TEAM NUMBER: 058

THE EUROPEAN HUMAN RIGHTS MOOT COURT COMPETITION 2016

ASSOCIATION LENITER-ALEGRIA, GREEN EXPLOITATIONS INITIATIVE AND 135 OTHERS

(Applicants)

vs.

KANDELIA

(Respondent)

SUBMISSIONS OF COUNSEL FOR THE APPLICANT

15 November 2015

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I. LIST OF ABBREVIATIONS

ALA	Association Leniter-Alegria
Art	Article
Convention	European Convention on Human Rights
Court	European Court of Human Rights
EIA	Environmental Impact Assessment
GEI	Green Exploitations Initiative
KMI	Kamba Mining International
KSC	Kandelian Supreme Court

II. LIST OF REFERENCES

1. Cases

A v. UK, app. no. 25599/94, 23 September 1998.

AB v. Slovakia, app. no. 41784/98, 4 March 2003.

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Akdivar v. Turkey [GC], app. no. 21893/93, 16 September 1996.

Aksoy v. Turkey, app. no. 21987/93, 18 December 1996.

Apostol v. Georgia, no. 40765/02, 28 November 2006.

Athanassoglou v. Switzerland [GC], app. no. 27644/95, 6 April 2000.

Baumann v. France, app. no. 33592/96, 22 May 2001.

Bensaid v. UK, app. no. 44599/98, 6 February 2001.

Budayeva v. Russia, app. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008.

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Centre for Legal Resources on Behalf of Valentin Campeanu v. Romania [GC], app. no. 47848/08, 17 July 2014.

Chapman v. UK, app. no. 27238/95, 18 January 2001.

Cyprus v. Turkey, app. no. 25781/94, 10 May 2001.

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Dudgeon v UK, app. no. 7525/76, 22 October 1981.

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Frydlender v. France [GC], app. no. 30979/96, 27 June 2000.

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Kolyadenko v. Russia, app. nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, 28 February 2012.

König v. Germany, app. no. 6232/73, 28 June 1978.

Kress v. France [GC], app. no. 39594/98, 7 June 2001.

LCB v. UK, no. 23413/94, 9 June 1998.

Mustafa v. France, app. no. 63056/00, 17 June 2003.

Oneryildiz v. Turkey, app. no. 48939/99, 30 November 2004.

Okyay v. Turkey, app. no. 36220/97, 12 July 2005.

Ringeisen v. Austria, app. no. 2614/65, 16 July 1971.

Scordino v. Italy (No 1) [GC], app. no. 36813/97, 29 March 2006.

Stankiewicz v. Poland, app. no. 46917/99, 6 April 2006.

Stögmüller v. Austria, app. no. 1602/62, 10 November 1969; 1 EHRR 155.

Storck v. Germany, app. no. 61603/00, 16 June 2005.

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Sürmeli v. Germany [GC], app. no. 75529/01, 8 June 2006.

Taskin v. Turkey, app. no. 46117/99, 10 November 2004.

Tătar v. Romania, app. no. 67021/01, 27 January 2009.

Tyrer v. UK, app. no. 5856/72, 25 April 1978.

Užukauskas v. Lithuania, app. no. 16965/04, 6 July 2010.

van Oosterwijck v. Belgium, app. nos. 7654/76, 6 November 1980.

Vallianatos v. Greece [GC], app. nos. 29381/09 and 32684/09, 7 November 2013.

Vilnes v. Norway, app. nos. 52806/09 and 22703/10, 5 December 2013.

X and Y v. The Netherlands, app. no. 8978/80, 26 March 1985.

Zietal v. Poland, app. no. 64972/01, 12 May 2009.

2. Treaties

1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

3. Literature

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European Court of Human Rights, Practice Directions: Just Satisfaction of Claims, 2014.

Justice and Environment, Banning Cyanide from Mining in the European Union: Legal Analysis, 2011.

Liu, Zhichang / et al., Selective isolation of gold facilitated by second-sphere coordination with α-cyclodextrin, Nature Communications; vol. 4, nr. 1855, 2013.

Vainshtein, Mikhail / et al., New non-toxic and secure technology for gold leaching, International Journal of Engineering Science and Innovative Technology, vol. 3, issue 4, 2014, p. 50.

III. SUMMARY OF THE RESULTS

- The applicants' claims satisfy all the conditions for admissibility. Both the individual applicants and NGOs are victims of breaches of Arts 2, 3, 8, and 9, as well as Arts 6 and 13. All viable domestic remedies were exhausted.
- Arts 2, 3 and 8 are engaged due to the severe risks and harms to the applicants' physical integrity. Alternatively, Art.8 is engaged due to the particularly important and personal nature of the activities that were exposed to risks of harm.
- The Respondent's authorisation of the mining project breached Arts 2, 3, and 8 due to the appreciable risks to health involved, and in view of the availability of alternatives.
- The Respondent's authorisation of the mining project further breached Art 9, as it had a significant deleterious impact on access to a highly meaningful religious site.

- The Respondent's response to the contamination of the river also breached Arts 2, 3, and 8 due to the three-day delay in closing off the site and the failure to notify the public.
- The Respondents further breached the applicants' rights under Art 6 due to the Kandol-Altol Administrative Court's failure to provide a timely judgment, and due to the prohibitive legal costs imposed by the Kandelian Supreme Court.
- Accordingly, the applicants seek EUR 20,000 per applicant, plus any tax chargeable.

IV. THE ADMISSIBILITY OF THE APPLICATION

1. The applicants' claims satisfy all the conditions for the admissibility of an application to the Court under Arts 34 and 35 of the Convention.

1. Victim Status

a. The 135 individual applicants

2. The 135 individual applicants are direct victims within the meaning of Art 34 of violations under Arts 2, 3, 8, and 9, as well as of Arts 6(1) and 13. They each suffered damage both to their physical and mental health as a result of the contamination of the Kand River. Furthermore, though they were not direct parties to those proceedings, the individual applicants' rights under Arts 6(1) and 13 were breached by the Kandol-Alto Administrative Court's delay in issuing a judgment, as the claimants in that case were, by analogy with *Gorriaz,* specifically intending and purporting to represent them in an intermediary capacity.[1] As parties to the 2015 civil proceedings, they are also direct victims of a breach of Art 6 in respect of the excessive legal fees imposed by the KSC.

b. The NGOs: ALA and GEI

3. ALA and GEI are NGOs within the meaning of Art 34 and have standing as they were (a) direct victims of the violations of Arts 6(1) and 13, and (b) indirect victims of the violations of Arts 2, 3, 8, 9.

<u>(i) Direct victim status</u>

4. The rights of ALA and GEI under Arts 6(1) and 13 have been breached, respectively, by the Administrative Court's delay in issuing its judgment in their case and the imposition of costs in the civil proceedings. ALA and GEI were parties in both proceedings.

<u>(ii) Indirect victim status</u>

5. Both NGOs have (a) a sufficiently "close link" with the direct victims, who were all

[1] *Gorraiz Lizarraga v. Spain*, § 38.

Leniterist and from the area whose protection GEI was founded specifically to fight for, and (b) a "personal interest" in pursuing the complaints, as its outcome goes to the very purposes of their existence as associations. They therefore qualify as "victims" under Art 34, since that concept extends to indirect victims to whom the violation would cause harm or who would have a valid personal interest in seeing it brought to an end.[2]

6. Moreover, the Convention is a "living instrument".[3] Thus, the interpretation of "victim" is liable to evolve in light of contemporary societal conditions and must be applied without excessive formalism.[4] Indeed, in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is sometimes the only means available to them to defend their particular interests effectively.[5] In *Gorraiz Lizarraga v Spain,* the Court noted that it "cannot disregard"[6] the fact most European countries through their legislation recognise the standing of associations to bring legal proceedings in defence of their members' interests[7]. "Any other, excessively formalistic, interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory."[8] Recent jurisprudence supports the increasing willingness of the Court to take a flexible approach to the question of victim status.[9]

2. Exhaustion of Domestic Remedies

7. In light of the circumstances, it is submitted that the applicants did all that could have been reasonably expected of them to exhaust domestic remedies as required by Art 35(1).[10] It is to be noted here that Art 35(1) must be applied with a degree of flexibility and without excessive formalism.[11] Furthermore, the rule on domestic remedies is not absolute; regard must be had to the particular circumstances of each individual case.[12]

a. The administrative proceedings

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[2] *Centre for Legal Resources on Behalf of Valentin Campeanu v. Romania*, § 107; *Vallianatos v. Greece* [GC], § 47, cited in Council of Europe, *Practical Guide on Admissibility Criteria*, § 15.

[3] Council of Europe, *Manual on Human Rights and the Environment*, p. 15.

[4] Council of Europe, *Practical Guide on Admissibility Criteria*, § 16; *Gorraiz Lizarraga v. Spain,* § 38; *Stukus v. Poland*, § 35; *Zięțal v. Poland*, §§ 54-59.

[5] *Gorraiz Lizarraga v. Spain* § 38.

[6] *Gorraiz Lizarraga v. Spain* § 38.

[7] For a comprehensive description, see Council of Europe, *Manual on Human Rights and the Environment*, pp. 175-179.

[8] *Gorraiz*, § 38.

[9] *The Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania* (17 July 2014).

[10] See *Akdivar v. Turkey* [GC], § 69; *Aksoy v. Turkey*, §§ 53-54; *Baumann v. France*, § 40, cited in *Gorraiz.*

[11] *Cardot v. France*, § 34; *Gorraiz Lizarraga v. Spain*, § 37.

[12] *van Oosterwijck v. Belgium*, § 35; *Gorraiz Lizarraga v. Spain,* § 35.

8. As regards the Convention violations arising from the authorisation of the mining process in April 2012, ALA and GEI brought proceedings before the Kandol-Alto Administrative Court to challenge that decision. Though the Administrative Court was due to deliver judgment in December 2014, a decision has yet to be issued. In light of this unreasonable delay, ALA and GEI must be regarded as having exhausted domestic remedies in respect of the mining authorisation.
9. Given that a substantively identical claim has thus been made – and been made, albeit indirectly, on their behalf – a claim by the remaining individual applicants on the same matter is otiose.[13] It must also be noted that there exists no possibility under Kandelian law for the applicants to file an expedition request to the court.[14] Accordingly, the applicants have exhausted domestic remedies in respect of the mining authorisation.

b. The civil proceedings

10. As regards the specific harms that arose following the rains of September 2014, the applicants – ALA and GEI, representing the 135 individual applicants – pursued liability claims against both the mining company KMI and the regional authority. These claims were dismissed by the KSC, which held not only that causation was not established, but that in any case the authorities have responded adequately by sealing the site and that it was the religious leaders who encouraged the pilgrims to continue to use the polluted water. Notably, the KSC, unlike the court at first-instance, thereby made a determination also as to the responsibility of the public authorities. Any further claim against the central as opposed to the regional authorities would have been ineffective, given in particular the approach taken by the KSC to causation as a matter of law, especially in respect of the interference of the religious leaders. Moreover, given the prohibitive costs already imposed and likely to be imposed again upon the claimants, it would be unreasonable to expect their pursuit of further domestic claims which are, given the above, sure to fail. It is to be remembered here that the standing rules are to be applied "with some degree of flexibility and without excessive formalism."[15] Moreover, the burden is on the Respondent to show that there is in fact an effective domestic remedy.[16]

<u>3. Time Limit</u>

[13] *Vilnes v. Norway*, §§ 177-178.
[14] Clarification Questions, answer to questions 53-60.
[15] *Ilhan v. Turkey,* § 51.
[16] *Apostol v Georgia*, § 39.

11. This application was lodged on 1 November 2015, i.e. within six months of delivery of the final judgment of the KSC on 15 July 2015, and is thus in compliance with Art 35(1).

V. THE MERITS OF THE APPLICATION

1. Unlawful Authorisation of the Mining Project

12. The Respondent breached several Convention rights in approving the reopening of the disputed mine. These breaches stem from the glaring dangers posed by the operation.

a. The dangers of the mining project

13. In the first instance, it is submitted that the mining exploitation presented appreciable risks of harm to the applicants, notwithstanding the failure of the EIA of 2012 to disclose them. The dangers of cyanide mining are well known. In fact, at least eight countries have banned cyanide use in gold and silver mining,[17] and the European Parliament in 2010 passed a resolution proposing an EU-wide ban of the method.[18] Accidents occur regularly.[19] It is also to be noted that the specific danger of cyanide seepage from mines as a result of heavy rains is a very familiar one. As noted by the European Parliament in 2010, there is no guarantee that accidents will not occur, "especially taking into account the increasing incidence of extreme weather conditions, including heavy and frequent precipitation events, as projected by… the Intergovernmental Panel on Climate Change."[20]
14. Alternatively, even if it is held that the Respondent could not have perceived of risks going beyond those identified by the 2010 EIA, it is submitted that the Government was nevertheless in possession of knowledge of a significant risk of harm. Whilst the EIA concluded that there should be no risks "provided the relevant norms were complied with and there were no accidents", it did not exclude dangers arising from an accident or from the effect of the mining process on the environment. Therefore, even taking the 2010 EIA as a basis, the project did pose a risk. Considering that the process involved the use of a highly toxic chemical, the magnitude of the harm risked was flagrantly severe. Notably, one teaspoon of a 2% solution of sodium cyanide can be fatal.[21] Accordingly, the risk was to be categorised as a significant one in virtue of the severity of the harm at issue, irrespective of the probability of materialisation. In such circumstances, the

[17] Justice and Environment (2011), p.1.
[18] European Parliament resolution P7_TA(2010)0145.
[19] Justice and Environment (2011), p.5.
[20] European Parliament resolution P7_TA(2010)0145.
[21] Justice and Environment (2011), p.3.

authorisation of the project breached the applicants' rights under the following heads, bearing in mind that even minimal-probability risks may breach Convention rights. In *Kolyadenko,* the State's protections relating to flooding of a kind "thought to occur only once a century" and "never seen before" was found to breach the Convention.[22]

b. Article 8

15. Firstly, the authorisation of the project violated Art 8 both in its substantive and its procedural aspects.

<u>i. Engagement of Art 8</u>

16. The authorisation of the mine engages Article 8 on two counts. Firstly, on a broad reading, the right to respect for "private life" encompasses a right to the protection of health and bodily integrity. As per Judge Jambrek's concurring opinion in *Guerra v. Italy*, "[t]he protection of health and physical integrity is… as closely associated with the 'right to life' as with the 'respect for private and family life.'"[23]
17. Similarly, the dissentients in *Hatton v. UK* noted that "'health as a state of complete physical, mental and social well-being' is, in the specific circumstances of this case, a precondition to any meaningful privacy, intimacy, etc., and cannot be unnaturally separated from it…"[24]
18. This broad view is reflected in other cases.[25] In *X and Y v. The Netherlands*, the Court held that "'private life'… covers the physical and moral integrity of the person."[26] A State's failure to protect against physical attacks from stray dogs was also held to breach Art 8, because private life encompasses protection of physical and psychological integrity;[27] likewise regarding health risks arising in the context of employment.[28]
19. The Court "reiterated" in *Storck v. Germany* that "even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life… if it is carried out against the individual's will..."[29] In the present case, the interference with physical integrity indubitably reaches the relevant threshold of severity, given that a potentially fatal toxin is involved and did, as a matter

[22] *Kolyadenko v. Russia,* § 145.
[23] *Guerra v. Italy,* concurring opinion of Judge Jambrek.
[24] *Hatton v. UK,* joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner.
[25] See also *LCB v. UK*, § 46.
[26] *X and Y v. The Netherlands,* § 22.
[27] *Georgel and Georgeta Stoicescu v. Romania*, § 49.
[28] *Vilnes v. Norway*.
[29] *Storck v. Germany*, § 143.

of fact, cause severe physical and mental disorders.

20. Alternatively, on a narrower reading, the facts engage Art 8 in view of the essential link between the activities exposed to risks of harm and the applicants' personal identities. The Court's jurisprudence recognises that measures affecting activities that are an integral part of a person's identity can impinge on their "private life."[30] Moreover, the European Commission on Human Rights has held that a minority group can in principle claim that its particular minority lifestyle falls under the concept of 'private life'.[31]

21. Notably, in *G & E v. Norway,* the Commission held that the submersion of a plot of public land due to the construction of a hydroelectric plant engaged Art 8, because of the applicants' respective occupations as reindeer shepherd and as fisherman and hunter. Equally, therefore, the rendering unsafe of public land that has the highest religious significance to a minority must engage Art 8. In fact, the present case is even more compelling, since the Commission's counterargument in *G & E* to the effect that there were alternative lands for shepherding and hunting is inapt here.

22. Having thus established that the environmental harms interfered with private life under Art 8(1), the Court must assess, under Art 8(2), firstly the substantive merits of the State's decision to authorise the mining project, and secondly the procedural fairness of that decision.[32] The authorisation lacks justification under Art 8(2) on both counts.

ii. Breach of the substantive aspect: disproportionate interference

23. Though the Court has in the past found that environmentally risky planning decisions fall within the State's margin of appreciation, the present case is unique. First, the usual margin of appreciation is substantially circumscribed with respect to cyanide mining by an evolving European consensus. As noted, the EU Parliament in 2010 passed a resolution proposing a ban on *all* cyanide mining. Such support for a *blanket* ban indicates *a fortiori* the existence of a European consensus that such mining should not be risked in special cases such as the present, where the mine neighbours a unique holy site.

24. Second, touching on the latter point, the margin of appreciation must be narrowed due to the intimate and minority nature of the interests harmed.[33] Weighing against the project is not simply the general danger of environmental harm against a core interest in bodily integrity, but also a very unique and profound danger of destroying the way of life of a

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[30] *Chapman v. UK*, § 73.
[31] *G & E v. Norway*; see also *Friend v. UK*, § 44.
[32] *Taskin v. Turkey,* § 115; *Giacomelli v. Italy,* § 79.
[33] Cf. *Dudgeon v UK,* § 52.

whole minority group and causing significant trauma at the defilement of a revered holy site. Majorities are inherently likely to underestimate such interests. Accordingly, a narrower margin must be applied.

25. The two factors above also speak forcefully for the disallowance of the mining project. If they do not of themselves establish that the project was not "necessary" or proportionate under Art 8(2), they certainly must be decisive when seen in combination with two further points.

26. Firstly, the proposed benefits of cyanide mining are not as significant as they seem. As the EU Parliament has noted, "cyanide mining provides few jobs, and only for a period of eight-16 years, whilst it runs the risk of causing enormous cross-border ecological damage the cost of which is usually not met by the responsible operating companies, which generally disappear or go bankrupt, but by the state, i.e. by taxpayers…[34]

27. Secondly, the European Parliament has also attested to the fact that there are viable, more environmentally and human-friendly alternatives to attain the economic advantages both in terms of extraction of gold and job creation.[35] Examples include mining methods using thiosulfate or cornstarch lixiviants.[36] Even if it is held that such alternatives do not wholly equal the cyanide mining method, it is submitted that, especially given the noted limitations on the benefits of cyanide mining, the existence of such alternatives deprives the mining project of the degree of general public utility required to trump the applicants' rights under Art 8(2). Accordingly, there has been a violation of Art 8.

<u>iii. Breach of the procedural aspect: failure to consult</u>

28. Even if it is held that the substantive decision to authorise the mining is in principle justifiable under Art 8(2), that decision fails to satisfy the procedural aspect of Art 8 on several counts, firstly due to the failure to consult the affected Leniterist population. An obligation to consult the Leniterist population must be seen as a basic element of 'respect' for their private life in the given circumstances, and as indispensable to a justified decision under Art 8(2). This follows from three considerations.

29. Firstly, close regard is to be had to the word "respect". Any government that fails to accord its citizens an opportunity to voice their concerns about projects that present a potential danger to sites of particularly special personal significance, such as religious

[34] European Parliament resolution P7_TA(2010)0145.
[35] European Parliament resolution P7_TA(2010)0145.
[36] Zhichang Liu et al (2013); Fellman (2013); Vainshtein et al (2014).

sites, can hardly be said to be "respecting" those citizens' private lives.

30. Secondly, that the right to respect for private life encompasses such a procedural obligation follows from the Court's judgment in *Giacomelli v. Italy,* which noted that the Court "has consistently held that, although Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by Article 8… It is therefore necessary to consider all the procedural aspects, including… the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available…"[37]

31. The authorities failed, in this case, sufficiently and properly to take into account the views of the applicants in omitting to give the Leniterist population an opportunity to submit the reasons for their objections and to explain the special significance that damage to the affected area would have for them. The Government's national referendum on this local issue cannot be regarded as an adequate mechanism for this purpose. For one, such an exercise was from the very outset biased against the applicants, given that they are a minority. A decision mechanism based on majority vote is inherently ill-suited to the protection of minorities. Furthermore, a referendum involves a simple yes/no vote, without opportunity for making arguments and giving explanations. Thus a referendum could not in the particular circumstances satisfy the *Giacomelli* requirement that the decision-making procedure be fair and take due account of the views of the affected individuals. What was required was consultation.

32. That Art 8 encompasses such a right of consultation in cases involving large-scale projects follows thirdly from evolving international standards. There is an evident international consensus – especially, but not only, among European states party to the ECHR – that large-scale environmental decisions presenting a *prima facie* risk of serious impacts on the lives of affected populations demand proper consultation of those populations. This consensus is encapsulated by the 1998 Aarhus Convention, to which Kandelia is a party. The right of public participation in decisions which may have significant effects on the environment forms one of three foundational 'pillars' of the Convention. For such decisions, the public concerned must be permitted, under Article 6(7), to submit its views in writing or at a public hearing. Per Article 6(8), national governments must take due account of such submissions.

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[37] *Giacomelli v. Italy,* § 82.

33. The provisions of the Aarhus Convention represent a concrete consensus among European nations as to what is required to do justice to populations whose lives are at risk of being significantly upturned by environmental damage. 42 European states as well as the European Union are party to the Aarhus Convention. Since the ECHR is a living instrument and its requirements responsive to evolving standards in European practice,[38] this common understanding of the requirements of fairness to individuals affected by major public projects should be reflected in the interpretation of the demands of "respect" for private life.

34. Indeed, the Grand Chamber has itself recognised the importance of the Aarhus Convention in delineating the specific requirements of Article 8 in environmental cases. The procedural requirements formulated by the Court in cases such as *Oykay v Turkey* and *Taskin* were derived specifically from the 'information' and 'access to justice' pillars of the Aarhus Convention, though the respondent state (Turkey) was not a party to that Convention.[39] There is no reason why the same approach should not apply to the last Aarhus pillar on public participation. The Respondent's failure to consult the Leniterist population thus constitutes an unjustifiable breach of Art 8.

iv. Breach of the procedural aspect: failure to promulgate EIA

35. In addition, the Respondent failed the obligation to ensure public access to impact studies and to inform those affected of the risks to which they were exposed.[40] Kandelia's regulatory framework is lacking in this respect, since the regulations on environmental impact assessment are inapplicable to areas smaller than 25 hectares. The leakage of one of KMI's reports at an unspecified time, without more specific notification of those affected, does not fulfil this obligation on the part of the State.

v. Breach of the procedural aspect: failure to provide a judicial remedy

36. Furthermore, the Court established in *Giacomelli* that the procedural aspect of Art 8 requires that "the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process."[41] This requirement has been failed on the facts, given that the Kandol-Altol Administrative

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[38] *Tyrer v. UK,* § 31; *Goodwin (Christine) v. UK,* § 74.
[39] *Okyay v. Turkey*, § 52; *Taşkin v Turkey,* §§ 99-100; *Tătar v. Romania*, §§ 69 and 118; *Demir v. Turkey*, § 83.
[40] *Giacomelli v. Italy,* § 83.
[41] *Giacomelli v. Italy,* § 83.

Court has failed, despite expiry of the expected date of judgment, to hand down its decision (see further Part V.3 below). Moreover, given the inapplicability of the environmental impact regulations of 2002, there is no general right of judicial review of the authorisation decision outside specific claims in respect of damages.

c. Article 2

37. Given that a teaspoon of a 2% solution of sodium cyanide can be fatal to humans, the authorisation of the mining project also breaches the applicants' right to life under Art 2. As is well established, Art 2 imposes on the State a positive duty to take "appropriate steps to safeguard the lives of those within their jurisdiction."[42] In cases involving risks to life, the question for the Court is whether the State did "all that could have been required of it to prevent life being avoidably put at risk".[43]

38. In light of the serious dangers involved in cyanide mining, the limited benefits to be gained from it, and the existence of adequate alternatives (as argued under Part V.1.b.ii above), it is submitted that the "appropriate step" to safeguard the lives of the applicants was to refuse permission for cyanide mining in favour of a different mining technique. In authorising the mining project, the Respondent therefore violated Art 2.

39. Alternatively, it is submitted that the State must at the very least have been expected to arrange for an adequate monitoring mechanism to track and be promptly put on notice of the development of the risk. This follows even if the EIA of 2010 is taken as the basis for establishing the risk of harm, given that that assessment did not entirely exclude the potentiality of harms as regards operational accidents and the impact on the environment. Thus, for example, the State might have placed, or required the mining company to place, monitors in the river to keep track of sodium cyanide concentrations.

40. The arrangement of some such monitoring mechanism can hardly be seen as an overly onerous measure to require of the State, particularly in view, firstly, of the large numbers of people who stand to be affected by the pollution, and, secondly, of the severity of the harm in question. In failing to take such a basic measure, the State certainly failed to do "what could reasonably have been expected of it to prevent life being put avoidably at risk."[44] It follows in particular from the duty on the state to adequately regulate

[42] *LCB v. UK,* § 36; *Budayeva v. Russia,* §§ 128-131; *Kolyadenko v. Russia*, §§ 157-161.
[43] *LCB v. UK,* § 36.
[44] *LCB v. UK*, § 36; *Budayeva v. Russia,* §§ 128-131; *Kolyadenko v. Russia,* §§ 157-161.

dangerous activities.[45] Ultimately, the State is obliged under Article 1 to "secure" Convention rights. A State that takes no measures to monitor risks to Convention rights self-evidently leaves those rights in a state of insecurity, i.e. fails to fulfil its obligation to "secure" them under Article 1.

d. Article 3

41. In view of the impact that exposure to cyanide has had on the applicants, who are suffering from skin, respiratory, gastrointestinal and serious psychological injuries, it is further submitted that the Respondent's authorisation of the mining project amounts to inhuman and degrading treatment, or a failure to protect against such treatment,[46] contrary to Art 3. For the reasons given above under Part V.1.b.ii, the appropriate measure to safeguard the applicants against inhuman or degrading treatment as required by Art 3[47] would have been to refuse authorization for the mining project.

e. Article 9

42. The State's approval of the mining project also violates the Leniterist applicants' right under Art 9 to manifest their religion. Approval of the mining project interfered with the applicants' freedom to manifest their religion in that it subjected an integral part of the practice of that religion to the risk of serious and potentially fatal illness. The State's decision subjected the population's access to a religious site to such a serious risk of harm, that it can be said in effect to have removed access to that religious site as a viable option for them.
43. That limitations on access to a religious site can interfere with the right under Art 9 follows from the Court's decision in *Cyprus v Turkey.*[48] In that case, the Turkish government had instituted a policy of restricting the access of the Cypriot population to places of worship and holy places. The Court concluded that the restrictions "considerably curtailed their ability to observe their religious beliefs" and found a violation of Art 9.
44. The same can be said for the case at hand. Access to and use of the Kand River is an essential part of the Leniterist faith. In particular, a visit to the river is believed to be necessary for after-life redemption. The State's approval of the mining project

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[45] See *Oneryildiz v. Turkey.*
[46] See *A v. UK*, § 22.
[47] *A v. UK*, § 22.
[48] *Cyprus v. Turkey.*

contaminated the river, rendering it in effect inaccessible for Leniterist religious practices. By analogy with *Cyprus v Turkey,* the Respondent must therefore be seen as having interfered the Leniterists' right to manifest their religion.

45. As regards the scope of "interference" and "manifestation" in this respect, it is to be borne in mind that "[i]n the Convention system, rights must be broadly construed and exceptions or limitations interpreted narrowly."[49] Furthermore, the guarantees found in the ECHR must be interpreted so as to be practical and effective, not theoretical and illusory.[50] The right to religious freedom under Art 9 would be rendered significantly empty if a state is free to subject essential religious practices or access to profound religious sites to serious risks of physical harm without being compelled to justify itself under Art 9(2). In this light, the Respondent's authorisation of the mining project clearly breached Art 9(1). For the reasons already given under Part V.1.b.ii above, that breach cannot be justified under Art 9(2).

2. Inadequate Response to the Contamination

46. The State of Kandelia further breached the applicants' Convention rights under Articles 2, 3 and 8 in its failure to take swift measures in response to the contamination of the Kand River after the rains in September 2014. Only after three days did the Government take measures to close off the site, and even then it entirely failed to inform the population of the risks of using the water.

a. Awareness of the risk

47. This failure to take prompt preventive or protective measures gives rise to a breach of Convention rights, given that the Government either was in fact already in possession of information disclosing the danger, or alternatively ought to have been in possession of such information. That it did have information disclosing a real risk of danger follows from the fact that the 2012 EIA had informed it of the nature of the mining operation. Coupled with knowledge of the heavy rains, of which the Government cannot have remained unaware, the Government cannot without negligence have failed to connect the dots and realise the immediate dangers of contamination, given that contamination following rains is a typical and well-known danger associated with cyanide mining.[51]

48. Alternatively, to the extent that the Government was not in possession of information

[49] *Friend v. UK,* § 41.
[50] *Airey v. Ireland,* § 24; *Ilhan v. Turkey*, § 91.
[51] European Parliament resolution P7_TA(2010)0145.

capable of informing it of the existence of a real risk within the three days following contamination of the river through flooding, it is submitted that such a failure is itself attributable to a breach of Convention rights, and accordingly cannot absolve the Government of its liability under the Convention. Indeed, it is generally sufficient for a breach of the Convention that the Government *ought* to have known of a risk.[52] The Government was at the very least put on notice of the fact that there was some risk attaching to the mining operation by the EIA of April 2012 (see Part V.1.a above). As argued under Part V.1.b.ii, the Government was therefore obliged to institute, or arrange for the institution of, monitoring measures to track any developments affecting the nature, probability or materialisation of the risk. It is the failure to put in place such monitoring arrangements that meant the Government was not notified promptly of the obvious danger presented by the heavy rains at the site.

b. Article 2

49. Given such knowledge or constructive knowledge of the risk, the failure promptly to close off the site or, at the very least, to inform the population of the risk, gives rise to a breach of Art 2. As noted, the question under Art 2 is whether the State did "all that could have been required of it to prevent life being avoidably put at risk."[53] At least given the appropriateness of a monitoring mechanism to track developments relating to the risk, it cannot be disproportionate to expect the State to have closed off the contaminated site more quickly following the rains. The heavy rains clearly meant that the risk of harm to the population using the Kand River was substantially greater and more immediate, and accordingly demanded greater action on the part of the State. That the State did eventually close off the site attests to the fact that such a measure in and of itself poses no unacceptable burden. Nor would the notification of the applicants' have been any more burdensome, given that all that needed to be done was the placement of warning signs at the relevant site.

c. Article 3

50. For the same reasons, in view of the serious skin, respiratory and gastrointestinal illnesses caused by the Government's failure to adopt swift and effective response measures, the Respondent failed to take "appropriate measures" to protect the Leniterist population against inhuman or degrading treatment in violation of Art 3.

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[52] *Akkoç v. Turkey*.
[53] *LCB v. UK,* § 36.

d. Article 8

51. The applicants' right to private life – engaged as per Part V.1.b.i above – was also breached by the respondent State's failure either promptly to close off the contaminated site or to inform the population of the danger, such as by the posting of warning signs at the site. It is well-established in the case-law of the Court that in cases involving environmental pollution, the State is at the very least under an obligation to notify the affected persons of the risks they face, so that they may make an informed decision in respect of the risk.[54] If the State fails of its own initiative to remove its population against the environmental harm, it must at least enable them to protect themselves. A complete failure to take prompt measures to guard against the applicants' exposure to such serious dangers of poisoning cannot be concordant with respect for their private life.

3. The Administrative Proceedings: Unlawful Delay in Adjudication

52. It is submitted that the respondent State has breached the applicants' rights under Art 6(1) by virtue of the "excessive procedural delay"[55] in obtaining a judgment from the Kandol-Alto Administrative Court.

a. Engagement of the right to a fair trial

53. Art 6 applies when an applicants' "civil rights and obligations" are being determined. "Civil" has an autonomous Convention meaning, so the respondent State's classification is not decisive.[56] "[O]nly the character of the right at issue is relevant"[57]; "the character of the legislation which governs how the matter is to be determined… and that of the authority which is invested with jurisdiction of the matter… are therefore of little consequence."[58] The rights to life[59]; physical integrity[60]; respect for private life[61]; and a healthy environment[62] have all been recognised by the Court as being "civil rights."

54. Though it was the exercise of a public function, the decision to reopen the mine is subject to Art 6: it directly determined the applicants' "civil rights", because of its direct impact on their lifestyle and Convention rights. Art 6 is therefore engaged.

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[54] *Giacomelli v. Italy*.
[55] *Stögmüller v. Austria,* p. 191.
[56] *König v. Germany,* § 88.
[57] *König v. Germany,* § 90.
[58] *Ringeisen v. Austria*, § 94, quoted in *König v Germany*, § 90.
[59] *Athanassoglou v. Switzerland* [GC].
[60] *Athanassoglou v. Switzerland*; *Okyay v. Turkey.*
[61] *Mustafa v. France; Užukauskas v. Lithuania.*
[62] *Ivan Atanasov v. Bulgaria.*

b. The delay

55. As a contracting party to the Convention, Kandelia is under a duty to organise its judicial system in such a way that its courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.[63] Owing to this duty, an excessive workload on the domestic courts cannot be taken into consideration by the Strasbourg Courts.[64] The meaning of reasonableness will depend on the particular facts of the case and will always include the complexity of the case, the conduct of the applicant, and the conduct of the competent administrative and judicial authorities, as well as what is "at stake" for the applicant. [65] Reasonableness may also be assessed while a decision in a case is still pending.

56. It is submitted that the case before the Administrative Court was not excessively complicated: for example, it involved neither a large number of applicants nor much expert evidence to be considered (just two reports). Regarding the conduct of the applicants, there is no provision in Kandelian law to file an expedition request in situations of delay, which also contrives the applicants' rights to an effective remedy under Art 13. In the absence of specific facts as to the other factors, particular regard should be had for what was at stake for the applicants in this case, namely: their ability to partake in rituals involving Leniter Rock and the Kand River, a fundamental aspect of their belief system and lives; the health of the local environment (threatened by the well-established and potentially dangerous risks posed to the environment by the leaching of gold and silver using cyanide); as well as their own health (again, from the well-documented risks the use of cyanide in mining poses to human health). In light of these factors, the delay in issuing a judgment in this case was unreasonable.

<u>4. The Civil Proceedings: Unfair Imposition of Legal Costs</u>

57. The principle of equality of arms is an essential element of the Art 6 right to a fair trial and "requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[66] Thus the Court has on several occasions found that legal fees levied on parties to civil proceedings interfered with the "the very essence" of the right under Art 6(1).[67]

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[63] *Scordino v. Italy (No 1)* [GC], § 183; *Sürmeli v. Germany* [GC], § 129.
[64] *Cappello v. Italy*, § 17, cited in Council of Europe (2013).
[65] *Frydlender v. France* [GC], § 43.
[66] *Kress v. France* [GC], § 72.
[67] *Stankiewicz v. Poland,* § 59.

58. In this light, the 30,000 kandis cost order issued by the KSC against the applicants breached their rights under Art 6(1). Given the economically disadvantaged nature of their home region, the applicants' could not reasonably afford such fees. The seriousness of what was at stake for the applicants must also be considered in this context.[68] Moreover, the imposition of such high fees is not in the broader interests of justice, given the chilling effect it would have on other claimants. This is particularly portentous in the environmental context, as reflected in the Aarhus Convention's safeguard against "prohibitively expensive" access to court. [69] The Court should be guided here, too, by the European consensus enshrined in that Convention, to hold that the costs order breached the requirements of a fair trial under Art 6.

VI. JUST SATISFACTION

In view of the above, the applicants seek "just satisfaction" under Art 41 covering: (a) costs of medical treatment; (b) non-pecuniary loss in terms of physical and mental suffering, including anguish from the loss of their religious site; and (c) all legal costs, including the expenses for the domestic proceedings. Accordingly, the applicants seek an award of EUR 20,000 per applicant, plus any tax chargeable. The size of the sum requested, as compared to similar cases, reflects the multiplicity of factors involved, in particular the unique religious injury.[70]

[68] *AB v. Slovakia,* § 55.
[69] Aarhus Convention Art 9(4).
[70] *Taskin v Turkey; Giacomelli v. Italy.* See also European Court of Human Rights (2007).