

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22876/93

Şemse Önen

against

Turkey

REPORT OF THE COMMISSION

(adopted on 10 September 1999)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Turkish citizen, born in 1969 and resident in the village of Karataş, near Mazıdağı (Mardin) in South East Turkey. She was represented before the Commission by Professor Kevin Boyle and Ms Françoise Hampson, both university teachers at the University of Essex (United Kingdom). The applicant states that she brings the application also on behalf of others, namely her deceased parents, Ibrahim and Mome, and her deceased brother Orhan as well as on behalf of ten other surviving siblings.

3. The application is directed against Turkey. The respondent Government were represented by their acting Agent, Mr Münci Özmen, of the Ministry of Foreign Affairs.

4. The case concerns the killing of the applicant's parents and brother Orhan, allegedly by armed members of the Balpınar village guards, on 16 March 1993 and the investigation of these killings. The applicant invokes Articles 2, 3, 6, 8, 13 and 14 of the Convention.

B. The proceedings

5. The application was introduced on 15 September 1993 and was registered on 4 November 1993.

6. On 10 January 1994, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 2 May 1994 after an extension of the time-limit fixed for this purpose. The applicant submitted observations in reply on 5 July 1994. The Government submitted further observations on 17 August 1994 to which the applicant replied on 21 September 1994.

8. On 14 January 1995, the Commission examined the state of proceedings and the Government's request to adjourn the proceedings pending the outcome of the criminal proceedings brought against the two suspects of the killings before the State Security Court of Diyarbakır. The Commission requested the Government to submit, before 16 February 1995, further information about these criminal proceedings.

9. On 30 March 1995, the Government submitted a number of documents, i.e. a report dated 17 March 1993 on the *post mortem* examination of the applicant's parents and brother, two statements dated 4 and 5 April 1993 respectively made by the two alleged perpetrators at the Fosfat gendarme station, a statement dated 4 April 1993 made by the Balpınar village guard Mecit Kaya at the Fosfat gendarme station, two statements dated 5 April 1993 made by the applicant and her sister Mekiye respectively at the Mazıdağı District gendarme station and two ballistics reports dated 29 April 1993 and 17 May 1993 respectively. The

Government further stated that the Commission would be informed of the state of the proceedings before the State Security Court as soon as this information was available.

10. On 15 May 1995, the Commission declared the application admissible.

11. The text of the Commission's decision on admissibility was sent to the parties on 30 May 1995 and they were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence they might wish to put before Delegates of the Commission. Neither party availed itself of this possibility.

12. On 21 October 1995, the Commission examined the state of proceedings in the application and decided that it should proceed to take oral evidence. It appointed three Delegates for this purpose: Mr G. Jörundsson, Mr N. Bratza and Mr G. Ress. It notified the parties by letter of 26 October 1995, proposing certain witnesses and inviting the parties to indicate before 6 December 1995 any person from whom they wished to take evidence before the Delegates. The Commission further requested the Government to identify by name a gendarme officer and a public prosecutor and to submit a copy of the respective investigation files of the public prosecutor in Mazıdağı and the public prosecutor at the Diyarbakır State Security Court. The Government were invited to submit the two names and files before 6 December 1995.

13. By letter of 6 December 1995, the applicant requested that a further three witnesses be heard, all of whom were eye-witnesses to the events on 16 March 1993. On 15 March 1996, the applicant submitted a further statement of herself and a further statement of her brother Ercan.

14. On 5 July 1996, the Commission granted the applicant legal aid for the representation of her case.

15. On 27 January 1997, the Government were reminded of the Commission's request of 26 October 1995 to identify two officials by name and to submit the investigation files. The Government were further requested to submit a number of additional documents as well as information about the state of proceedings against the suspects of the killings before the State Security Court of Diyarbakır.

16. On 10 March 1997, the Government submitted a number of documents concerning the investigation and the proceedings before the State Security Court.

17. Following consultations with the parties, the Commission informed the parties on 23 October 1997 that an oral hearing had been scheduled for the week of 2 to 7 February 1998.

18. By letter of 15 January 1998, the Government informed the Commission that they would not be able to participate in this hearing as their officials in charge of the case were taking part in proceedings before the Court in Strasbourg between 24 and 27 January 1998 and as the week preceding the oral hearing in the present case was a religious holiday. After having deliberated, the Commission decided to reschedule the hearing for the week of 30 March to 4 April 1998. The parties were informed of this decision by letter of 23 January 1998. In its letter to the Government, the Commission noted that the Government, several months after the hearing dates had been confirmed to the parties, stated that they were unable

to participate invoking reasons which must have been known much earlier than 15 January 1998. The Commission was thus compelled to cancel at short notice its taking of evidence in February 1998 which incurred, *inter alia*, substantial costs in the cancellation of various contractual engagements undertaken by the Commission in the organisation of the hearing. The Commission informed the Government that it considered the manner in which the Government had acted in this respect as incompatible with the Government's obligations under Article 28 para. 1 (a) of the Convention.

19. By letter of 17 March 1998, the Government requested that two further witnesses be heard before the Delegates, to which the Delegates acceded.

20. Evidence was heard by the Delegates of the Commission in Ankara on 30 March and 1 and 2 April 1998 from the applicant and twelve other persons.

21. Before the Delegates, the Government were represented by Mr M. Özmen, their acting Agent, assisted by Ms A. Emüler, Mr F. Polat, Ms A. Samantır, Mr B. Yıldız, Ms S. Güzel, Ms D. Bulutlar, Mr A. Kaya, Mr K. Alataş, Mr B. Doğan, Ms N. Ayman, Mr A. Cangöz, Mr S. Durmaz, Mr H. Aksoy, Mr Y. Yıldız, Ms G. Ayvalı, Ms B. Pekgöz, Mr E. Genel, Ms N. Eser and Ms F.S. Ergin. The applicant was represented by Professor K. Boyle, assisted by Mr T. Otty, Mr J. Rud, Ms N. Boucly, Mr T. Elçi, Mr M. Kalivuz, Mr K. Sidar, Ms S. Karakaş and Mr M. Kaya (interpreter). Further documentary material was submitted by both parties during the hearing. During the hearing, and later confirmed by letter of 2 June 1998, the Delegates requested the Government to submit a number of further documents, including the operation records, the daily logbook, the duty ledgers and service ledgers on the activities of the gendarmes in the Fosfat gendarme station between October 1992 and May 1993 and the statement of 1 April 1994 and possible annexes thereto issued by the Ministry of Internal Affairs in relation to the applicant's brother. The Delegates further requested the applicant to submit a specific document and an explanation in writing in relation to unexplained signatures on a document containing statements made by, *inter alios*, the applicant to the Diyarbakır Branch of the Human Rights Association.

22. By letter of 6 May 1998, the Government submitted three documents relating to the case, i.e. a document concerning the dismissal of three village guards, an ambulance record and an incident report dated 16 March 1993.

23. In its letter of 2 June 1998, the Commission also invited the parties to submit their written final observations on the merits of the case by 28 July 1998. Upon the request of the Government, this time-limit was extended until 28 September 1998 and, following a further request by the Government, until 19 October 1998.

24. By letters of 11 June and 16 July 1998, the Government submitted further information and a number of documents in response to the Commission's letter of 2 June 1998. A number of documents requested by the Commission, including the operation records, the daily logbook, the duty ledgers and service ledgers on the activities of the gendarmes in the Fosfat gendarme station between October 1992 and May 1993 and the statement of 1 April 1994 issued by the Ministry of Internal Affairs in relation to the applicant's brother, were not submitted by the Government. On 4 August 1998, the applicant submitted the document requested by the Delegates during the hearing.

25. On 29 September 1998, the applicant submitted her final written observations and the written explanation requested by the Delegates. Although the time-limit for the submission of the Government's final observations had expired on 19 October 1998 and no request from the side of the Government had been made for an extension of this time-limit, the Government were nevertheless granted a further extension of the time-limit for the submission of their final observations until 15 December 1998. The Government were informed that if no final observations had reached the Commission before that date, it would be assumed that the Government did not wish to submit such observations.

26. On 8 December 1998, the Commission requested the Government to submit the statements taken by the Fosfat gendarme commander from four persons in the context of the investigation. The Government submitted one statement on 21 January 1999 and explained that this commander had not taken any statement from the other three persons.

27. By letter of 22 February 1999, the Government requested an extension of the time-limit until 15 March 1999 for the submission of the Government's final observations. The Government were informed on 1 March 1999 that no further extension could be granted. To date, the Government has submitted no final observations.

28. After declaring the case admissible, the Commission, acting in accordance with former Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

29. The present Report has been drawn up by the Commission in pursuance of the former¹ Article 31 of the Convention and after deliberations and votes, the following members being present:

MM	S. TRECHSEL, President
	E. BUSUTTIL
	G. JÖRUNDSSON
	A.S. GÖZÜBÜYÜK
	A. WEITZEL
	J.-C. SOYER
	H. DANELIUS
Mrs	G.H. THUNE
MM	F. MARTINEZ
	C.L. ROZAKIS
Mrs	J. LIDDY
MM	L. LOUCAIDES
	J.-C. GEUS
	M.P. PELLONPÄÄ
	B. MARXER

¹ The term "former" refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

M.A. NOWICKI
B. CONFORTI
Sir Nicolas BRATZA
MM I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

30. The text of this Report was adopted on 10 September 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with the former Article 31 para. 2 of the Convention.

31. The purpose of the Report, pursuant to the former Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

32. The Commission's decision on the admissibility of the application is annexed hereto.

33. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

34. The facts of the case are partly in dispute between the parties. For this reason, pursuant to former Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has examined written material, as well as oral testimony presented before the Delegates. The Commission first presents a brief outline of the events, as submitted by the parties, and then a summary of the evidence adduced in this case.

A. The particular circumstances of the case

1. **Facts as presented by the applicant**

35. The various accounts of events as submitted in written and oral statements made by the applicant are summarised in Section B below. The version as presented in the applicant's final observations is summarised here.

36. Unlike its neighbouring village Balpınar, the village of Karataş - where the applicant and her family were living at the relevant time - had refused to accept the village guard system. This refusal resulted in certain tensions between the two villages and pressure from the side of the gendarmes.

37. On or about 15 November 1992, four Balpınar village guards were killed in a clash with the PKK. On the same day, shortly after the clash, gendarmes and village guards attacked the village of Karataş. This attack lasted for several hours. The following day, the Muhtar (headman) of Karataş complained to the Governor that his village was being subjected to pressure and violence by the gendarmes and village guards. No investigation of the attack took place.

38. Some weeks before 16 March 1993, the house of the Muhtar of Karataş and the applicant's family house were both strafed by several rounds of bullets fired by Balpınar village guards. The Muhtar complained again to the Governor about the pressure exerted on his village by the Balpınar village guards and requested that steps be taken.

39. In the evening of 16 March 1993, the applicant's parents, Ibrahim and Mome, and her older brother Orhan were killed and the applicant injured in her foot as a result of a planned action by members of the Balpınar village guards to kill the applicant's brother Orhan. Before he died, the applicant's father was able to pull the scarf from the head of one of the intruders and shouted that he had recognised the actual gunmen as Ali Ertaş, head of the Balpınar village guards, and his nephew Orhan Ertaş, a former Balpınar village guard. The applicant's mother, who was seriously injured, died on her way to hospital.

40. The Commander of the local Fosfat gendarme station, who had possibly been informed beforehand of the plan by the Balpınar village guards to kill the applicant's brother, seriously delayed the possibility of medical treatment for the applicant's mother, by refusing to provide another car for the defective minibus in which she was transported and by unduly delaying the further journey of this minibus to Mazıdağı.

41. The subsequent investigation of these killings was not only ineffective and inadequate in professional terms, but was in fact designed to cover up the involvement of the Balpınar village guards and to prevent the conviction of Ali and Orhan Ertaş. As from the very beginning of the investigation and throughout the entire subsequent proceedings, the authorities blamed the PKK for the killings and failed to keep the applicant informed of any steps taken in the investigation.

2. Facts as presented by the Government

42. The various accounts of events as submitted in written and oral submissions by the Government are summarised in Section B below. As the Government have not submitted any final observations, the version as presented below is based on the observations and other submissions made by the Government in the course of the proceedings before the Commission.

Events prior to 16 March 1993

43. On 8 October 1992, PKK forces attacked Balpınar village guards on the slopes of the Kırmızıtepe hill close to the village of Balpınar. This clash lasted about twenty minutes. There were no casualties. To date, the perpetrators of this attack have not been found.

44. On 15 November 1992, PKK forces ambushed nine Balpınar village guards on a road near the village of Karataş. In the course of this clash, which lasted about fifteen minutes, four village guards were killed and four others were wounded. An investigation into the clash was carried out in the course of which the Fosfat gendarme station commander, Salih Kaygusuz, took statements from the five surviving village guards. To date, the perpetrators of this attack have not been identified.

Events of 16 March 1993

45. On 16 March 1993, at about 20.15 hours an armed PKK attack with rocket missiles and heavy weapons took place on a PTT radio link station in Mazıdağı-Kaletepe, which lies about one kilometre from Mazıdağı. The village guards present returned fire. The clash lasted about ten to fifteen minutes. There were no casualties. Shortly after the clash, gendarmes from the Mazıdağı Central gendarme station arrived at the scene. The next day, a land mine was found on the road to the PTT station. The initial investigation of this attack was carried out by Mazıdağı Central gendarme station under the responsibility of the public prosecutor at Mazıdağı. Following the latter's decision of 26 July 1993 of lack of jurisdiction, the investigation was referred to the public prosecutor at the Diyarbakır State Security Court.

46. Also in the evening of 16 March 1993, the killing of three Karataş villagers was reported to the public prosecutor in Mazıdağı. For reasons of security, the public prosecutor only arrived at the scene of the incident at 08.00 hours the next morning and conducted an investigation there, including attending the *post mortem* examination of the bodies of the victims by a medical doctor.

The investigation of the events of 16 March 1993 and subsequent proceedings

47. All necessary steps were taken to investigate the killing of the applicant's parents and brother, including the collection of evidence. The nine cartridges found at the scene of the killing were subjected to ballistics examinations, which disclosed that they had not been fired from the Kalashnikov possessed by Ali Ertaş or any other Balpınar village guard. Statements were taken from the applicant and her sister Mekiye which were riddled with inconsistencies. Statements were also taken from the alleged perpetrators Ali and Orhan Ertaş, the Balpınar village guard Mecit Kaya, the Balpınar Muhtar and village guard Mahmut Denli. These latter statements were of a consistent nature and mutually supported each other.

48. After having completed his preliminary investigation, the public prosecutor of Mazıdağı issued on 7 July 1993 a decision of lack of jurisdiction and the investigation was referred to the public prosecutor's office at the Diyarbakır State Security Court. This referral resulted in the institution of proceedings against Ali and Orhan Ertaş before the State Security Court of Diyarbakır.

49. On 6 May 1994, in the context of these proceedings and upon instruction of the State Security Court of Diyarbakır, further statements were taken before a judge of the Mazıdağı Criminal First Instance Court from Ali Ertaş, Mahmut Denli and Mecit Kaya. No statements were taken from the applicant and her sister Mekiye, since they no longer resided in Karataş and their new address could not be established.

50. On 28 December 1994, the State Security Court of Diyarbakır acquitted Ali and Orhan Ertaş for lack of evidence. However, the investigation into the matter is still ongoing at the Mazıdağı District gendarme station but, to date, the perpetrators of the killing of the applicant's parents and brother have not been found.

51. The Government submit that it has appeared from information obtained that the PKK had provided the applicant's brother Orhan with a taxi, which he had used for his private benefit. He had thus rendered his family a target of the PKK, which organisation is in all likelihood responsible for the killing of the applicant's parents and brother.

B. The evidence before the Commission

1. Documentary evidence

52. The parties submitted various documents to the Commission. These included documents from the investigation and court proceedings and statements from the applicant and other persons concerning the events at issue in the present case. The applicant also submitted a transcript and tape of the BBC recording "Blood and Belonging - Karataş interview", two Amnesty International publications of May 1992 and July 1993 respectively on extrajudicial executions and "disappearances" in South East Turkey, part of a 1991 "Human Rights Report on East and South Region of Turkey under Emergency Law" on aspects of the village guard system by the Human Rights Association and a number of further documents concerning the village guard system in South East Turkey.

53. The applicant also submitted on 18 October 1993 a joint statement by herself, Ercan Önen, Muhittin Araç and Tahir Önen, which was taken on 24 September 1993 by Roza Alicioğlu of the Diyarbakır Branch of the Human Rights Association. In this joint statement,

the respective accounts of the applicant and the three others in relation to the events of 16 March 1993 and the subsequent investigation by the authorities are recorded. It bears the fingerprint of Şemse Önen and the signatures of Ercan Önen, Muhittin Araç and Tahir Önen. As Muhittin Araç, in his testimony to the Commission's Delegates, denied that the signature on this document was his, and as Tahir Önen's testimony about the manner in which he had signed this statement is rather ambiguous, the Commission asked the applicant to submit a written explanation from Ms Alicioğlu about the manner in which this statement was compiled and signed.

54. In her written explanation dated 3 April 1997, submitted to the Commission on 28 September 1998, Ms Alicioğlu stated, *inter alia*, that following a brain operation following beatings on her head while detained in Adana, she has certain memory problems. In view of her answer, the applicant has suggested in her final observations to the Commission to disregard the joint statement taken on 24 September 1993. Since the applicant does not wish to maintain this submission, the Commission has had no further regard to this joint statement.

55. The Commission has also noted the contents of the Information Report of 15 January 1999 on the honouring of obligations and commitments by Turkey by the Parliamentary Assembly Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe². In para. 20 of this Report, it is stated, *inter alia*:

“... an accompanying feature of emergency rule in these provinces [Diyarbakır, Hakkari, Siirt, Şırnak, Tunceli and Van] is the existence of a village guard system. The village guards are a force of approximately 50,000 ethnic Kurdish villagers armed and paid by the Government to fight the PKK [Workers Party of Kurdistan]. Pressure to join the village guards and reprisals by the security forces against those who refuse, or retaliation by the PKK against those who consent, puts the local population in an impossible situation ... “

56. The Commission has had particular regard to the following documents:

a. Statements by the applicant

- i. Statement of 1 April 1993 taken by the Fosfat gendarmerie station commander Salih Kaygusuz.

57. This statement, insofar as relevant, reads as follows:

<Translation>

“At around 21.00 hours on 16 March 1993 the door of our house was knocked on. When my father approached the door in order to open it my mother said: “They may not be soldiers, do not open.” My father addressed those outside and said “If you are going to search bring the Muhtar.” They said “We went to the Muhtar's house, apparently the Muhtar went to Istanbul”. Upon this my father opened the door. When my father opened the door, I was with my father. As soon as the door opened we

² This Report was debated in the Parliamentary Assembly of the Council of Europe during its Session held on 25 January 1999.

understood that they were not soldiers. The two individuals by the door had military clothes and big weapons. Whilst one of them was talking to my father, the other went straight into the room where my elder brother was. Sounds of gunshots came from that room. The man who shot my elder brother came out and started fighting with my father. During their fight my father removed the scarf from the head of one of them and said these are Ali and Orhan, sons of Kaso. At that stage they shot and killed my father. I was next to my father and they fired at me. When my mother jumped on me they shot her too and ran away. The one who murdered my brother Orhan was tall and without a moustache. The one who murdered my father had normal height, blond hair and a moustache, and he was slim. My knowledge and observation about this incident are as I stated. Upon stating thus and declaring that the witness has nothing else to state, her statement was read back via the interpreter and its truthfulness was confirmed with the signatures of those present.”

- ii. Statement of 5 April 1993 taken at the Mazıdağı district gendarme station by gendarme officer Cengiz Kesler.

58. This statement, insofar as relevant, reads as follows:

<Translation>

“On the evening of 16 March 1993 at around 21.30 hours we, my father Ibrahim Önen, mother Mome Önen, siblings Orhan Önen, Mekiye Önen and two younger siblings were watching the television. At this time our door was called at. My father, mother and I left the room and went to the hall in order to answer the call. We inquired who called at the door before opening it. A male voice responded by saying “We are soldiers, we will carry out a search in the house, it will only take 5 minutes”, in Turkish. At this stage my mother was speaking. My father did not as a result of being frightened. My mother responded by saying “If you are soldiers anyway, bring the Muhtar or a member [of the Elders] so we can open the door.” Upon this, those outside said that the mayor was in Istanbul and the member had gone to Diyarbakır. For this reason they came on their own. Upon this my father looked through the keyhole and saw those outside wearing military clothing. He thought that they were soldiers and opened the door. When we opened the door one of them quickly went to the living room. Another one remained with us by the door. They were wearing military camouflage clothes, poşu [local head scarf] around their necks and blue commando berets on their heads. My father became suspicious of their appearance and pulled the beret and poşu from his face. My father told us that they were Ali, son of Kaso the guard, and Orhan, son of Şeyhmus. He also told us to recognise them well. I do not personally know these individuals. I am only telling you what my father said. At the moment my father said this, the individual who went to the living room door and whom my father identified as being Orhan, fired upon my brother. They fired upon us by saying; “Since you recognised us, we will kill you”. They fired on my father, my mother and myself. Then they departed by running away. Those who entered into our house were two people. I don’t know if there were others outside. My father died at the incident location. My mother died on the way to the hospital. I was wounded in my left foot and received medical treatment. Right now my situation is good. As said before, before my father died, those responsible for the incident are the guards of Balpınar village, namely Ali and a former guard from the same village

named Orhan. I don't know their surnames. My sister Mekiye Önen, who was not injured, is a witness to the incident. There was no other witness to this incident. I am filing a complaint against these two individuals. I demand legal proceedings against them. Thus the witness stated and declared that she had nothing else to add, the statement was read back. The witness confirmed her statement with her left thumb print."

iii. Statement of 9 June 1993 taken by Mr Yekta Çobanoğlu, the public prosecutor of Mazıdağı

59. This statement, insofar as relevant, reads as follows:

<Translation>

"... in the evening of 16 March 1993 at around 21.30 hours I, my father Ibrahim, my mother Mome, my brother Orhan Önen, and Mekiye Önen were sitting in the house and watching the television. At this time our door was called at. Myself, my father and mother went to the hall from the room we were sitting in. We suspiciously waited for some time. Upon this, my father looked outside from the outer door hole, seeing that those outside were in military clothes. Upon this my mother inquired by saying "Who are you? What do you want?". Those outside responded by saying "We are soldiers, we will search the house". I noticed the speaker's broken Turkish. I mean he did not pronounce his words in correct Turkish. Of course I noticed these after the incident. My mother told the outsiders; "We will not let you in, however if you bring the village Muhtar or one of the members [of the Elders], we can open the door". The outsiders said that the Muhtar had gone to Istanbul and the member to Diyarbakır. Knowing that he had in fact gone there, we opened the door. On opening [the door], one individual wearing military clothes and his face being covered with a local scarf called a poşu, entered into the hall and adjoining side room. His eyes were the only visible part of his covered face. He was followed by another individual wearing the same type of military clothes and a poşu covering his face. Upon the entrance of the second individual my father became suspicious and wanted to uncover his face by raising his hand and pulling the poşu. Upon this, that individual pointed the Kalashnikov weapon towards my father's abdomen and wanted to take him outside. Upon this my father said, "What is my fault?". A third individual from outside spoke in Kurdish saying "He recognised us, kill him". At this stage my brother Orhan, who was lying covered on the bed and watching the television, and my father were fired at. Before being shot at my father suddenly pulled the poşu off of the person's face down to his chin and, facing us, said loudly "These are Ali and Orhan sons of Kaso. Recognise them well". Upon this I cried help, hoping that the next door neighbour would come and intervene. Upon this, shots were fired inside the house from the outside. I was wounded. They started shooting my brother Orhan and my father. Upon this my mother closed the outer door and leaned on the inside door to prevent the murderer of Orhan from going out. The perpetrator within started firing at my mother. She was wounded and fell to the floor. He opened the door and ran away with the others. I started shouting after them. They fired on me again. They did not score. I am filing a complaint and demanding the punishment of those who killed my mother, father and brother. ... During my statement at the Gendarme [station] I made a wrong statement due to the shock caused by the incident. Although I said there were seven

people outside and that the incident was carried out by Ali and Orhan, Provisional Village Guards of Balpınar village, in fact I don't know who shot my brother inside [the house]. I saw only those who shot my father and from what he said that they were Ali and Orhan, son of Kaso. Witness' declaration was read back via the interpreter. The witness confirmed her statement with her left thumb print."

- iv. Undated statement taken by Mr Sedat Aslantaş of the Diyarbakır Branch of the Human Rights Association, submitted to the Commission on 18 October 1993

60. This statement, insofar as relevant, reads as follows:

<Translation>

"On 16.03.93, myself, my father Ibrahim Önen, my mother Mome Önen, my elder brother Orhan Önen, my sister Mekiye Önen, my two year old sister Melek Önen and my one and a half year old brother Hamdullah Önen were sitting together in our house in Karataş village ... It was about 21.00 in the evening. There was a knock on the door, and my father went towards the door, saying, "Who's there?" Those outside gave the reply, "We are soldiers, we've come to do a search." When my father said, "If you're soldiers, then come with the Muhtar, or I won't open the door", the voice outside said, "The Muhtar isn't here, he's gone to Istanbul, don't be afraid of us, we're going to do a search and go away". When, upon this, my father opened the door slightly, they pushed the door suddenly and surged inside. One of them quickly opened the bedroom door and started shooting at my brother Orhan Önen who was sitting in the room. On this, a violent fight broke out between my father and the others. On the other side, my mother was fighting with the person who had shot my brother. When my mother pulled the scarf from the face of the man she was fighting with, there was a commando's beret on his head. This beret fell off in the house, so we hid it for a while and even showed it to the commander who came later. When my father pulled the scarf of the person he was fighting with, he recognised him. The person he recognised was Ali Ertaş, a village guard from Balpınar village. My father shouted out "Ali Ertaş, is this how you kill people?" And before my mother died, she was crying "It is Balpınar village guards who are shooting us, let everyone know." When my mother and father recognised the attackers, they shot both of them, whilst my mother was taken to hospital, my father and brother died at the scene of the incident. The village guards, who shot me as well, thought I had died too and went away. I had been wounded in the foot. The people who shot us were Balpınar village guards. We believe that the army had knowledge of the incident. Four months before this incident, four village guards from Balpınar were killed by guerrillas. ... Two months previously, a raid was organised on our village, and our houses, especially our house, were shot at. They were Balpınar village guards who carried out this attack. Four days after the incident, we were called to the village [gendarme] station to give statements. All of us, giving names, said that it was Balpınar village guards who shot at us. Although three months have passed since the incident, the file has not been transferred to the prosecution. We applied to the Ministry of Justice in Ankara. Ministry authorities spoke to the Mazıdağı prosecutor on the telephone. Apparently the prosecutor said that the investigation was underway. But there is no inquiry. In any case the prosecutor does not have the power to do this. My brother Ercan Önen met the prosecutor again in relation to this file. The prosecutor said to my brother

“The file may have got lost at the [gendarme] station, I cannot approach this incident, I do not have the power.” The guilty parties are being openly protected by the state. The state sees as enemies all those who will not accept village guard [system] or who will not act as informers for the state. ...”

b. Statements by the applicant’s sister Mekiye Önen

i. Statement of 1 April 1993 taken by the Fosfat gendarme station commander Salih Kaygusuz

61. This statement, insofar as relevant, reads as follows:

<Translation>

“At around 21.00 hours on 16 March 1993 we were sitting at home. At that time there was a knock on the door. My father asked from within the house who was there. The man outside said “We are soldiers, open the door”. My father believed that they were not soldiers and did not want to open the door. Later he went to the door in order to open it. My elder brother Orhan Önen shouted at my father saying “They are not soldiers, do not open the door”. However my father had already opened the door. Two individuals in military clothes who held weapons in their hands entered into the house. Whilst one of them was talking to my father outside, the other went straight in and started firing at the head of my elder brother Orhan Önen. I was in the same room as my elder brother. I took my younger sibling into my lap and went behind the stove. After having murdered my elder brother the man went outside. His head was covered with something. Afterwards, I heard my father shouting towards us saying “Those shooting us were Ali, son of Kaso”. A few minutes later the gunshots stopped. I went out and started screaming. My knowledge and observation about this incident are as I stated. Upon stating thus, and declaring that she has nothing else to state, the statement was read back via the interpreter and its truthfulness was confirmed with the signatures of those present.”

ii. Statement of 5 April 1993 taken at the Mazıdağı district gendarme station by gendarme officer Cengiz Kesler

62. This statement, insofar as relevant, reads as follows:

<Translation>

“On the evening of 16 March 1993 at around 21.30 hours we, my father, mother, siblings Orhan, Şemse and two younger siblings were watching the television in the living room. At this time our door was called at. Our house consists of a living room and a hall. We were in the living room. The outer door opens into the hall. When the door was called at my father, mother and elder sister Şemse went to the hall. My elder brother Orhan, myself and our younger siblings remained in the living room. However, we could hear the conversations spoken in the hall. Before opening the door my father inquired as to the identity of the callers. They said that they were soldiers and they were going to search the house. The callers were speaking Turkish. My mother and sister did not speak at all. My father, hearing that they were soldiers, told them to bring the Muhtar or a member of [the council of] the Elders. The callers said

that the Muhtar was in Istanbul and the member had gone to Diyarbakır. For this reason, they said, they came on their own. Upon this my father opened the door. One of them covered his face with a poşu. He wore military clothes. He came to where we were sitting. My elder brother Orhan was lying on the bed. Without saying anything he fired upon my brother. My brother died there [instantly]. I was unable to go out due to my fear. However, I heard my father saying “Recognise these people well, they are Ali, son of Kaso and Orhan, son of Şeyhmus”. Upon this I heard the raider saying “Since you recognised us we will kill you”. This was followed by gunshots and the individuals who fired run away. My father died at the incident location. My mother died on the way to the hospital. My sister Şemse Önen was injured in her foot. She received treatment in the hospital. At present she is well. I personally do not know the individuals who raided our house, killing my father, mother and brother and injuring my sister. However, I learned from my father’s voice the above stated identity of these individuals. I only saw one person. Another one remained with my father, who opened the door. The one who came to our room was wearing military camouflage clothes. And due to his face being covered I could not see who he was and was unable to recognise him. I could not recognise them if I saw them now. However, I learned from my father that they were the individuals I referred to. This is the situation. I am filing a complaint against these two individuals who killed my father, mother and brother and injured my sister. I demand legal proceedings against them. I and my sister Şemse Önen are the surviving witnesses of this incident. There is no one else. Thus the witness stated and declared that she had nothing else to add, the statement was read back in her presence and she confirmed her statement with her left thumb print.”

- iii. Statement of 6 July 1993 taken by Yekta Çobanoğlu, the public prosecutor at Mazıdağı

63. This statement, insofar as relevant, reads as follows:

<Translation>

“On the date of the incident we were watching television in the room where my brother Orhan Önen was. In other words my father, mother and elder sister Şemse were also in the room. The door was called at and my father, mother and elder sister Şemse went to the hall. We did not leave the room. When my father addressed those outside and asked who they were, they said; “We are soldiers, we will search the house”. The persons outside were speaking Turkish. Upon this my father said “Bring the Muhtar or member of the village [council], otherwise I will not open the door”. The persons outside said that the Muhtar was in Istanbul and that the member had gone to Diyarbakır. Relying on this my father opened the door. We were sitting in the room. At this stage someone, whose face and head was covered with a poşu, entered into the room and without speaking pointed his weapon to my elder brother Orhan who was lying on the bed and watching television, and fired. I heard gunshots from outside. I did not go out because I was frightened. Before the gunshots, I heard my father saying “Children be careful, these are Ali, son of Kaso, and Orhan, son of Şeyhmus, guards of Balpınar village”. Upon my father’s exclamation one of the outsiders said “Since you recognise us we will kill you”. They subjected my father to random shooting. The one who killed Orhan was wearing commando clothes. Only his eyes were visible. He had brown eyes and pale skin. When he left the house, I didn’t know what to do. I was shocked. When I threw myself into the hall my father was dead and mother was dying. She died on the way to the hospital. My sister, whilst being wounded in her foot, was crying for help. I do not personally know Ali Ertaş and Orhan Ertaş whose names were said by my father. He recognised them on seeing their faces and he shouted their names for us to know. I said that those who shot my father were Ali and Orhan Ertaş by relying on my father’s words. This is all I can state. I am filing a complaint. Thus the witness stated and her declaration was told via the interpreter. The witness confirmed her statement with her left thumb print.”

c. Statements by other persons

- i. Statements taken on 4 and 5 April 1993 at Fosfat gendarme station by Salih Kaygusuz

64. On 4 April 1993, the Fosfat gendarme station commander Salih Kaygusuz took statements from the Balpınar village guards Ali Ertaş, son of Kasım and born in 1953, and Mecit Kaya, son of Mehmet and born in 1960, in relation to the events of 16 March 1993. Ali Ertaş stated that he was the Head of the Balpınar village guards and that, on 16 March 1993, he had been on patrol duty on the Kırmızıtepe hill to the west of Balpınar. He denied any involvement in the killing of the applicant’s parents and brother and stated that he felt slandered. His account was supported by Mecit Kaya who confirmed having been on patrol on the Kırmızıtepe hill together with Ali Ertaş until the morning of 17 March 1993. Mecit Kaya further declared that neither the village of Balpınar nor Ali Ertaş had any involvement in the killings.

65. On 5 April 1993, Mr Salih Kaygusuz took a statement from Orhan Ertaş, son of Şeyhmus and born in 1969, who stated that on 16 March 1993 he had not been in Balpınar. On that day he had been loading goods in his lorry in the province of Mersin and had driven his lorry to Istanbul. He further declared that due to his work, he never stayed very long in Balpınar.

- ii. Statement by Mahmut Denli taken on 5 April 1993 at the Mazıdağı District gendarmerie station by gendarme Cengiz Kesler

66. In this statement, Mahmut Denli, the Muhtar of Balpınar and a member of the Balpınar village guards, denied any involvement of Ali Ertaş in the killings in Karataş on 16 March 1993. He stated that, in the evening of 16 March 1993, he had been on patrol duty together with Ali Ertaş. After having heard shooting coming from the direction of Karataş at about 21.30 hours, Ali Ertaş had communicated with the Fosfat gendarme station by radio about this shooting. Mahmut Denli further stated that he had been with Ali Ertaş at the time the shooting occurred. He confirmed that Orhan Ertaş had not been in Balpınar that day and stated that he did not think that Orhan Ertaş had been involved in the incident.

- iii. Statement of 6 July 1993 of Ali Ertaş taken by Yekta Çobanoğlu, the public prosecutor at Mazıdağı

67. In this statement, Ali Ertaş declared that, on 16 March 1993, he and other village guards were on ambush duty in Kırmızıtepe west of Balpınar. At some point in time he contacted the Fosfat gendarme station by radio in connection with a terrorist attack on the Etibank PTT installation. About 30 - 40 minutes later he had heard gunshots and had contacted the Fosfat gendarme station for a second time in order to find out whether this station was under attack. He was informed that the shots had come from Karataş. The village guards had remained on their position and continued their ambush duty until the morning. He further stated that, on 16 March 1993, Orhan Ertaş had not been in Balpınar.

- iv. Statements taken on 6 May 1994 from Mahmut Denli, Mecit Kaya and Ali Ertaş by judge Ayhan İstikbal of the Mazıdağı Court of First Instance upon request of the State Security Court of Diyarbakır

68. Mahmut Denli stated that, on 16 March 1993, he was a provisional village guard as well as the Muhtar of Balpınar. He stated that, on that day, they had been on ambush duty at a location from where they had a comfortable overview of their surroundings. They reported gunshots to the gendarmes. The distance between their position and the shooting was about five to six kilometres. They could not see who fired, they had only heard the shots.

69. Mecit Kaya stated that he was a provisional village guard and that, on 16 March 1993, he and other village guards were on ambush duty in the Kırmızıtepe region. They had heard gunshots from a long distance and had enquired about these shots with the gendarmes.

70. Ali Ertaş stated that he was a provisional village guard and that, on 16 March 1993, he and other village guards were on ambush duty. He saw the missile attack on the PTT Radio Link installation and reported this to the gendarmes. He denied any involvement in the killing of the applicant's parents and brother.

d. Official reports and documents

i. Incident report dated 16 March 1993

71. This report drawn up by the gendarmes of the Mazıdağı District gendarme station, and signed by its Commander Captain Sebahattin Taşan, states that on 16 March 1993, at around 21.30 hours, a group of terrorists belonging to the outlawed PKK organisation entered the home of Ibrahim Önen and opened fire. Ibrahim and Orhan Önen were shot and killed. Mome and Şemse Önen were injured. The report further states that Mome Önen died on the way to hospital. The report also mentions nine empty Kalashnikov cartridges without giving any further specification.

ii. Sketch map dated 16 March 1993

72. There is a sketch map drawn by NCO Salih Kaygusuz of the Fosfat Gendarme Station of the interior of the Önen family's two-room house (see Appendix II). It indicates in one room the location of the bodies of Ibrahim and Mome Önen, two blood stains between the body of Ibrahim Önen and the front door and five empty cartridges. In the other room the location of the body of Orhan Önen and four empty cartridges is indicated. No blood stain is recorded in the room where the body of Orhan Önen was indicated. The sketch map only records what had been found inside the house. It does not contain any information about the direct surroundings of the house.

iii. *Post mortem* examination report dated 17 March 1993

73. The report states that, due to security precautions, the team of experts only arrived on 17 March 1993 at about 08.00 hours in Karataş, acting on a report that three persons had been killed there on 16 March 1993 at 20.00 hours. This team consisted of the public prosecutor of Mazıdağı Yekta Çobanoğlu, the medical doctor Sedat İşçi of the Mazıdağı Health Centre, a clerk, an autopsy assistant and a driver. The report further indicated that Mome had died on the way to hospital and that her body had been brought back to the village.

74. The bodies of Ibrahim, Mome and Orhan Önen were identified by a relative, Mehmet Hadi Araç. In the following examination of the bodies, which was carried out by Dr. İşçi in the presence of the public prosecutor, three bullet entry and three bullet exit wounds on the body of Ibrahim Önen were recorded. One bullet entry wound was recorded on the right hand side of the chest, one in the right hand side abdomen region and one on the left upper leg. The three bullet exit wounds were recorded under the right hand side shoulder blade, in the right hand side armpit region and on the left leg respectively. The cause of death was haemorrhage of the lungs.

75. On the body of Orhan Önen, numerous bullet entry and exit bullet wounds in the lower chin, lower lips and upper lip were recorded, without any indication as to the exact or approximate number of bullet entry and exit wounds found on that part of his body. The record further states that "the bullet <which> entered from the left nipple on the level of the heart exited from the lower chin". A further bullet entry and exit wound was found in the knee region. The report further mentions the presence of a large amount of dried blood on the

floor where Orhan's body was lying. The cause of death stated was cessation of vital functions.

76. As to the examination of the body of Mome Önen, one bullet entry wound and one bullet exit wound were recorded. The bullet entry wound was recorded on the right hand side groin region at the level of the femoral artery. The bullet exit wound was recorded at the level of the femoral artery. The cause of death stated was loss of blood.

77. Given the obvious respective causes of death, it was decided that there was no need to conduct an autopsy.

iv. Correspondence of the Mazıdağı public prosecutor

78. On 17 March 1993, the public prosecutor Yekta Çobanoğlu addressed a telegram to the office of the public prosecutor at the State Security Court in Diyarbakır informing the latter that Ibrahim, Orhan and Mome Önen had been killed with fire arms on 16 March 1993 by members of the outlawed PKK terrorist organisation and that the investigation was ongoing. By letter of 18 March 1993, the public prosecutor at the State Security Court, Bekir Selçuk, instructed the public prosecutor in Mazıdağı to conduct a preliminary investigation in accordance with Article 10 of the Law No. 2845.

79. Also on 17 March 1993, Yekta Çobanoğlu requested the Mazıdağı Census directorate to prepare death certificate entries in respect of the three victims. In this request, he specified that they had been killed by members of the outlawed PKK terrorist organisation. On 29 March 1993, the Census directorate addressed the three death certificates to the public prosecutor at Mazıdağı. Under the rubric “cause of death” on these certificates it is stated “killing by the PKK terrorist organisation”.

80. In a letter dated 5 April 1993, signed by the Mazıdağı District gendarme station commander Sebahattin Taşan and addressed to the office of the public prosecutor in Mazıdağı, it was stated that the applicant’s brother and parents had been killed by members of the outlawed PKK terrorist organisation, that the necessary investigation into the incident had been completed and that the relevant investigation documents were enclosed.

81. In a letter dated 4 May 1993, Sebahattin Taşan informed the office of the public prosecutor in Mazıdağı that the identity or identities of those responsible for the killing of the applicant’s brother and parents had not been established, that there were no clues and that the investigation continues.

v. Forensic ballistics inquiries and examinations

82. On 7 April 1993, the Mazıdağı District gendarme command transmitted the nine empty 7.62 mm calibre Kalashnikov cartridges found at the scene of the killing to the Mardin Provincial gendarme command for a ballistics examination. On 18 April 1993, the Mardin Provincial gendarme command sent these cartridges to the Regional Criminal Police Laboratory in Diyarbakır. The public prosecutor at Mazıdağı, Yekta Çobanoğlu, was informed of the above transmissions.

83. By letter of 29 April 1993, referring to the applicant’s accusation of Ali Ertaş, Yekta Çobanoğlu instructed the Mazıdağı District gendarme command to obtain the weapon of Ali

Ertaş and transmit it for a ballistics comparison examination with the nine cartridges found at the scene of the killings.

84. According to a ballistics report No. 1993/1163 of 29 April 1993 of the forensic laboratory in Diyarbakır, the nine empty cartridges had been fired from three different weapons with the same calibre, i.e. six from one weapon, two from another and one from a third weapon.

85. By letter of 6 May 1993, the Mazıdağı District gendarme station sent five 7.62 mm calibre Kalashnikov empty cartridges to the Mardin Provincial gendarme command for comparison with the nine empty cartridges found at the scene of the killings. At the top of this letter it is stated "Subject : Dispatch of empty Kalashnikov cartridge shells taken from provisional village guard Ali Ertaş' weapon for expertise report". The letter itself reads, *inter alia*, "...Şemse Önen ... states that Ali Ertaş ... is one of the suspects ... Therefore 5 items of 7.62 mm calibre Kalashnikov empty cartridges taken from 6 provisional village guards were dispatched in order to be compared with the 9 empty cartridges ...". The letter does not specify the serial number of Ali Ertaş' weapon. On 13 May 1993, the Mardin Provincial gendarme command transmitted the five cartridges to the forensic laboratory in Diyarbakır for a ballistics examination.

86. In the ballistics report No. 1993/1316 of 17 May 1993 of the forensic laboratory in Diyarbakır, it was found that none of the nine cartridges found at the scene of the killings matched with the five empty cartridges reportedly taken from the Kalashnikov rifle of Ali Ertaş and that, therefore, the nine cartridges had not been fired from Ali Ertaş' weapon. On 26 May 1993, the Mardin Provincial gendarme command transmitted this report to the Mazıdağı public prosecutor via the Mazıdağı District gendarme station.

87. By letter of 13 September 1993, following the referral of the prosecution's case-file to the prosecutor's office at the Diyarbakır State Security Court, the prosecutor at this court, Tanju Güvendiren, referring to the letter of 6 May 1993, asked the Mardin/Mazıdağı District gendarme station for an explanation as to why only five empty cartridge shells were sent whereas six such cartridges taken from Kalashnikov weapons owned by six village guards were required for a comparison. He further instructed the gendarmerie to provide him with a list of the Karataş village guards and the Kalashnikov delivery receipts of these village guards. He instructed the gendarmerie to send the Kalashnikov delivered to Ali Ertaş and all other Kalashnikovs belonging to the village guards to the forensic laboratory in Diyarbakır for a ballistics examination or, in case there were insufficient replacement rifles, to fire these rifles and to number the empty cartridges in order to identify which cartridge was fired from which weapon and to send these cartridges for a ballistics examination to the forensic laboratory.

88. On 19 October 1993, the Mazıdağı District gendarme command sent to the prosecutor's office at the Diyarbakır State Security Court sixty-five weapon and ammunition delivery receipts of the Balpınar village guards and sixty-five numbered empty cartridges. This letter contains no information as to the circumstances of the firing of the weapons from which the sixty-five cartridges were obtained and, in particular, as to the controls exercised to ensure that the firing operation was properly performed.

89. On 27 January 1994, a public prosecutor at the State Security Court, Mustafa Alicioğlu, signed a receipt for a bag containing sixty-five 7.62 mm calibre empty cartridges. The case-number referred to in this document corresponds with the preliminary case-number of the proceedings before the State Security Court against Ali and Orhan Ertaş.

90. On 27 October 1994, the Regional Criminal Police Laboratory in Diyarbakır, in reply to a letter of 4 August 1994 from the prosecution's office at the State Security Court of Diyarbakır, sent to this office its report No. 1994/2050 on the ballistics examination of sixty-five empty 7.62 mm Kalashnikov cartridges. It was concluded that none of these cartridges matched with the nine cartridges found at the place where the applicant's parents and brother had been shot.

vi. Decision of lack of jurisdiction dated 7 July 1993

91. This decision, issued by the Mazıdağı public prosecutor Yekta Çobanoğlu, lists Ali and Orhan Ertaş as suspects of the offence of "politically motivated murder" of the applicant's parents and brother. It notes that, following its investigation, the District gendarme command had concluded that unidentified members of the PKK terrorist organisation had committed the killings, but that, according to the respective accounts of the applicant and her sister Mekiye, their father had recognised the perpetrators as Ali and Orhan Ertaş. Concluding that the alleged offence fell within the scope of Law No. 2845, it was decided that the Mazıdağı prosecutor's office lacked jurisdiction and that the case-file should be transmitted to the prosecutor's office at the Diyarbakır State Security Court.

e. Proceedings before the State Security Court

92. On 6 January 1994, Ali and Orhan Ertaş were indicted by the State Security Court prosecutor Tanju Güvendiren before the State Security Court of Diyarbakır on charges of politically motivated murder committed on the applicant's parents and brother Orhan. The indictment stated that the applicable provisions were Articles 31, 33 and 448 of the Turkish Penal Code and Article 13/2 of the Law No. 6136.

93. According to its minutes of 21 January 1994, the State Security Court decided to instruct the Mazıdağı Court of First Instance to, *inter alia*, take statements from Ali and Orhan Ertaş, Mecit Kaya and Mahmut Denli, and to take evidence from Şemse and Mekiye Önen. It adjourned its further examination until 16 March 1994.

94. In its minutes of 16 March 1994, the State Security Court noted that the results of its instructions had not yet arrived and that it appeared from the case-file that weapons seized from the suspects had been sent to the Diyarbakır Police Laboratory for a ballistics examination. It decided to request the forensic laboratory to submit its report and to adjourn the proceedings until 27 April 1994.

95. On 29 March 1994, the Regional Criminal Police Laboratory submitted to the State Security Court two ballistics reports, i.e. its report No. 1993/1163 of 29 April 1993 and its report No. 1993/1316 of 17 May 1993 (see above, paras. 84 and 86).

96. On 25 April 1994, Ayhan İstikbal, a judge at the Mazıdağı Court of First Instance, instructed the Mazıdağı prosecutor's office to summon Ali and Orhan Ertaş, Mahmut Denli, Mecit Kaya and Şemse and Mekiye Önen to appear on 6 May 1994 before the Court of First Instance in order to give evidence.

97. In its minutes of 27 April 1994, the State Security Court noted that not all the results of its instructions had yet arrived and decided to adjourn its examination until 29 June 1994.

98. In a statement dated 4 May 1994 and signed by the gendarmes Yusuf Kocer and Salih Günay and by the Muhtar of Karataş Muhittin Araç, it was noted that the applicant and her sister Mekiye resided around Cezaevi in the Diyarbakır province, but that their address could not be established. In another statement dated 4 May 1994 and signed by the same gendarmes and the Muhtar of Balpınar İzzettin Kaya, it was noted that the present whereabouts of Orhan Ertaş were unknown.

99. On 6 May 1994, in the presence of the Mazıdağı public prosecutor Yekta Çobanoğlu, the judge at the Mazıdağı Court of First Instance, Ayhan İstikbal, took statements from Mahmut Denli, Mecit Kaya and Ali Ertaş. It was noted that Orhan Ertaş had not appeared. Ali Ertaş stated that Orhan Ertaş had already left Balpınar some time ago, that he was unaware of Orhan's whereabouts and that in any event Orhan had not been in the village for a long time. As regards the applicant and her sister Mekiye, it was noted that they had not appeared and that the response to their summons indicated that they were not in the village and were residing in the Cezaevi neighbourhood in Diyarbakır.

100. According to its minutes of 29 June 1994, the State Security Court noted that no statements were taken from the applicant and her sister Mekiye as their address could not be established. It further acceded to the request of the prosecution to order a ballistics comparison of the nine cartridges found and the sixty-five cartridges obtained from the Balpınar village guards. It adjourned its further examination until 21 September 1994.

101. In its minutes of 21 September 1994, the State Security Court noted that the results of the ballistics examination had not yet been submitted and decided to adjourn its examination until 30 November 1994.

102. On 27 October 1994, the Regional Criminal Police Laboratory at Diyarbakır sent the report on the ballistics comparison examination to the prosecutor's office at the State Security Court of Diyarbakır (see above, para. 88). By letter of 11 November 1994 the prosecutor Mustafa Alıcıoğlu at the State Security Court transmitted the ballistics report to the President of the State Security Court. On 15 November 1994, the President Mehmet Orhan Karadeniz signed the letter, acknowledging receipt.

103. In its minutes of 30 November 1994, the State Security Court noted that the results of the ballistics examination had not yet been submitted. It decided to adjourn the further proceedings until 28 December 1994.

104. On 28 December 1994, the State Security Court tried the case. In its minutes it recorded that the defendants as well as the applicant and her sister had not appeared. The prosecution submitted that the applicant and her sister had only heard their father state the names of the accused whereas there was no other evidence supporting their account. The prosecution argued that, in these circumstances, the accused should be given the benefit of the doubt and consequently acquitted. By judgment of 28 December 1994, in conformity with the prosecution's plea, the State Security Court decided unanimously to acquit Ali and Orhan Ertaş of the charges against them.

f. Other documents

i. Özgür Gündem newspaper article dated 19 May 1993

105. The applicant submitted an article relating to the authorities' failure to investigate the killing of her parents and brother by Balpınar village guards, whose names were mentioned in the article. According to this article, a complaint against these village guards had been filed with the public prosecutor at Mazıdağı on the day after the incident, but no legal proceedings had yet been instituted. The article included a statement from unnamed relatives that the reason for the attack was the refusal to become village guards and that "everybody knows that the Balpınar village guards killed our relative Ibrahim Önen and his family on the instigation of the Mazıdağı Central Gendarme Commander." The Mazıdağı prosecutor, when approached by the newspaper for comment, stated that he was not permitted to speak to the press and according to the article added: "Don't put me in a difficult position."

ii. Documents relating to the Balpınar village guards

106. The Government have submitted the Weapon and Ammunition Receipts of the Balpınar village guards. According to these documents, the gendarme forces provided, on 9 December 1991, Ali Ertaş and seventeen others each with a 7.62 mm calibre Kalashnikov rifle and ammunition in their capacity as village guards of Balpınar. The weapon and ammunition delivery receipt concerning Ali Ertaş mentions him as head village guard. Thirty-four other Balpınar village guards, amongst whom the Muhtar of Balpınar Mahmut Denli, were provided with a 7.62 mm calibre Kalashnikov rifle and ammunition on 4 January 1992. The weapon delivery receipts of thirteen other Balpınar village guards do not mention the date on which they were provided with a 7.62 mm calibre Kalashnikov rifle and ammunition. No weapon and ammunition delivery receipt concerning Orhan Ertaş has been submitted.

107. According to a document dated 28 September 1992 and signed by the Deputy Commander to the Mazıdağı District gendarme station, the Governor of Mardin and the Mazıdağı District Governor, three persons including Orhan Ertaş, son of Şeyhmus and born in 1969, were dismissed from their duties as village guard. It does not appear from this document whether and in what manner these three persons had handed in the weapons and ammunition supplied to them in their capacity as village guards.

iii. Attacks on Balpınar village guards

108. In an incident report dated 9 October 1992, it is recorded that on 8 October 1992, at about 20.15 hours, PKK forces opened fire on Balpınar village guards on duty on the slopes of the Kırmızıtepe hill at a location of about 300 metres from Balpınar. After the clash 180 empty Kalashnikov cartridges, 47 empty G-3 rifle cartridges and 42 empty Diktiriyof machine gun cartridges were found at the site of the clash and taken as evidence. To date the attackers had not been identified, but a ballistics examination of a weapon found on a PKK fighter killed in the course of a clash with Turkish security forces on 29 January 1993 in Sayar (Girmeli subdistrict Nusaybin) revealed that one cartridge found on 9 October 1992 near Balpınar had been fired from this weapon.

iv. Investigation of the attack on Balpınar village guards on 15 November 1992

109. According to gendarme reports and a number of statements taken by the gendarmes from the Balpınar village guards involved in this incident, a group of nine Balpınar village guards travelling by tractor on the road from Balpınar to the Fosfat gendarme station were attacked by PKK forces on 15 November 1992 at around 16.00 hours. At the time of the attack, the village guards found themselves between the villages Arısu and Karataş. Four village guards were injured, amongst whom Ramazan Ertaş, son of Kasım and born in 1955. Four others were killed, amongst whom Nesrettin Ertaş, son of Şeyhmus and born in 1965, and Davut Ertaş, son of Kasım and born in 1944.

v. Investigation of the attack on the PTT radio link installation on 16 March 1993

110. According to gendarme reports and a number of statements taken by the gendarmes from the village guards and gendarmes involved, PKK forces committed an armed attack on the PTT radio link installation in the Kaletepe area near Mazıdağı on 16 March 1993. The attack started at 20.15 hours and lasted for about 10-15 minutes. No one was killed or injured. The next day, the gendarmes found a mine on the road leading to the radio link installation. To date the perpetrators had not been found.

vi. Ambulance record between 12 February 1993 and 25 March 1993

111. The ambulance record submitted by the Government on 7 May 1998 contains twelve entries dated between 12 February 1993 and 25 March 1993. Nine entries are signed by Dr Sedat İşçi. According to the entry dated 16 March 1993, the ambulance's odometer indicated 50,171 upon its departure and 50,266 upon its return, thus indicating a journey of 95 kilometres. The time of departure was recorded as 22.10 hours and the time of return 23.15 hours. The purpose of the journey was recorded as "taking an injured <person> to Diyarbakır, returned from Çınar". This entry is signed by Dr. Sedat İşçi.

vii. Ongoing investigation of the killing of the applicant's parents and brother

112. Between 30 June 1995 and 25 March 1998, the Commander of the Mazıdağı District gendarme station sent, at regular intervals of about three months, a letter to the office of the public prosecutor in Mazıdağı in which he informed the public prosecutor that the identities of the PKK members who had killed the applicant's parents and brother had not yet been established. A number of these letters, including the one sent on 25 March 1998, state that the investigation of the matter is still ongoing.

viii. Purchase of a vehicle by the applicant's brother Orhan Önen.

113. According to a copy of a contract of sale dated 28 August 1992, submitted by the applicant, the applicant's brother Orhan Önen bought a Şahin car from the car trading company Murat Kocabaş in Elazığ. In the contract, it was stipulated that the vehicle was to be delivered in December 1992 and that it would be a 1993 model. The contract further mentioned that the down payment for the car amounted to 40 million Turkish Lira and that the remainder of the purchase price was to be paid in eleven instalments between September 1992 and August 1993. The applicant further submitted copies of a number of bills of

exchange (i.e. bills of exchange numbered 1, 2, 3, 4, 10 and 11) of 2 million Turkish Lira each to be paid by Orhan Önen. The bills of exchange Nos. 1, 2 and 3 mentioned Murat Kocabaş as the person to whom the amount was to be paid. The bill of exchange No. 4 did not specify to whom it was payable and Nos. 10 and 11 contained the names of other persons.

2. Oral evidence

114. Not all of the witnesses summoned by the Delegates were heard during the hearing held in Ankara. Four inhabitants of Karataş, whom the applicant had proposed be heard, did not give evidence upon the suggestion of the applicant. These witnesses were excused with the consent of the respondent Government and the Delegates.

115. The evidence of the applicant and the twelve witnesses heard by the Delegates may be summarised as follows:

Şemse Önen

116. The applicant stated that she was about thirty years old and illiterate. Although she now lived in Diyarbakır, she had been living in her parents' two-room house in Karataş at the time of the events in question. About two months after the events at issue, she and her family had moved to Diyarbakır. Her parents' house was practically uninhabitable and they could not face to continue living there. Karataş had no village guards. The village of Balpınar, which lies about thirty minutes by foot from Karataş, had village guards. She had never seen any Balpınar village guards in Karataş, but they did travel every day on the nearby road to Etibank and the Fosfat gendarme station. This station lies close to the village and could be seen from there.

117. Prior to 16 March 1993, there had been many attacks on Karataş. After four Balpınar village guards had been killed in a PKK attack, shots or rockets had been fired at the house of the Muhtar of Karataş and at her parent's house. She thought these shots had been fired by the village guards and gendarmes from the station, because they considered the Karataş villagers as suspect. It started at about 15.00 hours and lasted until the evening.

118. At the relevant time, her brother Orhan had just bought a taxi from a company in Elazığ. He wanted to become a taxi driver in Diyarbakır. He had not used it yet. Her family had sold two cows in order to finance the down payment. The rest of the purchase price was to be paid in instalments out of the family's income from salary and other income. Her father already possessed a minibus, which her brother Orhan drove.

119. In the evening of 16 March 1993, she had been at home with her parents, her brother Orhan, her sister Mekiye and the young siblings Melek and Hamdullah. At about 21.00 hours, the doorbell had rung. Her father had gone to the door, followed by her mother. The persons outside announced themselves in Kurdish as soldiers wishing to carry out a house search. Her mother answered that she refused to open the door unless they were accompanied by the Muhtar or a member of the Council of Elders. The reply was that these persons were not in the village. Her father had looked outside through a hole and had seen that the persons outside were wearing uniforms. In order to avoid problems he had opened the door. Thereupon two men carrying Kalashnikovs entered. They had masked their faces with a

white and black spotted scarf and were wearing uniforms of the kind worn by soldiers and sometimes by village guards. Her father had thrust himself towards one of the men and had pulled the scarf off. Her father had then said that he recognised the men as Orhan and Ali. This man had then put his gun to her father's chest, had dragged him outside the house and started to fire. The other man had gone directly to the other room and had opened fire. When he returned from that room, her mother had pulled off his scarf, leaving a scratch mark above his eye. Her mother had told her that this man was Orhan and the other one Ali, village guards from Balpınar. Then her mother had been shot. She herself had also been injured in her foot by a shot fired from outside. She had fallen over her mother, who had kept on saying "Şemse, they are Ali and Orhan.", and she had pretended to be dead. She herself had not seen these men before. Orhan, who had shot her mother, had long fair hair, hazel eyes and a fair complexion. Ali, who had shot her father, was tall, had a moustache and black eyes. She had had the impression that there were more persons outside. When the men had left the house, she had got up and ran after them. She had seen three or four men running away towards the road to Balpınar. She had heard them say "We killed all four." Then a neighbour and other villagers had arrived at the scene. Shortly after that she had seen that her brother Orhan had been shot around his mouth. She had not been in the same room as Orhan when he was killed, but her sister Mekiye had. At that time she was in such a state that she had not noticed any cartridges.

120. Shortly afterwards her mother had been taken to a doctor by car. She herself had been taken by another villager in a different car to the University hospital for treatment of her injured foot. When she had returned to Karataş around 07.00 or 08.00 hours in the morning she had seen gendarmes from the nearby station in the village. She had seen one of them pick up and put in his pocket one or two cartridges behind a neighbour's house. She had not seen anyone taking photographs of the scene. A public prosecutor and a doctor, who had come to the village, had looked at the bodies of her parents and brother. They had not asked her any questions. She had not stayed in her own house, but had gone to the house of an uncle.

121. One of the gendarmes or the commander had asked her what had happened and she had answered him. He had not put any specific questions to her. At some later point in time she had gone to the gendarme station in Mazıdağı, where she had been asked questions about the events. She had not known whether she had given that statement to a prosecutor or a gendarme; she could not tell one from the other. She had fingerprinted her statement. After that she had seen Ali and Orhan Ertaş entering the gendarme station. She had recognised them as the intruders. Although some time had passed, the scratch on the face of Ali Ertaş had still been visible. The two men had threatened to kill her if she identified them as the perpetrators. When the gendarmes had asked her whether she recognised them, she had been too afraid to say anything. Her sister Mekiye, her brother Ercan and Hacı Hadi Araç had also been present at that occasion.

122. She had also gone several times to Diyarbakır, to the court, to give statements. Her brother Ercan had the papers requesting them to appear in court to give statements. After she had moved to Diyarbakır, she had heard nothing more about the matter.

Mekiye Önen

123. Mekiye Önen stated that she was about twenty-three years old and illiterate. She now lived in Diyarbakır. On 16 March 1993 she had been living with her parents, brothers and sisters in their two-room house in Karataş. Her father had a job at Etibank. Her brother Orhan had driven a minibus on the Mazıdağı-Diyarbakır route.

124. An incident had occurred in Karataş three or four months prior to 16 March 1993. She had been at home when it had started at around 16.00 or 17.00 hours. Village guards and soldiers had opened extensive fire at the village. Her parents' house had been strafed with bullets and hit by a missile. Also the house of the Muhtar had been damaged. Later that evening, around 23.00 hours, soldiers had come to the village telling them that four Balpınar village guards had been killed near Karataş. On that day, her brother Orhan had been working in Derik. He had driven workers to the fields in his minibus. Her father had told her that the Balpınar village guards had later verified with Orhan's supervisor whether he had been working that day, as they suspected him of being involved in the attack on the Balpınar village guards. His supervisor had confirmed that Orhan had worked that day.

125. Some days before 16 March 1993, soldiers had conducted house searches in Karataş. They had also searched her parents' house. She did not know whether these had been village guards or soldiers. She could not distinguish a soldier from a village guard.

126. On 16 March 1993, between 20.30 and 21.00 hours, the doorbell had rung. Her parents had gone to the door. The persons outside had said in Turkish that they were soldiers wishing to conduct a house search. From the voices outside, she estimated that there had been four or five persons outside. Her parents had initially replied that they refused to open the door unless the Muhtar was there. The reply had been that the Muhtar was in Diyarbakır. Her father, who had looked outside through a hole, had seen that the persons outside had masked their faces. Her brother Orhan had not spoken to the persons outside. He had only told her parents not to open the door. At that moment she had not been in the same room as her parents, who had been in the living room. She had been in the other room, the bedroom, with her brother Orhan. The door between both rooms had been open and she had been able to hear the conversation. After the persons outside had threatened to shoot their way in, her father had opened the door. She had hurried to her father, but when she got there, he had already opened the door. She had then gone back to the bedroom where she had told her brother Orhan that their father had opened the door. Her sister Şemse had stayed with her parents in the living room. She had then heard her father shout that he had recognised the intruders as Ali, son of Kaso, and Orhan, son of Şeyhmus. Then a man, carrying a large weapon and wearing a commando uniform and military boots like the soldiers who had searched her parents' house some days before, had entered the bedroom. He had masked his face with a scarf. She had only been able to see this man's nose and hazel eyes. Orhan had been lying in bed at that time. As soon as this man had entered the room he had opened fire on Orhan and had left the room again. When she had run after him to the other room, she had seen her mother struggling with this man in the living room, trying to bar him from leaving the house. Her mother had shouted "How could you kill my son!". She had then returned to the bedroom to see how her brother Orhan was. She had not seen her mother pulling off this man's scarf. She had not seen a second intruder. After having returned to the bedroom, she had heard shooting. She had then returned again to the living room where she had seen her mother and Şemse lying on the floor. Her sister had got up and together they had gone outside, but she had not seen anyone. The intruders had run away. She had found her father

lying dead outside the house in front of the door. She had not seen who had killed her father. Shortly afterwards, neighbours had started to assemble at her parents' house.

127. The neighbours had first taken her injured mother to hospital. Her sister, who had been injured in her foot, had also been taken to hospital, but in a different car. She herself had returned inside the house, where she had cried next to her brother's body. At some later point in time, her mother had been brought back and her body had been placed in the house. Her sister had returned from hospital the next morning.

128. Three or four hours later, at around midnight, and in any event after villagers had carried her father's body from outside into the house and had placed it in the living room and after her mother had been brought back to Karataş, soldiers had arrived in Karataş. They had not searched the house, but had just ordered the assembled villagers to go home. Initially, the soldiers had allowed her, her aunt Sehina Araç and one or two others to remain in the house, but later they had also been ordered to leave the house. The soldiers had not questioned her about what had happened. The soldiers had collected empty cartridges both inside and outside the house and for the rest had just stood around. She could not remember how many cartridges approximately there had been in the house. She had not seen villagers collecting any empty cartridges.

129. The next day, she had seen her brother Ercan. At around 10.00 hours that day a public prosecutor had arrived in Karataş. She remembered this, because the soldiers had prohibited them from burying the dead before the arrival of the prosecutor. She had not given any statement that day. Nobody had asked her for one.

130. At some point in time, she had gone to the Fosfat gendarme station in Karataş together with Ethem Önen, but they had not let her speak and had sent her home.

131. Some days or weeks later, she and her sister Şemse had been asked to go to Mazıdağı gendarme station. She thought that her sister had been there once before alone, but this time they had gone together. Her aunt and the latter's son Mehmet Hadi Araç and her brother Ercan had accompanied them. There they had been asked questions about what had happened. She had not heard what her sister had said. She herself had not told them much. She had been scared that if she told what had happened, her brother Ercan would be harmed. She had fingerprinted her statement. As she, her sister Şemse and her brother Ercan were waiting in the gendarme station while Mehmet Hadi was giving his statement, she had seen Ali and Orhan Ertaş being brought to the station. She had recognised Orhan Ertaş from his height, build, hazel eyes, nose and complexion. She had seen that he had a few marks on his face. She had never seen Ali Ertaş before. Şemse had told her that she had recognised both men. Then they had all been taken to a room, including Ercan and Mehmet Hadi Araç. When the gendarmes had asked whether these were the men who had killed her father, Şemse had replied in the affirmative, but not very loudly, and had pointed towards the Ertaş men. Like herself, Şemse had been scared. Out of fear she herself had said nothing. The official at the station shook hands with the Ertaş men telling them that it was over and that they could leave. After having returned home, she had told the Muhtar that she had recognised Orhan Ertaş, but that she had been too scared to say so at the station.

132. She had only gone to the gendarme station once. She did not know whether her brother Ercan had had any contacts with the prosecutor later. She had never been called to give another statement or to be heard before a court. She had only given one statement, namely in Mazıdağı.

Ercan Önen

133. Ercan Önen stated that he was born in 1976. At the relevant time, he had been at school in Diyarbakır and would regularly visit his parents in Karataş. The distance between his parents' house and the Fosfat gendarme station was about two kilometres. The distance between Karataş and Mazıdağı was about thirty kilometres and between Karataş and Diyarbakır about one hundred kilometres. Towards the end of 1993, his family had moved from Karataş to Diyarbakır. They had always resided at the same address in Diyarbakır.

134. Karataş had never had village guards. Balpınar had had village guards, most of whom he knew. After Balpınar had established the village guard system, they had asked Karataş for support. As the Karataş villagers had refused to adopt the village guard system, a certain tension had arisen between both villages. The Karataş villagers had no links with the PKK. They had not wished to help them nor to hurt them.

135. He remembered that, acting upon an advertisement in the newspaper, his brother Orhan had bought a 1993 Şahin car in order to start a business in Diyarbakır. The family had sold two cows in order to finance part of the down payment for this car. The other part had been financed by annual premiums his father had received from his employer, the Etibank Fosfat plant. After the events, the car had been sold as nobody in the family could drive it. Insofar as he knew, his brother Orhan had never had any links with the PKK. His family had also owned a minibus, which had been fully paid for. His brother Orhan used to run a minibus service between Mazıdağı and Diyarbakır.

136. In November or December 1992, when he himself had been in Karataş, Balpınar village guards had been attacked by the PKK. After this attack, the PKK forces had escaped between the villages of Karataş and Arısu, a village located between Karataş and Balpınar. After this attack, Karataş had been surrounded by village guards, soldiers from the Mazıdağı and the entire Fosfat gendarme station unit, he estimated in total about 500 men, who had opened fire on Karataş. The houses of his parents and the Muhtar had been particular targets. His parents' house had been hit by a missile. He had been in the house at that moment.

137. When he had arrived in Karataş on 17 March 1993 at about 07.00 or 08.00 hours in the morning, a large crowd had assembled near his parents' house. He had also seen five or six soldiers, including Salih, the Fosfat gendarme station commander. Inside his parents' house he had seen his parents' bodies in one room and his brother Orhan's body on the bed in the other room. Their bodies were located in the places indicated on the sketch map. He had seen no cartridges. The gendarmes had already picked them up. None of the gendarmes had put any question to him.

138. After about thirty minutes he had seen his sister Şemse, who had been in shock. His other sister Mekiye had told him that their father had recognised the intruders as Ali and Orhan Ertaş. She had also told this to the gendarmes. He himself knew both men. About two

hours after his arrival in Karataş, he had seen a prosecutor, doctor Sedat İşçi and a few soldiers arrive in the village. They had entered his parents' house and after about 15 minutes had told him that they wanted to conduct an autopsy. He had objected to an autopsy as this would further damage the remains. As other persons had given them empty cartridges, the cause of death in his opinion had been clear. He had not seen them questioning any villagers.

139. After a few days or a few weeks, he could not remember exactly, his sisters Şemse and Mekiye, Mehmet Hadi Araç and himself had gone to the Mazıdağı gendarmerie station after having been summoned there by telephone. They had been taken to a room, where the station commander entered after them. He had asked why they had come, to which they had replied that they had been summoned.

140. He had then seen Ali and Orhan Ertaş entering the room. The station commander had greeted both men cordially. His sisters, who had been nervous and afraid, had told him in Kurdish that they had recognised both men as the killers and had pointed at the two men. Şemse had recognised both men. Mekiye had only recognised Orhan Ertaş. Ali and Orhan Ertaş had heard his sisters. The station commander probably did not speak Kurdish, but in the small room he could easily have understood his sisters' gestures. The commander had not reacted and after five or ten seconds the commander had cordially shaken the hands of the two men and had told them to go back home and that everything was fine. After that Şemse, Mekiye and Mehmet Hadi Araç had also left the room. He himself had protested to the station commander and had told him that his sisters had recognised the two men. He had then asked to see the captain, the commander's superior, which had been refused.

141. At some later point in time his sisters had also gone to the prosecutor's office to give further statements, but he had not accompanied them on that occasion. After that they had not heard anything more from the authorities about any ongoing investigation of the case.

142. He and his sister Şemse had also gone together to the Human Rights Association in Diyarbakır to file a complaint as suggested by Rozan, a school friend of his brother Orhan, who worked there. Sedat Aslantaş had taken their statements. He had signed his statement and his sister had fingerprinted hers. When they had gone there for a second time, they had been told that Sedat Aslantaş had been arrested. They had given further statements then. Muhittin Araç had also been present that time. He did not recall whether Tahir Önen had also been present. He confirmed that the signatures on the statement taken from him on 24 September 1993 at the Diyarbakır Human Rights Association and on the statement taken from him on 1 December 1995 by Osman Baydemir and Mahmut Şakar were his.

143. Six or seven months after the incident, in any event after they had lodged a complaint at the Human Rights Association, he had gone to the public prosecutor at Mazıdağı in order to find out what had happened to the investigation. Being unsatisfied with the prosecutor's evasive replies, he had told the prosecutor that a complaint had been filed with the European Commission of Human Rights.

Muhittin Araç

144. Muhittin Araç stated that he had been born in 1962 and that he was related to the applicant. Although he currently lived in Diyarbakır, he had lived in Karataş. At the relevant

time he had been the elected Muhtar of Karataş. However, in 1996, halfway through his second term as Muhtar, he had been removed from office upon the authorities' sudden announcement of elections for Muhtar. Because of pressure felt from the side of the authorities, he had not sought any further clarifications as to the reasons for these early elections. In these early elections, his elder brother had been elected Muhtar of Karataş.

145. The relations between Karataş and the Fosfat Gendarme station as well as the Mazıdağı District gendarme station, to which the Fosfat station reported, had been good on a personal level. On the official level, however, they had been more strained as the Karataş villagers were known to vote for left wing parties. As Muhtar of Karataş, he had had frequent contacts with the Fosfat gendarme station.

146. The villagers of Karataş and Balpınar belonged to the Metina clan, which clan comprised about forty villages. With the exception of Karataş and one other village, all other Metina clan villages had accepted the village guard system. There had been a general pressure to join the village guard system. Some villages had not been able to resist this pressure, others needed the salaries paid to village guards. As the Muhtar of Karataş, he had become a sort of scapegoat for the refusal of Karataş to accept the village guard system and a target for pressure. Also the Önen family had become a target. He described Orhan Önen as a lively young man who had had no inhibitions about expressing his views in public. He did not know whether Orhan Önen had had sympathies for the PKK but Orhan Önen did have left wing views.

147. Karataş' relationship with Balpınar had been good until Balpınar, unlike Karataş, had accepted the village guard system. After that tensions had arisen between both villages. Balpınar village guards used to go to the local gendarme station and guarded the area, including the area around Karataş. If they accompanied security forces the village guards would wear uniforms. When they came to Karataş they would either wear uniforms or civilian clothing.

148. After the killing of some Balpınar village guards and before the events at issue, Karataş had been attacked by soldiers and village guards. This attack had lasted for about eight hours. All of the houses in Karataş had further been searched and many of the villagers taken to the gendarme station. Some of them had been taken to Mazıdağı. They had all been released later. He guessed that Karataş was held responsible for the attack on the Balpınar village guards. Any village that had not accepted the village guard system was considered as supporting the PKK. The next day he had gone to the Emergency Area Governor Ünal Erkan and had told him about the pressure and the attack. The Governor had promised him to discuss the matter with the Mardin regiment commander.

149. After this attack and about a month before the events at issue, his house and the Önen house had been strafed by hundreds of bullets fired by about 20-30 village guards. They had walked into Karataş, fired a number of rounds at the Önen house and then a number of rounds at his house. Afterwards he had collected the cartridges and taken them to the Mazıdağı District Governor. He had told the District Governor what he had earlier told the Emergency Area Governor about the pressure exerted on Karataş by the Balpınar village guards. During this conversation the District gendarme commander had entered the Governor's room and had told him to go back and not to worry and that the necessary steps would be taken.

150. The witness had been in Istanbul for business at the time of the killings. As usual when going away to a distant place, he had informed the local gendarme station of his absence. When he had returned to Karataş in the morning of 17 March 1993, the prosecutor and the gendarme captain had already arrived there and the autopsy on the bodies had been taking place. He recalled having seen the bodies of the victims lying on the floor and cartridges lying around. The prosecutor and the gendarme captain had left about twenty minutes after his arrival in the village. He had not seen them questioning any of the villagers. Although he did not clearly remember this, he thought that it had been Mekiye Önen who had told him that day that her father had recognised Ali and Orhan as the perpetrators. He knew both men personally. Although he had no clear recollection of his features, he remembered Orhan Ertaş as a lean, rather short man with a dark complexion and black hair. He recalled Ali as a more bulky man of about the same height as Orhan and with a lighter complexion and chestnut brown hair. He could not remember the colour of Ali's eyes.

151. He was convinced that the killings had been the result of a premeditated plan of which the security forces must have been aware. It was strange that three persons had been killed and nobody had been questioned, although numerous persons were stating loud and clear who had committed these killings, whereas a person suspected of just having given a piece of bread to the PKK was questioned for days.

152. The next day he had visited the public prosecutor in Mazıdağı whom he had urged to investigate the accusations made. The prosecutor had replied that he had heard from the gendarmes that the PKK had bought Orhan Önen a car, that Orhan had not paid the PKK back and that he had been killed for that reason. On the same day, the witness had gone to the gendarme station in Mazıdağı where he had spoken to the captain whom he urged duly to investigate the matter. The captain had told him the same thing as the prosecutor. Neither conversation had been recorded in any document.

153. One or two days after the incident, members of the Önen family had been taken to the gendarme station. After that they had not been summoned to give statements for quite a while. In the context of his regular visits to the Fosfat gendarme station, he had spoken there about the incident. The gendarme Sergeant Salih had told him that, at the moment of the killings, he had been on the hill behind the village at about 200 metres distance from the Önen house and that he had seen that there had been a raid on the house. He had informed the station commander NCO Salih by radio about that incident but had been instructed by the latter not to intervene. There had been two persons named Salih at the Fosfat gendarme station. One had been a special sergeant and the other had been the station commander.

154. About 15-20 days after the incident, while being at Etibank, he had been warned by a driver about the presence of a group of armed men at the junction where the roads to Etibank, Mazıdağı and Karataş met. He had been told that these men were probably village guards and could be planning an attack on his car. Both his brother and Ercan Önen, who had also driven past this junction, had confirmed the presence of these armed men there. He had then contacted the Fosfat gendarme station and asked the gendarmes to verify this. The gendarmes had told him about twenty minutes later that they had sent a vehicle, but had not found any armed men there. As he did not trust this, he had called Karataş for assistance. Two cars had come to accompany him and in three or four cars they had driven from Etibank to the Fosfat

gendarme station, where he had met with the station commander Salih. There he had lost his temper as the gendarmes had denied the presence of any armed men whereas these men had been seen by three different persons. He had accused the gendarmes of being part of a conspiracy. The commander Salih had then admitted that he had been aware of the presence of a group of village guards there. They had been waiting there for something that the commander had not disclosed, but which was not directed against him.

155. In his opinion the investigation by the authorities into the incident had not been serious. He remembered that the Önen sisters had gone to the Mazıdağı gendarme station together with his brother Mehmet Hadi Araç. Although he was not certain, he seemed to recall that Mekiye had told him that she had seen Orhan Ertaş at that station and that she had recognised him as the person who had killed her brother Orhan. He also seemed to recall that the Önen sisters had told him that they had been too afraid to say that they had recognised the Ertaş men.

156. Some two months after the incident and after the prosecutor had taken statements from the members of the Önen family, he had told Ahmet Türk, the then Chairman of the Popular Labour Party and Member of Parliament, of the incident, of the lack of investigation by the prosecutor and of his suspicion that it was intended to cover up the incident. Mr Türk had brought this subject up during a meeting he and other parliamentarians had had with the then Minister of Justice. After this meeting, Mr Türk had told him that the Minister of Justice, in the presence of Mr Türk, had called the prosecutor, who had told the Minister that the investigation was ongoing.

157. The witness did remember that he had gone to the Human Rights Association in Diyarbakır together with Ercan Önen and possibly Şemse Önen to file a complaint. He denied, however, that the signature next to his name on the joint statement taken by the Human Rights Association on 24 September 1993 was his. He had not been asked to sign anything after he had given his oral statement to a lady there.

158. As to the statement dated 4 May 1994, bearing the signatures of the gendarmes Yusuf Kocer and Salih Günay as well as his own, in which it was stated that the address of Şemse and Mekiye Önen could not be established, he declared that, after the Önen sisters' departure from Karataş, the gendarmes had never asked him about the sisters' new address. In fact he knew their address in Diyarbakır very well. They had left Karataş about six or seven months after the incident. He explained that, like all Muhtars in the area, he had been summoned to the gendarme station on various occasions to sign twenty or more blank documents. These signed blank documents were kept at the gendarme station for future use, if need be. Although it had been his duty as Muhtar to inform the authorities of the new addresses of people who had migrated from the village, he had in practice only done so when he had been requested to do so.

159. Some months after the incident, the villagers of Karataş had started to migrate from the village. Of the original forty households only seven or eight had stayed behind. There were regular contacts between the families who had migrated from the village with those who had stayed in Karataş. Visits between Diyarbakır and Karataş were frequent. The seven or eight households who had stayed in Karataş had been there also during 1994. He himself had permanently left Karataş in 1996.

Tahir Önen

160. Tahir Önen stated that he was born in 1957 and that he was illiterate. After four Balpınar village guards had been killed, pressure had been exerted on Karataş and the Muhtar's house had been shot at.

161. He had been in Karataş on 16 March 1993 when the killings had been committed. He had gone to the house of the Önen family, where he had seen the body of the applicant's father near the door of the house. Mome Önen had been lying in the hall. In the bedroom, he had seen the body of Orhan Önen lying in bed. He had also seen cartridges. They had been collected in the morning.

162. As he had discovered that Mome was still alive, he and others had placed her in a minibus in order to take her to hospital. Mahmut Akkuş had driven the minibus. He and another villager, Güllü Korkmaz, had accompanied him. They had first gone to the Fosfat gendarme station to inform the gendarmes. He had been met there by Salih, the station commander. It had not been the other gendarme named Salih. He had told the commander that three persons had been killed and had asked the commander for another vehicle as the minibus had broken down. The commander had refused to provide him with another vehicle and had told him in a rude manner to go away and to wait outside. The commander had not offered any medical assistance for Mome. Some time later the commander had shouted at him and had slapped his face. About one hour later, after Mahmut Akkuş had attempted to repair the minibus, they had obtained permission to pursue their journey to Mazıdağı. In Mazıdağı, they had first been stopped at a checkpoint near the District Governor's office, where they had had to wait for about fifteen minutes. Then they had been allowed to proceed to the centre.

163. At the Mazıdağı medical centre, he had seen two officers. He did not know their names. Someone wearing a white garment had examined Mome and given her an injection. At that moment there had been a power cut in Mazıdağı. They were told that Mome had to be taken to Diyarbakır and she was placed in an ambulance. However, on the way to Diyarbakır, near Çınar and about three hours after they had left Karataş, Mome had died. Under normal circumstances it would have taken only thirty minutes to drive from Karataş to Çınar. The ambulance had returned to Mazıdağı, where her body was placed back in the minibus. Then they had returned to Karataş, where they had arrived around 03.00 or 04.00 hours in the morning.

164. He had never been asked to give a statement to the authorities about the events at issue. He had gone with Ercan Önen, Abdulkadir Önen and Şemse Önen to the Human Rights Association in Diyarbakır to file a complaint. On that occasion Şemse had given her statement before he had given his. There had been two or three other persons present, a man and a woman. He could not remember their names. At some point in time, before the taking of statements had been completed, he had to leave urgently. Before he had left he had signed several sheets of paper. His statement had not been read back to him. When he had returned shortly afterwards he had signed a second time after the others had already signed. He confirmed that the signature on the statement taken on 24 September 1993 at the Human Rights Association was his.

Mehmet Hadi Araç

165. Mehmet Hadi Araç stated that he was born in 1959. He had always lived in Karataş and was related to the applicant. He stated that it took about ten minutes to walk from Karataş to the Fosfat gendarme station and that the distance between Karataş and Mazıdağı was about thirteen kilometres.

166. Four or five months prior to the events at issue, four Balpınar village guards had been shot by guerrillas. Shortly afterwards, at about 16.00 or 17.00 hours, all Balpınar village guards and security forces from Mazıdağı, Derik and the Fosfat gendarme station had opened fire on Karataş. This attack lasted until about 22.30 hours. After that, all villagers had been assembled and the houses had been searched. Five villagers had been arrested and released after two days.

167. At some later point in time, the house of the Muhtar, Muhittin Araç, and the house of the witness' uncle Ibrahim Önen had been fired at. The village elders had gone to the Fosfat gendarme station requesting the gendarmes to draw up an incident report. The station commander had come to Karataş, conducted an investigation there, collected empty cartridges and taken these with him.

168. On 16 March 1993, at about 21.00 hours, while in his home, he had heard gunshots. He had dressed and, after the shooting had stopped, had gone outside. He had heard crying and shouting coming from the house of Ibrahim Önen and had run to this house. He had not seen anyone running away from that house. He had seen the dead body of Ibrahim Önen lying in the yard in front of the door of the house. Inside the house, which consisted of two rooms, he had seen Mome, who had been wounded but who was alive. He had also seen the dead body of Orhan Önen. It had been riddled with bullets. He had then returned to Mome and had shouted that she should be rushed to a doctor. Mahmut Akkuş, who had brought the minibus, Tahir Önen and Güllü Korkmaz had taken her to hospital. He had stayed behind in the house near Orhan's body. He had only noticed later that Şemse had also been injured. Her foot had been bleeding. She could have left with her mother had he seen this earlier. Şemse had not said much. Mekiye had told him that persons who had come had announced themselves as soldiers wishing to do a house search and that, despite Orhan's objections, her father had opened the door. She had also told him that she had heard her father say that one of the intruders was Ali Ertaş son of Kaso and the other one Orhan.

169. About one hour later, at about 22.00 hours, the special sergeant Salih and three other gendarmes had arrived in Karataş and they had stayed with him by the dead bodies until the next morning. Sergeant Salih had told him that nobody would come to investigate during the night. There had been two persons called Salih at the Fosfat gendarme station. One was the special sergeant, the other Salih was the station commander. He guessed that they had been informed of the events as the minibus with Mome had first gone to the Fosfat gendarme station. These four gendarmes had collected the empty cartridges near the bodies of the three victims and had put them in a bag. He estimated that there had been about thirty empty cartridges lying near Orhan Önen's body. They had also collected empty cartridges in the yard. He himself and others had also collected empty cartridges and had taken the body of Ibrahim Önen inside the house.

170. As, by 08.30 hours the next day, an investigation team still had not arrived, which he had found strange as the authorities must have been aware of the incident, he himself had left for Mazıdağı, where he had informed the public prosecutor that three persons had been killed in Karataş and that no investigation team had yet arrived. The public prosecutor had sent him to the District Governor's office, as the prosecutor could not go anywhere without the Governor's permission. After he had complained to the Governor about the lack of measures, the Governor had rung the gendarme captain and informed him of the events in Karataş. Thereupon, the gendarme captain, about ten gendarmes, Dr. İşçi and a prosecutor and his clerks had gone to Karataş in two military Dodge vehicles. He had also returned to the village in a different car.

171. They had arrived in Karataş at about 10.00 hours. After he had identified the bodies, they had inspected the bodies and drawn up a record. He could not remember what they had written down. The gendarme captain had been present during this inspection. He had told the prosecutor, the doctor and the captain what had happened and that two daughters of Ibrahim and Mome Önen were alive. A clerk had taken notes which this clerk had then typed out on a typewriter which he had brought along. He did not remember having signed a statement or other document. Ercan Önen had also been around during the inspection of the bodies. The bag with the collected empty cartridges had been shown and given to the prosecutor and the captain. He did not know what had happened to the cartridges since then. After that, they had returned to Mazıdağı. He himself had stayed in Karataş until the burial.

172. Two to four months after the incident, the gendarme station had called. Together with his mother and with Şemse and Mekiye he had gone to the Fosfat gendarme station. After Şemse and Mekiye had given a statement there, they had been sent to Mazıdağı. In Mazıdağı they had been sent to the office of the public prosecutor in order to give statements. The public prosecutor had taken the statements of Şemse and Mekiye separately. They had gone into his room one after the other. He had not heard what they had stated to the prosecutor. After Şemse and Mekiye had given their statements, he himself had been called into the room to give a statement. While Şemse and Mekiye had gone inside the building, he had been sitting by the desk in the hall. At that point in time Ali and Orhan Ertaş, whom he both knew personally as neighbours, had been sitting opposite him. He described Ali Ertaş as a short man with a dark complexion with curly black hair. He described Orhan Ertaş as a man of about 1.70 m in height with a fair complexion, brownish hair and dark brown eyes. Şemse and Mekiye had been confronted with the Ertaş men in the presence of the prosecutor. One of the sisters had nearly fainted when she had seen Ali Ertaş and had told him that she had

recognised Ali as the person who had killed her father. The sisters had recognised Ali and Orhan Ertaş as the men who had killed their parents and brother.

173. In his opinion, the applicant's parents and brothers had been killed because ever since the killing of four Balpınar village guards, guards from that village had borne a grudge against Karataş.

174. He was unaware that proceedings had been brought against Ali and Orhan Ertaş before the State Security Court. He had never received a letter informing him about that nor had he ever received any summons. After having accompanied Şemse and Mekiye to the office of the public prosecutor, no letter or summons in relation to the events had been received in Karataş, of which he had been the Muhtar for the last three years. The previous Muhtar had been his brother Muhittin Araç.

Salih Kaygusuz

175. Salih Kaygusuz stated that he was born in 1970 and that he did not understand Kurdish. In March 1993, he had been a staff sergeant in the gendarmerie and commander of the Etibank Fosfat gendarme station. The distance between the Fosfat gendarme station and Karataş was about 2 or 2½ kilometres. Karataş was partly visible from the gendarme station. His deputy had been Salih Günay, a gendarme expert sergeant. He had received his orders from and reported to his Division commander, a First Lieutenant called Sebahattin Taşan at the District gendarme station in Mazıdağı. He did not know the name of the commander of the Mazıdağı District gendarme station. He had stayed at the Etibank Fosfat gendarme station from 1991 until August 1993. He had divided this station's staff into four teams, each headed by an expert sergeant. One team would be off duty whilst the other three teams would be on duty.

176. There had been seven villages in the area of jurisdiction of the Fosfat gendarme station, including Balpınar and Karataş. The inhabitants of both villages belonged to the same clan. There had been no enmity between the villages. Between the villages of Balpınar and Karataş there had been another village situated called Arısu. The Kırmızıtepe hill was located south-west or south-east from Balpınar and very close to this village. He had not known all villagers of Balpınar and Karataş, only the Muhtars and the village notables. From the Önen family in Karataş, he had only known Tahir, who had been running a minibusservice. He had had no personal friendships with any of the locals, but one of the gendarmes' duties had been to establish relations with the local population and to help them, which duty he had tried to fulfil.

177. The gendarmes would visit Karataş only rarely. They would carry out administrative duties there, like serving official notices or establishing the whereabouts of persons. If he needed the services of the Muhtar of Karataş, he would summon him to the station. At the Fosfat gendarme station a duty logbook had been kept in which all daily activities and duties were recorded before these were carried out. Also the return from a duty was recorded in the logbook. The results of any duty were, however, not recorded in the logbook. Details of such duties would be recorded on a separate service sheet linked to the logbook. This logbook was printed by the gendarme central headquarters. The keeping of that record was compulsory and anyone who failed to keep the record would be disciplined.

178. He had known the Muhtar of Balpınar. His name was Mahmut Denli. He had not known all of the Balpınar village guards personally, but he had known the village guard team leaders and the chief guards. He would summon them to go on duty. He had worked not only with the Balpınar village guards but also with village guards from other villages.

179. Village guards were appointed by the District Governor's office. The local gendarme forces would investigate each candidate and transmit their names to the Division command, which in turn would send these names to the office of the District Governor. After their appointment, village guards were provided with guns and ammunition by the District gendarme command against a receipt of delivery. He had provided the weapons to the appointed Balpınar village guards, which had been made available to him by the District gendarme command. The principal duty of village guards was to protect the lives and property of the inhabitants of their village and themselves. They could also carry out other duties assigned to them by the gendarme commanders. Village guards were not authorised to act on their own initiative or to conduct house searches. He had not treated a village with village guards any differently from a village without village guards, like Karataş. In fact he had seen the Muhtar of Karataş, Muhittin Araç, more often than Mahmut Denli, the Muhtar of Balpınar.

180. He had approached the Muhtar of Karataş and encouraged people from Karataş to become village guards in order to protect their village, but they had refused. He denied that, as a consequence of this refusal, tensions had arisen between Balpınar and Karataş.

181. The Balpınar village guards had received their orders from him and had to report to him personally. They had to report each incident first to him and subsequently to the District gendarme command. Ali Ertaş had been the head of the Balpınar village guards. As Ali Ertaş, Mahmut Denli and himself had worked out the village guards' plans and duties together, he had seen Ali Ertaş quite often. He could not remember Orhan Ertaş. He had never seen the Balpınar village guards pass through Karataş. They would use the road to the gendarme station which went past but did not pass through Karataş. The Balpınar village guards had been organised in teams of 12-14 persons. All members of each team would go up the same hill and could not be split up.

182. In 1992 and 1993, there had been many incidents caused by PKK forces in the area. Four months prior to the events at issue, four Balpınar village guards had been killed by PKK forces. The Fosfat gendarme station had been involved in the investigation of this incident. The perpetrators had never been found. He did not know that Balpınar villagers suspected Karataş villagers of having been involved in this attack. He had never conducted any house search in Karataş. If so, this would have been noted in the gendarme station's duty logbook. There had never been an attack on Karataş by Balpınar village guards. The Muhtar of Karataş had further never complained to him about such an attack.

183. He had been on duty in the evening of 16 March 1993. Some of the gendarmes of the station had been on ambush duty, guard duty or at lookout posts. This would appear from the duty logbook. He had been at the station when he heard on the radio that the PTT Radio link installation had been attacked. Salih Günay had been with him at that moment. When he had verified this information with the District gendarme station, he was told that this attack had

been committed by the PKK. He could not contact the village guards on duty there by radio as there was a mountain between them.

184. Shortly after having heard about that attack, at about 21.00 or 21.30 hours, he had heard gunfire from around and inside Karataş. The echo effect, caused by the surrounding mountains, had made it very difficult to determine from where exactly the gunfire was coming. It had lasted only a few seconds. There had been no further sounds of shooting. Also the Balpınar village guards on duty must have heard it, as they had contacted the Fosfat gendarme station by radio asking where the gunfire had come from and whether there was an incident. He did not remember who in the gendarme station had answered that call. The gendarmes had told the village guards that the gunfire was coming from Karataş and that the gendarme station was not under attack. The village guards confirmed that their situation was normal.

185. The gendarmes decided to wait to see whether further shooting would occur, which had not been the case. Some time after the shooting, a minibus driven by Tahir Önen had arrived at the gendarme station. Tahir Önen, who had been very agitated and had spoken very fast, had told him that there had been an attack on the house of Orhan Önen and that people had been killed and injured without mentioning any names. He had looked inside the minibus and had seen a seriously injured elderly woman, who had been unable to speak and whom he thought had been in a coma. In his opinion, nothing could be done for her in terms of first aid. She had to be taken straight to hospital. There had been another person in the minibus, but he could not recall who that was. He denied that the minibus had broken down and that Tahir Önen had asked him for another vehicle. He had sent the minibus on its way to Mazıdağı. In his opinion, they had stayed for not more than 10 or 15 minutes at the gendarme station, the duration of his conversation with Tahir Önen. He denied having asked Tahir Önen to wait at the station. After the minibus had left, he had informed the Mazıdağı District gendarme command of the incident and asked them to inform the prosecutor's office and to let him know whether or not a prosecutor would come. He had also informed them that a severely wounded woman was on the way to the hospital. He had not asked for an ambulance to be provided in Mazıdağı as no such request had been made.

186. As a further attack by PKK forces could not be excluded, he had sent a first team led by Salih Günay to secure the area around Karataş by covering the village from the peak above the village. He himself had stayed in the station. After the District gendarme command had informed him that, for reasons of security, the prosecutor would only come the next morning, he and a second team had gone to the peak where Salih Günay and his team had been. From there, he himself, Salih Günay and one team had gone to Karataş, where they had arrived sometime after midnight.

187. When he had arrived at the house of Ibrahim Önen he had seen three bodies there. At that time the body of Mome Önen had already been brought back to the house. The body of Ibrahim Önen had been lying inside the house near the doorway. No member of the Önen family had been in the house at that time. After his arrival at the house, some villagers had come from their houses to the Önen house. When he had asked them what had happened he had been told that nobody had seen anything, that nobody knew anything and that they did not want to talk about it. They had seemed to be afraid. He had not seen Şemse Önen or Tahir Önen at that time. He did not remember having spoken to the Muhtar's brother Mehmet Araç

at that time. As he had not received any instructions from the prosecution department to start any investigation, he and his men had not collected any evidence, they had only secured the incident site. He explained that this meant ensuring the safety of the bodies, preserving any evidence and preventing anyone from entering the house. They had awaited the prosecutor's arrival.

188. On the basis of previous experience and information received, he had concluded that PKK members were responsible for the killings. He had received information that Orhan Önen had had links with the PKK and that this organisation had bought a taxi for Orhan Önen so that he could drive this taxi for the PKK. However, as Orhan Önen had in fact used the taxi for his own benefit, the car had been driven away to another district where it had been hidden by the PKK. On the basis of this information, he concluded that the killings constituted a settling of accounts between Orhan Önen and the PKK. He had not found it surprising that Orhan Önen's parents had also been killed since this had not been uncommon in punitive actions by the PKK. He had informed his immediate superiors of this opinion, who in turn had reported this to their superiors. He did not remember whether he had also shared this view with the prosecutor.

189. After having arrived the next morning, the prosecutor had instructed him to collect the empty cartridges and evidence found at the scene of the incident and to draw up a sketch map of the incident site. The cartridges had all been collected and put together in a bag. He had shown the cartridges to the prosecutor and had handed the bag with these cartridges to the prosecutor. He had also given the prosecutor the sketch map he had drawn. He confirmed that the sketch map in the file was his. On this sketch map he had marked where the cartridges had been found. He had not identified each individual cartridge and each particular place where each individual cartridge had been found. In his opinion that was pointless as all the cartridges had been the same.

190. He had also inspected the area around the house. He had not found any blood stains, empty cartridges or any other military material outside the house. Apart from empty cartridges, he had not found a single bullet in the house, either in the walls or in the ceiling. No photographs of the scene of the incident had been taken, as this did not form part of a standard investigation. He had never seen photographs being taken of an incident scene.

191. During his stay in Karataş that day, he had not seen Şemse or Mekiye Önen. The incident report had been drawn up by the prosecutor. He had first heard the allegation that Ali and Orhan Ertaş had committed the killings when, on 1 April 1993, Şemse Önen had made a statement to him at the Fosfat gendarme station. She had been accompanied by the Muhtar Muhittin Araç and her sister Mekiye. He had also taken a statement from Mekiye on that day. He did not recall whether they had come on their own initiative or in response to a summons.

192. After the Önen sisters had made their statements, he had also taken statements from the named suspects Ali and Orhan Ertaş, as well as from Muhittin Araç, Tahir Önen, Mahmut Denli and Mecit Kaya. Ali Ertaş had been a village guard and, therefore, had a weapon. Orhan Ertaş had been an ordinary citizen. He had in fact gone to Balpınar, where he had seized Ali Ertaş' weapon and had taken Ali and Orhan Ertaş back to the Fosfat gendarme station in order to take their statements. He had only seized one weapon. He did not remember whether they had searched for a weapon belonging to Orhan Ertaş, whether or not they had searched

Orhan Ertaş' home or on which date he had gone to Balpınar. If they had conducted a search, this would have been recorded in the service sheets pertaining to the duty logbook of the gendarmerie station. He had sent the weapon of Ali Ertaş to the District gendarmerie for a ballistics examination. After Ali and Orhan Ertaş had given their statements to him, he had sent them together, under guard, to the Mazıdağı gendarmerie command for referral to the prosecutor's office. He had also sent the investigation documents to the Mazıdağı gendarmerie command.

193. Mecit Kaya, the Balpınar village guard, had stated that he had been at the same lookout post as Ali Ertaş on 16 March 1993. He had not checked Ali Ertaş' alibi and Mecit Kaya's account any further by taking statements from any other village guards. In his opinion, Ali Ertaş could not have been absent for about one hour from his duty. He had verified Orhan Ertaş' account by putting questions to Mahmut Denli and other Balpınar villagers, who had all confirmed Orhan's absence from Balpınar at the relevant time. He had not sought any further confirmation of Orhan's alibi from sources outside of Balpınar.

194. He had never confronted the Önen sisters with Ali and Orhan Ertaş. This was something for the prosecutor to do. Moreover, he could not have done so as the Önen sisters and the Ertaş men had not come to the Fosfat gendarme station at the same time. If they had come together he might have considered the idea. Gendarmes are competent to organise such a confrontation in urgent situations. In other circumstances, gendarmes did not have this competence.

195. He did not find it plausible that, between the date on which Şemse Önen had given her statement and his subsequent visit to Balpınar, Ali or Orhan Ertaş had been informed and taken precautions. In any event, given the lapse of time between the incident and the date on which Şemse Önen had made her statement, there had been ample time for the Ertaş men to hide any weapons. In his view it was possible that there were unlicensed weapons in the east of Turkey.

196. When the Mazıdağı authorities requested him at some later point in time to locate Orhan Ertaş in order to take his statement, he had enquired with the Muhtar of Balpınar about Orhan's whereabouts. He had recorded the Muhtar's reply in a written statement. He had not recorded which other persons he had asked for information about Orhan Ertaş' whereabouts. He further could not remember whether or not he had supervised the firing of the weapons of the Balpınar village guards and the collection and identification of the empty cartridges thus obtained.

197. He was unaware that proceedings against Ali and Orhan Ertaş had been instituted before the State Security Court in Diyarbakır. He further did not remember having been informed that Orhan Ertaş had been summoned and that his whereabouts could not be established. He explained that, if a prosecutor issued a summons for someone, it was standard procedure for gendarmes to reply that the person concerned had left and could not be found, if that was the case.

Mahmut Denli

198. Mahmut Denli stated that he was born in 1952 and that he lived in Balpınar. In 1993, he had been the Muhtar of Balpınar, which village had village guards. Apart from Karataş and one other village, all of the forty or so villages belonging to the Metina clan had had village guards. In his opinion Balpınar had good relations with Karataş and its refusal to accept the village guard system had not caused any suspicions of sympathies with the PKK from the side of the inhabitants of Balpınar. Some months prior to 16 March 1993 four Balpınar village guards had been killed. He had not held Karataş responsible for these killings and he had never heard any rumours that Orhan Önen had links with the PKK.

199. In the evening of 16 March 1993, at around 20.00 hours, he had heard shooting coming from the direction of the nearby PTT radio link station. At that time he had been in the village of Balpınar. At around 21.00 or 21.30 hours, whilst he was still in the village, he had heard further shooting coming from the direction of the Fosfat gendarme station. That evening, the Balpınar village guards had been on duty in different positions in the area. After having heard this second shooting, he had gone to the position where Ali Ertaş was in order to find out what was happening. Ali Ertaş was the chief of the village guards and the only one who had a radio. It took him about five minutes to reach Ali Ertaş' position. Ali Ertaş had

then contacted the Fosfat gendarmerie station by radio and was told that the shooting was not coming from there. He had stayed with Ali Ertaş for the rest of that night. He had only heard afterwards that the shooting had come from Karataş.

200. Orhan Ertaş had not been in the village at that time. Orhan Ertaş had been a village guard in the past, but had resigned and had returned his weapon. He did not remember exactly when this had taken place. Orhan Ertaş had a lorry at the relevant time and used to drive this lorry to Istanbul and other places. Orhan Ertaş had only occasionally come to Balpınar. Both Ali and Orhan Ertaş had black hair and probably dark eyes.

201. He had personally known Ibrahim Önen. He had never heard about any ill-feeling between the Önen family and the Ertaş family. He had never heard that, before he died, Ibrahim Önen had recognised Ali and Orhan Ertaş as the perpetrators. Sometime after this incident, he had given a statement to gendarmes at Mazıdağı in which he had said that Ali Ertaş had been with him and that it was impossible that Ali Ertaş had gone to Karataş to commit those killings. He had been aware of the fact that, in proceedings before the State Security Court, Ali and Orhan Ertaş had been charged with the killings. In this connection he had given a statement to the Mazıdağı court, in which he had stated that he had been with Ali Ertaş at that time and that it was not possible that Ali Ertaş had committed these killings.

Mecit Kaya

202. Mecit Kaya stated that he was born in 1960 and that he lived in Balpınar. In his opinion Balpınar and Karataş had good relations. Ali Ertaş' mother had come from Karataş. He did not personally know Orhan Önen and had never heard that one of the Karataş villagers had links with the PKK. He remembered that four Balpınar village guards had been killed, but did not remember exactly when this had happened. He had never heard about an attack on Karataş after the killing of these guards.

203. In the evening of 16 March 1993 he had been on ambush duty on the top of the Kırmızıtepe hill as from nightfall. He had stayed in the same position there during the entire night together with Ali Ertaş and Halil Ergin. Halil Ergin had no hair, he was bald. They had gone back to Balpınar in the morning of 17 March 1993. Ali Ertaş had stayed with him during the entire night. They had not gone to Karataş during that night.

204. At around 21.00 hours he had heard shooting at the radio link station. Later he had heard shooting which had sounded as though it had come from Karataş. Shortly after that, Mahmut Denli had joined them and had asked whether they had heard shooting from the radio link station. Mahmut Denli had then contacted the Fosfat gendarme station via Ali Ertaş' radio. Only Ali Ertaş had a radio and he was the only one who could operate it. Mahmut Denli was told that the gendarmes knew nothing about it. They had not received any further news that night. When questioned about subsequent events, in particular about statements given in relation to the events of 16 March 1993, the witness stated that he did not have any recollection of this.

Yekta Çobanoğlu

205. Yekta Çobanoğlu stated that he was born in 1966 and that, in 1993, he had been public prosecutor in the Mazıdağı District, whose area of jurisdiction included the villages of Balpınar and Karataş. The nearby Fosfat gendarme station had been manned by thirteen or fourteen privates and the commander had been an NCO. After having served one-and-a-half

years in Mazıdağı under difficult circumstances, he had been transferred from Mazıdağı to the District of Hadim. He was currently performing his military service.

206. Before he had taken up his functions as public prosecutor in Mazıdağı, there had been an attack on Balpınar village guards in which four of them had been killed and seven or eight unresolved killings had been committed in the region. There had also been an attack in 1993 on the District Governor in which the Governor's driver had been killed and his bodyguard injured. The Governor himself had survived the attack.

207. He had been informed of the incident on 16 March 1993, at about 23.00 hours, by a telephone call from the Mazıdağı District gendarme station commander Sebahattin Taşan. Commander Taşan had briefly described the incident and had told him that the nearby Fosfat gendarme station and the village guards had been informed, and that security measures in the surroundings would be taken. Gendarmes from the Fosfat station would go to the scene of the incident as soon as the situation would permit this and take control of the site of the incident. On the same evening there had also been an armed attack on a radio communication facility near Mazıdağı. For reasons of security in the region, it had not been possible to travel to Karataş during the hours of night. The Mazıdağı District gendarme commander had told him that it would be very dangerous to send a convoy during the night.

208. At about 07.30 hours in the morning of the next day, he had briefly spoken to Mehmet Araç in front of the courthouse in Mazıdağı, just before he had left with the security convoy organised by the District gendarme headquarters. Mr Araç had only enquired whether he would be going for the autopsy, which he confirmed. There had not been any further conversation between them.

209. On his arrival in Karataş with the convoy, he saw that gendarmes had already arrived at the scene in the course of the night and that they had taken the necessary measures. At the scene of the incident he had also seen a few civilians. The first measures taken had been to remove civilian bystanders from the scene of the incident and to collect empty cartridges. Then they had entered the house and had checked the location of the bodies. The Fosfat station commander had told him that, apart from the body of Mome, none of the bodies had been moved. He had found the body of Ibrahim Önen in the living room. His body had been left at the place where he had been shot. He denied that Ibrahim Önen had been shot outside the house. He remembered having seen cartridges lying beside the body of Ibrahim Önen. The body of Mome had been moved. She had been injured and taken away. After she had died her body had been brought back. She had already been brought back when he had arrived. Her body had also been in the living room. The body of Orhan Önen, who had been hit by bullets in the face, had been on the bed. He had further checked for the presence of bullets or cartridges, bullet traces on the walls and other material evidence. He had not found any bullets in the wall.

210. The local gendarme station commander had arrived at the scene after his own arrival in Karataş. After his arrival and on his instructions, the gendarmes had started to collect the empty cartridges at the scene of the incident. The gendarme NCO had showed him the cartridges. He thought there had been seven or nine cartridges and that they had been in a bag when they had been shown to him. Also on his instructions, the gendarme NCO had started to draw a sketch map of the scene of the incident. He explained that when he went to a place to conduct an autopsy or an on-site inspection, the gendarme or police, if they had secured the scene of the incident, would generally draw a sketch map of the scene of the incident and hear any witnesses without waiting for further instruction from the prosecutor. He could not

confirm that each mark on the sketch map represented one cartridge. Although that was probably the case, he did not exclude that each mark merely indicated the area where cartridges had been found.

211. For his own investigation, he had not found it necessary to know at which spot exactly each empty cartridge had been found or to discover from which direction the shots had been fired. It was only important to know the place in the room where the cartridges had been found. He was unable to identify where the six bullets from one weapon, the two bullets from the second weapon and the one bullet from the third weapon had been fired. As the cartridges had been in a bag, he had been incapable of discovering where each gun had been fired. In any event, he had not found such information of relevance. How the act had been committed was clear. What had been important was to find the perpetrators. As the door of the house had not been forced open and the perpetrators' *modus operandi* had been obvious, he further had seen no reason to take any fingerprints at the scene of the incident.

212. While the gendarme NCO had been drawing up the sketch map, he had proceeded with the examination of the bodies of the victims. One of the relatives present had objected to a classical autopsy. In any event this had not been necessary as it had been clear that gunshot wounds had been the cause of death. After Mr Araç had identified the bodies they had been examined. After this examination, he had wanted to talk to witnesses and had asked the local gendarme NCO, the Fosfat gendarme station commander, what the villagers had said. The reply had been that nobody had given them any information. In his opinion, nobody had wanted to say anything for fear of reprisals or fear of being considered as an informer. He had not found any eye-witnesses, only persons stating that they had heard about the incident afterwards.

213. He had learned from those persons that two children had been present during the incident, but that one of them had been injured and that the other one had been in shock. He had not seen them himself that day. He had been told that they had been taken away from the house to protect them from further distress and that they were in no condition to talk to him.

214. In his opinion what needed to be done in the initial phase of the investigation was to conduct an autopsy, to calm the atmosphere of indignation and unrest and, after that, to have the gendarme forces find the perpetrators. The District gendarme commander had expressed the view that, given the previous killing of four Balpınar village guards by PKK members, it was likely that the same people were responsible for this incident but that this needed further investigation. In his own experience, such incidents in the region had often been the doing of PKK members. He had read about the killing of the Balpınar village guards in the press. He confirmed that village guards, given their duties, are a target for PKK attacks. At the relevant time, he had not known that there were no village guards in Karataş, nor had he assumed automatically that there were village guards there.

215. In his opinion, the fact that a village has no village guards did not automatically imply that such a village was sympathetic towards the PKK. If he had been told at the relevant time that there had been no village guards in Karataş, he would not have considered it likely that the attack had been committed by the PKK. He had not been aware of any feelings of enmity between Balpınar and Karataş. There had been rumours that the inhabitants of Karataş would not agree to become village guards, that they were against the State and that the village

guards were therefore their enemies. However, those had just been rumours. No one had ever told him this in a formal way. He did not know of any previous attacks on Karataş.

216. After the on-site inspection, he had ordered the gendarmes to find the perpetrators. He explained that the gendarmes assist prosecutors in their investigations. The gendarmes were given a general instruction to hear the suspects, witnesses and the victims' relatives and to transmit the preliminary investigation documents to him. The gendarme station commanders transmitted any evidence collected by them to the District gendarme headquarters, who in turn transmitted such evidence to the prosecutors. As required in the emergency area in case of terrorist incidents, of which in his opinion this had been one, he had informed the public prosecutor at the Diyarbakır State Security Court on 17 March 1993 by telegram of the incident. On that date he had also addressed a letter to the Census Directorate. His remark in these communications that PKK members were responsible for the killing of the applicant's parents and brother was to be seen as merely a preliminary conclusion, inspired by the view expressed by the District gendarme commander and the general situation in the region. He denied any prejudiced opinion as to PKK involvement. The subsequent investigation had not been solely aimed at or limited to the PKK. Moreover, the State Security Court was not bound in any way by this information.

217. He had not spoken with Muhittin Araç, the Muhtar of Karataş, a couple of days after the incident. He did not exclude that the Muhtar might have spoken with the other prosecutor in Mazıdağı. The witness had notified the District gendarme station immediately after the incident. He recalled that about a week or ten days after the incident the gendarmes had taken a statement from the Önen sisters. However, statements taken by gendarmes were generally considered as preliminary but not as fully sufficient. Subsequent statements were to be taken by a prosecutor.

218. The letter from Sebahattin Taşan of 5 April 1993 to him (see para. 80 above) did not contain any conclusions. It was merely the transmission of preliminary evidence collected by the gendarme forces. What this letter in fact said was that the investigation was ongoing. Mr Taşan's letter of 4 May 1993 to him (see para. 81 above), was to be seen as one of the monthly interim reports to the prosecutor on the ongoing investigation by the gendarme forces.

219. After he had received these statements and as nobody had voluntarily come forward to give him a statement, he had been forced to summon the victims' relatives to give statements to him. He had waited two months before doing so. He had seen Şemse Önen for the first time when he had taken her statement at the courthouse. Although he had ordered this and despite the fact that promises had been given, Mekiye had not come together with Şemse. He had taken Mekiye's statement one month later after having issued a final order for her attendance. This had been the written order dated 10 June 1993. He denied that the Ministry of Justice had contacted his office.

220. The respective accounts of the Önen sisters to the gendarmes and subsequently to himself had been contradictory on a number of points. When he had taken their statements he had confronted each of the Önen sisters with any contradiction with their earlier statements to the gendarmes. He had not excluded the possibility that Mekiye Önen merely repeated what

she had heard from her sister Şemse and had not in fact heard exactly what her father had said.

221. No confrontation between the Önen sisters and Ali and Orhan Ertaş had taken place and he had not ordered such a confrontation. This would have been pointless, as the Önen sisters had explicitly and repeatedly stated both to the gendarmes and to himself that they would not be able to identify the perpetrators. They had only heard the names called out by their father. If they had recognised the perpetrators in a confrontation, this would have constituted sufficient grounds for a detention order. When he had taken the statements from the Önen sisters, they had not given him the impression of being scared.

222. He remembered that he had ordered that the weapon of Ali Ertaş be taken and sent for a ballistics examination. However, as no replacement weapon had been available, shots had been fired from Ali Ertaş' weapon and the resulting empty cartridges had been sent for a ballistics examination. To deprive him of his weapon would have rendered his work as a village guard impossible. In the absence of any concrete evidence or information that Ali and Orhan Ertaş possessed other weapons, he had not ordered that their homes be searched for weapons. In any event, it was generally speaking unlikely that a person would hide in his house a weapon with which he had committed a crime. He did not remember that he had verified the weapon delivery receipts of the Balpınar village guards, including the receipt for the weapon given to Ali Ertaş.

223. The statements of Ali and Orhan Ertaş had been taken at the District gendarme headquarters and had been transmitted to him. Ali Ertaş had been a village guard at the relevant time. Orhan Ertaş had not been a village guard. He had not found it necessary to seek further confirmation of their respective alibis in view of the supporting statements and information provided by the gendarmes. The relationship between prosecutors and gendarmes being based on trust, he had had no reason to doubt information provided by gendarmes. Although he could have instructed the gendarmes to conduct further supplementary enquiries, he had not found this necessary in the present case as no information casting doubt on this information had been received. In accordance with normal practice, after the gendarmes had taken their statements, he had summoned Ali and Orhan Ertaş and had taken their statements himself. He remembered that he had thoroughly interrogated Ali Ertaş. He did not remember how long that questioning had lasted. He had not taken any personal notes on that occasion. He must have asked Ali Ertaş who had been with him on ambush duty since statements of other Balpınar village guards had been taken. He also must have asked him about Orhan Ertaş' whereabouts. It would have been pointless to have asked Ali Ertaş how many weapons he possessed. In any event, had he had any doubts on that point, he would have ordered a house search.

224. In consultation with the prosecutor at the State Security Court, he had decided not to order the pre-trial detention of the Ertaş men, as the suspicions against them were not strong enough. They had permanent addresses and were not likely to flee. Furthermore, on the basis of the gendarmes' findings that it had been a politically motivated murder committed by PKK members, which finding, also given the general situation in the region, he had considered more plausible than the account of the Önen sisters, he had decided to refer the case to the State Security Court. Although there had been no clear evidence that the perpetrators had been village guards, he had, nevertheless, included the allegations made against Ali and

Orhan Ertaş in this decision. He did not know whether Şemse and Mekiye Önen had been informed of his decision of lack of jurisdiction, but in his opinion they must have been informed of that procedural step. In any event they could have sought this information at their own initiative via the Muhtar of Karataş. He had never received any written request from Şemse Önen asking to be kept informed as to the stage of the investigation and of any proceedings instituted.

225. Once proceedings had been instituted before the State Security Court, he had been requested by letters rogatory to take statements from the Önen sisters, the Ertaş men and other witnesses. The State Security Court was not bound by any preliminary investigation conducted by a local prosecutor. It could order the taking of further evidence. However, their summons to give evidence had not reached the Önen sisters, as they had moved and the gendarmes had not been able to establish their whereabouts. He had transmitted that information to the State Security Court. He denied that he had received information that the Önen sisters had moved to the Cezaevi area in Diyarbakır. If that had been the case, he would have contacted the prosecution department in Diyarbakır. Villagers had said to the gendarmes that the Önen sisters had gone to Diyarbakır. The Muhtar of Karataş could not offer any assistance as he had not been in Karataş at that time. The Muhtar resided in fact in Diyarbakır at that time where he had been attending to business.

226. He had not gone to the village in person to ask questions about the whereabouts of the Önen sisters. That was a task for the gendarmes. A prosecutor collected and evaluated information. Moreover, the statements by Şemse and Mekiye Önen had been accepted as truthful, but they had been unable to provide any supporting evidence for their accounts. If they had come forward their statements could have been taken. However, he had been convinced that they had been unwilling to give further evidence, which in his opinion could be explained by the fact that often family elders in that area decided whether or not a member of their family, especially in the case of women, was to give a statement to the authorities. In this case they had chosen to go into hiding and to lodge a complaint with the Human Rights Association while the investigation into the matter had still been ongoing and before a judgment had been handed down. He had realised this when he had received a request from the Mardin prosecution department, probably at the request from the European Commission of Human Rights, to provide information about the case.

227. He himself had taken the statement of Ali Ertaş. He had not seen any marks on Ali Ertaş' face. Shortly after that, he had been transferred to the Hadim District. He had not been involved in the taking of further comparison cartridges. He had already been transferred at the time that that request had been received from the prosecutor at the State Security Court.

Sedat İşçi

228. Sedat İşçi stated that he was born in 1965 and that he was a medical doctor working in a health unit in Mazıdağı. He had been working there at the relevant time. At that time and to date, no forensic doctor or pathologist was available in the region. Although he was not a forensic expert or specialist, he did deal with forensic cases. He explained that, when an incident like the present one occurred, the physician on duty was called upon by the public prosecutor to conduct an autopsy. It was a part of normal duties for physicians in the area.

229. In March 1993, the public prosecutor had called upon him to carry out an examination of three bodies in Karataş. The autopsy team had been led by the public prosecutor and had travelled to Karataş in a rented car, accompanied by gendarmes. When he had arrived in Karataş in the course of the morning, he had seen a crowd in front of the house where the bodies were located.

230. The public prosecutor had first identified the bodies and drafted his on-site inspection report. After that, he had examined the bodies. He had dictated his visual findings and a written record had been drafted and signed. He identified the report on the examination of the bodies of the applicant's parents and brother as his. The aim and object of his examination had been to establish the cause of death. As those respective causes had been obvious, namely death caused by bullet wounds, he and the public prosecutor had decided that a classical autopsy was not required. In case of a difference of opinion as regards the necessity to conduct a classical autopsy, the public prosecutor made the final decision whether or not to conduct such an autopsy. In this case, they had both agreed that this was not necessary. He further explained that relatives were generally reluctant to accept a classical autopsy as they did not want dead bodies to be damaged.

231. He had no clear recollection of the exact number of bullet entry and exit wounds found on the bodies. The body of Orhan Önen had been lying on the bed, face upwards, and

there had been a large amount of dried blood. He had considered that, given the state of the face, chin, lip and nose area, more than one bullet had either entered or exited through the facial area. Given the presence of a bullet entry and exit wound in the knee region, Orhan Önen must have been hit by certainly more than two bullets. Mome Önen had died of a prolonged loss of blood.

232. There had been no discussion about the possible perpetrators of the killings. He had not spoken to any member of the victims' family and had never heard any allegation that Balpınar village guards had been accused of these killings. He did not remember having met the identification witness Mehmet Hadi Araç. He did not know on what grounds the prosecutor had concluded immediately after the examination of the bodies that the PKK had been responsible for the killings, but he did remember that this had been said at that time.

233. Apart from his report on the *post mortem* examination, he had not written any further report to the State Security Court in relation to these killings.

Cengiz Kesler

234. Cengiz Kesler stated that he was born in 1965. In 1993, he had been working as an intelligence NCO under the orders of the Mazıdağı District gendarme headquarters. He had only been responsible for administrative matters there like keeping records. The most superior officer at the Mazıdağı District gendarme headquarters at that time had been Sebahattin Taşan, the Division commander. He had personally known Salih Kaygusuz, the station commander of the Fosfat gendarme station. The building of the District gendarme headquarters was located in the outskirts of Mazıdağı. The office of the public prosecutor was located in the central part of Mazıdağı, which is a relatively small town.

235. He had been on duty on 16 March 1993. There had first been an attack on the PTT radio link station and later an attack on Karataş. He had not personally received that information. He had no recollection of the arrival that night of a minibus transporting a wounded person. After the attack on the radio link station, he had left the building of the District gendarme in order to participate in security measures that were being taken in the area surrounding the gendarme station after that incident.

236. The Fosfat gendarme station had later sent a report on the incident in Karataş to the District gendarme headquarters. In this report it was stated that there had been an attack on the house of Ibrahim Önen resulting in a number of deaths. He confirmed that, upon instructions of the public prosecutor, he had taken a statement from Şemse and Mekiye Önen about three weeks after the incident. When they had given their statements to him, the sisters had not given him the impression of being frightened. He had also taken a statement from Mahmut Denli. He had no recollection of having seen Ali and Orhan Ertaş in the building of the Mazıdağı District gendarme headquarters. He had only known their names from the investigation documents.

237. His task had only been to record their statements. He had not been competent to make any suggestions as to what steps should be taken on the basis of the contents of these statements. That fell to be decided by the District commander, the station commander or the public prosecutor. He had only acted on orders received. He could not remember that he had

received the weapon of Ali Ertaş, but did not exclude that his colleagues had dealt with that weapon. He knew nothing about the taking of comparison cartridges from Balpınar village guards, but he had been present when these village guards had been provided with weapons. He had co-signed the delivery receipts of these weapons. If his name appeared on such a receipt, he had been present when it had been handed out. If a village guard resigned he was required to return his weapon and this would be recorded in a document. He had not been responsible for monitoring these files. That had been the task of someone else.

238. In August 1993, he had been transferred to another post. Apart from having taken statements from Şemse and Mekiye Önen and Mahmut Denli he had not had any further dealings with this incident.

Tanju Güvendiren

239. Tanju Güvendiren was born in 1950 and he had been public prosecutor at the State Security Court in Diyarbakır between 1992 and 1995. During these years he had lived for security reasons in military quarters close to the State Security Court building in Diyarbakır. It had been a very difficult time during which the PKK activity had been at its peak. Not a day would pass without a clash and there had been many so-called “unknown perpetrator killings”. The reality of this situation had had its repercussions on the manner in which investigations had been carried out. Any shortcomings in investigations should be considered as being caused by the physical circumstances rather than arising from negligence or malice.

240. The investigation in the present case had been carried out in a routine manner. The local public prosecutor had immediately informed the chief public prosecutor at the State Security Court of Diyarbakır of the incident of 16 March 1993 by sending a telegram. As, according to the local prosecutor, the PKK had been involved in it, the chief public prosecutor at the Diyarbakır State Security Court had ordered the transmission of the case-file concerning this incident once the local prosecutor had completed a preliminary investigation and had taken a decision of lack of jurisdiction. The gendarmes had carried out this investigation on behalf and under the direction of the local prosecutor. In this case, this preliminary investigation had required the preparation of an autopsy report and the collection of evidence, including a ballistics examination. All this had been done. In an ideal situation it would have been possible to go immediately to the scene of the crime, to take fingerprints and photographs at the scene of the crime or other investigative measures, but at the relevant time reality was different as armed actions were taking place on a very wide scale and any investigation required major security measures. The local prosecutor and the gendarmes had concluded that the PKK had been responsible for the killings.

241. Once the case had been transmitted to the prosecutor’s office at the State Security Court, he had noted some deficiencies in the preliminary investigation. He had noted, *inter alia*, that an insufficient number of comparison cartridges had been taken from the village guards. In order to complete the investigation, he had also ordered that all the weapons provided to the village guards were to be subjected to a ballistics examination. Pursuant to this order, the security forces had fired each of these weapons and the cartridges thus obtained had been sent for a ballistics examination. As the accusations had been made against the village guards only their weapons were subjected to a ballistics examination.

242. Given the type of weapon used, i.e. a Kalashnikov, the fact that no weapon had been found, the manner in which the killings were committed and the time at which they were committed, which showed similarities with other PKK actions, and also given the conclusion of the security forces, it had been clear to him from the outset that the PKK had been responsible for the killings.

243. He had been informed of the accusations made against Ali and Orhan Ertaş, but there had been no concrete evidence in support of this contention. In fact, the suspicion against the PKK was even stronger as the relatives of the victims had stated that there had been no enmity between the Ertaş men and the victims. Nevertheless, given the seriousness of the charges and on the sole basis of the contradictory statements made by the victims' relatives, and despite his own conviction that the PKK was responsible for the killings, he had decided to bring proceedings against Ali and Orhan Ertaş for politically motivated murder. He had chosen this charge in order to speed up the proceedings. If the charge had been common murder the proceedings should first have been brought before the competent local criminal court, with the possibility that this court would declare itself incompetent if the killing was found to be connected with terrorist or political organisations. The fact that the PKK, as such, had not been charged in the present proceedings before the State Security Court did not preclude the starting of an investigation into the question whether the PKK was responsible for the killings. However, no proceedings could be brought against an unknown perpetrator.

244. He did not recall whether the homes of Ali and Orhan Ertaş had been searched during the preliminary investigation. He did remember that there had been many witnesses who had stated that the two men had not been at the site of the incident at the time of the killings. Since the local prosecutor had already taken very detailed statements from the Ertaş men, he had not found it necessary to take any further statements from them prior to the start of the proceedings before the State Security Court. No arrest or pre-trial detention order had been issued as regards the Ertaş men, as the suspicion against them was not strong enough. The statements by the victims' relatives had been contradictory and had not been supported by any other evidence. He excluded the possibility that village guards would be protected by the security forces if such guards had committed a crime.

245. Şemse and Mekiye Önen had repeatedly been summoned to appear before the State Security Court, but the gendarmes had replied that their whereabouts could not be established as they had moved and had not given any information about their new address. This reply had not contained any indication as to their possible whereabouts. As a consequence they had not been heard before the State Security Court. No further efforts to find them had been undertaken by the State Security Court as the victims' relatives had not been able to submit evidence in support of their statements. Their statements had been accepted as truthful, but not substantiated by concrete evidence. Therefore, to hear them before the State Security Court would not have added anything to their previous statements. Orhan Ertaş had also been summoned to appear before the State Security Court, but after the gendarmes had replied that he had moved to an unknown address, the court had not pursued the matter.

246. After having assessed the evidence before the State Security Court, he had sought the acquittal of Ali and Orhan Ertaş. According to the evidence available, three different persons had fired shots. The victims' relatives had only seen two persons. Later, they had claimed to have seen seven persons in the house. Moreover, he had found it implausible that a person

would be able to remove a scarf from the head of a person who is wielding a Kalashnikov rifle. The only way of verifying the truth of the statements of the victims' relatives - which he himself accepted to the extent that they claimed they had heard their father call out the names of the accused - would have been the finding or identification of the weapon used or a confession. This had, however, not been the case. It would not have been possible to convict the accused on the sole basis of the statements made by the victims' relatives. As a matter of fact, in 1993, about 90% of all cases before the State Security Court had ended in acquittals.

C. Relevant domestic law and practice

247. In the absence of detailed submissions on domestic law and practice, the Commission has had regard to the relevant provisions and submissions made in the context of previous applications to the Commission.

Criminal law and procedures

248. The Turkish Criminal Code contains provisions dealing with intentional homicide (Article 448) and aggravated murder (Article 450). Under Article 13 of the Law no. 6136 of 10 July 1953 it is prohibited to possess and traffic in, *inter alia*, unlicensed fire arms.

249. Pursuant to Articles 151 and 153 of the Turkish Code of Criminal Procedure, complaints in respect of these offences may be lodged with the public prosecutor or the local administrative authorities. The complaint may be made in writing or orally. In the latter case, the authority must make a record of it (Article 151). The public prosecutor and the police have a duty to investigate crimes reported to them (Article 153).

250. If there is evidence to suggest that a deceased has not died of natural causes, agents of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). Pursuant to Article 235 of the Code of Criminal Procedure, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty shall be liable to imprisonment.

251. A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts by conducting the necessary inquiries to identify the perpetrators (Article 153). Such an investigation may entail, *inter alia*, the hearing of witnesses, the taking of statements from suspects and the issuing of search warrants. Under Article 154 of the Code of Criminal Procedure, the public prosecutor may conduct a preliminary investigation into an offence either directly or with the support of the police. According to Article 163 the public prosecutor may institute criminal proceedings if he or she decides that the evidence justifies the indictment of a suspect. If it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, the public prosecutor may close the investigation. However, the public prosecutor may decide not to prosecute if, and only if, the evidence is clearly insufficient. Under Article 165 of the Code of Criminal Procedure, a complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings within fifteen days after being notified.

252. Law no 3713 of 12 April 1991, the Prevention of Terrorism Act, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts committed for the purposes of terrorism" (Articles 3 and 4) and to which it applies. The acts punishable pursuant to Articles 448 and 450 of the Criminal Code are among them.

253. Decree no. 285 modifies the application of Law no. 3713 of 12 April 1991 in the areas which are subject to the state of emergency, with the effect that the decision to prosecute

members of the administration or the security forces is removed from the public prosecutor and conferred on local administrative councils. This Decree does not apply to village guards, as they are not considered as members of the administration or the security forces.

254. The State Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That Law was annulled by the Constitutional Court on 14 June 1976. The State Security Courts were later reintroduced in the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

<Translation>

“There may be acts affecting the existence and stability of a State such that when they are committed special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up State Security Courts.”

255. The composition and functions of the State Security Courts, which are established throughout Turkey, are governed by Articles 138, 139, 143 and 145 of the Constitution and further by Law no. 2845 of 16 June 1983 on the creation and rules of procedure of the State Security Court. The Law no. 2845 is based on Article 143 of the Constitution. In accordance with Article 9.e.1 of the Law no 2845, the State Security Courts shall try persons accused of the offences defined in, *inter alia*, Articles 448 and 450 of the Criminal Code where these offences have been committed under circumstances “being linked with the internal and/or external security of the State”. In case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate public prosecutor at the competent State Security Court.

Administrative liability

256. Article 125 §§ 1 and 7 of the Turkish Constitution provides as follows:

<Translation>

“All acts of decisions of the administration are subject to judicial review ...

...

The authorities shall be liable to make reparation for all damage caused by their acts or measures.”

257. This provision is not subject to any restriction even in a state of emergency or war. The second paragraph does not require proof of the existence of any fault on the part of the administration, whose responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as the theory of “social risk”. Thus the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

Civil action for damages

258. Pursuant to Article 41 of the Civil Code, anyone who suffers damage as result of an illegal act or tort act may bring a civil action seeking reparation for pecuniary damage (Articles 41-46) and non-pecuniary damage. The civil courts are not bound by either the findings or the verdict of the criminal court of the issue of the defendant's guilt (Article 53).

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

259. The Commission has declared admissible the applicant's complaints:

- that the killings on 16 March 1993 were carried out by armed members of the Balpınar village guards upon the instigation of the gendarmes, that the gendarme forces failed to offer her injured mother any assistance and that there has been no effective investigation of the killings and no adequate prosecution of those suspected of having committed the killings;
- that the subjection of the applicant and her siblings to the experience of an armed attack in their home, in which they witnessed the mortal wounding of their parents and brother by gunfire, constitutes inhuman treatment;
- that the attack on her family home and the killing of her parents and brother constitute an interference with the right to respect for the family life and home of the applicant and her siblings;
- that she has no effective remedies before a national authority for the violation of the right to life and other fundamental Convention rights in South East Turkey; and
- that she and her family have been discriminated against on grounds of their Kurdish origin.

B. Points at issue

260. The points at issue in the present case are as follows:

- whether there has been a violation of Article 2 of the Convention;
- whether there has been a violation of Article 3 of the Convention;
- whether there has been a violation of Article 6 of the Convention;
- whether there has been a violation of Article 8 of the Convention;
- whether there has been a violation of Article 13 of the Convention; and
- whether there has been a violation of Article 14 of the Convention in conjunction with the substantive rights under the Convention invoked by the applicant.

C. The evaluation of the evidence

261. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt

to establish the facts, pursuant to former Article 28 para. 1 (a) of the Convention. It would make a number of preliminary observations in this respect.

i. There have been no findings of fact reached by domestic authorities as regards the applicant's complaints under the Convention. The Commission has accordingly based its findings on the evidence given orally before its Delegates and submitted in writing in the course of the proceedings; in the assessment as to whether the applicant's allegations are well-founded the standard of proof is that of "beyond reasonable doubt" as adopted by the Court. Such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact and in addition the conduct of the parties when evidence is being obtained may be taken into account (*mutatis mutandis*, Eur. Court HR, Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25 p. 65 para. 161).

ii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters: it has therefore paid careful and cautious attention to the meaning and significance which should be attributed to the statements made by the witnesses appearing before its Delegates. The Commission has been aware that the cultural context of the applicant and witnesses has rendered inevitable a certain imprecision with regard to dates and other details and does not consider that this by itself reflects on the credibility of the testimony.

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission is acutely aware of its own limitations as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no powers to take specific measures to compel witnesses to give oral or written evidence. In the present case, despite the Commission's specific request, the Government has failed to submit certain relevant documents. The Commission has therefore been faced with the difficult task of determining events with incomplete evidence.

1. General background

262. Since the eighties, a violent conflict has been conducted in the south-eastern region of Turkey, between the security forces and sections of the Kurdish population in favour of Kurdish autonomy, in particular members of the PKK (Kurdish Workers' Party). According to the Government, one of the main terrorist activities of the PKK is the killing of people who have acted contrary to the cause of this organisation or who have mistreated certain valuables of the PKK. At the time of events in issue in this case, ten of the eleven provinces of south-eastern Turkey had been under emergency rule since 1987.

263. The villages of Balpınar and Karataş are situated in an area which was subject to significant PKK terrorist activities in the early nineties. It is undisputed that, prior to the events at issue, village guards from Balpınar had been attacked on two occasions by PKK forces and that, on 16 March 1993, PKK forces attacked a nearby PTT radio link installation.

264. The inhabitants of Karataş, Balpınar and about forty other villages belong to the “Metina” clan. It appears that, at the relevant time, all villages belonging to this clan, with the exception of the village of Karataş and one other village, had village guards and that a certain pressure was exerted to join the village guard system (Muhittin Araç, para. 146; Salih Kaygusuz, para. 180; and Mahmut Denli, para. 200). A number of witnesses stated that the refusal of Karataş to join the village guard system resulted in certain tensions between Karataş and Balpınar (Ercan Önen, para. 134; and Muhittin Araç, paras. 147-148). Other witnesses denied such tensions (Salih Kaygusuz, para. 180; Mahmut Denli, para. 198; and Mecit Kaya, para. 202). The public prosecutor at Mazıdağı confirmed that he had heard rumours that the inhabitants of Karataş opposed the Turkish State and that, therefore, the village guards were their enemies (Yekta Çobanoğlu, para. 215). The Balpınar village guards were not authorised to act on their own initiative. They received their orders from and had to report to the Commander of the nearby Fosfat gendarmerie station (Salih Kaygusuz, para. 181).

265. Although it cannot make any definite findings on this point, the Commission does not consider it to be implausible that Karataş’ refusal to join the village guard system during a period of significant PKK terrorist activities in the area, resulted in certain tensions between the village guards of Balpınar and the inhabitants of Karataş.

2. The killing of the applicant’s brother and parents

266. The applicant alleges that the killing of her brother Orhan and her parents were the result of a planned action by members of the Balpınar village guards to kill her brother Orhan and that the actual perpetrators were Ali Ertaş, chief of the Balpınar village guards, and his relative Orhan Ertaş.

267. The Commission’s Delegates heard evidence from two eye-witnesses to the killing of the applicant’s brother and parents, i.e. the applicant and her sister Mekiye Önen. The Delegates found the applicant to be rather confused in relating her account. It was obvious that the events had profoundly shocked her. On the other hand, the Delegates found Mekiye Önen on the whole to be sincere and credible and her evidence convincing. Although the applicant’s account of the killing of her brother and parents differs in certain details from Mekiye’s account, the Commission finds that their evidence to the domestic authorities as well as to the Delegates as to the essential facts of the incident is sufficiently consistent and mutually supporting.

268. The Commission is satisfied from the evidence given by the applicant and her sister, that in the evening of 16 March 1993, after having presented themselves as soldiers knowing that the Muhtar was absent from Karataş and wishing to conduct a house search, two armed and masked men entered their family home, where one of the men immediately shot and killed their brother Orhan. The Commission accepts that, in the course of their struggle with the intruders, the applicant’s father was shot and killed by one of the intruders and the applicant’s mother was seriously injured by a shot fired by the other intruder. The Commission further finds no reason to doubt that both the applicant and her sister heard their father call out the names of two perpetrators whom he had recognised as Ali and Orhan Ertaş from Balpınar.

269. The Commission notes that the applicant gave to the Delegates a description of the two men: the one who shot her brother Orhan and her mother was described as a person with long fair hair, hazel eyes and a fair complexion, whilst the man who shot their father was described as having a moustache and black eyes (para. 119). Her sister, Mekiye, confirmed that the man who shot Orhan had hazel eyes but stated that she had not seen the second intruder (para. 126). The applicant further gave evidence that, when she subsequently attended at the Mazıdağı gendarmerie station, she saw Ali and Orhan Ertaş and recognised them as the same two men (para. 121), which Mekiye confirmed in that, at the same occasion, she recognised Orhan Ertaş as one of the killers from his height, build, hazel eyes, nose and complexion (para. 131).

270. The Commission considers that this evidence should be treated with some caution. In the sudden and traumatic events of that night, it is at least doubtful whether either the applicant or her sister would have had an opportunity to form a clear and accurate impression of the features of either man. In particular, Mekiye appears only fleetingly to have seen her brother's killer, whose face was masked with a scarf. The Commission notes that the description given by them of Orhan and Ali was contradicted by Muhittin Araç, who knew both men and who described Orhan as being lean with a dark complexion and black hair and Ali as being a more bulky man of the same height with a light complexion and chestnut brown hair (para. 150).

271. As to the evidence of the subsequent identification of these two men, the Commission, for reasons given below (para. 307), finds no reason to doubt that the applicant and her sister did see Ali and Orhan Ertaş at the Mazıdağı gendarmerie station on 5 April 1993. What is, however, more doubtful is whether the identification of the two men was entirely spontaneous or whether the applicant and her sister were made aware that the men were Ali and Orhan, whose names had been called out by their father. In this regard the Commission notes that the evidence of Şemse and Mekiye that they recognised the two men as soon as they saw them being brought into the gendarmerie station (paras. 121 and 131) does not precisely tally with that of Ercan Önen who claimed that they identified the two men when they had been brought into the room where they were waiting and had been greeted by the station commander (paras. 139-140).

272. The Commission accepts that the approximate time of these killings lies between 20.30 and 21.00 hours as indicated by Şemse and Mekiye Önen. This indication is supported by other evidence. The commander of the nearby Fosfat gendarmerie station Salih Kaygusuz had heard shooting coming from the direction of Karataş shortly after he had learned from radio communications that the Etibank Fosfat PTT radio link installation had been attacked (para. 184). Also Mahmut Denli and Mecit Kaya stated that, after they had heard shooting coming from the direction of the PTT radio link installation, they had heard further shooting coming from the direction of the Fosfat gendarmerie station and Karataş, and that they had contacted the Fosfat gendarmerie station via the radio of Ali Ertaş in relation to this second shooting (paras. 199 and 204). According to the incident report and various witness statements about the attack on the radio link installation, it had started at 20.15 hours and had lasted about 15 minutes (para. 109). Moreover, it appears from Ali Ertaş' statement of 6 July 1993 to the public prosecutor of Mazıdağı that he had heard shooting coming from the direction of the Fosfat gendarmerie station about 30-40 minutes after the attack on the radio link installation (para. 67). This time-frame is further supported by the ambulance records, from

which it appears that the applicant's mother left Mazıdağı for Diyarbakır in an ambulance at 22.10 hours (para. 111). In these circumstances, the Commission considers that the killing of the applicant's brother and parents must have occurred around 21.00 hour at the latest.

273. According to the testimonies of Mahmut Denli and Mecit Kaya, the Balpınar village guards had been on guard duty in the evening of 16 March 1993. Mecit Kaya stated both before the domestic authorities and the Commission's Delegates that he had been on duty in the company of Ali Ertaş at a position on Kırmızıtepe during the entire night of 16-17 March 1993 (paras. 64 and 203).

274. The Delegates considered that their evidence was to be treated with a certain degree of caution. Although Mahmut Denli stated to the domestic authorities that he had been on duty together with Ali Ertaş at the time the shooting in Karataş occurred (paras. 66 and 68), he told the Commission's Delegates that he had in fact been in Balpınar at that moment and had only gone to Ali Ertaş' position afterwards (para. 199). As regards the testimony of Mecit Kaya, it appears that, apart from a firm recollection that he had been with Ali Ertaş during the entire night of 16-17 March 1993, he did not remember any subsequent events (para. 204).

275. As to the possible motive for the planned killing of Orhan Önen, the Commission's Delegates heard evidence that the killing of the applicant's brother and parents was likely to be linked to the PKK attack on Balpınar village guards on 15 November 1992 in which four Balpınar village guards had been killed. A number of witnesses stated that, after this incident, the Balpınar village guards had been involved in one or two armed attacks on Karataş, allegedly aimed in particular at the house of the Muhtar and the applicant's family home (Şemse Önen, para. 117; Mekiye Önen, para. 124; Ercan Önen, para. 136; Muhittin Araç, paras.148-149; Tahir Önen, para. 160; and Mehmet Hadi Araç, paras. 166-167). Evidence was also given that, at some point in time between 15 November 1992 and 16 March 1993, the gendarmes had conducted house searches in Karataş (Mekiye Önen, para. 125; Muhittin Araç, para. 149; and Mehmet Hadi Araç, para. 166). However, according to the evidence given by the Commander of the Fosfat gendarmerie station and one of the Balpınar village guards, there had been no such attacks nor had any house searches been conducted there (Salih Kaygusuz, para. 182; and Mecit Kaya, para. 202).

276. Since, according to the testimony of the commander of the Fosfat gendarmerie station, all activities and duties of the gendarmes, including the conducting of house searches, were compulsorily recorded in a duty logbook and further details in separate related service sheets (Salih Kaygusuz, paras. 177, 182 and 192), the Commission requested the Government on 2 June 1998 to submit these records of the Fosfat gendarmerie station for the period October 1992-May 1993. These records have, however, not been submitted (see paras. 21 and 24).

277. Evidence was also given to the Commission's Delegates that the killings were the result of a settling of accounts between Orhan Önen and the PKK. According to intelligence information, the PKK had provided the applicant's brother Orhan with a taxi for use by the PKK, but Orhan had driven this car for his personal benefit (Salih Kaygusuz, para. 188). In their observations of 18 August 1994 to the Commission, the Government also referred to a statement made to the Ministry of the Interior by the applicant dated 1 April 1994 in which it is alleged that the applicant explained that her brother Orhan had used a taxi provided by the PKK for his personal benefit (No. 22876/93, Dec. 15.5.95, *infra*, p. 70 at p. 76). Although the

Government were requested on 2 June 1998 to substantiate this contention by documents, no such documents have been made available to the Commission (see paras. 21 and 24).

278. The applicant as well as her sister Mekiye and brother Ercan gave evidence to the Commission's Delegates that their brother Orhan Önen had operated a minibus service with a vehicle owned by their father and that, in the second half of 1992, he had purchased a vehicle in order to start a taxi business in Diyarbakır (paras. 118, 123, 124 and 135). The applicant's family had financed the down payment for the car from the proceeds of the sale of two cows. The applicant has made available to the Commission the contract of sale of a car to Orhan Önen from a car trader in Elazığ, as well as certain documents concerning the loan contracted to purchase this car and repayment of the loan (see para. 113).

279. In these circumstances, the Commission finds no reason to doubt the veracity of the evidence of the applicant and her siblings as to how or for what purpose their brother had acquired the vehicle. Although no definite findings on these points can be made, the Commission further cannot, on the basis of the available evidence, discard as implausible the various accounts that, after the killing of four Balpınar village guards and prior to 16 March 1993, Balpınar village guards were involved in one or two armed attacks on Karataş, that in these attacks the houses of the applicant's parents and the Muhtar had been damaged and that house searches in Karataş had taken place.

280. The accounts given to the Delegates as to what happened after the killings differ in various respects. The Delegates considered that some of these differences could be explained by the fact that those villagers of Karataş from whom the Delegates took evidence must have been emotionally affected by the killings and in a situation of stress, as native Kurdish speakers, had possibly experienced certain linguistic problems in communicating with the Turkish speaking officials involved in the matter. Other differences may be explained by problems in recalling events which took place a number of years ago.

281. What appears from the various accounts is that, immediately after the shooting, the perpetrators fled on foot and that villagers, having heard the gun shots, assembled at the applicant's house. At that stage, the body of Orhan Önen was lying on the bed in the bedroom where he had been shot and the body of the applicant's father was lying outside the house immediately in front of the house door. The applicant's mother, injured but alive, was lying in the living room (Şemse Önen, para. 119, Mekiye Önen, para. 126; Tahir Önen, para. 161-162; Mehmet Hadi Araç, para. 168).

282. Villagers placed the applicant's injured mother in a minibus in order to take her to a doctor. Three villagers accompanied her. The minibus first drove to the nearby Fosfat gendarme station, where the villagers were met by the station commander (Tahir Önen, para. 162; and Salih Kaygusuz, para. 185).

283. The accounts of Tahir Önen and Salih Kaygusuz of their meeting that evening are inconsistent. Tahir Önen claims that the commander refused to provide them with a replacement vehicle for the minibus and that they were forced to remain at the gendarme station for about one hour before receiving permission to pursue their journey to Mazıdağı. Salih Kaygusuz declared that Tahir Önen had been very agitated and had spoken very fast. After Tahir Önen had explained what had happened and after having concluded that he could

do nothing for the injured person in the minibus, he had sent them to Mazıdağı and had informed the Mazıdağı District gendarme station of the incident and of the fact that an injured person was on the way to hospital. He denied having been asked for a replacement vehicle and estimated the time the villagers had stayed at the station at about 10-15 minutes.

284. The Commission's Delegates found both Tahir Önen and Salih Kaygusuz, in general, to be convincing witnesses. Insofar as their accounts contradict each other, the Commission does not exclude that Tahir Önen's notion of time may have been distorted by the situation of stress in which he found himself and that Salih Kaygusuz may not have fully or immediately understood, due to linguistic difficulties, all that Tahir Önen was trying to tell him and that it may very well have taken Salih Kaygusuz at least 10-15 minutes to understand what had happened. Salih Kaygusuz' account as to the period of time the minibus stayed at the Fosfat gendarme station is further supported by the ambulance record, from which the Commission concludes that the applicant's mother left Mazıdağı by ambulance at 22.10 hours (para. 111). Whether or not the minibus transporting the applicant's mother to Mazıdağı had in fact had any technical problems when it arrived at the Fosfat gendarme station is a matter which the Commission cannot establish on the basis of the available evidence. In any event, what may be concluded from the evidence is that the applicant's mother did receive some form of medical treatment before 22.10 hours.

285. It is not in dispute that the applicant's mother died in the ambulance on the way to Diyarbakır, that she was taken back to Mazıdağı and subsequently to Karataş, where she arrived in the course of the night.

286. The Commission regrets that the Government submitted the ambulance record signed by Dr. Sedat İşçi only after he had given oral evidence to the Commission's Delegates (see para. 108). Consequently, no questions could be put to him as regards the identity of the injured person mentioned in the ambulance record, who treated the applicant's mother in Mazıdağı and what her medical condition was at that moment.

287. It is further undisputed that, after her mother had left Karataş in the minibus, the applicant herself was taken in a different vehicle to Diyarbakır where she received medical treatment for a fire arm injury in her left foot and that she returned to Karataş on 17 March 1993 in the early morning.

288. Although the Commission's Delegates considered that, generally speaking, the testimony given by Mehmet Hadi Araç should be assessed with caution in that the chronology of his account was rather confused and certain elements of his evidence seemed to be rather exaggerated, it transpires from his evidence that, before any gendarmes arrived at the scene of the killings, he and other villagers had carried the body of the applicant's father, who had been shot outside the house, into the house where it was placed in the living room (para. 169; see also Mekiye Önen, para. 128). He further stated that he and others had collected empty cartridges at the scene of the killings, but the Commission cannot establish from his account whether this occurred before or after the arrival of the gendarmes.

Concluding findings

289. In the light of the evidence before it, the Commission finds it established that the killings in question were the result of a premeditated plan to kill the applicant's brother. As to the possible motive for this planned killing, the Commission considers that it cannot be excluded that there were tensions between the inhabitants of Karataş and the Balpınar village guards at the relevant time which had resulted in prior armed attacks on houses in Karataş. Nor can it be excluded that Orhan Önen may have been a particular target of attack because of his suspected involvement in the PKK killing of village guards from Balpınar. On the other hand, the Government's contention that the PKK had a motive for killing Orhan Önen because they had provided him with a vehicle which he had used for his own benefit rather than for services required by the PKK has not only remained unsubstantiated but is moreover contradicted by substantial evidence submitted by the applicant.

290. As to the circumstances of the killing itself, the Commission finds it established that the killers were aware that the Muhtar of Karataş was absent from the village and that the applicant and her sister heard their father call out the names of the perpetrators, identifying them as Ali and Orhan Ertaş. Moreover, as noted above (para. 274), the evidence of Mahmut Denli and Mecit Kaya that the Balpınar village guards, including Ali Ertaş, had been on guard duty throughout the night of 16 March 1993 is at least open to question. In addition, the suspicion of the involvement of Balpınar village guards is reinforced by the identification of Ali and Orhan Ertaş by the applicant and her sister at the Mazıdağı gendarme station.

291. Nevertheless, while the evidence before the Commission is sufficient to give rise to suspicion as to the identity of the killers, the Commission does not find that it has been established to the required standard of proof beyond reasonable doubt that the applicant's brother, father and mother were killed by agents of the State.

292. The Commission further does not find it established that Salih Kaygusuz, the Commander of the Fosfat gendarme station, considerably delayed medical treatment for the applicant's injured mother or that the gendarme forces failed to offer her available assistance. It recalls in this respect its findings as regards the time of the killing of the applicant's brother and father and the moment at which the applicant's mother received medical care in Mazıdağı (paras. 272 and 284).

3. Inquiries and investigations at the domestic level into the killings

293. Noting that the applicant also alleges that the investigations by the domestic authorities into the killing of her brother and parents were ineffective, the Commission will next assess the evidence relating to these investigations, as there are a number of disputes of fact.

294. From the evidence of Salih Kaygusuz it appears that, after the minibus with the applicant's mother had left for Mazıdağı, he reported the incident in Karataş to his superiors at the District gendarme station in Mazıdağı and stated that he suspected that the PKK was responsible for the killings. He was told that, for reasons of security, the public prosecutor would only come the next morning. He then ordered a first gendarme team to secure the area around Karataş. A second team, led by himself, joined the first team some time later. Thereupon one gendarme team and he himself went to Karataş, where they arrived sometime

after midnight and where he found the bodies of the three victims inside the applicant's house (paras. 186-188).

295. Although evidence was heard that gendarmes had already arrived in Karataş around 22.00 hours (Mehmet Hadi Araç, para. 169), the Commission considers that it is likely that this first team in fact only arrived there after midnight. Salih Kaygusuz' recollection of their time of arrival in Karataş is supported by the ambulance record signed by Dr. Sedat İşçi, from which the Commission concludes that the ambulance with the body of Mome Önen had arrived back in Mazıdağı at 23.15 hours. The Commission finds it plausible that the minibus transporting her body arrived back in Karataş around midnight and in any event before the arrival of the first gendarmes, who found her body in the house.

296. According to Salih Kaygusuz, the villagers present were unwilling to provide the first team of gendarmes with any information about the killings. After having secured the scene of the killings, he and the other gendarmes had merely awaited the arrival of the prosecutor since they had not been ordered to take any investigative steps (para. 187; see also Mekiye Önen, para. 129).

297. In the morning of 17 March 1993, an investigation team consisting of the public prosecutor of Mazıdağı, Yekta Çobanoğlu, and, amongst others, Dr. Sedat İşçi left Mazıdağı for Karataş. Shortly before this team left Mazıdağı, the public prosecutor met briefly with Mehmet Hadi Araç. Although, according to Yekta Çobanoğlu, while on his way to depart for Karataş he had only had a brief conversation with Mehmet Hadi Araç in front of the courthouse in Mazıdağı, their respective recollections of this conversation differ (paras. 208 and 170). Recalling that the testimony of Mehmet Hadi Araç is to be assessed with caution, the Commission considers it implausible that the public prosecutor would require the Governor's permission for conducting an on-site investigation in Karataş. Yekta Çobanoğlu's account of the contents of this conversation strikes the Commission as the more likely.

298. After the investigation team had arrived in Karataş and before attending the *post mortem* examination of the victims' bodies, the public prosecutor briefly inspected the scene of the killings and ordered Salih Kaygusuz to draw a sketch map of the scene of the killings and to collect the empty cartridges lying there. Without having been numbered and without having recorded the exact location of each cartridge, the nine empty cartridges found were put together in a bag and handed to the public prosecutor (Salih Kaygusuz, para. 189; and Yekta Çobanoğlu, para. 210-211). No photographs of the scene of the killings were taken by or on behalf of the investigation team (Salih Kaygusuz, para. 190; see also Tanju Güvendiren, para. 240).

299. The Commission notes that, according to the *post mortem* examination report, the applicant's brother, lying in bed, was hit by numerous bullets in his face, by one bullet in his chest and by another bullet in his knee. The Commission finds this recorded observation difficult to reconcile with the fact that, according to the sketch map, only four empty cartridges were found in the room where Orhan Önen was shot and with the evidence given that not a single bullet was found in that room (Salih Kaygusuz, para. 190 and; Yekta Çobanoğlu, para. 209). Furthermore, although there is strong evidence suggesting that the applicant's father was shot and killed outside the house, the sketch map only contains information on what was found inside the house. Although this was denied by Salih

Kaygusuz, the Commission would not exclude that in fact more than the nine recorded empty cartridges were found and collected, including empty cartridges found outside the house (Şemse Önen, para. 130; Mekiye Önen, para. 138; and Mehmet Hadi Araç, para. 178).

300. After having conducted the examination of the bodies and released the victims' remains for burial, the investigation team left Karataş. Although the public prosecutor was aware that both the applicant and her sister were present in Karataş during the visit of the investigation team, neither the public prosecutor nor any other official took any statement from them or any of the other inhabitants of Karataş on that day (Şemse Önen, para. 120; Mekiye Önen, paras. 128-129; Ercan Önen, paras. 137-138; Muhittin Araç, para. 151; and Yekta Çobanoğlu, paras. 212-213).

301. Already on 17 March 1993, the public prosecutor suspected that the PKK was responsible for the killings and, in a telegram sent the same day, informed the office of the public prosecutor at the State Security Court in Diyarbakır accordingly (para. 78; Yekta Çobanoğlu, para. 214-216; Sedat İşçi, para. 232; and Tanju Güvendiren, para. 240). Although in his evidence to the Commission's Delegates, Yekta Çobanoğlu stressed that this had only been a provisional opinion, his respective requests dated 17 March 1993 to the Census Directorate in Mazıdağı to issue death certificates in respect of the applicant's parents and brother simply state that they "were murdered by fire-armed members of the outlawed PKK terrorist organisation" and, consequently, their deaths were officially recorded as having been caused by the PKK terrorist organisation (para. 79).

302. It was not before 1 April 1993 that the applicant and her sister Mekiye gave a statement about the events of 16 March 1993 to the commander of the Fosfat gendarmerie station Salih Kaygusuz. The applicant stated that she had heard her father call out the names of the intruders and she further gave a description of the intruders' physical appearance. Mekiye stated that she had heard her father call out only one name and did not give any description of the intruders' physical features (paras. 57 and 61). According to Salih Kaygusuz, this was the first time that he heard the allegation that Ali and Orhan Ertaş had committed the killings (para. 191).

303. In his testimony to the Delegates, Salih Kaygusuz had a firm recollection that he had also taken statements from Muhittin Araç, Tahir Önen and Mahmut Denli (paras. 192). In reply to the request of the Commission's Delegates to submit these statements, the Government stated by letter of 21 January 1999 that Salih Kaygusuz had not participated in the interrogation of these three persons (see para. 26). The Commission further notes that its case-file does not contain a statement given by any of these three persons at the Fosfat gendarmerie station.

304. Salih Kaygusuz further gave evidence that, after the applicant and her sister had given their statements to him, he went to Balpınar, where he seized one weapon, i.e. the weapon of Ali Ertaş. He then brought both Ali and Orhan Ertaş to the Fosfat gendarmerie station and took their statements. He sent the seized weapon to the District gendarmerie station for a ballistics examination and, after the Ertaş men had given him their statements, he sent them together, under guard, to the Mazıdağı gendarmerie station for referral to the public prosecutor. He could not remember whether a search had been conducted in order to find a weapon belonging to

Orhan Ertaş, but if there had been such a search it would have been recorded in the service sheets relating to the Fosfat gendarmerie station duty logbook (para. 192).

305. The Commission's Delegates found the evidence given by Salih Kaygusuz as regards the investigation conducted at the level of the Fosfat gendarmerie station on the whole logical, reasonable and convincing. On the other hand, it appears that after the applicant and her sister had made a statement to him on 1 April 1993, it was not until 4 April 1993 that he took statements from Ali Ertaş, Mecit Kaya and Orhan Ertaş, which strikes the Commission as rather late given the serious nature of the accusations made by the applicant and her sister. As the duty logbook and the relevant service sheets of the Fosfat gendarmerie station have not been made available to the Commission, it cannot be verified from these records on what date Salih Kaygusuz went to Balpınar and what activities the gendarmes undertook there in the context of the investigation of the killings or on which date Ali and Orhan Ertaş were brought under guard to the District gendarmerie station in Mazıdağı.

306. On 5 April 1993, after having been summoned, the applicant, her sister Mekiye, her brother Ercan and Mehmet Hadi Araç went to Mazıdağı District gendarmerie station, where they each gave a statement which was recorded by Sergeant Cengiz Kesler. The latter also took a statement from the Muhtar of Balpınar, Mahmut Denli. According to Cengiz Kesler, these statements were taken on instructions of the public prosecutor (para. 236). In their testimony to the Commission, the applicant, Mekiye Önen, Ercan Önen and Mehmet Hadi Araç all stated that on that occasion, and in the presence of the Mazıdağı gendarmerie station commander, they were confronted with Ali and Orhan Ertaş in the Mazıdağı District gendarmerie station. Both Şemse and Mekiye recognised them as the intruders (Şemse Önen, para. 121; Mekiye Önen, para. 131, Ercan Önen, paras. 139-140; and Mehmet Hadi Araç, para. 172; see also Muhittin Araç, para. 155). Cengiz Kesler did not remember having seen Ali and Orhan Ertaş on that day, but it appears from his evidence that he only knew their names and, apart from recording the statements, was not further involved in the investigation (paras. 236-237). The public prosecutor of Mazıdağı, Yekta Çobanoğlu, stated that he had not ordered any confrontation (para. 221). He also denied that any such confrontation had taken place. However, it does not appear from the evidence made available to the Commission that he was in fact present at the Mazıdağı District gendarmerie station on 5 April 1993.

307. Although there is no formal record of a confrontation held on 5 April 1993, the Commission sees no reason to doubt that the applicant and her sister did see Ali and Orhan Ertaş in the Mazıdağı District gendarmerie station on 5 April 1993. Although no findings can be made as to the question whether their confrontation had been planned or had been a mere coincidence, the Commission finds that their simultaneous presence on 5 April 1993 at the Mazıdağı District gendarmerie station finds support in Salih Kaygusuz' account that, after having taken the statements of Ali and Orhan Ertaş, i.e. on 4 and 5 April 1993 respectively, he had sent them, under guard, as well as the investigation documents and the seized weapon to the Mazıdağı District gendarmerie station (para. 192).

308. On 5 April 1993, the Commander of the Mazıdağı District gendarmerie station, Captain Sebahattin Taşan, transmitted the investigation documents to the public prosecutor of Mazıdağı, i.e. six statements taken from unspecified persons, two copies of unspecified identity cards and one incident location sketch. On 7 April 1993, Captain Taşan transmitted the nine empty cartridges found at the scene of the killings for the purposes of a ballistics

examination. On 29 April 1993, on the basis of the applicant's accusations, the public prosecutor in Mazıdağı ordered the seizure of Ali Ertaş' weapon for a ballistics examination. On 6 May 1993, Captain Taşan transmitted five empty cartridges taken from the weapon of Ali Ertaş for a ballistics examination. The rather confusing contents of the accompanying letter, in which he states that the five empty cartridges were taken from six village guards, does not contain any details as to when and in which manner these cartridges were obtained and why Ali Ertaş' weapon had not been seized.

309. In the report of the ballistics examination of these five empty cartridges dated 17 May 1993, it was concluded that these showed no similarities with the nine cartridges found at the scene of the killings.

310. On 9 June 1993, the applicant gave a statement to the public prosecutor in Mazıdağı, Yekta Çobanoğlu. The latter further took statements from the applicant's sister Mekiye and from Ali Ertaş on 6 July 1993. Orhan Ertaş had also been summoned to give a statement to Yekta Çobanoğlu. His summons was, however, returned as he was absent from Balpınar for professional reasons. It does not appear that any other steps were taken in order to establish Orhan Ertaş' whereabouts or to secure his presence before the public prosecutor in Mazıdağı.

311. By his decision of lack of jurisdiction of 7 July 1993, Yekta Çobanoğlu referred the case to the prosecutor's office at the State Security Court in Diyarbakır. Although he was convinced that the applicant's parents and brother had been killed by members of the PKK, Yekta Çobanoğlu nevertheless included the allegations made against Ali and Orhan Ertaş in this decision. In consultation with the public prosecutor at the State Security Court, he decided that it was not necessary to order the pre-trial detention of Ali and Orhan Ertaş (para. 224).

Concluding findings

312. Although the local gendarmes only arrived in Karataş at least three hours after the killings occurred, the Commission accepts that this delay was caused by the fact that on the same evening an armed attack on a nearby radio link installation took place. However, once arrived in Karataş, the gendarmes only secured the scene of the crime and, in the absence of any instructions, passively awaited the arrival of the competent investigation authorities, in the instant case the public prosecutor at Mazıdağı.

313. However, the Commission considers that the investigation conducted on 17 March 1993 at the scene of the killings after the arrival of the investigation team from Mazıdağı cannot be regarded as complete or satisfactory.

314. The information recorded on the sketch map of the scene of the killings appears to be incomplete. In contrast to a remark in the *post mortem* body examination report (para. 75) and the testimony of Dr. Sedat İşçi (para. 231), the sketch map does not indicate a large blood stain on the place where the body of Orhan Önen was found. Furthermore, although both Salih Kaygusuz, who drew the sketch map, and Yekta Çobanoğlu were aware that the body of the applicant's mother had been moved (paras. 187 and 209), this fact has not been recorded on the sketch map. Although the Commission accepts that, at the time this sketch map was drawn, the members of the investigation team may have been unaware of the fact

that the body of the applicant's father had also been moved from the outside of the house, the subsequent investigation cannot have been assisted by the fact that the scope of the sketch map was confined to the inside of the house and did not contain any information as to its direct environment.

315. The Commission further recalls its doubts as to the exact number of empty cartridges found and recorded on the sketch map and the evidence that no bullets were found at the scene of the killings (para. 292) and finds it surprising for a professional criminal investigation that both Salih Kaygusuz and even Yekta Çobanoğlu did not find it necessary to ensure that the empty cartridges found were numbered individually and to ensure that the exact location of each numbered empty cartridge was recorded on the sketch map. The relevance thereof can only be emphasised by the findings in the subsequent ballistics examination of the empty cartridges, i.e. that these had been fired from three different weapons (para. 84). In this connection the Commission further considers it regrettable that at the relevant time the taking of photographs of a crime scene apparently did not form part of a standard procedure in the initial phase of a criminal investigation.

316. In addition, although Yekta Çobanoğlu was aware that two eye-witnesses of the killings, namely the applicant and her sister Mekiye, were in Karataş on 17 March 1993, it does not appear that any serious attempts were made to talk to them or to take any statements from other villagers. The Commission concludes from his testimony that he decided not even to try to see the applicant and her sister Mekiye on the sole basis of having been told by villagers that they were in no condition to talk to him. This resulted in the situation that it was only on 1 April 1993, i.e. more than two weeks later, that the authorities became aware of the names allegedly called out by the applicant's father before he died.

317. The Commission further finds it established that Yekta Çobanoğlu, from the outset, had a rather firm conviction that PKK forces had committed the killings. Although he stressed that this had only been a provisional opinion inspired by views expressed by the gendarmes and his own experience, the Commission finds no support for the asserted provisional nature of this suspicion. In fact, it appears from the contents of his written communications of 17 March 1993 that his ideas about the identity of the perpetrators were firm (paras. 78-79). This element taken together with his failure to try to talk to the applicant and her sister on 17 March 1993 resulted in a loss of time in the initial phase of the investigation.

318. The Commission considers that the actions taken by Salih Kaygusuz after he had obtained statements from Şemse and Mekiye Önen on 1 April 1993, as related in his testimony (para. 192), constitute in principle an adequate response to the contents of these statements. However, the evidence given also discloses that it was not until 4 April 1993 that Salih Kaygusuz acted on the contents of the statements of the applicant and her sister, thus causing a further loss of time in the investigation. No reasons have become apparent for this further delay in the investigation.

319. As to the events of 5 April 1993, the Commission recalls its findings as regards the meeting between the applicant and her sister with Ali and Orhan Ertaş in the Mazıdağı District gendarme station (para. 307). It cannot be excluded that this meeting was in fact the result of a coincidence since Yekta Çobanoğlu had not ordered a confrontation. It has,

however, not appeared from the evidence made available to the Commission that the applicant and her sister have been invited by the investigation authorities to identify the perpetrators either from a collection of photographs or at an identity parade. The Commission finds it established that in fact no photographs of Ali and Orhan Ertaş have ever been shown to the applicant and her sister and that at no point in time had a formal confrontation been ordered. Insofar as Yekta Çobanoğlu explained that this would have been pointless as the Önen sisters had claimed to be unable to identify the perpetrators, the Commission observes that only Mekiye Önen had once made a remark to this effect, namely in her statement taken on 5 April 1993 at the Mazıdağı District gendarme station. Insofar as the applicant made such a remark, the Commission has found no record of this.

320. The Commission further notes from the evidence submitted that, apart from the statement taken from Orhan Ertaş at the Fosfat gendarme station on 5 April 1993, hardly any attempts were made or seriously pursued to obtain any further evidence from him. Nor does any attempt appear to have been made to verify his alibi by, for instance, checking his whereabouts on 16 and 17 March 1993, by seeking confirmation from those persons present when he was allegedly loading goods in Mersin or from those to whom he had delivered these goods. In this respect the Commission further notes that it does not appear from the statement he gave at the Fosfat gendarme station that he was in fact asked to give the names of persons who had seen him on 16 and 17 March 1993.

321. As regards the alibi advanced by Ali Ertaş, the Commission notes that his presence on Kırmızıtepe hill at the time of the killings was in fact only supported by the statements of Mecit Kaya and Mahmut Denli, whereas the latter stated to the Commission's Delegates that he had in fact not been in the presence of Ali Ertaş at the time of the killings, but had only seen him shortly afterwards. Given the evidence that there were in total 65 village guards in Balpınar, who were organised in teams of 12-14 persons, the Commission finds it remarkable that, apart from Mecit Kaya, no evidence was taken from the other village guards who were on duty in the same team as Ali Ertaş at the relevant time in order to verify the respective positions of each team member on Kırmızıtepe hill that evening.

4. Proceedings before the State Security Court

322. After having received the case-file, the public prosecutor at the State Security Court noted that the investigation had been incomplete. In order to complete the investigation, he issued a number of instructions to the Mazıdağı District gendarme station by letter of 13 September 1993, including that comparison cartridges be taken from the weapons held by the village guards from Karataş. On 19 October 1993, the Commander of the Mazıdağı District gendarme station transmitted 65 weapon delivery receipts and 65 empty cartridges taken from the Balpınar village guards to the office of the public prosecutor to the State Security Court. This letter contains no information as to when and in which manner these cartridges were obtained.

323. Although the public prosecutor at the State Security Court, Tanju Güvendiren, considered at the outset that there was no concrete evidence in support of the accusations made against Ali and Orhan Ertaş and, like the gendarmes and the public prosecutor of Mazıdağı, was convinced that the PKK was responsible for the killings, he nevertheless decided to bring proceedings against Ali and Orhan Ertaş on charges of politically motivated

murder and, consequently, indicted them on 6 January 1994 before the State Security Court, the competence of which includes trying murder suspects where this offence is linked with terrorism (see paras. 252 and 255). He did not find it necessary to take any further statements or to order the arrest or pre-trial detention of the accused. In his opinion it was excluded that the security forces would cover up a crime committed by village guards (paras. 244).

324. In the subsequent proceedings before the State Security Court in Diyarbakır, the court requested, *inter alia*, that statements be taken from Ali and Orhan Ertaş, from the applicant and her sister Mekiye, and from Mecit Kaya and Mahmut Denli. All these persons were summoned to appear on 6 May 1994 before a judge of the Mazıdağı Court of First Instance in order to give statements. Ali Ertaş, Mecit Kaya and Mahmut Denli did in fact give statements to the judge on 6 May 1994. However, as the whereabouts of Orhan Ertaş, the applicant and her sister could not be established, their summonses were returned to the State Security Court in Diyarbakır and, consequently, no further statements were taken from them.

325. The Commission notes that, although the gendarmes and the State Security Court were informed that the applicant and her sister were residing in the Cezaevi neighbourhood in Diyarbakır, it does not appear that any attempts were made or ordered to locate them there. It further does not appear that any further attempts were made or ordered to find Orhan Ertaş. The Commission further notes that the Muhtar of Karataş, Muhittin Araç, testified that he had been aware of the exact address of the applicant and her sister in Diyarbakır, but that he had never been asked to provide the local gendarmes with this address. He explained his signature on the document dated 4 May 1994 by stating that it had been a normal practice in the area that gendarmes would require Muhtars to sign blank documents for future use (para. 158). No further clarification on this point could be obtained from Salih Kaygusuz, as he had left the Fosfat gendarme station in August 1993 (para. 174). In these circumstances it is impossible for the Commission to make any findings in this respect. What is clear, however, is that the State Security Court was informed that the applicant and her sister were residing at that time in the Cezaevi neighbourhood in Diyarbakır. In this connection the Commission has also had regard to the evidence of the applicant's brother that, since their departure from Karataş and to date, the Önen family has always lived at the same address in Diyarbakır (Ercan Önen, para. 133).

326. After having received the statements taken on 6 May 1994 and the report dated 27 October 1994 on the ballistics examination of the 65 comparison cartridges taken from the Balpınar village guards, the State Security Court tried the case on 28 December 1994 and, in conformity with the public prosecutor's plea, acquitted Ali and Orhan Ertaş for lack of evidence.

327. According to letters sent by the Commander of the Mazıdağı District gendarme station to the public prosecutor's office in Mazıdağı at regular intervals, the investigation of the killings is still ongoing but has not resulted in the identification of the perpetrators.

Concluding findings

328. The Commission accepts that the supplementary investigation measures ordered by the public prosecutor at the State Security Court, Tanju Güvendiren, in order to repair certain deficiencies in the preliminary investigation were appropriate in the circumstances of the

present case, although it is open to doubt whether, given the passage of time since the killings, these measures were as effective as they would have been in the initial phase of the proceedings. Moreover, it appears from his testimony that he was convinced at the outset that the PKK was responsible for the killings, which might offer an explanation for the fact that he decided to indict Ali and Orhan Ertaş before the State Security Court rather than referring the case to a court competent to try common crimes.

329. This appears to be supported by the fact that in the proceedings before the State Security Court, apart from Ali Ertaş, none of the other vital witnesses gave evidence to the court. Although the State Security Court was aware of the approximate whereabouts of the Önen sisters in Diyarbakır and had found it necessary to take further evidence from them, it does not appear from the evidence that any steps were taken to locate them in Diyarbakır. Also the attempts to take evidence from Orhan Ertaş have remained rather limited. In fact he only gave one statement in the course of the entire investigation and subsequent judicial proceedings. Moreover, it does not appear that the State Security Court found it necessary to pursue the attempts to locate him in order to secure his participation in the proceedings against him. For a person standing trial on suspicion of having been involved in the killing of three persons, this cannot be considered as a satisfactory course of action.

D. As regards Article 2 of the Convention

330. Article 2 of the Convention provides 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."

331. The applicant submits that her brother and parents were killed by Ali and Orhan Ertaş as a result of a planned action by Balpınar village guards to kill her brother Orhan, of which plan the commander of the local gendarme station possibly had prior knowledge. This commander, in refusing assistance and delaying the treatment of her seriously wounded mother, further failed to protect her mother's life.

332. The applicant further submits that the Government failed to comply with the procedural requirements of Article 2 of the Convention to provide an effective investigation into the circumstances of the killings. She submits that in the light of the evidence as a whole

serious questions arise not alone of inadequate professional behaviour in the criminal investigation, but of corruption of justice through attempts to cover up the involvement of the Balpınar village guards in the killings of the applicant's parents and brother, as well as the wounding of herself. The applicant claims that this cover up embraced the police, prosecutorial and judicial authorities and resulted in the denial of justice to her and her relatives.

333. Although the Government have not submitted their final observations, it is apparent from their submissions in this case that they deny the applicant's complaints under this provision of the Convention. They appear to rely on the proceedings conducted against Ali and Orhan Ertaş, as well as the apparently still ongoing investigation, as indicating that the investigation of the killings at issue was competently and efficiently handled and as showing that these killings could not have been committed by Ali and Orhan Ertaş but were in all probability the result of a settling of accounts between the applicant's brother and a prohibited terrorist organisation, whose actions are not only directed against the State but also against private individuals who act against the organisation's interests.

As regards State responsibility for the killing of the applicant's brother and parents

334. The Commission has found that the killings were the result of a premeditated plan to kill the applicant's brother, Orhan. However, for the reasons given above (paras. 289-291) it does not find it established to the requisite standard of proof beyond reasonable doubt that the killing of the applicant's brother, father or mother was carried out by agents of the State. Nor does the Commission find it established to the requisite standard of proof that the gendarme forces delayed medical treatment for the applicant's injured mother or failed to offer her any available assistance.

335. However, this does not exclude the responsibility of the Government under Article 2 of the Convention. The Commission has examined in addition whether the circumstances disclose any failure on the part of the Government to fulfil any positive obligation under Article 2 to protect the right to life.

336. The Commission recalls that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention, and together with Article 3 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe. It must be interpreted in light of the principle that the provisions of the Convention must be applied so as to make its safeguards practical and effective (Eur. Court HR, McCann and others judgment of 27 September 1995, Series A no. 324, pp. 45-46, paras. 146-47).

337. Article 2 extends to but is not exclusively concerned with killings caused by State agents. The mere fact that the authorities were informed of the killing of the applicant's brother and parents gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation (cf. Eur. Court HR, Yaşa v. Turkey judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, no. 88, p. 2438, para. 100).

338. As a minimum, a Contracting State is under an obligation to provide a framework of law which generally prohibits the taking of life and to ensure the necessary structures to

enforce these prohibitions, including the provision of a police force with responsibility for investigating and suppressing infringements. While it cannot be a requirement of Article 2 of the Convention that a State must necessarily succeed in locating and prosecuting perpetrators of fatal attacks, the case-law of the Convention organs has established a requirement that the investigation undertaken be effective:

"The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', 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 by, *inter alios*, agents of the State." (McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, para. 161; and Eur. Court HR, Kaya v. Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, no. 65, p. 324, para. 86).

339. The Commission accepts that the methods applied and the resources allocated for such investigation will to a large extent be based on policy decisions to be taken by the Contracting States. However, it considers that for such investigation to be effective, it must as a minimum involve an examination of the immediate factual circumstances of the killing, including the obtaining of relevant eye-witness testimony and forensic evidence.

340. Taking into consideration that, on the same evening, an armed attack on a nearby radio link installation took place, the Commission cannot find that there was an unacceptable lack of expedition in the gendarmes' response to the incident in Karataş. However, it might have been expected from the initial investigation team that it commenced the investigation by taking more concrete measures of investigation than those taken in the present case - which have remained limited to securing the scene of the crime and to passively await the arrival of the competent investigation authorities - such as to take photographs of the scene of the crime and to record the identities and initial statements of the persons found on the scene.

341. While taking into account the fact that the prevailing climate at the time in that area may to a certain degree have impeded the search for evidence, the Commission has found that the preliminary investigation conducted in the instant case cannot be regarded as satisfactory. It refers in this respect to its findings as regards the manner in which the preliminary investigation was conducted under the responsibility of the public prosecutor of Mazıdağı (paras. 310-317). The Commission does not exclude that the ideas of this public prosecutor about the identity of the perpetrators in fact determined his approach to the preliminary investigation in the present case.

342. As to the manner in which the public prosecutor at the State Security Court, Tanju Güvendiren, and the State Security Court of Diyarbakır dealt with the case, the Commission, recalling its findings as regards this part of the proceedings in the present case (paras. 324-325), considers that it appears that the suspicions against Ali and Orhan Ertaş were not taken very seriously by the authorities involved, in that there appears to have been an implicit conviction that the killings at issue were in fact linked with the PKK and not with the two accused. As in the preliminary investigation of these killings, this implicit conviction seems to have determined the approach taken by the judicial authorities in the trial at issue.

343. The Commission finds that the domestic investigation and subsequent judicial proceedings disclose a number of grave deficiencies, in particular in respect of the search of the scene of the crime, the taking of evidence from eye-witnesses in the initial phase, the attempts to obtain evidence from Orhan Ertaş, to verify the alibis of the accused and to secure the taking of evidence from vital witnesses in the proceedings before the State Security Court. On the basis of these findings, the Commission considers that it cannot be said that there has been an effective investigation for the purposes of Article 2 of the Convention.

CONCLUSION

344. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention.

E. As regards Article 3 of the Convention

345. The applicant further complains of a violation of Article 3 of the Convention, which provides as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

346. The applicant submits that the subjection of herself and her sibling to an armed attack in their home in the course of which they witnessed the killing of their parents and brother constitutes treatment contrary to Article 3 of the Convention.

347. According to the Government's submissions, the perpetrators of this attack and the resulting killings were members of the PKK and not any agent of the State.

348. The Commission recalls its findings above (para. 334). It observes that it has not been established that any State agent was implicated, directly or indirectly, in the attack on the applicant's family home in Karataş and in the resulting killing of her parents and brother.

CONCLUSION

349. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention.

F. As regards Articles 6 and 13 of the Convention

350. Article 6 of the Convention, insofar as relevant, reads as follows:

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

Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in this 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."

351. The applicant submits that there has been no effective investigation of the killings and no adequate prosecution of those against whom there is direct evidence of having committed the killings, which makes it impossible for the surviving family members to seek compensation in court proceedings, and that she has no effective remedies before a national

authority for the violation of the right to life and other fundamental Convention rights in South East Turkey.

352. Although the Government have not submitted any final observations, the Commission understands from their submissions that the Government submit that the investigation is still ongoing in order to establish the identities of the perpetrators of the killings, albeit to date without any tangible results.

353. The Commission considers, given that the applicant has not pursued a claim for compensation before the domestic courts, that it is not possible to determine whether these courts would have been able to adjudicate on her claims. It notes, however, that the applicant's complaint under Article 6 para. 1 of the Convention is inextricably bound up with her more general complaint concerning the manner in which the investigating authorities treated the killing of her parents and brother and the repercussions which this had on access to effective remedies. Therefore, the Commission will examine this complaint in relation to the more general obligation on Contracting States under Article 13 of the Convention.

354. The Commission recalls that Article 13 of the Convention guarantees the availability at a national level of a remedy to enforce the Convention rights and freedoms, as secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its existence must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. The nature of the right that is alleged to have been infringed has implications on the extent of the obligations under Article 13. Given the fundamental importance of the rights to protection of life, Article 13 of the Convention imposes, without prejudice to any other remedy available under the domestic system, including the payment of compensation where appropriate, an obligation on States to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and in which the complainant has effective access to the investigatory procedure. (*Yaşa v. Turkey* judgment, *op. cit.*, pp. 2441-2442, paras. 112 and 114).

355. In the present case, the Commission recalls its findings that there is no evidence which would allow any finding as to the identity of the perpetrators of the killings at issue to the requisite standard of proof beyond reasonable doubt (paras. 289-291). That does, however, not necessarily mean that the complaint under Article 2 is not arguable. The Convention organs' findings as to the merits do not relieve the State of the obligation to carry out an effective investigation into the substance of the complaint, which in the present case the Commission considers, in particular having regard to its findings as regards the applicant's complaint under Article 2 of the Convention (para. 334), was arguable for the purposes of Article 13 of the Convention.

356. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the killings. However, five years after those killings took place, the investigations have still not produced any results. Insofar as can be established on the basis of

the evidence submitted, it does not appear that, since the judgment of the State Security Court of 28 December 1994, any activities other than the sending of a regular report by the Mazıdağı District gendarmerie station to the office of the public prosecutor in Mazıdağı have in fact taken place in this investigation. Recalling its conclusion as regards the applicant's complaint under Article 2 of the Convention, the respondent State cannot be considered as having conducted an effective criminal investigation as required by Article 13, the requirements of which are stricter still than the investigatory obligation under Article 2 (*Yaşa v. Turkey* judgment, *op. cit.*, p. 2442, para. 115).

CONCLUSION

357. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention.

G. As regards Article 8 of the Convention

358. Article 8 of the Convention reads 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."

359. The applicant submits that the attack on her family home and the killing of her parents and brother constitutes an interference with the right to respect for the family life and home of herself and her siblings.

360. According to the Government's submissions, the attack and killings were committed by members of the PKK and not by any agents of the State.

361. The Commission recalls its findings above (para. 334) to the effect that, on the basis of the written and oral evidence before the Commission, it cannot be considered to have been established beyond reasonable doubt that any State agent was implicated, directly or indirectly, in the events at issue.

CONCLUSION

362. The Commission concludes, unanimously, that there has been no violation of Article 8 of the Convention.

H. As regards Article 14 of the Convention in conjunction with Articles 2, 3, 6, 8 and 13 of the Convention

363. Article 14 of the Convention reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

364. The applicant submits that because of the Kurdish origins of her and her family the various alleged violations of their Convention rights were discriminatory, in breach of Article 14 of the Convention.

365. The Government have not addressed this allegation beyond denying the factual basis of the substantive complaints.

366. The Commission has examined the applicant's allegations in the light of the evidence submitted to it, but considers them unsubstantiated.

CONCLUSION

367. The Commission concludes, unanimously, that there has been no violation of Article 14 in conjunction with Articles 2, 3, 6, 8 and 13 of the Convention.

I. Recapitulation

368. The Commission concludes, unanimously, that there has been a violation of Article 2 of the Convention (para. 344).

369. The Commission concludes, unanimously, that there has been no violation of Article 3 of the Convention (para. 349).

370. The Commission concludes, unanimously, that there has been a violation of Article 13 of the Convention (para. 357).

371. The Commission concludes, unanimously, that there has been no violation of Article 8 of the Convention (para. 362).

372. The Commission concludes, unanimously, that there has been no violation of Article 14 in conjunction with Articles 2, 3, 6, 8 and 13 of the Convention (para. 367).

M.-T. SCHOEPFER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

