

Caso de Avsar contra Turquía, de 10/07/2001 [ENG]

Preliminary objection

EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF AVSAR v. TURKEY

(Application no. 25657/94)

JUDGMENT

STRASBOURG

10 July 2001

FINAL

27/03/2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Avsar v. Turkey,

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

Mrs E. Palm, *President*,

Mrs W. Thomassen,

Mr L. Ferrari Bravo,

Mr J. Casadevall,

Mr B. Zupancic,

Mr R. Maruste, *judges*,

Mr F. Gölcüklü, *ad hoc judge*,

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

Having deliberated in private on 3 May and 19 June 2001,

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

PROCEDURE

1. The case originated in an application (no. 25657/94) against Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Behçet Avsar ("the applicant"), on 10 October 1994.

2. The applicant was represented by Mr Kevin Boyle and Ms Françoise Hampson, lawyers practising in the United Kingdom. The Turkish Government ("the Government") were represented by their Agent, Mr Münci Özmen.

3. The applicant alleged, in particular, that his brother, Mehmet Serif Avsar had been kidnapped and killed by village guards acting with the knowledge and under the auspices of the authorities. He invoked Articles 2, 3, 6, 10, 13 and 14 of the Convention.

4. The application was declared admissible by the Commission on 14 October 1996 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

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

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1), the former on 8 June and 11 August 2000 and the latter on 31 May and 4 August 2000. The applicant withdrew before the Court his complaint under Article 10 of the Convention.

7. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. This case concerns, principally, the events between 22 April and 7 May 1994, when Mehmet Serif Avsar who had been taken away by armed men was found killed outside Diyarbakir. A criminal prosecution brought against five village guards and an ex-member of the PKK on 5 July 1994 culminated recently in a decision of the Diyarbakir Criminal Court no. 3 of 21 March 2000.

9. The facts being disputed by the parties, the Commission appointed Delegates who took evidence in Ankara from 4 to 6 October 1999. They heard the following witnesses: Mr Mehmet Ali Avsar (brother of the deceased Mehmet Serif Avsar); Mr Edip Avsar (cousin of the deceased); Mrs Senal Sarihan, the lawyer representing the family at the criminal trial; Mr Süleyman Avsar, father of the deceased; Mr Ömer Güngör, Mr Fevzi Gökçen, Mr Zeyyat Akçil, Mr Yasar Günbati and Mr Aziz Erbey, the five village guards charged in relation to the kidnapping and murder of Mehmet Serif Avsar; Mr Mehmet Mehmetoglu, the ex-member of the PKK and confessor, charged in relation to the kidnapping and murder of Mehmet Serif Avsar; Mr Kadir Metin, assistant commander of the Diyarbakir provincial gendarmerie command in 1994; Mr Mithat Gül, commander of the Diyarbakir provincial central district gendarmerie in 1994; Mr Sinasi Budakli, intelligence operations NCO at the provincial central district gendarmerie in 1994; Mr Ümit Yüksel, public prosecutor in the criminal trial from 1998 to date; Mr Mustafa Atagün, public prosecutor who drew up the indictment for the criminal trial.

10. The transcripts of the oral evidence, together with the documentary evidence provided by the parties to the Commission, have been transmitted to the Court. Additionally, the Government have provided the decision of the Diyarbakir Criminal Court no. 3 of 21 March 1993 and other documentary materials requested by the Commission Delegates. This material is summarised below (Sections C and D), as are the submissions by the parties concerning the facts (Sections A and B).

A. The applicant's submissions on the facts

11. Between 1992-1994, a large number of disappearances and unexplained killings occurred in the south-east of Turkey in the context of counter-insurgency measures against the PKK. The province and city of Diyarbakir were particularly notorious for this phenomenon. The involvement of security forces and shadowy gangs linked to elements in the security forces was rumoured and supported, *inter alia*, by the findings of the Susurluk report.

12. The Avsar family was headed by Süleyman Avsar, who had 16 children. His son Mehmet Serif Avsar, born in 1966, was married with two children, Silan born in 1988 and Servan born in 1993. He, with his brother Mehmet Ali Avsar and another relative, owned a company which sold fertilisers to farmers. Other brothers included Abdulkерim Avsar, who had been arrested and charged with PKK offences and the applicant Behçet Avsar who had been convicted and sentenced to eight years' imprisonment but had fled to Germany, where in 1994 he was European correspondent for the Özgür Gündem newspaper.

13. On 21 April 1994, Lieutenant Altinoluk, commander of Hazro district gendarmerie instructed five village guards to travel to Diyarbakir to assist in the detention of four

suspects. He gave them a car registered 21AF989. The car which was used by the guards to go to Diyarbakir and during their activities in Diyarbakir belonged to a person detained for PKK activities and it was given to the guards for their use, though it was later alleged that they had been instructed to deliver it to the gendarmerie in Saraykapi, Diyarbakir. On arrival at the Saraykapi gendarme station Captain Mithat Gül sent them to the Anti-Terror police to assist in the apprehension of three or four suspects. These suspects were brought back to the Saraykapi station, from where they were to be sent on to Hazro.

14. On 22 April, at about 11.00 hours, the five village guards entered the fertiliser business premises run by the Avsar family in Diyarbakir. They started talking to Mehmet Serif Avsar and stated that they were going to take him into custody. It was not apparent that they had come for Mehmet Serif Avsar personally rather than acting with the intention merely of taking away one of the family. When their authority to take Mehmet Serif Avsar was challenged, they spoke on a walkie-talkie and two village guards left to find a police officer. Mehmet Mehmetoglu and a seventh person then arrived. The seventh man acted as if he was in charge and the village guards deferred to him. He was referred to as “*müdür*” (director), spoke proper Turkish and wore glasses. The seven men took Mehmet Serif Avsar from the shop, placing him in a white Toros car. Members of the family (Abdullah and Sait Avsar) who followed the car saw it enter the district central gendarmerie, Saraykapi, which was about five minutes away.

15. The family made complaints to the authorities, describing and giving, in some cases, the names of the men who had abducted Mehmet Serif Avsar.

16. The white car used in the abduction was found on 25 April 1994 in Hazro and returned to Diyarbakir, where it was handed over to the family of the owner.

17. On 5 May 1994, an identification parade was held and four village guards were identified. The fifth village guard and Mehmet Mehmetoglu were also detained. On 6 May 1994, Captain Mithat Gül, in charge of the investigation, carried out a reconstruction of the abduction at the family’s shop. The five guards admitted involvement in the abduction and Mehmet Mehmetoglu admitted being present at the abduction but denied involvement in the incident. They denied the presence of any seventh person.

18. On 7 May 1994, Ömer Güngör took the gendarme investigators to a disused building 19 km from Diyarbakir on the Diyarbakir-Silvan highway. Mehmet Serif Avsar’s body was found there. He had been shot twice in the head.

19. On 18 June 1994, there was an attempted abduction of two Avsar cousins in Bismil, Edip and Nedim.

20. On 5 July 1994, the trial of the five village guards and Mehmet Mehmetoglu opened in Diyarbakir Criminal Court no. 3. In testimony to the court, the village guards partially retracted their pre-trial statements and claimed that a seventh person was present and that he took charge of the detention of Mehmet Serif Avsar. On several occasions during the trial (5 July, 24 August and 19 October) the village guards testified that they had acted under orders and that the killing and abduction of Mehmet Serif Avsar had been carried out under the orders of Mehmet Mehmetoglu and a gendarme special sergeant.

21. From the beginning of the trial, the Avsar family suffered intimidation, resulting in them ultimately closing down their business and moving to Istanbul. The family's lawyer Senal Sarihan was also intimidated when she attended the trial in Diyarbakir.

22. On 16 October 1994, Ömer Güngör identified the special sergeant as Gültekin Seçkin, from the 7th Army corps infantry battalion, code-named Hoca.

23. At the beginning of 1998, the Susurluk report was published, which named Gültekin Sütçü and Mehmet Mehmetoglu in connection with the killing of Mehmet Serif Avsar. It stated that, amongst various other activities, a gang including Alaattin Kanaat, Mehmet Mehmetoglu, Ahmet Demir and a specialist sergeant Gültekin Sütçü were involved in extorting money and that they tried to extort money from Mehmet Serif Avsar using threats against his brother Abdulkerim who was in detention suspected of PKK activities, killing him when he refused to pay. On 16 February 1998, the name Gültekin Sütçü was raised in the trial. On 18 June 1999, the family's lawyer requested the court to enquire as whether Gültekin Sütçü had served in Diyarbakir in 1994. The court made a request for information to the army authorities. On 4 August 1999, the court received the response that Gültekin Sütçü left his duties in the region on 15 August 1994. The court referred the file to the public prosecutor for information to be gathered on Gültekin Sütçü and requested a statement be taken from him. On 20 September 1999, the lawyer for Ömer Güngör requested a confrontation between Gültekin Sütçü and her client.

24. On 21 March 2000, the court convicted the six defendants. Ömer Güngör was convicted of murder and sentenced to 20 years' imprisonment while the others were convicted of aiding and abetting and given six years and eight months' imprisonment. Ömer Güngör, the prosecutor and the Avsar family appealed against the decision. On the same day, after being informed that Gültekin Sütçü had left his place of residence to go to Bulgaria, the court issued an arrest warrant.

B. The Government's submissions on the facts

25. The Government submit that it is premature to make any observation on the facts as firstly, the decision of the Diyarbakir Criminal Court of 21 March 1993 is subject to appeal to the Court of Cassation which has the power to require the first instance court to fill the gaps in the investigation or collect further evidence and, secondly, as the Diyarbakir court has in its judgment notified the offence allegedly committed by Gültekin Sütçü to the public prosecutor, who will now carry out an investigation.

C. The documentary evidence submitted by the parties

1. Materials provided by the applicant

Petition of 23 April 1994 from Mehmet Ali Avsar to the Diyarbakir Security Directorate and public prosecutor

26. This stated that on 22 April 1994 five armed persons, who said they were village guards, came to the fertiliser business premises and asked to take away Mehmet Serif Avsar. Two more persons came, who made themselves known as security officers. They took Mehmet Serif Avsar away by force in a white Toros car 21AF989, with the car 21T1127 following behind. The petitioner and other brothers followed and saw that the

cars entered the provincial central gendarme command. Abdullah Avsar saw the village guards inside the grounds of the gendarmerie. They had learned the names of two of the village guards – Ömer the lame and Ali. The family was concerned by the way Mehmet Serif Avsar had been taken and the denials of the authorities that he had been taken into custody. He requested that the necessary proceedings be instituted in respect of the perpetrators.

Petition of 25 April 1994 from Mehmet Ali Avsar to the Diyarbakir State Security Court (SSC) chief public prosecutor

27. On 22 April 1994, at about 11.30 hours, five armed men came to their workplace to take away Mehmet Serif Avsar. When they opposed this, the men stated that they were village guards. Two people came then, who claimed that they were security officers. The seven men took away Mehmet Serif Avsar, getting into two cars 21AF989 and 21T1127. He and his brothers followed them to the provincial central gendarmerie. Abdullah Avsar identified the five village guards whom he saw in the grounds. The gendarme commander said that he would carry out the necessary legal procedures. The family was concerned by the way Mehmet Serif Avsar had been taken and the denials of the authorities that he had been taken into custody. He requested that the necessary proceedings be instituted in respect of the perpetrators.

Statement dated 28 April 1994 of Sait Avsar taken by Tim Otty and David Marshall of the Human Rights Committee of the English bar

28. On 22 April, at about 11.00 hours, five men came to the shop, saying that they were policemen. They spoke to Mehmet Serif Avsar, saying that he had to give a statement on behalf of his brother Abdulkерim who was in custody in Diyarbakir prison. Mehmet Serif Avsar said that they had not given him their identification and that he would be happy to give his statement to a uniformed police officer. There was an argument between the men and the Avsar brothers. The men said that they would call the police station and as a result the brothers heard that they were village guards. Two more people appeared, claiming to be policemen, speaking Turkish and flashing cards. As the argument continued, one of the two men pulled a gun, and the others followed suit. As Mehmet Serif Avsar believed that they were going to shoot, he agreed to go with them. The brothers saw five men and Mehmet Serif Avsar get into a Renault car AF989, while the others got into a taxi 21T1127. The brothers jumped into their own car and followed to the Saraykapi gendarmerie, where they could not go in after the two cars. They could see three of the village guards outside the command building. They saw two of the men from the shop driving off in a blue car (06CDE35). A gendarme denied Mehmet Serif Avsar was there and they could not get anyone to do anything.

29. They returned to their shop and phoned the police who said that Mehmet Serif Avsar had not been kidnapped but was at the gendarmerie. They made written petitions to the governor, State Security Court prosecutor and the judicial prosecutor. All denied that his brother was in custody. Someone called their house, saying that Mehmet Serif Avsar had been killed and they were all next. They had given up hope of seeing their brother alive.

Letter dated 20 June 1994 from the applicant to the Kurdish Human Rights Project, London

30. On 18 June 1994, in Bismil, armed persons shot at his two cousins Edip and Nedim. Nedim managed to run away. Edip was caught, beaten and taken to the Bismil gendarme headquarters. Both the police and gendarmes denied to the family that he was in custody. Edip was released the next day from the gendarme headquarters. Shortly before the trial concerning the killing of his brother Mehmet Serif Avsar, his family had been threatened by the Saraykapi gendarmes, who warned that if the family mentioned the gendarmes in court things would get worse for them.

Petition dated 22 September 1994 from the lawyer Senal Sarihan to the Ministry of Justice

31. The petitioner was the lawyer acting for the family in the trial against six accused for the kidnapping and murder of Mehmet Serif Avsar. She pointed out that, though the six accused had initially denied the involvement of the seventh person, during the trial on 5 July 1994 the five village guards had said that the incident had been carried out on the orders of Mehmet Mehmetoglu and a gendarme officer known as "the director". Their description of the seventh man corroborated her clients' account.

32. Captain Mithat Gül, who had much information about the incident had failed to attend the court under summons although he worked next door to the judicial buildings. She also complained that the three Avsar brothers had been subject to threats and had been forced to leave Diyarbakir. When she came to Diyarbakir to attend the trial, she was followed by a car with four armed plain clothed men inside. She had reported this to the chairman of the Diyarbakir bar. On 21 September 1993, as she passed through security control at the airport, a plain clothed man who had followed behind her issued a threat.

2. Materials concerning the domestic investigation

Protocol dated 21 April 1994 signed by First Lieutenant Altinoluk

33. The car 21AF989, taken from Mehmet Koyun, accused of aiding the PKK and sent to Diyarbakir, was at Hazro. It was handed over to Yasar Günbati, Feyzi Gökçen, Zeyyat Akçil and Aziz Erbey, who were to deliver it to Mehmet Koyun's family at Tellikaya village. The document was signed also by the four village guards.

Protocol dated 23 April 1994 signed by First Lieutenant Altinoluk

34. This stated that the car 21AF989 had been found in the garden of the Hazro gendarme command. On 21 April, it had been handed over to Yasar Günbati, Feyzi Gökçen, Aziz Erbey and Zeyyat Akçil to be taken to the Diyarbakir central gendarmerie. It was understood that they had been unable to contact anyone and after waiting for two days rejoined the convoy coming back to Hazro. As it was dark, they left the car in the garden.

35. The document was also signed by the four village guards.

Two protocols dated 25 April 1994 signed by gendarme officers

36. The first recorded the transfer of car 21AF989 from a Hazro officer to an officer from the Diyarbakir central gendarmerie. The second recorded that the owner of the car Abdi Koyun received it from the gendarmerie in perfect condition.

Statement dated 25 April 1994 of Abdullah Avsar taken by police officers

37. On 22 April, at about 11.30 hours, three persons entered the business premises of the Avsar brothers from car 21AF989. They told Mehmet Serif Avsar that they would take him away. Mehmet Ali told them that his brother would not go until the police arrived. Four more men entered, making a total of seven. The men pulled guns out when they opposed them. They took his brother, got into two cars and drove to court buildings. The brothers, who followed, told the gendarmes. One gendarme asked if he could identify the individuals and he went up to the building and pointed to three men, whom he learned were village guards. He identified a fourth man, getting out of a car in the yard. When the brothers approached the gendarme commander, he said that the village guards would be handed over to security officials. The gendarmes said however that Mehmet Serif Avsar was not at the gendarmerie.

Statement dated 25 April 1994 of Mehmet Ali Avsar taken by police officers

38. On 22 April, at about 11.30 hours, three persons entered the business premises of the Avsar brothers from car 21AF989, wanting the brothers to make a statement at the justice buildings about his brother Abdulkерim who was involved with the PKK and in prison. He told them that this was not possible. The men said that they were village guards. He said no-one would go until the police arrived. Two more men entered, saying that they were police officers. When they objected, six men pulled their guns and said that they would take one of the brothers away, randomly pulling at Mehmet Serif Avsar. Four men and Mehmet Serif Avsar got into a car with a wireless and weapon inside. Three other men got into a second car. He remained in the shop while his other brothers followed the cars to Saraykapi, where the provincial central gendarmerie is at the entrance of the court building. His brothers reported immediately to gendarmes that four village guards, present at that time, had taken their brother. The gendarmes, a duty NCO and an NCO called Okan said that they would refer the village guards to security. His brothers left. They later found the names of two of the village guards, Ömer and Ali.

Statement dated 29 April 1994 of Mehmet Sait Avsar taken by Captain Mithat Gül and Colonel Kadir Metin

39. On 22 April, between 11.00 and 11.30 hours, he saw Mehmet Serif Avsar arguing with someone in the shop. The man wanted him to go with him to give a statement. Serif said he would only go with a police officer. The man went out to a white Toros car (21AF989), where there were two men, one of whom spoke to the police on the radio. In less than a minute, two men came into the shop, introducing themselves as police officers. This man said that one of the brothers had to come and make a statement for their brother Abdulkерim. Mehmet Ali protested that Abdulkерim was in prison and should make his own statement. A quarrel began and three more persons came in. The man whom he had described said 'Shoot them' and he and three men drew their guns. Then they took Mehmet Serif Avsar into the Toros car. He described the men in the shop, stating that the one with the radio was called Ömer. The two men who had claimed to be security officers both spoke Turkish properly without a local accent; the taller one wore sunglasses. He wanted the people who abducted his brother to be found.

Statement dated 29 April 1994 of Mehmet Ali Avsar taken by Captain Mithat Gül and Colonel Kadir Metin

40. On 22 April, at about 11.15 hours, he saw three villagers enter their business premises. He asked what they wanted. A man said that his brother Abdulkерim had to make a statement at Saraykapi court building but as he was in prison one of his brothers

should come to make a statement instead. The witness objected that they could not make a statement for Abdulkerim. The man claimed that they were security personnel. The witness asked him to show his ID and then said that he would phone the police. At this point, two persons came inside to join the three villagers. There were two men outside in a white Toros car 21AF989, who also came inside, making seven. Two of the men drew guns and forced the brothers against a wall, threatening to kill them. Mehmet Serif Avsar then said that he would go with them. The seven men took his brother and left in two cars. The witness and others followed in their own car but could not find their brother. They went to the police station, gave their statements and after 10-15 minutes were told that Mehmet Serif Avsar was with the gendarmes. They also gave a petition to the public prosecutor and to the gendarmes at Saraykapi. The gendarmes said that Mehmet Serif Avsar was not there. When the brothers told this to the police, the police said that they must have misunderstood the matter.

41. The witness gave detailed descriptions of the men in the shop. He described one of the men who claimed to be a security official as speaking very proper Turkish, clean-shaven with sunglasses.

Statement dated 29 April 1994 of Abdullah Avsar taken by Captain Mithat Gül and Colonel Kadir Metin

42. On 22 April, at about 11.30 hours, three persons in villagers' clothes entered their shop. A few minutes later, four more men entered. The witness was outside in the kiosk and when he heard quarrelling, he went inside. The men were arguing with his elder brother Mehmet Ali. The witness did not understand what was going on. One of the men pulled a gun on him. The brothers were made to stand against the wall. Mehmet Serif Avsar said that he would go with them. He and four men got into a white car 21AF989 and the others got into a taxi 21T1127. After about ten minutes, the brothers drove to the Saraykapi court building, which was where the men had told Mehmet Ali they were going. The men had said that they were security personnel. The brothers saw the taxi driver of the second car and he told them that he had taken the men to the Saraykapi court building. When they got there, they could not see their brother though they saw one of the abductors sitting by the fountain. They told this to a gendarme who said that it was not their business and that village guards were within the jurisdiction of the gendarmes. The witness told an NCO in front of the gendarmerie building that the abductors of his brothers were there – he could see three in the gendarmerie. The brothers were told to go and that if the persons had abducted their brother, they would be handed to the police.

43. The witness gave a description of the men in the shop. One wore sunglasses and spoke Turkish properly without a local accent. They had seen one of the abductors leaving the gendarmerie in a blue or black car O6CD35 while they were waiting at the front of the gendarmerie.

Statement dated 30 April 1994 of Ali Sancar taken by Captain Mithat Gül and Colonel Kadir Metin

44. The witness, a village guard from Oyuklu village, was asked about the alleged abduction of Mehmet Serif Avsar by village guard Ömer the lame and other Okuylu village guards. The witness denied any involvement. He said that Ömer could only walk with the help of crutches and was too disabled to be involved.

Statement dated 30 April 1994 of Ali Güngör taken by Captain Mithat Gül and Colonel Kadir Metin

45. The witness, the *muhtar* and head village guard of Oyuklu village, was asked about the alleged abduction of Mehmet Serif Avsar by village guard Ömer the lame and other Okuylu village guards. The witness denied any involvement. He said that his son Ömer was disabled and certainly could not be involved.

Identification report of 5 May 1994 signed inter alia by Mithat Gul and Sinasi Budakli

46. The report referred to seven armed persons, who claimed to be security personnel, having abducted Mehmet Serif Avsar from his shop. The investigation indicated that among the perpetrators were village guards Aziz Erbey, Ömer Güngör, Feyzi Gökçen and Yasar Günbati. Twenty-two persons were gathered for an identification parade including these persons. The brothers Mehmet Sait, Mehmet Ali and Abdullah Avsar were present.

47. Mehmet Ali identified Aziz Erbey, Feyzi Gökçen and Yasar Günbati. Abdullah identified Ömer Güngör, definitely, and Aziz Erbey, less certainly. Mehmet Sait identified Yasar Günbati.

Request for extension of custody dated 6 May 1994 signed by Captain Mithat Gül

48. This informed the public prosecutor that Aziz Erbey, Feyzi Gökçen, Ömer Güngör and Yasar Günbati had been identified and that Mehmet Mehmetoglu and Zeyyat Akçil had also been detained on suspicion of involvement. It requested an extension in custody in order to complete the investigation.

Reconstruction report dated 6 May 1994 accompanied by photographs

49. This described a reconstruction of the incident at the Avsar business premises. Feyzi Gökçen, Yasar Günbati and Aziz Erbey entered the shop and said that on 22 April they had gone in and asked if this was the shop of Abdulkерim Avsar. They said that they were security personnel and that one of the brothers should come with them to make a statement at the Saraykapi court building in Abdulkерim's place. The people in the shop did not believe them and would not go unless the police came. They said that they would bring the police. Meanwhile, Zeyyat Akçil and Ömer Güngör were outside by a car. They said that they never went inside the shop and showed where they waited. Mehmet Mehmetoglu had come along from outside and said, "I am a policeman. Do what these people want." As the brothers were not convinced, Ömer Güngör, Yasar Günbati, Mehmet Mehmetoglu and Aziz Erbey pulled out their guns. They acted this out. Then the victim had said that he would come. Ömer Güngör and Mehmet Mehmetoglu took him by the arms. The accused said that Ömer Güngör, Yasar Günbati and Zeyyat Akçil got into the car 21AF989 with the victim, while the other three accused got into a cab that was passing.

50. The witnesses (Mehmet Ali, Mehmet Sait and Abdullah Avsar) were asked if they agreed with this description of the event. They said that there was another man, in addition to these six accused, whom they described, *inter alia*, as speaking Turkish without an accent.

Statement dated 6 May 1994 by Abdi Koyun taken by Captain Mithat Gül

51. The vehicle 21AF989 belonged to this witness. His son had driven it to Hazro on 12 April 1994 and had been apprehended and taken to Diyarbakir to be questioned. The car remained at Hazro gendarmerie. The witness took delivery of it from Hazro on 25 April 1994.

Statement dated 7 May 1994 of Yasar Günbati taken by Captain Mithat Gül

52. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

53. The suspect said that on 21 April 1994 he arrived in Diyarbakir with his friends Feyzi Gökçen, Ömer Güngör, Aziz Erbey and Zeyyat Akçil. They had the duty to deliver a car 21<A>F989 to the central gendarme command. Ömer Güngör joined them later. When they arrived, they helped anti-terror police apprehend four men wanted by Hazro gendarmerie. The village guards were to deliver them to Hazro. They spent the night in Saraykapi gendarmerie at a place used for village guards. On 22 April, they went to the shopping district in the car. Ömer Güngör pointed out the Avsar shop and said that Mehmet Serif Avsar, brother of Abdulkерim, was in contact with the PKK and that they should apprehend him to take along with the others. They met Mehmet Mehmetoglu at this point and he went along with them to the shop.

54. Inside the shop, they introduced themselves as security officials. There were six of them, no-one else was with them. After taking Mehmet Serif Avsar, the suspect, Ömer Güngör and Zeyyat Akçil went in the car 21<A>F989 towards the Saraykapi court buildings. Ömer Güngör told Mehmet Serif Avsar they would hand him over to Hazro. Mehmet Serif Avsar said that he knew where Ömer Güngör's brother was buried and that he would show them. He said that he should not be handed over but that they could go together to Lice and look for Ömer Güngör's brother. Ömer Güngör agreed. They picked up Feyzi Gökçen and Aziz Erbey who arrived in another car and they went off towards Lice. After a while, some of the guards, including this suspect, doubted that they had the authority to go to Lice and decided to go back. They left Ömer Güngör and Mehmet Serif Avsar by some ruined buildings to fetch another car. They could not find one. When they went back to find Ömer Güngör and Mehmet Serif Avsar at about 13.30 hours, they found Ömer Güngör crying by the roadside. He said that he had accidentally shot Mehmet Serif Avsar. They all panicked. Ömer Güngör threw the gun into the river and they drove back to Diyarbakir. They left the four suspects with the soldiers who came in the convoy from Hazro and made an excuse to leave. They deposited the car 21AF989 somewhere near the Hazro gendarmerie and returned to their villages.

55. He had thought that they were going to hand Mehmet Serif Avsar over to the gendarmes. He had not wanted the incident to end as it did. No official authority had ordered them to apprehend Mehmet Serif Avsar. He acknowledged that the unlicensed gun found at his address was his and used in the abduction.

Statement dated 7 May 1994 of Feyzi Gökçen taken by Captain Mithat Gül

56. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

57. The suspect said that on 21 April 1994 when he went to Hazro district gendarmerie to get permission to go to Diyarbakir for personal reasons, he met fellow village guards Yasar Günbati, Aziz Erbey and Zeyyat Akçil, who also wanted to go to

Diyarbakir. The Hazro gendarme commander gave them permission and told them to deliver a car 21AF989. They met Ömer Güngör after taking the car and he joined them. In Diyarbakir they reported to Saraykapi gendarme command but kept the car. They used it for shopping and also to help anti-terror police to apprehend four suspects (Fatih Çelebi, Yılmaz Eken, Hanefi Ekici and Çelebi Akkus), whom they were to take back to Hazro. That night they stayed in the Saraykapi guesthouse for village guards. On 22 April, they went to the shopping district in the car. Ömer Güngör pointed out the Avsar shop and said that Mehmet Serif Avsar was in contact with the PKK and might know where the PKK had buried the body of his murdered elder brother. He suggested that they apprehend him and take him along with the others. Mehmet Mehmetoglu, whom they knew before, came up and went with them to the shop.

58. As the village guards did not know Mehmet Serif Avsar, they said that one of the Avsar brothers had to come to Saraykapi to make a statement for their brother Abdulkerim. When they objected, the suspect went outside to call the police. However Mehmet Mehmetoglu who had been outside, came in and tried to convince them. There was an argument. With threats and persuasion, they took Mehmet Serif Avsar away. The suspect thought they were going to take him to be detained with the other four suspects. Mehmet Mehmetoglu, Aziz Erbey and himself left in a taxi, while the others left in the white Toros car. Mehmet Mehmetoglu got off at the Post Office. He and Aziz Erbey got out in front of the judiciary building, where the white car also arrived. Ömer Güngör said that Mehmet Serif Avsar had agreed to go to Lice. They all got into the car and started towards Lice. After a while, some of the village guards doubted that they had the authority to go to Lice and recalled that they were to deliver the car. They decided to go back and hire two cars so Ömer Güngör could go on to Lice. They left Ömer Güngör and Mehmet Serif Avsar by some ruined buildings. They could not find any cars. When they went back, they found Ömer Güngör crying by the roadside. He said that he had accidentally shot Mehmet Serif Avsar. They panicked and drove back to Diyarbakir. They left the four suspects with the soldiers who came in the convoy from Hazro and made an excuse to leave. They deposited the car 21AF989 somewhere near the Hazro gendarmerie and returned to their villages.

59. He had not wanted the incident to end as it did. No official authority had ordered them to apprehend Mehmet Serif Avsar. He acknowledged that the licensed gun found at his address was his and that he carried it during the abduction.

Statement dated 7 May 1994 of Aziz Erbey taken by Captain Mithat Gül

60. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

61. The suspect said that on 21 April 1994 when he went to Hazro district gendarmerie to get permission to go to Diyarbakir for personal reasons, he met fellow village guards Feyzi Gökçen, Yasar Günbati and Zeyyat Akçil, who also wanted to go to Diyarbakir. The Hazro gendarme commander gave them permission and told them to deliver a car 21AF989. They met Ömer Güngör after taking the car and he joined them. In Diyarbakir they reported to Saraykapi gendarme command but kept the car. They went shopping and also helped anti-terror police to apprehend four suspects, whom they were to take back to Hazro. That night they stayed in the Saraykapi guesthouse for village guards, as well as guarding the suspects. On 22 April, they went to the shopping district again. Ömer Güngör pointed out the Avsar shop. He said that Mehmet Serif Avsar was

connected with the terrorists and might know where the PKK had buried the body of his murdered elder brother. He suggested that they apprehend him and send him for interrogation. Mehmet Mehmetoglu, who had previously been in the PKK, came up and agreed to help them apprehend Mehmet Serif Avsar.

62. The six men – no-one else was involved – went to the shop, introducing themselves. As they did not know Mehmet Serif Avsar, they said that any one of the brothers should come. Mehmet Mehmetoglu, Feyzi Gökçen and himself left in a taxi, while the others left in the white Toros car. Mehmet Mehmetoglu got off at the Post Office. He and Aziz Erbey got out in front of the judiciary building, where the white car also arrived. Ömer Güngör said that Mehmet Serif Avsar had agreed to go to Lice to help to find his brother's body. They all got into the car and started towards Lice. After a while, some of the village guards thought this might be dangerous and remembered that they had no permission to go to Lice. They decided to go back and hire two cars so Ömer Güngör could go on to Lice. They left Ömer Güngör and Mehmet Serif Avsar by some ruined buildings. They could not find any cars. When they went back, they found Ömer Güngör in a sad state. He said that he had accidentally shot Mehmet Serif Avsar, who had attempted to run away and attack him. They panicked and drove back to Diyarbakir. They handed over the four suspects to the soldiers who came in the convoy from Hazro and made an excuse to leave. They deposited the car 21AF989 somewhere near the Hazro gendarmerie and returned to their villages.

63. He had thought Mehmet Serif Avsar was going to be handed over for proceedings. No official had ordered them to apprehend Mehmet Serif Avsar. He acknowledged that the licensed gun found at his address was his and that he was carrying it during the abduction.

Statement dated 7 May 1994 of Zeyyat Akçil taken by Captain Mithat Gül

64. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

65. The suspect said that on 21 April 1994 he and fellow village guards Feyzi Gökçen, Yasar Günbati and Aziz Erbey were given a car by Hazro gendarme commander to deliver to Diyarbakir. Ömer Güngör joined them. In Diyarbakir they reported to Saraykapi gendarme command but kept the car. They went shopping and also helped anti-terror police to apprehend four suspects, involved in incidents in Hazro district, whom they were to take back to Hazro. He named the four suspects. That night they stayed in the Saraykapi guesthouse for village guards. On 22 April, they went to the shopping district again. Ömer Güngör pointed out the Avsar shop. He said that Mehmet Serif Avsar was connected with the terrorists and that if they apprehended him, he might be able to find the body of his brother. They met Mehmet Mehmetoglu, whom they knew from Hazro and he came with them. They apprehended Mehmet Serif Avsar as shown in the reconstruction.

66. The suspect, Ömer Güngör and Yasar Günbati were in the Toros car with Mehmet Serif Avsar. Ömer Güngör told Mehmet Serif Avsar that he would be interrogated to disclose where his brother was buried. Mehmet Serif Avsar proposed that they did not take him for interrogation and offered to help Ömer Güngör find the body in Lice. Ömer Güngör suggested that he should go to Lice with Mehmet Serif Avsar. They arrived in front of the judiciary building, where Aziz Erbey and Feyzi Gökçen arrived in a taxi. They

all got into the Toros car and started towards Lice. After a while, some of the village guards thought this might be dangerous and remembered that they had no permission to go to Lice. They decided to go back and hire two cars so Ömer Güngör could go on to Lice. They left Ömer Güngör and Mehmet Serif Avsar by some ruined buildings. They could not find any cars. When they went back, they found Ömer Güngör crying by the road. He said that he had accidentally shot Mehmet Serif Avsar. They panicked and drove back to Diyarbakir. They handed over the four suspects to the soldiers who came in the convoy from Hazro and made an excuse to leave. They deposited the car 21AF989 somewhere near the Hazro gendarmerie and returned to their villages.

67. He had thought Mehmet Serif Avsar was going to be handed over to the gendarmerie. No official authority had ordered them to apprehend Mehmet Serif Avsar.

Statement dated 7 May 1994 of Mehmet Mehmetoglu taken by Captain Mithat Gül

68. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

69. The suspect said that on 22 April 1994 he was going to the Trafik tea gardens when he met Feyzi Gökçen and Yasar Günbati whom he knew from Hazro. They were with three other village guards. They told him that they were on duty and were going to apprehend Mehmet Serif Avsar. While talking, they reached the shop. A few of them entered but he did not as he was not an official. When an argument broke out, he entered and told the people that his friends were officials. The atmosphere was tense and several of the village guards took out their guns. They apprehended someone and left. He got into a taxi with Feyzi Gökçen. He got out in front of the Post Office and did not know where the others went. After a few hours, he went to Saraykapi gendarmerie to find Feyzi Gökçen but was unsuccessful. That was his only involvement with the incident. He had thought that the village guards had authority to act as they did. Otherwise he would have reported them. Inside the shop, he saw only the five guards and some shop people.

Statement dated 7 May 1994 of Ömer Güngör taken by Captain Mithat Gül

70. The suspect was asked to submit his defence to the charge that he, along with six friends, had kidnapped Mehmet Serif Avsar.

71. The suspect said that on 21 April 1994 he went to Hazro district gendarmerie to get permission to go to Diyarbakir for personal reasons, including obtaining medical treatment. He came across Feyzi Gökçen, Aziz Erbey, Yasar Günbati and Zeyyat Akçil, who wanted also to go to Diyarbakir and were to deliver a car 21AF989 to Saraykapi gendarmerie. He joined them. In the car he told the others that his village Oyuklu had recently been attacked and that some of the people involved were wanted for other offences were in Diyarbakir. After a discussion, they decided it would be appropriate to apprehend those individuals and hand them over to Hazro or Diyarbakir security people. In Diyarbakir they reported to Saraykapi gendarme command. They went to the Security Directorate and explained that they knew where to find certain individuals connected with the terrorists. They went along with police teams and apprehended the four individuals. The village guards took delivery of them in order to take them back to Hazro. That night they stayed in the Saraykapi guesthouse for village guards. On 22 April, they went to the shopping district in the white car. They met Mehmet Mehmetoglu, who was known to some of the village guards.

72. The suspect, who had lost members of his family to the PKK and was himself disabled due to injuries caused by the PKK, had discovered that Abdulkerim Avsar was the leader of the group who kidnapped and killed his elder brother. The Avsar family was also in contact with the PKK, especially Mehmet Serif Avsar who met with the terrorists in Lice. He learned the address of the Avsar business premises and explaining the situation to his friends, proposed to apprehend Mehmet Serif Avsar. The six of them entered the shop at about 11.30 hours. They introduced themselves as security officials and when an argument broke out, drew their guns. He, Yasar Günbati, Zeyyat Akçil and Mehmet Serif Avsar got into the white car while the others caught a taxi. While taking Mehmet Serif Avsar to Saraykapi gendarme command, the suspect told Mehmet Serif Avsar that he had to help locate his brother's body or they would hand him over to the court. Mehmet Serif Avsar pleaded not to be handed over and offered to go to Lice and help him. They arrived at Saraykapi as did the other guards. Mehmet Mehmetoglu had already got out at the Post Office. They all got into the white car and started towards Lice. After a while, some of the village guards said that they would be late returning to Hazro and decided to go back and hire two cars so the suspect could go onto Lice. They left the suspect and Mehmet Serif Avsar, who was blindfolded, by some ruined buildings. They talked. Then Mehmet Serif Avsar tried to attack him and run away. The suspect, alone and disabled, fired a few warning shots from his Browning pistol. Mehmet Serif Avsar fell down covered in blood. The suspect panicked and ran away to the road, in tears. When his friends returned, he told them an accident had happened. They drove back to Diyarbakir, the suspect stopping to throw the gun into the river. They handed over the four suspects to the convoy from Hazro and made an excuse to leave. They deposited the car 21AF989 somewhere near the Hazro gendarmerie and returned to their villages.

73. He had had no intention of killing Mehmet Serif Avsar who was going to be handed over for proceedings. There was no official present at the shop other than his five friends. No official had ordered them to apprehend Mehmet Serif Avsar.

Incident establishment report dated 7 May 1994 signed by Captain Mithat Gül

74. As a result of the interrogations of the six suspects, it appeared that Mehmet Serif Avsar had been taken to a ruined building about 19 km away on the Silvan Road. The gendarmes sent out a team to the location. According to Ömer Güngör, the incident had taken place in front of the south-facing door. A barely visible bloodstain 30 cm in diameter was found on the doorstep. The victim was not there however, nor did a search disclose any empty cartridges. The victim was found 50 metres to the south, half buried in water in a field, putrefying, with the face unidentifiable. No marks or evidence were found in the vicinity and it was not possible to tell whether he had been killed on the spot or brought there afterwards. Photographs were taken.

Reconstruction report dated 7 May 1994 signed by Captain Gül and Ömer Güngör

75. Ömer Güngör indicated the place at the old dynamite depot, 55 metres south of the 19th kilometre point on the Diyarbakir-Silvan road, where he had been left with Mehmet Serif Avsar. The two men had sat on a wall and were talking, when Mehmet Serif Avsar attacked him and tried to escape. He fired two shots with his pistol. He indicated the spot. At the entrance of the building some dried blood was observed. Mehmet Serif Avsar had fallen on the ground but he did not know if the man was injured or dead as he panicked and ran away. When showed the body lying in the field, 50 metres south of the

building, he could not remember the clothing but it was possible that it was Mehmet Serif Avsar's body. He showed where he threw the gun into the Dicle river.

Autopsy report dated 7 May 1994

76. The body was identified by Mehmet Ali Avsar as being Mehmet Serif Avsar. There was a bullet entry to the right temporal region, with an exit wound to left frontal region, and one bullet entry below the left ear and an exit hole on the left cheek bone. Due to absence of burns or soot, both bullets had been shot at a distance. No other injury from physical violence was observed. It was concluded that death occurred from the bullet wounds, either of which would have been fatal, about 10 to 20 days before.

Protocol dated 9 May 1994 drawn up by Captain Mithat Gül

77. This stated that car, no. 21T1127, had not been found. It belonged to Erdal Açıkgöz, resident in Istanbul.

Letter dated 9 May 1994 from Captain Mithat Gül to the Diyarbakir chief public prosecutor

78. This letter enclosed the investigation documents and concluded that the six men had admitted their guilt in respect of abducting Mehmet Serif Avsar and that Ömer Güngör had admitted that he had killed him.

Statement dated 9 May 1994 of Aziz Erbey taken by the public prosecutor

79. On 21 April, the Hazro gendarme commander had appointed the four village guards to apprehend four individuals. They set out in car 21AF989 to go to Diyarbakir and met Ömer Güngör, who joined them. They finished their task in Diyarbakir and stayed in the guest house. On 22 April, the five men went shopping. Ömer Güngör pointed out a shop and said that they should apprehend someone there and take him to the gendarmes. Ömer Güngör went inside the shop and talked to Mehmet Serif Avsar, who did not want to come. The suspect and others went into the shop. When Mehmet Serif Avsar would not go unless the police came, he and Feyzi Gökçen went outside to look for the police. Feyzi Gökçen met someone called Mehmet Mehmetoglu and they went back into the shop. The suspect told the elder brother that they were taking Mehmet Serif Avsar to the gendarmerie and they could follow. They got into two cars and arrived in front of the gendarmerie. Ömer Güngör told Yasar Günbati that they should take the victim to Lice and not into the gendarmerie. They started out towards Lice. Talking amongst themselves, they thought they might have problems going to Lice without permission and decided to go back. Ömer Güngör and Mehmet Serif Avsar got out to wait for them to return with two cars, one for them to go onto Lice. The village guards were unable to find any cabs willing to come back with them. They returned to the spot to find Ömer Güngör crying. Mehmet Serif Avsar had attacked him while they were talking and he had shot him.

80. They returned to the gendarmerie. Ömer Güngör begged them not to hand him over. They felt sorry for him. Without returning the car, they went back to Hazro and from there to their homes. The suspect had had a gun on him in the shop but did not draw it. No-one drew their guns.

Statement dated 9 May 1994 of Mehmet Mehmetoglu taken by the public prosecutor

81. On the day of the incident, he was going to the Trafik tea gardens to meet friends when he met Feyzi Gökçen whom he knew. Feyzi Gökçen told him that they were going to apprehend someone in the shop nearby. When they arrived in front of the shop, he saw 8-10 people having an argument. Two village guards were pointing their weapons. The shop people refused to let anyone go without the police. The village guards said that they were officials and would take them to the gendarmerie. The suspect told Feyzi Gökçen that they could call the police. At this point, two village guards took a man outside and got into a white Toros car. He, Feyzi Gökçen and Aziz Erbey got into a cab. He got out near a bakers. He was shocked by the incident. When he came to the gendarmerie two to three hours later, he asked the sergeant at the checkpoint if the Hazro guards had brought some-one in. He was told that the village guards had brought in four men earlier but none since.

82. The suspect went to Elazig and was called by the gendarmerie to take part in an identification parade, where no-one recognised him. He took part in the reconstruction but in fact he had not helped take out the victim as was shown in the photographs. He had only been there because he believed that the guards would hand the man over to the gendarmes.

Statement dated 9 May 1994 of Feyzi Gökçen taken by the public prosecutor

83. On 21 April, the Hazro gendarme commander had appointed the four village guards to apprehend four individuals. They took Ömer Güngör with them. They apprehended the four men and delivered them to the gendarmerie. On 22 April, the five village guards wandered round the shopping district. Ömer Güngör pointed out a shop and said that they should apprehend someone there and take him to the gendarmes. The suspect stood outside while the other four went inside. Ömer Güngör told a man that he had to come. There were three or four other people present. They argued, saying no-one would go unless the police came. The suspect walked off about 30 metres looking for the police. He met Mehmet Mehmetoglu, who said that he would see to the situation and walked into the shop. The suspect stayed outside and heard nothing. Shortly after, the guards came outside with Mehmet Serif Avsar. Yasar Günbati, Ömer Güngör, Zeyyat Akçil and Mehmet Serif Avsar got into the car to go to Saraykapi gendarmerie. Aziz Erbey, Mehmet Mehmetoglu and himself got into a cab. Mehmet Mehmetoglu got out on the way. When they arrived by the fountain, Yasar Günbati told Ömer Güngör that they would go to Lice. They started out towards Lice. Talking amongst themselves, they thought they might have problems going to Lice without permission and decided to go back. Ömer Güngör and Mehmet Serif Avsar were to wait by an old building for them to return with two cars, so that they could continue to Lice. They were unable to find any cabs willing to come back with them. They returned to the spot to find Ömer Güngör crying. Mehmet Serif Avsar had attacked him while they were talking and he had shot and killed him.

84. They returned to the gendarmerie. Without returning the car, they went back to Hazro and from there to their homes. The suspect had had a gun on him in the shop but did not draw it. Ömer Güngör had told them that his uncles and brother were killed by the PKK and that Mehmet Serif Avsar had a relationship with the PKK and might know where his brother's body was buried. Their initial idea however had been to hand Mehmet Serif Avsar over to the gendarmerie.

Statement dated 9 May 1994 of Yasar Günbati taken by the public prosecutor

85. On 21 April, he and three others were setting out from Hazro to Diyarbakir to apprehend four individuals. They met Ömer Güngör, who joined them. All five went to the Security Directorate and with police teams took the four men and delivered them to the provincial gendarmerie. They stayed in the guest house. On 22 April, the five village guards went shopping. Ömer Güngör pointed out a shop and said that they should apprehend someone there and take him to the gendarmes. Ömer Güngör went inside the shop but the man would not come. The suspect and Aziz Erbey went inside, saying that they were guards and that he should come to the gendarmerie. He refused to go unless the police came. The suspect agreed. Feyzi Gökçen and Aziz Erbey went to look for the police. They came back with Mehmet Mehmetoglu who spoke to the man. They told the people to come to the gendarmerie and took the man out by the arms, putting him in the car. The suspect drove the car which also contained Ömer Güngör and Zeyyat Akçil. The others followed in a taxi.

86. They arrived at the fountain next to the gendarmerie. Mehmet Mehmetoglu was no longer there. Ömer Güngör said that they should go to Lice and hand him over there. As Ömer Güngör was a Lice guard, they thought it must be a Lice matter. They started out towards Lice. Talking amongst themselves, they thought they might have problems going to Lice without permission and changed their minds. Ömer Güngör and Mehmet Serif Avsar stayed at an old building while they went to look for two cars, so that they could go on to Lice. They were unable to find any cabs willing to come back with them. They returned to the spot to find Ömer Güngör crying. Mehmet Serif Avsar had attacked him while they were talking and he had fired two shots, killing him. Angry, they intended to take Ömer Güngör back to the gendarmerie. When they got there, Ömer Güngör begged them not to hand him over, referring to his uncles and brother being shot by the PKK. They were in a panic but agreed to keep quiet. They went back to Hazro and from there to their homes. They had only taken Mehmet Serif Avsar away as Ömer Güngör had claimed that he would be handed over to the gendarmerie.

Statement dated 9 May 1994 of Ömer Güngör taken by the public prosecutor

87. The suspect said that on 21 April 1994 he met Feyzi Gökçen, Aziz Erbey, Yasar Günbati and Zeyyat Akçil, who were going to Diyarbakir. He joined them as he wanted to go to hospital. In Diyarbakir, they helped apprehend some people and handed them over to the provincial gendarmerie. On 22 April, they went to the shopping district. At that stage, Mehmet Serif Avsar came into his mind. In 1992, his brother had been kidnapped by the PKK and though he was dead, his body had not been found. As Mehmet Serif Avsar had connections with the PKK in Lice, he thought he might know the location of the body. He proposed to the others that they should apprehend Mehmet Serif Avsar. The five of them entered the shop. Mehmet Serif Avsar refused to come without the police. Feyzi Gökçen went to look for the police. He came back with Mehmet Mehmetoglu, who spoke to Mehmet Serif Avsar. Mehmet Serif Avsar agreed to come. They all went in cars to the front of the gendarmerie, except Mehmet Mehmetoglu. In the car, the suspect talked about his brother with Mehmet Serif Avsar and asked his help. Mehmet Serif Avsar said that if they did not hand him over, he would help the suspect find the body at Lice. The suspect asked the other village guards to take him to Lice.

88. They started towards Lice. After a while, some of the guards said that they had no permission and decided to go back. Mehmet Serif Avsar proposed getting out to wait for the others to send back a car. Mehmet Serif Avsar and the suspect entered the old building and sat down. After a while, Mehmet Serif Avsar said that he wanted to go

outside. The suspect refused to let him. Mehmet Serif Avsar ran at him, making threats. The suspect drew his gun, pointed it at the man's head and fired. After firing, the suspect ran away without looking back. When his friends returned, he told them an accident had happened. They drove back to Diyarbakir, the suspect stopping to throw the gun into the river. The others were angry and he pleaded not to be handed over. They felt sorry for him and went back to Hazro.

Statement dated 9 May 1994 of Zeyyat Akçil taken by the public prosecutor

89. On 21 April, the Hazro gendarme commander had appointed the four village guards to apprehend some individuals in Diyarbakir and to take the car 21AF989 to the provincial central gendarmerie. They met Ömer Güngör, who joined them. They went to the anti-terror police and apprehended the four named individuals, handing them over to the provincial gendarmes. On 22 April, the five village guards went shopping. Ömer Güngör pointed out a shop and said that they should apprehend someone there and take him to the gendarmes. Ömer Güngör went inside the shop, followed by the others. He talked to a man, who did not believe them and would not go unless the police came. Feyzi Gökçen went outside to look for the police, returning with Mehmet Mehmetoglu, who said that they were village guards on duty. The village guards took the man by the arm and put him in the car. They arrived in front of the gendarmerie. Ömer Güngör told the others that the man had agreed to go with him to Lice. The others thought they would hand him over to the gendarmerie at Lice. On the way, they thought they might have problems going to Lice without permission and decided to go back. Ömer Güngör and Mehmet Serif Avsar were to wait for them to return with two cars, one for them to go onto Lice. They were unable to find any cabs willing to come back with them. They returned to the spot to find Ömer Güngör crying. Mehmet Serif Avsar had attacked him while they were talking and he had fired two shots at him.

90. They returned to the gendarmerie. Ömer Güngör begged them not to hand him over. They felt sorry for him. They delivered the car to the station at Hazro and went home.

Minutes dated 10 May 1994 of Diyarbakir Criminal Court no. 1

91. The six accused appeared. All gave statements (those of Ömer Güngör and Feyzi Gökçen were illegible in the copy provided by the Government).

92. Yasar Günbati confirmed his statements to the gendarmes and the public prosecutor. Ömer Güngör had told them that Mehmet Serif Avsar had information about the body of his brother. They took him from his shop to take to the gendarmerie but changed their minds and went towards Lice. They left the victim with Ömer and when they came back found that Ömer had killed him.

93. Aziz Erbey confirmed his previous statements. They took Mehmet Serif Avsar in order to find information about Ömer's brother. They had left him with Ömer on the road to Lice and Ömer had killed him.

94. Zeyyat Akçil confirmed his previous statements. They had taken Mehmet Serif Avsar to find out information with the intention of handing him over to the gendarmerie. They had changed their minds and Ömer had killed him when they left them on the road to Lice.

95. Mehmet Mehmetoglu confirmed his previous statements. He had come across the five others by chance and had been told that they were taking Mehmet Serif Avsar to the gendarmerie. He had gone into the shop with Feyzi Gökçen. After leaving the shop in a taxi, he got off at the Post Office and knew nothing more about the incident. He had not introduced himself as an official in the shop. He had only said that the others were officials.

96. The court decided that the six accused should be arrested and charged with the murder of Mehmet Serif Avsar and the aiding and abetting of murder.

Indictment dated 16 May 1994 signed by Diyarbakir public prosecutor Mustafa Atagün

97. The indictment listed Mehmet Sait Avsar, Mehmet Ali Avsar and Abdullah Avsar as complainants and identified Ömer Güngör, Feyzi Gökçen, Yasar Günbatı, Zeyyat Akçil, Aziz Erbey and Mehmet Mehmetoglu as having committed the offence of murder and conspiracy in respect of Mehmet Serif Avsar. It concluded that the four village guards had been instructed by the Hazro gendarme commander to go to Diyarbakir to apprehend certain suspects in the car 21AF989 which was to be delivered to the provincial gendarme command. On their way, they met the fifth guard Ömer Güngör, who joined them. They handed over the suspects to the provincial gendarmerie and the next day went shopping. Ömer Güngör told them that Mehmet Serif Avsar had a brother in prison for being in the PKK and that his own brother had been killed by the PKK but they had not found the body. He suggested that if they took Mehmet Serif Avsar, who had a relationship with the PKK, the gendarmes could interrogate him to find where the body was. The others agreed and went to the Avsar business premises. They introduced themselves as security officials and were going to take Mehmet Serif Avsar to the gendarmerie. An argument broke out, the shop people requesting that the police be brought. Feyzi Gökçen went to look for the police. He met Mehmet Mehmetoglu, who came back, introducing himself as a security officer. When there was still resistance, they drew their guns, took Mehmet Serif Avsar by the arms and put him into the Toros car. The guards arrived in front of the gendarmerie. Mehmet Mehmetoglu had got out earlier. Ömer Güngör told the others that he was going to hand over the victim in Lice and that the victim would help find the body. They set out for Lice. However the other four village guards said that they had no permission to go to Lice and decided to go back. Ömer Güngör suggested that he and Mehmet Serif Avsar wait by a ruined building and that the others bring back a car for them to go on to Lice. After the others left, Ömer Güngör argued with Mehmet Serif Avsar. He drew his gun and fired several times, before running away. When the others came back, they drove Ömer Güngör to Diyarbakir. He threw his gun in the river. They returned together to Hazro, leaving the car in the gendarmerie yard. Mehmet Serif Avsar's body was later found and an autopsy disclosed that he had two bullet wounds to the head.

98. According to the evidence, the accused had taken the victim without any instruction from any authority. They had used force and threats. Ömer Güngör had believed that the victim had connections with the PKK and wanted revenge. He took the victim to an isolated spot with the agreement and collaboration of the others, murdered and abandoned the body. He had therefore committed premeditated murder.

Minutes of 8 June 1994 of the Diyarbakir Criminal Court

99. The court ordered the continued detention of the six accused, that the complainants to be informed of the proceedings and the summoning of witnesses: Ali

Güngör, Kasim Saka, Resit Demirbas, Ismail Kahraman, Huseyin Erkus, Zeydin Colak, Ismail Erkus, Ali Sancar and Abdi Koyun.

Minutes of 5 July 1994 of Diyarbakir Criminal Court no. 3

100. The six accused made statements to the court in response to the indictment.

101. Ömer Güngör stated that when he came to Hazro he found that his four friends Feyzi Gökçen, Yasar Günbati, Zeyyat Akçil and Aziz Erbey were appointed by the Hazro gendarmes to go to Diyarbakir to detain some suspects. He joined them. In Diyarbakir, they met Captain Mithat Gül at the central gendarmerie, who sent them to the Anti-Terror Department. They detained four persons with police teams and handed them over to the gendarmerie. At this time, he had the idea of locating the body of his brother Mustafa, who had been killed on 8 August 1992. Mehmet Serif Avsar was known to have been involved in village raids and he thought he might have information about his brother. He had also been injured in a clash himself. They went to the Avsar premises in the car brought from Hazro. The accused told Mehmet Serif Avsar that they were the police and he had to come to make a statement. Avsar resisted and said he wanted the police. Feyzi Gökçen and Aziz Erbey went outside to find the police. They came back with someone he later learned was Mehmet Mehmetoglu. He told them that he was a police officer and showed them an ID. He had another person with him whose name he did not know. Mehmet Serif Avsar was taken in a car by Mehmet Mehmetoglu, the unknown friend, the accused, Yasar Günbati and Zeyyat Akçil. In front of the gendarmerie, Mehmet Mehmetoglu and his friend said that they would take Mehmet Serif Avsar to be interrogated. They drove off. They stopped at a ruined building on the Lice road. Mehmet Mehmetoglu and his friend took the victim inside. He and Feyzi Gökçen waited by the car. He did not know what was talked about but he did hear mention of some 3 billion Turkish lira (TRL). Sometime later, Mehmet Mehmetoglu came and told him to shoot Mehmet Serif Avsar. He did so. When they arrived back in Diyarbakir, he gave Mehmet Mehmetoglu his gun. Mehmet Mehmetoglu was driving. The other man wore glasses.

102. The accused was asked to explain the contradictions in this account compared with the other statements. He said that this statement was correct and the other ones were untrue. He had made his statement to the court on 10 May 1994 as he was scared of being tortured at the gendarmerie. In answer to questions, he said that as village guards they had been given the authority and duty to apprehend those they knew to be criminals and hand them over to the gendarmes or police, even outside their own villages. He was therefore empowered to apprehend Mehmet Serif Avsar and hand him over to the authorities. It was what they did in apprehending four suspects the day before.

103. Feyzi Gökçen said as follows. He and the others had been sent to Diyarbakir to apprehend some individuals and hand them over to the Diyarbakir gendarmes. They had gone to the Avsar shop because Ömer Güngör said Mehmet Serif Avsar might know where his brother was buried. Mehmet Serif Avsar refused to go without the police. The accused and Aziz Erbey went outside to bring the police. After 30 metres, they met Mehmet Mehmetoglu, with a man wearing glasses, whom he did not know. They entered the shop and showed their IDs. Mehmet Serif Avsar then came with them in the Toros car. The accused, Mehmet Mehmetoglu's friend, who was introduced as "Müdür" (director) and Aziz Erbey got into a taxi. At the gendarmerie, he joined Ömer Güngör, Mehmet Mehmetoglu, Müdür and Mehmet Serif Avsar in the car, which Mehmet Mehmetoglu drove to a ruin on the Lice Road. He remained near the car. He could hear

Mehmet Mehmetoglu asking the victim about the PKK. A sum of 3 billion lira was mentioned. He heard nothing about Ömer's brother. There were two gun shots. He saw Ömer come out with a pistol and bloodstains on his trouser legs. Mehmet Mehmetoglu said Ömer had killed the victim. On the way back to Diyarbakir they were stopped by the police. Mehmet Mehmetoglu's friend showed his ID. There was some mention about the number plate of the car and that the car should be held. Mehmet Mehmetoglu drove on anyway and they arrived at the Saraykapi gendarmerie. The police arrived later looking for the car but did not find it. Captain Gul asked what had happened but the accused said that he did not know anything and should ask Mehmet Mehmetoglu. When the incident was discovered, someone whom he did not know told him what he should say in the preliminary investigation.

104. Yasar Günbati said as follows. He and his three friends were going to Diyarbakir to apprehend four suspects. Ömer Güngör joined them as they were leaving Hazro in the white Toros. He said he was going for a medical report. In Diyarbakir they carried out an operation with security officials. They found three of the suspects, handing them over to the gendarmes. They found the fourth, Fatih Celik, the next day and handed him over. Ömer Güngör told them at this stage that Mehmet Serif Avsar was to be apprehended due to his connection with the PKK. They went to his shop. They told him that they were village guards but he refused to come unless police were present. Feyzi Gökçen and Aziz Erbey went to look for a police officer. Five minutes later, they returned with Mehmet Mehmetoglu and another person, wearing glasses and speaking proper Turkish. That person showed his ID to Mehmet Serif Avsar saying that he was the police. Mehmet Serif Avsar agreed to come and was put into the car. Aziz Erbey, Feyzi Gökçen and the man called the Director got into a taxi. They all arrived in front of the gendarmerie. The accused, Aziz Erbey and Zeyyat Akçil stayed at the gendarmerie while the others went off at about 13.00-13.30 hours. A few minutes later, the police arrived. The individuals from the shop might have been with them. Police asked Zeyyat Akçil where the white Toros had gone. The accused told the police that Mehmet Serif Avsar had been taken for questioning. The police officers left. They handed over the four suspects to the Hazro convoy. Ömer Güngör and the others returned after an hour. Mehmet Mehmetoglu told him to remove the number plates from the car. He handed them to Captain Mithat Gül. He saw the captain talking to the police. Mehmet Mehmetoglu and the man with glasses disappeared at about that time. Growing suspicious, the accused asked Ömer Güngör what had happened. Ömer Güngör said that he had accidentally shot Mehmet Serif Avsar. He stated that the previous statements were not correct and that he could not explain why.

105. Aziz Erbey said as follows: They caught three suspects in Diyarbakir on the first day and stayed on the next day to catch the fourth. They caught Fatih Çelik and handed him over to the gendarmes. Ömer Güngör then told them that Mehmet Serif Avsar was in touch with the PKK and might know where his brother was buried, so he should be taken for questioning. They went to the shop and Ömer Güngör told Mehmet Serif Avsar that he had to come for questioning. Mehmet Serif Avsar refused. Feyzi Gökçen and the accused went to find a police officer. Feyzi Gökçen met Mehmet Mehmetoglu, who was with another man and who said that there was no need for the police. They went into the shop. Mehmet Mehmetoglu talked to Mehmet Serif Avsar and the man with glasses showed his wallet to him. Mehmet Serif Avsar agreed to come and got into the Toros car. The accused got into another car with the man with glasses. Later, he saw Mehmet Serif Avsar, Ömer Güngör, Mehmet Mehmetoglu, Feyzi Gökçen and the man with glasses go

off in the Toros car. Mehmet Mehmetoglu was driving. They returned after an hour. The police arrived and asked Zeyyat Akçil where the Toros car was. His present statement was true. At the gendarmerie, they wrote the statements and he signed. They prepared the statements probably to protect the man with glasses.

106. Zeyyat Akçil said that he did not accept his previous statements. He knew only what Aziz Erbey and Yasar Günbati had said.

107. Mehmet Mehmetoglu said that he repeated his previous statements. He had no friend wearing glasses. His hand was disabled due to a cut above the wrist. He was unable to use his right hand and anyway did not know how to drive. He had gone into the shop with Feyzi Gökçen to help them as they were village guards. He told Mehmet Serif Avsar that the men were officials, that he would be taken to the gendarmerie and nothing abnormal would happen. Mehmet Serif Avsar agreed to go with them. The accused got into the taxi with Feyzi Gökçen and Aziz Erbey but got off at a bakers' near the post office. He did not tell anyone that he was a police officer. He played no part in the murder.

108. The court heard from witnesses from Ömer Güngör's village who maintained their previous statements and Abdi Koyun the owner of the Toros car. The minutes noted that Ömer Güngör was limping with his left foot and that Mehmet Mehmetoglu's arm had a deep cut above the right wrist.

109. The court ordered, *inter alia*, that it should be established whether the accused were village guards; whether Mehmet Mehmetoglu had any form of identification from the gendarmerie; that an instruction warrant be issued to establish whether Hazro gendarme command appointed village guards to apprehend persons outside the village; that a rogatory letter be sent to Hazro for a statement to be taken from Lieutenant Ertan Altinoluk; that Mithat Gül be summoned to give evidence; and that the hospital medical file concerning Mehmet Mehmetoglu be provided.

Statement dated 18 July 1994 given by Lt Ertan Altinoluk under rogatory letter

110. He stated as follows. Mehmet Koyun had been apprehended and sent to the provincial gendarmerie for interrogation. On 21 April 1994, he gave Koyun's car to Yasar Günbati, Feyzi Gökçen, Aziz Erbey and Zeyyat Akçil to be delivered to the provincial central gendarmerie for safekeeping until the owner was referred to court. On 23 April, the car was seen back in the grounds of the gendarmerie. On investigation, the guards claimed that they had brought it back as the Diyarbakir gendarmerie was very crowded and they could not find an officer. They came back with the convoy after two days. He knew nothing of the incident until the provincial central gendarme command telephoned to ask him about the village guards.

Minutes dated 27 July 1994 of the Diyarbakir Criminal Court no. 3

111. A petition from Feyzi Gökçen was read out. The court ordered, *inter alia*, that sufficient time be allocated to establishing the identity of the specialist sergeant referred to in the petition.

Petition dated 27 July 1994 by Feyzi Gökçen to the Diyarbakir Criminal Court

112. The accused wished to add a further point to his statement to the court. A gendarme special sergeant, whose name he did not know, had been involved in taking in Mehmet Serif Avsar. He had been transferred from Diyarbakir within a month of 10 May

1994. The sergeant told the accused that he and Mehmet Mehmetoglu were going to interrogate Mehmet Serif Avsar and later take him back to the provincial gendarmerie. He told the accused to wait by the car while they interrogated him. The accused did not realise that they were going to kill him.

Minutes dated 24 August 1994 of the Diyarbakir Criminal Court no. 3

113. Ömer Güngör addressed the court, stating that he had no intention to kill the deceased but only did so because the specialist sergeant told him to. The court ordered, *inter alia*, for the summons for Mithat Gül to be renewed.

Minutes dated 21 September 1994 of the Diyarbakir Criminal Court no. 3

114. The defence counsel requested the hearing of the driver of the car 21T1127 who had seen the seventh man and also Ferit Aka, another village guard who had been with the accused in Diyarbakir. The court ordered the public prosecutor to locate the witnesses and resummon Mithat Gül.

Minutes dated 19 October 1994 of the Diyarbakir Criminal Court no. 3

115. Defence counsel submitted that a JITEM officer had been involved and requested that steps be taken for him to be identified. Ömer Güngör told the court that he did not know the name of the specialist sergeant and had only learned that he was a sergeant after he was detained. The court agreed that the official's identity should be established but did not agree to the means suggested by the defence counsel. Mithat Gül was resummoned, and summonses issued for Ferit Aka and the officials present when the accuseds' statements were allegedly taken by force.

Statement dated 3 November 1994 of Captain Mithat Gül by rogatory letter

116. He stated that he had carried out the investigation into the incident. This had established that the accused had entered the shop. He confirmed the reconstruction and location reports as correct. No pressure was exerted on the accused. He did not know the identity of the official referred to by the witnesses.

Minutes dated 16 November 1994 of the Diyarbakir Criminal Court no. 3

117. Ferit Akça appeared as a witness. He confirmed meeting Zeyyat Akçil and Aziz Erbey at the Diyarbakir Security Directorate and seeing Feyzi Gökçen and Yasar Günbatı there later. He returned with them from there to the gendarmerie at about 10-11.00 hours. He saw them returning to Hazro in the convoy later.

118. Mehmet Ali Avsar appeared as a witness. When they had refused to go with the village guards to give a statement in place of Abdulkerim, Zeyyat Akçil had left to find a police officer. He returned with two individuals (pointing to Mehmet Mehmetoglu in the court room). He described the second man as tall, wearing sunglasses and speaking fluent Turkish. When he said that he was the police, the witness asked for his ID. He produced something which he opened and shut without the witness seeing what it was. All had weapons except Zeyyat Akçil and the seventh man.

119. Sinasi Budaklı, a gendarme NCO, gave evidence, saying that he was present when the accused made their statements. No pressure was applied on them and the contents were true. The accused made no mention of a seventh man, though the relatives of the deceased had. They were unable to establish the identity of that man.

120. Mehmet Mehmetoglu told the court, *inter alia*, that persons linked with the PKK had put pressure on the others to change their story and incriminate him.

121. Counsel for the accused requested that steps be taken to identify the security official known as “*müdür*”.

122. The court ordered *inter alia* for disclosure of Mehmet Mehmetoglu’s medical records and rejected counsel’s request concerning the official known as “*müdür*”.

Letter dated 22 November 1994 from the Diyarbakir public prosecutor to the Diyarbakir central gendarme command

123. This stated that the accused Mehmet Mehmetoglu had informed the Parliamentary Investigation Commission that there had been a seventh person with them on the day of the incident. They should investigate the identity of this person and inform the prosecutor’s office.

Letter dated 24 November 1994 from the Diyarbakir provincial central gendarme command to the Diyarbakir public prosecutor

124. This stated, *inter alia*, that the relatives of the deceased and witnesses had mentioned a seventh person. All accused however had clearly stated that they were not joined by anyone else. No-one answering the description given by the relatives had been found during the investigation. The search for the seventh person would continue.

Statement dated 14 December 1994 of Kenan Kaymaz taken by rogatory letter

125. Present when statements were taken from the six accused, the gendarme witness stated that no pressure or force was used but that they answered questions freely.

Statements dated 5 January 1995 taken from Abdullah Avsar and Mehmet Sait Avsar by rogatory letter

126. They confirmed their previous statements. Abdullah stated that he had identified Mehmet Mehmetoglu as involved during the reconstruction. Mehmet Sait stated that there was another man involved and requested that he be identified and that the reasons why the accused were sent for his brother be investigated.

Statement dated 20 January 1995 of Suayip Yener taken by rogatory letter

127. The gendarme witness was present when the body of Mehmet Serif Avsar was discovered due to the description of the location by Ömer Güngör. They established the involvement also of five other suspects but no-one else. They had investigated but failed to identify the person described by the brothers of the deceased.

Minutes dated 7 April 1995 of the Diyarbakir Criminal Court no. 3

128. Sinasi Budakli attended as a witness. He stated that he had taken part in the investigation under Captain Gül. The relatives told them of a person involved in addition to the village guards. They were asked to describe him. During the confrontation and identity parades and in making their statements, the accused had however made no mention of such a man.

129. Counsel for some of the accused stated that the unidentified person was present in the gendarmerie during the interrogation and it was inconceivable that he was not known or found.

130. Mehmet Mehmetoglu repeated his assertion that he was unable to drive at the time of the incident as his arm was injured and in plaster.

Minutes dated 3 May 1995 of the Diyarbakir Criminal Court no. 3

131. A medical doctor was heard as a witness concerning Mehmet Mehmetoglu. He had examined the hospital records concerning treatment given for a cut to Mehmet Mehmetoglu's right arm on 17 February 1994 and gave the opinion that he would have been unable to turn keys in a car ignition or make the movements necessary to drive with facility two months and five days later. There was no record that plaster had been applied.

132. Yasar Günbati stated that Mehmet Mehmetoglu did know how to drive and used to come to their village driving a car many times. Mehmet Mehmetoglu stated that it was his father who drove and he did not know how.

Minutes dated 25 May 1995 of the Diyarbakir Criminal Court no. 3

133. Counsel for the interveners (family) rejected the previous medical evidence concerning Mehmet Mehmetoglu and submitted their own expert opinion. Counsel made further submissions, rejecting the alleged motivation of personal revenge for the killing, referring to the traces of ill-treatment found on the body of Mehmet Serif Avsar. She stated there was an intention to intimidate the family of the deceased. Abdulkirim Avsar, in prison for PKK offences, had been asked to become a confessor and had refused, since they wanted him to commit murders. The abduction of Mehmet Serif Avsar was intended to put pressure on him. The involvement of an unidentified person raised the suspicion that it was a murder involving an organised group of people enjoying State support and that officials were obstructing the investigation.

134. The public prosecutor made submissions on the merits of the case. It was clear from the file and evidence that the Hazro district gendarme commander sent four village guards to Diyarbakir to apprehend four suspects. They took Ömer Güngör with them. They stayed overnight, looking for a remaining suspect the next day. Ömer Güngör believed that Mehmet Serif Avsar knew the place where his brother and uncle were buried and at 11.00 hours took the others to the Avsar business premises, which had been shown to him by Ferit Akça. While Ferit and Ömer Güngör stayed by the car, the others went in and said that they were police officers and that Mehmet Serif Avsar was wanted to give a statement in the Saraykapi court buildings. When there was resistance, the accused Zeyyat Akçil went out to find a police officer and returned with the confessor, Mehmet Mehmetoglu, and an unidentified person. He introduced himself as a police officer and flashed an identity card. When the deceased resisted, they pulled their guns, and that caused him to go along with them. They all went together to the gendarme command in Saraykapi. The man described as the "spectacled director", Mehmet Mehmetoglu, Feyzi Gökçen and Ömer Güngör took Mehmet Serif Avsar in the white car to a ruined building for interrogation. Feyzi Gökçen stayed by the car. Following a talk inside the building, Mehmet Mehmetoglu and the director walked out. Ömer Güngör went inside and shot Mehmet Serif Avsar with two bullets in the head. The motivation for this incident – whether money, or revenge – was unclear. However none of the accused knew that Mehmet Serif Avsar was going to be killed, including Ömer Güngör. It was more

probable that Mehmet Serif Avsar was there only for interrogation. All the accused had restricted the liberty of the victim. While Ömer Güngör carried out the killing, deliberately and unpremeditatedly committing a crime under Art. 448 of the TPC, there was no information that the others knowingly took part in, or facilitated, the killing.

135. Submissions were made by counsel representing the village guards. Mehmet Mehmetoglu requested time to submit his defence to the public prosecutor's pleadings. The court adjourned and granted Mehmet Mehmetoglu further time.

Minutes dated 27 June 1995 of the Diyarbakir Criminal Court no. 3

136. Ömer Güngör repeated that he only killed Mehmet Serif Avsar under pressure and threat to his own life when Mehmet Mehmetoglu and the director had told him to do so. It had been Mehmet Mehmetoglu who had chosen the location and driven them there.

137. Feyzi Gökçen said that Mehmet Mehmetoglu's arm was not plastered during the incident. He had told Captain Gül about the incident on their return. Captain Gül had been angry with Mehmet Mehmetoglu.

138. Mehmet Mehmetoglu claimed that the village guards were trying to incriminate him due to family enmity dating back 30 years. He also claimed the PKK were waging a campaign against him.

Minutes dated 7 July 1995 of the Diyarbakir Criminal Court no. 3

139. The public prosecutor proposed that the driver of the taxi who took the accused from the scene be found. The accused present were asked to describe who was in which car.

140. Feyzi Gökçen said that he, Aziz Erbey and the spectacled director were in the taxi and the others in the white Toros. Yasar Günbati said that he was in the Toros, with Ömer Güngör, Mehmet Mehmetoglu, Zeyyat Akçil, the victim and Ferit Akça. Mehmet Mehmetoglu did not get out on the way to the gendarmerie and they arrived at the judicial buildings. Aziz Erbey agreed that he, Feyzi Gökçen and the director were in the taxi. Zeyyat Akçil was in the white car with Yasar Günbati, Ömer Güngör, Mehmet Mehmetoglu, Ferit Akça and the victim. The court ordered the issue of a warrant to identify the taxi driver and that a letter should be written to the provincial gendarme command to enquire as to whether a man named or nicknamed "*müdür*" existed.

Minutes dated 23 August and 20 September 1995 of the Diyarbakir Criminal Court no. 3

141. The court gave, *inter alia*, directions concerning the location and summoning of Erdal Açıkgöz, the driver of the taxi.

Letter dated 31 September 1995 from Diyarbakir provincial gendarme command to the Diyarbakir Criminal Court

142. This referred to a letter from the court of 19 September 1995, enquiring whether anyone called or nicknamed "*müdür*" was employed at their command. No personnel were known by that name.

Minutes dated 18 October 1995 of the Diyarbakir Criminal Court no. 3

143. The court gave instructions, *inter alia*, for the request for information to the provincial gendarme command to be repeated, under penalty of attribution of a criminal offence.

Minutes dated 17 November 1995 of the Diyarbakir Criminal Court no. 3

144. The response of 7 September 1995 of the provincial gendarme command, denying the existence of any person known as “*müdür*”, was read out. The court issued a summons for the driver of the taxi whose presence was to be secured by the police.

Minutes dated 8 May 1996 of the Diyarbakir Criminal Court no. 3

145. Feyzi Gökçen made a statement confirming his earlier accounts. The accused informed the court that they no longer needed any more time for their defence. The court ordered a rogatory letter be sent to Pendik to obtain Erdal Açıkgöz’s statement and that Yasar Günbati, Aziz Erbey and Zeyyat Akçil be released due to the change in the nature of the charge and the time spent in custody.

Statement by rogatory letter dated 12 June 1996 of Erdal Açıkgöz taken at Pendik Criminal Court

146. Erdal Açıkgöz denied being in Diyarbakir after 1990. He was not involved in driving any car in the incident. His car 21T1127 had been in Istanbul.

Minutes dated 7 October 1996 of the Diyarbakir Criminal Court no. 3

147. The court instructed that the court file be sent to Istanbul Forensic Medicine Institute for a report on the deceased’s injuries and on whether Mehmet Mehmetoglu could have driven a car or turned on the ignition.

Petition dated 16 October 1996 by Ömer Güngör to the Diyarbakir Criminal Court

148. This identified Sergeant Gültekin Seçkin, known as “*Hoca*”, a member of the 7th Army infantry battalion at Devegeçidi, as the man who organised the killing of Mehmet Serif Avsar. The accused was prepared to confront him and requested that he be brought before the court.

Minutes dated 4 November 1996 of the Diyarbakir Criminal Court no. 3

149. Ömer Güngör’s petition was read out. He had not known the name earlier. Counsel for Feyzi Gökçen and Ömer Güngör requested that an inquiry be made into Gültekin Seçkin. Mehmet Mehmetoglu’s counsel protested that it would unnecessarily prolong the trial. The court ordered, *inter alia*, that an inquiry be sent to the Devegeçedi Infantry Battalion, 7th Army Corps Command, to determine whether Gültekin Seçkin was still serving in that unit and for his presence to be secured.

Letter dated 29 November 1996 from the Diyarbakir 16th Armoured Brigade Command (Land Army Command) to the Diyarbakir Criminal Court

150. Referring to the court’s summons of Gültekin Seçkin of 5 November 1996, this stated that their records showed no-one of that name employed by the 16th Armoured Brigade.

Minutes dated 25 December 1996 of the Diyarbakir Criminal Court no. 3

151. The response from the Army Corps was read out. The court instructed, *inter alia*, that further enquiries be made from the 16th Armoured Regiment Command about Gültekin Seçkin.

Letters dated 25 December 1996 and 21 January 1997 sent by the Diyarbakir Criminal Court to the Diyarbakir army command

152. The following information was requested: did Gültekin Seçkin work for their command in 1994; if, so what were his duties; where did he now work; what was his address?

153. There was a manuscript note on the letters: "does not exist in our records".

Minutes dated 20 January 1997 of the Diyarbakir Criminal Court no. 3

154. The Istanbul Forensic Medicine Institute requested the exhumation of the deceased's body to examine the skull and neck. The court, *inter alia*, instructed the public prosecutor to locate the body and to repeat the enquiry to the 16th Armoured Regiment.

Letter dated 31 January 1997 from the Diyarbakir 16th Armoured Brigade Command to the Diyarbakir Criminal Court

155. This referred to the court's letters of 25 December 1996 and 21 January 1997. The court had requested information with regard to Gültekin Seçkin. No entry had been found in their records.

Minutes dated 17 February 1997 of the Diyarbakir Criminal Court no. 3

156. Response from the 16th Armoured Brigade was read out. The court instructed *inter alia* that the public prosecutor continue his investigation concerning the body and that an enquiry be addressed to the army chiefs of staff as to whether a specialist sergeant Gültekin Seçkin served under their command, and if so, when and where.

Minutes dated 7 April 1997 of the Diyarbakir Criminal Court no. 3

157. The public prosecutor submitted that there was no useful purpose in exhuming the body. He adopted the submissions on the merits made earlier on 25 May 1994 and 24 April 1996. The court decided, *inter alia*, to abandon the exhumation and the attempt to hear evidence from Gültekin Seçkin; to review whether the file was ready for a final ruling; and to summon Mehmet Mehmetoglu's counsel to make his final submissions in his defence.

Minutes dated 5 May 1997 of the Diyarbakir Criminal Court no. 3

158. Counsel for the family submitted that the investigation was incomplete as the procedure to bring Gültekin Seçkin before the court had not been completed. She requested that the court extend the investigation in this respect. She also submitted that as the incident had been committed by gangs, working for state officials, the matter fell within the jurisdiction of the State Security Court. The court ordered that counsel for the family be allowed to carry out an inquiry into the case files concerning gangs operating in Diyarbakir and to inform the court if there was any information in them concerning a man matching the description of Gültekin Seçkin.

Minutes dated 26 May 1997 of the Diyarbakir Criminal Court no. 3

159. The court ordered the release on bail of Mehmet Mehmetoglu and Feyzi Gökçen.

Minutes dated 25 June 1997 of the Diyarbakir Criminal Court no. 3

160. It was noted that Mehmet Mehmetoglu had been released on bail and was performing his military service. Counsel for Feyzi Gökçen and Mehmet Mehmetoglu and the public prosecutor submitted that further investigation into Gültekin Seçkin was unnecessary. Intervening counsel was not present. The court stated that it abandoned the intention to inquire into Gültekin Seçkin and withdrew previous instructions concerning such enquiries.

Minutes dated 23 July, 20 August, 15 September and 8 October 1997 of the Diyarbakir Criminal Court no. 3

161. As the bench had changed, the court gave adjournments to examine the file and invited the public prosecutor and defence counsel to make further submissions.

Petition dated 3 November 1997 of Ömer Güngör to the Diyarbakir Criminal Court no. 3

162. The accused stated that he had had no animosity towards Mehmet Serif Avsar. Mehmet Serif Avsar had aided the PKK. He had stated that he would not accompany specialist sergeant Gültekin Seçkin and Mehmet Mehmetoglu when they wanted to take him from his business premises. Feyzi Gökçen and Aziz Erbey had been going for the police when they met those two persons, who said that there was no need for the police. They entered the shop, showed their identification and took Mehmet Serif Avsar away. When they stopped at a place on the Silvan Road, the accused, who was using crutches, waited during the interrogation. They told him to kill Mehmet Serif Avsar and as they threatened him, for his own safety, he had to kill Mehmet Serif Avsar. The incident took place due to the incitement of the specialist sergeant and Mehmet Mehmetoglu.

Minutes dated 24 November 1997 of the Diyarbakir Criminal Court no. 3

163. The public prosecutor adopted his previous submissions. Ömer Güngör and Feyzi Gökçen had nothing to add. The court noted that charges had not been brought against the accused concerning Articles 179 paragraphs 1-3 and Article 180 paragraph 1. As Article 448 could apply to Feyzi Gökçen and Mehmet Mehmetoglu, the former should be given time to make submissions and the latter should be summoned to appear from his military service. The prosecutor was to issue a new indictment.

Minutes dated 19 January 1998 of the Diyarbakir Criminal Court no. 3

164. Mehmet Mehmetoglu appeared and made submissions on Article 448, repeating that he could not drive at the time. Ömer Güngör had nothing to add.

Supplementary indictment dated 26 January 1998

165. This listed Ömer Güngör, Feyzi Gökçen, Yasar Günbati, Aziz Erbey, Zeyyat Akçil and Mehmet Mehmetoglu as accused of abduction and deprivation of liberty of Mehmet Serif Avsar on 22 April 1994.

Petition dated 16 February 1998 of Ömer Güngör to the Diyarbakir Criminal Court

166. The accused had previously identified Mehmet Mehmetoglu and specialist sergeant Seçkin from Devegeçidi as responsible for the incident. The sergeant's name was in fact Sütçu. The Susurluk report referred to Avsar murder as being carried out by Mehmet Mehmetoglu and others (see paragraph 89). Apparently, the reason was that Alaatin Kanaat had demanded money from Abdulkerim Avsar who was in prison. Mehmet Serif Avsar must have been murdered when he refused to pay the demanded sum. He asked the court to take the Susurluk report into account as evidence in the case.

Minutes dated 16 February 1998 of the Diyarbakir Criminal Court no. 3

167. Ömer Güngör made submissions and presented a petition. This stated that the specialist sergeant's name was not Seçkin but Sütçü and referred to the Susurluk report as giving information about this man's activities and the killing of Mehmet Serif Avsar. The court ordered the indictment to be served on the accused and for them to attend to answer it and for the matter of the Susurluk report to be adjourned.

Minutes dated 16 March 1998 of the Diyarbakir Criminal Court no. 3

168. The court instructed that a request be made to the Prime Minister, via the Ministry of Justice, to obtain the Susurluk report.

Minutes dated 13 January 1999 of the Diyarbakir Criminal Court no. 3

169. The court received a copy of the Susurluk report.

Minutes dated 8 February 1999 of the Diyarbakir Criminal Court no. 3

170. Ömer Güngör stated that he had killed Mehmet Serif Avsar under duress from Mehmet Mehmetoglu and Gültekin Sütçü. The court summoned Mehmet Sait Avsar to verify the autopsy identification.

Minutes dated 22 April 1999 of the Diyarbakir Criminal Court no. 3

171. Ömer Güngör stated that he was not guilty of the charges. Sergeant Gültekin Sütçü killed Mehmet Serif Avsar. He had confessed because he was threatened. He was still being threatened. He asked for release.

Minutes dated 14 May 1999 of the Diyarbakir Criminal Court no. 3

172. Mehmet Ali Avsar confirmed that the autopsy report was signed in his presence and was correct.

Minutes dated 21 May 1999 of the Diyarbakir Criminal Court no. 3

173. The public prosecutor repeated his submissions on the merits. Ömer Güngör had initiated the incident due to his belief that Mehmet Serif Avsar might know the location of his brother's body. Feyzi Gökçen had brought Mehmet Mehmetoglu back to the shop and Mehmet Mehmetoglu had introduced himself as a security official and the others as village guards. The accused had drawn their pistols and forced Mehmet Serif Avsar to go with them. Mehmet Mehmetoglu left the taxi on the way to the gendarmerie while the others went on. The five village guards drove out of Diyarbakir with the victim. When four of them changed their minds, leaving Ömer Güngör and Mehmet Serif Avsar together in the ruined building, Ömer Güngör shot and killed Mehmet Serif Avsar. He submitted that Ömer Güngör had committed premeditated murder (Article 450 paragraph 4), that Feyzi Gökçen, Yasar Günbati, Zeyyat Akçil, Aziz Erbey and Mehmet Mehmetoglu

should be convicted and sentenced under Articles 179 paragraphs 1-3 and 180 paragraph 1 for restricting the freedom of Mehmet Serif Avsar in using weapons and acting in concert.

174. Ömer Güngör submitted that Gültekin Sütçü was the perpetrator. At the very beginning, the gendarmes had told him what to say in his statement and that he would be out of prison in a year as they would look after him. No-one had helped him and now he had been threatened instead.

175. The court adjourned, stating that the case had reached the verdict stage.

Minutes dated 18 June 1999 of the Diyarbakir Criminal Court no. 3

176. Counsel for the family submitted that murder was widespread at the time in the region, when certain public officials were abusing their powers and forming gangs. Though the search for Gültekin Sütçü had earlier been abandoned, she stated that a search for him would lead to a more just result and would show that the allegations about the incident being personally motivated by Ömer Güngör's desire to find his brother's body were a diversion. The public prosecutor agreed that the 7th Army Corps and Army Supreme Command be questioned about Sütçü. The court gave orders to that effect.

Court decision dated 21 March 2000

177. The court summarised the indictment, the submissions of the prosecution, defence counsel and counsel for the family. It recounted the various statements made by the accused in their defence, and the other documentary and oral evidence.

178. The court concluded from the evidence as follows. Feyzi Gökçen, Yasar Günbati, Aziz Erbey and Zeyyat Akçil, provisional village guards, were sent to Diyarbakir to apprehend four PKK suspects. On the way in the car provided by the gendarmes, they met Ömer Güngör who joined them as he wanted to go to Diyarbakir for medical treatment. Three of the suspects were found and handed over that day. With help from the Security Directorate, they found the fourth the next day. At this point, the five guards bumped into Ferit Akça outside the Security Directorate. The uncle and brother of Ömer Güngör had been killed by the PKK, but their bodies never found. Ömer Güngör thought that Mehmet Serif Avsar had been involved with the PKK and he might know where the bodies were. Carried away by this idea, Ömer Güngör took the others along to the Avsar shop, which Ferit Akça showed them. They arrived in the white Toros. Feyzi Gökçen, Yasar Günbati and Aziz Erbey entered first, joined later by Zeyyat Akçil, and they told Mehmet Serif Avsar that he had to come for interrogation. He resisted. The others present asked for the police and for identity cards to be shown. Aziz Erbey and Feyzi Gökçen left to fetch the police. They brought back two people, Mehmet Mehmetoglu and a man, with glasses, speaking good Turkish who was addressed as "Boss". This man was said by Ömer Güngör to be Gültekin Sütçü. Mehmet Mehmetoglu showed his ID card. The accused pulled their weapons when there was continued resistance. Mehmet Serif Avsar agreed to leave. They hired a taxi as they were so many. Ömer Güngör, Zeyyat Akçil, Yasar Günbati, Mehmet Mehmetoglu, Mehmet Mehmetoglu's friend and the deceased got into the white Toros and the others into the taxi.

179. The cars arrived at the gendarmerie. The white Toros left, with Ömer Güngör, Mehmet Mehmetoglu, Feyzi Gökçen, the deceased and the man with glasses. Outside the city, Mehmet Serif Avsar was taken to the scene of the incident. Mehmet Mehmetoglu and the man in glasses interrogated him inside a building, while Ömer Güngör and Feyzi

Gökçen were outside. Mehmet Mehmetoglu and the man in glasses came out. Ömer Güngör went inside and killed Mehmet Serif Avsar with two shots.

180. The motivation for the incident came from Ömer Güngör, the other village guards acting on the basis of his wishes. They had no authority or assignment to take Mehmet Serif Avsar and so the five accused had restricted the freedom of the victim and violated his liberty in a manner which was to end in death. Ömer Güngör did not enter the shop but was at the scene of the killing. He had killed Mehmet Serif Avsar without the knowledge of, and with a different motive from, the others.

181. The court convicted Feyzi Gökçen, Yasar Günbati, Aziz Erbey, Zeyyat Akçil and Mehmet Mehmetoglu pursuant to Articles 179 paragraphs 1-3 and 180 paragraph 1 as they had restricted the freedom of Mehmet Serif Avsar at gunpoint, collectively and unlawfully, and he had been killed as a result. They were sentenced to 6 years and 8 months' imprisonment and a fine of 216,666 TRL. They were acquitted of murder. Ömer Güngör was convicted of intentionally killing Mehmet Serif Avsar pursuant to Article 448 and sentenced to 20 years' imprisonment. A complaint was to be filed with the Chief Public Prosecutor against Gültekin Sütçü for the necessary action to be taken.

3. Supplementary information requested by the Commission's Delegates provided to the Court

182. The Turkish Government, responding to requests from the Commission's Delegates at the hearing of evidence, submitted the Law on Village Guards (see Relevant Domestic Law and Practice below) and a copy of the statement taken from the NCO Okan. They also stated that there was no entry in the Diyarbakir or Hazro gendarme records concerning the four men detained on 21-22 April 1994 with the alleged assistance of the five village guards.

Statement dated 29 November 1999 of NCO Hasan Okan Tong taken by an officer

183. It was recounted to the witness that Abdullah Avsar had stated that he had informed the duty NCO at Saraykapi that his brother Mehmet Serif Avsar had been abducted and taken inside the gendarmerie and that the NCO told the family to go away. It was also stated that the witness' signature appeared on a record of 9 May 1994 concerning the impossibility of finding car, registration no. 21T1127.

184. The witness stated that between 1990 and 1994 he was second-in-command of the central gendarmerie station under the orders of the Diyarbakir central gendarmerie commander. Since it was more than five years before he was unable to recall the Avsar incident clearly. He did not remember, and did not think that, he had talked to Abdullah Avsar as described and he did not remember being spoken to in that way. He remembered nothing about the investigation.

4. The Susurluk Report

185. The applicant lodged with the Commission a copy of the so-called *Susurluk* report¹, produced at the request of the Prime Minister by Mr Kutlu Savas, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, though eleven pages and certain annexes were withheld.

186. The introduction stated that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

187. The report analysed a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of “informants” supposedly serving the State, and concluded that there was a connection between the fight to eradicate terrorism in the region and the underground relations that formed as a result, particularly in the drug-trafficking sphere. The report made reference to an individual Mahmut Yildirim, also known as Ahmet Demir or “Yesil” detailing his involvement in unlawful acts in the south-east and his links with MIT (National Intelligence Organisation):

“... Whilst the character of Yesil, and the fact that he, along with the group of confessors he gathered around himself, is the perpetrator of offences such as extortion, seizure by force, assault on homes, rape, robbery, murder, torture, kidnap etc., were known, it is more difficult to explain the collaboration of the public authorities with this individual. It is possible that a respected organisation such as MIT may use a lowly individual... it is not an acceptable practice that MIT should have used Yesil several times... Yesil, who carried out activities in Antalya under the name of Metin Günes, in Ankara under the name of Metin Atmaca and used the name Ahmet Demir, is an individual whose activities and presence were known both by the police and MIT... As a result of the State’s silence the field is left open to the gangs (*page 26*).

... Yesil was also associated with JITEM, an organisation within the gendarmes, which used large numbers of protectors and confessors (*page 27*).

In his confession to the Diyarbakir Crime Squad, ... Mr G. ... had stated that Ahmet Demir (*page 35*) would say from time to time that he had planned and procured the murder of Behçet Cantürk¹ and other partisans from the mafia and the PKK who had been killed in the same way... The murder of ... Musa Anter² had also been planned and carried out by A. Demir (*page 37*).

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay, in the financial strength the latter presented in economic terms. These factors also operated in the murder of Savas Buldan, a smuggler and pro-PKK activist. They equally applied to Medet Serhat Yos, Metin Can and Vedat Aydin. The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9³). Other journalists have also been murdered (*page 74*).”

188. The report concluded with numerous recommendations, including the improvement of co-ordination and communication between different branches of the

security, police and intelligence departments, the identification and dismissal of security force personnel implicated in illegal activities, the limiting of the use of confessors, a reduction in the number of village protectors, the cessation of the use of the Special Operations Bureau outside the south-east region and its incorporation into the police outside that area and the opening of investigations into various incidents and steps to suppress gang and drugs smuggling activities. It was recommended that the results of the Grand National Assembly Susurluk enquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

189. In the section of the report concerning the activities of *Yesil*, there were references to unlawful activities, including extortion, kidnapping and murder allegedly involving, amongst others, Mehmet Mehmetoglu and Alaatin Kanaat. This passage is included:

“By March 1994 Alaattin Kanat started introducing himself as the person in charge of the south-eastern region for MHP [the Nationalist Action Party]. At this stage his relationship with Ibrahim Yigit, chairman of the Diyarbakir Province MHP went bad and around that time Ahmet Demir and Alaattin Kanat took Ibrahim Yigit from the hotel at which he was staying in order to murder him but at a later stage for some unknown reason released him and took a certain amount of money in this fashion from Ibrahim Yigit for the relevant company.

– Specialist sergeant (Gültekin Sütçü) code name KURSAD from Devegeçidi, confessor Ismail Yesilmen and confessor Burhan Sare were witnesses to this incident.

– Alaattin Kanat, Mehmet Mehmetoglu, Ismail Yesilmen and Ahmet Demir, code name Yesil, conspired and murdered Mehmet Sincer (member of Parliament from Batman) ...

– Ahmet Demir personally planned and carried out the murder of Vedat Aydin and Musa Anter. A. Demir and A. Kanat collected large sums of money from Diyarbakir and the surrounding provinces with PKK headed threatening letters ... This collection of money was made by Mehmet Mehmetoglu and A. Kanaat.

– In 1993 by indicating that Abdülkerim Avsar, who was under arrest in Diyarbakir Type E prison in a PKK trial and who was the brother of the proprietor of the “Sedef Trading Company”, was transferred to the confessors’ dormitory, A. Kanat collected TRL 1 billion from Sedef Trading. They repeated their demand in 1994 and upon a refusal to pay the money they murdered Mehmet Serif Avsar, a partner in the company and this incident surfaced for some unknown reason.

D. The oral evidence

1. Mehmet Ali Avsar

190. Mehmet Ali Avsar, the brother of the applicant, was born in 1959. He, Mehmet Serif Avsar and Nemik Kemal Avsar ran a business partnership in Diyarbakir, running a fertiliser franchise. On 22 April 1994, shortly after 11.00 hours, a group of three people came into the shop, joined a few minutes later by two others. His brother Mehmet Serif Avsar was down by the entrance. The witness, on the mezzanine, saw him talking to the visitors. His brothers Sait and Abdullah were also in the shop.

191. At first, he thought the visitors were customers. Then, due to the sound of arguing, he realised that they were not and he opened the window of his office and asked what was going on. They said that they had instructions from the public prosecutor in the Saraykapi court building to take one of them there. They did not mention Mehmet Serif Avsar specifically. When the witness asked why, they said that Abdülkerim Avsar was in prison and had not come to make a statement. The witness said that they could not make a statement for their brother. They asked why he was making problems and said that they were security officials. He asked them to show their identity cards. They did not want to do that. He suggested that they go and find some police officers nearby, saying they would go with the police officers. One of the men said that he would call on the radio. He walked to the door, talking into the radio in his hand. He later recalled that it was probably Ömer who had a radio in his hand. At that point there were five men there, who talked, dressed and acted like people from the region. Abdullah noticed that one of the men was limping but did not see any crutches. The man who left came back in with two more people. They looked different and the others deferred to them as if they were in charge. One of them was dressed elegantly and neatly, spoke very correct Turkish and had a diary in his hand. He was clearly in command, being greeted respectfully like a senior official. The witness did not hear the word “*müdür*” used though.

192. The two men asked why the Avsar brothers were causing difficulties for the five men, saying that they were security officials and he should go with them. The Avsar brothers asked them to show their ID. One of the men, who claimed to be a security officer, opened his ID and closed it. The witness insisted on seeing it properly. The man pushed him to the wall, and said, “Shoot them.” The men drew their guns and cocked them. After argument, Mehmet Serif Avsar said that he would go with the men in order to avoid an incident. They agreed, pulled him into the white Toros car 21AF989 in which they had arrived and took him away. According to his brothers, the seventh man, the one in charge, got into a taxi however. The brothers took the numbers of both cars. The people left in the shop panicked. They called the police emergency number and he himself called the gendarme number. His brothers Sait and Abdullah went out immediately and followed the white Toros in their own car, which was parked outside. He stated that the statements taken by the gendarmes which referred to a lapse of ten minutes were inaccurate. About 10-15 minutes later, the police arrived. They took their statements and said that they would look into it. After they had called their station on their radios, the police said that his brother had been taken to the gendarmerie and not to worry. He also phoned his father Süleyman, at his jewellers’ shop and his father went to Saraykapi to join his brothers. The taxi driver also came back to the shop, saying that he had dropped three men off at the gendarmerie.

193. He heard later that his brothers followed the car as far as the gendarmerie compound, which was at most five minutes away. The white car went inside. His brothers stopped at the gate. They told an NCO that their brother had been brought inside and wanted to know what was happening. The NCO told them that they were lying. After the village guards had delivered Mehmet Serif Avsar into the gendarmerie, they came out. The brothers saw them and pointed them out to the gendarmes.

194. The witness was rung by his brothers who told him they were waiting outside the gendarmerie. The witness went to join them there. They told the gendarmes that they wanted to make a complaint. They were kept waiting until about 13.30 hours. Finally, the gendarmes told them to write a petition to the public prosecutor’s office. They wrote a

petition and the witness took it to the public prosecutor's office. At about 13.30 hours, the public prosecutor sent them to the police, as he had told the witness that the gendarmes had no authority to detain people in the city without the knowledge of the police. At the police station, they were kept waiting until about 16.00-17.00 hours, when they made their statements. The police said at that point that they had made a mistake in saying that his brother had been taken to the gendarmerie. The witness took their petition from the police and went back to the public prosecutor. The prosecutor said that the people concerned were village guards. As the gendarmes said that the village guards had returned to their villages, he would try to bring them back.

195. The next day, and over the days that followed, they went back to the police, the public prosecutor and the gendarmerie. Their father went to Ankara, talking to politicians, bureaucrats and many others. On about the fourth day, the witness went to see the Diyarbakir provincial governor. The governor said that he was aware of the incident and that they were doing everything in their power to find Mehmet Serif Avsar. The witness and the family waited anxiously.

196. When the gendarmes came with six suspects to the premises to reconstruct the incident, he and his brothers pointed out that it was incomplete as the seventh person was missing. That evening, Captain Gül rang to say that a body had been found. They rushed to the morgue and identified it as their brother. He saw the body at the autopsy. There were dark bruises on his head and shoulders and his ankles were swollen and bruised, with a mark as if a cord had been wrapped round them. He did not believe, from the intact state of the body, that it had been left all that time in a river in the open as alleged.

197. From the beginning, they had insisted that there were seven persons but there was always excuses as to why he could not be found or denials that he existed. Someone was always protecting the seventh person. As they considered that all their lives were now in danger, they left Diyarbakir. He moved to Istanbul to continue business there. About a year before the incident, Mehmet Serif Avsar had been taken into custody but released after being brought before the court. The witness thought the incident had nothing to do with Ömer Güngör's brother's body but was because his family were perceived as being against the State. For example, the applicant worked for Özgür Gündem and Abdülkerim was in prison for helping the PKK. The confessor, Mehmet Mehmetoglu, had also been with Abdülkerim in the mountains and maybe knew Mehmet Serif Avsar when he helped Abdülkerim with an operation with his ear, though that was only a guess.

198. When the applicant's lawyer referred him to the passage in the Susurluk report, the witness explained that Sedef Ticaret was a business in a different district and he did not know the partners. Nor did he know Alaattin Kanat. No threats had been made concerning demands for money. His brother Mehmet Serif Avsar had been close friends with Mehmet Necati Aydin, who had disappeared a month before. His brother had been active in trying to find him.

2. Süleyman Avsar

199. The witness, born in 1932, was the father of the applicant and Mehmet Serif Avsar. At the time of events, he and two of his sons had a jewellery shop, while Abdullah, Sait, Mehmet Serif and Mehmet Ali ran the *Toros Gübre* fertiliser franchise, about a

kilometre away. He was in his shop when his son was taken away. At about 11.30 hours, Mehmet Ali called him on the phone, saying that Mehmet Serif had been abducted. He jumped in a taxi at once and went to the shop. Only Mehmet Ali was there. He said that they had taken Mehmet Serif to the gendarmerie, so the witness went there immediately in a taxi. Ali stayed, waiting for the police. At the gendarmerie, where he arrived at about 12.00 hours, he saw Sait and Abdullah. They wanted to go inside to report the abduction but the gendarmes said the station was closed until 13.30 hours. As they waited by the door, Abdullah pointed out five of the persons who had been involved, walking around in the courtyard, 200 metres away. The white car was there also. His sons said the other two men involved had left in a car. He was sure that Mehmet Serif Avsar was in the compound. There was only one entrance/exit, as the place was inside the ramparts of the old fort. Inside the wide gate, was the gendarmerie on the left and the prosecutor's building to the north, with the prison behind.

200. At 13.30 hours, they were allowed into the gendarmerie. The five men were still outside in the courtyard. He spoke to an NCO on duty, telling him that his son had been abducted and brought there. He went upstairs to find out and when he returned his attitude had changed and he said, "Get out. Nothing of the sort happened." He then returned to his shop. He was upset and did not notice if the village guards were still there at that point. He contacted a Member of Parliament, who called the Minister of Justice and the President for him. The deputy police chief called them that night to re-assure them that nothing would happen to their son. He flew to Ankara on 23 April, where he talked to 15 to 20 MPs, to the Minister for Human Rights and to the Vice President of the Turkish Grand National Assembly. The latter talked on the phone to the Minister of the Interior who said that Mehmet Serif Avsar had been found in a military unit and nothing would happen to him.

201. His son Abdulkerim had gone to the mountains, been caught and confessed. The family had told him not to become a confessor because confessors not only admitted their crime but became contra-guerrillas, like Mehmet Mehmetoglu. He suspected that his son's decision to leave the confessors' wing was a reason for what happened. Also his son Behçet (the applicant) had been found guilty of sympathising with the PKK and had fled to Germany, where he worked for the *Özgür Gündem*. There were photographs in the newspaper of the applicant with Öcalan. He had told his son that this put the family in Diyarbakir in danger. Mehmet Serif Avsar was also a close friend of Necati Aydın who had disappeared, after which his son had looked after the father.

202. In answer to a question by the Government, he stated that many of his 500 strong family had been arrested or detained. His son Mehmet Ali had been arrested and sentenced under Article 169¹, being released in 1991. His son Sait, Sait's wife and his daughter Adalet had been arrested, then released after a month. He had been told that his daughter Sükran had gone to the mountains. She was detained twice, and on the second occasion acquitted and released. As one of his sons was in the mountains, the police were always around, in their shops, harassing them. Mehmet Serif Avsar had been detained once before, but released after being taken to court.

203. He had not attended the court proceedings himself as he was afraid. Because of the pressure, they sold their businesses at half price and left. He had never been called to give his statement.

3. Edip Avsar

204. The witness born in 1961, was the cousin of Mehmet Serif Avsar. He was living in Bismil at the time of the kidnapping and murder. He described an incident on 18 June 1994, when he and his brother Nedim were told to get into a car by armed men. Both of them had run away. He tried to reach a police station but was knocked unconscious, coming round in a room with men in civilian dress. They asked him his connection with the applicant and Mehmet Serif Avsar, saying that they had killed Mehmet Serif Avsar and it would be his turn next. He was taken blindfolded to the gendarmerie and tortured, before being released. He had recognised one of the men in the car who had shot at him as being a gendarme NCO.

4. Senal Sarihan

205. The witness, born in 1948, was a member of the Ankara bar. She was representing the family as interveners in the trial of the village guards in Diyarbakir. Though she did not attend all the hearings due to the distance and expense for the family, she followed the proceedings and received the documents. The proceedings had been going on so long because of the seventh person and the frequent changes in the bench of judges. Cases usually lasted two years, including appeals, though political ones lasted a long time.

206. As regarded the seventh person, her clients had mentioned the involvement of seven persons in their statements shortly after the incident to the gendarmes. Their statements to the police had apparently been lost. The accused referred to the seventh person for the first time on 5 July 1994, describing him as a military person or police officer but without giving his name. She had suspected that their earlier statements to the gendarmes, which were all suspiciously the same, had been given under duress and the seventh person deliberately omitted. The descriptions given were almost identical – an individual 1.60-70 cm, brown hair, somewhat heavy, with sunglasses who spoke perfect Turkish.

207. The seventh person's name had been revealed as Gültekin Sütçü by the Susurluk report. His address had recently been given to the court in August 1999. As officials' addresses were easily found, the reason for his non-appearance in the proceedings was due to powerful elements deliberately causing the delay or he had his own particular reason not to appear. She thought that the 7th Army Corps had been very negligent in not obtaining his address earlier. The court had failed to accept her request for photographs of personnel to be shown to her clients for the purposes of identification. Though the court made various requests on her application, they did not try very hard in her view. It was a mistake for the court now to summon him as a witness as he has been described as a suspect in the documents for a long time. However, he could only be heard as a suspect if the prosecution drew up an indictment, based on the necessary steps. She considered that there was negligence in that respect.

208. Her clients had been forced to leave Diyarbakir because of threats. She herself was followed when in Diyarbakir and threatened openly. She had received no response to her petition to the Ministry of Justice, though the judge, the President of the Court and the public prosecutor took some initiatives, helping her for a while in getting to the airport. That protection stopped when the bench changed. There were increased threats when the seventh person was mentioned in the proceedings. More recently with the exposure of the situation in the south-east, matters had improved.

209. She did not believe that the incident was based on Ömer Güngör's personal ideas. It was ludicrous to believe a village guard would go with such a large group and take someone away. It was something more – a scare tactic, one of the illegal acts prevalent at that time. Her clients had told her that Abdulkерim had been forced to become a confessor under pressure and after a short time had changed his mind. They were afraid that they were being targeted to put pressure on him.

210. She referred to a medical report that recorded blows and marks on the body which were possibly due to trauma from a hard object. She had also been suspicious about the state of the body, which had not deteriorated as might have been expected if Mehmet Serif Avsar had been killed when alleged.

5. Ömer Güngör

211. The witness, born in 1966, had been a village guard from 1989. He had been wounded in a clash in July 1993. The injury had disabled him on the left side. Following an operation in November 1993, he had been told to come back to the military hospital in Diyarbakir every three or four months for treatment. He had been walking with crutches until November 1994. As village guard, he had gone wherever the State had told him. He had a gun. Though his principal duty was to protect the village, he went where he was sent, to take part in clashes elsewhere. That had happened many times. He did not remember if he had helped to detain persons before.

212. In April 1994, he went to Hazro as he wanted to go to Diyarbakir for medical treatment. He had not been during the winter as travel was not possible. He did not have a specific appointment. The commander said that he should go with the four village guards who were going to Diyarbakir and that he should help them apprehend some men to hand over to the station. There was no car to be delivered – the car was not an issue but only mentioned later for something to say. When asked how he could be expected to help if he was still injured, he said that he had to do what he was told and that perhaps it was to show the others where the headquarters were.

213. When they arrived in Diyarbakir, he showed the guards the gendarmerie headquarters and they saw Captain Gül. He sent them to the police headquarters. Together with the police, they apprehended four men and handed them over to the gendarmes. The witness stayed in the car during the operation. The guards stayed at the headquarters that night. In the morning, Captain Gül told them to go and bring Mehmet Serif Avsar. He did not give any reason.

214. A villager Ferit Akça showed them where the shop was, but did not go into the shop. All five village guards entered the shop. He did so on crutches. He did not have a walkie-talkie or a gun, as he could not carry anything. Mehmet Serif Avsar refused to come, saying that he would only go with the police. Aziz Erbey and Feyzi Gökçen went to call the police. They came back with two people, who had been outside and who had said that there was no need to call the police. The witness thought that they were the police. They showed their identity cards and took the man. At that point, as it was crowded, he was outside the shop leaning on a tree outside the door. He did not hear what was said inside the shop. The two men and one of the village guards drew their guns. They left in two cars.

215. When they arrived inside the gendarmerie, the men whom he later knew were the expert sergeant and the confessor Mehmet Mehmetoglu said that they would

interrogate Mehmet Serif Avsar before handing him over. The witness was in the car and could not get out without help. The two men called for Feyzi Gökçen, got into the car and the confessor drove out of Diyarbakir, stopping at a ruin. He and Feyzi Gökçen stayed by the car. He could hear the men talking with Mehmet Serif Avsar. Feyzi Gökçen helped the witness out of the car. Then, they heard gunshots and the two men came back. Feyzi Gökçen was a little way off. The expert sergeant came to the witness and said that he had to admit to killing Mehmet Serif Avsar or they would kill him. The witness agreed as he was alone and disabled, with hardly any family.

216. On the way back, the police stopped them. Mehmet Mehmetoglu accelerated away, the police following. When they got back to the gendarmerie, they explained everything and he had to admit to the killing. When he told Captain Gül that it was his man that did it and he would end up in prison, the Captain said that it was his problem. Captain Gül kept them detained for about an hour, then on release, they went back to Hazro with the convoy. From there he returned to the village. As matters had turned out, he had not been taken by the others to the hospital for treatment.

217. The witness' elder brother had been taken away by the PKK and they had never seen the body since. He did not know who in the PKK killed him. There was no connection between his family and the Avsars. Mehmet Serif Avsar who had not gone to the mountains would not know where to find his brother.

218. He had learned Mehmet Mehmetoglu's name in prison. Mehmet Mehmetoglu told the guards that the other man was Gültekin Sütçü, an infantry expert sergeant from Devegeçidi in Diyarbakir. He gave the name to the court.

219. The reconstruction had been carried out as the gendarmes wanted. It was not correct that he had taken Mehmet Serif Avsar's arm. They took his crutches away when they took the photographs. The statements taken by the gendarmes had been made up by them. He went to where the body was, with the gendarmes and Captain Gül. He did not see the body himself, though he saw the gendarmes doing things with blankets and cameras.

6. Feyzi Gökçen

220. The witness, born in 1960, had been a village guard from 1992. As a guard, he protected the village. When they saw persons helping the PKK, the village guards told the State and apprehended the suspects with the help of the State. They did so in the village, in the surrounding district and as far as Diyarbakir, with the knowledge of the State. There were no police in Hazro at the time and the soldiers did not know the people so the village guards virtually did the police work. Things had changed as the police were there now and there was no work left for the village guards. The guards had walkie-talkies for use at night in the villages. He did not have one with him in Diyarbakir. He had been to the Saraykapi gendarmerie quite a few times before in respect of the deaths of various relatives – three of his brothers and two uncles had been shot by the PKK.

221. The Hazro commander sent them to Diyarbakir to deliver a car and to help apprehend four people whom they knew, as they were from the Hazro area. He remembered meeting Ferit Akça outside the police headquarters, who was perhaps there about a licence for a gun. He had known Mehmet Mehmetoglu as he was from Hazro. Ömer Güngör had walked with a single crutch.

222. He referred to his previous statements and court proceedings as regarded other questions. When asked, he stated that the latest of his statements was the one that was correct – the one which mentioned Mehmet Mehmetoglu, and another unidentified man. He did not know if Ömer Güngör had killed Mehmet Serif Avsar. However, he remembered seeing a gun in Ömer Güngör's hand and a spot of blood on his shoe. Apart from that the statements read out were correct: 5 July 1994, 27 June 1995, 7 July 1995. He was still a village guard.

7. Zeyyat Akçil

223. The witness, born in 1969, referred to his statement in court and stated that he did not wish to say anything more.

224. He did however answer a few questions. He had become a village guard in Ormankaya in 1994, or maybe November 1993. He did not go into the Avsar shop, but stayed outside. When they went to Diyarbakir, it was the first time he had been asked to do a duty.

8. Yasar Günbati

225. The witness had become a village guard in 1992. His duty was to protect the village. There had been a raid on the village by the PKK, following which people gave up resistance and left. As he and others were unable to serve in the village, they went to carry out their duty in Hazro.

226. They had gone to Diyarbakir for their own personal needs, not under orders. While there they had seen some people and picked them up, delivering them to the authorities. Whether they had orders or not, they could intervene when they saw wanted people. Sometimes they helped the police pick people up; other times they acted by themselves and handed the people over. They would conduct searches around Hazro on their own initiative. Ömer Güngör was a village guard from Lice but he was living in Hazro temporarily as his village had been evacuated.

227. He did not remember whom the car belonged to. Ömer Güngör was limping a bit, but he did not recall if he was using crutches. There was probably a walkie-talkie with them. Probably they showed the people in the shop their village guard identity cards. They apprehended three men on the first day in Diyarbakir and the fourth one the next day. Captain Gül knew nothing about the incident. Ömer Güngör had acted on his own initiative and could not accuse anyone else.

228. When his statement to the court on 5 July 1994 was read out, he confirmed that it was correct. He was still a village guard. He referred to losing four of his own family to the PKK and to the deaths of 10 village guards in their village. The State did not order them to do things: if a crime was committed by the village guards, it was because of the village guards' own ignorance or personal resentment against other villagers.

9. Aziz Erbey

229. The witness had become a village guard in Ormankaya in 1993. The guards' job was to protect the village. It had been attacked several times by the PKK and his elder brother, an uncle and three other villagers had been shot. He was still a village guard.

230. When asked about events in April 1994, he said that he did not want to remember and did not remember.

10. Mehmet Mehmetoglu

231. The witness, born in 1974, was living in Diyarbakir in April 1994. Prior to this time, he knew only Feyzi Gökçen, though all the other village guards were from his own district, Hazro.

232. On 21 April 1994, he was in the Kültür café with a woman friend. He left to go to his cousin's shop and met Feyzi Gökçen and Aziz Erbey by chance. They told him that they were to apprehend a terrorist and hand him over to the State. They did not ask him to help them. He went back with them to the shop, as it was in the direction that he was going. He heard one of the people in the shop say that they could not trust the village guards. He asked them how they could take that position, as the men were village guards and would hand Mehmet Serif Avsar over to the State. There was an argument going on as to whether Mehmet Serif Avsar should go. The people in the shop said that the police should come. Eventually Mehmet Serif Avsar said that he would go with them to the gendarmerie. No-one used force and there were no security officers present. At this time, he was at the door, waiting for Feyzi Gökçen. He never went inside, only talking to a young man whom he later knew to be a relative from by the door. He was not carrying a gun.

233. He got into a car with Feyzi Gökçen and was dropped off at the main post office area, from where he went to his relatives' home. The post office was about 600-800 metres away. It was not in the direction of his relatives' home. Mehmet Serif Avsar was in another car with the other guards. He knew nothing about what happened until he was taken into custody later by the gendarmes. He got into the car as he thought Mehmet Serif Avsar's family might think he was one of them and react against him.

234. He had been in the PKK for a few months and when he was in custody he had given evidence on a few occasions. He had benefited from the remorse law by confessing to the State everything that he knew. He had been given no other duties, official or unofficial. He was just a citizen. In April 1994, he had no job.

235. When he was told that persons said that he had claimed to be a security officer with another man who had authority, he stated that he had been the victim of frame-up theories for years. He had seen no person acting as if they were in charge of the village guards. At another point he said that he could not say if any such person was there as he did not know anyone but Feyzi Gökçen and there was a group of people, five or six in addition to the village guards.

236. Ömer Güngör had no difficulty in walking or other functions at this time. He carried a small pistol. He was of the opinion that the whole incident was caused by Ömer Güngör using his own friends to carry out a murder for personal revenge. Abdulkerim Avsar had been the leader of a PKK group which had killed Ömer Güngör's elder brother by melting plastic over him. He had heard about the incident when he was in prison with other confessors. Ömer Güngör had taken on a kind of blood feud. The witness had been in Abdulkerim Avsar's PKK group for about a month and a half and they had carried out activities together.

237. About one month and a half before the incident, he had cut his hand, punching it through glass. The plaster had come off a few days before but he could not use his hand e.g. to pick up cigarettes or to turn a car ignition or to drive.

238. When asked why Mehmet Serif Avsar's relatives would insist that he was involved with another person, he claimed that the relatives had not been able to point him out at the identity parade. His photograph had been in the newspaper and he was always accused of being mixed up in incidents. At the reconstruction, sergeant Suayip put a gun in his hand and made him under duress play the part of the person taking Mehmet Serif Avsar away.

239. He did not meet Captain Gül on the day of the incident. He only saw him when he was taken into custody. He knew him from before though, when he was interrogated for terrorist offences.

240. He knew Alaatin Kanat. They had been together in prison for eleven-twelve months. They had had a friendly and respectful relationship. In prison though, there was no choice as to whom you were confined with.

11. Kadir Metin

241. The witness, born in 1947, was assistant commander at the Diyarbakir provincial gendarme command in 1994. He was given a team by the commander with orders to conduct an investigation jointly with Captain Gül, into the killing of Mehmet Serif Avsar. This was a normal part of his duties, carrying out investigations as the commander considered appropriate. Captain Gül was not his subordinate but was attached directly to the provincial commander.

242. He did not remember many details of the investigation. He had taken statements of some relatives. He did not know anyone called Mehmet Mehmetoglu. Neither had he heard the name Gültekin Sütçü. After a short time, he was assigned elsewhere and Captain Gül continued without him. He was not involved in any line of investigation concerning any alleged involvement of the security forces in the killing. He recalled one of the guards was disabled and it had crossed his mind how he could have been involved.

243. From his experience of 31 years, he stated that village guards were appointed by the provincial governor on approval of the district governor and the security forces. The State paid them and supplied them with pistols and long-barrelled weapons. Their duty was to provide security to the place where they were registered, namely within the territory of their village. They were given walkie-talkies when the need arose. They had special identity cards from the governor. They took orders from the muhtar. He denied that the muhtar would take orders from the gendarmerie, or that the gendarmerie would give orders to village guards. Village guards were not used for any purpose other than protecting their own village. It was not possible to use them for taking persons into custody. He did not recall why the village guards in this case had come into Diyarbakir. He confirmed that it would be unlawful for the Hazro gendarme commander to order the village guards to go to Diyarbakir to apprehend suspects.

12. Mithat Gül

244. The witness, born in 1960, was in April 1994 commander of the Diyarbakir provincial central district gendarmerie, in charge of the Saraykapi headquarters as well as the stations within the administrative limits of the central district, outside the municipal limits. He left that post in August 1994. Village guards used to come from the province and districts and always called at Saraykapi. It was a sort of meeting centre for them and they had guest houses at the regiment. At another point, he said that the guest house

was by the courthouse. He could have met the 5 village guards before the investigation, but could not remember. He might have sent them on to the police when told about their instructions. Saraykapi had custody facilities, used for persons detained within their jurisdiction.

245. As regarded the five village guards' involvement in apprehending persons in Diyarbakir, he had given no such orders. Orders might have been issued by the Hazro command to which they were attached. However, village guards were not authorised to take people into custody on their own. They only helped law enforcement officers, by informing them about wanted persons and assisting in their detention. Though their primary function was to protect their villages, they were regularly given anti-terrorist missions in other areas e.g. in operations or in assisting in apprehension. The village guards in this case were working with the police as far as he could remember. He agreed that he would have to be informed if village guards had been sent to his jurisdiction to take persons into custody. However the men concerned in this case were not in his jurisdiction. If the village guards had come to the guest house, they would certainly have reported to the gendarmes. He had not been in touch with the Hazro gendarme commander about the persons to be detained in his gendarmerie, though information would have been sent when they had been taken into custody. The custody record, if the persons were in the custody room and not merely waiting a few hours for the convoy, would record that event.

246. He knew Mehmet Mehmetoglu, who had left the PKK. He would have co-operated with the police or other units in giving information and providing support in that connection.

247. He first learned about Mehmet Serif Avsar's abduction when the public prosecutor referred the petition of the family. He did not know if Mehmet Serif Avsar was under surveillance or observation but his family might be directly or indirectly involved in terrorism. They were from Bismil and were known to have organic connections with terrorism. He was appointed by the provincial commander to conduct the investigation with Colonel Metin. Most of the questioning however was done by him and his team. After a month or so, the investigation was complete, and they sent the file to the public prosecutor. That was the end of his role.

248. According to his recollection, the real key to the incident was a personal conflict between Ömer Güngör and the Avsar family, members of whom were in the PKK and whom he considered had killed his brother. As regarded the alleged seventh person, they had found no indication or sign of the person in the investigation – there were contradictions in the descriptions given anyway. According to their enquiries, there was no such person in the security forces or police. He did not know anyone called Sütçü. Devegeçidi was entirely an army unit.

249. He recalled that Ömer Güngör was slightly disabled but did not notice crutches. Nor would his condition have prevented him from using a gun. He would never have given the instruction to detain Mehmet Serif Avsar as it was outside his jurisdiction in the municipal area and the village guards were not attached to his command. There had been no duress during the reconstruction and the family and the village guards had not had any objections to what was done.

250. The gendarmes had carried out the investigation as the village guards were involved, guards being under the command of the gendarmerie, and because they had said that they were taking Mehmet Serif Avsar to the gendarmerie. Though the victim had been abducted within police jurisdiction, he had been taken within gendarmerie jurisdiction and they took over the entirety of the investigation for consistency, aided by the police.

251. The checkpoint for the Saraykapi gendarmerie was by the Lion Fountain. The fountain itself was open to the public. The checkpoint did not affect persons going past the gendarmerie to the court building. It would have been impossible for the village guards and Mehmet Serif Avsar to have entered without being checked. The allegation that he was brought to the gendarmerie was false. He could have been brought to the courthouse without their knowing. In his view, the family were exploiting the abduction of their son on behalf of the PKK. It was a case of ordinary homicide and Ömer Güngör had changed his story to save his skin. Any involvement of the security forces was out of the question and could never have happened.

13. Sinasi Budakli

252. The witness, born in 1965, was acting at the relevant time as intelligence operations NCO at the Saraykapi gendarme headquarters in Diyarbakir, under the command of Captain Gül. He had been in the team investigating the Mehmet Serif Avsar incident.

253. The descriptions of the alleged seventh man had been contradictory, about height etc. Nothing was clear. At another point, the witness said that, as Ömer Güngör alone had done the killing, they left matters there. They had tried to find the taxi driver who drove from the scene without success. It was normal for village guards to give information about suspects to their commanders and then be sent to give the information to the relevant authorities in the city and show where the persons were if necessary. They could not act to detain on their own.

254. The guards and Mehmet Mehmetoglu had raised no objections to the reconstruction. If so, they would have been recorded. He did not remember if they tried to find the NCO Okan identified by the relatives.

255. He stated that he had never heard of anything called JITEM. He had no information before the incident about the Avsar family or whether they were involved with the PKK.

14. Ümit Yüksel

256. The witness, born in 1958, had been public prosecutor in the trial concerning the killing of Mehmet Serif Avsar since January 1998 to date.

257. The prosecution view was that Ömer Güngör killed Mehmet Serif Avsar and the others were accessories. Ömer Güngör had given information in 1996 about a man Seçkin. The court had little information about him and enquiries with the General Staff showed no-one by that name had worked in the region. Defendants often used to make up names to save themselves from conviction. Later, it was established that an expert sergeant Sütçü in fact existed and lived near Manisa. Letters rogatory had been issued. He was currently a witness, not a suspect.

258. Much of the delay in the proceedings was due to the lack of a presiding judge for a long time, and the fact that the court was presided over by temporary presidents. There were changes in the bench. The length in this case was exceptional.

259. He confirmed that the prosecution had consistently taken the view that the village guards were in Diyarbakir to search for and apprehend four men wanted for interrogation. There had never been any question of Ferit Akça being the seventh person. He had had doubts about the alleged desire of Ömer Güngör to find out information about his brother's body, which would be difficult after that length of time. It was probably only a pretext for taking him away to kill him in a premeditated way.

15. Mustafa Atagün

260. The witness, born in 1949, was involved in the Mehmet Serif Avsar investigation up to the transfer of the case to the court, where it was taken up by another colleague. He had prepared the indictment. He recalled no allegation about a seventh person being made by that time. He did not recall why the gendarmerie were carrying out the investigation, even though the abduction had taken place in police jurisdiction. As far as he could remember the body was found outside police jurisdiction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal prosecutions

261. The Turkish Criminal Code makes it a criminal offence:

- to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants);
- to issue threats (Article 191);
- to subject an individual to torture or ill-treatment (Articles 243 and 245);
- to commit unintentional homicide (Articles 452 and 459), intentional homicide (Article 448) and murder (Article 450).

262. 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).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge (Article 152). 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).

263. 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.

264. 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.

265. 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 264 above) also applies to members of the security forces who come under the governor's authority.

266. 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 262 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

267. 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.

268. 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."

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.

269. 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 268 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.”

270. 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).

C. Village Guards

271. Chapter Eight of the Law on Villages (Law no. 442) concerns village guards and their duties. The role of village guards is to protect the life, honour and property of the people within the boundaries of the village (Article 68). There is to be at least one in every village, with one per five hundred population in villages of more than one thousand (Article 69). They are to be recruited by the Council of Elders and take up their duties on approval by the district governor (Article 70). Guards must be between the ages of 22 and 60, have no previous criminal conviction, have a good reputation and have no bad habits such as drunkenness or a tendency to quarrel with others (Article 71). They carry out the orders of the muhtar (Article 72) and carry weapons, resistance to them to be punished in the same way as resistance to gendarmes (Article 73).

272. Provision is made for the recruitment of volunteer guards in times of raiding and pillaging, extended by an amendment of Law no. 3612 dated 7 February 1990) to cover circumstances disclosing a state of emergency or other serious acts of violence. The provincial governor, with the approval of the Minister of the Interior, may establish the appropriate number of guards to be recruited, who are paid salaries, aids and indemnities for service by the Ministry of the Interior (Article 74). The weapons and ammunition of

village guards are provided to the Council of Elders by the authorities (Article 75) and the weapon given to a guard can be used only by that person (Article 76).

273. Guards are allowed to use their weapons to protect themselves against attack, to protect the life of another person when no other solution is possible, if they encounter armed resistance while trying to apprehend a murderer or any other person caught in the act of committing an offence or fleeing the scene of the offence, where the apprehended person flees, disregards the “stop warning” and there is no other possibility than to resort to the use of weapons; and where during a chase to capture brigands a suspect appears in the area where the brigands are sheltering and does not respect the “stop warning” given by the guard. In any other circumstances, the guards shall be punished for using their weapons. Even where the use of weapons is justified, the guards should as far as possible seek to wound, rather than kill, the suspects (Article 77).

274. Village guards are required always to carry the village guard ID issued to them (Article 78). On death, resignation or dismissal, the guard’s weapon, ID, papers, badges etc are to be handed over to the muhtar (Article 79). Provision are made for disciplinary punishment (caution, reprimand, dismissal) of guards neglecting their duties or engaging in prohibited activities e.g. absence without leave, taking improper advantage of the vineyards, orchards or farmlands guarded by them, failing to carry their badge, uniform, weapons or exchanging them (Articles 80-81). Village guards who lose negligently or allow others to take their weapons or ammunition are to be discharged (Article 82).

275. Regulations concerning temporary village guards were drawn up under sections 74 and 75 of the Law on Villages (Law no. 442) and came into force on 24 October 1986 to establish the principles and procedures relating to temporary village guard’s appointments, training, duties and responsibilities, the areas within which they shall perform their duties as well as their occupational rights and their dismissal from duty.

276. Conditions for appointment as a temporary village guard include: that the person be of Turkish nationality, has completed military service, has no conviction for an infamous crime or inciting hatred or enmity (Article 312 paragraph 2 of the TPC), has no involvement in separatist or anti-State activities or blood feuds, is a native and resident of the village where he performs his duties and has no physical or mental illness or disability that prevents him from performing his duties (section 7). Candidates have to apply in writing to the district or provincial governor, with copies of various documents (section 8). The application is referred to the district gendarme command, which opens a file on each application and investigates from its own records and other official sources. The collected information and the district gendarme commander’s comments are returned to the district governor and the candidates selected by him as suitable are submitted to the provincial governor for approval. The provincial governor issues the order of appointment. (section 10). On appointment, the village guards are summoned to the district gendarme command to take up their duties and receive their weapons, ammunition, clothes, identity cards and other items (section 11).

277. Pursuant to section 12, the area within which the village guards carry out their duties is the area within the boundaries of the village. However a village guard can pursue beyond the boundaries a person who has committed an offence within the village and the provincial or district governor can extend the area covered by the village guard beyond the village boundaries. The area of a village guard carrying out his duties along with the

law and order forces, including tracking, chasing, collecting information and guiding such forces, was to be the area covered by that law and order force.

278. Pursuant to section 13, the duties of the village guards are as follows:

- to identify, pass information to the gendarme command about, prevent the escape of and capture, persons who committed or attempted to commit, acts of assault, theft, violations of honour, sabotage, abduction, armed attacks, arson;

- to take steps to preserve evidence of incidents requiring judicial procedures;

- to report natural disasters;

- to investigate the activities of, and collect information concerning, convicted persons and their relatives, and to report to the gendarmerie any information about offences;

- to learn the names of any strangers in the area and to enquire into the reasons for their presence, finding out the names of the persons with whom they are staying;

- to identify villagers or strangers spreading false reports or news aimed at disturbing the peace, or disseminating separatist propaganda;

- to take measures to prevent attacks on, *inter alia*, roads, bridges, energy transmission lines, railways, pipelines, dams and to assist the general and special law and order forces in protection of such facilities;

- to keep watch on whether derelict or remote houses in the village area are being used as shelters by fugitives, criminals or wanted persons;

- to report at least once every fifteen days to the gendarme station with jurisdiction for the village to obtain instructions from the commander with regard to their tasks; to report, on being called to the gendarme station with their weapons with all promptness; to place themselves at the disposal of the gendarmerie or authorised military unit to carry out checks, or searches, or to track and capture fugitives from justice.

279. While carrying out their duties, they must use their weapons subject to Article 77 of the Law on Villages. When carrying out their duties along with military or law-and-order forces, the village guards, under the command of those units, have the same powers and responsibilities as those entrusted to that unit. They are authorised to use force to apprehend and to overpower those carrying out an attack or attempting an attack. (section 15). Guards are accountable administratively to the village muhtar and subject to his supervision. Occupationally, guards are under the command of the gendarme commander for the area covering their village and the district commander is responsible for training, ensuring village guards perform their duties effectively and supervising them (section 16).

280. On request of the district gendarme commander, the district governor may issue a warning to a guard who fails to carry out his duties or to maintain his equipment; he can stop pay one to ten days' pay where a guard has been absent without leave for up to five days, disclosed confidential information or reported untrue facts (section 21). Guards may be dismissed, on approval by the provincial governor, for absence of more than five days without leave; recurrence of the acts under section 21; failure to take part in a mission when summoned by the district gendarme commander; hiding fugitives or

wanted persons or failing to report their location; making improper use of, losing or allowing the seizure of, weapons and ammunition or other tools or equipment issued to them. (section 22).

281. On taking up their duties, the guards undertake a one week compulsory training course by the district gendarme commander, and receive two days' training once every six months (section 25). Guards must present their weapons and ammunition for inspection by the gendarmerie at least once a month (section 27).

THE LAW

I. THE COurt's assessment of the facts

A. General Principles

282. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (*Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

283. The Court is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case (see, for example, *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). Where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and as a general rule it is for those courts to assess the evidence before them (see the *Klaas v. Germany* judgment of 22 September 1993, Series A no. 269, p. 17, § 29). Though the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see the *Klaas* judgment cited above, p. 18, § 30).

284. Where allegations are made under Articles 2 and 3 of the Convention however, the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, p. 24, § 32). When there have been criminal proceedings in the domestic court concerning those same allegations, it must be borne in mind that criminal law liability is distinct from international law responsibility under the Convention. The Court's competence is confined to the latter. Responsibility under the Convention is based on its own provisions which are to be interpreted and applied on the basis of the objectives of the Convention and in light of the relevant principles of international law. The responsibility of a State under the Convention, arising for the acts of its organs, agents and servants, is not to be confused with the domestic legal issues of individual criminal responsibility under examination in the national criminal courts. The Court is not concerned with reaching any findings as to guilt or innocence in that sense.

B. The Court's evaluation in this case

1. Background

285. Since approximately 1985, serious disturbances have occurred in the south-east of Turkey, involving armed conflict between the security forces and the members of the PKK (Kurdistan Workers' Party). By 1996, the violence had claimed, according to the Government, the lives of 4,036 civilians and 3,884 members of the security forces. Since 1987, ten of the eleven provinces of south-eastern Turkey have been subject to emergency rule.

286. At the time of events in this case, April-May 1994, PKK activities were very intense and there were large numbers of security forces in the area pursuing the aim of establishing public order. In order to assist in the protection of the rural villages, regulations had been issued, coming into force on 24 October 1986, concerning the recruitment of temporary village guards.

287. According to these regulations, men from a village, fulfilling the conditions of appointment, which included lack of a criminal record or involvement in blood feuds, could be appointed by the governor with the approval of the local district gendarme commander. They would receive pay, arms and training and would undertake the protection of the village. The regulations also envisaged that the temporary village guards could act under the orders of the district gendarme commander in assisting in operations and duties outside the village area (see section 13, at § 277). It was expressly stated that the guards were occupationally under the command of the district gendarme commander and administratively under the authority of the muhtar (section 16, § 279). The regulations not only permitted the use of weapons to prevent crimes being committed but also referred to the pursuit and apprehension of suspects (*ibid*).

288. The text of the regulations therefore contrasts with the oral testimony received in this and other cases. Colonel Kadir Metin told the Commission Delegates in this case that village guards were not used for any purpose other than protecting their village and denied that village guards would act under orders from the district gendarme command. In the previous case of *Çakici v. Turkey*, the Hazro district gendarme commander Lieutenant Ertan Altinoluk had told the Commission's Delegates that village guards were not used in operations, only in protecting the area around their village (see no. 23657/94, Commission report of 12 March 1998, to be published in ECHR 2000, § 131).

289. The Court considers that the testimony of Captain Mithat Gül on this point accords both with the regulations and the facts of previous cases (see, for example, the involvement of village guards in operations in the Kurt case and the taking into custody of three villagers in the Aydin case: *Kurt v. Turkey* judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, p. 1168, § 52, and *Aydin v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, p. 1873, § 16). The evidence of the village guards to the Delegates also supported the view that their functions extended wider than village protection. Feyzi Gökçen gave testimony that due to the lack of security personnel in their district the village guards were effectively fulfilling a police role, including helping the security forces to apprehend people. Ömer Güngör described being summoned to assist the gendarmes on many operations.

290. Captain Gül specified that the village guards were not authorised to take persons into custody on their own and that their proper role was by way of assisting law and order officials, whether gendarmes or police. Yasar Günbati however described the village guards as intervening to apprehend wanted persons, with or without the police, and as conducting searches on their own initiative. It therefore appears that there were

widely differing views held by security officers and village guards as to the scope of village guard functions.

291. The Court is satisfied that while village guards were primarily concerned with defending their own villages, they were also regularly involved in anti-terrorist duties outside the areas of their villages, including participation in operations and the apprehension of suspects. The extent to which they acted, on their own initiative and without the presence of security officials, is one of the crucial issues in this case.

2. Events in Hazro on 21 April 1992

(a) the purpose of the village guards' journey to Diyarbakir

292. There were five village guards involved in the events in this case; Ömer Güngör had been a village guard since 1989, first in the village Oyuklu in Lice district and then, after the evacuation of that village, in Kirmatas village in Hazro district; Feyzi Gökçen had been a village guard in a village in the Hazro district since 1992; Yasar Günbati had been a village guard since 1992, also in the Hazro district; Zeyyat Akçil and Aziz Erbey were both guards in Ormankaya village, Hazro, from 1994 and 1993 respectively. They knew each other, all acting as village guards under the command of the Hazro district gendarme commander Lieutenant Altinoluk. Three of them referred in their evidence to having lost members of their family to PKK attacks: Ömer Güngör's elder brother had been abducted and killed, as well as two uncles; Yasar Günbati referred to losing four of his family; and Aziz Erbey's elder brother and uncle had been shot.

293. On 21 April 1992, the four guards Yasar Günbati, Feyzi Gökçen, Aziz Erbey and Zeyyat Akçil went to Hazro district gendarmerie. There are differing versions of what occurred:

(i) According to the written evidence of Lt Altinoluk of 18 July 1994, he sent the four guards to Diyarbakir to deliver a white Toros car 21AF989, belonging to a suspect, to the Diyarbakir provincial central gendarmerie (hereinafter known as the Saraykapi station). This version is supported by various protocols signed by him and the village guards, dated variously 21 and 23 April 1994; and also the statements of the village guards of 7 May 1994 taken by Captain Mithat Gül. However the latter statements of Feyzi Gökçen, Yasar Günbati, Aziz Erbey and Zeyyat Akçil also refer to the fact that once in Diyarbakir they gave assistance to the Security Directorate in taking into custody four men to be taken back to Hazro the next day (see paragraphs 53, 57, 61, 65). The statement of Ömer Güngör of 7 May 1994 stated that he had proposed to the four others on the way to Diyarbakir that they should take four suspects into custody (paragraph 71).

(ii) According to the statements of the village guards taken by the public prosecutor on 9 May 1994, the Hazro district commander had sent them to Diyarbakir to apprehend four suspects. The car is mentioned by Aziz Erbey only in the context of being provided to them to make the journey and only Zeyyat Akçil referred to having to deliver it to Saraykapi (see paragraphs 79 and 89). In their oral testimony to the Diyarbakir Criminal Court no. 3 on 5 July 1994, the five village guards referred to the purpose of the visit to Diyarbakir as being to apprehend some suspects.

294. The oral testimony given by the guards to the Delegates varied. Ömer Güngör stated that the car was irrelevant and its delivery was made up afterwards to cover what was going on. Feyzi Gökçen stated that they went to Diyarbakir to apprehend four suspects and to deliver the car. Yasar Günbati claimed that they had gone to Diyarbakir

for their own personal needs, not under orders, and were involved in apprehending people in Diyarbakir on their own initiative.

295. The Court finds on the weight of the evidence that the primary purpose of the four guards going to Diyarbakir was to assist, under instructions of Lt Altinoluk, in the apprehension of four named suspects who were to be brought back to Hazro. It rejects Lt Altinoluk's statement by rogatory letter, which was not tested by any questioning or reference to the other evidence before the Diyarbakir court. Given the subsequent events that occurred involving the village guards under his command, the Hazro gendarme commander's account appears selective and intended to minimise his own responsibility. It observes that the Diyarbakir Criminal Court in its judgment of 20 March 2000 found that the reason for the village guards' visit to Diyarbakir was to apprehend four suspects. That court also referred to the car as having been given to them by the gendarmes for carrying out that purpose. It impliedly rejected therefore that the guards were under instructions to deliver it at all. Indeed, the guards used the car throughout their stay in Diyarbakir without any compunction. Also, if the idea was to deliver the car to Diyarbakir for safekeeping, no credible explanation has been provided for the village guards returning it to the Hazro district gendarmerie.

296. This lends support to Ömer Güngör's assertion that delivery of the car was an invented story and casts strong suspicion on the reliability and authenticity of the signed protocols produced by Lieutenant Altinoluk.

297. The statement taken by the gendarmes on 7 May 1994 according to which Ömer Güngör admitted purportedly that it was his idea to apprehend four suspects in Diyarbakir, and Yasar Günbati's assertion that they had not been acting under any instructions, are not credible in light of the other evidence. Ömer Güngör's statement of 7 May 1994, along with the others taken by the gendarmes, gives a version of events which downplays the official nature of the village guards' visit to Diyarbakir. Yasar Günbati's oral evidence, as the evidence of the other guards before the Delegates, was clearly influenced by the fact that they were standing trial at the time that the Delegates were taking evidence. Ömer Güngör, who was the only suspect still in custody, was aggrieved by the fact that he was regarded as the principal perpetrator, while the others, released, were at some pains to distance themselves from events and from anything which would jeopardise their position with the authorities. Their testimony on any controversial or disputed fact must therefore be regarded with great care.

(b) Ömer Güngör's participation

298. Most of the statements (7 and 9 May 1994 of Yasar Günbati, Feyzi Gökçen, Aziz Erbey and Zeyyat Akçil) referred to Ömer Güngör joining the other four after they had been instructed to go to Diyarbakir by Lieutenant Altinoluk. Ömer Güngör had arrived in Hazro to obtain permission to go to Diyarbakir to obtain further treatment for an injury to his leg and joined the others in their car for that purpose (see his statements of 7 and 9 May 1994). The minutes of the court proceedings indicated that Ömer Güngör gave evidence that he joined the group after they had been appointed to go to Diyarbakir as he wanted to go for medical treatment, which was also the finding of the court in its decision of 21 March 2000.

299. In the oral proceedings before the Delegates, Ömer Güngör asserted that Lieutenant Altinoluk had specifically instructed him to accompany the four other village

guards and assist them. When it was queried what assistance he could give as he alleged that he was unable to walk without crutches, he replied that he had to do what he was told and that perhaps it was to show the others the Saraykapi station. It appeared however that Feyzi Gökçen already knew the station well from previous visits.

300. The Court notes that Ömer Güngör did accompany the others during the next two days in Diyarbakir, including when they apprehended the four suspects wanted by the Hazro gendarmes. He did not go immediately for the medical treatment which had been his reason for asking for leave. This does support to some extent Ömer Güngör's account to the Commission Delegates that he had been told to go along with the others. This is also not inconsistent as such with the statements of the other village guards, who referred to Ömer Güngör joining them as they were leaving and made no further comment as to the circumstances in which he met up with them.

301. The Court considers that Ömer Güngör would have reported to Lieutenant Altinoluk for the necessary permission to leave Hazro for Diyarbakir. He would have told Ömer Güngör that the four other village guards were going in a car the same morning. The Court is also satisfied that in all probability he instructed Ömer Güngör to go along with them and render assistance before going for treatment. The other alternative – that he joined the four guards and accompanied them on their tasks of apprehending persons without any official instructions – is far less credible in the circumstances.

(c) events in Diyarbakir on 21 April 1994

302. On arrival in Diyarbakir, the five village guards went to the Saraykapi gendarme station. It seemed to be expected that the village guards, attached to a district gendarme station, would report their presence to the central provincial gendarme command, particularly if they intended to stay there. From there, they went to the Security Directorate in Diyarbakir to assist the police officers in apprehending four named suspects, Fatih Çelebi, Yılmaz Eken, Hanefi Ekici and Çelebi Akkus. According to most versions, all four were caught that day and taken back to Saraykapi to await transfer in the convoy to Hazro the next day. According to Yasar Günbati and Aziz Erbey's testimony in the trial on 5 July 1994 and Yasar Günbati's oral testimony to the Delegates, it was specified that only three were found that day, the fourth being picked up the next day. This discrepancy has not been clarified by documentary evidence. The Court notes with concern that the Government have stated that no entries in the Diyarbakir custody records exist for these four men.

303. That night was passed by the five village guards in the house used by visiting village guards at the station.

304. Ömer Güngör specified in his oral evidence that the village guards saw Captain Mithat Gül on their arrival at Saraykapi and that he sent them on to the Security Directorate (paragraph 213). Captain Mithat Gül had no recollection of meeting them at this stage, though he accepted that it was possible that they came to tell him why they were in Diyarbakir and he would have sent them on to the police. He was vague on whether, and by what means, he would have been kept informed of the proposed activities of village guards sent to Diyarbakir – he did agree that he must have been informed at some stage about the persons taken into custody to be held by him pending transfer to Hazro. He stated that the suspects fell within the jurisdiction of the police and so it would not have been necessary to inform him as such (paragraphs 244-245).

305. Again the Court observes a reluctance in an official witness to admit knowledge of the activities of the five village guards in Diyarbakir. It finds no element to contradict Ömer Güngör's account on this point, which is also credible. It finds that the five village guards reported at the Saraykapi station to its commander Captain Mithat Gül that they were instructed to assist in the apprehension of four persons within the city and bring them back to his station for transfer to Hazro. He was therefore aware of their presence and their purpose in the Diyarbakir, sending them on to the Security Directorate accordingly.

3. Events on 22 April 1994

(a) the arrival of the five village guards at the Avsar business premises

306. On the morning of 22 April 1994, the five village guards paid a visit to the *Toros Gubre* premises, a wholesale fertiliser shop, run by Mehmet Ali Avsar, Mehmet Serif Avsar and another relative. Two other Avsar brothers, Sait and Abdullah worked on the premises, while their father Süleyman Avsar and other family members worked at a jewellery shop about a kilometre away.

307. The Avsar family, which was very large, was regarded by the authorities as having a history of involvement in suspected PKK activities. Abdulkerim Avsar was, at the time of events, in prison awaiting trial for such offences. Süleyman Avsar explained that the applicant, his son Behçet, had fled to Germany after being found guilty of sympathising with the PKK and had had his photograph taken with the PKK leader Öcalan, while working for the newspaper *Özgür Gündem*, which was regarded by the authorities as a propaganda tool of the PKK. A daughter had also been charged with offences but acquitted; Mehmet Ali Avsar had been sentenced and spent some time in detention for a harbouring offence; while Mehmet Serif Avsar had been detained briefly on one occasion. Captain Mithat Gül told the Commission Delegates that the family was regarded as organically linked with the PKK. The Court is satisfied that the family would have been a subject of interest to police and security officers in the area.

308. There are different versions of the reasons for the village guards going to the shop.

(i) It is alleged that Ömer Güngör told the other four guards that Mehmet Serif Avsar might be able to say where the body of his elder brother, abducted and killed by the PKK, was buried and that they should therefore take him to the gendarmerie for questioning. This version appears in the statements of the village guards taken by the gendarmes on 7 May 1994. In the statements of 9 May taken by the public prosecutor from Feyzi Gökçen, Aziz Erbey, Zeyyat Akçil and Yasar Günbati, it is stated that Ömer Güngör proposed that they take someone into custody from the shop for questioning, without however explaining any purported reason for it, while Ömer Güngör's statement alone refers to Mehmet Serif Avsar's alleged knowledge of where his brother was buried. The court minutes of the village guards' testimony on 10 May 1994 and 5 July 1994 also refer to Ömer Güngör's alleged desire to find out about his brother's body. The court in its decision of 21 March 2000 found that it was this factor which motivated his proposal to the others to take Mehmet Serif Avsar away from the shop.

(ii) In his oral testimony to the Commission's Delegates, Ömer Güngör said that he had been told by Captain Mithat Gül to bring Mehmet Serif Avsar back to the gendarmerie for questioning. Captain Gül had not given any reason for this. Ömer Güngör stated that

he did not know who had killed his brother and that Mehmet Serif Avsar had no information about it. He referred to the question of money being raised by Mehmet Mehmetoglu and the security official “*müdür*” with Mehmet Serif Avsar and had relied before the Diyarbakir criminal court on the reference in the Susurluk report to pressure being put on the Avsar family to pay money under blackmail concerning Abdulkерim who was in prison. Feyzi Gökçen also stated in the Diyarbakir criminal court on 5 July 1994 that he had heard Mehmet Mehmetoglu talking to Mehmet Serif Avsar about 3 billion lira. On the basis of these elements, the applicant suggested that the village guards were ordered to detain Mehmet Serif Avsar who was then questioned by Mehmet Mehmetoglu and a security force officer, possibly with the motive of extorting money as part of the pattern of unlawful activities carried out by groups acting under the auspices of the security forces at that time.

309. The Court observes that in his evidence to the Delegates the public prosecutor Ümit Yüksel considered that the finding of the body was only a pretext, while Senal Sarihan thought that it was ludicrous to believe that a village guard would perform such a public act with others for personal motives. It also notes that Mehmet Mehmetoglu, the confessor, who purported throughout to be only accidentally and marginally involved, told the Commission Delegates precise factual details about the death of Ömer Güngör’s brother, which he claimed to have heard when he was in prison. This involved the assertion that Abdulkерim Avsar had been the leader of the group which killed Ömer Güngör’s brother by pouring melted plastic over him. The Court has grave reservations about Mehmet Mehmetoglu’s role in the events, and comments below on the credibility and reliability of his evidence.

310. The Court shares the doubts that the kidnapping of Mehmet Serif Avsar was wholly undertaken at the initiative of Ömer Güngör. It indeed seems incredible that a village guard, who had arrived in Diyarbakir to obtain medical treatment, would be able to convince four others to take someone away by force when such action had no official authorisation. Later events also cast doubt on the extent of alleged official ignorance of what was going on and who was involved. It nonetheless notes that the story about Ömer Güngör’s brother is based on the undisputed fact that he was killed by the PKK and that it ran through all the testimony given by the village guards including Ömer Güngör’s, even at their trial when they denied their statements to the gendarmes, and referred for the first time to the presence of a seventh man, “*müdür*”.

311. It is possible that the incident was motivated by an official desire to question the Avsars who were known to have relatives in the PKK, and that it was undertaken by persons involved in unlawful activities, which included extortion. Ömer Güngör’s participation in the incident, and that of the other village guards, might have been secured by telling him that one of the Avsar brothers had been involved in the killing of his brother and holding out the prospect of information or retribution.

312. This however is only speculation. The applicant has conceded that there is insufficient evidence to establish that an extortion attempt occurred. Mehmet Ali Avsar indeed denied to the Delegates that there had been any such attempt or that they owned the business referred to in the Susurluk report.

313. The Court finds that it is not proved to the necessary standard of proof that Captain Gül or any other official sent the village guards to the shop with the purpose of taking Mehmet Serif Avsar away.

(b) the events in the shop

314. According to the evidence of Mehmet Ali Avsar, Abdullah Avsar and Sait Avsar, the village guards entered the shop at about 11.00 to 11.30 hours. At least three village guards entered initially, the other two joining them shortly afterwards. The village guards were insisting that one of the brothers should come with them to make a statement for Abdulkirim. Mehmet Ali, the older brother, protested that Abdulkirim should make his own statements. The brothers also stated that no-one would go unless a police officer came. At this resistance, two of the village guards left. They returned shortly afterwards with two other men, one of whom spoke Turkish perfectly and to whom the others deferred as if to a person of authority. These two men claimed to be security officials and the one in authority purported to show an identity card, flicking it shut before Mehmet Ali could read it. At continued resistance, several of the guards pulled out their guns. Mehmet Ali was pushed against a wall. At that point, Mehmet Serif Avsar volunteered to go with the men. He was taken outside and placed inside a white Toros car 21AF989.

315. The accounts of the three brothers, the written statements taken from them by the gendarmes and public prosecutor and Mehmet Ali's oral evidence to the Commission, are largely consistent on the above (see paragraphs 26-29, 37-43, 118, 190-203).

316. The applicant submitted that it was significant that the village guards did not seem to care which of the brothers came with them. This was consistent with his view that there was no real belief that Mehmet Serif Avsar knew about Ömer Güngör's brother and that the intention was to question and extort money from the family generally.

317. However, the statements of the village guards varied greatly on this point. Some statements, and the oral testimony in the Diyarbakir criminal court, maintained that Ömer Güngör specifically named Mehmet Serif Avsar as the man to be taken from the shop due to his alleged PKK connections (see, for example, the testimony of Ömer Güngör, Feyzi Gökçen, Yasar Günbati, and Aziz Erbey in the minutes of 5 July 1994, paragraphs 101-105). The statements of Feyzi Gökçen and Aziz Erbey to the gendarmes on 7 May 1994 referred nonetheless to asking for any of the brothers to come, while the statements of Feyzi Gökçen, Aziz Erbey, Zeyyat Akçil and Yasar Günbati to the public prosecutor on 9 May 1994 made no reference to having been told by Ömer Güngör the name of the person they were to apprehend in the shop.

318. The accounts of the village guards, who were arguably motivated by exculpatory intentions, are so inconsistent when taken as a whole that it is difficult to place any great probative value on them. However, the Court concludes that there is insufficient evidence to conclude that the village guards were indeed acting at random in taking Mehmet Serif Avsar.

319. Having regard, as above, to the changing stories of the village guards, the Court has not given weight to the different versions of the events in the shop which may be found in their statements. The early versions recorded by the gendarmes on 7 May 1994 referred to the guards meeting with Mehmet Mehmetoglu before entering the shop and denied the involvement of any seventh person. The statements of 9 May 1994 to the prosecutor accorded on the fact, and thus support the testimony of the Avsar brothers, that two guards, Feyzi Gökçen and Aziz Erbey left the shop when there was a refusal to co-operate. However, they maintained that only one man returned with them, Mehmet Mehmetoglu. In the oral testimony to the Diyarbakir criminal court on 5 July 1994, all the

village guards referred for the first time to Mehmet Mehmetoglu being accompanied by a person of authority; only Mehmet Mehmetoglu continued to deny the presence of that seventh person. The change in their testimony was explained to the Diyarbakir criminal court by Ömer Güngör as being the result of pressure and fear of the gendarmes; Feyzi Gökçen said that he had been told what to say in his first statement; Aziz Erbey referred to the first statements being intended to protect the seventh man; and Yasar Günbatı was unable to give any explanation.

320. In his oral testimony to the Delegates, Ömer Güngör again insisted on the presence of the seventh man, allegedly discovered since to be a security force officer Gültekin Sütçü. Feyzi Gökçen stated that his later statements to the court were correct, not his earlier ones, while the others refused to make any further comment.

321. The Court finds that it has no reason to doubt the testimony of the Avsar brothers who were eyewitnesses at the scene and whose accounts it finds to be credible and consistent. Their statements in the immediate aftermath of the abduction referred to the seventh person. It does not accept the assertion made, for example, by Captain Gül, that the seventh man was an invention to exploit Mehmet Serif Avsar's abduction against the State's interests. The Diyarbakir court in its judgment on 21 March 1993 also concluded from the evidence before it that there had been two men brought back to the shop by the village guards.

322. The Court has considered the evidence of Mehmet Mehmetoglu. His family was from the Hazro area and he was known to Feyzi Gökçen. He had been a member of the PKK and involved in activities for the PKK, during which he had met Abdulkemir Avsar, brother of the victim Mehmet Serif Avsar in this case. He had previously given evidence before the Commission Delegates in the Mahmut Kaya case, which concerned the killing by unknown perpetrators of Dr Hasan Kaya (see the Mahmut Kaya v. Turkey judgment of 28 March 2000, to be reported in *Reports* 2000-III, application no. 22535/93, Commission report of 23 October 1998, §§ 245-247). According to the evidence in that case, he had been detained by the security forces in January 1991 and sentenced to 15 years' imprisonment. However, he had taken advantage of the Remorse Act and was released from prison in January 1993. In this case, before the Delegates, he stated that he had assisted the State providing information and giving evidence but had been given no other official functions after his release. He denied the rumours, and allegations in the Susurluk report, that he had been involved in contra-guerrilla activities under the auspices of the security forces.

323. The Court finds Mehmet Mehmetoglu's account of events in the shop incredible and unreliable. It notes that his version of how he came to meet up with the village guards varied in each statement. His explanation that he went with Feyzi Gökçen to persuade the Avsar family that they should co-operate was particularly lacking in credibility, set against his assertion that he was not involved in what happened. Similarly, his explanation for getting into the car with the village guards when he stated that he was afraid that the family would think that he was involved and react against him is not convincing. The Court places little weight in his denials of participation or the absence of a seventh person.

324. The Court therefore accepts as the principal elements of the account of events described by the brothers (see paragraph 314, subject to the qualification contained in paragraph 318 above). It finds in particular that there was a seventh person who arrived

on the scene and purported to be a member of the security forces with the authority to take Mehmet Serif Avsar into custody.

(c) where Mehmet Serif Avsar was taken from the shop

325. Mehmet Serif Avsar was placed in the white Toros car, with Ömer Güngör, Yasar Günbati and Zeyyat Akçıl. Aziz Erbey and Feyzi Gökçen got into a taxi. The seventh man *müdür* got into the taxi according to the evidence of Aziz Erbey, Yasar Günbati and Feyzi Gökçen given to the Diyarbakir criminal court on 5 July 1994, while Ömer Güngör in his evidence on that date thought that the seventh man got into the white Toros car. There is some evidence that the village guard Ferit Akça accompanied the other village guards at this stage (see paragraph 140) however it has never been alleged that he played any significant role in events and the Court has not considered it necessary to refer to his limited involvement.

326. Mehmet Mehmetoglu asserted that he got into the taxi and then got out at the post office a short distance, 600-800 metres, away (see his oral evidence to the delegates and his statements of 7 and 9 May 1994). This was supported by the first statements of the village guards, who however changed their account before the Diyarbakir criminal court on 5 July 1994 to state that he continued with them in the Toros car. Mehmet Mehmetoglu notably has maintained the same account on this point throughout. The Diyarbakir criminal court however preferred the village guards' oral evidence in its judgment of 21 March 2000.

327. Having regard in addition to its findings as to Mehmet Mehmetoglu's lack of credibility, the Court finds that Mehmet Mehmetoglu remained in the car with the others.

328. The cars arrived at the Saraykapi gendarmerie station. There is a dispute as to whether they entered inside the station, through its gates, or pulled up outside the court building which was by the fountain adjacent and accessible to the public.

329. In their oral evidence, Mehmet Ali Avsar and Süleyman Avsar were adamant that after the cars had left Sait and Abdullah Avsar had immediately followed in their car and seen the white car and taxi enter into the gendarmerie. They had told the gendarmes on duty that they could see the village guards walking around inside. Mehmet Ali joined them a short while later as did Süleyman Avsar, to whom Abdullah pointed out five village guards and the white car.

330. The written statements by the Avsar brothers are less clear, referring to differing numbers of guards being seen and also to the cars being at or near the court building (Abdullah Avsar and Mehmet Ali Avsar's statements of 25 April 1994, Abdullah Avsar's statement of 29 April 1994). The village guards in their early statements of 7 May 1994 were also recorded as stating that they drove to the court building. The statements taken from them by the public prosecutor referred to the cars being driven to the gendarmerie, and were vague as to where the decision to take Mehmet Serif Avsar elsewhere had been taken, though the statements of Feyzi Gökçen and Yasar Günbati referred to the fountain, the statement of Ömer Güngör to being in front of the gendarmerie. The court minutes of evidence on 5 July 1994 referred to the guards arriving in front of the gendarmerie, where some of the guards stayed. The court decision of 21 March 2000 concluded that the cars had arrived at the gendarmerie.

331. Ömer Güngör told the Delegates that they drove into the gendarmerie with Mehmet Serif Avsar. Captain Mithat Gül was emphatic that this was false. If they had driven into the gendarmerie, they would have had their identities checked and their presence would have been known. The Court notes however that the fact that their presence would have been known does not prove that they were not there. It considers that the village guards had no reason for going to the judicial buildings, having no authority to take persons to the public prosecutor. The pretext for taking Mehmet Serif Avsar was, according to the village guards, to bring him to the gendarmerie for questioning. The statements taken by the gendarmes have already been commented on by the Court as disclosing a tendency to minimise any official knowledge or participation in the incident. It has already found that the accounts of the Avsar family are more credible and consistent in comparison. Their evidence has received recent indirect substantiation in the form of the statement from the NCO on duty at the gendarmerie at the time, who turned out to be called Okan as they had claimed (see paragraph 183). The Court would also observe that if the village guards had been in the part of Saraykapi accessible to the public, it would have been open to the Avsar brothers to approach them and ask for the whereabouts of Mehmet Serif Avsar themselves.

332. The Court concludes that the cars drove from the shop into the gendarmerie. In those circumstances, the presence of the village guards, Mehmet Mehmetoglu, the seventh person and Mehmet Serif Avsar were known to the gendarmes.

(d) where Mehmet Serif Avsar was taken from the gendarmerie

333. Shortly after their arrival at the gendarmerie, Mehmet Mehmetoglu, the seventh person, Ömer Güngör and Feyzi Gökçen drove with Mehmet Serif Avsar out of Diyarbakir in the white Toros car. It is not clear who drove the car: Ömer Güngör and Feyzi Gökçen claimed that it was Mehmet Mehmetoglu while Mehmet Mehmetoglu asserted before the Diyarbakir criminal court that an injury to his arm rendered this impossible. The Diyarbakir criminal court made no finding on the point and the Court does not consider it necessary to resolve the issue. The latest versions of events (for example, Ömer Güngör and Feyzi Gökçen's testimony at the Diyarbakir court on 5 July) as accepted by the Diyarbakir criminal court, indicated that they stopped at a ruined building about 19 km outside Diyarbakir. Mehmet Serif Avsar was shot twice in the head, after being questioned by Mehmet Mehmetoglu and the seventh person.

334. The Court makes no finding as to who fired those shots, which concerns the issue of criminal responsibility determined by the Diyarbakir criminal court which was satisfied that the evidence established Ömer Güngör's guilt. It observes that Ömer Güngör had always admitted firing the gun during the court proceedings, though he had alleged that he had done so on the orders of Mehmet Mehmetoglu and the seventh person. It notes also that the court's finding was reached in the absence of any evidence from the seventh person, and in light of an outstanding summons for Gültekin Sütçü who was named as being that person.

(e) the subsequent events of 22 April 1994 – the family

335. Mehmet Ali Avsar and the other members of the family meanwhile had waited outside the gendarmerie gates. They had talked to the gendarmes at the gate, telling them that their brother had been brought inside. They received denials and were told to wait. They were allowed in at 13.30 hours to make a complaint. Süleyman Avsar stated that he reported the abduction and the presence of the five village guards in the

gendarmerie to the NCO. After the NCO had left the room for a short time, his attitude had changed and he made them leave. Mehmet Ali then went to the public prosecutor and made a petition. At about 13.30 hours, the public prosecutor, who took the view that the incident had happened within the police jurisdiction, sent him on to the police. At the police station, they were kept waiting until 16-17.00 hours when the police took their statements. They denied that their brother was with the gendarmerie. Mehmet Ali took his petition back to the public prosecutor who said that the persons involved were village guards who had gone back to their villages. He undertook to pursue the matter.

336. This was the basis of the account given by Mehmet Ali Avsar and Süleyman Avsar to the Commission delegates. The oral and written statements given by them and other family members are not consistent in all details and do present some difficulties, in particular the claim by Süleyman before the Delegates that five of the village guards were still present in the gendarmerie when they went to complain to the NCO. According to the bulk of the evidence, two of the village guards (Feyzi Gökçen and Ömer Güngör) must have left by that time with Mehmet Mehmetoglu and the seventh man, taking Mehmet Serif Avsar with them. As there was only one main entrance out of the gendarmerie, Süleyman considered that Abdullah and Sait would have seen if they had left.

337. The inconsistencies, particularly as regarded the numbers of village guards, may perhaps be explained by the passage of time and the fact that Süleyman was recalling what he had been told, rather than referring to an identification which he had made for himself. Abdullah Avsar, who had seen the village guards in the shop and was able to identify them, said in his statement of 29 April 1994 that they had seen one of the village guards at the gendarmerie, while his and Mehmet Ali's statement of 25 April 1994 referred to seeing four of the persons who had been in the shop. However, Yasar Günbati told the Diyarbakir court on 5 July 1994 that Mehmet Mehmetoglu and the others did not leave the gendarmerie until 13.00-13.30 hours. It is possible on that account that they left while the family were talking to the NCO or going to see the public prosecutor.

338. In any event, the Court does not find that these matters undermine the general credibility and reliability of the evidence of the Avsar family. It is however unable to draw any clear picture of who was seen and when. It accepts that the family complained to the gendarmerie, public prosecutor and police within a short time of the events.

(f) the subsequent events – the village guards and Mehmet Mehmetoglu

339. The later accounts, accepted by the Diyarbakir criminal court, referred to Ömer Güngör, Feyzi Gökçen, Mehmet Mehmetoglu and the seventh man driving out of Diyarbakir with Mehmet Serif Avsar and returning to Diyarbakir after Mehmet Serif Avsar had been shot and killed. Feyzi Gökçen told the court on 5 July 1994 that they were stopped by the police. Though the seventh man showed some kind of ID, there was some talk by the police about the number plate of the car and holding the car. Mehmet Mehmetoglu however drove through the checkpoint and brought them into the gendarmerie. The police arrived afterwards looking for the car. Zeyyat Akçil recalled being asked by them about the car. According to Yasar Günbati (minutes of evidence of 5 July 1994), the police had already been at Saraykapi looking for the car, shortly after 13.30 hours. This would be consistent with the fact that Mehmet Ali Avsar was sent to the police station by the public prosecutor at around this time and the police would, on his description of the vehicle, have been able to commence a search. Ömer Güngör's oral

evidence to the Delegates also supports Feyzi Gökçen's description. The Court finds that this evidence is credible, and not contradicted by other elements.

340. Once back at the gendarmerie, there are varying versions as to what was told to the gendarmes, in particular, the commander Captain Mithat Gül. The early statements of 7 and 9 May 1994 of the village guards referred only to them panicking or taking pity on Ömer Güngör with the result that they did not report the shooting. Instead, they joined the convoy to return to Hazro, where they abandoned the car and hurried back to their villages. Mehmet Mehmetoglu alleged throughout that he had no involvement after leaving the taxi at the Post Office, though in his statement of 7 May 1994 he claimed that he had returned to the gendarmerie to look for Feyzi Gökçen without success. He knew nothing more, he alleged, until he was detained by the gendarmes.

341. Before the Diyarbakir criminal court however, Feyzi Gökçen maintained that Captain Gül had asked them what had happened when they arrived back at the gendarmerie. He had told the captain to ask Mehmet Mehmetoglu (see the court minutes of 5 July 1994; also the court minutes of 27 June 1995, when he referred to the captain being angry with Mehmet Mehmetoglu – paragraphs 103 and 137). Yasar Günbati said that Mehmet Mehmetoglu had told him to take the plates from the car and that these had been handed to Captain Gül, whom he had also seen talking to the police. According to Ömer Güngör's oral evidence to the Delegates, he had told Captain Gül everything. Captain Gül had kept the guards for an hour or so and then released them to go home with the convoy.

342. The Court observes that Captain Gül denied that Ömer Güngör had told him anything after the event. He stated that he did not have any knowledge of the incident until he received the family's petition submitted to the public prosecutor. He did not specify when that was. From the account of the family, the public prosecutor had certainly been in touch with gendarmes after 13.30 hours and had been told that there were village guards involved. The police had also been informed and were looking out for the car, visiting Saraykapi also shortly after 13.30 hours.

343. The Court finds it implausible that Captain Gül, or the gendarmes under his command, were not aware by early afternoon that an abduction had occurred and that it involved a white Toros car 21AF989, driven by village guards. In those circumstances, it appears highly probable that on the return of the car to the gendarmerie and another visit of the police Captain Gül took steps to talk to the men who brought the car back. In such circumstances, he must at that point have had grounds to suspect the involvement of the five village guards, Mehmet Mehmetoglu and the seventh person in the abduction of Mehmet Serif Avsar, at least, if not also in his murder. He however permitted the village guards to return to Hazro and took no steps to detain Mehmet Mehmetoglu or the seventh person.

4. The investigation

344. The investigation into the abduction of Mehmet Serif Avsar reported by his family was conducted by the gendarmes headed by Colonel Kadir Metin and Captain Mithat Gül. Colonel Metin was the deputy provincial gendarme commander. Both he and Captain Gül told the Delegates that carrying out investigations was a normal part of his functions as deputy: it could not therefore be regarded as particularly significant. However, it appears that he was only involved in the first few days of the investigation, leaving to fulfil other duties. The investigation was run effectively by Captain Gül.

345. It is not altogether apparent why investigative responsibility was taken by the gendarmes. The abduction took place within police jurisdiction. Captain Gül explained his involvement on the basis that the victim had been taken within gendarme jurisdiction, while the public prosecutor Mustafa Atagun referred to the fact that the body was found outside police jurisdiction beyond Diyarbakir city limits. The Court notes however that the body was not apparently found until 7 May 1994, more than two weeks after the abduction. Captain Gül's assumption of jurisdiction on the basis of the victim's whereabouts sits uneasily therefore with his denial that Mehmet Serif Avsar had ever been brought to the gendarmerie and his denial that he had been told anything about the incident by the village guards.

346. The first steps taken in the investigation are recorded as being statements taken from the family members, following the petitions made on the day of the incident, and additional petitions lodged on 23 and 25 April 1994 with the Diyarbakir State Security Court and Diyarbakir prosecutors. These included statements of:

- 25 April 1994 from Mehmet Ali Avsar taken by the police;
- 29 April 1994 from Mehmet Sait, Mehmet Ali and Abdullah Avsar taken by Captain Gül.

347. It is not clear what steps were being taken to find and apprehend the persons involved in the abduction, though Mehmet Ali Avsar himself had discovered the names Ali and Ömer and told the police.

348. On 30 April 1994, statements were taken by Captain Gül from various villagers who knew the village guards, questions being put about the involvement of Ömer Güngör and other unnamed guards in the abduction.

349. It was only on 5 May 1994 that the five village guards appear to have been brought to Diyarbakir for an identification parade. Mehmet Mehmetoglu stated that he had been taken into custody by that date and was also involved in the identification parade. On 6 May 1994, Captain Gül requested from the public prosecutor an extension of three days in the custody period for Ömer Güngör, Aziz Erbey, Feyzi Gökçen and Yasar Günbati who had been identified as perpetrators, as well as Zeyyat Akçil and Mehmet Mehmetoglu who were also suspected of involvement. That letter referred to the suspects as having been taken into custody by his command on 5 May 1994.

350. The investigation continued with the following steps:

- a reconstruction of the scene at the Avsar shop on 6 May 1994;
- a statement taken from the owner of the white Toros car on 6 May 1994;
- statements taken from the five village guards and Mehmet Mehmetoglu by Captain Gül on 7 May 1994;
- two reports of 7 May 1994, relating to the discovery of the body of Mehmet Serif Avsar at the depot outside Diyarbakir, signed by Captain Gül;
- an autopsy report of 7 May 1994;
- a protocol drawn up by Captain Gül reporting on the inability to find the taxi involved in taking Mehmet Serif Avsar away.

351. On 9 May 1994, Captain Gül sent these materials to the public prosecutor, with his report which concluded that the six suspects had admitted their guilt of abduction, and in Ömer Güngör's case, had confessed to killing Mehmet Serif Avsar. His role, as stated to the Delegates, thereby ceased.

352. There is no reference in the investigation materials to any attempt to find the seventh person. When asked about this by the Delegates, Captain Gül said that they had found no indication or sign of this person. According to their enquiries, no such person existed. When it was pointed out that the Avsar family had given evidence about him, he referred to the contradictions in the descriptions given and expressed doubts as to the genuineness of the allegations. No details were given about what he had done to enquire about the existence of this person. The gendarme NCO Sinasi Budakli who had been in the investigation team referred to the descriptions given by the family as contradictory on details. He did not refer to any steps taken either. His evidence gave the impression of evasion, even making allowance for the lapse of time since the events. He was the intelligence operations NCO at the time, yet had no knowledge about the alleged and known PKK links of the Avsar family. Nor had he ever heard of JITEM, the gendarme intelligence organisation notorious in the region at the time (see the Susurluk report). Though the family had named an officer on duty called Okan and given details of how they had told him about the village guards inside the gendarmerie, no step was apparently taken to obtain a statement. The statement recently provided by the Government revealed that Okan Tong was Captain Gül's second-in-command and his identity would have been obvious at the time.

353. The Court notes that the bulk of the investigation file was made up of the statements taken by the gendarme from the village guards, which had notably denied the existence of the seventh person. These statements read almost identically in places and appear stereotyped. In a number of respects, it has been observed that the information given minimised any official gendarme role in the incident. The village guards later denied these statements before the trial court, referring to pressure and an attempt to protect the seventh person. The Diyarbakir criminal court accepted their oral testimony in preference to these statements. The reliability of the statements taken by Captain Mithat Gül must, in the circumstances, be regarded as highly suspect, as must the reconstruction reports.

5. The court proceedings

354. Following their appearance in court on 10 May 1994, the five village guards and Mehmet Mehmetoglu were indicted on 16 May 1994, with the offences of murder and conspiracy in respect of Mehmet Serif Avsar. The indictment made no mention of any seventh person being involved.

355. The Diyarbakir Criminal Court no. 3 held hearings subsequently at approximately one-month intervals, though many of the sessions did not involve any hearing of evidence. The principal events in the proceedings were as follows:

- 5 July 1994: the five village guards departed from their previous statements telling the court that there was a seventh person who came to the shop with Mehmet Mehmetoglu;
- 18 July 1994: Lieutenant Altinoluk gave evidence by rogatory letter;
- 27 July 1994: Feyzi Gökçen submitted a petition to the court identifying the seventh person as a specialist sergeant;

- 24 August 1994: Ömer Güngör claimed that he committed the crime because the specialist sergeant told him to;
- 3 November 1994, after a summons had been issued three times, Captain Mithat Gül gave evidence by rogatory letter;
- 16 November 1994, Ferit Akça, Mehmet Ali Avsar and Sinasi Budakli gave oral evidence to the court;
- 14 December 1994, a statement was received from Kenan Kaymaz, a gendarme involved in the investigation, by rogatory letter;
- 5 January 1995, statements were given by Abdullah and Mehmet Sait Avsar by rogatory letter;
- 20 January 1995, a statement was given by Suayip Yener, a gendarme involved in the investigation, by rogatory letter;
- 7 April 1995, Sinasi Budakli, gendarme NCO in the investigation, gave evidence to the court concerning the investigation into the seventh man;
- 3 May 1995, medical evidence was heard concerning Mehmet Mehmetoglu's alleged inability to drive at the time of the incident;
- 25 May 1995, the court heard addresses by the counsel for the parties and granted an adjournment for Mehmet Mehmetoglu to submit his defence to the public prosecutor's case;
- 7 July 1995, the court adjourned for steps to be taken to identify the taxi driver of the second car and for a letter to be written to the gendarme command about the seventh man referred to as "*müdür*";
- 31 September 1995, the Diyarbakir provincial gendarme command denied the existence of such a person;
- 17 November 1995, the Diyarbakir gendarme command repeated its denial to a renewed court request for information of 18 October 1995;
- 8 May 1996, Yasar Günbati, Aziz Erbey and Zeyyat Akçil were released; the court sent instructions for a statement to be taken from the taxi driver, identified as Erdal Acikgöz; the accused stated that they needed no more time for their defence;
- 12 June 1996, Erdal Acikgöz gave a statement by letter rogatory;
- 7 October 1996, the court requested an expert forensic report on Mehmet Serif Avsar's injuries and Mehmet Mehmetoglu's ability to drive;
- 16 October 1996, Ömer Güngör wrote a petition to the court, purporting to identify the seventh man as Sergeant Gültekin Seçkin from Devegeçedi;
- 4 November 1996, the court ordered an inquiry from the 7th Army Corps Command at Devegeçedi about Seçkin;
- 29 November 1996, the Diyarbakir 16th Armoured Brigade replied that there was no such person in their records;

- 25 December 1996 and 21 January 1997, letters were sent enquiring about Seçkin to the Diyarbakir army command;
- 20 January 1997, the Istanbul Forensic Medicine Institute requested the exhumation of the body and the public prosecutor was instructed to locate it;
- 31 January 1997, the Diyarbakir 16th Armoured Brigade denied the existence of any Seçkin;
- 17 February 1997, the court instructed that an enquiry be made to the chiefs of staff as to the existence of a Gültekin Seçkin;
- 7 April 1997, the court abandoned the exhumation and the attempt to find Seçkin and commenced a review of the file;
- 5 May 1997, the court granted the interveners' counsel permission to inquire into other case files concerning any similar killings involving anyone matching Seçkin's description;
 - 26 May 1997, Feyzi Gökçen and Mehmet Mehmetoglu were released on bail;
 - 25 June 1997, the court abandoned any further enquiries concerning Seçkin;
 - 24 November 1997, the court noted that the indictment did not reflect the nature of the evidence in the case and instructed the public prosecutor to issue a new indictment;
 - 19 January 1998, Mehmet Mehmetoglu appeared to make final submissions;
 - 26 January 1998, the supplementary indictment issued charging the six accused with abduction offences;
 - 16 February 1998, Ömer Güngör informed the court that the name of the specialist sergeant was in fact Sütçü not Seçkin, and submitted that the court should accept as evidence the Susurluk report which included a reference to the killing of Mehmet Serif Avsar;
 - 16 March 1998, the court requested a copy of the Susurluk report from the Ministry of Justice;
 - 14 May 1998, Mehmet Ali Avsar appeared on summons to verify the autopsy report;
 - 21 May 1998, after hearing submissions from the public prosecutor and the accused's counsel, the court adjourned for the purpose of reaching a verdict;
 - 13 January 1999, the court received the Susurluk report;
 - 18 June 1999, following the interveners' counsel's application, the court adjourned for the public prosecutor to be enquire with the army about Gültekin Sütçü;
 - 21 March 2000, the Diyarbakir Criminal Court convicted the six accused, Ömer Güngör of murder and the others of abduction. It instructed an investigation to be commenced against Gültekin Sütçü.

356. In the gap between 18 June 1999 and 21 March 2000, only a few of the court minutes have been provided. From the testimony given to the Commission Delegates in October 1999 by the public prosecutor and the family's lawyer, it appears that information

had been received that there was a specialist army sergeant called Gültekin Sütçü who had served in Diyarbakir at the relevant time and that an address had been obtained. The court had given instructions that a statement should be taken from him by letters rogatory. However, he failed to appear and information was given to the court later that he had gone to Bulgaria. According to the applicant, an arrest warrant had been issued.

357. It took over five years and 10 months from their first appearance in court for the trial of the five village guards and Mehmet Mehmetoglu to conclude with a verdict. The family's counsel Senal Sarihan and the public prosecutor in the case commented to the Commission Delegates that this was unusually long. The public prosecutor referred to delays resulting from the changes in the bench. The minutes of the court indicated that the membership did change frequently, necessitating reviews of the file on each occasion.

358. The last substantial new evidence taken by the court, excluding the submissions of the accused, appears to be the statement taken from Erdal Acikgöz on 12 June 1996.

6. The identity of the seventh person

359. The existence of the seventh man was known in the investigation since the Avsar family gave their account of events shortly after the abduction. They were only able however to provide a description and state that he acted as, and held himself out to be, a member of the security forces.

360. At the beginning of the court proceedings in July 1994, the village guards also gave evidence as to his existence, adding that they had heard him referred to as "*müdür*" and that he was a member of the security forces, with an official ID of some kind.

361. In his petition of 27 July 1994, Feyzi Gökçen expressly referred to the man as being a gendarme special sergeant who had been transferred out of Diyarbakir about May-June 1994.

362. The first documentary evidence of any enquiry being made was a letter of 22 November 1994 from the Diyarbakir public prosecutor to the Diyarbakir central gendarme command about the existence of a seventh person at the incident. By reply of 24 November 1994, from the Diyarbakir provincial central gendarme command, it was stated that the accused had denied that there was any such person and that no-one answering the description of the family had been found.

363. The court made enquiries about "*müdür*" from the Diyarbakir gendarmes receiving negative replies on 31 September and 17 November 1995.

364. On 16 October 1996, Ömer Güngör provided the name Gültekin Seçkin and the information that he was not a gendarme but an army specialist sergeant from Devegeçidi. The enquiries with the Diyarbakir army command that followed referred to that name and received only negative replies.

365. It was on 16 February 1998 that Ömer Güngör stated that in fact the specialist sergeant was called Gültekin Sütçü. It was only on 18 June 1999 however that the court ordered enquiries to be made into that identity. At a subsequent date unknown, it transpired that a sergeant by that name had been located. He did not however give any statement as requested by the court and by 21 March 2000 had, apparently, fled abroad.

366. In his oral evidence to the Commission delegates, Ömer Güngör claimed that it was Mehmet Mehmetoglu who told the village guards in prison about Gültekin Sütçü from Devegeçidi. However this does not explain why the name Seçkin was given to the court first or why in his petition to the court in 1998 he appeared to rely on the Susurluk report for the identification. It seems likely that he was simplifying considerably. It is possible that the village guards while in prison heard rumours about the specialist sergeant and put forward a name which was only partly correct. It was perhaps not until the Susurluk report that the full name of the specialist sergeant involved in alleged unlawful activities in Diyarbakir in 1993-94 was correctly reported. That is however a hypothesis. There is insufficient evidence in the materials before the Court to establish that Gültekin Sütçü was indeed the seventh man involved in the abduction and killing of Mehmet Serif Avsar. There were however suspicions which required further investigation.

367. Having regard to

- the evidence of the family eyewitnesses who saw the seventh person;
- the evidence of the village guards after the commencement of the trial;
- the circumstances of the abduction, where the seventh person intervened in the shop and was in position of authority vis-à-vis the village guards;
- the way in which the existence of the seventh person was obscured in the initial gendarme investigation, although his presence and identity would have been known to the gendarmes at the station;

the Court is satisfied beyond reasonable doubt that the seventh person was a member of the security forces.

6. Concluding summary

368. Mehmet Serif Avsar was abducted by five village guards and Mehmet Mehmetoglu. The five village guards had been sent to Diyarbakir by the Hazro gendarmes to take part in the apprehension of four other suspects. They had reported to Captain Gül at Saraykapi gendarme station, who was aware of their presence and activities. Mehmet Mehmetoglu was unlikely to have been involved in the incident by chance. He appeared on the scene with a seventh man, who acted with authority as a member of the security forces. The exact motivation of the abduction is not established – it is unlikely to have been purely the desire of Ömer Güngör, the village guard, to obtain information or vengeance. The Avsar family was suspected by the authorities of being closely involved with the PKK and there was a possible extortion or blackmail attempt linked to the detention of Abdülkerim Avsar in Diyarbakir prison. However, it is not established to the standard of proof beyond reasonable doubt that there was an instruction issued by Captain Gül to bring Mehmet Serif Avsar to Saraykapi.

369. The seven men brought Mehmet Serif Avsar back to the gendarmerie at Saraykapi, where their presence would have been known to the gendarmes. After a while, Mehmet Mehmetoglu and the seventh man, accompanied by Feyzi Gökçen and Ömer Güngör took Mehmet Serif Avsar out of Diyarbakir. They returned to Diyarbakir shortly afterwards, and were stopped by the police on the way. They left the police checkpoint and went back to the gendarmerie. The police had already been alerted to the abduction and were aware of the car number plates. The police called at the gendarmerie, making enquiries of the gendarmes and village guards. Captain Gül knew of the abduction of

Mehmet Serif Avsar and would have known that the village guards, Mehmet Mehmetoglu and the seventh person previously at the station were likely to have been involved.

370. Despite the complaints of the Avsar family, Mehmet Mehmetoglu and five village guards were allowed to return to their homes. They were only taken into custody on or about 5 May 1994. Their statements made no reference to any seventh person, minimised their contacts with the gendarmes and the official nature of the visit to Diyarbakir and were stereotyped. No steps were taken to identify, question or locate the seventh person who had been at the gendarmerie with Mehmet Serif Avsar and the village guards. His identity, in the circumstances, was likely to have been known to at least some of the gendarmes at the station.

371. The body of Mehmet Serif Avsar was found on 7 May 1994, outside Diyarbakir. There was no precise dating as to when the death occurred nor any analysis of marks to verify if he had been ill-treated before his death.

372. The investigation was effectively conducted by Captain Gül, the commander of the Saraykapi station, where the victim had initially been taken. His investigation ceased on 9 May 1994. The public prosecutor took no further investigatory steps concerning the seventh person, relying in the indictment on the accounts of the village guards. On 5 July 1994, the five village guards appeared before the court and retracted their initial statements, supporting the family's account that a seventh person, a security officer, had been involved. Some four years later, an individual Gültekin Sütçü, an army specialist sergeant, was identified as possibly being that person. He disappeared abroad after a rogatory letter had been issued for his statement to be taken. Five years, ten months after the commencement of the proceedings the five village guards and Mehmet Mehmetoglu were convicted of murder in the case of Ömer Güngör and abduction in the case of the others, receiving prison sentences of 20 and 6 years 8 months respectively. An investigation was now pending into Gültekin Sütçü's involvement in the incident. The Court is satisfied that there was a seventh person involved in the incident and that he was a member of the security forces.

II. The government's preliminary objection

373. The Government submitted that the domestic proceedings had not yet terminated and that the application was premature. Though the first instance proceedings had ended on 21 March 2000, the decision was not final as the appeal to the Court of Cassation was pending. The Diyarbakir Criminal Court had also issued an arrest warrant against Gültekin Sütçü and the public prosecutor's investigation was ongoing. They referred to the Aytekin case (Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII, p. 2807), in which the Court upheld the Government's preliminary objection where an appeal was pending concerning the conviction of a gendarme for killing the applicant's husband.

374. The applicant claimed that there had been no effective remedy concerning the death of his brother, due to the defects in the investigation, including the trial proceedings, which had been designed to avoid answering the issues concerning the involvement of the security forces in the killing of Mehmet Serif Avsar. He referred, *inter alia*, to the inordinate length of the trial, the fact that the investigation was conducted by the

gendarmes who were implicated in the abduction and the lack of any genuine or prompt effort to identify or locate the security force officer involved in the incident.

375. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52, and the *Akdivar and Others v. Turkey* judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

376. The Court observes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraph 261 et seq. above).

377. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 267-268 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the *Yasa v. Turkey* judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 74).

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

378. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents (see paragraph 270 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, no evidence was forthcoming as to the identity of the alleged security officer implicated in the killing of Mehmet Serif Avsar until some years had passed. The person finally identified as Gültekin Sütçü in the criminal court proceedings has now apparently fled to Bulgaria.

379. With regard to the criminal-law remedies (paragraphs 261-266 above), the Court notes that the family of Mehmet Serif Avsar petitioned the public prosecutor concerning the involvement of seven persons in the abduction of Mehmet Serif Avsar, identifying them as village guards and two persons appearing to be security officers. Members of the family participated as interveners in the trial against the five village guards and the confessor Mehmet Mehmetoglu, which has now concluded in the conviction of one village guard Ömer Güngör for homicide and the others for abduction. Appeals are pending. The applicant has argued that these proceedings have been shown to ineffective due to the lapse of time – the conviction occurred in March 2000, after almost six years of trial procedures – and due to the lack of any real effort to locate the seventh participant, who was a security force officer.

380. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the *Akdivar and Others* judgment cited above, p. 1211, § 69, and the *Aksoy* judgment cited above, p. 2276, §§ 53 and 54).

381. The Court considers that the limb of the Government's preliminary objection concerning civil and criminal remedies raises issues concerning the effectiveness of the criminal investigation in uncovering the facts and responsibility for the death of Mehmet Serif Avsar which are closely linked to those raised in the applicant's complaints under Articles 2 and 13 of the Convention. It also observes that this case differs from the *Aytekin* case relied on by the Government as in that case the soldier who had shot the applicant's husband had been convicted of unintentional homicide by the Batman Criminal Court. The appeal which was pending before the Court of Cassation concerned both the applicant's and the public prosecutor's claims that he should have been convicted of a more serious degree of homicide. In those circumstances, it could not be said that the investigation conducted by the authorities did not offer reasonable prospects of bringing the person responsible for the death of her husband to justice (*Aytekin v. Turkey* judgment cited above, p. 2827, § 83). There were no allegations in that case that a key perpetrator had not been identified or investigated in the proceedings.

382. Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the administrative remedy relied on (see paragraph 377 above). It joins the preliminary objection concerning remedies in civil and criminal law to the merits (see paragraphs 396-408 below).

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

383. The applicant complains that his brother Mehmet Serif Avsar was arbitrarily killed while in the custody of security officials and that there was a failure by the authorities to protect his life and to carry out an effective investigation into his killing. He invokes Article 2 which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. Submissions of the parties

1. *The applicant*

384. The applicant submitted that Mehmet Serif Avsar was in the custody of security officials acting as such and that security officials killed him in circumstances that lacked any justification under Article 2 § 2 of the Convention. The explanation offered by the State as to how Mehmet Serif Avsar came to be murdered was not credible, nor were the attempts to deny that he was ever in the custody of state officials.

385. The applicant pointed out that Article 2 also enjoined the State to take operational steps to safeguard the lives of those within its jurisdiction. While the police had been informed immediately of the abduction and the Avsar family had gone to the gendarmerie, no effective steps were taken to intervene to end the abduction. Captain Gül was aware of the identity of the village guards involved by 25 April 1994 at the latest and the Toros car was inside the gendarmerie yet it was not until 5 May that the guards were brought to an identity parade.

386. The applicant further submitted that the investigation into the killing did not fulfil the procedural obligations under Article 2. It was conducted by the gendarmes implicated in the incident rather than the police within whose jurisdiction the abduction fell and they failed to act promptly on the evidence received. There was no effort to find Mehmet Serif Avsar, no forensic tests were done on the Toros car and no steps were taken to enquire into any official involvement in the incident. No statement was taken from the NCO Okan referred to by the family. When the public prosecutor drew up the indictment, he made no reference to a seventh person and took no further investigative steps to determine the truth or otherwise of the Avsar family's account. He challenged the *bona fides* of the entire pre-trial investigation, alleging that there was no genuine effort to find his brother alive and the authorities reacted early on as if knowing that his brother was dead. The whole investigation was designed to hide the unlawful activities of security officers as disclosed in the Susurluk report. The length of trial, along with the intimidation of the family and their lawyer and the dilatoriness of the security forces in attempts to trace the seventh person, also rendered the trial an inadequate procedure for the purposes of Article 2.

2. *The Government*

387. The Government considered that it was limited in its response by constraints of the ongoing criminal appeal in the case. However, they pointed out that the trial court had only heard the name of Gültekin Sütçü in June 1999 and steps had been taken to notify the alleged offence committed by him to the public prosecutor for the appropriate procedure to be instituted.

388. The evidence in the case so far proved no causal relationship between the murder of Mehmet Serif Avsar and the Government. There would only have been

responsibility of the Government if it could be proved that the village guards or a gendarme officer had committed the murder on the instructions or with the incitement of the authorities. It seemed however that the perpetrators acted for personal motives.

389. In the Government's view, it could not be said that the authorities remained passive or failed to pursue the perpetrators. The evidence of the Avsar family was taken down accurately and they participated freely in, and confirmed, the reconstruction of the incident. Further, the Avsar family had ample opportunity to present their views and evidence to the trial court, and on appeal, if they were dissatisfied.

B. The Court's assessment

1. General considerations

390. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

391. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities, *Selmouni v. France* [GC] no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.

392. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; *Çakici v. Turkey* [GC], no. 23657/94, § 85, ECHR 1999-IV; *Ertak v. Turkey*, no. 20764/92, § 32, ECHR 2000-V, and *Timurtas v. Turkey*, no. 23531/94, § 82, ECHR 2000-VI).

393. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann and Others v. the United Kingdom* judgment cited above, p. 49, § 161, and the *Kaya v. Turkey* judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105). The

essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility for the conduct of any investigatory procedures (see, for example, *mutatis mutandis*, *Ilhan v. Turkey* [GC] no. 22277/93, § 63, ECHR 2000-VII).

394. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, the *Güleç v. Turkey* judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82, *Ögur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III). The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (for example, *Kaya v. Turkey* judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible (*Ögur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, for example, *Salman v. Turkey*, cited above, § 106; concerning witnesses, for example, *Tanrikulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence, for example, *Gül v. Turkey*, no. 22676/93, (Sect. 4), § 89, judgment of 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

395. There must also be a requirement of promptness and reasonable expedition implicit in this context (see the *Yasa v. Turkey* judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, § 102-104; *Cakici v. Turkey*, cited above, §§ 80, 87, 106; *Tanrikulu v. Turkey*, cited above, § 109, *Mahmut Kaya v. Turkey*, no. 22535/93 (Sect. 1), ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

2. Concerning the alleged failure to carry out an adequate investigation into the killing

396. In the present case, the mere fact that the authorities were informed of the abduction of Mehmet Serif Avsar by village guards and others holding themselves out as security officers, following which he was found dead, gave rise of itself to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding this incident (see, *mutatis mutandis*, the *Ergi v. Turkey* judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and the *Yasa* judgment cited above, p. 2438, § 100).

397. The Court recalls that although the gendarmes were almost immediately aware that Mehmet Serif Avsar had been taken from his shop to the gendarmerie and the identity of those involved, the village guards and Mehmet Mehmetoglu were not taken into custody until about 5 May 1994, some twelve days later.

398. It has also noted that there was no convincing reason given for entrusting the investigation of the incident to Captain Gül and the central provincial gendarmerie, who were implicated in the course of events. The statements taken from the village guards by the gendarmes in their investigation were stereotyped and minimised the role of the gendarmes and security forces, omitting any mention of the seventh person. These statements were revoked by the village guards before the Diyarbakir criminal court which accepted the account of the guards given orally in those proceedings and impliedly rejected the evidence gathered by the gendarme investigation.

399. Further, there is no indication of any steps being taken during this stage of the investigation with a view to identifying or locating the seventh person, who had been present at the gendarmerie. The gendarme investigation concluded with the reconstruction reports whose reliability were also in doubt. It lasted effectively from 22 April to 9 May 1994, when Captain Gül sent the documents to the public prosecutor, namely a period of 17 days.

400. These elements disclose serious defects in the reliability, thoroughness and independence of this part of the investigation. The Court has examined whether this was remedied by the investigation conducted by the public prosecutor and by the court.

401. Turning to the public prosecutor's role, the indictment was issued on 16 May 1994, with no intervening investigative enquiry made beyond taking further statements from the suspects. The indictment relied heavily on the statements by the suspects, ignoring the accounts by the family concerning the seventh person. It appears that on 22 November 1994, following a report from the Parliamentary Investigation Commission, the public prosecutor's department sent an inquiry to the central provincial gendarme command concerning the identity of the seventh person. The gendarmes replied on 24 November 1994 that no such person had been found and that the search was continuing. No documents have been provided showing that the public prosecutor either followed up that enquiry or that the gendarmes in fact took any steps whatsoever with regard to locating the seventh person.

402. As regards the proceedings in the Diyarbakir criminal court, these lasted from 16 May 1994 until 21 March 2000, over five years and ten months. The appeals are still pending. Four village guards and Mehmet Mehmetoglu were convicted and sentenced for abduction while Ömer Güngör was found guilty of murder.

403. The Court recalls that in the normal course of events a criminal trial, with an adversarial procedure before an independent and impartial judge must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility (see *McKerr v. the United Kingdom* (Sect. 1), no. 28883/95, judgment of 4 May 2001, § 134). Nonetheless, it cannot be excluded, for example, that defects in an investigation may fundamentally undermine the ability of a court to determine responsibility for a death (see *Salman v. Turkey* judgment [GC], no. 21986/93, ECHR 2000-VII, §§ 106-109, concerning inadequate autopsy procedures and *Kiliç v. Turkey* (Sect. 1), no. 22492/93, ECHR 2000-III, §§ 79-83, where there was no

evidence presented to the trial court linking the suspect to the killing). Where as in this case suspects are convicted and sentenced for their participation in the killing under investigation, it cannot ordinarily be claimed that the procedure has not proved capable of identifying and punishing the perpetrators.

404. The Court reiterates that the obligation under the procedural aspect of Article 2 is one of means not result. The fact therefore that one suspect, amongst several, has succeeded in escaping the process of criminal justice is not conclusive of a failing on the part of the authorities. In this case however it is the responsibility of the respondent State for the death of Mehmet Serif Avsar which is in issue, not merely the criminal responsibility of individuals. The applicant alleged that the abduction and murder were carried out by the village guards and Mehmet Mehmetoglu under the instructions and authority of a seventh man who was a member of the security forces and that this was part of a pattern of unlawful killings carried out under the auspices of the security forces with the knowledge and acquiescence of the State authorities. This raised serious concerns about the State's compliance with the rule of law and its respect in particular for the right to life. In those circumstances, the procedural obligation under Article 2 of the Convention must be regarded as requiring a wider examination (see the above-mentioned McKerr judgment, at §§ 135-136, where issues arose concerning concealment of evidence and an alleged shoot to kill policy that had not been addressed at the criminal trial).

405. Though the family and the five village guards had brought to the notice of the court that there was a seventh person involved who was a member of the security forces, the proceedings did not however succeed in clarifying either his identity or the exact nature of his role in the incident. The Court has remarked above on the failure of the gendarmes and public prosecutor to acknowledge the existence of a seventh person or pursue any enquiries in this regard. Once the case was before the criminal court, such steps as were taken were dilatory and half-hearted. The Court notes the following:

(i) The village guards revoked their statements to the gendarmes in the court on 5 July 1994 and implicated a seventh person, whom Feyzi Gökçen shortly afterwards on 27 July 1994 identified as a specialist sergeant and whom Ömer Güngör claimed had incited him to commit the offence. It was not until 7 July 1995, almost a year later, that the court instructed enquiries to be made from the gendarme command about the seventh person.

(ii) After the gendarme command had denied the existence of "müdür" on 31 September and 17 November 1995, the court ceased consideration of this aspect, making no other enquiries, for example, from any other security force body operating in Diyarbakir at the time.

(iii) On 16 October 1996, Ömer Güngör provided information that the seventh person was an army sergeant from Devegeçedi, called Gültekin Seçkin. This led to the court making enquiries from the 7th Army Corps Command on 4 November 1996, 25 December 1996 and 21 January 1997. Following the denial of any knowledge by the army, the court instructed on 17 February 1997 that enquiry be made of the army chiefs of staff but on 7 April 1997 they decided to abandon that line of investigation.

(iv) No other steps were taken until Ömer Güngör again provided information to the court on 16 February 1998, referring to the specialist army sergeant Gültekin Sütçü mentioned in the Susurluk report. On 16 March 1998, the court requested a copy of the Susurluk report from the Ministry of Justice. It was not provided until 13 January 1999, no

explanation being forthcoming for the delay. Nor is there any sign of an attempt to speed up the response of the Ministry. Even then, it was not until 18 June 1999, on the application of the family's counsel, that the court instructed the public prosecutor to enquire with the army about Gültekin Sütçü. His address was obtained shortly afterwards and instructions given for a statement to be taken. He failed to appear however and has apparently fled to Bulgaria.

406. The Court finds therefore that, although the proceedings culminated in the convictions of six persons in connection with the killing of Mehmet Serif Avsar, they failed adequately to address a crucial issue, namely, the role played by the seventh person, who was a member of the security forces. The findings of the criminal court with regard to the responsibility of the village guards and Mehmet Mehmetoglu were made in the absence of potentially significant evidence about security force involvement in the abduction and killing. A proper and effective investigation into this aspect of the case was necessary to clarify to what extent the incident was premeditated and whether, as alleged, it formed part of the unlawful activities carried out with the connivance and acquiescence of the authorities at that time in the south-east of Turkey.

407. The Government have pointed out that an appeal is pending to the Court of Cassation. However, the Court is not persuaded that after six years and in light of the flight of the individual potentially identified as the seventh man, the cassation proceedings are capable of remedying the defects in the proceedings, in particular by clarifying or improving the evidence available. That being so, the applicant must be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.

408. The Court concludes that the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Serif Avsar and therefore was in breach of the State's procedural obligation to protect the right to life. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil proceedings limb of the Government's preliminary objection (see paragraphs 373 and 381 above) and holds that there has been a violation of Article 2 in this respect.

3. Concerning the killing of Mehmet Serif Avsar

409. It is not disputed that Mehmet Serif Avsar was killed unlawfully and in circumstances falling outside the exceptions set out in the second paragraph of Article 2. The question arises however whether the Government may be held responsible for his death.

410. The Court has found that Mehmet Serif Avsar was taken from his premises by five village guards, the confessor Mehmet Mehmetoglu and a seventh person, a security official. They took him to the gendarmerie where his presence was known to the gendarmes. He was removed from the gendarmerie by Mehmet Mehmetoglu and the seventh person, along with Feyzi Gökçen and Ömer Güngör. He was killed some time later.

411. The Court recalls that the Avsar family had contacted the police shortly after Mehmet Serif Avsar had been taken away and that they also went to the gendarmerie where they told the gendarmes what had happened. The gendarmes were aware of Mehmet Serif Avsar's presence at the gendarmerie and the identity of his abductors. The

latter were not required to account for their action and were allowed to leave the gendarmerie with Mehmet Serif Avsar without interference. Mehmet Serif Avsar was not entered into any record as a person detained for any lawful purpose. While it is not established that any gendarme was aware of any intent to kill Mehmet Serif Avsar, the circumstances in which he was removed from his shop and not submitted to formal procedure of recorded detention showed that he was at real and immediate risk of arbitrary and unlawful treatment, including, in the circumstances of south-east Turkey at the time, the risk of being killed (see the *Kiliç v. Turkey* and *Mahmut Kaya v. Turkey* judgments of 28 March 2000, to be published in ECHR 2000-III). The failure of the gendarmes to react to the unlawful activities of the village guards, Mehmet Mehmetoglu and the seventh person, as well as to the complaints of the family of the abducted person, supports a strong inference of connivance or at least acquiescence in those activities.

412. The Court is satisfied that Mehmet Serif Avsar may be regarded as having died after having been taken into custody by agents of the State. It does not accept the Government's submission that the crime was committed by persons acting in their private capacity without the knowledge of the authorities and thereby beyond the scope of the State's responsibility.

413. The village guards enjoyed an official position, with duties and responsibilities. They had been sent to Diyarbakir to participate in the apprehension of suspects and they held themselves out to the Avsar family as acting on authority. The seventh person, a security officer, also held himself out as acting officially. The participants were, and purported to act as, agents of the State, and made use of their position in forcing Mehmet Serif Avsar to go with them. In these circumstances, the Government is answerable for their conduct.

414. In that context, the Court has already found that there was a lack of accountability as regarded the security forces in south-east Turkey in or about 1993 (see the above-mentioned *Kiliç* and *Mahmut Kaya* judgments, *loc. cit.*). This case additionally highlights the risks attaching to the use of civilian volunteers in a quasi-police function. Notwithstanding the official denials that guards were used outside their own villages, it has been established in this case that guards were used regularly on a variety of official operations, including the apprehension of suspects. According to the regulations provided by the Government, village guards were hierarchically subordinate to the district gendarme commander. However, it is not apparent what supervision was, or could be exerted over guards who were engaged in duties outside the jurisdiction of the district gendarme commander. Nor, as the village guards were outside the normal structure of discipline and training applicable to gendarmes and police officers, is it apparent what safeguards there were against wilful or unintentional abuses of position carried out by the village guards either on their own initiative or under the instructions of security officers who themselves were acting outside the law.

415. Though there was a prosecution which resulted in the conviction of the village guards and Mehmet Mehmetoglu, there was a failure to investigate promptly or effectively the identity of the seventh person, the security official, and thereby to establish the extent of official knowledge of or connivance in the abduction and killing of Mehmet Serif Avsar. In these circumstances, and as set out above (see paragraphs 396-408), the investigation and court proceedings did not provide sufficient redress for the applicant's complaints concerning the authorities' responsibility for his brother's death and he may still claim to be a victim, on behalf of his brother, of a violation of Article 2.

416. No justification for the killing of Mehmet Serif Avsar being provided, the Court concludes that the Government are liable for his death.

There has accordingly been a breach of Article 2 in this respect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

417. The applicant alleged that his brother had been the victim of serious human rights violations on the basis of racial discrimination, invoking Article 3 of the Convention which provides:

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

418. The applicant submitted that his brother was the victim of killing due to his identity as a Kurd, an indigenous racial group as well as a distinct national minority. The ill-treatment which he suffered in addition to the discrimination on grounds of race was of such a nature and severity as to violate Article 3 of the Convention (see, for example, the *East African Asians v. the United Kingdom*, Commission report of 14 December 1973, DR 78, p. 5).

419. The Government denied any responsibility for what happened to Mehmet Serif Avsar.

420. The Court finds that it is unsubstantiated that the killing of Mehmet Serif Avsar was racially motivated. It therefore finds no breach of Article 3 of the Convention.

V. ALLEGED VIOLATIONS OF ARTICLES 6 and 13 OF THE CONVENTION

421. The applicant invoked both Articles 6 and 13 in respect of the investigation and criminal trial conducted into the death of his brother.

422. Article 6 of the Convention provides as relevant:

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

423. Article 13 of the Convention 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.”

A. Parties' submissions

424. The applicant submitted that Article 6, which guarantees the right of everyone to a fair trial within a reasonable time, extended to the applicant who was a participant through his family lawyer Senal Sarihan. He had exercised his right to intervene in the proceedings and other members of the family were witnesses in the trial. They complained that the trial into the abduction and murder of Mehmet Serif Avsar took over

five years to conclude and this was not compatible with Article 6. They referred to the Court's judgment in *Selmouni v. France* (judgment cited above, §§ 108-118). The delay resulted from the obstructive efforts of the security forces to hide the seventh person and was in no way attributable to the applicant's conduct or the complexity of the proceedings.

425. The applicant submitted under Article 13 that he had no effective remedy for his complaints under Turkish law. There were arguable grounds for the involvement of the security forces in the death of his brother and the entire investigation including the trial was designed not to determine that question but to avoid answering it. He referred to the defects in the investigation mentioned under Article 2 of the Convention (see paragraph 386 above).

426. The Government maintained that the necessary investigation was carried out effectively into the events. They relied on the criminal trial against the village guards and Mehmet Mehmetoglu, pointing out that the Avsar family had every opportunity to put forward their views and evidence. Furthermore, they were able to appeal, and were appealing, against the decision of the first instance court concerning alleged shortcomings in the proceedings.

B. The Court's assessment

427. The Court notes that the Commission's decision declaring the applicant's application admissible did not include any express reference to Articles 6 or 13 of the Convention. It recalls however that the application introduced before the Commission contained complaints concerning the lack of effective remedies under Article 13 and that the applicant expressed the intention to raise complaints as to the effectiveness of the ongoing trial as problems became apparent. No objection was taken by the Government. The Court finds that it has competence to examine these complaints.

428. The applicant's complaint under Article 6 concerns essentially the delay in the criminal trial. The Court observes that he is not a party in the proceedings. It was his three brothers Mehmet Ali, Mehmet Sait and Abdullah who lodged complaints with the public prosecutor and acted as intervening parties in the trial. While it is true that in doing so the brothers are acting on behalf of the family as a whole, including the applicant, it is nonetheless the case that the applicant has no formal standing in the proceedings. In these circumstances, the Court considers it appropriate to consider the applicant's complaints under Article 13, which is broad enough to encompass all the issues raised by the applicant with regard to the investigation and trial.

429. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State

(see the Aksoy v. Turkey judgment cited above, p. 2286, § 95; the Aydin v. Turkey judgment cited above, pp. 1895-96, § 103; and the Kaya v. Turkey judgment cited above, pp. 329-30, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see the Kaya v. Turkey judgment cited above, pp. 330-31, § 107).

430. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Article 2 of the Convention for the death of the applicant's brother. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yasa v. Turkey judgments cited above, pp. 330-31, § 107, and p. 2442, § 113, respectively).

431. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's brother. For the reasons set out above (see paragraphs 396-408), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which are broader than the obligation to investigate imposed by Article 2 (see the Kaya v. Turkey judgment cited above, pp. 330-31, § 107). The Court finds therefore that the applicant has been denied an effective remedy in respect of the death of his brother and thereby access to any other available remedies at his disposal, including a claim for compensation.

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

VI. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

432. The applicant complained that his brother and family had been victims of discrimination contrary to Article 14 which provides:

"The enjoyment of the rights and freedoms set forth in the 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."

433. The applicant referred to the intimidation of his family and their expulsion from Diyarbakir and Bismil, resulting in the complete loss of their businesses in the region. This intimidation resulted, as did the killing of Mehmet Serif Avsar, from their ethnic status as Kurds and their political opinions.

434. The Government rejected the applicant's allegations of discrimination.

435. The Court does not consider that there is sufficient evidence to justify any findings that the applicant, his brother Mehmet Serif Avsar or other members of his family, who are not applicants, have been victims of intimidation based on their ethnic status or political opinions. Accordingly, there has been no breach of Article 14 of the Convention in this respect.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

436. Article 41 of the Convention provides:

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

A. Pecuniary damage

437. The applicant claimed pecuniary damages on behalf of Kadriye Avsar, the widow of his deceased brother, and their two children Silvan (born in 1988) and Servan (born in 1993), who were dependent on Mehmet Serif Avsar as husband and father. He submitted that Mehmet Serif Avsar was co-owner of a chemical fertiliser business called *Baran Gübrecilik* based in Diyarbakir, together with his brother Mehmet Ali and his cousin Namik Kemal Avsar. He held 33% of the shares of the company, which passed to his wife Kadriye Avsar on his death.

The applicant claimed that prior to the events in question the business was economically successful, though it was forced to close down in or about the end of 1994 due to the intimidation suffered by the family in the region. In 1993, it had a net profit of about 12 billion TRL. In 1994, Mehmet Ali Avsar stated that its annual income was about 30 billion TRL. Accordingly, Mehmet Serif Avsar would have earned 10 billion TRL from that source alone. He also owned sales agencies in Bismil for the Pirelli tyre company and the *Mutlu Aku* company (car batteries), as well as having other economic investments. However, the applicant's family was unable to provide the documentation for these businesses as all the documents and papers relating to their affairs were seized by the authorities during a raid on 26 December 1994, Mehmet Ali and Namik Kemal being prosecuted on for various charges of fraud and falsification of documents.

Having regard to the applicable exchange rate into sterling, the age of Mehmet Serif Avsar at the time of death, namely 29 and actuarial calculations to convert the loss of future income into a lump sum, the applicant claimed the sum of 4,399,999.99 pounds sterling (GBP) in respect of the loss of income from *Baran Gübrecilik* business

438. The Government submitted that the applicant had failed to substantiate the grossly inflated claims for loss of income from the alleged businesses. The actuarial method used was, in their view, highly speculative and led to exaggerated figures. Such an award would amount to unjust enrichment. They refuted the allegation that the documentation was seized and pointed out that, even if it was, the family would be able to obtain further copies of taxation documents from the tax authorities. They urged the Court to refrain from fictitious calculations and argued that it should only award, if necessary, an equitable amount of pecuniary damage within reasonable limits.

439. As regards the applicant's claim for pecuniary loss, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities,

the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, and *Cakici v. Turkey* cited above, § 127).

440. A precise calculation of the sums necessary to make complete reparation (*restitutio in integrum*) in respect of the pecuniary losses suffered by an applicant may be prevented by the inherently uncertain character of the damage flowing from the violation (Young, James and Webster v. the United Kingdom judgment (former Article 50) of 18 October 1982, Series A no. 55, p. 7, § 11). An award may still be made notwithstanding the large number of imponderables involved in the assessment of future losses, though the greater the lapse of time involved the more uncertain the link between the breach and the damage becomes. The question to be decided in such cases is the level of just satisfaction, in respect of either past and future pecuniary loss, which it is necessary to award to an applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (*Sunday Times v. the United Kingdom* judgment (former Article 50) of 6 November 1989, Series A no. 38, p. 9, § 15; *Lustig-Prean and Beckett v. the United Kingdom* (Article 41), nos. 31417/96 and 32377/96 (Sect. 3), §§ 22-23).

441. In this case, the Court notes that the applicant has provided statements from Mehmet Ali Avsar, co-owner in the *Baran Gübrecilik* business and his accountant, concerning the profits of the business in 1993 and 1994, but has not submitted any detailed accounts, as the business documents are alleged to have been seized during a criminal investigation. The Court observes that the figure claimed of TRL 10 billion as Mehmet Serif Avsar's share in the company profits is very high. In the absence of documents substantiating this sum, the Court is unable to accept this figure as a basis for an award. In any event, Mehmet Serif Avsar's wife inherited his share of the business and presumably received benefits from that. It further notes that the business ceased to function after 1994, which renders any claims for future loss of income a highly speculative exercise. It cannot be assumed that the authorities were responsible for the failure of the business as this application has not included any investigation or findings of fact, concerning the alleged intimidation of the family after the death of Mehmet Serif Avsar.

442. Nonetheless, the Court finds that Mehmet Serif Avsar was involved in running an economically viable business at the time of his death and was providing financial support to his wife and children. But for his death, it may have been anticipated that, as a healthy twenty nine-year-old, he would have continued to provide such support in the years which followed. It is accordingly appropriate to make an award to his dependants to reflect the loss of financial support. Having regard to awards made in other cases, and basing itself on equitable considerations, the Court awards the sum of GBP 40,000 to be held by the applicant for Mehmet Serif Avsar's widow and children and to be converted into Turkish liras at the date of settlement.

B. Non-pecuniary damage

443. The applicant claimed non-pecuniary damages of GBP 40,000 for the widow of Mehmet Serif Avsar and their two children and GBP 10,000 for himself as the deceased's brother. He referred to a statement from Kadriye Avsar which described the illnesses and psychological problems suffered by the two children after their father's death. He also alleged that the death was part of a concerted campaign against the family which suffered

greatly from intimidation as well as emotional loss. The sums claimed were justified by *inter alia* the severity of the violations of the compensation and the aggravation of the conduct of the authorities in failing to act promptly and establish properly the extent of involvement of state agents.

444. The Government submitted that these claims were excessive and unacceptable. Due to the lack of evidence to substantiate the applicant's allegations, only a symbolic amount would be equitable with regard to non-pecuniary damages. Further, it was not necessary to award any amount separately to the applicant, the figure claimed being disproportionate when compared to the amount claimed on behalf of the widow and children together.

445. The Court recalls that it has found that the authorities were responsible for the death of Mehmet Serif Avsar. In addition to violations of Article 2 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13 of the Convention. In these circumstances and having regard to the awards made in comparable cases, the Court awards on an equitable basis the sum of GBP 20,000 for non-pecuniary damage to be held by the applicant for Mehmet Serif Avsar's widow and children, such sum to be converted into Turkish liras at the rate applicable at the date of payment. It recalls that the applicant, living in Germany, was not directly involved in the events, including the domestic proceedings. In the circumstances, it awards the sum of GBP 2,500.

C. Costs and expenses

446. The applicant claimed GBP 20,270.40 for legal costs and expenses. This figure included a sum of GBP 12,346.15 for fees for Mr Kevin Boyle who represented the applicant in the early stage of the proceedings and at the hearing of evidence in Ankara. A further sum of GBP 7,954.25 was claimed for costs and expenses incurred by the Kurdish Human Rights Project (KHRP), which included fees of GBP 600 for Mr Philip Leach, a solicitor and the legal director of KHRP, who took over representation from March 2000, the sums of GBP 3,250 for translation costs and GBP 2,067 by way of expenses for travel and accommodation at the hearing in Ankara (Mr Kevin Boyle, two Turkish lawyers, a representative from KHRP and counsel attending for the case to be heard after the Avsar case).

447. The Government submitted that only expenses actually incurred should be reimbursed and that the figures put forward by the applicant were insufficiently substantiated. They considered that the figures were inflated and that no payment should be made to the KHRP, which should not be allowed to use court proceedings to make profits and whose role was unnecessary.

448. The Court observes that this case involved complex issues of fact and law requiring detailed examination and involving the taking of evidence from witnesses in Ankara. The claims of the applicant's representatives with respect to the hours of work undertaken do not in the circumstances appear unreasonable. As regards the sum claimed in respect of the KHRP, it considers that sums in respect of translation costs, the travel and accommodation expenses for the applicant's representatives at Ankara (Mr Boyle and the Turkish counsel only) and the sums for representation by Mr Philip

Leach from March 2000 may be allowed as necessarily and actually incurred. It accordingly awards the sum of GBP 17,320, such sum to be paid in sterling into the applicant's bank account in the United Kingdom as identified by him.

D. Default interest

449. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by six votes to one that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the circumstances of Mehmet Serif Avsar's death;
3. *Holds* by six votes to one that there has been a violation of Article 2 of the Convention in respect of the death of Mehmet Serif Avsar;
4. *Holds* unanimously that there has been no violation of Article 3 of the Convention;
5. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
6. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) 40,000 (forty thousand) pounds sterling for pecuniary damage to be held on behalf of Mehmet Serif Avsar's wife and children;
 - (ii) 20,000 (twenty thousand) pounds sterling for non-pecuniary damage to be held on behalf of Mehmet Serif Avsar's wife and children and 2,500 (two thousand five hundred) pounds sterling for non-pecuniary damage in respect of the applicant himself;
 - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
7. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within the above-mentioned three months and into the bank account in the United Kingdom identified by him, in respect of costs and expenses, 17,320 (seventeen thousand, three hundred and twenty) pounds sterling together with any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and notified in writing on 10 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle Elisabeth Palm

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

E.P.

M.O'B.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In this – very simple – case I share neither the approach nor the conclusion of the majority.

Let me explain myself.

1. First of all, an outline of the facts: on 22 April 1994 six men (five village guards and a confessor, who is an ex-PKK terrorist) arrive at the business premises of Mehmet Serif Avsar, the brother of the applicant, Behçet Avsar. They want to take him to the central gendarmerie, apparently for questioning. Mehmet Serif Avsar says he will not go without someone from the security forces being present. One of the six men referred to above calls a seventh man, apparently a police guard, by walkie-talkie. The seven men and Mehmet Serif Avsar leave in several cars for the gendarmerie and are seen entering the building. The five village guards and the PKK confessor, having been identified on 5 May, are arrested on 6 May (see paragraph 17 of the judgment). They deny that a seventh man was present. On 7 May Ömer Güngör, one of the village guards, takes the gendarme investigators to a place 19 km from Diyarbakir where they find Mehmet Serif Avsar's body. He has been shot twice in the head. Ömer Güngör admits having committed the murder.

The trial of the six accused opens on 5 July 1994. It has still not been possible to identify the seventh man because of untrue statements and collusion by the six others. By the time he is identified, he has already taken refuge in Bulgaria. Accordingly, it has not been possible to bring him before Diyarbakir criminal court and try him alongside the others; the proceedings against him have been disjoined pending his extradition.

On 21 March 2000 the trial ends. Ömer Güngör is sentenced to twenty years' imprisonment for murder and the five other men to six years and eight months' imprisonment for aiding and abetting murder and abduction. On the same day an arrest

warrant is issued by the same court against the seventh man, Gültekin Sütçü, who is still on the run.

2. This case calls for a number of points of clarification.

The six (convicted) men and the seventh one (who is on the run) wear the “same hats”: they are all “State officials”, depositories of public authority. In the instant case their rank does not count; none of them is more important than the other.

Secondly, the proceedings against the seventh officer, who has so far succeeded in escaping justice, are still pending; the limitation period for the crime of which he is accused is twenty-five years.

The six convicted men are now serving their sentence.

3. With regard to the merits of the case, I consider that, in convicting the perpetrators of the deed which has allegedly constituted a violation of Article 2 of the Convention, the respondent Government have fulfilled their obligations under that provision. As the Commission rightly held in its inadmissibility decision in a similar case (“Death and serious injury of children in a public hospital caused by a nurse suffering from mental illness”), “[t]he procedural requirements of Article 2 are satisfied where there have been criminal proceedings against the nurse (which led to her conviction and imprisonment) and an inquiry conducted which was independent of the parties” (The Taylor, Crampton, Gibson and King families v. the United Kingdom, application no. 23412/94, 30 August 1994, DR 79, p. 127).

I am firmly convinced that the fact that one of the suspected perpetrators of the crime has so far succeeded in escaping prosecution and punishment by taking refuge in Bulgaria - even supposing that that was made possible by the collusion of the co-accused - is not such as to vitiate the end result (punishment of the offenders) and invalidate the entire proceedings. The seventh man, regardless of his official title, is not the first defendant to have succeeded – temporarily – in escaping justice, and will not be the last.

4. In paragraphs 394 et seq. the Court goes to extreme lengths – even if it means stating the obvious – to explain that the investigation carried out in the instant case and the trial which followed are worthless as long as the seventh man has not been prosecuted alongside the others. What is more, in doing so it refers to factors that none of the parties has raised (for example, the length of the proceedings, which is not excessive in itself, especially when compared with the length at issue in the four British judgments to which I shall refer in due course in connection with Article 13), makes generalisations on the basis of irrelevant points of fact (the general situation in Turkey and the Court’s point of view concerning the village guards etc.) and presents the case from an inaccurate angle. It asserts that even at the end of the trial the facts have still not been elucidated (paragraph 408)! In my view, they have been elucidated as they should have been. Proof of this can be seen from the fact that the proceedings culminated in heavy criminal penalties. Is it being suggested that those penalties are unjustified?

Paragraph 408 *in fine* contains an untruth. In cases to which the Turkish Government have been a party they have submitted many times (on the subject of exhaustion of domestic remedies) that in the country’s legal system civil, administrative and criminal remedies must be exhausted and that each of those remedies is independent of the others. The Court has rightly stressed on each occasion that the main

thing is the criminal remedy. On this occasion the criminal remedy worked, but the Court does not find it satisfactory or adequate. What more could be done? One might well wonder.

In the final analysis, the Court sets itself up as a national court of first instance. The majority question why the suspects were not arrested immediately (paragraph 397). The truth of the matter is that they were arrested as soon as they were identified. Moreover, it is not for this international Court to judge the appropriateness of a decision to detain on remand, an exceptional – and not always recommended – measure. The Court held in *Kemmache v. France* (no. 3) of 24 November 1994 (paragraph 44):

“In principle, and without prejudice to its power to examine the compatibility of national decisions with the Convention, it is not the Court’s role to assess itself the facts which have led a national court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of third or fourth instance, which would be to disregard the limits imposed on its action” (see, in the same sense, *Winterwerp v. the Netherlands* of 14 October 1979, § 46, and *Bozano v. France* of 18 December 1986, § 58).

A reading in good faith of paragraphs 396 et seq. of the present judgment should suffice to see that all my foregoing points are valid.

5. With regard to the finding of a violation of Article 13, I shall confine myself to the observation that this provision is not in any way at issue in the present case.

Firstly, after an offence had been committed there was an investigation, a prosecution and a trial, which resulted in the conviction of the guilty parties. Having regard to those facts, how can it be claimed that Article 13 was not complied with?

Secondly, no separate issue arises under Article 13 where there is a finding, as by the majority here, of a violation of Article 2 under its procedural head. On that point I need merely refer to my detailed dissenting opinion in the cases of *Ergi v. Turkey* of 28 July 1998 (*Reports of Judgments and Decisions* 1998-IV), *Akkoç v. Turkey* of 10 October 2000 and *Tas v. Turkey* of 14 October 2000, and to four recent judgments against the United Kingdom (*Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001, §§ 164-65; *Kelly and Others v. the United Kingdom*, no. 28883/95, 4 May 2001, §§ 158-59; *McKerr v. the United Kingdom*, no. 30054/96, 4 May 2001, §§ 175-76; and *Shanaghan v. the United Kingdom*, no. 37715/97, 4 May 2001, §§ 139-40). Need I add that, with regard to the proceedings in issue in the four British cases, the Turkish system hardly differs from that of the United Kingdom, contrary to what is erroneously asserted in the above-mentioned judgments (*McKerr*, §§ 171 et seq.; *Hugh Jordan*, §§ 160 et seq.; *Shanaghan*, §§ 136 et seq.; and *Kelly*, §§ 155 et seq.)?

6. I am therefore forced to conclude that there has not been any violation in the instant case and that, accordingly, it was not necessary to award the applicant either compensation or legal costs.

1. Susurluk was the scene of a road accident in November 1996 involving a car in which a member of parliament, a former deputy director of the Istanbul security services, a notorious far-right extremist, a drug trafficker wanted by Interpol and his girlfriend had been travelling. The latter three were killed. The fact that they had all been travelling in

the same car had so shocked public opinion that it had been necessary to start more than sixteen judicial investigations at different levels and a parliamentary inquiry.

1. An infamous drug trafficker strongly suspected of supporting the PKK and one of the principal sources of finance for *Özgür Gündem*.

2. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the People's Labour Party ("the HEP"), director of the Kurdish Institute in Istanbul, a writer and leader writer for, *inter alia*, the weekly review *Yeni Ülke* and the daily newspaper *Özgür Gündem*. He was killed at Diyarbak*r on 30 September 1992. Responsibility for the murder was claimed by an unknown clandestine group named "Boz-Ok".

3. The appendix is missing from the report.

1. For example, harbouring a member of an armed organisation.