The right to an effective remedy for Asylum-seekers before the European Court of Human Rights

By

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Abstract

The right to an effective remedy is a fundamental principle of international human rights law, crucial for the protection of individuals, especially for asylum seekers who have faced human rights violations in their countries of origin. Due to the importance of this right, it was included in art. 13 of the European Convention on Human Rights (ECHR), however, this article did not provide a clear definition of what is an effective remedy.

The European Court of Human Rights (ECtHR), as the judicial body responsible for the application of the ECHR, discussed the right to an effective remedy in many cases in which the applicants claimed that their right to an effective remedy has been violated. The Court did not provide a specific definition rather it provided requirements for a remedy to be effective which will be discussed in this thesis. As the ECHR is applied to "everyone" as provided in article 1 of the Convention, asylum seekers can claim the violations of their right to an effective remedy before the ECtHR. This can provide a significant guarantee in the protection system for asylum seekers in different ways.

Art. 13 of the ECHR stipulated the national authorities are the main responsible for providing the right to an effective remedy. In case the national authorities failed in providing such remedy, hence the role of the ECtHR comes to provide such remedy which is known as the principle of subsidiarity. Also, as asylum seekers are the more vulnerable groups for forcible refoulement, it became important to discuss if the right to an effective remedy can be protect them against such refoulement.

This thesis aims to investigate the right to an effective remedy as evolved by the case law of the European Court of Human Rights. It analysis the interpretation of this right by the ECtHR to explain its requirements, type, and scope of application, Also, it focuses on the principle of subsidiarity and how it can be applied in this regard. Finally, it discussed the implementation of the right to an effective remedy in conjunction with the principle of non-refoulement to explain the scope of protection that can be guaranteed for asylum seekers against forcible refoulement.
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1. Introduction
1.1. Background:

The world has witnessed several human-made and natural disasters that forced people to flee, leaving their homes, families, and jobs, and moving to other places inside their country or another country. According to The United Nations High Commissioner for Refugees (UNHCR), the number of people who have been forcibly displaced worldwide was more than 100 million people by May 2022. Among this number, there are 27.1 million refugees, whether under the UNHCR's mandate or the UNRWA's mandate and 4.6 million asylum seekers.¹

If those people flee but remain inside the territory of their country, then they are labeled as internally displaced persons (IDPs).² If they fled war, violence, conflict, or persecution and crossed the borders of their home countries internationally into another country that is a party to the 1951 UN Convention Relating to the Status of Refugees and/or the 1967 Protocol, they can be qualified as refugees which are “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it,”³ while asylum seekers are those individuals who are seeking international protection; in other words, whose their claims for protection have not been decided yet by the country. Hence, not every asylum-seeker will ultimately be recognized as a refugee, but every refugee was initially an asylum-seeker.⁴

Despite these increasing numbers of asylum seekers, the international protection regime cannot adequately respond to their basic needs.⁵ In contrast, the regime faces

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³ See: Article 1 of the 1951 UN Convention Relating to the Status of Refugees.
⁵ UNHCR and the Inter-Parliamentary Union, A guide to international refugee protection and building state asylum systems, 2017, p. 73, available at: https://www.unhcr.org/3d4aba564.pdf
unprecedented challenges as many states recently increased the restrictions and the requirements and denied asylum to those fleeing conflict and persecution.⁶

For example, Greece decided to return asylum seekers from Syria, Afghanistan, and Somalia who arrived from Turkey arguing that Turkey is a "safe country," and the government decided not to accept asylum claims.⁷ This means that the Greek authorities did not consider the vulnerability of the persons who claimed asylum for other reasons once they came from a "safe country," which resulted in dire consequences and put the lives of those persons in danger and exposed them to the risk of refoulement.

The European Convention on Human Rights (ECHR) is an international treaty launched by the Council of Europe in 1950 to help protect people’s human rights and fundamental freedoms. The Council of Europe created the European Court of Human Rights (ECtHR), which is the supranational court supervising the European Convention on Human Rights (ECHR), to decide complaints ("applications") submitted by individuals and States concerning violations of the Convention for the Protection of Human Rights and Fundamental Freedoms as stated in article 32 of the ECHR.

The ECtHR has played a significant role in the field of human rights since the beginning of its operation in 1959. Although the ECHR does not directly refer asylum seekers in the provisions of the conventions, the Court dealt with many cases related to the protection of their rights under the Convention, which highlights the significance of the court’s judicial arena for bringing to light systematic shortcomings of the member-states of the Council of Europe’s legal orders as regards the protection of asylum seekers rights.

One of the fundamental rights included by the ECHR is the right to an effective remedy which is provided in Article 13 of the Convention which states that “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.”


In the early ECHR case-law, it discussed the implementation of Article 13 in cases related to expulsion or extradition. The Court had the chance to significantly discuss this issue in Soering v. The United Kingdom in 1989 to decide if there was an effective remedy in the UK in respect of the applicant’s complaint. Also, the Court, in Cruz Varas and others vs Sweden, investigated whether the applicants’ expulsion amounted to inhuman and degrading treatment and interference with the right to family life, and it discussed the applicant’s complaint of a violation of the right to a fair hearing and to an effective remedy.

Asylum seekers are those whose international protection applicants have not decided yet. Despite their vulnerability and special needs, their legal situation has been a matter of debate by the courts and jurists in the contracting parties of the ECHR during the last decades, especially with the increase of their flows to these countries with the absence of any express provision related to them in the Convention. Hence, a question as to the application of the ECHR and particularly the right to an effective remedy for asylum seekers has been raised during the ECtHR case laws.

The importance of this right for asylum seekers relies on its inherent link to the other asylum seekers’ rights as it guarantees their receiving of these rights appropriately and sufficiently. Although they are entitled to many rights ensured by the ECHR, the ECtHR practices regarding the right to an effective remedy have been criticized regarding its sufficiency and implementation. Therefore, this study will focus on the right to an effective remedy regarding its definition, types, and scope of application. Then, it will discuss the principle of subsidiarity on the basis that it is fundamental in deciding the role of the court in implementing effective remedies where national authorities became unable to provide such remedies. Finally, it will focus on the principle of non-refoulment in conjunction with the right to an effective remedy due to

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8 Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, available at: https://www.refworld.org/cases_ECHR,3ae6b6fec.html [accessed 5 October 2023]
the importance of not this principle in ensuring the right of asylum seekers to be protected against expulsion or extradition.

1.2. **Purpose and Delimitations:**

This thesis aims to investigate the right to an effective remedy as evolved by the case law of the European Court of Human Rights. It focuses on the process of the application of this right regarding the principle of subsidiarity which refers to the responsibility of the national authorities to provide an effective remedy otherwise the ECHR will address the issue. It gives more attention to the most significant right related to the asylum seekers which is the protection against forcibly refouled to their home country.

This thesis aims to examine the following questions:

1- What is the definition of the right to an effective remedy, what is its scope of application, and the types of effective remedies?
2- How did the ECtHR in its case-laws apply the principle of subsidiarity as to the right to an effective remedy?
3- What are the obligations of the contracting states under the right to an effective remedy in its extraterritorial application of the ECHR?
4- What is the relation between the right to an effective remedy and the principle of non-refoulement and how does the ECtHR explain this relation as to asylum-seekers?

1.3. **Methodology:**

The research methodology to be followed in this study will be a mixed approach. The quantitative legal approach will be used to examine the asylum cases heard by the ECtHR during the last years, while the qualitative legal analysis approach will be used to analyze the sufficiency of the right to an effective remedy applied by the Court. Moreover, it will be used to illustrate how the ECtHR can promote its implementation in this regard.

The scholarly approach undertaken in this study will be non-empirical legal research as the purpose of this study is to examine the sufficiency of the right to an effective remedy applied by the ECtHR for asylum seekers. In selecting the cases, the researcher will give more focus to the most remarkable judgments in which the ECHR
established significant rules as to the right to an effective remedy. It focuses mainly on the significant judgments in which the Court established its approaches to the research issue. Although there are enormous cases in which the Court issued decisions as to the research questions, the researcher will focus on the main cases that the Court refers to in its decisions as a precedent.

Moreover, the researcher will use the cases referred to in the guide published by the ECtHR itself to explain its main principles as to the right to an effective remedy. Hence, these cases are approved by the Court as having a significant impact in establishing its principles and approaches in this regard. Finally, the researcher uses a keyword search on the ECHR's HUDOC database to examine a large number of cases related to the research issues to select the most relevant ones.

As to the key legal concepts, the research focused mainly on international treaties and conventions as one of the main sources of international law. In case it is not possible, the researcher uses writings of publicists and international organizations and agencies as their interpretations are considered a material source of international law.
2. The right to an effective remedy under Article 13 of the ECHR:

2.1. Introduction:

The right to an effective remedy is one of the basic rights included in the ECHR to guarantee that everyone will get adequate compensation for the violations that have been committed. Since the purpose of this thesis is to discuss the right to an effective remedy, this section explains the definition of this right, its scope of application, and the types of effective remedies.

2.2. Definition of the right to an effective remedy under Art. 13 of the ECHR and its requirements:

The right to an effective remedy was established in art. 13 of the ECHR by providing that “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”\(^{11}\). This article is considered one of the main elements of the system of the ECHR which starts by addressing the high contracting parties to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Thus, the decisive role of Art. 3 ensures that those whose rights are violated shall have an effective remedy by the national authority. In case the national courts’ remedies were not adequate, and as a result, the ECtHR issued another judgment Art. 46 of the Convention includes the binding force and the execution mechanisms of the Court’s judgments.\(^{12}\)

In this meaning, the right to an effective remedy has been also one of the remarkable rights in international human rights law as it was indicated in Art.8 of the Universal Declaration of Human Rights (UDHR) which provides that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”\(^{13}\) and Art.2 (3) of the International Covenant on Civil and Political Rights (ICCPR) which states that “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose

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\(^{11}\) Article 13 of the European Convention of Human Rights.

\(^{12}\) Council of Europe, GUIDE TO GOOD PRACTICE IN RESPECT OF DOMESTIC REMEDIES, 2013, p. 7, available at: https://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf

\(^{13}\) Article 8 of the Universal Declaration of Human Rights (UDHR) of 1948.
rights or freedoms as herein recognized are violated shall have an effective remedy...”14.

From the European Union’s perspective, this right has been included in the EU Charter of Fundamental Rights which provides in art. 47 that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article...”15. Also, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection is provided in Art. 46 that “Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal...”16

Although the aforementioned articles indicate the right to an effective remedy, they did not explain the definition of ‘remedy’ nor the requirements to be ‘effective’. However, these articles demonstrate the importance of the right of an effective remedy for an effective human rights policy. At the same time, all these articles refer to the domestic authorities’ duty to guarantee this right virtue to the principle of subsidiarity which means that the ECtHR serves as a ‘safety net’ in case of the failure of the national authorities to act properly. In other words, the domestic authorities should be given priority to address the alleged violations according to its legal system, and the ECtHR will act as a supervisor for the national remedies and will only intervene if the latter is not effective.17

For the remedy to be effective, it needs to be accessible, sufficient, adequate, and capable of directly remedying the alleged violations. This also includes the fairness of the trial in which the parties are represented equally before the court.18 However, the remedy must not be a judicial one as the ECtHR has declared in many situations that

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14 Article 2/3 of the International Covenant on Civil and Political Rights (ICCPR) of 1966.
the national authority provides appropriate relief and the remedy should be effective in practice as well as in law.\textsuperscript{19}

Also, in McFarlane v. Ireland (2010), in which the applicant claimed a violation of his right to an effective remedy with the absence of a domestic effective remedy, the ECtHR declared that for a remedy to be effective it must be: (1) accessible, (2) be capable of providing redress in respect of the applicant's complaints, and (3) offers reasonable prospects of success.\textsuperscript{20} As a result, for a remedy to be effective, it should fulfill specific requirements as follows:

\textbf{2.2.1. Substantive requirement:}

This requirement is related to the core rights guaranteed by the ECHR. As has been mentioned above, art.13 grants the right to an effective remedy for “...rights and freedoms as set forth in this Convention are violated..” This means that the remedy will be available to be claimed by the individuals whose rights and freedoms under the ECHR are violated. This has been confirmed by the Court in Rotaru v. Romania by stating that Art. 13 guarantees the availability of a remedy to enforce ECHR rights and freedoms at the national level.\textsuperscript{21}

Also, the availability of the remedy should be clear in practice as well as in law. This is related to the inclusion of the remedies in the domestic legislation as the ECtHR stated in Conka v. Belgium that the requirements of art.13 “..take the form of guarantee and not of a mere statement of intent or a practical arrangement.”\textsuperscript{22} Hence, the remedies need to be included in states’ laws and regulations not merely a matter of goodwill or practical arrangements.

\textbf{2.2.2. Procedural requirement:}

As the ECtHR stated for a remedy to be effective, it must be accessible. The concept of accessibility is not limited only to the remedy itself, but it includes the entire process of trial. This includes the stages before the trial which include the legislation and the

\textsuperscript{19} See for example: CASE OF AKSOY v. TURKEY, Application no. 21987/93, JUDGMENT, 18 December 1996, para 95.
\textsuperscript{20} See Case of McFarlane v. Ireland, Application no. 31333/06, Judgement, 10 September 2010, para 114, available at: \texttt{McFARLANE v. IRELAND (coe.int)}
\textsuperscript{21} See Case of Rotaru v. Romania, Application no. 28341/95, Judgement, 4 May 2000, para 67, available at: \texttt{ROTARU v. ROMANIA (coe.int)}
access to legal aid, as well as the process of the implementation of the court’s judgments and decisions as included in principle 9 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.23

Therefore, the complainants of a case should be able to claim the violations of their rights before the national authorities first, and before the ECtHR at a later stage. This is inherently linked to the concept of “access to justice” which is an evolving concept; it does not have a categorical definition. Nevertheless, it can be defined as “access to lawyers and courts and as complexly as an equal right to participate in every institution where [the] law is debated, created, found, organized, administered, interpreted and applied”.24 This will have particular importance in speaking about the asylum seekers’ access to justice.

As a result, this requirement runs parallel to the right to a fair trial which was stated in Art. 6 of the ECHR by providing that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. This right includes general guarantees as well as specific ones. The general guarantees include fairness, public hearing, and reasonable time, while the specific guarantees the presumption of innocence, and the right of a defense.25

Hence, it can be said that the effectiveness of a remedy includes the ability of the applicants to submit their claims before the national authorities, and in the case of the failure of the domestic remedies, they should be able to access the ECtHR to submit their claims, be represented equally with the other party before the court in a fair trial, effective investigation in a reasonable time, and be able to defend their claims before the concerned bodies.

23 Principle 9 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides that “States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid’. Principle 10 provides that special measures should be taken for asylum. See: United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Resolution adopted by the General Assembly [on the report of the Third Committee (A/67/458)], 2012.


However, it should be noted that the ECHR held that the right to a fair trial does not apply to asylum cases as to their expulsion on the ground that asylum “do not concern the determination of applicant’s ‘civil right’ or obligation or of a criminal charge against him within the meaning of article 6”\(^{26}\). Also, despite the fact that Article 1 of Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1984 ensured the aliens’ right for their cases to be reviewed before a decision of expulsion made against them, it gives the state parties the right to expel aliens for the interests of public order or national security purposes\(^{27}\). As the asylum issue has been considered a matter of national interest for its various effects\(^{28}\), states can simply expel asylum seekers invoking that such acts are for national interest.

2.2.3. Institutional requirement:

Art.13 indicates that the right to an effective remedy is before “…a national authority….”. The utilization of the term “authority” refers to that the remedy does not need to be claimed and addressed before judicial bodies, it can be before any official body. Judicial institutions indeed guarantee more independence, access for complaints, and enforceability of awards, but with the generality of Art.13, it can be administrative or other entities.\(^{29}\) What is important in this regard is that this body can provide an effective remedy. The ECtHR decided that in considering whether the body can provide an effective remedy different factors shall be considered including the facts of the case, the nature of the right at issue, and the powers and guarantees of the body.\(^{30}\)

\(^{26}\) Maaouia v. France, Appl. no. 39652/98, Council of Europe: European Court of Human Rights, 5 October 2000, p. 9, 11, available at: https://www.refworld.org/cases, ECHR, 3ae6b74c0.html [accessed 6 October 2023]

\(^{27}\) Article 1 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1984.


\(^{29}\) See Case of Z and others v. the United Kingdom. Application no. 29392/95, Judgement, 10 May 2001, para 110, available at: Z AND OTHERS v. THE UNITED KINGDOM (coe.int)

2.3. Scope of the application of the right to an effective remedy:

For the purpose of this study, the scope of the application of the right to an effective remedy means the framework within the state parties are obliged to provide this right. Generally speaking, state parties are obliged to ensure the right to an effective remedy to everyone within its jurisdiction as Article 1 of the ECHR provides that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”31. As Article 13 relates to the right to an effective remedy in part of Section I of the Convention, this means that Article 1 shall apply to the right to an effective remedy.

Hence, the scope of the application of the right to an effective remedy shall be considered on personal and territorial scope as follows:

2.3.1. Personal scope:

Article 1 of the ECHR utilized the term ‘everyone’ to describe those whose rights and freedoms are protected by the Convention. ‘Everyone’ indicates that the personal scope of the application of the rights provided by the Convention is not limited to specific groups or categories regardless of nationality. This means that those whose rights are violated can claim their rights before the ECtHR even if they are neither nationals of the state concerned nor any other contraction party.32

This scope goes far to include persons with unknown nationality as in the case of Aswat v. the United Kingdom (2013) in which the Court decided the case despite the applicant’s nationality being unknown33. This also includes stateless persons as in the case of Kurić and others v Slovenia (2012) in which many of the applicants were stateless persons claiming violation of among others, article 13 of the right to an effective remedy34. Moreover, asylum seekers who left their home country enjoy the right to an effective remedy against their home country and it became the responsibility

31 Article 1 of the European Convention of Human Rights.
33 ASWAT v. THE UNITED KINGDOM, Application no. 17299/12, Council of Europe: European Court of Human Rights, 16 April 2013, para. 1, available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2217299%22],%22itemid%22:[%22001-118583%22]}
34 Kuric and others v. Slovenia, Application no. 26828/06, Council of Europe: European Court of Human Rights, 26 June 2012, available at: https://www.refworld.org/cases,ECHR,4fe9c88c2.html [accessed 6 October 2023]
of the received state to ensure their right to an effective remedy as in the case of Gebremedhin (Gaberamadhien) v France (2007) in which the ECtHR decided that the applicant, Eritrean national whose application for asylum at Charles de Gaulle airport in Paris was rejected by the French authorities, that is why he claimed that his removal to Eritrea can violate Article 13 of the ECHR.35

Furthermore, the ECtHR did not make a distinction in applying the right to an effective remedy to adults and minors as the Court decided the case of M.A. v. ITALY (2023) in which the applicant who is unaccompanied minor migrant claiming that she is a victim of sexual abuse at a reception center, her right to an effective remedy has been violated with the failure of the implementation of the procedural guarantees set up for minor migrants.36

The right to an effective remedy in this regard shall also be applied regardless of the legal status of the asylum seeker in the state party concerned as the ECHR applied it whether the applicants are lawfully resident at the state party or not. This was adopted by the ECtHR in the famous case of Chahal v. The United Kingdom (1996) in which the applicant, who claimed a violation of his right to an effective remedy for the lack of national courts, entered the United Kingdom illegally and yet the Court considered their application is admissible.37

This leads us to a simple finding that asylum seekers enjoy the rights and freedoms secured by the ECHR. Hence, state parties are obliged to secure these rights to asylum seekers, with nationality or with unknown nationality, adults and minors, whether they are nationals of the contracting parties or not, and whether they entered the country legally or not.

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35 GEBREMEDHIN [GABERAMADHIEN] v. FRANCE, Application no. 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, paras. 1,10, available at: https://www.refworld.org/cases,ECHR,3ae6b6f910.html [accessed 3 October 2023]

36 M.A. v. ITALY, Application no. 70583/17, Council of Europe: European Court of Human Rights, 31 August 2023, available at: https://hudoc.echr.coe.int/fre#(/%22tabview%22/%22document%22,%22Itemid%22/%222001-226390%22) [accessed 6 October 2023]

2.3.2. Territorial scope:

The territorial application of the right to an effective remedy can be extracted from the ECHR, besides the general rules of the interpretation of treaties as provided by the Vienna Convention on the Law of Treaties. As mentioned before Article 1 of the ECHR provides that contracting states shall ensure the rights and freedoms provided by the Convention within its ‘jurisdiction’.

The general rule regarding the territorial application of treaties provides that a treaty is binding upon the contracting parties in respect of its entire territory unless a different intention appears from the treaty or is otherwise\textsuperscript{38}. In examining the territorial application of the ECHR, by reading Article 1 and Article 56 of the ECHR, it can be extracted that the ECHR applies to everyone within the state jurisdiction. However, Article 56 of the ECHR provides that “Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible”\textsuperscript{39}.

In the remarkable case of Al-Skeini and Others v. the United Kingdom (2011), the ECtHR decided that jurisdiction was in the “threshold criterion”\textsuperscript{40}. Therefore, contracting states are under a legal obligation to ensure the right to an effective remedy to everyone within its jurisdiction. However, an argument has been raised as to whether the term ‘jurisdiction’, in Article 1 of the ECHR, covers only the territory of the state, with the primary or essential meaning of jurisdiction that it is ‘territorial’\textsuperscript{41} or it can extend to all the cases in which the state parties can practice jurisdiction.

The ECtHR case law provides other criteria in which states can exercise extra-territorial jurisdiction and by this, it is obliged to guarantee the rights and freedoms provided by the ECHR, including the right to an effective remedy, to persons who fall within its jurisdiction. In this regard, the ECtHR developed two criteria:


\textsuperscript{39} Article 56 of the ECHR.

\textsuperscript{40} Al-Skeini and Others v. United Kingdom, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011, para. 130, available at: https://www.refworld.org/cases,ECHR,4e2545502.html [accessed 9 October 2023]

"Effective Control":

The criterion of "effective control" is decisive in deciding the responsibility of the contracting states in violating their obligations under the ECHR. Hence, it can be said that the ECtHR can hold the state responsible in case of effective control whether the effective control is exercised over a person or areas\textsuperscript{42}.

The first case, regarding effective control over persons, can be extracted from the ECtHR’s famous decision in Öcalan v. Turkey (2005) when the court found Turkey was responsible for violating Öcalan’s rights based on the fact that the Turkish agents were practicing physical control over him in Kenya where he was arrested and transferred to Turkey. It found that the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.\textsuperscript{43}

The second case regarding effective control over an area can be found in the case of Ilascu and Others v. Moldova and Russia in which the Court held that despite the fact the alleged violations were committed by the Moldavian Republic of Transdniestria (the “MRT), the applicant was within the jurisdiction of Russia as it was practicing effective control through its organs of power and its administration\textsuperscript{44}.

Furthermore, the ECtHR reached the same conclusion when a state exercises factual control over a ship and its crew during interception operations. This was the case in Medvedyev and Others v. France (2010) when the court found that the applicants were within the jurisdiction of France as it was exercising full and exclusive control over the Cambodian vessel from the time of its interception on the high seas\textsuperscript{45}.

\textsuperscript{43} Öcalan v. Turkey, 46221/99, Council of Europe: European Court of Human Rights, 12 March 2003, para. 91, available at: https://www.refworld.org/cases,ECHR,3e71a9d84.html [accessed 9 October 2023]
\textsuperscript{44} Ilascu and Others v. Moldova and Russia, 48787/99, Council of Europe: European Court of Human Rights, 8 July 2004, para. 392, available at: https://www.refworld.org/cases,ECHR,414d9df64.html [accessed 9 October 2023]
Moreover, a state’s extra-territorial jurisdiction exists when the state can exercise effective control over a territory as a result of lawful or unlawful military action. This was declared by the ECtHR in its landmark judgment in Loizidou v. Turkey (1995) when the Court found that acts committed in Northern Cyprus fall within Turkey’s jurisdiction as this area was under the military occupation of Turkish forces.

- “State-agent model”:

The second criterion is when states can exercise extra-territorial jurisdiction through the acts of its diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law. In W.M. v. Denmark (1992) in which the applicant, a citizen of the German Democratic Republic, entered the Danish embassy in East Berlin to seek diplomatic asylum. But the Danish ambassador handed him over to the police of the host State, the EComHR found that the State party’s jurisdiction extends extraterritorially to include persons under the authority of the State’s diplomatic or consular agents. The ECtHR concluded that “… authorized agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged”.

To face the increasing numbers of asylum seekers, since the late 1980s, the countries receiving migration movements (Western European countries, the United States, Australia, and Canada) have sought to tighten their immigration policies and strengthen border control mechanisms by adopting non-access or interception policies. Therefore, the practices of states in confronting the flow of asylum are not

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48 Eman Hamdan, The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Brill | Nijhoff, 23 May 2016, p. 47, available at: https://brill.com/display/title/33338?language=en
limited to the traditional form of refusing to accept persons upon their arrival or after their entrance to their territories. In other meaning, states have increasingly used extraterritorial policies to prevent people from crossing their borders, for the purpose of excluding the jurisdiction\textsuperscript{50}.

These practices can take place in the form of physical interception, which is carried out by intercepting ships suspected of carrying irregular migrants or asylum seekers, either within the territorial waters of other states or on the high seas. Some countries try to intercept boats used to smuggle migrants or asylum seekers as far as possible from their territorial waters, and after the interception, the passengers are disembarked either on the territory of the intercepted state, or on the territory of a third country that agrees to this, and in most cases, the purpose after the interception is It is the return of all irregular passengers without delay to their country of origin\textsuperscript{51}.

It may take also the form of administrative interception, which is done by establishing administrative measures or procedures with the aim of intercepting illegal immigrants, such as appointing communication officers for airlines at major international airports in the countries of departure and in the countries of transit to prevent the boarding of persons with incorrect documents, or to provide financial and other assistance from potential destination countries to enable diaspora countries to detect, detain and deport persons suspected of having the intention of entering the destination country in an irregular manner.

Although these policies officially aim to combat illegal immigration and regulate migration flows, in reality, they do not distinguish between those who seek international protection and those who seek protection from refoulement, and thus these policies contradict the principle of pacta sunt servanda “the principles” of pacta sunt servanda” and the principle of good faith under Articles 26 and 31 of the Vienna Convention on the Law of Treaties, because it could lead to results inconsistent with

\textsuperscript{50} Andrew Brouwer and Judith Kumin, Interception and Asylum: When Migration Control and Human Rights Collide, Refuge Canada’s Journal on Refuge 21(4), December 2003, p. 8, available at: https://www.researchgate.net/publication/265240973_Interception_and_Asylum_When_Migration_Control_and_Human_Rights_Collide/link/54819a350cf22525dcb626ae/download

the purpose and objective of the European Convention on Human Rights in prohibiting the refoulement of ill-treatment.

Despite the lack of an internationally accepted definition of interception, its meaning must be derived from studying the practices of states in the past and present, and thus some define it as including all measures applied by the state, outside its national territory, in order to prevent, interrupt or stop the movement of persons who do not carry the documents required to cross. They cross international borders by land, air, or sea, and make their way to the country of potential destination.

Here the question arose about the extent to which the principle of non-refoulement can be applied to the policies of states in this context, given that they take place outside their territorial borders and jurisdiction. To answer this question, we would like to say that it is difficult to limit the various policies in this context, but we can address the most important of these policies as follows.

These practices can take several forms such as interception processes and visa requirements which will be discussed as follows:

1- Interception and rescue at sea:

There is an agreed definition of interception, however, the UNHCR defined interception as “…encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination”52.

Interception can be physical, which is conducted by intercepting vessels suspected of carrying irregular migrants or asylum-seekers, either within territorial waters or on the high seas, and it can be administrative objection, which is done by establishing administrative measures or procedures aimed at intercepting illegal immigrants, such as the appointment of airline communication staff at major international airports in the countries of departure and in transit countries, to prevent the boarding of persons with incorrect documents to enter the country of destination irregularly53.

In order to determine if states are obliged to provide the right to an effective remedy during interceptions, we can distinguish between two cases, the first case being that the interception process is within the territorial waters of the State, in which case it does not raise any difficulties since the State’s jurisdiction extends to its territorial waters as part of its territory, and therefore, when States implement such measures, they are obliged to respect their obligations under the conventions to which they are parties, including the right to an effective remedy under art.13 of the Convention54.

In the second case, however, the problem arises when such measures are taken on the high seas or in the territorial sea of another State, it is well established that the jurisdiction of a state extends beyond its territory to ships flying its flag, therefore when intercepted persons are transferred to a vessel flying the flag of the intercepting State, the objecting state exercises de jure and de facto jurisdiction over those intercepted persons, and the objecting state is obliged to respect their right of an effective remedy55.

B- Visa Requirements:

While citizens of a country have the right to enter its territory, non-citizens are often required to obtain a visa to enter the territory of a foreign state and in some cases to transit through international transit zones at airports. Thus, visa policies enable countries to assess the situation of each person seeking to enter their territory and provide them with broad discretion in accepting or rejecting the applicant, visa regulations vary from country to country, with some countries imposing visa requirements on all foreigners. Most countries impose these requirements on citizens of certain countries, especially those that export migrants, refugees, or asylum-seekers in general56.

54 Article 2/3 of the United Nations Convention on the Law of the Sea of 1981 which provides that “3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”
The difficulty of the problem lies in the relationship between the application for valid travel documents and the visa on the one hand, and the situation of asylum seekers on the other, a person who fears abuse at the hands of the authorities of his country, is unlikely to risk requesting travel documents from these same authorities or requesting a visa from a foreign embassy or consulate where the visa section is staffed by local staff, and even when the protection applicant takes the risk and applies for a visa, embassies and consulates rarely accept his application.

Moreover, the lack of consulates in some war-torn countries is another practical obstacle for visa protection seekers, and in order to solve this problem, States may completely cancel or temporarily suspend visa requirements for asylum seekers from these countries.

As already mentioned, the extraterritorial jurisdiction of a State party to the European Convention on Human Rights may extend to the acts of diplomatic or consular representatives of a State abroad, who remain under the jurisdiction of the State, and also subject any person to the jurisdiction of the State, to the extent that they exercise State authority over him, and thus the applicant for protection is considered to be subject to the authority of the State's representatives as long as his visa application is pending.

Accordingly, any act or omission of the State's diplomatic or consular representatives in connection with the applicant's application for a visa affecting the applicant's rights may result in the State of destination being held liable under the ECHR, if there is a causal link between the refusal of the visa application by State officials and the foreseeable risk that the applicant may face.

To meet visa requirements, several countries have imposed fines or other penalties, which are an integral part of the visa policy, on carriers (airlines, trains, and freighters) transporting passengers with incorrect documents (without a valid passport or visa) to their territory.

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57 Ibid, p. 495.
Thus, the fact that the carrier’s personnel have this function delegated to the State does not mean that their conduct cannot be attributed to the State, but that their conduct can be attributed to the State because they act in accordance with the State’s instructions, as confirmed by the European Court of Human Rights through its report that States parties cannot absolve themselves of their responsibilities under the European Convention on Human Rights by delegating them to others60.

Therefore, the extraterritorial jurisdiction of a state extends to the acts of its immigration control officials, and this includes airline officials operating at foreign airports, so when such officials prohibit, directly or indirectly, a passenger from boarding a flight, it is clear that they control that person and their conduct falls within the extraterritorial jurisdiction of a state party under the European Convention on Human Rights. If a person’s right to an effective remedy has been violated during these processes, this raises the state’s responsibility for such an act. This result can be reached by following the rule that the conduct of a person or a group of persons is attributed to a state under international law if that person or group of persons acts on the instructions of the State, or exercises elements of governmental authority in default of the official authorities61, and as the state party delegates its authority to the carrier officials, their acts are attributed to the state itself. This is also affirmed by the ECtHR in Van der Mussele v. Belgium (1983) in which it decided that state parties are still responsible for their acts even if they delegate their authority to others62.

2.4 Types of Effective Remedies:

Art.13 stipulates that a remedy must be effective without mentioning specific remedies or requiring that the remedy should be of a special nature. This means that remedies for the violations of the rights and freedoms included in the ECHR can vary to include different types of remedies with different natures. Hence, the remedy can take different forms of a general or specific nature which will be explained below as follows:

61 Article 8 of the United Nations General Assembly Resolution No. 56/83. Responsibility of States for internationally wrongful acts.
2.4.1. General remedies:

General remedy refers to “the remedy intended to redress a violation of a convention right or freedom by a public authority, without being limited in application to any particular factual or legal context”. General remedies can be of constitutional or legislative nature as follows:

2.4.1.1. Constitutional remedies:

This type of remedy is provided by the national constitutional courts in countries where international conventions have legal value as constitutions. Hence, violations of the ECHR rights or freedoms are considered as a violation of the constitution itself allowing the complaints to submit their claims to the domestic constitutional courts. It should be noted that reaching the constitutional courts imposes resorting to the subordinate courts first according to national legal systems. This remedy is crucial in countries where national laws do not contain adequate remedies. For the constitutional remedy to be effective, the court should be able to redress the violations by different means such as declaration of violations, the ability to overturn the alleged decision, and/or ordering the concerned authority to take a specific action.

2.4.1.2. Legislative remedies:

The second type of general remedies is the legislative remedy which exists in countries where conventions have the legal status of ordinary laws. As a result, individuals can complain about violations of the rights included in the ECHR before the domestic courts directly. This will be governed by the standard procedural rules according to the national legal system. As in the first type, the national courts should be able to provide effective remedy by different types such as compensation or other means of addressing the violated right.

2.4.2. Specific remedies:

Besides the general remedies, several specific remedies can be adopted to address violations of art. 13. Among these remedies are the following:

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64 Ibid, p. 46, 49.
65 Ibid, p. 52.
2.4.2.1. Specific performance:

This is the first type of specific remedies which, in civil law, enforces the terms of the agreement between the concerned parties. This means that when a party breaches its agreement, the other party can claim the performance of the agreement.66 Considering the right to an effective remedy, the injured parties can claim the performance of the state’s obligations regarding the violated rights or freedoms. This type can also include restitution which means to annul or reverse the act that caused the violation. It can also be defined that “Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights or humanitarian law occurred.”67

Restitution shall have a significant importance on many occasions; especially in asylum cases where compensation cannot be effective and does not provide protection for the victims of violations. This is because restitution can include different measures such as the right to reopen criminal proceedings and restoration of different legal rights.68 This remedy has been recognized by art. 41 of the ECHR which provides that “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

2.4.2.2. Compensation:

Compensation is one of the common forms of reparation in the field of human rights. It is intended to offset the damage suffered by the injured party as a result of violation which can be awarded for material and immaterial damages as well. It is measured depending on different factors such as the primary obligation and the damage caused to the injured part.69 However, restitution cannot be effective in many cases such as

67 Principle 19 of the UN Principles on Remedy and Reparation.
violations of the conditions of detention, if the complaint is still in prison. In YURIY v. UKRAINE, the ECtHR has defined specific conditions to evaluate the effectiveness of compensation such as fairness of the trial and the judicial proceedings; particularly the burden of proof.\textsuperscript{70}

\textbf{2.4.2.3. Rehabilitation:}

Rehabilitation is defined by the WHO as “a set of interventions designed to optimize functioning and reduce disability in individuals with health conditions in interaction with their environment”\textsuperscript{71}. Although the ECHR does not mention rehabilitation explicitly, it can be inferred from the European Convention on the Compensation of Victims of Violent Crimes (ECCVVC) and its explanatory report that compensation can include rehabilitation by stating that compensation includes “prescription charges and cost of dental treatment.”\textsuperscript{72}

Therefore, rehabilitation can be one of the remedies applied in violations of the ECHR; however, for rehabilitation to be effective, it should encompass a set of services and processes that allow the victim to reconstruct the harm that has been suffered depending on each circumstance of each case.\textsuperscript{73}

\textbf{2.4.3. Specific Remedies in Asylum Claims:}

As it was mentioned before, the right to an effective remedy is one of the fundamental rights which was included in Art. 3 of the ECHR which includes substantive, procedural, and institutional requirements. The ECtHR addressed these requirements in many cases which will be discussed as follows.

\textbf{2.4.3.1. The right to a fair and effective asylum process:}

During the asylum process, asylum seekers have to pass many stages until a decision is issued by the concerned authority. These stages are different from one state to another; but generally, they have to pass background checks, interviews, processing

\textsuperscript{70} See CASE OF YURIY NIKOLAYEVICH IVANOV v. UKRAINE, Application no. 40450/04, Judgement, 15 October 2009, available at: YURIY NIKOLAYEVICH IVANOV v. UKRAINE (coe.int)

\textsuperscript{71} WHO, Rehabilitation, 10 November 2021, available at: https://www.who.int/news-room/fact-sheets/detail/rehabilitation


\textsuperscript{73} Redress, REHABILITATION AS A FORM OF REPARATION UNDER INTERNATIONAL LAW, December 2009, p.9, available at: https://www.refworld.org/pdfid/4c46c5972.pdf
of the case, and adjudication process if the application was rejected. As part of these processes, the authorities had to evaluate the risks that asylum seekers may face in their home country to decide the acceptance of the asylum application or not after assessing their situations and get clear evidence that they are in real danger or threat.\footnote{UN High Commissioner for Refugees (UNHCR), Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, available at: https://www.refworld.org/docid/3b36f2fca.html [accessed 28 November 2023]}

In many cases, the ECtHR has found that authorities may violate the right of an effective remedy in the asylum process. In the \textit{CASE OF ILIAS AND AHMED v. HUNGARY} in which two Bangladeshi nationals complained that their detention conditions at the transit zone violated their rights under Article 3 as their asylum application were rejected on grounds that Serbia was considered to be a ‘safe third country’ according to Government Decree no. 191/2015. The applicants were subsequently escorted to the Serbian border by Hungarian officers and entered Serbian territory. Where the Grand Chamber agreed with the Court that Hungary did not violate Article 3 as to the conditions in the transit zone\footnote{CASE OF ILIAS AND AHMED v. HUNGARY, Application no. 47287/15, The Gran Chamber Judgement, 21 November 2019, para. 189.}, it found that the Hungarian authorities were not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment regarding the removal to Serbia as a ‘safe country’, as it did not provide any documents or facts to prove that the concerned authority did sufficient analysis or assessment of the risk that applicants face and it relied on the Government Decree only which the court considered it as a ‘presumption’\footnote{Ibid, para 154.}.

Moreover, In M.A. and Others v. Lithuania in which a Russian family with five young children, attempted to lodge asylum applications on the Lithuanian border but were refused entry – without asylum proceedings being initiated – and returned to Belarus, the applicants claimed that did not have an effective remedy as they were not allowed to access to asylum procedures in Lithuania. In this regard, ECtHR decided that there is a violation to the right to Article 13 of the right to an effective remedy as the government failed to provide the applicants with an effective domestic remedy since
they would have been immediately returned to Belarus rather than allowed to wait for the outcome of that appeal at the border or in a reception center for aliens.77

2.4.3.2. The right to access to legal representation:

During the asylum process, asylum seekers should be able to access fair and efficient asylum procedures as well as the right to legal advice in a language they understand.78 In the above-mentioned case, M.A. and Others v. Lithuania, the border guards were not able to deal with applicants in their language as the guards do not speak Russian. In this respect, while the government claimed that the guards should not acquire the Russian language, the Court decided that asylum should be able to access to interpreters and the border-control authorities should be able to identify an asylum request as such and subsequently to act according to their function, which involves relevant language skills. That is why the Court found that there is a violation of the principle of effectiveness.79

In other cases, the ECtHR found that the lack of legal aid can render a remedy under Article 13 inaccessible. In Sharifi and Others v Italy and Greece in which 35 individuals had reached Greece and later traveled by boat to Italy. Upon their arrival at Italian ports, they were intercepted by border guards and immediately refouled to Greece. The applicants, in Italy, were not provided any information about their rights and were not able to get lawyers or translators. Therefore, the ECtHR found the Italian authorities violated Article 13 read in conjunction with Article 3 as there was a lack of communication between the applicant and asylum authorities, a shortage of lawyers and translators, a lack of legal aid, and excessive delays in obtaining a decision.80

Also, in M.S.S. v. Belgium and Greece concerned an Afghan asylum seeker who fled Kabul through Greece and travelled on to Belgium where he applied for asylum, the ECtHR decided that there is a breach of Article 13 taken in conjunction with Article 3

77 CASE OF M.A. AND OTHERS v. LITHUANIA, (Application no. 59793/17), JUDGMENT, 11 December 2018, para. 84, available at: https://hudoc.echr.coe.int/fr#{%22itemid%22:[%22001-188267%22]}
79 Ibid, para 24.
80 Sharifi and Others v Italy and Greece, Application No. 16643/09, 21 October 2014, para 175, available at: https://www.asylumlawdatabase.eu/en/content/ecthr-sharifi-and-others-v-italy-and-greece-application-no-1664309
as it noted that the applicant had no practical means of paying a lawyer and received no information on the organizations offering legal advice and assistance in Greece. As a result of this lack of legal advice, he was unable to effectively access the asylum procedure and did not have access to an effective remedy.\textsuperscript{81}

Furthermore, in A.A. v. Greece concerned a Palestinian national who entered the Greek territorial waters after fleeing the refugee camp he had been living in Lebanon and was arrested by the maritime police while his boat was sinking, while the ECtHR did not consider article 13 as to the right to an effective remedy, it found that there is a lack of legal aid for a detained Palestinian asylum seeker made the remedy available purely theoretical and, therefore, amounted to a violation of Article 5(4) ECHR.\textsuperscript{82}


3. The right to an effective remedy and the principle of subsidiarity:

3.1 The core of the principle of subsidiarity:

As mentioned before, Art. 13 of the ECHR made it clear that the right to an effective remedy should be addressed by a national authority as the main responsibility for the implementation of the ECHR is laid down on the national authorities. When the national authorities became unwilling or unable to provide such a remedy, hence comes the role of the ECtHR. This process is known as the principle of subsidiarity which means that national authorities are responsible for guaranteeing of rights and freedoms provided by the Convention, once it fails to do its function, the ECtHR takes the responsibility to address the situation as it is a subsidiary to the national authority.

This subsidiarity character can also be extracted from the first paragraph of art. 35 of the ECHR, related to the admissibility criteria of applications before that Court, which provides that “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of four months from the date on which the final decision was taken”\(^{83}\).

Hence, the Court declared that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights\(^{84}\). Therefore, it can be said that the right to an effective remedy is a double obligation to both the national authorities and the applicants. On one side, national authorities are obliged to provide effective remedy for violations of the rights and freedoms provided by the convention, and on the other side, applicants should consider the available levels of domestic remedies before resorting to the ECtHR as art. 35/1 considers the application shall be inadmissible to the Court if the applicant could not fulfill this obligation. Hence, the importance of the right to an effective remedy became vital in the admissibility of an application related to a violation of any right provided by the court.

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\(^{83}\) Article 35/1 of the European Convention of Human Rights.

\(^{84}\) Cocchiarella v. Italy, Application no. 64886/01, Council of Europe: European Court of Human Rights, Grand Chamber, 29 March 2006, para. 38, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-72929&filename=001-72929.pdf&TID=ihgdqbxnfi
3.2 The covered acts under the principle of subsidiarity:

As a general rule, art. 13 guarantees effective remedies to all acts which can constitute a violation of the rights and freedoms provided by the Convention which there could be a remedy under domestic law. However, a distinction between the acts of the different national authorities should be made in this regard as follows:

3.2.1. The executive authority:

The right to an effective remedy should be addressed to all acts of the administration as Art. 13 provides it covers all acts constituting a violation of the Convention committed by persons in an “official capacity”85. In Al-Nashif v. Bulgaria (2002), the ECtHR provides that even in the case of national security and while any independent authority dealing with an appeal may need to afford a wide margin of appreciation86 to the executive in matters of national security, it affirms that this can by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term “national security”87.

3.2.2. The legislative authority:

In contrast to the acts of the administration which are covered by the right to an effective remedy, the acts of the legislators are not guaranteed by this right as the ECtHR affirmed in the case of James and others vs. the United Kingdom (1986) that “… Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic legal norms.”88 The same approach has been followed regarding public policy as the Court explained in Hatton and Others v. The United Kingdom (2003) that neither the legislation nor the general policies are guaranteed by the right to an effective remedy in case it is contrary to the

85 Article 13 of the ECHR.
86 The term “margin of appreciation” refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights. See: S. Greer – The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Council of Europe, 2000, p. 5.
88 James and others v. the United Kingdom, Application no. 8793/79, Council of Europe: European Court of Human Rights, 20 June 2002, para. 85, available at: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-57507%22]}
convention, however, there is still an obligation that the domestic regime must afford effective remedy\textsuperscript{89}.

The Court considered that such a remedy for legislation can be considered a kind of judicial review to domestic laws and this may lead to allowing this remedy may be considered as an obligation on the contracting states to include the ECHR in its domestic laws as stated in Christine Goodwin v. the United Kingdom in which the Court found that art. 13 cannot be interpreted to include a remedy to the state of domestic law and such interpretation can be understood as a requirement on states to incorporate the Convention in its national law\textsuperscript{90}.

This result achieved by the Court can lead to dire consequences as to the immigration rules adopted by the contracting states to face the increasing numbers of migrants as the contracting states can enact legislation violate its obligations under the Convention without any judicial review from the ECtHR, fortunately, the Court could realize this issue and addressed it in Abdulaziz, Cabales and Balkandali v. the United Kingdom (1985) in which it decided that the abovementioned principle shall not be applicable as the rules of immigration and there was a violation to Art. 13 of the Convention of the right to an effective remedy due to the absence of any available channels of complaint under Article 3, 8, and 14 of the convention\textsuperscript{91}.

Hence, it can be said this principle can be considered one of the stable principles in the ECtHR’s case laws as to the right to an effective remedy as in later cases, as in the case of Boyle and Rice v. the United Kingdom (1988), the Court decided not to go into the interpretation related to the question of whether national legislations can be challenged by the right to an effective remedy\textsuperscript{92}.

\textsuperscript{89} Hatton and others v. The United Kingdom, Application no. 36022/97, Council of Europe: European Court of Human Rights, 8 July 2003, para. 138, available at: \url{HATTON AND OTHERS v. THE UNITED KINGDOM (coe.int)}

\textsuperscript{90} Christine Goodwin v. the United Kingdom, Application no. 28957/95, Council of Europe: European Court of Human Rights, 11 July 2002, para. 113, available at: \url{https://www.refworld.org/cases,ECHR,4dad9f762.html} [accessed 2 November 2023]

\textsuperscript{91} Abdulaziz, Cabales and Balkandali v. The United Kingdom, 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985, para. 91, available at: \url{https://www.refworld.org/cases,ECHR,3ae6b6f1c18.html} [accessed 3 November 2023]

\textsuperscript{92} Boyle and Rice v. the United Kingdom, Application no. 9659/82; 9658/82, Council of Europe: European Court of Human Rights, 27 April 1988, para. 87, available at: \url{BOYLE AND RICE v. THE UNITED KINGDOM (coe.int)}
Here we can conclude that even though legislation and general policies cannot be challenged before the ECtHR regarding their violation of the right to an effective remedy, except the immigration rules, states are still under an obligation to provide an effective remedy before a national authority and in case it failed to provide such remedy, such failure can be challenged before the ECtHR.

3.2.3. The judicial authority:

Generally speaking, judicial proceedings cannot be claimed under Art. 13 of the right to an effective remedy unless the alleged violation is related to the right of fair trial within a reasonable time under Art. 6 of the Convention\textsuperscript{93}. However, the ECtHR decided that it may find a violation of the right to an effective remedy in the case of the deprivation of the applicant’s right to claim redress, in criminal court, for a violation of his right to be presumed innocent\textsuperscript{94}.

Furthermore, as to the acts of the judicial bodies, according to Art. 13, there are no requirements as to the existence of different levels of jurisdiction nor to appeal to a constitutional court\textsuperscript{95}. This means that individuals cannot claim a violation of the right to an effective remedy under art.13 in case of the absence of judicial review as the ECtHR declared in Wendenburg and Others v. Germany (2003) that the non-existence of a judicial review to the decision of the constitutional court did not raise any issues as to the application of art.13, and that is why the ECtHR declared the admissibility of this claim\textsuperscript{96}.

3.3 The requirements of the principle of subsidiarity:

According to Article 35 (1) of the ECHR provides that “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of four months from

\textsuperscript{93} KUDŁA v. POLAND, Application no. 30210/96, 26 October 2000, para. 147, available at: KUDŁA v. POLAND (coe.int)
\textsuperscript{94} KONSTAS v. GREECE, Application no. 53466/07, 24 May 2011, para.56-57, available at: KONSTAS v. GREECE [Extracts] (coe.int)
\textsuperscript{95} Christian MULLER v. AUSTRIA, DECISION on the admissibility of the application, 16 December 1974 , available at: http://hudoc.echr.coe.int/eng?i=001-75078
\textsuperscript{96} Albrecht WENDENBURG and others v. Germany, DECISION AS TO THE ADMISSIBILITY OF Application no. 71630/01, 6 February 2003, available at: WENDENBURG AND OTHERS v. GERMANY (coe.int)
the date on which the final decision was taken"\textsuperscript{97}. Therefore, the applicant must exhaust all domestic remedies before he can submit his application to the European Court of Human Rights, and the rationale for this rule lies in the subsidiarity nature of the role of the ECHR\textsuperscript{98}.

The subsidiarity nature of the Court's role is particularly important in light of the increasing number of applications submitted to the Court, this huge number limits the Court's effectiveness and poses a threat to the quality and consistency of its efforts, and therefore the applicant must meet this rule when he invokes a violation of the rights provided by the ECHR\textsuperscript{99}.

For an act of a national authority to be effective, the Court made it clear by noting that the effectiveness of remedies under the first paragraph of Article 35 necessarily requires that the person concerned have access to remedies with an "automatic suspensive effect"\textsuperscript{100}. Also, the domestic remedies to be exhausted are only those that are effective and available and can adequately redress the claimed breach and offer "a reasonable prospect of success"\textsuperscript{101}.

3.3.1 "An automatic suspensive effect":

In Al-Hanshi v. Bosnia and Herzegovina (2011), while the case was before the Constitutional Court, the ECtHR noted that the appeal before the Constitutional Court does not have an automatic suspension effect as the ECtHR stated that an appeal to the Constitutional Court cannot be considered an effective remedy to prevent deportation before a final decision is issued by that court unless it results in an automatic suspension effect\textsuperscript{102}.

\textsuperscript{97} Article 35/1 of the ECHR.

\textsuperscript{98} Selmouni v. France, Application no. 25803/94, 28 JULY 1999, para. 47, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58287%22]}

\textsuperscript{99} Al Hanchi v. Bosnia and Herzegovina, Application no. 48205/09, 15 November 2011, Council of Europe: European Court of Human Rights, para. 32, available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155392%22]}

\textsuperscript{100} Ibid. The Court affirmed that "... in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of ill-treatment materializes, the effectiveness of a remedy for the purposes of Article 35 § 1 imperatively requires that the person concerned should have access to a remedy with automatic suspensive effect".


\textsuperscript{102} Ibid., para. 33.
Moreover, it should be noted that in the absence of any effective domestic remedy leading to redress of the alleged violation, the applicant does not need to wait for the adoption of the final decision before applying to the ECtHR as in the case of Buzan v. Ukraine (2010), the Court found that proceedings against the applicant were still pending and that he remained at risk of extradition to Belarus until the final decision of such proceedings was rendered, the Court, therefore, rejected the Government's claim that the applicant had failed to provide domestic remedies on the grounds of the absence of a domestic remedy providing a review of the extradition decision and a suspension of extradition pending such review103.

3.3.2. “A reasonable prospect of success”:

The Court has also consistently held that, in order for domestic remedies to be effective, they must provide a reasonable prospect of success, and therefore the denial of its likelihood of success relieves the applicants of the requirement to exhaust local remedies104. In Salah Sheikh v. Netherlands (2007), although an appeal to the administrative Court was available to the applicant, the ECtHR held that this appeal had almost no prospect of success, and this conclusion was reached after the court referred to the case law of the Administrative Chamber in cases where the facts were similar to those of the applicant and found it difficult to foresee how the Administrative Court could reach a different outcome in the present case105.

Moreover, the Court found that the government referred to two legal articles, article 55 of the Constitution and Article 2 of the Administrative Judiciary Law, which provide the applicant with an effective remedy to challenge the extradition decision and any action taken during the extradition proceedings. These provisions, according to the government's claim, guarantee every individual the right to challenge any decisions, acts or omissions by state authorities in the courts, especially in administrative courts, however, the ECtHR considered that these provisions are likely to be able to provide an effective remedy and decided to reject the Government's claim as the Government could not give any references as to the authority of the national courts to provide such review as to the compatibility of the applicant's removal or the suspension of the

103 Puzan v. Ukraine, Application no. 51243/08, Council of Europe: European Court of Human Rights, 18 February 2010, para. 29, available at: https://www.refworld.org/cases,ECHR,4d42a1002.html
105 Ibid, para. 123.
extradition suspension\textsuperscript{106}. Therefore, the ECtHR rejected the initial claim submitted by the government as to the necessity of the applicant to exhaust the local remedies referred to by the government\textsuperscript{107}.

Hence, it can be concluded that, according to the principle of subsidiarity, national authorities are the main responsible for the implementation of the ECHR and providing the right to an effective remedy as explained in Article 13 of the Convention. However, when the national authorities became unwilling or unable to provide such a remedy, hence comes the role of the ECtHR to address the situation. A distinction has been made as to the acts which are covered by the Convention. Mainly all the executive acts are subject to the ECtHR, but this is not the situation as to the legislative acts or judicial decisions which are not subject to such reviews. However, the Court decided that immigration rules can be subject to the Court's review in exceptional situations including Article 3 of the Convention which will have a significant importance when the principle of non-refoulement shall be examined in the following section.

Moreover, the ECtHR considered two requirements to decide the effectiveness of the remedy as to the principle of subsidiarity which are that the remedy should be of "an automatic suspensive effect" and "a reasonable prospect of success".

\textsuperscript{106} Soldatenko v. Ukraine, Appl. no. 2440/07, Council of Europe: European Court of Human Rights, 23 October 2008, para. 49, available at: \url{https://www.refworld.org/cases,ECHR,4906f2272.html}

\textsuperscript{107} Ibid.
4. The right to an effective remedy in conjunction with the principle of non-refoulement:

As it was mentioned before, the ECHR is applied to "everyone" as provided in Article 1 of the Convention. Also, it was discussed before that the ECHR has an extra-territorial application which means that it can be applied outside the territory of the contracting states where these states practice effective control. Therefore, asylum seekers can start a claim against violations of their human rights guaranteed by the Convention. One of the most significant rights that asylum seekers may request its application is their right against refoulement when they claim an effective remedy from the national authorities or the ECtHR. This raised the question about the application of the principle of non-refoulement in conjunction with Art. 13 of the right to an effective remedy.

The relation between the two rights can also be considered in the main attention given by the Court in immigration cases to examine the effectiveness of the domestic procedures and to ensure that they respect their human rights as explained by the Court in the case of De Souza Ribeiro v. France (2012) in which the Court dismissed the Government’s preliminary objection concerning the complaint under Article 13 when the Court found that there are ineffective remedies as to the applicant's removal decision108.

A similar approach was adopted by the Court in the case of B.A.C. v. Greece (2016), in which the Ministry of Public Order did not issue any decisions as to the asylum application of the applicant despite the favourable opinion issued by the Advisory Board on Asylum, hence the Court decided that there was a violation as to article 13109. Therefore, it can be concluded that the expulsion, transfer, or extradition of asylum seekers without any effective asylum procedures before deciding this decision may raise the responsibility of the contracting state as to the principle of non-refoulement and the right to an effective remedy, however, this is only applicable in certain situations which will be discussed as follows.

4.1 The notion of the principle of non-refoulement:

In general, the principle of non-refoulement refers to a state's obligation to refrain from forcibly removing an individual to another state where he or she may be subjected to ill-treatment which requires for its application that there should be two states, the sending state and the receiving state. However, this principle does not address the relationship between the sending state and the receiving state, rather, it addresses the relationship between the sending state and the individual who is forcibly returned to the receiving state. This principle also applies only if the deported person is at real risk of ill-treatment in the receiving State\textsuperscript{110}.

A distinction should be made between cases of non-refoulement as such in cases in which the way of deportation constitutes a violation of the sending State's obligation to refrain from ill-treatment during the removal process, whether the individual being deported is at risk of ill-treatment in the receiving State or not. In contrast to the cases in question regarding the method of deportation, the risk of ill-treatment in the receiving State is an essential element for the application of the principle of non-refoulement, regardless of the method of deportation itself which may not directly violate the sending State's obligation to refrain from ill-treatment\textsuperscript{111}.

Although the ECHR did not directly address the principle of non-refoulement, the jurisprudence of the ECtHR has included this principle within the framework of art.3 of the Convention, which stipulates that “No one shall be subjected to torture or inhuman or degrading treatment or punishment.” This approach was also adopted by the European Commission on Human Rights in a series of decisions that began in 1962, where the Commission adopted the principle that a violation of Article 3 of the ECHR may arise when returning a person to a country where they could face serious deprivation of their human rights\textsuperscript{112}.

The first opportunity for the ECtHR to consider the possibility of applying Article 3 of the Convention to cases of forced return was in the important case of (Soering) v. the

\textsuperscript{111} Ibid.
United Kingdom (1989) “The Seminal Soering Judgment”, which is considered one of
the most important cases that the Court has considered in the context of the prohibition
of refoulement constitutes a turning point in this context, the facts of which are that
Jens Söring, a German citizen, grew up in the United States and while studying at the
University of Virginia met his girlfriend, Elizabeth, whose parents objected to this
relationship, and in March In 1986, the parents were stabbed to death with a knife,
then the young couple fled to the United Kingdom, where they were arrested in 1987,
and the United States requested their extradition\textsuperscript{113}.

Elizabeth did not appeal her extradition to the United States, and after her extradition,
she was sentenced to 45 years in prison, while Soering appealed his extradition before
the European Court of Human Rights based on a violation of article 3 of the ECHR, as
he explained that the prisoners in Virginia, the state to which he will be extradited, they
often wait for the execution of the death sentence for a period of six to eight years,
which constitutes inhuman and degrading treatment, and is contrary to the
aforementioned Article Three\textsuperscript{114}.

The Court noted that the interpretation of the ECHR must take into account that the
Convention is “a treaty for the collective enforcement of human rights and fundamental
freedoms,” and, that the object and purpose of the Convention require that its
provisions be interpreted and applied so that its guarantees become practical and
effective. The Court explained that interpretation must be done in accordance with the
general purpose of the Convention, which is a document or instrument designed to
preserve and promote the ideals and values of a democratic society\textsuperscript{115}.

Furthermore, the right to non-refoulement is an inherent right of international law, and
this is based on its inclusion in many international conventions and agreements,
including the Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment of 1984, which stipulates in its Article 3/1: That “No State
Party shall expel, return ("refouler") or extradite a person to another State where there

\textsuperscript{113} Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human
Rights, 7 July 1989, paras. 11, 12, available at: https://www.refworld.org/cases,ECHR,3ae6b6flec.html
[accessed 17 November 2023]

\textsuperscript{114} Ibid, paras 13-19.

\textsuperscript{115} Ibid, para 87.
are substantial grounds for believing that he would be in danger of being subjected to torture"\textsuperscript{116}.

Likewise, Article 33 of the 1951 United Nations Convention relating to the Status of Refugees stipulates that “a Contracting State shall expel or return ("refouler a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"\textsuperscript{117}. Also, the American Convention on Human Rights stipulates in Article 22 that “8 - In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”\textsuperscript{118}.

Moreover, the International Convention for the Protection of All Persons from Enforced Disappearance stipulates in Article 16 that “1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”\textsuperscript{119}.

Hence, we can conclude that the principle of non-refoulement became one of the fundamental rights under international law, and the main difference between the principle of non-refoulement under the above-mentioned texts is the question of who falls under its protection and for what reasons. Under the Refugee Convention, this principle protects refugees from returning to places of persecution, while under international human rights law, it protects any person subject to the jurisdiction of a state, provided that a relevant risk exists in the state to which the person will be transferred including refugees and asylum-seekers.

The United Nations High Commissioner for Refugees (UNHCR) has also indicated that the principle of non-refoulement is a rule of customary international law by fulfilling the conditions of international custom stipulated in article 38 of the Statute of the

\textsuperscript{116} Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.
\textsuperscript{117} Article 33 of the Convention relating to the Status of Refugees of 1951.
\textsuperscript{118} Article 22/8 of the AMERICAN CONVENTION ON HUMAN RIGHTS of 1969.
\textsuperscript{119} Article 16 of 1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance of 2006.
International Court of Justice by being “a general practice accepted as law”, and this conclusion supports the fact that this principle has been included in international treaties adopted at the global and regional levels to which a large number of countries are now parties, and this principle has been affirmed in the United Nations Declaration on Regional Asylum of 1967. The UNHCR also explained that this principle has been affirmed systematically in the conclusions of the Executive Committee of the United Nations High Commissioner for Refugees and in the resolutions adopted by the United Nations General Assembly.

In this meaning, the principle of non-refoulement is of a peremptory nature (Jus Cogens), basing this on the fact that it is an essential element in asylum and international protection for refugees, and the essence of this principle is that the state may not force any person to return to a territory where he may be exposed to persecution. The principle of non-refoulement has developed in the context of protecting human rights in general and has become a customary rule in international law and has steadily gained the status of jus cogens, as is the case with rules related to human rights in general. International jurisprudence and jurisprudence have settled on considering it as Jus cogens norms as it applies to everyone and the principle of reciprocity does not apply to it, and therefore it may not be violated or changed except by a rule of the same degree.

Therefore, the principle of non-refoulement aims to prevent the deportation of a person in order to protect him from the risk of ill-treatment to which he may be exposed in the receiving country, despite this principle being explicitly stipulated in many international agreements, but the ECHR does not explicitly stipulate it. However, this principle was extracted from Article 3 of the Convention by the ECtHR, as indicated by the Court and as a result of a set of arguments and justifications previously mentioned, and

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121 Ibid.


therefore, the state is obligated to refrain from extraditing, expelling, or deporting any person to another state where he may face the risk of torture, treatment or inhuman or degrading punishment\(^{124}\). Consequently, asylum-seekers can claim a violation as to the principle of non-refoulement when they may face the prohibited treatment according to Article 3 of the Convention in the receiving state.

4.2 The absolute nature of the principle of non-refoulement:

It is established from the jurisprudence of the ECtHR that the prohibition of torture or ill-treatment stipulated under Article 3 of the Convention is absolute, and there are no exceptions or restrictions in its application, even in the most difficult circumstances, such as combating terrorism or organized crime, and this result is related to the fact that since the principle of non-refoulement is derived from the prohibition of torture or inhuman or degrading treatment contained in article 3 of the Convention, this leads to the logical conclusion that the principle of non-refoulement has an absolute nature\(^{125}\).

This approach can be reached for many reasons. On the one hand, many international agreements have provided texts prohibiting any exceptions to the prohibition of torture or inhuman or degrading treatment as in article 7 of the International Covenant on Civil and Political Rights of 1966 stipulates that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment…”\(^{126}\) and it was stated in the second paragraph of article 4 of the Covenant that no derogation from this article can be made,\(^{127}\) which confirms the absolute nature of the prohibition of torture and, by consequently, the principle of non-refoulement.

Furthermore, article 15 of the ECHR provides that "No derogation from ... Articles 3 .... shall be made under this provision"\(^{128}\). The Court also recognized the absolute nature of this right and even worked to expand the scope of its application to include expulsion cases in which a state party plans to transfer a person to another state where

\(^{126}\) Article 7 of the International Covenant on Civil and Political Rights 1966.
\(^{127}\) Article 4/2 of the International Covenant on Civil and Political Rights of 1966 which provides that “No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”
\(^{128}\) Article 15/2 of the ECHR which provides that " No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision".
he or she is at risk of ill-treatment as in the famous case of Chahal v. the United Kingdom of 1996 related to the extradition of a terrorism suspect, the Court recognized the absolute nature of the principle of non-refoulement under article 3 of the Convention whenever it is established on good grounds that the person is likely to be exposed to the danger of torture or inhuman or degrading treatment if he is deported to another country, and it affirmed that it is the responsibility of the contracting states to protect him from such treatment in the event of expulsion, no matter how undesirable or dangerous the actions of the person concerned are\textsuperscript{129}.

Therefore, the Court, in this case, considered the relation between the prohibition of being subjected to torture or inhuman or degrading treatment and the principle of non-refoulement, and as the former in itself has a peremptory nature, then the latter is considered of an absolute nature under article 3 of the Convention has an absolute nature in cases of refoulement\textsuperscript{130}.

Hence, the sending state is the responsible for the violation of this principle whenever there are substantial reasons to say that there is a possibility of the risk of torture or inhuman or degrading treatment in the receiving state, even regardless of the national security interests of the sending state and regardless of the reasons behind this decision as there is no room for balancing the risk of ill-treatment and the reasons for expulsion\textsuperscript{131}. The Court has reached the same conclusion in many cases\textsuperscript{132}.

4.3 The prohibition of indirect-refoulement:

The ECtHR has expanded its interpretation regarding the scope of the application of the principle of non-refoulement to prohibit not only direct refoulement to a state where the person concerned may face a risk of ill-treatment but also in case of indirect refoulement, which refers to the situation in which a person is transferred to a second state in which he may be transferred to a third state where he may face the risk of the prohibited treatment under article 3 of the Convention\textsuperscript{133}.


\textsuperscript{130} Ibid, para. 81.

\textsuperscript{131} Ibid.

\textsuperscript{132} Soering v. the United Kingdom, Op. cit., para. 89.

This approach has a significant importance to the protection of asylum seekers as in the admissibility decision of the case of T.I. v. The United Kingdom (2000), in which the plaintiff was a Sri Lankan citizen who unsuccessfully sought asylum in Germany and then made a similar application in the United Kingdom. The British government, in enforcing Dublin Agreement rules, ordered his transfer to Germany without examining his asylum application\textsuperscript{134}. The applicant argued that transferring him to Germany, where he might be exposed to the risk of being deported to Sri Lanka, would constitute a violation of Article 3 of the ECHR. The Court decided that although the claimant was not threatened with any treatment in Germany contradicts Article 3 of the Convention, his deportation to Germany nevertheless constitutes one link in a possible chain of events that could lead to his return to Sri Lanka where he would face a real risk of treatment prohibited under article 3 of the Convention\textsuperscript{135}.

In this regard, despite the arguments of the governments in many situations that its decision of the transfer of the concerned person was pursuant to the Dublin Regulation, the Court held that when a state party applies these regulations, it must ensure that the asylum procedures in the intermediary country provide sufficient guarantees to avoid the deportation of the asylum seeker, directly or indirectly, to his country of origin without assessing the risks he may face in accordance with article 3 of the Convention\textsuperscript{136}.

In Mohammadi v. Austria, the Court clarified the concept of the risk assessment process, under Article 3 of the Convention, and indicated that there is a process to be followed in this situation to determine if the transfer of the applicant to a third country can constitute a violation to article 3 of the Convention, and in this regard, the Court must, first, determine whether there is a real risk of the applicant that he may be subjected to the prohibited treatment under article 3 in his country of origin, second, the court must determine whether there is a real risk of transferring the applicant from the receiving state to his country of origin and in this case it needs to determine whether the applicant’s access to asylum procedures is sufficient to allow examination

\textsuperscript{134} T.I. v. The United Kingdom, DECISION AS TO THE ADMISSIBILITY OF Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, p. 4, available at: https://www.refworld.org/cases,ECHR,3ae6b6dfc.html [accessed 26 November 2023]

\textsuperscript{135} Ibid.

\textsuperscript{136} Ibid, see also: Mohammed v. Austria, Application no. 2283/12, Council of Europe: European Court of Human Rights, 6 June 2013, para. 93, available at: https://www.refworld.org/cases,ECHR,51b192004.html [accessed 26 November 2023]
of the merits of his claim in the receiving state before his transfer to his country of origin\textsuperscript{137}.

It can be noted that the Court tends to presume that the intermediary state is one of the contracting states to the ECHR, they are likely will consider and respect the right of non-refoulement whenever the concerned person may face the risk of the prohibited treatment under Article 3 of the Convention as in the above-mentioned case of T.I. v. The United Kingdom when the Court clarified that there is no reason to expect that Germany will not respect its obligations under the Convention\textsuperscript{138}.

However, it should be said that the Court considered this presumption to be a rebuttable presumption, specifically if there applicant could provide evidence or there is information that indicates that there are substantial difficulties or shortcomings in the asylum procedures in the intermediate country, or that the intermediate country applies direct or indirect refoulement practices of an individual or collective basis, and in this case the applicant must present a justified claim as well as refute this presumption\textsuperscript{139}.

However, the difficulty arises in the event that the intermediary state is not a party to the ECHR as in the significant case of Hirsi Jamaa v. Italy (2012), in which the applicants were originally from Somalia and Eritrea and they were transferred to Libya as an intermediary state to transfer them to their countries of origins, the Court stated that the state conducting the return process is responsible for ensuring that the intermediary state provides adequate guarantees to prevent the person concerned from being deported to his or her country of origin without assessing the risks he or she may face\textsuperscript{140}.

In this case, the Court first decided that the right of the applicants to claim that their return to Eritrea and Somalia would violate Article 3 of the Convention, and then it found that there was no form of asylum and protection procedures for refugees in

\textsuperscript{137} Mohammadi v. Austria, Application no. 71932/12, Council of Europe: European Court of Human Rights, 3 July 2014, paras. 71-73, available at: https://www.refworld.org/cases/ECHR,53b521674.html [accessed 26 November 2023]


\textsuperscript{139} M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 367. 347, available at: https://www.refworld.org/cases/ECHR,4d39bc7f2.html

\textsuperscript{140} Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para. 147, available at: https://www.refworld.org/cases/ECHR,4f4507942.html [accessed 26 November 2023]
Libya, and this was confirmed by evidence of previous forced returns of asylum seekers and refugees to high-risk countries. Accordingly, the Court concluded that Italy’s expectation that Libya would provide adequate guarantees against the arbitrary return of the applicants to their countries of origin was not based on reasonable grounds.\(^\text{141}\)

It can also be noted that some countries adopted, under Directive No. 2013/32 issued by the European Parliament on June 26, 2013, the concept of (the safe third country) which is based on the assumption that the applicant for international protection could have obtained it in another country. Therefore, the receiving State has the right to refuse responsibility for the protection request, and in this case, their application shall be declared inadmissible and the receiving state does not need to fully examine the merits of their application, as is the case for the concept of “first country of asylum”, which includes refugees who have already been granted asylum and can once again apply for asylum in a third country.\(^\text{142}\)

Member State practices show significant variations in the way safe third country rules have been applied, with some adding to the list of countries they consider safe recently in response to the arrivals in 2015/2016, while other contracting states have at the same time shown an unwillingness to implement the standards to be recognized as a third safe country. In this context, the proposals contained in the reform of the Common European asylum system that began in 2016 include a set of new provisions related to the safe third country concept, specifically, to adopting binding standards as to the application of safe third country (and first country of asylum), rather than leaving it at the discretion of the member states as in the current directive.\(^\text{143}\)

It can be concluded that asylum-seekers enjoy protection under Article 3 of the ECHR not to be transferred, in any form, to another country, whether their home country or a third country (direct or indirect refoulement), whenever these may expose them to the danger of the prohibited treatment under article 3, and the failure of the sending state

\(^{141}\) Ibid, paras. 150-158.


\(^{143}\) Ibid, p. 13,14.
to guarantee them effective asylum procedures raises their responsibility as to article 13 of the right to an effective remedy.
5. Conclusion:

The right to an effective remedy is one of the basic principles guaranteed by the ECHR as provided in Article 13 which establishes the basic role of the national authorities to deliver an effective remedy for those whose rights or freedoms as provided in the convention are violated. It can be said that this right is the general guarantee for the rights provided in the Convention. From one side, it confirms the subsidiarity nature of the ECtHR as a complementary judiciary to the national courts, and from the other side, it ensures the responsibility of the national authorities to provide a remedy for the violations of the right and freedoms included in the ECHR, and this remedy should be "effective".

As it was discussed, the ECHR did not provide a definition for what can be a "remedy" and how this remedy can be "effective". This may back to the intent of the ECHR drafters to give a discretionary authority for the national authorities to decide the suitable remedy for the alleged violation, and to extend the review of the judges of the ECtHR to consider in two steps, first if the national authority provided a remedy or not, and to ensure, second, if this remedy is effective.

Hence, we can say that it is a good approach by the ECHR to leave this term without a rigid definition that can bind both the national authorities and the ECtHR in considering what can be an effective remedy. Also, with the various rights and freedoms included in the Convention, as well as the different forms of alleged violations that may occur, it was better to leave this term without a strict definition. Moreover, it gives the national authorities and the ECtHR the ability to decide what is an effective remedy on a case-by-case basis. That is why it was difficult for this study to provide a specific definition for the term "effective remedy", rather it focused on the case-laws of the ECtHR in which it discussed the conditions and the requirements of the right to an effective remedy.

The claim of the violation of the right to an effective remedy can be found in most of the cases submitted to the ECtHR as if the national authorities had provided an effective remedy, from the applicant's point of view, there would not be a reasonable reason to go to the ECtHR. It can be said that it is used by the applicants as a supplementary claim to their main alleged violation they pretend it was committed. This explains the importance and the unique nature of this right.
As the ECtHR decided in its case-laws, for a remedy to be effective, it needs to fulfil certain requirements as it should be available on the national level, accessible, capable of providing redress in respect of the applicant's complaints, and offers reasonable prospects of success. Moreover, the competent national authority should have the authority to provide an effective remedy regardless this authority is a governmental or judicial body.

As to the scope of the application of art. 13 of the right to an effective remedy on asylum seekers, they can claim a violation of their rights to an effective remedy under this article despite they are not national of the state parties of the Council of Europe. Also, the state parties are responsible to provide such right for asylum seekers when they are on their territory as well as outside their territory whenever the parties practice extraterritorial jurisdiction such as in cases of effective control, and state-agent model. This may extend to situations when state parties face asylum flow through the operations of interception and rescue at sea. Furthermore, the ECtHR affirmed the responsibility of the state parties even if they delegate their authority to others. This can be useful in deciding the responsibility of states in the process of the visa application despite the practical obstacles that face the application of this result.

The right to an effective remedy ensures the rights of asylum seekers for constitutional and legislative remedies. Moreover, they can benefit from specific remedies such as specific performance which can be used to adjust their situation, compensation, and rehabilitation. More important, the right to an effective remedy can be a guarantee for asylum seekers of a fair and effective asylum process and their access to legal representation.

This study also discussed the principle of subsidiarity to affirm that national authorities are the responsible to provide an effective remedy as stated in art.13. Hence, for an act of a national authority to be effective, the person concerned should have access to remedies with an “automatic suspensive effect” and the domestic remedies need to be able to adequately redress the claimed breach and offer “a reasonable prospect of success”.

Finally, this thesis discussed the right to an effective remedy under art.13 in conjunction with the principle of non-refoulement under which refers to a state's obligation to refrain from forcibly removing an individual to another state where he or
she may be subjected to ill-treatment. As it was explained, the principle of non-refoulement was not mentioned directly in the ECHR, however, the ECtHR has included this principle within the framework of art.3 of the Convention. Hence, whenever the removal, transfer, or delivery of asylum seekers only if they may face the prohibited treatment under article 3 of the ECHR in the receiving country.

The ECtHR has affirmed the absolute nature of the principle of non-refoulement which means that it shall be applied in all the cases without exception as it even rejected the expel or delivery of persons suspected of terrorism crimes or regardless the interest of the national security of the sending state. However, this result cannot be acceptable in situations when the removal or transfer of a person is a matter of a national security. However, this result cannot be acceptable in situations when the removal or transfer of a person is a matter of a national security. It should be said here that it is obvious that the ECtHR's approach aimed mainly to protect the weakest side in the refoulement process which is the person regardless of the interests of the states.

Finally, it should be mentioned that the right to an effective remedy is a vital right for the protection of all the rights and freedoms included in the ECHR. It affirms that not any remedy can be acceptable, but only effective ones. Hence, this right ensures that the ECHR is a living instrument designed to protect the rights and freedoms included in the Convention on the ground. Also, this right can be a shield for asylum seekers in many ways as they can claim their rights to effective remedies whenever their rights are violated. Also, it plays a vital role to protect them from forcible refoulement when they may face the prohibited treatment under art. 3 of the ECHR.
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