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ECtHR'S QUARTER OF A CENTURY LONG BALANCING BETWEEN INDIVIDUAL AND COMMUNITY INTERESTS IN INDUSTRIAL POLLUTION CASES – EVOLUTION OF ENVIRONMENTAL STANDARDS V REMEDIAL POTENTIALS OF ENVIRONMENTAL JUDGMENTS

Abstract

The paper focuses on the oldest and, presumably, the most successful line of environmental applications – those that related to alleged violations of ECHR rights as a consequence of industrial activities. By analyzing the relevant judgments of the ECtHR, the author traces the evolution of ECHR standards from the first industrial pollution case *López Ostra v Spain* decided by the Court in 1994 to the latest judgment *Cordella v Italy* delivered in 2019. The research is based on two main hypotheses. Firstly, it is argued that outstanding developments occurred with regard to the extent of states' positive environmental obligations that the Court identified as constitutive elements of certain conventional rights. Secondly, as opposed to such significant developments, the author argues that the remedial potential of ECtHR's environmental judgments seems questionable due to a number of reasons. The aim of the paper is therefore to explore the reasons for such an obvious discrepancy between the high standards identified by the Court as regards both the substantive and procedural environmental duties on the one hand, and the limited remedial effects of the Court's judgments on the other, as well as to offer potential solutions. The latest case of *Cordella v Italy* seems to offer valuable guidance and fairly positive development in that regard since it focuses, through measures recommended by the Court, not only on the respondent State's obligation to address the consequences of industrial activities but also to prevent future damages.

Keywords: European Court of Human Rights, industrial pollution, positive environmental obligations, remedies.

I. INTRODUCTION

If compared to the 70 years long application of the European Convention on Human Rights[1] (ECHR), the environmental jurisprudence of the European Court of Human Rights (ECtHR)

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos 11 and 14) ETS 5 (ECHR).

might appear to have started to develop rather late. However, taking into consideration that neither the Convention nor its protocols guarantee the right to a healthy environment, the Court needed a proper moment to start including environmental elements into other human rights. Thus the 'moment' when the environmental applications started to be successful happened in the mid-1990s and coincided with the rising of environmental awareness within the international community and the development of environmental considerations at the level of general International Law.

ECtHR's contribution to 'greening' human rights has meanwhile been commendable, expansive and progressive. Throughout the last 25 years, the Court has developed significant environmental standards in various areas and regarding different sources of pollution, such as noise pollution, nuclear activities, waste management, nature conservation and industrial pollution. It has read environmental obligations into a number of human rights guaranteed by the European Convention, thus partially overcoming the lack of an autonomous conventional right to a clean and healthy environment. The 'greening' has mostly affected the right to private life guaranteed by Article 8 of the European Convention. However, environmental jurisprudence involving the right to life (Art. 2 ECHR), right to an effective remedy (Art. 13 ECHR) and right to property (Art. 1 of Protocol No 1) should not be underestimated.

The analysis will focus on industrial pollution cases as the oldest and presumably the most successful line of environmental cases brought before the ECtHR. Therefore, the first part of the paper offers a brief overview of these cases, from the 1994 *López Ostra v Spain* case until the latest *Cordella and Others v Italy* case, decided by the Court in 2019 (II). The remaining part of the paper challenges the successfulness of ECtHR's industrial pollution case-law by, on the one hand, commenting on the Court's contribution and results with regard to the development of states' positive environmental obligations (III) and questioning the remedial potential of ECtHR's environmental judgments on the other (IV). In order to explore the remedial capacity of ECtHR's judgments in industrial pollution cases and their potential to actually improve the quality of the environment, a number of issues are discussed. After presenting general principles with regard to the execution of ECtHR's judgments (IV.i.), an in-depth analysis is offered of remedies indicated by the Court in industrial pollution cases (IV.ii.) followed by preliminary conclusions as to its remedial practice (IV.iii.). The last part of the paper contains concluding remarks and guidelines for improving the existing environmental practice with regard to execution and remedial capacities of ECtHR's environmental judgments (V).

II. FROM *LÓPEZ OSTRA V SPAIN TO CORDELLA AND OTHERS V ITALY* – AN OVERVIEW OF ECtHR'S INDUSTRIAL POLLUTION CASES

Passive attitude of Spanish authorities to deal with smells, noise and fumes emitted by the plant for the treatment of liquid and solid waste in the town of Lorca, led the applicant, Mrs. López Ostra, to bring the first industrial pollution application to the European Court of Human Rights. The applicant claimed that, due to the vicinity of the plant to her home and the failure of state authorities to deal with pollution, a violation of articles 8 and 3 of ECHR occurred. While dismissing the possibility to qualify the applicant's situation as a violation of the prohibition of ill-treatment, ECtHR upheld the claims relating to the right to respect for one's home and private life and found a violation of Article 8. The Court insisted that „regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole" and that „the State enjoys a certain margin of appreciation" in that regard.[2] Even though the town council reacted by temporarily rehousing the residents free of

[2] *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) [51].

charge in 1988 and by closing one of the plant's activities, the Court noted that the council must have known that environmental problems continued despite the partial shutdown[3] and that it not only failed to take measures necessary for protecting the applicant's rights but in addition contributed to prolonging the situation.[4] The Court concluded that Spain „did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and private and family life", thus violating Article 8 of the Convention.[5]
In the 1998 case of *Guerra and Others v Italy*, the ECtHR established but did not develop more precisely, the states parties' positive environmental obligations, this time with regard to toxic emissions from a chemical factory. It confirmed that „severe environmental pollution may affect individuals' well-being" and reproached Italy for not providing the applicants with „essential information that would have enabled them to assess the risks" of being exposed to danger in the event of an accident at the factory, consequently finding a violation of Article 8.[6]
A mining industry case followed in 2004 – *Taşkin and Others v Turkey*, where the Court developed considerably the procedural aspect of Article 8 in industrial pollution cases and defined the so-called "three stages of the procedure".[7] The Court stressed that the decision-making process taken before measures of interference have to satisfy the requirement of being „fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8".[8] More precisely, in complex cases of balancing between environmental and economic policies, „the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights", the public should have access to such studies and environmental information, whereas individuals have the right „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".[9] Since, according to ECtHR's view, Turkey failed to meet these requirements, the Court found Article 8 to have been violated.[10]
A year later, the Court delivered another important judgment regarding pollution in the town of Cherepovets caused by the operation of a steel plant. *Fadeyeva v Russia* case introduced two significant novelties. Firstly, it made the procedural limbo of Article 8 an essential element in assessing whether national authorities succeeded or not in striking a fair balance between the competing interests.[11] Secondly, it meticulously analyzed the state's duty to regulate the private industry and considered it a positive obligation encompassed by Article 8 ECHR.[12] In its 2005 judgment, the Court concluded that „despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life", thus finding a violation of Article 8 of the Convention.[13]

[3] *Ibid* [53].
[4] *Ibid* [56].
[5] *Ibid* [58].
[6] *Guerra and Others v Italy* App no 116/1996/735/932 (ECtHR, 19 February 1998) [60].
[7] Rodoljub Etinski, 'Due Weight and Due Account Standards of the Public Participation in Environmental Matters under the European Convention on Human Rights and the Aarhus Convention (2020) XI Czech Yearbook of International Law 117, 121.
[8] *Taşkin and Others v Turkey* App no 46117/99 (ECtHR, 10 November 2004) [118].
[9] *Ibid* [119].
[10] *Ibid* [126].
[11] *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) [105].
[12] *Ibid* [124] - [133].
[13] *Ibid* [134].

The 2006 *Giacomelli v Italy* case concerned once again the operation of a plant for the storage and treatment of special waste and its impact on the applicant's right to private life. The Court determined the number of national authorities' failures to deal with pollution caused by the plant, which led it to conclude that Italy failed to strike a fair balance between the interests of the community and those of the individual. Namely, the Court noted that the state's decision to grant an operating licence to the plant was not preceded by an adequate study,[14] that state authorities failed to comply with domestic environmental legislation, that they, in addition, failed to enforce judicial decisions in which the operation of the plant was qualified as unlawful and that they made ineffective the procedural safeguards such as the right to environmental information, to participate in environmental decision-making and to access justice in environmental matters.[15]

Several decades-long contaminations caused by the factory for the extraction of minerals, accompanied by an environmental accident occurring in 2001, reached its judicial finale in 2009 owing to an application brought before the ECtHR by two Romanian nationals. The Court concluded that Romania violated Article 8 of the Convention due to the passivity of national authorities to deal with the contamination and the past, present and future consequences of the environmental accident.[16] It considered that the factory was allowed to continue its operation despite the fact that it used a new technology that had never been used in Romania and whose consequences for the environment were unknown,[17] thus applying for the first time the precautionary principle[18] to the facts of the case. Once again, the Court confirmed that, in order to strike the appropriate balance between its economic interests consisting in, among others, the operation of a highly polluting factory, and the interest of an individual to enjoy the rights guaranteed in Article 8, the state needs to act preventively and diligently, satisfying all the requirements of an environmental due process.

The 2011 *Dubetska and Others v Ukraine* case concerned adverse effects on Article 8 rights of industrial pollution caused by a coal mine and a coal-processing factory. The Court found a violation of Article 8 by observing that national authorities, although aware of the pollution and its effects on the applicants, neither resettled them nor offered another solution to deal with the levels of contamination.[19]

After another application with regard to which the Court found Article 8 to have been violated because the state failed to protect the applicants from the pollution emanating from a thermal power plant due to, *inter alia*, absence of a proper regulatory framework,[20] the latest and the most interesting in the line of industrial pollution cases was decided by the Court in 2019. It concerned the effects of toxic emissions from Ilva steel plant and the decades-long adverse effects it had on the inhabitants of the municipality of Taranto. The *Cordella and Others v Italy* case differed from other industrial pollution applications in that it encompassed the largest number of applicants - 180. Referring to a number of studies and expert reports dealing with the effects of Ilva's operation on both the environment of the entire Taranto region and the health of its inhabitants, as well as the failed attempts of the authorities to diminish the contamination and to take all the necessary measures to provide effective protection to the applicants of their conventional rights, the Court found that Italy did not strike the fair balance

[14] *Giacomelli v Italy* App no 59909/00 (ECtHR, 2 November 2006) [86].
[15] *Ibid* [93] - [94].
[16] *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009) [122].
[17] *Ibid* [108].
[18] The most cited and relevant definition of the precautionary principle is provided in the 1992 Rio Declaration on Environment and Development. Principle 15 states that lack of full scientific certainty should not be used as a reason for not taking measures to prevent environmental degradation in situations of threats of serious or irreversible damage. UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).
[19] *Dubetska and Others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) [155].
[20] *Jugheli and Others v Georgia* App no 38342/05 (ECtHR, 13 July 2017) [75].

between the interests of the community and the individuals, thus violating the applicants' rights to private life and effective remedy.[21]

This brief overview of the facts and ECtHR's reasoning and conclusions in cases concerning industrial pollution points to several common traits that they all share. Firstly, the continuity in the operation of different industrial facilities, both prior and after ECtHR's judgments, appears to be the feature that they have in common. Secondly, such a continuity resulted in creating longstanding environmental problems and high levels of pollution that adversely affected different parts of the environment – air, soil, subsoil, water. Thirdly, in all cases contamination reached and affected large numbers of persons, not all of them appearing before the Court in the capacity of applicants in the proceedings. Fourthly, applications concerning industrial pollution cases can be considered as 'successful' from the standpoint of their final outcome and the fact that the Court concluded that violation of the Convention actually occurred. In addition, they all concerned Article 8 and contributed to a gradual but solid evolution of environmental standards qualified as an integral aspect of the right to private life and home. However, and finally, their capacity to actually remedy the polluting situation as the source of the infringement of ECHR rights, not only with regard to the applicants but also to other persons potentially or indeed affected by the pollution, remains questionable and minimal.

III. STATES PARTIES' POSITIVE OBLIGATIONS WITH REGARD TO INDUSTRIAL POLLUTION – ESTABLISHING FIRM ENVIRONMENTAL STANDARDS?

As previously noted, the first hypothesis to be examined relates to environmental standards applying to the operation of various industrial facilities, as developed by the ECtHR. Since the thorough analysis of industrial pollution cases in all aspects surpasses the scope of this article, the analysis will focus on environmental standards established with regard to the state's positive environmental duties, leaving aside other important standards such as the level of pollution necessary to consider the potential violation of human rights and the issue of causality.[22] The focus on states' positive obligations is required due to its link to the balancing of the opposing general and particular interests, the central issue of the paper. It is claimed that, through its 25 years-long jurisprudence, the Court achieved outstanding results in establishing, widening and strengthening states' positive obligations encompassed by Article 8. Through its game of assessing the capacity of the concerned state to balance between the opposing interests of the community and an individual, the Court has created a catalogue of substantive and procedural environmental obligations that states are expected to perform with regard to industrial activities. Fulfilling the list of positive environmental duties ensures that the state establishes a proper balance between the competing interests and therefore does not violate ECHR. On the contrary, failure to do so will lead to an imbalance in the general interests of the community and particular interests of an individual, thus resulting in a State party's violation of the Convention.

The Court has distinguished between an obligation of a substantive nature consisting in taking preventive measures, and a set of procedural environmental duties – duty to provide environmental information, to enable participation in environmental decision making and to enable access to justice in environmental matters. Although there appears to exist an obvious

[21] *Cordella and Others v Italy* App nos 54414/13 and 54264/15 (ECtHR, 24 January 2019) [161] - [174].

[22] For analysis and a critical appraisal of industrial pollution cases from the perspective of the causality link, see: Jonathan Verschuuren, 'Contribution of the case-law of the European Court of Human Rights to Sustainable Development in Europe' in Werner Scholtz and Jonathan Verschuuren (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar Publishing 2015) 363, 374-377.

discrepancy between the frequency of referring to the substantive and procedural contents of Article 8 in environmental cases in general, a tendency recognized as proceduralisation of the right to private life,[23] it seems that confirmation of substantive positive environmental duties occurred mainly owing to the industrial pollution case law. It was in *Taşkin and Others v Turkey*[24] and *Fadeyeva v Russia*[25] that the Court recognized its role in revising the material conclusions of domestic authorities, though qualifying it as a subsidiary and exceptional one when compared to assessing the fulfilment of state's procedural duties. Such an approach prompted certain authors to conclude that "breach of domestic law is, in itself, sufficient to deprive the state of any fair balance arguments".[26] *Tătar v Romania* case brought added value to such arguments. Namely, the Court explicitly held that Romanian authorities had an obligation to assess in advance and a satisfactory manner the possible risks of the industrial activity and to take adequate measures capable of protecting the rights of interested parties.[27] Once again stressing that it cannot substitute its point of view for that of local authorities as to the best policy to be adopted in environmental and industrial matters, the Court acknowledged the fact that the town was already highly polluted due to intense industrial activity and held that the authorities were required to take preventive measures which fell within the scope of their powers and which could reasonably be regarded as capable of mitigating the risks brought to their attention,[28] thus explicitly confirming that a substantive duty to prevent environmental harm fell within the ambit of Article 8 ECHR. Such an abstract substantive obligation has received precise contents by transposing Court's conclusions reached in other environmental cases to those dealing with industrial pollution. In the latest case of *Cordella and Others v Italy*, the ECtHR widened the scope of substantive environmental obligations by including a positive obligation to put in place regulations adapted to the specificities of industrial activity, in particular with regard to the level of risk that could result from it.[29] These regulations, according to the Court's opinion, must govern the authorization, start-up, operation, safety and control of the activity in question, whereas the state also has a duty to require any person concerned by such regulation to adopt practical measures capable of ensuring the effective protection of citizens whose rights risk being exposed to the dangers of the industrial activities' adverse consequences.[30]

When it comes to procedural environmental duties, the reasons for their evolution through ECtHR's case law are twofold. They appear to have developed using the analogy with regular procedural rights and corresponding state's duties such as the right to an effective remedy.[31] On the other hand, its evolution has, throughout the years, detached from classic procedural rights and came under a prevailing influence of the rules of International Environmental Law, the Aarhus Convention in particular.[32] Although procedural environmental duties were first

[23] Ricardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights – Comparative Insights' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015) 69, 84-85

[24] *Taşkin* (n 8) [117].

[25] *Fadeyeva* (n 11) [105].

[26] Svitlana Kravchenko and John Bonine, 'Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights (2012) 25 (1) Pacific McGeorge Global Business and Development Law Journal 245, 268.

[27] *Tătar* (n 16) [112].

[28] *Ibid* [108].

[29] *Cordella* (n 21) [159].

[30] *Ibid*.

[31] Bojana Čučković, *Zaštita životne sredine u međunarodnom pravu ljudskih prava* (Univerzitet u Beogradu – Pravni fakultet 2018) 137.

[32] Ivana Krstić and Bojana Čučković, 'Procedural Aspects of Article 8 of the ECHR in Environmental Cases – The Greening of Human Rights Law'(2015) 3 Annals of the Faculty of Law in Belgrade – Belgrade Law Review 170, 177-180.

introduced by the Court in early 1998 *Guerra and Others v Italy judgment*, it was in the 2004 *Taşkin* case that it explained subsuming procedural requirements under Article 8. The Court simply transposed its settled case-law not related to environmental issues to the case at hand and concluded that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8".[33] Due respect for individual interests is ensured by allowing individuals access to information that would enable them to assess the risks of industrial activity.[34] Information needs to be „essential",[35] „sufficient and detailed" and should refer to „past, present and future" consequences of industrial activity on health and environment.[36] Secondly, the state has a duty to allow individuals participation in environmental decision-making. With regard to this procedural environmental duty, the Court assesses „the type of policy or decision involved, the extent to which views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available".[37] However, even if such procedural safeguards are formally provided in national law, the Court will not be satisfied but will instead insist upon their effectiveness. In other words, national environmental regulations that formally allow concerned citizens to participate in the industrial facility licencing procedure must prove to be useful in effect to satisfy this procedural requirement of Article 8.[38] Thirdly, „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".[39] The requirement of effectiveness applies to the third procedural duty as well, suggesting that failure of the administrative authorities to implement relevant judicial decisions will also result in finding a violation of Article 8.[40]

Finally, *Dubetska and Others v Ukraine* case implies that there is another layer to be taken into account by the Court when balancing between the competing common and individual interests regarding the operation of industrial facilities. Finding the legislative framework concerning industrial pollution to be appropriate, not objecting to the state's involvement in monitoring the levels of pollution nor to measures taken in order to minimize their adverse effects in the environment, still cannot be seen as a sufficient guarantee that violation of Article 8 will not be established. By concluding that state authorities failed to "put in place an effective solution for the applicants' personal situation" for more than twelve years and despite all the efforts,[41] the Court basically acknowledged its remedial role, though quite a limited one. On the one hand, the Court restricted its considerations to potential solutions exclusively as regards the applicants and "their individual burden".[42] On the other hand, it seems to have focused on prompt solutions, such as resettlement of the applicants to a non-contaminated area, rather than long-term options of dealing with the source of pollution, considering them "a complex task which required time and considerable sources, the more so in the context of these facilities' low profitability and nationwide economic difficulties".[43] Though commendable from the standpoint of the explicit requirement that the state's Article 8 obligation consists in setting up effective solutions for the applicants, the Court's approach leaves room for criticism with

[33] *Taşkin* (n 8) [118].
[34] *Guerra* (n 6) [60].
[35] *Ibid*.
[36] *Tătar* (n 16) [122].
[37] *Giacomelli* (n 14) [82].
[38] *Ibid* [94].
[39] *Taşkin* (n 8) [119].
[40] *Ibid* [124]-[125].
[41] *Dubetska* (n 19) [147].
[42] *Ibid* [155].
[43] *Ibid.*

regard to its capacities and willingness to suggest and impose such solutions, as well as to their extent.

IV. REMEDIAL CAPACITY OF ECtHR'S JUDGMENTS IN INDUSTRIAL POLLUTION CASES – IS THE USE OF HUMAN RIGHTS INSTRUMENTS LIKELY TO INFLUENCE THE QUALITY OF THE ENVIRONMENT?

As opposed to previously analyzed positive aspects of the Court's industrial pollution case law, the remedial potential of ECtHR's environmental judgments appears to be questionable. This part of the paper will therefore focus on the second hypothesis and try to demonstrate that ECtHR's remedial capacities have not so far been fully employed. Notwithstanding the fact that states mostly complied with ECtHR's industrial pollution judgments with regard to indicated measures, if one takes into account the specificities of industrial pollution it becomes questionable whether their potentials to actually remedy the occurred violations have been fully resorted to, both as regards the applicants and as regards the source of the violation.

i. General principles with regard to indication of remedial measures and execution of judgments

While the Court, in line with the principle of subsidiarity, leaves to the respondent state the choice of measures through which to implement the judgment, monitoring of the execution lays, according to Article 46 of ECHR, within the competence of the Committee of Ministers. Although relying on International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts,[44] the Court has given specific meaning to the threefold obligation of the respondent state to remedy the violation.[45] Consequences of established responsibility may, therefore, consist in paying appropriate sums by way of just satisfaction, but also in implementing individual and/or general measures in order "to put an end to the violation found by the Court and to redress so far as possible the effects".[46] In other words, such measures aim to "remove the source of violation and prevent its recurrence".[47]
It was as early as in the 1979 *Marckx v Belgium* case that the Court considered its judgment to be "essentially declaratory" and that "the choice of the means to be utilized in its domestic legal system for the performance of its obligation" was left to the state.[48] However, in 1995 the Court started introducing exceptions to the previously proclaimed position,[49] and continued to extend them through its subsequent jurisprudence.[50] For example, in 2004 *Broniowski v Poland* judgment the Grand Chamber, due to the systemic situation identified, observed that general measures at a national level are necessary and noted that measures "must take into account the many people affected" and "must be such as to remedy the systemic defect underlying the Court's finding of a violation".[51] Meanwhile, the Court has taken a similar approach in a

[44] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) Supplement no 10 (A/56/10) 50-51.
[45] Helen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26 (4) European Journal of International Law 829, 832.
[46] *Scozzari and Giunta v Italy* App nos 39221/98 and 41963/98 (ECtHR, 13 July 2000) [249].
[47] Andreas von Staden, *Strategies of Compliance with the European Court of Human Rights: Rational Choice Within Normative Constraints* (University of Pennsylvania Press 2018) 174.
[48] *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979) [58].
[49] *Papamichalopoulos and Others v Greece* App no 14556/89 (ECtHR, 31 October 1995) [34].
[50] For a detailed overview of the Court's jurisprudence see: Sanja Trgovac, Sidonija Grbavac and Sandra Marković, 'Ustavnosudski pogled na izvršenje presuda Europskog suda za ljudska prava' (2018) 39 (1) Zbornik Pravnog fakulteta Sveučilišta u Rijeci 633, 643-644.
[51] *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) [193].

number of cases, thus creating a significant shift and establishing clear standards. The 2013 *Oleksandr Volkov v Ukraine* judgment offers the most user-friendly overview of the Court's novel approach: "exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist".[52] The Court identified two different scenarios. Under the first one, the choice of measures, as well as the implementation, will be left to the discretion of the state concerned, whereas the Court's proposal of different options will be purely recommendatory.[53] However, in certain cases "the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate a specific measure".[54] This novel approach to the Court's remedial functions has been welcomed by the legal doctrine which qualifies it as a "hybrid approach to remedies"[55] and even "judicialization" of the execution of judgments.[56] However, the exact legal effect of indicating measures still raises opposing opinions even among the judges of the ECtHR, especially depending on whether they are included in the operative part or the main body of the judgment.[57] Of relevance would also be to differentiate between indication of remedial measures in the course of the pilot judgment procedure, which is considered as undisputed, and the option of relying on Articles 41 or 46 in that regard since neither explicitly places within the competence of the Court the possibility to indicate individual and general measures.[58] Finally, the Court's competence to indicate remedial measures has also been considered from the point of differentiating between the so-called restorative and preventive measures, the latter being disputed mainly due to the fact that they are usually not included in the operative part of the judgment.[59] In order to consider these important, yet unresolved issues in the environmental sphere, as well as to test the Court's willingness to apply various options at its disposal with regard to redress, it is now necessary to analyze the remedies indicated by the Court in its industrial pollution cases.

ii. Analysis of remedies indicated by the ECtHR in industrial pollution cases

Taking the type of remedies indicated by the Court as the relevant criteria, previously analyzed industrial pollution judgments may be classified into five different categories.
The first and at the same time the rarest type of cases contain no redress at all, basically considering that finding of a violation represents a sufficient form of reparation. Quite curiously, such a position was taken by the Court in the *Tătar v Romania* case, a case that concerned several decades-long pollutions caused by a factory for the extraction of minerals together with a heavy accident followed by significant adverse consequences for the inhabitants and the environment. Although, as previously explained, the *Tătar* case introduced a number of commendable novelties with regard to ECHR environmental standards, especially with regard to future adverse effects of the industrial facility, the judgment may be considered disappointing when redress is concerned. The Court rejected applicants' claims regarding both

[52] *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 27 May 2013) [195].
[53] *Ibid*.
[54] *Ibid*.
[55] Gerald Neuman, 'Bi-Level Remedies for Human Rights Violations' (2014) 55(2) Harvard International Law Journal 323, 352-355.
[56] Keller and Marti (n 45) 839.
[57] The authors refer to opposing views of Judge Spano and Judge Pinto de Albuquerque. Alice Donald and Anne-Katrin Speck, 'The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments' (2019) 19 (1) Human Rights Law Review 1, 18.
[58] *Ibid*.
[59] Lize Glas, 'The European Court of Human Rights supervising the execution of its judgments' (2019) 37 (3) Netherlands Quarterly of Human Rights 228, 241.

pecuniary and non-pecuniary damage. The Court simply upheld the arguments provided by the Government and stated that there was no causal link between the pecuniary damage sought and the violation of the Convention, whereas no non-pecuniary damage is necessary since the mere finding of a violation represents a redress in itself.

In the second type of cases, the Court decided to award non-pecuniary damage, considering the mere finding of a violation as insufficient. In *López Ostra v Spain* the Court concluded that the applicant „undeniably sustained non-pecuniary damage" since „in addition to the nuisance caused by the gas fumes, noise and smells from the plant, she felt distressed and anxiety as she saw the situation persisting and her daughter's health deteriorating".[60] In *Taşkin and Others v Turkey* the Court stressed that the applicants were „obliged to tolerate adverse living conditions and to bring several actions against decisions taken by the central authorities", which caused them „a considerable degree of damage",[61] whereas in *Jugheli and Others v Georgia* ECtHR accepted that „the applicants suffered distress and frustration on account of the violation of their rights under Article 8" and that „non-pecuniary damage would not be adequately compensated for by the mere finding of the breach".[62] It is worth noting that in all three cases applicants sought either non-pecuniary damage only (*Taşkin* and *Jugheli*) or both pecuniary and non-pecuniary damage (*López Ostra*). They did not seek any additional measure that would remedy the pollution and its present and future effects.

The third type of cases is, to the contrary, characterized by an explicit claim on the side of the applicants that the Court awards additional measures in the form of decontamination. However, in *Guerra and Others v Italy* and *Giacomelli v Italy* the Court only awarded non-pecuniary damage and took refuge in the principle of subsidiarity. A nuance may, however, be noticed in its approach. In 1998 the Court was explicit and categorical in its conclusion that „the Convention does not empower it to accede to such a request" and that „it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation".[63] Eight years later, although it neither upheld the applicant's request for additional measures nor discussed them in any manner whatsoever, the Court did not deny its power to accede to such a request but instead used the standard formulation that „its judgments are *essentially* declaratory in nature and that, *in general*, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention" (italics added by the author).[64]

Quite curiously, in a judgment that preceded the 2006 *Giacomelli* case, as well as in another judgment that was delivered subsequently, the Court chose to discuss additional measures sought by the applicants, though within their request for pecuniary damage. In both cases, the Court, in addition to awarding the applicants non-pecuniary damage due to their „prolonged exposure to industrial pollution" that caused them „much inconvenience, mental distress and even a degree of physical suffering",[65] discussed other future measures to be taken by the respondent state in order to comply with the Court's finding of a violation. Namely, the Court noted that „the resettlement of the applicant in an ecologically safe area would be only one of many possible solutions",[66] implying, on the one hand, that it is concerned solely with measures that should remedy the applicant's individual situation, not the very source of violation, and,

[60] *López Ostra* (n 2) [65].
[61] *Taşkin* (n 8) [144].
[62] *Jugheli* (n 20) [85].
[63] *Guerra* (n 6) [74].
[64] *Giacomelli* (n 14) [102].
[65] *Fadeyeva* (n 11) [138] *Dubetska* (n 19) [165].
[66] *Fadeyeva* (n 11) [142] *Dubetska* (n 19) [162].

on the other hand, that it considers its remedial role in environmental cases as purely recommendatory.

Finally, in its most recent industrial pollution judgment, the Court has made an incomprehensible step backwards and a slight step forward. Without any effort to explain, the Court decided not to award non-pecuniary damages to either of the 180 applicants, simply stating that the finding of a violation was a sufficient form of reparation. It is not, however, clear what distinguishes the 2019 *Cordella* case from any of the previously discussed industrial pollution cases in which the Court had no difficulty to establish that continued exposure to contamination resulted in anguish and distress for the applicants. Such a conclusion is even more surprising if one takes into account the significance of the case, the extent and level of contamination, its several decade's long continuing characters as well as applicants' various unsuccessful attempts, both at the national and European Union level to protect their interests. In addition, if compared to other industrial pollution cases brought before the ECtHR, the *Cordella* case appears to be the most complex about consequences of industrial activity, yet relatively simple from the point of view of proving them. However, and this may be considered a fairly positive aspect of the judgment, the Court explicitly stated that the environmental plan to remedy the harm caused by the plant must be implemented as soon as possible.[67] The significance of such a conclusion lays in the fact that it is the first time in its 25 years-long industrial pollution case-law that the Court dared to point to a measure of a genuinely environmental character, aimed to remedy the harm caused by the plant not only with regard to the applicants but also other inhabitants of the contaminated region. Additionally, the Court's pronunciation is commendable for its obvious focus on eliminating the very source of the violation of ECHR which is at the same time the source of pollution. Finally, the Court, again for the first time in its environmental practice, acknowledged the urgency of the factual situation that caused the violation of the Convention and stressed that environmental measures should be taken in the briefest possible delays. Besides these positive aspects, there is a number of arguments that significantly limit the potential benefits. Firstly and most importantly, by including the environmental plan to remedy the harm caused by the plant, the Court did not profit from the possibility to indicate general measures as a specific form of remedy. Secondly, the Court once again stressed that it is not its task to give the Government „detailed recommendations with prescriptive content“,[68] thus confirming that it simply provided guidance, a pure recommendation to the Committee of Ministers whose competence it is, in turn, to indicate remedial measures in accordance with Article 46. Thirdly, its recommendation, although subsequently followed by the Committee of Ministers, may be criticized for being too vague and abstract, therefore deprived of any meaningful effect. Last but not least, the Court invoked “technical complexity of the measures necessary to clean up the area concerned” as the main reason for refusing to address the *Cordella* application through the pilot judgment procedure.[69] Although it is clear that the Court dismissed the applicants’ request for the pilot judgment procedure, *inter alia*, to avoid indicating general measures that such a procedure regularly entails, ECtHR's reliance on the 'technical complexity' argument does not appear to be convincing. As remarked by Greco, the complexity of the case did not prevent the Court to grant the pilot judgment procedure in other cases,[70] just as it did not impede it to establish the causal link between the conduct of the state concerned and the harm caused to the applicants

[67] *Cordella* (n 21) [182].
[68] *Ibid* [181].
[69] *Ibid* [180].
[70] Roberta Greco, ’*Cordella et al v Italy* and the effectiveness of human rights law remedies in cases of environmental pollution (2020) Review of European, Comparative and International Environmental Law 1, 5.

by simply relying on available scientific evidence contained in a number of expert reports.[71] Why not use the same approach and the same reports for overcoming the same technical complexity only this time concerning remedial measures?

iii. Preliminary conclusions as to ECtHR's remedial practice in industrial pollution cases – assessment and explanation

Assessment of the Court's approach to remedies in industrial pollution cases points to a number of conclusions that merit an explanation.

Namely, the Court sticks to just satisfaction and most often awards either pecuniary or non-pecuniary damages, sometimes both. It does not use the novel practice of indicating itself mandatory individual and general measures, obviously not considering environmental adverse effects on human rights an exception. The Court has only occasionally given recommendations to the Committee of Ministers with regard to potential specific measures that would remedy the consequences of the violation. On those rare occasions, suggested measures have either been individual (resettlement to an ecologically safe location, enforcement of a final judgment) or too abstract and vague (taking appropriate measures to remedy the applicant's individual situation). The 2019 *Cordella* case was the only time ECtHR dared to suggest decontamination of the polluted area in the briefest possible delays, thus striving to reach a wider range of people and aiming at eliminating on a permanent basis the very source of the violation. As opposed to its previous remedial adventures the potential benefits of which were limited to the applicants in the case, the Court's recommendation of remedial measures was included in the main body of the judgment, not it's an operative part, thus significantly reducing its practical effect. Finally, it is not possible to determine any kind of consistent pattern in the Court's remedial approach since factually similar situations have led to a variety of remedial outcomes, with no clear and precise factors upon which the Court's practise is based.

There is a number of explanations that may be offered for the Court's current remedial practice in industrial pollution cases, although they are by no means a justification. ECtHR's reluctance to indicate precise remedial measures may be explained by reasons of strategic nature. In their study on the ECtHR's general remedial practice, Donald and Speck interviewed members of the Court and officials of the Registry and revealed fear for the legitimacy of the Court as one possible explanation. Basically, should the Court estimate that the indicated measures would not be followed by the state in question, it would prefer to leave it entirely to the Committee of Ministers and thus not endanger its own legitimacy.[72] Such an explanation fits the typical industrial pollution case scenario of decades-long pollution that the respondent state was not capable and/or willing to deal with. This continuity in the state's passive attitude towards industrial contamination serves the Court as a clear signal in assessing the potentials of the state's more active environmental involvement in the future. However, a counter-argument appears to be stronger. The Court's tendency to exclusively award modest sums of either pecuniary or non-pecuniary damage in cases of massive pollution will inevitably lead to a further retrenchment of its reputation.[73] The second possible explanation lays in the Court's specific understanding of the adverse consequences of industrial activity as a complex technical rather than a structural problem. The *Cordella* case offers an insight into the Court's, to say the

[71] Andrea Longo, 'Cordella et al. v. Italy: Industrial Emissions and Italian Ommissions Under Scrutiny' (2019) 4 (1) European Papers 337, 343.

[72] Donald and Speck (n 57) 16. The legitimacy argument has been raised by other authors as well: Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights (2017) 66 International and Comparative Law Quarterly 467, 469.

[73] Kravchenko and Bonine (n 26) 258.

least, controversial understanding of this issue. Namely, should the Court qualify heavy consequences of a particular industrial activity as a structural and systematic problem that may lead to similar applications in the future, it would open the possibility of indicating genuine remedial measures of a general nature, not only recommendatory and contained in the main body of the judgment, but also mandatory and pronounced in the judgment's operative part. According to Rule 61 of the Rules of Court, the main aim of the pilot judgment procedure consists of identifying "the dysfunction which has given rise or may give rise to similar applications".[74] The fact that Italian authorities in the *Cordella* case adopted 11 decrees aimed at enabling the plant to continue functioning despite the Constitutional Court's judgments declaring the decrees to be unconstitutional, as well as other national and EU proceedings,[75] may, as rightly noted by Greco, serve as an indication "that there was (and still is) a large-scale structural problem rooted in the Italian legislation, which put thousands of persons in the same position as that of the applicants".[76] Finally, ECtHR's remedial practice and the reluctance to indicate concrete measures may be attached to the Court's own perception of its incapacity to assess the extent of adverse environmental consequences and suggest adequate measures to remedy them. However, in environmental cases, the Court does not necessarily have to posses "detailed knowledge of the domestic system in question",[77] an obstacle highlighted by certain authors with regard to the Court's general reluctance to indicate specific measures beyond the environmental sphere but instead disposes of expert reports and other available sources that had enabled it to establish the violation of the Convention in the first place.

V. A WAY FORWARD: SUGGESTIONS TO IMPROVE THE REMEDIAL POTENTIALS OF ECtHR'S INDUSTRIAL POLLUTION JUDGMENTS

ECtHR's industrial pollution case law is characterized by consistency with regard to environmental standards, states' positive obligations in particular, and an obvious lack of consistency when remedial measures are concerned. Therefore, the question is raised whether there is room for enhancing the remedial potentials of the Court's industrial pollution judgments?

Certain suggestions appear beneficial in this regard. Firstly, clear criteria should be defined by the Court and taken into account when it decides whether to order specific measures. Criteria have already been proposed by the doctrine in cases beyond the environmental context.[78] By adapting them to the specific circumstances of industrial pollution, a number of factors may be discerned: necessity to take urgent action in order to deal with adverse effects of the industrial activity, continuing character and persistence of pollution as a source of violation, extent of environmental pollution and its outreach with regard to the number of affected persons, gravity of the adverse environmental consequences, possibility that the source of pollution would cause additional violations, whether absolute or relative rights are breached as a consequence of pollution, as well as the existence and outspread of systemic deficiencies in the state's response and ability to provide redress for human rights violations caused by industrial pollution. Secondly, the Court would need to continue identifying specific environmental measures, with a tendency to make them less abstract and more obligatory. Regarding the first aspect, delivering a clear judgment, through which it would be easily identifiable what the Court

[74] European Court of Human Rights, Rules of Court (entered into force on 1 January 2020).
[75] Francesco Carelli, 'Enforcing a Right to Healthy Environment in the ECHR System: the "Cordella v. Italy" Case' (2019) 4 Rivista Giuridica Ambiente Diritto 1, 8-10.
[76] Greco (n 70) 5.
[77] Elisabeth Lambert Abdelgawad, 'The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability (2009) 69 ZaöRV 471, 474.
[78] Keller and Marti (n 45) 843.

demands and what the time-frames for remedial action are, would serve as valuable guidance for both the Committee of Ministers and the state as regards the choice of remedies. As far as the second aspect is concerned, in massive pollution cases and situations that involve long-lasting environmental damage, the Court would have to consider introducing environmental measures in the operative part of the judgment in the form of genuine general measures, either within or outside the pilot judgment procedure. Taking into account the characteristics of environmental pollution cases that reach the Court, as well as their constantly rising numbers, a shift from purely recommendatory towards mandatory environmental remedial measures would improve ECtHR's roles of assuring the accountability of States parties and ensuring respect for human rights. Simply „diagnosing the root causes of a violation without going so far as to specify remedial measures or invoke Article 46"[79] does not afford human rights real and effective protection which is the main aim of the Council of Europe system. Discretion in choosing measures for redress seems, for the same reasons, unjustified in cases that reveal the State party's persistent unwillingness and years-long inability to correct its behaviour to make it compatible with the provisions of the Convention.

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[79] Donald and Speck (n 57) 21.

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