| Chapter 15 |

The Right to an Effective Remedy

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ABSTRACT

This paper studies the evolution, scope, and practical significance of Article 13 of the European Convention on Human Rights, which guarantees the right to an effective domestic remedy in cases of alleged violations of Convention rights. Through a systematic analysis of the European Court of Human Rights jurisprudence, the study summaries the development of key concepts for applicability of Article 13 of the ECHR, such as 'national authority', 'arguable claim', and the criteria that determine whether a remedy is effective in law and in practice. Special attention is given to the relationship between Article 13 and other substantive Convention rights, particularly Articles 2, 3, 5, 6 and 8, highlighting the overlap, absorption, and the lex specialis/lex generali relationship in the ECtHR's approach. The paper furthermore explores the proceduralisation of Convention rights and the absence of the Court's clear methodology for examining Article 13 complaints. The paper concludes by identifying remaining issues, emphasizing the importance of strengthening national remedial systems as a foundation of principle of subsidiarity and effective human rights protection.

KEYWORDS

European Convention on Human Rights, Article 13 of the ECHR, effective remedy, arguable claim, European Court of Human Rights, subsidiarity, domestic remedies

1. General Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR) has developed an effective international system for the protection of human rights. The mechanism established by the Convention 'is most likely the most influential human rights'[1] mechanism in the world. The 'beneficiaries of the Convention rights' are everyone within the jurisdiction of the Contracting States.[2] The European Court of Human Rights (the Court or the ECtHR) has jurisdiction over the interpretation and application of the Convention, reflecting the principle of shared responsibility. Yet, the 'scheme of the Convention'[3] stipulates

1 Vila, 2017, p. 394.
2 Ehlers, 2007, p. 39.
3 Harris, O'Boyle and Warbrick, 2023, p. 17.

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that national authorities hold primary responsibility for implementing and enforcing the Convention rights at the domestic level.

The main objective of the Convention is to safeguard the fundamental freedoms and rights of individuals under the jurisdiction of the state's parties to it. This subsidiary role of the Convention system originates in Article 1 of the Convention, which provides that the High Contracting Parties shall secure everyone within their jurisdiction the rights and freedoms defined in the Convention. The subsidiary nature of the Convention control mechanism is further expressed in Articles 13 and 35 § 1 of the Convention.[4]

Article 13 of the Convention protects the right to an effective remedy and guarantees the accessibility and availability of a remedy at the domestic level to enforce the protection of the right. This Article provides as follows: 'Everyone whose rights and freedoms, as set forth in this Convention, are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

The greatest possible protective effect of the Convention is achieved when individuals and public authorities respect the individual rights of others enshrined in the Convention; nevertheless, daily violations and denials of human rights occur, triggering different mechanisms for their protection. Article 13 of the Convention requires States to have an efficient system in place to protect rights in the event that any of the rights specified in the Convention are violated or denied, making this right one of the key provisions of the Convention.[5] According to Articles 1 and 13 of the ECHR, national authorities are required to ensure that the rights guaranteed by the Convention are effectively enjoyed and that, in the event that a protected right is violated, a domestic remedy is provided. Thus, the role of the State to protect human rights within the boundaries of its own legal system is expressly stated in Article 13.

The Court's work, which 'has contributed, through a progressive approach and expansive reach,'[6] is directly impacted and influenced by the existence and ongoing development of efficient domestic remedies for the protection of Convention rights. If these remedies 'at home'[7] are available and effective, the overall caseload will be reduced, allowing the Court to process fewer cases and to review them more effectively.[8]

> 'If Article 13 does not have full application, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise have to be addressed in the first place within the national legal system. In the long term, the effective functioning, on both the national and international

4 *Cocchiarella v. Italy,* Application No. 64886/01, Judgment 29 March 2006*., § 38; Scordino v. Italy,* Application no. 36813/97, Judgement 29 March 2006, § 140.
5 Beširević et al., 2017, p. 338.
6 Morawska, 2019, p. 160.
7 Tumay, 2009, p. 190.
8 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies.

> level, of the scheme of human rights protection set up by the Convention, is liable to be weakened.'[9]

There is no legal obligation to incorporate the Convention into the domestic legal system. According to Article 1 of the Convention, the substance of the rights and freedoms set forth in the Convention must be provided under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States.[10] Additionally, the main positive obligation of the State under Article 13 is to guarantee the availability of an effective remedy at the domestic level. Given the margin of appreciation granted to Contracting States and discretion as to the manner in which they conform to this obligation under Article 13, the protection provided by Article 13 does not go so far as to require any specific type of remedy.[11]

The role of the Court is to determine whether the national legal system provides an 'effective remedy' that would have stopped the alleged infringement of the applicant's rights or provided the applicant with the necessary redress for any violations that have already happened.

> 'Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. This Article therefore requires the provision of a domestic remedy allowing the 'competent national authority' both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.'[12]

The importance of Article 13 of the Convention and the existence of an effective legal remedy at the domestic level is highlighted in other documents produced under auspices of the Council of Europe. For example, in Recommendation REC(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, the member states have been encouraged

> 'to examine their respective legal systems in the light of the case-law of the Court and to take, if need be, the necessary and appropriate measures to ensure, through legislation or case-law, effective remedies as secured by

9 *Kudła v. Poland [GC],* Application no. 30210/96, Judgment 26 October 2000, § 155.
10 *Lithgow and others v. UK,* Application nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment 8 July 1986, § 205.
11 *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, § 106 and *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 190.
12 *Rotaru v. Romania [GC],* Application no. 28341/95, Judgment 4 May 2000, § 67.

> Article 13. The examination may take place regularly or following a judgment by the Court'.[13]

In addition, declarations adopted in the Interlaken process[14] underlined the importance of the proper implementation of the Convention at the national level and the obligation of the states to provide effective domestic remedies to address alleged violations of the Convention, emphasising the significance of the 'work' done by national authorities, as well as the Court.

Throughout its evolution, the Court has recognised the existence of procedural rights of various substantive Convention rights in the so-called 'proceduralisation'[15] of the Convention rights. This case-law of the Court often resulted in the overlap between Article 13 and other Convection rights, for example Articles 2, 3, 5 and 6 of the Convention, and Article 13 has been comprehended as a 'framework norm.'[16] At the same time, it sometimes created uncertainty in the court's approach as to whether and when Article 13 complaints would be examined. Furthermore, since the right to an effective remedy lacks an independent existence owing to its supplementary nature, this right may only be examined in connection with other substantive Convention rights, again potentially creating scope for overlapping with other Convention rights or its absorption.

This paper analyses the development of the Court's case law under Article 13 and the key cases that have shaped its scope, as well as the general principles regarding Article 13, and its applicability and relationship with other provisions of the Convention. Finally, the paper provides conclusions on the methodology that the Court uses and explores current issues regarding this right.

2. Development of the Case-Law Under Article 13 of the Convention

Article 13 of the Convention is one of the most significant instruments for implementing the Convention in practice at the national level. This Article functions as a mechanism of cooperation between the Convention's system and domestic legal systems, as well as a tool for dialogue between the Strasbourg Court and national

13 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, p. 4.

14 Five ministerial conferences have been organized as part of the Interlaken process to modify the Convention system, with the goal of ensuring improved implementation of the Convention at the domestic level. The conference was first held in February 2010 in Interlaken, in April 2011 in Izmir, in April 2012 in Brighton, and in March 2015 in Brussels. In April 2018, the last conference took place in Copenhagen. Following each of these conferences, declarations including recommendations and measures that member states ought to do domestically, were adopted. On 16 and 17 May 2023, Reykjavík hosted the CoE Summit of Heads of State and Government and Reykjavík Declaration has been adopted.

15 Buckley, Kamber, McCormick, Harris, 2022, p. 269.

16 Ibid.

courts. Nevertheless, in interpreting Article 13 of the Convention, the ECtHR has provided 'little principled reasoning,'[17] leading to the frequently cited opinion from two of the Court's judges that,

> 'Article 13 constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation'.[18]

At first, the Court analysed Article 13 using a very restrictive methodology predicated on a verbatim reading of its clause. The phrase 'everyone whose rights and freedoms… are violated' was interpreted literally, meaning that the Court[19] would only find a breach of Article 13 if it also found a violation of any other Article of the Convention[20] (emphasis added).

This limiting approach was revised in the *Klass* ruling, which held that Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated'[21] (emphasis added). However, the scope of application of Article 13 remained unclear; further development of the Court's case-law helped establish the threshold for applying Article 13 and provided clarification on the notion of 'everyone who claims a violation'.

In *Boyle and Rice* case, the ECtHR reiterated that

> 'Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order'. However, the Court further emphasised that, 'Article 13 cannot reasonably be interpreted so as to require a remedy in domestic law *in* respect of any supposed grievance under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an *arguable* one in terms of the Convention'[22] (emphasis added).

Still, the Court did not provide an abstract definition of the notion of arguable claim, stating that

17 Reiertsen, 2022, p. 22.
18 See Partially dissenting opinion of judges Matscher and Pinheiro Farinha in *Malone v. UK*, application no. 8691/79, 2 August 1984.
19 At that time Commission and the Court.
20 *Wilde, Ooms and Versyp (Vagrancy) v. Belgium* (Merits), Application nos. 2832/66; 2835/66; 2899/66). Judgment 18 June 1971, §95 and *Swedish Engine Drivers' Union v. Sweden*, Application no. 5614/72, Judgment 6 February 1976, § 50.
21 *Klass and others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 64.
22 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 52.

> 'rather it must be determined, in the light of the particular facts and the nature of the legal issue or issues raised, whether each individual claim of violation forming the basis of a complaint under Article 13 was arguable and, if so, whether the requirements of Article 13 were met in relation thereto'.[23]

In the *Silver* case[24], the Court reaffirmed key ideas derived from the abovementioned case-law while also establishing a few important new concepts – some of which will be discussed later. First, the ECtHR stressed in *Silver* that if an individual has an arguable claim of a breach of their rights under the Convention, they should have a remedy before a national authority to have the claim decided and, if appropriate, to receive redress. Second, the *Silver* case interpreted the notion 'a national authority' and outlined that 'the authority referred to in Article 13 may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective'.[25] Third, the *Silver* case established the possibility of combining domestic legal remedies; if a single remedy is unable to fully satisfy the requirements of Article 13, a combination of remedies available under domestic law may be able to accomplish this. Furthermore, the Court reiterated in *Silver* that the Contracting States are not required by Article 13 or the Convention to implement any particular method in order to guarantee the efficient implementation of any of the Convention's provisions within their national legal systems[26].

Although *Silver* case provided some new insights into the scope of Article 13, there were still some outstanding issues, especially regarding the necessity and methodology of the court's examination of the complaint under Article 13 and potential overlaps with other provisions of the Convention. These issues were addressed in the *Kudla* judgment[27], often mentioned as the 'renaissance'[28] case of Article 13 case-law.

In the *Kudla* case, the applicant complained under Article 13 of the Convention that he had no effective domestic legal remedy whereby to raise the issue of the

23 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 55.
24 *Silver and Others v. UK,* Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §113.
25 Ibid.
26 Today the Convention became an integral part of the domestic legal orders of all states, see Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, point 7.
27 *Kudła v. Poland [GC],* Application no. 30210/96, Judgment 26 October 2000.
28 Chanturia, 2023, p.10; see Morawska, 2019, p. 162 on the significance and influence of *Kudla* judgment.

excessive length of the proceedings in his case before a national authority.[29] The Court was called upon to answer the question whether it was necessary to examine the complaint under Article 13, since in many previous cases in which the Court had found a violation of Article 6 § 1, it did not consider it necessary to decide on an additional complaint under Article 13. Analysing the issue of overlap and absorption of different Convention rights, the Court emphasised that

> 'the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1'.[30]

The main reason for the change in the Court's approach to separately examining complaints under Article 13 arose from the 'growing frequency' of violations in this regard and 'the important danger' that exists for the rule of law within national legal orders when 'excessive delays in the administration of justice' occur 'in respect of which litigants have no domestic remedy.'[31] In *Kudla*, the Court highlighted that the scope of the States' obligations under Article 13 varies based on the nature of complaint raised by the applicant; nevertheless, the remedy envisaged by Article 13 of the Convention must be 'effective' both in practice and in law.[32]

Even with its importance, the above-mentioned rulings indicate that the Court did not initially consider Article 13 of the Convention particularly significant, nor did it see it necessary to provide general principles for interpreting this article. In the words of Judges Matscher and Pinheiro Farinha 'for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons.'[33] Starting from *Kudla*, the ECtHR revisited its position on overlapping rights and the need to look into an additional complaint under Article 13, mainly due to the altered circumstances regarding the broader acknowledgment of the subsidiarity principle, as well as an increase in the number of similar violations, and a general backlog of cases before the Court. Although there is an ongoing trend towards coherence in the interpretation of this provision, outstanding questions

29 See *Kudla v. Poland*, Application no. 30210/96, Judgment 26 October 2000, §113: 'The Court has been invited to determine the scope of the Contracting States' obligation under Article 13 to provide a person with an 'effective remedy before a national authority' if the Convention right asserted by the applicant is the right to a 'hearing within a reasonable time' guaranteed by Article 6 § 1. The applicant argued that Article 13 should be interpreted as requiring such an 'effective remedy'; the Government disputed that. The Commission did not find it necessary to determine this issue'.

30 Ibid.

31 Ibid.

32 *Kudla v. Poland*, Application no. 30210/96, Judgment 26 October 2000, §157.

33 Recommendation REC (2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, p. 4.

remain, including the lack of a clear methodology in the Court's approach to the examination of Article 13 complaint.

3. Requirements for Applicability of the Right to an Effective Remedy – General Principles

Specific requirements for the applicability of the right to an effective remedy may be identified by examining the text of Article 13 and the relevant case-law of the Court on this Article. A significant number of these requirements are linked to different State obligations, as well as to the applicant's obligation under Articles 13 and 35. These obligations, converted into requirements for the applicability of the right to an effective remedy, will be discussed in the next section and will provide some broad guidelines. As previously stated, the main obligation of the State under Article 13 of the Convention is to ensure that the applicant enjoys at the domestic level access to an effective domestic remedy for any arguable claim of a violation of the Convention's rights. In relation to this, the State also has an obligation to determine a national authority that will decide on the applicant's claim, thus defining the main institutional requirement for the applicability of this right.

3.1. Notion of 'A National Authority' – Institutional Requirement

Based on Article 13 of the Convention, the State has a duty to determine at the national level a 'national authority' in order both to have the applicant's claim decided and, if appropriate, to obtain redress.[34] This authority does not necessarily have to be judicial.[35] According to the case-law of the Court,[36] while a remedy before a judicial authority can be essential, that authority may also be a quasi-judicial body such as an ombudsman,[37] an administrative authority such as a government minister,[38] or a political authority such as a parliamentary commission.[39] These elements are essential: the first determining element for fulfilling the institutional requirement of an effective remedy concerns the powers and procedural guarantees entrusted to that national authority, as well as procedural safeguards afforded to the applicant;[40] the

34 *Klass and Others v. Germany*, Application No. 5029/71, Judgment 6 September 1978, § 64; *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113.

35 See Guide on Article 13 of the European Convention, 2023, p. 25. 'According to the *travaux préparatoires* in respect of the European Convention on Human Rights, the national authority before which a remedy will be effective may be a judicial or non-judicial body'. Also, in *Klass and Others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 67; *Rotaru v. Romania* [GC], Application no. 28341/95, Judgment 4 May 2000, § 69.

36 Guide on Article 13 of the European Convention, 2023, p. 28.

37 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987, § 83.

38 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 87.

39 *Klass and Others v. Germany*, Application no. 5029/71, Judgment 6 September 1978, § 67.

40 Harris, O'Boyle, and Warbrick, 2023, p. 763.

second element relates to the independence of this 'national authority' from the other national authority allegedly responsible for the violation of Convention right(s).

The place of the national authority within the national legal system is not decisive; an authority can provide effective protection even if it is part of the executive or legislative branches of power, as long as it is independent.[41] Since judicial authorities are presumed to be independent, the ECtHR will verify whether nonjudicial authorities are independent.[42] For example, in *Khan v. the United Kingdom*, the Court examined the independence of non-judicial authorities – the various avenues open to the applicant in respect of the Article 8 complaint – and decided that 'the system of investigation of complaints did not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13'.[43]

In *Mugemangango v. Belgium*,[44] the Court examined an Article 13 complaint in conjunction with Article 3 of Protocol 1 and Belgium's failure to provide an effective remedy by which applicants could challenge election results and seek a recount. The Court found the absence of 'a procedure offering adequate and sufficient safeguards to prevent arbitrariness and to ensure (...) effective examination' of the complaint of the applicant, a candidate for election to the Parliament of the Walloon Region in 2014, who sought a recount of the ballot papers for his electoral constituency, after having lacked 14 votes to obtain a seat. The Court found that applicant's complaint 'was examined by a body which did not provide the requisite guarantees of its impartiality (...) and whose discretion was not circumscribed with sufficient precision by provisions of domestic law' and 'the safeguards afforded to the applicant during the procedure were likewise insufficient, having been introduced on a discretionary basis'.[45]

The power granted to the 'authority' represent an additional institutional requirement of an effective remedy. For a non-judicial authority to be recognised as a competent national authority, it must have the power to hand down legally binding decisions.[46] The Court has analysed different types of bodies that have advisory powers and concluded that authorities that have only advisory powers cannot be regarded as providing an effective remedy. For example, in *Chahal v. the United Kingdom*, the Court recognised deficiencies in non-judicial proceedings before a panel reviewing a terrorism suspect's deportation order.[47] In *Silver and Others v. the United Kingdom*,[48] the Court examined different remedies that were available to the applicants – four channels of

41 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987, § 77 b.
42 Ibid.
43 *Khan v. UK*, Application no. 35394/97, Judgment 12 May 2000, §§ 44–47.
44 *Mugemangango v. Belgium* [GC], Application no. 310/15, Judgment 10 July 2020, § 137–139.
45 *Mugemangango v. Belgium* [GC], Application no. 310/15, Judgment 10 July 2020, 2020, § 122.
46 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §§ 114-115; *Chahal v. UK*, Application no. 22414/93, Judgment 15 November 1996, § 154.
47 *Chahal v. UK* [GC], Application no. 22414/93, Judgment 15 November 1996, § 154.
48 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, §§ 114–115.

complaints against abuse of the powers to control prisoners' correspondence. The ECtHR found that these authorities cannot be viewed as providing an appropriate remedy because they lacked the authority to render legally binding decisions.

3.2. Notion of 'An Arguable Claim'

It has already been already mentioned that in the interpretation of Article 13, the Court established the notion of 'an arguable claim', stating that this Article cannot reasonably be interpreted so as to require a remedy in domestic law in respect of every supposed grievance under the Convention that an individual may have, no matter how unmeritorious complaint may be and that the grievance must be an arguable one in terms of the Convention.[49]

However, the case-law of the ECtHR has not provided an abstract or general definition of the notion of 'an arguable claim', which makes the 'precise delimitation' of an arguability test challenging.[50] From the early case-law, the Court has adopted the approach that this notion must be determined in the light of the particular facts and the nature of the legal issue or issues raised,[51] thus introducing the so-called concretisation principle. The right to a remedy provided in Article 13 applies only to alleged violations which may be considered arguable within the meaning of the Convention. Since Article 13 has a subsidiary nature and is only applicable in conjunction with other Convention rights, in order to rely on Article 13, the applicant must have an arguable claim under another Article of the Convention.[52]

Considering the concretisation principle that the Court applies in the arguability test, the Court will determine whether an Article 13 complaint is arguable and applicable in relation to a possible infringement of the Convention rights for which the right to a domestic remedy is raised under Article 13. If the Court finds a violation of an Article of the Convention or the Protocols in response to the complaint for which the right to a domestic remedy is raised under Article 13, the Court will find the Article 13 complaint to be arguable. However, a finding of a violation of another Convention right is not a requirement for the application of Article 13. Article 13 may be applicable and arguable even without a violation of another substantive Convention right.[53]

An additional question arises concerning the distinction between the notions of 'manifestly ill founded' and 'arguable claim'. Under Article 35 of the Convection, which will be discussed later, at the admissibility stage, the ECtHR has to examine whether the application is manifestly ill founded, which essentially means taking a position on the merits of the case. The fact that a complaint has been declared admissible under Article 35 of the Convention may be an indication that it can be regarded

49 Beširević et al., 2017, p. 343.
50 Rainey, McCormick, Ovey, Wicks, 2021, p. 138.
51 *Boyle and Rice v. UK*, Application nos. 9659/82; 9658/82, Judgment 27 April 1988, § 55.
52 Regarding the Court's case-law on an arguable claim See Guide on Article 13 of the European Convention, 2023, Points 10–23.
53 *Klass and Others v. Germany*, 1978, § 64, Beširević et al., 2017, p. 346.

as 'arguable'. 'The admissibility of a complaint is not so much about a *prima facie* violation but rather a *prima facie* 'arguability".[54]

The inadmissibility of a complaint under another Article of the Convention may be an indication of the inapplicability or non-violation of Article 13. In *Boyle and Rice*[55], the Court established that 'it was difficult to conceive how a 'manifestly ill-founded' claim could nevertheless be 'arguable' and *vice versa*'. Later, in *Powell and Rayner,*[56] the Court explained that

> 'Article 13 and Article 35 § 1 are concerned, within their respective spheres, with the availability of remedies for the enforcement of the same Convention rights and freedoms. The coherence of this dual system of enforcement is at risk of being undermined if Article 13 is interpreted as requiring national law to make available an 'effective remedy' for a grievance classified under Article 35 as being so weak as not to warrant examination on its merits at international level. Whatever threshold the Commission has set in its case-law for declaring claims 'manifestly ill-founded' under Article 35, in principle it should set the same threshold in regard to the parallel notion of 'arguability' under Article 13'.[57]

For Article 13 to be applicable, the complaint must also be arguable. A complaint that has been declared manifestly ill founded by the Court will not satisfy the threshold test for reliance on Article 13, and there will be no violation of that provision.[58]

54 Morawska, 2019, p. 170.
55 *Boyle and Rice v. UK*, Application no. 5029/71, Judgment 6 September 1978, § 54.
56 In case of *Powell and Rayner,* Application no. 9310/81, Judgment 21 February 1990, §§ 31–33, the Court emphasized that 'each one of the claims of violation forming the basis of the applicants' complaints under Article 13 (the 'substantive' claims) was declared inadmissible by the Commission as being 'manifestly ill-founded'. The majority of the Commission, however, drew a distinction between the notions of 'manifestly ill-founded' and lack of 'arguability'. It was 'implicit in the Commission's established case-law that the term 'manifestly ill-founded' extends further than the literal meaning of the word 'manifest' would suggest at first reading'. Thus, some serious claims might give rise to a *prima facie* issue but, after 'full examination' at the admissibility stage, ultimately be rejected as manifestly ill-founded notwithstanding their arguable character. 'This does not mean, however, that in the present case the Court is bound to hold Article 13 (art. 13) Inapplicable solely as a result of the Commission's decisions declaring the applicants' substantive claims under Articles 6 § 1 and 8 to be manifestly ill-founded. Whilst those decisions as such are unreviewable, the Court is competent to take cognisance of all questions of fact and law arising in the context of Article 13 complaints duly referred to it, including the 'arguability' or not of each of the substantive claims. In order to determine the latter question, the particular facts and the nature of the legal issues raised must be examined, notably in the light of the Commission's admissibility decisions and the reasoning contained therein'.
57 *Powell and Rayner v UK*, Application no. 9310/81, Judgment 21 February 1990, § 33.
58 *Čonka v Belgium*, Application no. 51564/99, Judgment 5 February 2002, § 76. In *Čonka* case, the complaints of a violation of Article 3 which the Court declared manifestly ill-founded were not arguable. Accordingly, the Court found that there has been no violation of Article 13 of the Convention taken in conjunction with Article 3.

3.3. Notion of 'An Effective Remedy' and Its Exhaustion – Substantive Requirement

The question of what constitutes 'an effective remedy' under Article 13 of the Convention and what makes a remedy effective arises together with fulfilment of different types of State obligations, as well as the applicant's obligations.[59] 'Something has to fulfil its intended goal in order to be effective. Consequently, a remedy is considered 'effective' if it achieves its goal or goals.'[60]

The main goal of an effective remedy is its capability to directly resolve the impugned state or condition, either by preventing the alleged violation or its continuation, or by providing adequate redress, fair compensation, and satisfaction for any violation that has already occurred.[61]

> 'The protection afforded by Article 13 is not absolute. The context in which an alleged violation or category of violations occurs may entail inherent limitations in the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of 'an effective remedy' is to be read as meaning 'a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]'.[62]

In this sense, the Court emphasised that 'the remedy required by Article 13 must be 'effective' both in law and in practice.'[63] This establishes a primary obligation on the part of the State to set up an efficient remedial system for safeguarding Convention rights in domestic procedural legislation, as well as in the practice of administrative and judicial authorities. This State obligation comes with a degree of discretion. The Convention does not specify how the Contracting States are to ensure that any of its provisions are implemented effectively within their internal laws. As a result, the States are free to choose how they wish to implement an effective remedy under Article 13.[64] Nevertheless, as will be explained later, the nature of the right to issue affects the type of remedy that the State must offer in accordance with Article 13.[65]

The provisions of Article 13 do not provide a remedy by which a Contracting State's legislation may be contested before a national authority on the grounds of being contrary to the Convention *in abstracto*, nor do they allow a challenge to a general policy

59 See for this section of the paper more on Guide on Article 13 of the European Convention, 2023, pp. 14–20.
60 Reiertsen, 2022, p. 28.
61 Etinski, 2004, p. 437 and *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 158.
62 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 151. See Shelton, 2015, pp. 7–21.
63 *Ibid*, § 157; *Vilho Eskelinen and Others v. Finland* [GC], Application no. 63235/00, Judgment 19 April 2007§ 80.
64 *Silver and Others v. UK*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113.
65 Zombory, 2023, pp. 205–244.

as such.[66] The effectiveness of the remedy is assessed *in concreto*, in the light of the particular facts of the case and the nature of the legal issue or issues raised.

A strong indicator of the effectiveness of a remedy is that the domestic authorities consider the merits of complaints under the Convention.[67] The substance of the complaint alleging infringement of the Convention must be taken into account by a domestic authority; otherwise, the remedy will be insufficient.[68] Remedies must be directly accessible and available for the person concerned – Article 13 does not mean an accessible remedy guaranteed to succeed, but rather an accessible and available remedy before an authority competent to examine the merits of the Convention complaint. The 'effectiveness' of a remedy for the purposes of Article 13 does not depend on the certainty of a positive outcome for the applicant[69], but it must 'offer reasonable prospects of success.'[70]

If there is a weak likelihood of success in the light of the particular circumstances of the case, or if the applicant's complaint was dismissed, this by itself does not weaken the 'effectiveness' of a remedy in general nor is it sufficient to declare a remedy ineffective.[71] Additionally, the existence of mere doubts as to the prospects of the success of a particular remedy is not a valid reason for failing to exhaust that avenue of redress, which is the main obligation of the applicant under Article 35 of the Convention and will be discussed later. Furthermore, in order to be effective, a domestic remedy must fulfil the obligation of promptness and must present minimum guarantees of speed in the decision-making process.[72] A successful outcome of an effective remedy will vary, and mainly depends on the circumstances of the case, such as the annulment of an act or action, removal or amendment of an act breaching the Convention, repeating the procedure, compensation for damage sustained, or sanctions imposed on the person responsible for the act or action.[73]

Regarding the date of the remedy's introduction into the national legal system and the availability of case-law pertaining to it, there are specific rules in place. The general rule is that an effective remedy must exist and be in place on the date the application is submitted to the Court in order for the exhaustion rule under Article 35 of the Convention to be applicable. Nevertheless, there may be exceptions to this rule, which may be justified by the particulars of each case. The Court acknowledges that this can be the case when a new national law is introduced with a retroactive effect to address a structural issue that existed in the national legal system before that law was

66 *Hatton and Others v. UK* [GC], Application no. 36022/97, Judgment 8 July 2003, § 138.
67 *Hatton and Others v. UK* [GC], Application no. 36022/97, Judgment 8 July 2003, § 141.
68 *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, Application no. 14134/02, Judgment 11 October 2007, § 69.
69 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 157.
70 *Selahattin Demirtaş v. Turkey* (No. 2) [GC], Application no. 14305/17, Judgment 22 December 2020, § 205.
71 Ibid.
72 *Pine Valley Developments Ltd and Others v. Ireland*, Application no. 12742/87, Judgment 29 November 1991, § 47.
73 Zombory, 2023, pp. 205–244.

adopted. The law, with retroactive effect, should provide direct redress for violations of fundamental procedural rights.[74]

The Court has determined that it is not required to consider remedies that were either unavailable at the relevant time or inapplicable given the circumstances of the case. The Court may still examine the effectiveness of a remedy before the practice of the domestic courts can be determined,[75] as it cannot be satisfied that an effective remedy was available in theory and in practice by a single final court decision, no matter how thorough the reasoning may be[76]. Finally, the combined remedies provided under domestic law may meet the requirements of Article 13, even where no single remedy may itself entirely satisfy them.[77]

For a remedy to be effective, it must also be used by the applicant in a proper manner – this creates an obligation for the applicant under Article 35§1 of the Convention to exhaust domestic legal remedies in accordance with the applicable rules and procedures of domestic law.[78] It has previously been stated that Articles 13 and 35§1 of the Convention express the subsidiary nature of the Convention system, with Article 13 generating positive obligations for the States and Article 35§1 generating obligations for the applicant; these obligations are in direct correlation.

The rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.[79] According to the wording of Article 35§1 of the Convention, the applicant has an obligation to exhaust all domestic remedies in order to submit application to the Court, giving the national authorities, mainly the courts, the opportunity to prevent the alleged violations of the Convention or to provide appropriate redress for any violation that has already occurred[80]. Thus, an applicant who fails to use and exhaust all appropriate and relevant domestic remedies cannot rely on Article 13 separately or in conjunction with another Article of the Convention.

> 'States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. Those who wish to invoke the supervisory jurisdiction of

74 *Stoica v. Romania*, Application no. 42722/02, Judgment 4 March 2008, § 104, *Muratović v Serbia*, Application no. 41698/06, Judgment 21 March 2017, §§ 13–16, and Practical Guide on Admissibility Criteria, 2023, pp. 38–40

75 *Slaviček v. Croatia* (dec.), Application no. 20862/02, Judgment 4 July 2002.

76 *Sürmeli v. Germany* [GC], Application no. 75529/01, Judgment 8 June 2006, § 113.

77 *Silver and Others v. the United Kingdom*, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment 25 March 1983, § 113, *Kudła v. Poland* [GC], 2000, § 157.

78 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11... 17443/11, Judgment 25 March 2014, § 90.

79 Schabas, 2015, pp. 546–555.

80 For more on Exhaustion of remedies requirement see Practical Guide on Admissibility Criteria, 2023, pp. 27–38.

> the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system.'[81]

When it comes to applying the exhaustion of domestic remedies rule under Article 35§1, the Court has a well-established case-law that mostly corresponds to the concepts already discussed under Article 13. First, an individual is only obliged to exhaust domestic remedies that are available in theory and in practice at the relevant time 'remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospects of success'.[82] In determining whether any particular remedy meets the criteria of availability and effectiveness, the particular circumstances of the individual case are decisive. Although the rule of exhaustion is flexible and is not apply automatically, the applicant must comply with the applicable rules and procedures of domestic law[83] and the Convention right complaint has to be raised in domestic proceedings 'at least in substance'[84]. In the presence of several potentially effective remedies which an individual can pursue, the individual is only required to use one of them and is entitled to choose a remedy which addresses his or her essential grievances.[85]

Regarding the burden of proof,

> 'it is incumbent on the Government pleading non-exhaustion to satisfy it that the remedy was an effective one available in theory and in practice at the relevant time, that is to say that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact used or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances exempting him or her from this requirement'.[86]

To summarise, the state is required by Article 13 of the Convention to provide, in theory and in practice, at the national level, an effective legal remedy for the protection of rights under the Convention – the State has an obligation to enact the law establishing an effective remedy and to provide credible evidence that this remedy is effective in practice. The nature of the right and the circumstances of the case

81 *Anđelka Bistrović-Nastić v. Serbia*, Application no. 47040/07, Judgment 11 September 2018, § 20.
82 *Sejdović v. Italy*, [GC], Application no. 56581/00, Judgment 1 March 2006, § 46.
83 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11… 17443/11, Judgment 25 March 2014, § 90.
84 *Vučković and Others v. Serbia* [GC], Applications nos. 17153/11… 17443/11, Judgment 25 March 2014, §§ 72, 79 and §§ 81–82;
85 *Jeličić v. Bosnia and Herzegovina* (dec.), Application no. 41183/02, Judgment 15 November 2005.
86 *Selahattin Demirtaş v. Turkey* (No. 2) [GC], Application no. 14305/17, Judgment 22 December 2020, § 205.

regarding the infringement will essentially determine the specific legal remedy. Preventive and compensatory legal remedies are the most commonly identified in the present classifications of legal remedy types, primarily because of the Court's case-law and their nature and legal effects. Another important, but more general, remedy is the constitutional complaint orappeal.

At the same time, before submitting an application to the Court, the applicant has an obligation to exhaust all effective domestic remedies in accordance with the applicable rules and procedures of domestic law – that is, remedies that are effective and capable of redressing the alleged violation, that are accessible and available to the applicant and offer reasonable prospects of success.

4. Article 13 of the Convention and Other Substantive Provision of the Convention and Its Protocols

The right to an effective remedy has a supplementary nature. This right does not exist in and of itself; rather, it is applicable in conjunction with complaints alleging infringement of all Convention rights, and can only be considered in connection with other substantive Convention rights. As mentioned, the existence of other Convention rights, namely Articles 5 §§ 4 and 5 and 6 § 1 of the Convention, which have incorporated *in texto* remedial requirements and guarantees of a specific remedy,[87] creates a special relationship between Article 13 and these rights, generating either separate or coexisting application of these Convention rights, but most likely resulting in the absorption of Article 13.[88] This correlation between Article 13 and the said Articles of the Convention is recognised in terms of *lex generalis* and *lex specialis*. Article 13 is a more general provision, while other articles may provide a stronger guarantee of procedural rights and specific remedies.[89]

Additionally, as previously indicated, with the 'proceduralisation' of the Convention, the ECtHR has acknowledged the existence of procedural rights derived from various substantive Convention rights.[90] For example, although there are no explicit procedural rights in Articles 2 or 3 of the Convention, the Court has acknowledged implicit procedural guarantees in these Articles to conduct an effective investigation, suggesting that Article 13 requirements are broader than a Contracting State's obligation under Articles 2 or 3 of the Convention.[91]

87 Reiertsen, 2015, p. 31.
88 Chanturia, 2023, p.19. Beširević et al., 2017, p. 346.
89 Grabenwarter Ch., 2014, p. 328. cited in Chanturia, 2023, p. 19, *A and others v. the UK [GC]*, 2009, § 202.
90 See Footnote 15.
91 *Lyanova and Aliyeva v. Russia*, Applications nos. 12713/02 and 28440/03, Judgment 2 October 2008, § 134, *Khashiyev and Akayeva v. Russia*, Application nos. 57942/00 and 57945/00, Judgment 24 February 2005, § 183.

Both these variants, depending on the circumstances of a specific case, could enable Article 13 of the Convention to overlap with other Convention rights or be absorbed into them. In the following section of this paper, the interplay of Article 13 with other important and often discussed rights of the Convention – specifically Art. 2, 3, 5, 6 and 8 of the Convention[92] – will be examined, and it will be analysed how the nature of the 'main' right essentially determines the nature and type of remedies under Article 13 of the Convention.[93]

4.1. Article 13 of the Convention in Conjunction With or in the Light of Article 2

The wording of Article 2 of the Convention does not mention any procedural rights; yet, the Court's case-law has recognised additional rights within Article 2 of the Convention, including the right to compensation and the right to an effective investigation into the circumstances of one's death. Specifically,

> 'the obligation to protect the right to life under this provision, read in conjunction with the state's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention,' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alias*, agents of the State,'[94]

by private persons,[95] or where the cause of death is unknown or self-inflicted.[96] Moreover, the Court considered that the State's obligation to set up an effective judicial system capable of providing victims (or their next of kin) with appropriate redress for the purposes of Article 2 – that is, a remedy in the civil courts to claim compensation for the non-pecuniary damage, either alone or in conjunction with a remedy in the criminal courts – facilitate any responsibility to be established and any appropriate civil redress to be obtained.[97]

Regarding Article 13 in the context of the right to life, the notion of an effective remedy under Article 13 demands a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for relatives to the investigatory procedure and the payment of compensation where appropriate. 'Seen in these terms, the requirements of Article 13 are broader

92 The scope of this study is focused on most often examined and analyzed Articles. For the other Articles of the Convention and relationship with Article 13 see Guide on Article 13 of the European Convention, 2023.
93 Guide on Article 13 of the European Convention, 2023, p. 25,
94 *McCann and Others v. UK*, Application no. 18984/91, Judgment 27 September 1995, Series A no. 324, § 161.
95 *Opuz v. Turkey*, Application no. 33401/02, Judgment 9 June 2009, § 150.
96 *Trubnikov v. Russia*, Application no. 49790/99, Judgment 5 July 2005, § 68.
97 *Hubert Nowak v. Poland*, Application no. 57916/16, 16 February 2023, § 86.

than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation.'[98]

Since both Articles guarantee the right to an effective investigation and payment of appropriate redress, it is often the case that, after examining the alleged violation of Article 2 of the Convention, the Court considers it unnecessary to examine the complaints separately under Article 13 in conjunction with Article 2 of the Convention.[99] Still, if the Court decides to separately examine the alleged violation of Article 13 in conjunction with Article 2, Article 13 may not always require the authorities to assume responsibility for investigating the allegations regarding the person's death. However, a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the violation of Convention rights must be available to the victim or the victim's family.[100] In other words,

> 'What is important is the impact the State's failure to comply with its procedural obligation under Article 2 had on the deceased's family's access to other available and effective remedies for establishing liability on the part of State officials or bodies for acts or omissions entailing the breach of their rights under Article 2 and, as appropriate, obtaining compensation'.[101]

As a consequence of these positions, if a criminal investigation in a specific case does not meet the requirements of State's procedural obligation to conduct an effective investigation under Article 2, this does not automatically mean there has been a breach of Article 13 of the Convention; for example, the Court found no violation of Article 13 of the Convention, 'since the existing civil actions were effective remedies capable of providing redress for fatal shootings by police officers'.[102]

4.2. Article 13 of the Convention in Conjunction With or in the Light of Article 3

Similar to Article 2 of the Convention, no procedural rights are mentioned explicitly in Article 3; nonetheless, the Court's case-law has acknowledged a number of special procedural rights. The main one is the right to an effective investigation into allegations of ill treatment, which is triggered under Article 3 whenever someone has an arguable claim. Additionally, Article 3 of the Convention recognises the right to compensation, just like Article 2 does.

98 *Kaya v. Turkey*, Application no. 158/1996/777/978, 19 February 1998, § 107.
99 *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 195.
100 *Centre for legal resources on behalf of Valentin Câmpeanu v. Romania*, [GC], Application no. 47848/08, Judgment 17 July 2014, § 149.
101 *Budayeva and Others v. Russia*, Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment 20 March 2008, § 19.
102 Guide on Article 13 of the European Convention, 2023, p. 26, for Selected examples of examination of Article 13 by the Court see Guide on Article 13 of the European Convention, 2023, p. 26.

Regarding Article 13 in the context of the prohibition of torture, the requirements of Article 13 for an effective legal remedy are broader than a State's obligation under Article 3 to conduct an effective investigation. The Court emphasised that,

> 'The nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. Accordingly, as regards Article 13, where an individual has an arguable claim that he has been tortured by agents of the state, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an 'effective remedy' under Article 13'.[103]

Regarding the question of compensation, Article 13 of the Convention provides a remedy to claim compensation for the non-pecuniary damage sustained as a result of a violation of Article 3 of the Convention. The Court underlined that,

> 'Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be part of the range of available remedies'.[104]

In addition, the Court emphasised that given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised, and the importance the Court

103 *Aksoy v. Turkey,* Application no. 21987/93, Judgment 18 December 1996, §98.
104 *Z and others v. UK* [GC], Application no. 29392/95, Judgment 10 May 2001, §109.

attaches to Article 3, the notion of an effective remedy under Article 13 requires an independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.[105]

Because of the broad scope of Article 3's *ratione materiae* applicability to various situations of potential ill treatment, the Court has developed additional conclusions on the relation between Article 13 of the Convention and Article 3.[106]

For example, since Article 3 is applicable to asylum, expulsion, and extradition cases, the Court established a case-law regarding the requirements under Article 13 to ensure an effective domestic remedy in the context of these issues. The Court emphasises that that an applicant's complaint alleging that his or her removal to a third state would expose him or her to treatment prohibited under Article 3 of the Convention must imperatively be subject to close scrutiny by a 'national authority. The notion of 'effective remedy' within the meaning of Article 13, taken together with Article 3 requires, firstly, 'independent and rigorous scrutiny' of any complaint made by a person in such a situation, where 'there exist substantial grounds for fearing a real risk of treatment contrary to Article 3,' and, secondly, 'the possibility of suspending the implementation of the measure impugned.'[107] The Court considers that the notion of an effective remedy under Article 13 requires that the remedy be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible[108]. Furthermore, in the circumstances of expulsion cases, an efficient remedy must have an automatic suspensive effect.[109]

The Court's case-law concerning conditions of detention and an effective legal remedy for prisoners' complaints recognises that both preventive and compensatory remedies have to be complementary in order to be effective. The ECtHR underlined that two types of remedy are possible regarding complaints under Article 3 about inhuman or degrading conditions of detention: improvement in these conditions by prompt termination of violation and compensation for any damage sustained as a result.

> 'Therefore, for a person held in such conditions, a remedy capable of rapidly bringing the ongoing violation to an end is of the greatest value and, indeed, indispensable in view of the special importance attached to the right under Article 3. However, once the impugned situation has come to an end because this person has been released or placed in conditions that meet the

105 *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Judgment 13 December 2012, § 257.
106 For selected examples of examination of Article 13 by the Court see Guide on Article 13 of the European Convention, 2023, pp. 29-38.
107 *Hirsi Jamaa and Others v. Italy* [GC], Application no. 27765/09, Judgment 23 February 2012, § 198.
108 *Čonka v. Belgium*, Application no. 51564/99, Judgment 5 February 2002, § 79.
109 *A.M. v. the Netherlands*, Application no. 29094/09, Judgment 5 July 2016, § 66.

requirements of Article 3, he or she should have an enforceable right to compensation for any breach that has already taken place.'[110]

4.3. Article 13 of the Convention in Conjunction With or in the Light of Article 5[111]

Article 5 of the Convention explicitly embeds procedural rights regarding the review of the lawfulness of detention and the right to compensation, thus guaranteeing specific legal remedies. Namely, paragraph 4 of this Article guarantees 'proceedings' conducted 'by a court' that shall decide 'speedily' on 'lawfulness of detention' and that can 'order a release' in case of unlawful detention, thus describing at the same time the legal nature of this remedy. Also, paragraph 5 of Article 5 provides 'an enforceable right to compensation' in the case of unlawful detention.

In relation to Article 13 of the Convention, the Court has a well-established case-law holding that Article 5 §§ 4 and 5 of the Convention constitute *lex specialis* in relation to the more *lex generali* norm of Article 13 – meaning that Article 5 §§ 4 and 5 of the Convention absorb Article 13,[112] and that the Court will not examine separately the complaint under Article 13 if it has already examined and found a violation of Article 5 §§ 4 and 5 of the Convention.[113]

4.4. Article 13 of the Convention in Conjunction With, or in the Light of, Article 6

The *Kudla* case represents one of the most significant cases on Article 13; this judgment reconsidered the ECtHR's position on overlapping rights and the need to examine separately a complaint under Article 13 in conjunction with Article 6 of the Convention. In *Kudla*, the Court examined several complaints, including a complaint under Article 5 § 4 of the Convention regarding the length of the applicant's detention on remand and a complaint under Article 6 § 1 of the Convention regarding the length

110 *Volodya Avetisyan v. Armenia*, Application no. 39087/15, Judgment 3 May 2022, § 29.

111 Similar regarding Article 4 of the Convention. Where Article 13 complaint is incorporated by a complaint alleging a violation of the positive procedural obligations under Article 4 of the Convention, those obligations form *lex specialis* in relation to the general obligations under Article 13. See Guide on Article 13 of the European Convention, 2023, p. 38.

112 Chanturia, 2023, p. 20.

113 *Chahal v. the United Kingdom* [GC], Application no. 22414/93, Judgment 15 November 1996, § 126 and See Guide on Article 13 of the European Convention, 2023, p. 41.

of criminal proceedings; the Court found violations of both rights.[114] When examining the complaint regarding applicant right to an effective remedy in respect of a complaint about the length of court proceedings before a national authority, the Court first assessed whether it was necessary to examine the complaint under Article 13, since it already found violation of Article 6§1 of the Convention regarding the length of criminal proceedings.

In *Kudla* the ECtHR first reaffirmed that in many previous cases, in which the Court has found a violation of Article 6 § 1 of the Convention, it did not consider it necessary to rule on an additional complaint made under Article 13, since Article 6 § 1 was considered to constitute a *lex specialis* in relation to Article 13. The Court further underlined that where the Convention right asserted by the individual is a 'civil right' or 'criminal' recognised under domestic law, the protection afforded by Article 6 § 1 will also be available. 'In such circumstances the safeguards of Article 6 § 1, implying the full panoply of a judicial procedure, are stricter than, and absorb, those of Article 13' and 'there is no legal interest in re-examining the same subject matter of complaint under the less stringent requirements of Article 13'.[115]

However, in *Kudla*, the Court emphasised that there was

> 'no overlap and hence no absorption where, as in the present case, the alleged Convention violation that the individual wishes to bring before a 'national authority' is a violation of the right to trial within a reasonable time, contrary to Article 6 § 1. The question of whether the applicant in a given case did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground. In the present case, the issue to be determined before Article 6 § 1 'tribunals' was the criminal charges brought against the applicant, whereas the complaint that he wanted to have examined

114 The applicant was detained on remand in August 1991. The detention order was quashed in June 1992, on the basis of a psychiatric report on applicant's medical state. Since the applicant failed to attend a hearing in his case in February 1993, an arrest warrant was issued and he was arrested in connection with a traffic offence in October 1993 and placed in detention on remand. Numerous applicant's requests for release were refused and in January 1995 the applicant attempted to commit suicide. The applicant was convicted in June 1995, but the conviction was quashed in February 1996 and a retrial ordered. In May 1996 the detention order was quashed, subject to payment of bail of 10,000 zlotys. The applicant's appeals against the amount, in which he invoked the risk of suicide, was rejected. He was released in October 1996 after bail had been lodged. He was again convicted in December 1998, the sentence imposed was reduced on appeal in October 1999 and a cassation appeal was pending before the Supreme Court in the time of Court's judgment. The Court examined several complaints, including complaints on alleged failure to provide adequate medical care for detainee applicant, length of applicant's detention on remand, length of criminal proceedings and right to an effective remedy in respect of a complaint about the length of court proceedings.

115 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 146.

> by a 'national authority' for the purposes of Article 13 was the separate one of the unreasonable length of the proceedings'.[116]

The above-mentioned distinction, together with the growing frequency of the cases with violation due to 'excessive delays in the administration of justice' 'in respect of which litigants have no domestic remedy,' as well as backlog of cases before the Court, were the reasons for the reevaluation of the Court's case-law in *Kudla* and conclusion to examine the applicant's complaint under Article 13 separately, apart from its earlier finding of a violation of Article 6 § 1 for failure to have a trial within a reasonable time.[117]

The Court highlighted that,

> 'the object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court. From this perspective, the right of an individual to trial within a reasonable time will be less effective if there exists no opportunity to submit the Convention claim first to a national authority; and the requirements of Article 13 are to be seen as reinforcing those of Article 6 § 1, rather than being absorbed by the general obligation imposed by that Article not to subject individuals to inordinate delays in legal proceedings'.[118]

All these findings represent guidelines for understanding the relationship between complaints about the length of proceedings under Article 6 § 1 of the Convention and the lack of an effective legal remedy complaint under Article 13 of the Convention. Although Article 6 § 1 of the Convention is *lex specialis* in relation to Article 13, the precise understanding of Article 13 is that this provision guarantees an effective remedy before a national authority for an alleged violation of the requirement under Article 6 § 1 to hear a case within a reasonable time.[119]

Since the Contracting States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13 and conform to their Convention obligation under that provision, the different types of remedies may redress the violation appropriately.[120] According to the Court's case-law, remedies

116 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, §147. In previous cases, the Court, as a rule, declined to decide on additional complaint of the absence of an effective remedy as guaranteed by Article 13, considering it unnecessary in view of its prior finding of a breach of the 'reasonable time' requirement laid down in Article 6§1 of the Convention.
117 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, §§ 148, 149.
118 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 152.
119 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 156 and *Vilho Eskelinen and others v. Finland*, Application no. 63235/00, Judgment 19 April 2007, §§ 79–83.
120 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, pp. 20–23.

available to a litigant at domestic level for raising a complaint about the length of proceedings are 'effective' within the meaning of Article 13 of the Convention if they can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred – that is preventive (expediting) and compensatory (reparatory) remedy,[121] which must be available in theory and in practice in order to be effective.[122]

> 'Some states, such as Austria, Croatia, Spain, Poland, and Slovakia, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation.'[123]

Finally, the Court has also examined complains of Article 13 in conjunction with or in the light of Article 6 § 1 concerning the absence of effective domestic remedies by which to complain about the length of all types of domestic proceedings – that is criminal, civil including enforcement, and administrative proceedings.[124]

4.5. Article 13 of the Convention in Conjunction With, or in the Light of, Article 8

The *ratione materie* scope of Article 8 of the Convention includes various substantial rights that have been developed by the ECtHR under the notions of 'private' and 'family' life.[125] In addition, although Article 8 contains no explicit procedural requirements, the Court has recognised that Article 8 encompasses procedural rights – 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 of the Convention.[126] This requires, in particular, that the applicant be involved in that process[127] and that the competent authorities carry out a proportionality test of the competing interests at stake and give due consideration to the relevant rights protected by Article 8 of the Convention.[128]

In a number of cases, the ECtHR has examined complaints under Article 13 in conjunction with, or in the light of, Article 8. However, often, when the Court finds a violation of Article 8 on procedural aspects, it may decide not to separately examine the complaint under Article 13, even though it is closely related to the admissible

121 *Sürmeli v. Germany*, [GC], Application no. 75529/01, Judgment 8 June 2006, § 99.
122 *Burdov v. Russia* (No. 2), Application no. 33509/04, Judgment 15 January 2009, § 104. More on preventive remedies and compensatory remedies for the length of proceedings complaint and selected examples see Guide on Article 13 of the European Convention, 2023, pp. 42–45.
123 *Scordino v. Italy* (no. 1) [GC], Application no. 36813/97, Judgment 29 March 2006, § 186.
124 More on selected examples regarding all type of domestic proceedings in Guide on Article 13 of the European Convention, 2023, pp. 45–46.
125 See Guide on Article 8 of the European Convention on Human Rights, 2024
126 *Fernández Martínez v. Spain* [GC], Application no. 56030/07, Judgment 12 June 2014, § 147.
127 *Lazoriva v. Ukraine*, Application no. 6878/14, Judgment 17 April 2018, § 63.
128 *Liebscher v. Austria*, Application no. 5434/17, Judgment 6 April 2021, §§ 64–69.

complaint under Article 8 of the Convention[129]. Although there are various subjects arising under Article 8 concerning the effectiveness of remedies for complaints related to respect for the right to private life or the right to family life, this paper refers only to a few key examples. The Court examined the important question of covert surveillance and personal data retention under Article 8 in the landmark cases of *Klass and Others v. Germany* and *Leander v. Sweden*.[130]

In *Klass and others*[131] the Court emphasised,

> 'that it is the secrecy of the measures which renders it difficult, if not impossible, for the person concerned to seek any remedy of his own accord, particularly while surveillance is in operation. Secret surveillance and its implications are facts that the Court, albeit to its regret, has held to be necessary, in modern-day conditions in a democratic society, in the interests of national security, and for the prevention of disorder or crime. The Convention is to be read as a whole and therefore, any interpretation of Article 13 must be in harmony with the logic of the Convention. The Court cannot interpret or apply Article 13 so as to arrive at a result tantamount in fact to nullifying its conclusion that the absence of notification to the person concerned is compatible with Article 8 in order to ensure the efficacy of surveillance measures. Consequently, the Court, consistently with its conclusions concerning Article 8, holds that the lack of notification does not, in the circumstances of the case, entail a breach of Article 13'.

129 *Roman Zakharov v. Russia* [GC], Application no. 47143/06, Judgment 4 December 2015, § 307.
130 *Leander v. Sweden*, Application no. 9248/81, Judgment 26 March 1987.
131 In *Klass and other v. Germany*, the applicants, German attorneys, contested the legality of the legislation that allowed authorities to listen in on phone calls and open and examine mail in order to safeguard state security. The applicants disputed the law on the grounds that it hindered legal action against the order and execution of the measures and that it did not require notice of the individuals once the surveillance had ended. The applicants claim that the contested legislation, notably because the person concerned is not informed of the surveillance measures and cannot have recourse to the courts when such measures are terminated, violates Article 8. The applicants also alleged a breach of Article 13.

In *Leander*,[132] the Court reaffirmed that an effective remedy under Article 13 must mean a remedy that is as effective as can be, having regard to the restricted scope for recourse inherent in any system of secret surveillance for the protection of national security. It further decided on the combination of several remedies and found that the aggregate of the remedies set out above satisfied the conditions of Article 13 in the particular circumstances of the instant case, endorsing two principles important for Article 13: the particularities of specific case principles and the aggregate of the remedies principle.

Since the topic of covert surveillance measures potentially carries the risk of abuse, the Court emphasised that, it is, in principle, desirable to entrust supervisory control to a judge, as judicial control offers the best guarantees of independence, impartiality, and proper procedure. As soon as notice can be issued without exposing the purpose of the control, information should be provided to the concerned persons after termination of the surveillance measures. In principle, it is necessary to provide that person with a minimum amount of information about the decision that may be challenged, such as its date of adoption and the authority from which it originates, to allow them to request a review of the proceedings regarding interference with their right to exercise their right to private life.[133]

5. Some Challenges Regarding Article 13 of the Convention and Final Remarks

According to Article 1 of the Convention, the primary responsibility for implementing and enforcing rights and freedoms guaranteed by the Convention lies with the national authorities. Safeguarding human rights at the national level implies respect for guaranteed rights and protection in case of violation; that is, the existence of an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.

132 In *Leander* case, the applicant had been refused employment as a carpenter at a Naval Museum, having been assessed as a security risk on the basis of information stored on a register maintained by State security services that had not been disclosed him. The Applicant complained that he should have been provided with the information in question, and should have been given the chance to contest it. The applicant claimed that the personnel control procedure, as applied in his case, gave rise to a breach of Article 8. he applicant further maintained that the same facts as constituted the alleged violation of Article 8 (Art. 8) also gave rise to a breach of Article 10. Finally, he complained under Article 13 of the Convention of the fact that neither he nor his lawyer had been given the right to receive and to comment upon the complete material on which the appointing authority based its. He also objected that he had not had any right to appeal to an independent authority with power to render a binding decision in regard to the correctness and release of information kept on him.

133 *Roman Zakharov v. Russia* [GC], Application no. 47143/06, Judgment 4 December 2015, §§ 233, 287 and 291.

> 'In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaints before the Court.'[134]

The growth and progress of the Court's case law under Article 13 have been mostly focused on the scope of Article 13 and explanation of general notions connected to it – 'a national authority,' 'an arguable claim' and 'an effective remedy.' The Court has also developed a case-law on the applicability of complaints under Article 13 and the relationship of this provision with other provisions of the Convention. However, this right's supplementary role and its dependent nature have determined the relationship of Article 13 with other significant rights, as it can only be considered and examined in relation to other substantial Convention rights.

Although Article 13 of the Convention represents one of the most significant tools for implementing the Convention in practice at the national level, the ECtHR, in interpreting Article 13 of the Convention, has offered limited principled reasoning in its approach regarding the applicability of this right, focusing more on the issue of overlapping and absorption of this more general Convention provision by other, more specific (*lex specialis*) provisions. Moreover, the 'proceduralisation'[135] of some Convention rights has led to an overlapping of Article 13 with other Convention rights and to uncertainty in the Court's approach as to whether and when Article 13 complaint will be examined. Some guidelines and methodology exist; but it is still occasionally unclear if the Court will separately have examined 'an effective remedy' complaint. Although there is a continuous tendency toward consistency in the interpretation of this clause, there are still outstanding issues such as the Court's unclear methodology for examining Article 13 complaints.

In cases of systemic violation of substantive Convention rights, the Court, at times, in the framework of the 'pilot' judgment procedure, chooses to separately examine the complaint under Article 13 of the Convention, while simultaneously giving indications under Article 46 of the Convention and ordering adoption of general measures that would provide an effective domestic remedy.[136]

> 'Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the

134 *Kudła v. Poland* [GC], Application no. 30210/96, Judgment 26 October 2000, § 152.
135 See footnote 15.
136 *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, Application no. 60642/08, Judgment 16 July 2014, §§ 131–136 and 144–150 and *Kurić and others v. Slovenia*, Application no. 26828/06, Judgment 26 June 2012, §§ 369–374 and 406–415.

> person affected by this problem has applied to the Court or not. One alternative might be to adopt an *ad hoc* approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.'[137]

The real purpose of Article 13 of the Convention is most evident in the work of the Committee of Ministers in supervising the execution of Court's judgments. Namely, the question of the existence of an effective legal remedy arises in communications that respondent states submit in the process of executing the Court's judgments. Given the importance of avoiding repetitive applications before the Court, the question of the existence of an effective remedy before national authorities should always be addressed in the action plans or action reports, especially in systemic and structural problems, even where no violation of Article 13 has been found or has not been examined by the Court.[138]

This is also reflected in the declarations adopted in Interlaken process – specifically the Interlaken declaration, which emphasised that regarding the implementation of the Convention at the national level, States must commit themselves to

> 'ensuring, if necessary by introducing new legal remedies, whether they be of a specific nature or a general domestic remedy, that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate'.[139]

A similar conclusion derives from the Brighton declaration, which affirms the strong commitment of States Parties to fulfil their primary responsibility to implement the Convention at national level 'considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention'.[140] The Brussels Declaration called upon the States Parties, prior to and independently of the processing of cases by the Court, to

> 'ensure the effective implementation of the Convention at national level, take effective measures to prevent violations and to provide effective domestic remedies to address alleged violations of the Convention'.[141] Finally, the Copenhagen declaration called upon the States Parties to continue strengthening the

137 Recommendation REC(2004)6 of the Committee of Ministers to member states on the improvement of domestic remedies, pp. 13–19.
138 See Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights, p. 9.
139 Interlaken declaration, p. B4 d).
140 Brighton declaration, p. 9 III.
141 Brussels declaration, p. B1 e.

> implementation of the Convention at the national level in accordance with previous declarations Brighton declaration adopted in the Interlaken process 'in particular by creating and improving effective domestic remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention, especially in situations of serious systemic or structural problems'.[142]

Lastly, the purpose of Article 13 is aligned with another supplementary tool: Recommendation REC(2004)6 of the Committee of Ministers to Member States on the Improvement of Domestic Remedies. This document, although non-legally binding, represents an important instrument for the accomplishment of the key objectives of Articles 1 and 13: to ensure that the rights guaranteed by the Convention are effectively enjoyed at the domestic level and that, in the event that a protected right is violated, a domestic remedy is provided. It provides additional guidelines for each Member State on how to improve existing domestic legal remedies and make them more effective or create new ones.

All this, along with the Court's case-law, gives States a clearer framework for fulfilling their responsibilities to provide, with an effective domestic legal remedy, sufficient protection against the violation of Convention rights, and to ensure that everything will function in practice as intended in theory.

142 Copenhagen declaration, p. 16a.

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