remove the bullet from his leg. On 23 February 1999, as the Izmir Assize Court was unable to find İbrahim Akan, the court sent a letter to the Midyat public prosecutor asking the whereabouts of İbrahim Akan. During the following seven hearings the court continued to try to ascertain the address of İbrahim Akan.

55. At the hearing of 13 June 2000 the public prosecutor requested the conviction of the accused as charged. The lawyer of some of the accused requested additional time to submit his defence on the merits. In order not to delay the proceedings any longer, the court decided to annul the interim order to remove the bullet from İbrahim Akan's leg. It decided to send letters rogatory to assize courts in different cities to obtain the final statements of the accused.

56. On 18 July 2000 all the accused, except one, presented their oral submissions on the indictment. They all alleged that the incident was a trap for the village guards which had been set by the PKK.

57. Approximately fifty hearings were held before the Denizli Assize Court. In these hearings the court sent several letters to public prosecutors in different regions to find out the addresses of the witnesses. All the applicants filed petitions with the court at different times requesting to intervene in the criminal proceedings. After the submission of all the birth registry records, the court established their relationship with the deceased and accepted their request to intervene. Furthermore the court examined the statements of various witnesses, accused and interveners which were given before different assize courts, on different dates.

58. On 20 November 2000 the court decided to acquit the village guards. The court drew the following conclusions from the evidence:

“The statements which the witnesses and the complainants made when interrogated by the public prosecutor were different from those they later made before the court. In particular, in his statement before the public prosecutor, Salih Acar stated that the accused had covered their faces when they stopped the convoy, whereas in his statement to the court he did not specify whether or not the attackers had covered their faces. Süleyman Acar did not mention in his statement to the public prosecutor that it had been Cengiz and Ethem who had attacked them, whereas he stated before the court that it had been the village guards Ethem and Cengiz who had attacked them. Reşit Acar also stated before the public prosecutor that he did not know who had attacked them because their faces had been covered. However, in his statement before the court he said that Cengiz’s face had been completely uncovered, but that Ethem’s face had been covered. The witnesses Salih Akay, Hüseyin Akan and Selim Acar gave no description of the identity of the attackers in their previous statements. Furthermore, those witnesses did not state whether or not the faces of the attackers had been covered. However, in their statements before the court, they gave a detailed account of the events and identified Ethem and Cengiz as the village guards who had opened fire on them.

The village of Çalpınar was 10 kilometres away from the village of Kutlubey. It was highly probable that the inhabitants of the two villages did not maintain close relations or contacts. It was therefore unlikely that the complainants could have identified the accused village guards as the attackers.

Even assuming that the accused village guards Cengiz and Ethem were among the group of people who had attacked the complainants, there was no reasonable explanation as to why some of the village guards had covered their faces and some had not.

In their statements the non-commissioned officers Ali Kılıç, Kazım Demirbaş and Arif Güner had said that they had kept guard together with the accused village guards from 6 p.m. on 19 April 1992 to 6 a.m. on 20 April 1992. It appears from the non-commissioned officers’ statements that the village guards returned to the gendarmerie command after they had completed their shift of duty. It further appears that the weapons belonging to the village guards had not been used during the morning when the incident had taken place. The non-commissioned officers confirmed that fact. Accordingly, it could not be concluded that the accused village guards had been involved in the killing of the villagers.

In the ballistic report by the Forensic Medicine dated 28 October 1993, it was stated that 66 cartridges had been found at the scene of the crime, 63 of which had been fired from weapons belonging to the accused village guards. However, that evidence in itself is not sufficient to convict the village guards. First, it is still not known from whose weapon the remaining cartridges were fired. Secondly, it could not be determined by the laboratory whether or not the bullets removed from the bodies of Sabri Acar and Reşit Acar were fired from weapons belonging to the village guards.

In their submissions the accused village guards stated that the empty cartridges found at the scene of the crime had been placed there by their enemies in order to implicate them in the crime. In fact, on 21 March 1992 the village guards and the security forces had opened fire in order to stop a march that was being carried out by members of the terrorist organisation. Furthermore, in a clash between the security forces and members of the illegal organisation on 13 April 1992 the security forces, as well as the village guards, had opened fire on the PKK members. In a report dated 13 April 1992, it was stated that 447 bullets had been fired and 215 empty cartridges had been recovered from the scene of the crime. It therefore appears that 232 empty cartridges were not found. It is highly probable that empty cartridges from the incident of 20 April 1992 were placed at the scene of the crime before or after the villagers were killed by unknown persons.”

59. On 9 February 2001 the applicants lodged an appeal with the Court of Cassation against the decision of the Denizli Assize Court.

60. On 4 December 2001 the public prosecutor at the Court of Cassation submitted his opinion. He noted that the bullet in İbrahim Akan’s leg had not been removed. Moreover he noted that the court’s decision to acquit the village guards was in contradiction with the findings in the ballistic report of 23 June 1992 and the statements of four witnesses who had recognized two of the village guards and of the Midyat Public Prosecutor. The public prosecutor subsequently recommended the quashing of the decision of the first-instance court and the conviction of the ten accused village guards.

61. On 7 February 2002 the Court of Cassation upheld the decision of the first-instance court in respect of seventeen of the accused village guards. Moreover, in the light of the findings in the ballistics reports dated 23 June 1992 and 28 October 1993 and the statements of the Midyat Public Prosecutor, the Court of Cassation quashed the decision of the first-instance court in respect of ten of the accused. In its detailed decision the court further held that to try to remove the bullet in İbrahim Akan’s leg would have been too risky for the patient as was pointed out in the İzmir Atatürk Eğitim Hospital’s medical report.

62. The criminal proceedings were reopened before the Denizli Assize Court against ten of the accused village guards. At the hearing of 25 March 2002 the court decided to send letters rogatory to assize courts in five different cities to obtain the statements of the accused and the interveners.

63. On 25 May 2003 Denizli Assize Court convicted the accused village guards as charged and sentenced them to life imprisonment. The summary of the court’s decision is as follows:

“In view of the autopsy reports, there is no question as to the cause of death of the six villagers. Instead, the question to be resolved is whether those who fired on the villagers were the accused village guards.

It is not possible to rely solely on the witness statements as they are contradictory on several points. However the witness statements given during the preliminary investigation seem to be, in general, objective. Relying on these initial statements it is established that the persons who had fired had their faces covered in order not to be recognised. The court is not convinced by the statements in which certain witnesses claimed to have recognised Ethem and Cengiz. Even assuming that Ethem and Cengiz were among those who had fired, there is no reasonable explanation for the fact that they had not covered their faces when everybody else had done so.

Furthermore, in the court’s opinion, what a commander would normally do when he had been notified of an incident would be to go to the scene of the incident as soon as possible. However in the present case, the fact that the non-commissioned officer Ali Kılıç checked all twenty seven weapons one by one without taking any action is incomprehensible. Moreover the court notes that the Midyat Public Prosecutor maintained that the soldiers were not collecting the empty cartridges to help him and that he had personally to collect the empty cartridges which were near the dead bodies. In view of the above, the court concludes that Ali Kılıç, Kazım Demirbaş and Arif Güner were trying to defend the accused who were working with them to fight against terrorism and it does not therefore find their statements reliable.

The court notes that the bullets removed from the bodies of Sabri Acar and Reşit Acar, can no longer be used for comparative tests to determine from which of the weapons they had been fired as the bullets in question have oxidised. Furthermore it is not possible to remove the bullet from İbrahim Akan’s body due to medical complications.

Considering the Midyat Public Prosecutor’s statements where he said that there was a smell of gunpowder, the court comes to the conclusion that the allegation concerning the placing of empty cartridges at the scene of the incident, in order to implicate the village guards in the crime, is not corroborated in any persuasive manner by eyewitnesses or other evidence.

Moreover the fact that three of the sixty-six cartridges were not fired from the village guards’ weapons cannot be taken as a proof of their innocence. It is possible that one of the village guards had a weapon that had not been seized by the authorities after the incident.

In conclusion, relying on the findings of the ballistic report and the statements of the Midyat Public Prosecutor who had an impartial position in the present case, the court decides that ten of the accused village guards are responsible for the wounding and killing of the villagers whom they considered to be PKK supporters.”

64. This decision was appealed against *ex officio* pursuant to domestic law. However the village guards also filed an appeal against the decision of the first-instance court.

65. On 29 February 2004 the public prosecutor at the Court of Cassation submitted his opinion to the court, recommending that the decision of the first-instance court be quashed. He noted that despite the fact that the

relevant domestic law required that the opinion of the accused on the decision of the Court of Cassation should be sought, the court had failed to do so in the case of two accused village guards.

66. On 9 December 2004 the Court of Cassation quashed the decision of the first instance court in respect of two of the village guards and upheld it as regards eight of them.

II. RELEVANT DOMESTIC LAW AND PRACTICE

67. The relevant domestic legislation and practice is outlined in the Court's *Avşar v. Turkey* judgment (no. 25657/94, §§ 261-81, ECHR 2001-VII (extracts)).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

68. The applicants alleged that their relatives' right to life was violated in that they were deliberately killed by village guards. The applicants, İbrahim Akan and Reşit Acar further complained that their right to life was violated as the village guards attempted to kill them. The applicants in addition claimed that the national authorities failed to comply with their procedural obligations to carry out an adequate and effective investigation into the killings and attempted killings. They relied on 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. Submissions of the parties

69. The Government made no submissions on the applicants' complaints under this head on the ground that the proceedings were still pending before the domestic courts. They only argued that the length of the criminal proceedings was due to the difficulty in contacting the victims who lived in different cities and in having them medically examined.

70. The applicants maintained that their relatives were deliberately killed by the Kutlubey village guards. They alleged that they had been continuously intimidated and pressured by the guards who were attempting to force them to adopt the village guard system in the village of Çalpınar.

71. They further submitted that the investigation into the incident did not fulfil the procedural obligations under Article 2 of the Convention. As the gendarmes who were at the scene of the incident had not helped the Midyat Public Prosecutor, he was only able to collect some, but not all, of the empty cartridges. However, if more empty cartridges had been collected from the scene of the incident, the ballistic investigation of these cartridges could have revealed the involvement of more than ten accused village guards in the incident.

B. The Court's assessment

1. General considerations

72. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47, and *Avşar*, cited above, § 390)

73. 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 State agents who actually administer the force but also all the surrounding circumstances.

74. 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*, *McCann and Others*, cited above, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). 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 (see *Avşar*, cited above, § 593)

75. 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, for example, *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). 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 (for example, *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, for example, *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII; concerning witnesses, for example, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; concerning forensic evidence, for example, *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 responsible will risk falling foul of this standard (see *Avşar*, cited above, § 594).

76. There must also be a requirement of promptness and reasonable expedition implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-40, § 102-04, *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87, 106, ECHR 1999-IV, *Tanrıkulu*, cited above, § 109, and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, 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 maintenance of the rule of law and in preventing

any appearance of collusion in or tolerance of unlawful acts (see *Avşar*, cited above, § 596).

2. Applicability of Article 2 of the Convention in the case of the applicants İbrahim Akan and Reşit Acar

77. The Court observes in the present case that the applicants İbrahim Akan and Reşit Acar were wounded during the incident. Thus the force used against these applicants was not, in the event, lethal. While this does not exclude an examination of the complaint under Article 2, the Court has held that it is only in exceptional circumstances that physical ill-treatment by State officials which does not result in death may disclose a violation of that Article, complaints of such ill-treatment falling to be examined in general under Article 3. In this regard, the degree and type of force used and the intention or aim behind the use of force may, among other factors, be relevant in assessing whether in a particular case the State agents' actions in inflicting injury short of death are such as to bring the facts within the scope of the safeguard afforded by Article 2 of the Convention, having regard to the object and purpose pursued by that Article (*İlhan v. Turkey* [GC], no. 22277/93, § 76, ECHR 2000-VII).

78. What the Court must therefore determine in the present case is whether the force used against the applicants was potentially lethal and what kind of impact the conduct of the village guards concerned had not only on their physical integrity but also on the interest which the right to life is intended to protect (see, *mutatis mutandis*, *Makaratzis v. Greece* [GC], no. 50385/99, § 52, 20 December 2004).

79. It is established that the two applicants were wounded in the course of a sustained and lethal attack with firearms which resulted in the death of eight of their fellow villagers. In these circumstances, and in particular the degree and type of force used, the Court concludes that, the applicants were the victims of conduct which, by its very nature, put their lives at grave risk, even though, in the event, they survived. Article 2 of the Convention is thus applicable in the instant case to the applicants İbrahim Akan and Reşit Acar.

3. Concerning the killing of the applicants' relatives and the wounding of İbrahim Akan and Reşit Acar

80. The Court does not consider it necessary to verify the facts itself in order to draw a complete picture of the factual circumstances surrounding the incident. It observes that there was a judicial determination of the facts of the instant case at domestic level (paragraph 63 above) and that no material has been adduced in the course of the Strasbourg proceedings which could call into question the findings of fact of the Denizli Assize Court in their decision of 25 May 2003 and lead the Court to depart from

them (see *Klaas v. Germany*, judgment of 22 September 1993, Series A no. 269, pp. 17-18, § 30, and *Makaratzis*, cited above, § 47).

81. Therefore, even if certain facts remain unclear, the Court considers, in the light of all the material produced before it, that there is a sufficient factual and evidentiary basis on which to assess the case, taking as a starting point, as mentioned above, the findings of the domestic court.

82. It is not disputed that the applicants' relatives were killed and two applicants were wounded unlawfully and in circumstances falling outside the exceptions set out in the second paragraph of Article 2. On 25 May 2003, following the Court of Cassation's decision to quash the decision to acquit the accused, the Denizli Assize Court, relying on the findings of the ballistic reports and the statements of the witnesses, convicted ten of the accused village guards and sentenced them to life imprisonment (paragraph 63 above). The convictions of eight of the village guards were upheld by the Court of Cassation (paragraph 66 above).

83. The question arises however whether the Government may be held responsible for the deaths and unlawful wounding. The Court notes that the village guards enjoy an official position, with duties and responsibilities. They are accountable administratively to the village *muhtar* and subject to his supervision. Their salaries, aids and indemnities for service are paid by the Ministry of Interior. Occupationally, guards are under the command of the gendarme commander. Resistance to them is punished in the same way as resistance to gendarmes. When carrying out their duties along with military or security forces, the village guards, under the command of those units, have the same powers and responsibilities as those entrusted to that unit (see the description of the role, functions and duties of village guards in the *Avşar* judgment, cited above, §§ 271-81).

84. In that context, the Court has already found that there was a risk attached to the use of civilian volunteers in a quasi-police function. It held in this regard that it is not apparent what supervision was, or could be exerted over guards who were engaged in duties outside the jurisdiction of the district gendarme commander. Nor, as the village guards operated outside the normal structure of discipline and training applicable to gendarmes and police officers, is it apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers (see, *mutatis mutandis*, *Avşar*, cited above, §§ 413-14).

85. In the particular context of the present case, the Court recalls in addition that, according to the Midyat Public Prosecutor's statements, the gendarmes did not help him to collect the empty cartridges at the site of the incident (paragraph 41 above). Furthermore the Denizli Assize Court concluded in its final decision that the gendarmes were trying to defend the accused who were working with them to fight against terrorism and the Court therefore did not find their statements reliable (paragraph 63 above).

The Court is of the opinion that the failure of the gendarmes to react to the unlawful activities of the village guards supports a strong inference of acquiescence in those activities (see, *mutatis mutandis*, *Avşar*, cited above, § 411).

86. In these circumstances, the Court finds that the State must bear responsibility for the killing of the applicants' relatives and the attempt to kill two of the applicants. No justifications for the killings or attempted killings having been provided, the Court concludes that there has accordingly been a breach of Article 2 in this respect.

4. As regards the alleged failure to carry out an adequate investigation into the incident

87. The Court notes that a preliminary investigation was initiated by the Midyat Public Prosecutor as well as by the police officer Hüseyin Coşar immediately after the incident (paragraphs 13, 14 and 16 above). However, despite the seriousness of the incident and the necessity to gather and record the evidence which would help to shed light on the facts of the incident, there were a number of omissions.

88. Due to the gendarmes' failure to assist the Midyat Public Prosecutor to collect the empty cartridges, only sixty six cartridges were collected from the scene of the incident and sent for ballistics examination (paragraph 41 above). By relying on the findings of the ballistics report dated 23 June 1992, the court was able to identify only ten out of the twenty seven accused village guards. If the authorities had collected more empty cartridges the criminal court might have been in the position to establish the involvement of more than ten accused, as according to the witnesses' statements approximately fifteen to twenty persons were involved in the attack (paragraphs 14 and 16 above). It should also be noted in this regard that one of the village guards identified by the eyewitnesses, namely Cengiz Kaçmaz, was not among the ten accused who were convicted.

89. The Court is of the opinion that the above elements disclose a significant defect in the reliability and thoroughness of this part of the investigation. It has therefore examined whether this was remedied by the investigation conducted by the assize courts during the criminal proceedings.

90. 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, §§ 106-09 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). However in the present case, suspects were prosecuted and ten of them were consequently convicted. Although the proceedings are still pending against two village guards (paragraph 66 above), it cannot therefore be claimed that the preliminary investigation proved incapable of identifying and prosecuting the perpetrators of the killings.

91. 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 half hearted and dilatory. The Court notes the following in this regard:

(i) The criminal proceedings began on 8 July 1992 when the Public Prosecutor filed an indictment with the Midyat Assize Court charging the twenty seven village guards with the murder and attempted murder of more than one person. Following the transfer of the case to the Denizli Criminal Court for security reasons, the court gave its first decision on 20 November 2000. Thus, the first set of criminal proceedings lasted more than eight years. Considering that the case is still pending before the Denizli Criminal Court as regards two of the accused village guards, the total length of the criminal proceedings has already exceeded twelve years.

(ii) Despite the persistent requests by both the Midyat Assize Court and the Denizli Assize Court, the weapons deposited in the safe storage at Nusaybin Gendarmerie Command, were submitted to the Diyarbakır Provincial Criminal Police Laboratory for ballistic examination only one year after the first order of the court (paragraphs 24 and 42 above). During this period authorities also delayed the progress of the proceedings by sending an unrelated set of weapons to the court (paragraph 28 above).

(iii) There were six victims each with a bullet lodged in their bodies. Despite the decisive role of this evidence for the case, only three of these six bullets were removed. İbrahim Akan was not operated on as the court was unable to ascertain his address. On the other hand there is no satisfactory explanation as to the reason for not removing the bullets found in Salih Acar and Erdal Acar's bodies.

(iv) The ballistic examination of the bullets removed from the victims' bodies was of crucial importance for establishment of the facts in the present case. However, by the time the bullets removed from Reşit Acar and Sabri Acar's bodies reached the laboratory, they were oxidised as they had not been preserved under adequate conditions. Thus, the laboratory concluded that these bullets could no longer be used for comparative tests (paragraph 45 above).

(v) The bullet which was removed from the deceased Hasan Akay's body during his autopsy was never sent to the Forensic Medicine Institute for a ballistic examination (paragraph 22 above).

(vi) On 20 July 1993 the court was aware of the fact that there were only bullet fragments in Süleyman Acar's body. However, it continued to seek medical advice for five months about the removal of these fragments, although it ultimately held that the ballistic examination of such fragments would not yield any positive results (paragraphs 43, 44 and 46 above).

92. Although the case is still pending in respect of two of the village guards, the Court is not persuaded that, after twelve years and in light of the shortcomings occurring during the preliminary investigation, these proceedings are capable of remedying the defects in the investigation, in particular by clarifying or improving the evidence available.

93. Having regard therefore to the duration and serious shortcomings of the criminal investigation and trial proceedings in this case, the Court concludes that there has been a breach of the State's procedural obligation under Article 2 of the Convention.

94. It consequently holds that there has been a violation of Article 2 in this respect.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

95. The applicants complained of the excessive length of the proceedings before the national courts which was in violation of Article 6 of the Convention that provides as relevant:

"In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal..."

96. Moreover the applicants in application no. 38417/97 complained that there exists in Turkey an officially tolerated practice of violating Articles 2 and 13 of the Convention. They submitted that, in the state of emergency region in Turkey, criminal proceedings against the perpetrators of such violations were bound to fail and were incapable of preventing unlawful acts and abuse of power by the authorities. The applicants relied on Article 13 in conjunction with Article 2 of the Convention. Article 13 provides as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

97. The applicants maintained that Article 6, which guarantees the right of everyone to a fair trial within a reasonable time, extended to the applicants who had exercised their right to intervene in the proceedings. They complained that the trial into killing of their relatives that had lasted already over twelve years was still pending before the Court of Cassation and that this could not be justified either by the complexity of the case or by their conduct.

98. The Government considered that their response had to be limited by the constraints of the ongoing criminal proceedings in the case. However, they pointed out that the case was particularly complex. They submitted that the very serious nature of the facts had justified handling the proceedings in a special way, which had contributed to their prolongation. The Government observed that the proceedings were not concluded rapidly owing to the difficulties in contacting the accused, as well as the complainants, who were living in different cities. Furthermore, it had been deemed necessary to transfer the case to a different court out of concern for the “proper administration of justice”.

99. The Court observes that the applicants’ grievance under Article 6 § 1 of the Convention is inextricably bound up with their more general complaint concerning the manner in which the investigating authorities treated the death of the applicants’ relatives and the repercussions which this had on access to effective remedies which would serve to redress the grievances they had as a result of the incident. It is accordingly appropriate to examine the applicants’ Article 6 complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention. 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, pp. 330-31, § 107).

100. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Article 2 of the Convention for the death of the applicants’ relatives and the attempt to kill two applicants.

101. The Court observes that although soon after the incident a preliminary investigation was carried out under the authority of the public prosecutor, there were a number of shortcomings in the criminal proceedings. The Court particularly points out that almost twelve years after the incident the criminal proceedings had not been concluded, despite the fact that some of the accused village guards had been identified by the witnesses. For the reasons set out above (paragraphs 87 to 94 above) no effective criminal investigation can be considered to have been conducted which could satisfy Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see *Kaya*, cited above, pp. 330-31, § 107).

102. The Court finds therefore that in the present case the applicants have been denied an effective remedy in respect of their complaints under Article 2 of the Convention and thereby access to any other available remedies at their disposal, including a claim for compensation.

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

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

104. The applicants complained that their right to respect for their private and family life was violated as they had been compelled to leave their village following alleged pressure from the security forces. They rely on Article 8 of the Convention, which provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

105. Referring to the statement of one of the applicant’s relatives (paragraph 52 above) the Government argued that the applicants had not been intimidated by the security forces or the village guards and that they had not been compelled to leave their village.

106. The Court has examined the applicants’ allegations in the light of the evidence submitted to it, but considers that it does not have a sufficient factual basis on which to reach a conclusion that there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

107. 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. Pecuniary damage

108. The applicant Selime Akay, the wife of the deceased Hasan Akay, claimed damages on her behalf and on behalf of her seven children, who were aged between 1 and 12 years at the time of the incident. She maintained that they were dependent on Hasan Akay as husband and father. He was supporting his family by working as a farmer and a truck driver. Having regard to the legal minimum wage, the applicable interest rate and the exchange rate into US dollars (USD) the applicant Selime Akay claimed the sum of USD 31,409. Furthermore in respect of the deprivation of

property and their expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

109. The applicant Hanıme Ağırman, the wife of the deceased Mehmet Ağırman, claimed damages on her behalf and on behalf of her six children, who were aged between 1 and 11 years old at the time of the incident. She submitted that her deceased husband was supporting his family by working as a farmer and a minibuss driver. Having regard to the legal minimum wage, the applicable interest rate and the exchange rate into US dollars, Hanıme Ağırman claimed the sum of USD 31,041. Moreover, in respect of the deprivation of property and expenditure on alternative accommodation in another city, the applicant requested USD 11,285.

110. The applicant Osman Acar, the brother of the deceased İsmet Acar claimed damages on his behalf, on behalf of İsmet Acar's wife and his six children, aged between 1 to 11 years at the time of the incident.

The applicant maintained that although he was living in İzmir he was the owner of a plot of land in Çalınar which he was renting out. As he had to abandon this property following the incident, he claimed the sum of USD 4,500 in respect of his loss of income. He also submitted that his deceased brother İsmet Acar was supporting his family by working as a farmer and a minibuss driver. Having regard to the legal minimum wage, the applicable interest rate and the exchange rate into US dollars, Osman Acar claimed the sum of USD 24,199 on behalf of the heirs of his deceased brother. Moreover he claimed USD 15,785 in respect of the deprivation of the property of İsmet Acar's wife and six children and of their expenditure on alternative accommodation in another city.

111. The applicant Cihan Akan, the wife of the deceased Abdülkadir Akan, claimed damages on her behalf and on behalf of her four children, who were aged between 1 and 5 years at the time of the incident. She submitted that his deceased husband was supporting his family by working as a farmer. Having regard to the applicable exchange rate into US dollars and the legal minimum wage, Cihan Akan claimed the sum of USD 30,605. In respect of the deprivation of property and expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

112. The applicant Elife Akalan (Acar), the daughter of the deceased Mehmet Emin Acar, claimed damages on her behalf and on behalf of her mother and brothers, who were aged between 1 and 12 years, at the time of the incident. She submitted that her deceased father was supporting his family by working as a farmer and a truck driver. Having regard to the applicable interest rate and exchange rate into US dollars and the legal minimum wage, Elife Akalan claimed the sum of USD 26,301. Furthermore, in respect of the deprivation of property and expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

113. The applicant Mehmet Ali Akan, who was aged 11 at the time of the incident, is the son of the deceased Mehmet Akan. He claimed damages on his behalf and on behalf of his father's heirs. He submitted that his deceased father was supporting his family by working as a farmer. Considering that he was the only one in the family who was a minor at the time of the incident and therefore dependent on his father, he claimed damages for his loss of potential financial support. Having regard to the legal minimum wage, the applicable interest rate and the exchange rate into US dollars he claimed the sum of USD 295 on behalf of himself and the rest of his deceased father's heirs. Furthermore in respect of their losses in respect of deprivation of property and expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

114. The applicant Hüseyin Akan who is also the son of the deceased Mehmet Akan, survived the incident without sustaining any injuries. In respect of his expenses of settling in a different city, the applicant requested USD 3,000.

115. The applicant İbrahim Akan, was injured during the incident and he still has a bullet in his body. Having regard to his medical expenses, the applicant claimed the sum of USD 3,000. Moreover, in respect of the deprivation of property and his expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

116. The applicant Reşit Acar, who lost one of his legs due to the injury that he sustained during the incident, has a 35% reduction in his working capacity. Having regard to his medical expenses and his disability to work, the applicant claimed the sum of USD 24,893. Moreover, in respect of his expenditure on alternative accommodation in another city, the applicant requested USD 15,785.

117. The applicant Mehmet Akay, who is the brother of deceased Hasan Akay, was slightly injured during the incident. In respect of his expenditure on alternative accommodation in another city the applicant requested USD 3,000.

118. The Government contended that the applicants had failed to submit any evidence in support of their claims. They maintained that the claims were exaggerated.

119. The Court recalls that there must be a causal connection between the damage alleged by the applicants and violation of the Convention found and that this may, if appropriate, include compensation in respect of loss of earnings (see, amongst other authorities, *Barberà, Messegue and Jabardo v. Spain* (Article 50), judgment of 13 June 1994, Series A no. 285-C, pp. 57-58, §§ 16-20, and *Salman*, cited above, § 137).

120. The Court has held (paragraph 86 above) that the authorities were responsible under Article 2 of the Convention for the death of the applicants' relatives and for the injuries to two of the applicants. It considers that there is a direct causal link between the violation of Article 2 and the

loss of potential financial support which the victims had been providing to their widows and children. The Court recognises that if they were still alive they would have had the possibility of contributing to their family's livelihood.

121. In view of the documents submitted by the applicants in support of their claims and having regard to equitable considerations, the Court awards the applicants the following amounts in respect of pecuniary damage:

- (a) 24,000 euros (EUR) to Selime Akay and her seven children;
- (b) EUR 23,500 to Hanime Ağırman and her six children;
- (c) EUR 18,000 to be held by Osman Acar for İsmet Acar's widow and his six children;
- (d) EUR 23,000 to Cihan Akan and her four children;
- (e) EUR 23,000 to Elife Akalan (Acar) and her eight children;
- (f) EUR 200 to Mehmet Ali Akan;
- (g) EUR 19,000 to Reşit Acar.

122. The Court further notes that although it is established that the applicant İbrahim Akan was injured during the incident, as his medical expenses are not substantiated, it decides not to award him any compensation for his pecuniary damages.

123. As to the applicants' claim in respect of the deprivation of their property and expenditure on alternative accommodation in another city, the Court recalls that it has found an insufficient factual basis to support a finding of a violation of the Convention on this ground (paragraph 106 above). Accordingly it rejects the applicants' claims in this regard.

B. Non-pecuniary damage

124. The applicant Selime Akay claimed non-pecuniary damages of USD 100,000 for herself as the wife of Hasan Akay and for their seven children.

The applicant Hanime Ağırman claimed non-pecuniary damages of USD 100,000 for herself as the wife of Mehmet Ağırman and for their six children.

The applicant Osman Acar claimed non-pecuniary damages of USD 110,000 for himself as the brother of İsmet Acar and for the deceased's wife and six children.

The applicant Cihan Akan claimed non-pecuniary damages of USD 110,000 for herself as the wife of Abdülkadir Akan and for their four children.

The applicant Elife Akalan (Acar) claimed non-pecuniary damages of USD 100,000 for herself as the daughter of Mehmet Emin Acar and for her mother and seven brothers.

The applicant Mehmet Ali Akan claimed non-pecuniary damages of USD 100,000 for himself as the son of Mehmet Akan and for his mother and six brothers.

The applicant Hüseyin Akan claimed non-pecuniary damages of USD 10,000 for himself.

The applicant İbrahim Akan claimed the sum of USD 30,000 by way of compensation for non-pecuniary damage, having regard to the suffering he endured because of the injuries he sustained during the incident.

The applicant Reşit Acar claimed the sum of USD 50,000 by way of compensation for non-pecuniary damage, having regard to the suffering he endured because of the injuries he sustained during the incident and the resultant loss of his leg.

The applicant Mehmet Akay claimed non-pecuniary damages of USD 10,000 for himself.

125. The Government contended that the amounts claimed were excessive.

126. The Court recalls that it has found that the authorities were responsible for the incident which resulted in the wounding of some of the applicants and the killing of their relatives. In addition to violations of Article 2 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters in breach of the procedural obligation under Article 2 and in breach of Article 13 of the Convention. In these circumstances and having regard to the awards made in comparable cases, the Court awards on an equitable basis the sum of EUR 30,000 for non-pecuniary damage to each of the following five applicants: Selime Akay, Hanime Ağırman, Cihan Akan, Elife Akalan and Mehmet Ali Akan.

The Court also awards on an equitable basis the sum of EUR 26,000 for non-pecuniary damage to be held by the applicant Osman Acar for İsmet Acar's widow and children. It recalls that the applicant Osman Acar, living in Izmir, was not present during the incident, however he was involved in the domestic proceedings. In the circumstances, it awards Osman Acar the sum of EUR 4,000.

Having regard to all the circumstances of the present case, the Court accepts that the applicants Reşit Acar, İbrahim Akan and Mehmet Akay have suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards Reşit Acar EUR 20,000, İbrahim Akan EUR 10,000 and Mehmet Akay EUR 5,000. As to the claim of Hüseyin Akan, the Court observes that the applicant is the son of Mehmet Akan, in respect of whose death an award for non-pecuniary damage has already been made to Mehmet Ali Akan, who claimed on behalf of his mother and his six brothers, including Hüseyin Akan. Accordingly, no additional award is made to Hüseyin Akan under this head.

B. Costs and expenses

127. The applicants claimed a total of USD 9,800 for fees and costs in the preparation and presentation of their case before the Convention institutions. This included costs incurred by their representatives (USD 9,000 for approximately 90 hours' legal work) and expenses such as telephone calls, postage, photocopying, stationery, transportation and expert's fee (USD 800).

128. The Government submitted that the claims were excessive and unsubstantiated. They argued that no receipt or any other document had been produced by the applicants to prove their claims.

129. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (*Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). Making its own estimate based on the information available, the Court considers that the claims made in respect of administrative costs and expenses may be regarded as having been necessarily incurred and reasonable in their amounts.

130. In the light of the foregoing, the Court awards the sum of EUR 7,400, less the sum of EUR 762 (formerly equivalent to 5,000 French Francs) received in way of legal aid from the Council of Europe.

C. Default interest

131. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of Article 2 of the Convention in respect of the death of the applicants' relatives and the wounding of İbrahim Akan and Reşit Acar;
2. *Holds* that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the said deaths and wounding;
3. *Holds* that it is not necessary to consider the applicants' complaint under Article 6 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *Holds* that there has been no violation of Article 8 of the Convention;

6. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted into Turkish liras at the rate applicable at the date of settlement and paid to the applicants' bank account in Turkey:

– in respect of damages,

(i) to Selime Akay EUR 24,000 (twenty-four thousand euros) in respect of pecuniary damage and EUR 30,000 (thirty thousand euros) for non-pecuniary damage;

(ii) to Hanime Ağırman EUR 23,500 (twenty-three thousand five hundred euros) in respect of pecuniary damage and EUR 30,000 (thirty thousand euros) for non-pecuniary damage;

(iii) to Osman Acar EUR 18,000 (eighteen thousand euros) in respect of pecuniary damage, and for non-pecuniary damage EUR 26,000 (twenty six thousand euros) to be held for the heirs of İsmet Acar as well as EUR 4,000 (four thousand euros) for himself;

(iv) to Cihan Akan EUR 23,000 (twenty-three thousand euros) in respect of pecuniary damage and EUR 30,000 (thirty thousand euros) for non-pecuniary damage;

(v) to Elife Akalan (Acar) EUR 23,000 (twenty-three thousand euros) in respect of pecuniary damage and EUR 30,000 (thirty thousand euros) for non-pecuniary damage;

(vi) to Mehmet Ali Akan EUR 200 (two hundred euros) in respect of pecuniary damage and EUR 30,000 (thirty thousand euros) for non-pecuniary damage;

(vii) to İbrahim Akan EUR 10,000 (ten thousand euros) for non-pecuniary damage;

(viii) to Reşit Acar EUR 19,000 (nineteen thousand euros) in respect of pecuniary damage and EUR 20,000 (twenty thousand euros) for non-pecuniary damage;

(ix) to Mehmet Akay EUR 5,000 (five thousand euros) in respect of non-pecuniary damage;

– in respect of cost and expenses,

EUR 7,400 (seven thousand four hundred euros) minus EUR 762 (seven hundred sixty-two euros) paid by the Council of Europe by way of legal aid, to all applicants jointly;

– plus any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

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

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

Done in English, and notified in writing on 24 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President