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SECOND SECTION

CASE OF ŞEMSI ÖNEN v. TURKEY

(Application no. 22876/93)

JUDGMENT

STRASBOURG

14 May 2002

This judgment is final but it may be subject to editorial revision.
In the case of Şemsi Önen v. Turkey,
The European Court of Human Rights (Second Section), sitting as a Chamber composed of:
Mr J.-P. COSTA, President,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, judges,
Mr F. GÖLCÜKLÜ, AD HOC JUDGE,
and also of Mrs S. DOLLÉ, Section Registrar,
Having deliberated in private on 23 April 2002,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the European Commission of Human Rights ("the Commission") on 30 October 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48).

The case originated in an application (no. 22876/93) against the Republic of Turkey lodged with the Commission under former Article 25 of the Convention by a Turkish national, Ms Şemsi Önen ("the applicant"), on 15 September 1993 who stated that she brought the application also on behalf of her deceased parents, her deceased brother Orhan and ten other surviving siblings.

2. The applicant alleged violations of Articles 2, 3, 8, 6, 13 and 14 of the Convention on account of the attack on her family home and the killing of her brother and parents on 16 March 1993, and the lack of an effective investigation into the circumstances of the event.

3. The Commission declared the application admissible on 15 May 1995. In its report of 10 September 1999 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been violations of Articles 2 and 13 of the Convention on the ground of the lack of an effective investigation, but that there had been no violation of the Convention with respect to the remainder of the applicant's complaints.

4. The applicant, who had been granted legal aid, was until 7 March 2000 represented by Professor Kevin Boyle and Professor Françoise Hampson, both barristers and university teachers at the University of Essex (United Kingdom). Thereafter, the applicant was represented by Mr Philip Leach, Legal Director of the Kurdish Human Rights Project, London, assisted by Mr Timothy Otty, counsel. The Turkish Government ("the Government") were represented by their Agent.

5. On 6 and 8 December 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be

examined by one of its Sections. It was, thereupon, allocated to the Second Section. Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided for in Rule 26 § 1. It included ex officio Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court), who later withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as an ad hoc judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1).
6. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the Government's and the applicant's memorials on 11 May and 2 June 2000 respectively.
7. On 29 June 2000, after consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 in fine). The parties were invited to reply in writing to each other's memorials. On 17 July 2000 the applicant submitted further observations commenting on the Government's submissions. On the same date the Government filed their observations on the applicant's Article 41 claim.
8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).
THE FACTS
I. THE CIRCUMSTANCES OF THE CASE
9. The applicant, Ms Şemsi Önen, is a Turkish citizen, born in 1968. At the relevant time, she lived in the village Karataş near Mazıdağı (Mardin) in south-east Turkey. The application was brought by the applicant on behalf of her deceased parents and brother, on her own behalf and on behalf of her ten suriving siblings, namely Mekiye, Ishan, Ercan, Mehmet Nuri, Medine, Sultan, Sevgi, Iskender, Melek and Hamdullah. It concerns the killing of their parents and brother Orhan, allegedly by armed members of the Balpınar village guards, and the investigation thereof.
10. Since the 1980s, 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 was the killing of people who have acted contrary to the cause of this organisation or who have misused property of the PKK. At the time of the events in issue, ten of the eleven provinces of south-east Turkey had been under emergency rule since 1987.
11. The facts of the case, in particular the circumstances of the killings and the efforts of the authorities to investigate the killings, are disputed.
A. The applicant's version of the facts
12. As the village of Karataş, where the applicant and her family lived at the time of the events in issue, had refused the village guard system, tension had arisen between Karataş and its neighbouring village Balpınar. This refusal had also resulted in pressure being applied to the villagers by the gendarmes.
13. 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 several hours. The following day, the Muhtar of Karataş complained to the Governor that his village was being subjected to pressure and

violence from the gendarmes and village guards. No investigation of the attack took place.
14. Some weeks before 16 March 1993 the house of the Muhtar and the applicant's family house were both strafed by several rounds of bullets fired by Balpınar village guards. The Muhtar again complained to the Governor about the pressure exerted on his village by the Balpınar village guards and requested that steps be taken to put an end to it.
15. In the evening of 16 March 1993 the applicant's older brother, Orhan Önen, and her parents, Ibrahim and Mome Önen, were killed and the applicant suffered a wound to her foot as a result of a planned action by members of the Balpınar village guards to kill Orhan Önen. Before he was shot and killed, the applicant's father was able to pull the scarf from the head of one of the intruders and shouted that he recognised the 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 by a bullet, died on her way to hospital.
16. The Commander of the local Fosfat gendarme station, who had possibly been informed beforehand of the plan by the Balpınar village guards to kill Orhan Önen, seriously delayed the applicant's mother's access to medical treatment by refusing to provide a car to replace the defective minibus which was to transport her to a hospital and by unduly delaying the departure of this minibus for Mazıdağı.
17. 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. 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.
B. The Government's version of the facts
18. 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.
19. 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 wounded. An investigation into the clash was carried out. The Fosfat gendarme station commander, Salih Kaygusuz, took statements from the five surviving village guards during the course of the investigation. To date, the perpetrators of this attack have not been identified.
20. On 16 March 1993 at about 20.15 hours an armed PKK attack using rocket missiles and heavy weapons was carried out on a PTT radio link station in Mazıdağı-Kaletepe, at a distance of 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 leading 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.
21. 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. He conducted an investigation, including attendance at the post mortem examination of the bodies of the victims carried out by a medical doctor.
22. All necessary steps were taken to investigate the killing of the applicant's parents and brother, including the collection of evidence. 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 Diyarbakır State Security Court.
On 6 May 1994, in the context of these proceedings and on the instructions of the Diyarbakır State Security Court, 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.
23. On 28 December 1994 the Diyarbakır State Security Court acquitted Ali and Orhan Ertaş for lack of evidence. After this decision the investigation nevertheless continued but the perpetrators of the killing of the applicant's parents and brother have not been found.
24. The Government submitted that it appeared from information obtained that the PKK had provided the applicant's brother Orhan with a taxi, which he had put to his own private use. He had thus made his family a target of the PKK, a terrorist organisation which was in all likelihood responsible for the killing of the applicant's parents and brother.
C. Proceedings before the domestic authorities
1. Preliminary investigation
25. On 16 March 1993 an incident report was drawn up by the gendarmes of the Mazıdağı District gendarme station stating that at around 21.30 hours that day, 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 Şemsi Önen were injured and Mome Önen died on the way to hospital. The report also referred to nine empty Kalashnikov cartridges without further specifications.
On the same date NCO Salih Kaygusuz of the Fosfat Gendarme Station drew a sketch map of the interior of the Önen family's two-room house. It indicated 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 was indicated. No blood stains were recorded in the room where the body of Orhan Önen was indicated. The sketch map only recorded what had been found inside the house. It did not contain any information about the immediate surroundings of the house.
26. According to a post mortem examination report dated 17 March 1993, 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. The bodies of Ibrahim, Mome and Orhan Önen had been identified by a relative, Mehmet Hadi Araç. The examination report contained information on bullet - entries and exits and concluded that the respective causes of death were haemorrhaging of the lungs, loss of blood and cessation of vital functions. Given the obvious nature of the cause of death, it was decided that there was no need to conduct an autopsy.

27. On 1 and 5 April 1993 statements were taken from the applicant and her sister Mekiye by the Fosfat gendarme station commander, Salih Kaygusuz, and by gendarme officer Cengiz Kesler of the Mazıdağı district gendarme station.

On 4 April 1993 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 that he had 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.

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 onto 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.

28. Between 7 April and 17 May 1993 a ballistics examination was carried out. According to a ballistics report of 29 April 1993 of the forensic laboratory in Diyarbakır, the nine empty 7.62 mm calibre Kalashnikov cartridges found at the scene of the killing 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. In a report of 17 May 1993, transmitted to the Mazıdağı prosecutor, the forensic laboratory in Diyarbakır concluded that none of the nine cartridges found at the scene of the killings matched 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.

29. On 7 July 1993 the Mazıdağı public prosecutor Yekta Çobanoğlu, decided that he lacked jurisdiction to deal with the case. The decision listed Ali and Orhan Ertaş as being suspected of the offence of “politically motivated murder” of the applicant's parents and brother. It noted 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.

2. Proceedings before the State Security Court

30. On 13 September 1993, following referral of the prosecution's case file to the prosecutor at the Diyarbakır State Security Court, the prosecutor at this court, Tanju Güvendiren, took certain additional measures with respect to the ballistics examination. He enquired as to why only five empty cartridge shells had been sent for examination, whereas six such cartridges taken from Kalashnikov weapons owned by six village guards had been required for a comparison. He further instructed the gendarmerie to provide him with a list of the Karataş village guards as well as the Kalashnikov delivery receipts of these village guards and 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. In the event of there being insufficient replacement rifles, he instructed that these rifles be discharged and the empty cartridges numbered in order to identify which cartridge was fired from which weapon and to send these cartridges to the forensic laboratory for a ballistics examination.

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. No information was provided as to the circumstances of the firing of the weapons. On 27 October 1994 the Regional Criminal Police Laboratory in Diyarbakır submitted to the State Security Court a ballistics examination report which concluded that none of the sixty-five empty 7.62 mm Kalashnikov cartridges matched the nine cartridges found at the place where the applicant's parents and brother had been shot.

31. On 6 January 1994 prosecutor Tanju Güvendiren charged Ali and Orhan Ertaş with politically motivated murder of the applicant's parents and brother Orhan, under Articles 31, 33 and 448 of the Turkish Penal Code and Article 13/2 of the Law No. 6136.

On 21 January 1994 the State Security Court instructed the Mazıdağı Court of First Instance, inter alia, to take statements from Ali and Orhan Ertaş, Mecit Kaya and Mahmut Denli, and to take evidence from Şemsi and Mekiye Önen. It adjourned its further examination until 16 March 1994. On that date it 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.

Pending the implementation of its above-mentioned orders for the hearing of witnesses and a request for the preparation of a further forensic laboratory report, the State Security Court adjourned the proceedings several times, on the last occasion until 28 December 1994.

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

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 left Balpınar some time ago, that he was unaware of Orhan's whereabouts and, 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. On 29 June 1994 the State Security Court noted that no statements had been taken from the applicant and her sister Mekiye as their address could not be established.

33. On 28 December 1994 the State Security Court tried the case in the absence of the defendants as well as of the applicant and her sister. The prosecution submitted that the applicant and her sister had only heard their father state the names of the accused but that 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 acquitted. By judgment of 28 December 1994 the State Security Court unanimously acquitted Ali and Orhan Ertaş of the charges against them.

E. The Commission's findings of fact

34. Since the facts of the case are disputed, particularly concerning the circumstances of the killings and the adequacy of the follow-up investigation, the Commission conducted an investigation with the assistance of the parties. The Commission obtained documentary evidence, including written statements. The oral evidence of the applicant and 12 witnesses was heard by three Delegates at a hearing in Ankara on 30 March and 1 and 2 April 1998.

35. As regards written evidence, the Commission had particular regard to the statements of both the applicant and his sister Mekiye Önen of 1 and 5 April 1993 (taken by the Fosfat gendarme station commander Salih Kaygusuz and by gendarme officer Cengiz Kesler of the Mazıdağı district gendarme station); a statement by the applicant of 9 June 1993 (taken by Mr Yekta Çobanoğlu, the public prosecutor of Mazıdağı); an undated statement taken by Mr Sedat Aslantaş of the Diyarbakır Branch of the Human Rights Association (submitted to the Commission on 18 October 1993); a statement by the applicant's sister of 6 July 1993 (taken by Yekta Çobanoğlu); statements by village guards Ali Ertaş and Mecit Kaya taken on 4 and 5 April 1993 (at Fosfat gendarme station by Salih Kaygusuz); a statement by Mahmut Denli (taken on 5 April 1993 by gendarme Cengiz Kesler at the Mazıdağı District gendarme station); a statement of 6 July 1993 of Ali Ertaş (taken by Yekta Çobanoğlu); 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.

The Commission also had regard to an incident report and a sketch map, both dated 16 March 1993; an ambulance record of 16 March 1993; a post mortem examination report dated 17 March 1993; correspondence of the Mazıdağı public prosecutor; forensic ballistics inquiries and examinations; Yekta Çobanoğlu's decision of lack of jurisdiction dated 7 July 1993 and a number of minutes of the proceedings before the State Security Court; as well as other documents.

The latter included gendarme reports and statements related to the investigation of the attack on Balpınar village guards on 15 November

1992, according to which 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.
Account was also taken of letters of various dates between 30 June 1995 and 25 March 1998, from the Commander of the Mazıdağı District gendarme station 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 one sent on 25 March 1998, stated that the investigation of the matter was still ongoing.
36. The oral evidence included statements by the applicant herself, Mekiye Önen, Ercan Önen, Muhittin Araç, Tahir Önen, Mehmet Hadi Araç, Salih Kaygusuz, Mahmut Denli, Mecit Kaya, Yekta Çobanoğlu, Sedat İşçi, Cengiz Kesler and Tanju Güvendiren.
37. The verbatim record of the hearing held on 30 March 1998 contained the following passages of relevance to the Government's preliminary objection as to the authenticity of the application (see paragraph 71 below):
“Mr RESS: Did you make two statements at the station, and did you sign them?

Miss Şemsi ÖNEN: Yes. I went there a few times. They asked me questions. I answered them. They wrote them down. I put my fingerprint as I don't know how to write. But I don't know what they wrote. I answered the questions just as I'm doing here now. My brother was with me. I put my fingerprint to the statements.

Mr. RESS: Since you cannot read, I will only show you your fingerprint, and you will say whether it's yours or not.

A document is shown to the applicant.

Miss Şemsi ÖNEN: Yes, it's mine. That's how I put my fingerprint.”

38. In relation to the oral evidence, the Commission was aware of the difficulties in assessing evidence obtained orally through interpreters: it therefore paid careful attention to the meaning and significance to be attributed to the statements made by the witnesses appearing before its Delegates. The Commission was aware that the cultural context of the applicant and witnesses rendered it inevitable that there would be a certain degree of imprecision with regard to dates and other details. However it did not consider that this by itself detracted from the credibility of the testimony.
In a case where there were contradictory and conflicting factual accounts of events, the Commission was acutely aware of its own limitations as a first instance tribunal of fact. The problems of language were adverted to above; there was also an inevitable lack of detailed and direct familiarity

with the conditions in the region. In addition, the Commission had 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 failed to submit certain relevant documents. The Commission was therefore faced with the difficult task of determining events on the basis of incomplete evidence.

The Commission's findings can be summarised as follows.

1. General background

39. The villages of Balpınar and Karataş were situated in an area which was subjected to significant PKK activity in the early 1990's. It was 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.

The inhabitants of Karataş, Balpınar and about forty other villages belonged to the “Metina” clan. It appeared 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 pressure was exerted to join the village guard system. A number of witnesses stated that the refusal of Karataş to join the village guard system had resulted in tension between Karataş and Balpınar. Other witnesses denied such tension. The public prosecutor at Mazıdağı confirmed that he had heard rumours that the inhabitants of Karataş opposed the Turkish State and, therefore, the village guards were their enemies. 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 gendarme station.

40. Although it could not make any definite findings on this point, the Commission did not consider it to be implausible that Karataş' refusal to join the village guard system during a period of significant PKK activity in the area, had resulted in tension between the village guards of Balpınar and the inhabitants of Karataş.

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

41. The Commission was satisfied from the evidence given by the applicant and her sister, that in the evening of 16 March 1993 after having introduced 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. One of the men immediately shot and killed their brother Orhan. 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. There was no reason to doubt that both the applicant and her sister heard their father call out the names of the two perpetrators whom he had recognised as Ali and Orhan Ertaş from Balpınar.

The killings in question were the result of a premeditated plan to kill the applicant's brother. As to the possible motive for the killing it could not be excluded that there were tensions between the inhabitants of Karataş and the Balpınar village guards at the relevant time which had already resulted in armed attacks on houses in Karataş. Nor could it be excluded that Orhan Önen may have been a particular target 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 had not only remained unsubstantiated but was, moreover, contradicted by substantial evidence submitted by the applicant.

42. As to the circumstances of the killing itself, the Commission found 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, 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 was at least open to question. In addition, the suspicion of the involvement of Balpınar village guards was reinforced by the identification of Ali and Orhan Ertaş by the applicant and her sister at the Mazıdağı gendarme station. Nevertheless, while the evidence was sufficient to give rise to suspicion as to the identity of the killers, it had not 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.

In this connection, the Commission noted that the applicant had given the Delegates a description of the two men: the one who shot her brother Orhan and her mother had been 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. Her sister, Mekiye, confirmed that the man who shot Orhan had hazel eyes but stated that she had not seen the second intruder. The applicant had further given evidence that, on 5 April 1993, when she subsequently attended the Mazıdağı gendarme station, she saw Ali and Orhan Ertaş and recognised them as the same two men. This was confirmed by Mekiye in that, on the same occasion, she had recognised Orhan Ertaş as one of the killers from his height, build, hazel eyes, nose and complexion.

The Commission considered that this evidence should be treated with caution. In the circumstances of the sudden and traumatic events of that night, it was 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 appeared only fleetingly to have seen her brother's killer, whose face had been masked with a scarf. The Commission noted 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.

As to the evidence of the subsequent identification of these two men, the Commission found no reason to doubt that the applicant and her sister did see Ali and Orhan Ertaş at the Mazıdağı gendarme station on 5 April 1993. What was, however, more doubtful was 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.

43. Finally, it had not been established that Salih Kaygusuz, the Commander of the Fosfat gendarme station, had considerably delayed the provision of medical treatment to the applicant's injured mother or that the gendarme forces failed to offer her available assistance. In this connection, the Commission had regard to its findings as regards the time

of the armed attack and the moment at which the applicant's mother received medical care in Mazıdağı.

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

44. From the evidence of Salih Kaygusuz it appeared that, after the minibus transporting 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 to Karataş 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, he and one gendarme team went to Karataş. They arrived sometime after midnight and found the bodies of the three victims inside the applicant's house.

45. Although the local gendarmes only arrived in Karataş at least three hours after the killings occurred, the Commission accepted that this delay had been caused by the fact that on the same evening an armed attack on a nearby radio link installation had taken place. However, once 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.

46. 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 merely awaited the arrival of the prosecutor since they had not been ordered to take any investigative steps.

47. 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.

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. No photographs of the scene of the killings were taken by or on behalf of the investigation team.

48. The information recorded on the sketch map of the scene of the killings appeared to be incomplete. In contrast to a remark in the post mortem body examination report and the testimony of Dr. Sedat İşçi, the sketch map did not indicate a large blood stain on the spot where the body of Orhan Önen had been 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, this fact had not been recorded on the sketch map. Although the Commission accepted 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 could not 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 about the immediate surroundings.

49. The Commission noted 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 found 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 that not a single bullet had been found in that room. Furthermore, although there was strong evidence suggesting that the applicant's father had been shot and killed outside the house, the sketch map only contained information on what had been found inside the house. Although this was denied by Salih Kaygusuz, the Commission could not exclude that more than the nine recorded empty cartridges were in fact found and collected, including empty cartridges found outside the house.
50. 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's from them or any of the other inhabitants of Karataş on that day.
51. As early as 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. 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.
52. It was only on 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 gendarme 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. According to Salih Kaygusuz, this was the first time that he heard the allegation that Ali and Orhan Ertaş had committed the killings.
53. 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. 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. The Commission further noted that its case-file did not contain any statement given by any of these three persons at the Fosfat gendarme station.
54. The Commission further found 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 found no support for the asserted

provisional nature of this suspicion. In fact, it appeared from the contents of his written communications of 17 March 1993 that he had firm ideas about the identity of the perpetrators. 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.

55. As regards the encounter on 5 April 1993 between the applicant and her sister and Ali and Orhan Ertaş in the Mazıdağı District gendarme station, the Commission found that it could not be excluded that this encounter was in fact the result of a coincidence since Yekta Çobanoğlu had not ordered a confrontation. It did not appear from the evidence that the applicant and her sister had been invited by the investigation authorities to identify the perpetrators either from a collection of photographs or at an identity parade. The Commission found that no photographs of Ali and Orhan Ertaş had ever been shown to the applicant and her sister and that at no point in time had a formal confrontation been ordered.

The Commission further noted 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 did it seem that any attempt had 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. It did 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.

As regards the alibi advanced by Ali Ertaş, the Commission noted 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 had stated to the Commission's Delegates that he had not in fact 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 found 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 in Diyarbakır

56. After having received the case-file, Tanju Güvendiren, 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 at the State Security Court. This letter contained no information as to when and in which manner these cartridges were obtained.

Although Tanju Güvendiren considered that there was no concrete evidence in support of the accusations made against Ali and Orhan Ertaş

and was convinced that the PKK was responsible for the killings, he nevertheless brought proceedings against Ali and Orhan Ertaş on charges of politically motivated murder and indicted them on 6 January 1994 before the State Security Court, which had jurisdiction to determine murder charges linked to terrorism. 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.

In the subsequent proceedings before it, the State Security Court in Diyarbakır 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. They were all summoned to appear on 6 May 1994 before a judge of the Mazıdağı Court of First Instance in order to give statements, but only Ali Ertaş, Mecit Kaya and Mahmut Denli in fact did so. As the whereabouts of Orhan Ertaş, the applicant and her sister were not established, their summonses were returned to the State Security Court and, consequently, no further statements were taken from them.

The Commission noted 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 did not appear that any attempts were made or ordered to locate them. Nor did it seem that any further attempts were made or ordered to find Orhan Ertaş. The Commission noted 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 a document dated 4 May 1994 by stating that it had been normal practice in the area for gendarmes to require Muhtars to sign blank documents for future use. No further clarification on this point could be obtained from Salih Kaygusuz, as he had left the Fosfat gendarme station in August 1993. In these circumstances, it was impossible for the Commission to make any findings in this respect. What was clear, however, was that the State Security Court was informed that the applicant and her sister were residing at that time in the Cezaevi neighbourhood of Diyarbakır. In this connection, the Commission had also regard to the evidence of the applicant's brother that, since their departure from Karataş and to date, the Önen family had always lived at the same address in Diyarbakır.

57. The Commission accepted that the supplementary investigation measures ordered by the public prosecutor at the State Security Court, Tanju Güvendiren, in order to mend certain deficiencies in the preliminary investigation, were appropriate, although it was open to doubt whether, given the passage of time since the killings, these measures were as effective as they might have been in the initial phase of the proceedings. Moreover, he testified that he was convinced at the outset that the PKK was responsible for the killings, which might explain why 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. This was supported by the fact that, apart from Ali Ertaş, none of the other vital witnesses gave evidence to the State Security Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

58. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

59. Under the Turkish Criminal Code (TPC) all forms of homicide (Articles 448 to 455) and attempted homicide (Articles 61 and 62) constitute criminal offences. The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutor's offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

By Article 235 of the Criminal Code, 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 is liable to imprisonment.

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 in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

60. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of State Security prosecutors and courts established throughout Turkey.

61. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction ratione personae at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the Council. If a decision not to prosecute is taken, the case is automatically referred to that court.

62. By virtue of Article 4, paragraph (i), of Legislative Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 61 above) also applies to members of the security forces who come under the governor's authority.

63. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a “military offence” under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 59 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

64. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.
65. Article 125 §§ 1 and 7 of the Constitution provides:
“All acts or decisions of the authorities are subject to judicial review ... The authorities shall be liable to make reparation for all damage caused by their acts or measures.”
66. That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.
67. Article 8 of Legislative Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 66 above), provides:
“No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification.”
68. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).
However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an “administrative act” or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).
THE LAW
I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS
69. By way of a “preliminary observation” the Government questioned the authenticity of the application. Moreover, they raised a preliminary objection to the Court's jurisdiction, arguing that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.
70. The Court recalls that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in

substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see the Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994 Series A no. 301-B, p. 77, § 32).

A. The alleged lack of authenticity of the application

71. The Government, referring to the records of the oral witness statements during the hearing before the Commission Delegates, pointed out, firstly, that the applicant did not recall having signed her “statement” and her application; she affirmed, only vaguely, that she had put her fingerprint “somewhere”. Secondly, the Muhtar, Muittin Arac, had categorically denied having signed his “statement” and did not recognise the signature shown to him by the Delegates as being his.

72. The applicant objected to the Government's suggestion that her application was insincere. She invoked the Commission's general finding as to the honesty and sincerity of her witnesses and to her proven wish to obtain justice. Being unable to write, she could not be criticised for authenticating her statements by means of a fingerprint. The Muhtar had been quite clear in his evidence that he had been to the Human Rights Association to make a statement, which was not contradicted by the fact that someone may have written his name at the end of a record of the statement he gave.

73. The Court observes that this point was not raised at the admissibility stage, nor even at the merits stage, before the Commission. It is in any event unsubstantiated and, moreover, contradicted by oral evidence before the Commission Delegates and calls for no further examination by the Court, which dismisses the Government's objection.

B. The alleged failure of the applicant to exhaust domestic remedies

74. The Government reiterated their request made at the admissibility stage of the procedure before the Commission that the application be declared inadmissible on grounds of failure by the applicant to exhaust domestic remedies, as required under Article 35 § 1 of the Convention. Firstly, they argued that there were ongoing criminal proceedings before the State Security Court in which the two alleged assailants were indicted in relation to the killing of the applicant's parents and brother. In these proceedings, the applicant could intervene and, in the event of an acquittal, appeal to the High Court of Appeals. Secondly, the applicant had the possibility of instituting compensation proceedings before the civil courts against the alleged wrongdoers. The Government invited the Court to apply in this case the approach which it had taken in the case of Aytekin v. Turkey (judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, pp. 2825-29, §§ 77-86), where it upheld the respondent Government's preliminary objection of non-exhaustion of domestic remedies.

75. The applicant maintained that there was no requirement that she pursue domestic remedies. Any purported remedy was illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. She referred to an administrative practice of not respecting the requirement under the Convention to provide effective domestic remedies.

The applicant further disputed the Government's argument that her application was to be rejected on the basis of the approach followed by the Court in its Aytekin v. Turkey judgment. In that case, the applicant

had been fully aware of, and had participated in, the relevant criminal proceedings, including at the appellate level, which had resulted in the conviction of an individual for unintentional homicide. In contrast, in the present case the applicant had not been informed of the commencement or progress of the domestic proceedings and no adequate attempts had been made by the authorities to locate her; the two accused had been acquitted and one of them never in fact appeared before the competent national court.

76. The Commission, in its decision declaring the application admissible, observed that it did not deem it necessary to determine whether there existed an administrative practice on the part of the Turkish authorities of tolerating abuses of human rights of the kind alleged by the applicant, because it agreed with her that it had not been established that she had at her disposal adequate remedies to deal effectively with her complaints. Despite the Commission's request for information on the progress of the criminal proceedings in question, no further clarification had been received. In the absence of any apparent progress in those proceedings and in view of the delays involved and the serious nature of the crimes alleged, the Commission was not satisfied that the proceedings could be considered as furnishing an effective remedy for the purposes of (former) Article 26 of the Convention. It also found it curious that the village guards accused by the applicant had been subject to an indictment whereas the Government alleged that the forensic and other evidence exonerated them of the accusations and suggested that the PKK might be responsible for the attack.

77. The Court notes that since the Commission's decision on admissibility, more detailed information has come to light concerning the domestic proceedings in issue. The Court, for the reasons given, agrees with the applicant that the circumstances of the present case are distinguishable from those of the Aytekin v. Turkey case. However, it considers that the Government's preliminary objection raises issues that are closely linked to those raised by the applicant's complaints under Articles 2 and 13 of the Convention about the lack of an effective investigation into the factual circumstances of the attack and killing. Consequently, the Court joins the preliminary objection concerning the availability and effectiveness of remedies in criminal and civil law to the merits.

II. THE MERITS OF THE APPLCIANT'S COMPLAINTS

A. Alleged violation of Article 2 of the Convention

78. The applicant alleged that her parents and brother had been deliberately killed on 16 March 1993 by village guards without justification, in breach of Article 2 of the Convention. Moreover, the authorities' failure to investigate the circumstances surrounding her parents' and brother's deaths further violated this provision. Article 2 of the Convention reads:

“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."

79. The Government contested both of these allegations. The Commission did not find the first allegation established but accepted the second.

1. Arguments submitted in the proceedings before the Court

(a) The Commission

80. The Commission found that the killings were the result of a premeditated plan to kill the applicant's brother, Orhan. However, on the evidence before it, the Commission did not find it established to the requisite standard of proof beyond reasonable doubt that the killing of the applicant's brother, father or mother had been carried out by agents of the State. Nor did it find it established to the same standard of proof that the gendarme forces had delayed the provision of medical treatment to the applicant's injured mother or failed to offer her all available assistance.

However, the Commission found that the domestic investigation and subsequent judicial proceedings disclosed 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 considered that it could not be said that there had been an effective investigation for the purposes of Article 2 of the Convention. There had accordingly been a violation of this provision.

(b) The applicant

81. The applicant alleged that the killing of her brother Orhan and her parents had been the result of a planned action by members of the Balpınar village guards to kill Orhan and that the actual perpetrators were Ali Ertaş, chief of the Balpınar village guards, and his relative Orhan Ertaş. The applicant argued that there was substantial evidence to point to a motive on the part of the Balpınar village guards to kill Orhan Önen. The perpetrators of the attack had been wearing uniforms of the kind worn by village guards. Immediately before his death, the applicant's father had cried out that his assailants were Ali and Orhan Ertaş. Similar allegations had been made by Mome Önen at the time of the attack. The Government had offered no explanation as to why they would make false allegations against Ali and Orhan Ertaş. Upon meeting the latter at the Mazidag Gendarme station both Şemsi and Mekyie Önen recognised them as the perpetrators of the attack. The discrepancies in the witness evidence alluded to by the Commission were either non-existent or immaterial or had been given excessive weight. Faced with these serious allegations, it was remarkable that the Government failed to ensure that Ali Ertaş gave evidence before the Commission Delegates although he was still in the village, or even to offer any explanation as to why they did not do so. It would thus be appropriate for the Court to draw adverse inferences from the non-attendance of Ali Ertaş at the hearing.

82. Furthermore, the applicant requested the Court to confirm the Commission's finding that there was no adequate and effective investigation into the killing of her brother and parents.

(c) The Government

83. The Government agreed with the Commission's conclusion that the deaths of the applicant's parents and brother were not directly or indirectly imputable to acts of the Turkish authorities and requested the Court to uphold the Commission's findings.
84. The Government further disputed that the witness statements obtained by the Commission showed beyond reasonable doubt that the Turkish authorities had failed to carry out an adequate and effective investigation. The statements taken from members of the applicant's family and persons close to the family were riddled with inconsistencies and contradictions if considered together or, even worse, on their own. These inconsistencies concerned such matters as the number of assailants, their physical characteristics, the date on which the applicant and her sister had gone to the gendarmes or the prosecutor, the existence, or absence rather, of any denunciation on their part of the killings when they appeared before the competent authorities. Neither the applicant nor her sister, who were the only eye witnesses, were able to read or write or speak Turkish and had both led withdrawn lives. At the hearing the applicant revealed that she had little notion of time, space and distance.
The Government submitted that all necessary steps had been taken to investigate the killing of the applicant's parents and brother. In reaching the contrary conclusion, the Commission failed to take into account the investigation as a whole. While considering as appropriate the investigation ordered by the prosecutor before the State Security Court, the Commission had found the preliminary investigation deficient. In doing so, it ignored important aspects of the case, notably the climate of terror that prevailed at the relevant time and place and, notwithstanding this fact, one hour after the incident the gendarmes arrived at the Önen family home in order to protect the family against further attacks and to await the prosecutor, who arrived at 8 a.m. next morning together with a doctor. The Government further referred to the various other steps taken to investigate the case (see paragraphs 22-32 above). They emphasised that the prosecutor had to wait for months until he could obtain a witness statement from the applicant. This statement had been obtained thanks to the assistance of the police as the applicant had failed to answer repeated summonses.
2. The Court's assessment
(a) As to the killing of the applicant's brother and parents
85. The Court notes that, while it is undisputed that the killings in question were the result of a premeditated plan to kill the applicant's brother, there are contradictory versions as to the motive and the circumstances that led to the killings. While the applicant maintained that the killing had its background in tension between the inhabitants of Karataş and the Balpınar village guards which had resulted in previous armed attacks on houses in Karataş, the Government maintained that the PKK had a motive for killing Orhan Önen because the PKK had provided him with a vehicle which he had used for his own benefit rather than for the performance of services required by the PKK.
As regards the motive for the killing, the Commission could not exclude the possibility that there were such tensions as described by the applicant, nor that Orhan Önen may have been a particular target because of his suspected involvement in the PKK killing of village guards from Balpınar. However, the Commission considered the Government's version

unsubstantiated and contradicted by substantial evidence. Moreover, as to the circumstances of the killing itself, the Commission found it established that the killers had introduced themselves as soldiers being 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. In addition, the suspicion of the involvement of Balpınar village guards was reinforced by the identification of Ali and Orhan Ertaş by the applicant and her sister at the Mazıdağı gendarme station. Nevertheless, although the evidence was sufficient to give rise to suspicion as to the identity of the killers, the Commission did not find that it had 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.

86. The Court observes that, in so far as the applicant disputed the Commission's assessment of the evidence, she argued that it had attached excessive weight to certain discrepancies in the testimonies and, above all, it had failed to draw inferences from the Government's failure to secure Ali Ertaş' appearance before the Delegates and to explain his non-appearance. However, having regard to the Commission's fact-finding and to its own careful examination of the evidence, the Court considers that there are legitimate grounds for questioning the identity of the perpetrators of the killings. It does not find any exceptional circumstances compelling it to reach a different conclusion from that of the Commission which had the primary task of establishment and verification of the facts (former Articles 28 § 1 and 31 of the Convention). Accordingly, the Court too considers that there is an insufficient evidentiary basis on which to conclude that the applicant's brother and parents were, beyond reasonable doubt, killed by agents of the State in the circumstances alleged by the applicant.

Finally, like the Commission, the Court does not find it established that the gendarme forces delayed the provision of medical treatment to the applicant's injured mother or failed to offer her all available assistance, which matter was, moreover, not pursued before the Court.

(b) As to the alleged inadequacy of the investigation

87. The Court recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to “secure to everyone within [its] 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 alia, agents of the State (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161; and also the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, pp. 322, 324, §§ 78, 86). This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.

88. As regards the preliminary investigation, the Court considers that the investigation conducted on 17 March 1993 at the scene of the killings

after the arrival of the investigation team from Mazıdağı could not be regarded as complete or satisfactory, for the following reasons.
The scope of the sketch map was too limited in that it was confined to the inside of the house, containing no information as to the immediate surroundings. Moreover, it failed to record the exact number of empty cartridges found and their location. These shortcomings were compounded by the fact that the empty cartridges found had not been numbered individually. The importance of this omission was highlighted by the findings in the subsequent ballistics examination of the empty cartridges, namely that these had been fired from three different weapons. In addition, at the relevant time, the taking of photographs of the scene of a crime apparently did not form part of standard procedure in the initial phase of a criminal investigation.
The Court is further struck by the fact that, although investigator Yekta Çobanoğlu had been aware that two eye-witnesses to the killings, namely the applicant and her sister Mekiye, had been 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. It was only on 1 April 1993 - more than two weeks later - that the authorities became aware of the names allegedly uttered by the applicant's father before he died.
Nor does it appear that any photographs of Ali and Orhan Ertaş had ever been shown to the applicant and her sister or that a formal confrontation had been ordered beyond the incidental meeting on 5 April 1993 between the applicant and her sister and Ali and Orhan Ertaş in the Mazıdağı District gendarme station.
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 or to verify his alibi by, for instance, checking his whereabouts on 16 and 17 March 1993.
The alibi advanced by Ali Ertaş, namely his alleged presence on Kırmızıtepe hill at the time of the killings, was in fact only supported by the statements of Mecit Kaya and Mahmut Denli, though the latter had not in fact been in the presence of Ali Ertaş at the time of the killings, but had only seen him shortly afterwards. No evidence was taken from the other village guards who were on duty in the same team as Ali Ertaş in order to verify the respective position of each team member on Kırmızıtepe hill that evening.
Thus, rather than carrying out a serious and effective investigation in the preliminary phase, the competent authorities appear to have proceeded on the assumption that it was the PKK, not the State security forces/Gendarmes, who were responsible for the killings.
89. Similar criticism could also be made about the subsequent investigation before the State Security Court. The Government's argument that the Commission was satisfied with this phase of the investigation is misleading. It is true that the public prosecutor in charge, Tanju Güvendiren, had taken various measures that were deemed appropriate by the Commission, namely enquiries and orders for an additional investigation with respect to the ballistics examination, but it does not appear that any further statements were sought or that the arrest or pre-trial detention of the accused, Ali and Orhan Ertaş, were ordered, despite the fact that proceedings were brought against them on charges of politically motivated murder and that they were indicted on 6 January 1994 before the State Security Court.

90. Finally, as regards the proceedings before the State Security Court, it should be noted that Ali and Orhan Ertaş, the applicant and her sister Mekiye, and Mecit Kaya and Mahmut Denli had been summoned to give statements to a judge on 6 May 1994 but that only the first and the latter two did so. As the whereabouts of Orhan Ertaş, the applicant and her sister were not established, their summonses were returned to the State Security Court in Diyarbakır. Thus, no further statements were taken from these other vital witnesses.
Although the gendarmes and the State Security Court were informed that the applicant and her sister were residing in the Cezaevi neighbourhood in Diyarbakır, no attempts were made or ordered to be made to locate them there. There is no basis for the Government's allegation that the applicant was indifferent or failed to co-operate with the authorities in their efforts to establish the factual background to the acts which led to the death of her brother and parents. Nor does it appear that any further attempts were made to find Orhan Ertaş, who in fact, in the course of the entire proceedings, only gave one statement, on 5 April 1993, in connection with the preliminary investigation.
It is to be recalled that, in view of the state of the evidence, the prosecution requested the defendants' acquittal and the State Security Court acquitted them. The Court notes that, since the conclusion of those proceedings, nothing has come to light which suggests that the authorities have taken further investigative measures that could be regarded as effective for the purposes of Article 2 of the Convention.
91. In the light of the foregoing, the Court, like the Commission, finds that the authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the death of the applicant's brother and parents. Accordingly, there has been a violation of this provision.
92. In the circumstances, this rendered recourse to criminal and civil remedies equally ineffective in the circumstances. It accordingly dismisses the Government's preliminary objection (see paragraph 74 above) based on non-exhaustion of these remedies (see, mutatis mutandis, Gül v. Turkey, no. 22676/93 (unreported).
B. Alleged violation of Article 3 of the Convention
93. The applicant further alleged that there has been a violation of Article 3 of the Convention, which reads:
“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
She maintained, firstly, that subjecting her and her siblings to an armed attack in their home, in the course of which they witnessed the killing of their parents and brother, constituted treatment contrary to this provision.
Secondly, in the course of the proceedings before the Court, the applicant submitted that the failure on the part of the authorities to carry out an adequate investigation into the brutal killing of her parents and brother involved subjecting her and her ten surviving siblings to degrading treatment in violation of Article 3 of the Convention.
94. The Government, in reply to the first contention, submitted that it was members of the PKK, not agents of the State, who had perpetrated the attack and who were responsible for the killings. They offered no comment on the second point.
95. On the first point the Court, like the Commission, recalls its above

conclusion that it has not been established that any State agent was implicated, directly or indirectly, in the attack on the applicant's family home and in the resulting killing of her parents and brother. In this respect, it finds no violation of Article 3 of the Convention.
As regards the allegation that the authorities' failure to conduct an effective investigation amounted to degrading treatment of the Önen family, the Court considers this complaint to be a separate complaint from the one dealt with above under Article 3 and from the complaints brought respectively under Articles 2 and 13, which relate to procedural requirements, not ill-treatment in the sense of Article 3. The Court notes that this is a new complaint which was not covered by the Commission's decision of admissibility. According to the Court's established case-law (see, amongst other judgments, Guerra and Others v. Italy, Reports 1998-I, § 44), it has no jurisdiction to entertain it.
C. Alleged violations of Articles 6 § 1 and 13 of the Convention
96. The applicant complained that the authorities' deliberate omission to investigate the facts of the impugned killings gave rise to violations of Articles 6 § 1 and 13 of the Convention.
In so far as relevant, Article 6 § 1 reads:
“In the determination of his civil rights and obligations ... , everyone is entitled to a ... hearing ... by an independent and impartial tribunal ...”.
Article 13 provides:
“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”
In this regard, the applicant disputed the Commission's opinion that the matter fell to be considered, not under Article 6, but only under Article 13. She argued that, under Turkish law, a criminal conviction of the perpetrators of the killings was a prerequisite for claiming compensation, in the absence of which she did not enjoy an effective access to a court as guaranteed by Article 6 of the Convention.
97. The Court notes that the above submission is not supported by any references to national legal provisions or case-law. Since the applicant made no attempt to seek compensation before the domestic courts, the Court agrees with the Commission that it is not possible in the instant case to determine whether these courts would have been able to adjudicate on her claims. The Court further notes that the applicant's complaint of lack of access to a court is bound up with her more general complaint concerning the manner in which the investigating authorities dealt with the killing of her parents and brother and the repercussions which this had on access to effective remedies which would help redress the grievances which she and her surviving siblings harboured as a result of the killings. In these circumstances, the Court, in accordance with its own case-law (see, for example, the Gündem v. Turkey judgment of 25 May 1998, Reports 1998 III p. 1136, § 74; and the above-mentioned Kaya v. Turkey judgment, p. 329, § 105), finds it appropriate to examine this compliant in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of alleged violations of the Convention. It does not find it necessary therefore to determine whether there has been a violation of Article 6 § 1.
98. The Government contested, firstly, the applicability of Article 13, disputing that the applicant had an arguable claim of a violation of Article

2 of the Convention. In this connection, they relied on the Commission's finding, which was endorsed by the Court above, that it had not been established beyond reasonable doubt that any State agent had been implicated, directly or indirectly, in the events at issue. In any event, as regards the issue of compliance with Article 13, the Government prayed in aid, as they did with respect to the duty to investigate under Article 2, the Commission's finding that the supplementary investigation measures ordered by the prosecution during the phase of the proceedings before the State Security Court had been appropriate.

99. As regards the first issue, the applicability of Article 13, the Court, in the light of the Commission's findings of facts summarised in paragraphs 41-42 above, is satisfied that the applicant had an arguable claim for the purposes of this provision, which is therefore applicable.

100. As regards the further issue, namely that of compliance, the Court recalls that, according to its case-law, given the fundamental importance of the right 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 (see the Yaşa v. Turkey judgment of 2 September 1998, Reports 1998-VI, pp. 2441-2442, §§ 112 and 114). These requirements are both broader and stricter than those that may be derived from Article 2 of the Convention (see ibidem and the above-mentioned Ergi v. Turkey judgment § 98). Recalling its conclusion above with respect to the complaint under Article 2 (see paragraphs 87-91 above) concerning the inadequacy of the investigation, the Court is also of the view that the respondent State failed to meet its obligations under Article 13. Accordingly, it finds a violation of this provision.

In the light of its finding above, the Court finds it unnecessary to examine separately the applicant's complaint (see paragraph 75 above) as regards an alleged practice of failure to provide effective remedies under Article 13 (see İlhan v. Turkey, no. 22277/93, § 105, ECHR 2000-VII).

D. Alleged violation of Article 8 of the Convention

101. The applicant alleged violations of Article 8 of the Convention, which reads:

“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.”

She maintained that the attack on her family home and the killing of her parents and brother had violated this provision, as had the authorities' failure to investigate the incident.

102. The Government disputed the first allegation, stressing that the attack and killings had been committed by members of the PKK and not by agents of the State. They did not comment on the second allegation.

103. The Court, like the Commission, bearing in mind its conclusions that it cannot be considered to have been established beyond reasonable

doubt that any State agent was implicated in the events at issue (see paragraphs 85-86 above), finds no violation of Article 8 in this respect. As regards the further submission that the failure to investigate also amounted to a violation of Article 8, the Court observes that this is a new complaint that was not covered by the Commission's decision of admissibility and it therefore has no jurisdiction to examine it.

E. Alleged violation of Article 14 of the Convention, taken in conjunction with Articles 2, 3, 6, 8, and 13

104. Article 14 of the Convention reads:

“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.”

105. The applicant submitted that, because of her and her family's Kurdish origins, the various alleged violations of their Convention rights also gave rise to a breach of Article 14 of the Convention. She maintained that the case-law of the Commission and the Court clearly showed the inadequacy of investigations into allegations of security force wrongdoing in the predominantly Kurdish south-eastern region of Turkey. The matters complained of had a disproportionate impact on individuals of Kurdish origin.

106. The Government did not address this allegation beyond denying the factual basis of the substantive complaints.

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

108. The Court, for its part, agrees with the Commission and finds no substantiation of a violation of Article 14 of the Convention, taken in conjunction with Articles 2, 3, 6, 8 and 13.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

109. The applicant, on behalf of the estates of the deceased Ibrahim, Mome and Orhand Önen, on her own behalf, on behalf of her sister Mekyie Önen and her other surviving siblings, sought just satisfaction under Article 41 of the Convention, which provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

110. Should the Court reject her claim that her parents Ibrahim and Mome and brother Orhan had been intentionally killed by the security forces, but find that there had been violations of Articles 2 and 13 of the Convention on account of the Turkish authorities' failure to carry out an effective investigation into their deaths, the applicant claimed by way of non-pecuniary damage (1) 15,000 pounds sterling (GBP) for each of the estates of her deceased relatives; (2) GBP 15,000 for the applicant and her sister Mekiye who had both been exposed to a particularly high degree of suffering as they had witnessed the attack and killings during which the applicant had been injured; (3) GBP 15,000 for each of the other surviving siblings - Ihsan, Ercan, Mehmet Nuri, Medine, Sultan, Sevgi, Iskender, Melek and Hamdullah - who had not witnessed the event but had suffered grievously from the loss of their brother and parents.

111. The Government emphasised that there was only one applicant and

that it would be incompatible with the Convention system to make an award with respect to the other members of her family. In any event, the Government submitted, the claim was exorbitant and unjustified.
112. The Court, in accordance with its case law (see, for example, the above-mentioned Ergi judgment, § 110, and Kaya judgment, § 122), considers that it is empowered under Article 41 of the Convention to make an award under this provision, not only to the applicant, as suggested by the Government, but also to other members of her family who are victims of the violations found and on whose behalf the applicant has brought the application and has sought just satisfaction.
The Court finds no causal connection between the authorities' failure to carry out an effective investigation and the prejudice referred to under item (1). The claim under (1) must therefore be rejected. However, there was a causal link with respect to the damage referred to under items (2) and (3). The applicant and her ten surviving siblings must have suffered considerable anguish and distress from the authorities' failure to investigate effectively the deaths of their mother, father and brother. Having regard to the high rate of inflation in Turkey, the Court expresses the award in euros, to be converted into Turkish liras at the rate applicable on the date of settlement. Deciding on an equitable basis and noting the awards made in previous cases from south-east Turkey concerning complaints under Articles 2 and 13 related to the death of a close family member (see, notably, the Güleç v. Turkey judgment of 27 July 1998, Reports 1998-IV, p. 1734, § 88; the above-mentioned Ergi judgment, § 110, Kaya judgment, § 122, and Yaşa judgment, § 124; and also Oğur v. Turkey [G.C.], no. 21594/93, ECHR 1999-V, § 98), the Court awards € 16,000 each to Şemsi and Mekiye Önen and € 13,000 each to Ihsan, Ercan, Mehmet Nuri, Medine, Sultan, Sevgi, Iskender, Melek and Hamdullah Önen.
B. Pecuniary damage
113. Under the heading of pecuniary damage, the applicant sought compensation with respect to the loss of earnings of the deceased Ibrahim and Orhan Önen. The former worked for the Etibank Phosphate Institution; the latter worked as a taxi driver. Both had contributed to the upkeep of the family. She argued that the effect of the authorities' failings had been, in any event, to reduce or eliminate the potential for compensation to be obtained.
The applicant further claimed certain sums for loss of earnings from land. As a result of the attack and the violation of Article 8, the Önen family had been forced to leave Karatas and move to Diyarbakır.
In addition, the applicant requested the Court to make an award for losses arising out of rental costs incurred since leaving their village and moving to Diyarbakır.
114. The Government contested the applicant's claim.
115. The Court does not find any causal connection between the matter found to constitute a violation of the Convention - the absence of an effective investigation - and the pecuniary damage alleged by the applicant. In accordance with the principles in its case-law, it rejects the entirety of the applicant's claim under this heading (cf. Çakıcı v. Turkey [G.C.], no. 23657/94, ECHR 1999-IV, § 127).
C. Costs and expenses
116. The applicant further sought the reimbursement of costs and expenses incurred in the proceedings before the domestic authorities and

before the Convention institutions. This included work and administrative costs incurred by (1) her United Kingdom-based representative Kevin Boyle (GBP 18,810) and (2) by Mr Phillip Leach and others, attached to the Kurdish Human Rights Project in London (GBP 4,059.50, including GBP 2,882.50 for translation/summarising from Turkish into English and from English into Turkish, plus GBP 9,333 for two lawyers in Turkey); (3) TL 1,000,000,000 or GBP 1,087.72 for travel and accommodation expenses incurred equally by the applicant and her surviving siblings in their efforts to persuade the domestic authorities to investigate properly their relatives' deaths.

117. The Government disputed the above claim. They argued that this claim related to a multitude of Turkish and foreign lawyers and that only the work carried out by lawyers appointed by the applicant, and who had actively taken part in the proceedings, should be taken into account. The work in question was merely a repetition of what had been presented in other applications introduced by the same lawyers in the past. No award should be made with respect to consultations by lawyers with witnesses in Turkey. The fact of consultation constituted flagrant evidence of their attempts to influence witnesses prior to the hearing before the Commission Delegates. The Government further argued that the applicant had failed to support her claims with vouchers and bills and that the costs and expenses in question were exorbitant and unjustified.

118. The Court is not satisfied that all the costs and expenses, totalling more than GBP 33,000, were necessarily incurred.

No breakdown or particulars have been submitted with regard to item (3), which must therefore be rejected.

Unlike item (1), item (2) is only substantiated in part. Considering also that the applicant has only succeeded with respect to part of her application under the Convention, and deciding on an equitable basis, the Court awards GBP 15,000 with respect to item (1) and GBP 2,500 with regard to item (2), together with any value-added tax that may be chargeable, less the € 1,470 and € 274 already paid by the Council of Europe in legal aid for these items respectively, to be converted into pounds sterling at the rate applicable on the date of settlement. This sum is to be paid direct, respectively, to Mr Boyle and Mr Leach in the United Kingdom.

D. Default interest

119. The Court considers it appropriate that default interest should be payable at the rate of 7.25 % per annum with regard to the sums awarded in euros and 7.5% per annum with respect to the sums awarded in pounds sterling.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection as to the authenticity of the application;

2. Joins unanimously to the merits the Government's preliminary objection concerning the exhaustion of domestic remedies;

3. Holds unanimously that it has not been established that the applicant's parents and brother were killed by agents of the State in violation of Article 2 of the Convention;

4. Holds unanimously that there has been a violation of Article 2 of the

Convention on account of the failure of the authorities of the respondent State to conduct an adequate and effective investigation into the circumstances surrounding the death of the applicant's parents and brother;

5. Dismisses unanimously the Government's preliminary objection concerning the exhaustion of domestic remedies;

6. Holds unanimously that it has not been established that the applicant's parents and brother died in circumstances which engage the respondent State's responsibility under Article 3 of the Convention;

7. Holds unanimously that the Court lacks jurisdiction to examine the applicant's complaint that the failure of the authorities to carry out an effective investigation amounted to degrading treatment in violation of Article 3 of the Convention;

8. Holds by 6 votes to 1 that there has been a violation of Article 13 of the Convention in respect of the applicant and her surviving siblings;

9. Holds unanimously that it is not necessary to examine the applicant's complaint under Article 6 of the Convention;

10. Holds unanimously that it has not been established that the applicant's parents and brother died in circumstances which engage the respondent State's responsibility under Article 8 of the Convention;

11. Holds unanimously that the Court lacks jurisdiction to examine the applicant's complaint that the failure of the authorities to carry out an effective investigation amounted to a violation of Article 8 of the Convention;

12. Holds unanimously that there has been no violation of Article 14, taken in conjunction with Articles 2, 3, 6, 8, and 13 of the Convention;

13. Holds unanimously
(a) that the respondent State is to pay, within three months, the following sums:
(i) EUR 16,000 (sixteen thousand euros) each to the applicant and her sister Mekiye and EUR 13,000 (thirteen thousand euros) to each of their surviving siblings in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable on the date of settlement;
(ii) GBP 15,000 (fifteen thousand pounds sterling) and GBP 2,500 (two thousand, five hundred pounds sterling) to be paid directly to Mr Boyle and Mr Leach, respectively, in respect of costs and expenses together with any value-added tax that may be chargeable, less the EUR 1,470 and EUR 274 already paid by the Council of Europe in legal aid for these items respectively, to be converted into GBP at the rate applicable on the date of settlement;
(b) that simple interest at the following annual rates shall be payable from the expiry of the above-mentioned three months until settlement:
(i) an annual rate of 7.25% in relation to the sums awarded in euros, and
(ii) an annual rate of 7.5% in relation to the sums awarded in pounds

sterling;

14. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.
Done in English, and notified in writing on 14 May 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.
S. DOLLÉ J.-P. COSTA
Registrar President
In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly concurring and partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.
J.-P.C.
S.D.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ
(Provisional translation)

1. In the present case, the facts giving rise to the applicant's complaints under the Convention are undisputed: two masked and unidentified persons killed three members of the same family. According to the applicant:
“15. In the evening of 16 March 1993 [her] older brother, Orhan Önen, and her parents, Ibrahim and Mome Önen, were killed and [she] suffered a wound to her foot as a result of a planned action by members of the Balpınar village guards to kill Orhan Önen. Before he was shot and killed, [her] father was able to pull the scarf from the head of one of the intruders and shouted that he recognised the gunmen as Ali Ertaş, head of the Balpınar village guards, and his nephew Orhan Ertaş, a former Balpınar village guard. [Her] mother, who was seriously injured by a bullet, died on her way to hospital.”
According to the Government:
“...in the evening of 16 March 1993 the killing of three Karataş villagers was reported to the public prosecutor...He conducted an investigation, including attendance at the post mortem examination of the bodies of the victims carried out by a medical doctor.” (See paragraph 21 of the judgment)
“On 28 December 1994 the Diyarbakır State Security Court acquitted Ali and Orhan Ertaş for lack of evidence. After this decision the investigation nevertheless continued but the perpetrators of the killing of the applicant's parents and brother have not been found.”[Emphasis added]
2. After examining the facts of the case the Commission concluded:
“...there is an insufficient evidentiary basis on which to conclude that the applicant's brother and parents were, beyond reasonable doubt, killed by agents of the State in the circumstances alleged by the applicant.”(See paragraph 86 of the judgment and point 3 of the operative provisions)
3. However, in the light of what is stated in paragraphs 87 et seq. (and in paragraphs 47 and 48), the Court is of the view that “the authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the death of the applicant's brother and parents. Accordingly, there has been a violation of [Article 2]...” in its procedural aspect (see paragraph 91 of the judgment and point 4 of the operative provisions). That is to say, owing to the lack of an adequate and

effective investigation, it has not been possible to identify and convict the culprits, in accordance with the State's positive obligations under Article 2.

4. Thus, in a case of this kind, simple logic dictates that the essential task is to establish the “procedural shortcomings” which have resulted in the investigation being unsuccessful – in other words inadequate and ineffective – in terms of identifying the culprits, and which thereby prevented the domestic criminal law being applied which, as noted above, is vital to the protection of the right to life under Article 2.

Contrary to this legal logic, what the Court has done is to list, randomly, a series of circumstances which it qualifies as “shortcomings” without any regard for their pertinence or purpose, still less for the conclusions of the national authorities responsible for the investigation reached in the light of the specific requirements of the factual situation at the relevant time and the precise purpose of the investigation. This the Court has done after the event, using reasoning that is entirely abstract.

In short, the right approach would, in my view, have been to separate the grain from the chaff. On this point the Sabuktekin v. Turkey judgment of 9 March 2002 (application no. 27243/95) could have served as a model: decisions should be based on concrete facts not abstract reasoning.

In this regard, I see no causal, and even less any pertinent, connection between inter alia the following “shortcomings” found by the Court and the conclusion that there has been a violation of Article 2 in its procedural aspects (the identification of the killers), which is the crucial aspect of this case: “the empty cartridges” found were not “numbered”; their “exact location” was not “recorded”; “no photographs of the scene of the killing were taken” (see paragraph 47 of the judgment); “the sketch map did not indicate a large blood stain on the spot where the body of Orhan Önen had been found”; “although [the gendarme and public prosecutor] were aware that the body of the applicant's mother had been moved, this fact had not been recorded on the sketch map”; “the scope of the sketch map was confined to the inside of the house and did not contain any information about the immediate surroundings” (see paragraphs 48 and 49 of the judgment). None of these matters have even the remotest connection to the heart of the case.

5. With regard to a violation of Article 13, I consider that when the Court finds a violation of Article 2 in its procedural aspect, as the majority did in the instant case, no separate issue arises under Article 13, since the finding of a violation of Article 2 takes account of the fact that there has been neither an effective inquiry nor a satisfactory procedure after the incident. For more details on that subject, I refer to my dissenting opinions in the Ergi v. Turkey judgment of 28 July 1998 (Reports, 1998-IV) and Akkoç v. Turkey judgment of 10 October 2000.

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