1

Setting the Scene

1.1 GOALS AND LIMITATIONS

This book analyzes the legal content and scope of the right to an effective domestic remedy in Article 13 of the European Convention on Human Rights (hereinafter the Convention or the ECHR),[1] as construed and applied in the case law of the European Court of Human Rights (hereinafter the Court or the ECtHR).[2]

The book not only accounts for the current scope of Article 13, but the development in the Court's case law.[3] These elements are both interconnected and independent. It is, on the one hand, not possible to account for the content of law without having, at the very least, a sense of how law has

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, entry into force on September 3, 1953, on the condition of ten ratifications; see Article 59(3) of the ECHR. The Convention has been amended by several Protocols, *inter alia*, Protocols 11 and 14 amending the control system, and several Protocols granting additional rights. These rights are additional to the Convention, with the consequence that all provisions of the Convention apply accordingly; see, for example, Article 6 of Protocol 4. As a consequence, the jurisdiction of the European Court of Human Rights (ECtHR), as foreseen in Section II of the ECHR, applies to the Protocols, and, most importantly in this context, Article 13 of the ECHR applies in combination with substantive rights in the Protocols.

[2] The jurisdiction and competences of the Court are regulated in Section II of the ECHR and the Rules of the Court; see Articles 24(1) and 25 *litra* d ECHR.

[3] The most comprehensive expositions of Article 13 in legal literature, which I am aware of, is Mertens (1968) (in French) and Barkhuysen (1998) (in Dutch). Further, the general legal literature on the Convention deals with Article 13 only briefly (between five and thirty pages). Article 13 has also been dealt with in legal articles, focusing on specific contexts, for example, Vysockiene (2002), or as one of the elements in developing a more "… adequate, theoretical understanding of the Court's practice"; see Christoffersen (2009) 1. Remedies have also been analyzed more generally in international human rights law, most thoroughly in Shelton (2015) and Roach (2021). However, these studies are primarily directed at the remedial powers of international courts (Shelton) or with a comparative and more general perspective (Roach).

developed. The present is always understood in the light of the past. This is not only a realization of general hermeneutics,[4] but is firmly present in the legal method applied by the Court, not least when it considers whether its interpretation should be dynamical or not. On the other hand, knowing the past has independent historical value, and knowing the current content of law, is the primary task of lawyers working in practice.

Given the enormous amount of case law from the Court, it is not possible to give an exhaustive account of every judgment and decision in which the Court has dealt with Article 13, nor is it desirable. Facts, details, and tensions in a rapidly expanding case law would distort the general picture. However, the book provides an exhaustive overview of the requirements stemming from Article 13, as they present themselves in the Court's case law, including how they have been developed. The depth and amount of detail of the analyses are guided by three lines of thought: (1) the need for clarification (e.g. because of unclear, contradicting, or a lack of case law), (2) the development in the case law, and (3) the potential for achieving a more subsidiary and effective protection of human rights. This third element is closely related to the second goal of this book, which I return to shortly.

The focus on clarifying what the Court requires and has required, under Article 13, has several consequences.

First, this book does not analyze ideal practices of remedies at the domestic level. Indeed, the Court sets out minimum standards, not an ideal level of protection.[5] This is reflected in the fact that the Court, also under Article 13, affords States a margin of appreciation (Chapter 8). Consequently, for the search of an ideal remedy, the specific remedial structures of Member States must be taken into account, and the discretion that the Court grants left out. In any case, the judgments of the Court rarely provide examples of best practices, but controversial practices, which, arguably, violate the Convention.[6]

Second, Article 13 deals with legal remedies (legal requirements concerning remedies, according to Article 13). But nonlegal remedies, and various nonlegal measures, may certainly be important for the effectiveness of the remedial task and, implicitly, legal remedies, for instance, measures concerning education and professional training, electronic communication, and general

4 See, for example, Gadamer (1975).
5 See, as an expression, Article 53 of the ECHR.
6 *Guide to Good Practice in Respect of Domestic Remedies* (adopted by the Committee of Ministers on September 18, 2013, available at the web page of the Council of Europe) attempts to analyze best practices of remedies.

information.[7] Indeed, such measures may, under other circumstances, constitute legal remedies (*i.e.* if the Court had construed the legal requirements differently) but are not dealt with in this book. That being said, the distinction between legal remedies and nonlegal remedies is not always easy to draw – in particular, because of the (legal) requirement that the remedy be effective not only in theory but also in practice (Section 9.4).

Third, when analyzing the legal content of Article 13, both the past and current scope of Article 13 must be read in context with other rights and principles in the Convention.[8] However, many such relationships would have deserved a more thorough and maybe different treatment than that which I provide in this book. Indeed, the guiding criterion of "need for clarification" mostly only implies that I demonstrate this need. I do not always provide a fully fledged account of how I perceive that the question should be clarified. The relationship between Article 13 and similar procedural and remedial requirements under substantive Articles, in particular the positive obligation to secure substantive rights, is one such area. This limitation, however, leads me to the second and normative goal of this book.

In principle, a normative analysis of every requirement in Article 13, including its relationship with other rights and principles in the Convention, could be undertaken. But the normative goal of this book is primarily to illustrate and provide advice concerning the role Article 13 could have in the system of protection of human rights under the Convention. By that I mean the role Article 13 could have in regulating, more generally, the relationship between international and national protection of human rights. In this respect, the developing notion of subsidiarity is essential. This analysis is chiefly undertaken

[7] The importance of such measures is increasingly recognized within the Council of Europe; see, for example, Rec(2002)13, December 18, 2002, of the Committee of Ministers on the publication and dissemination in the Member States of the text of the ECHR and of the case law of the ECtHR; Rec(2004)4, May 12, 2004, of the Committee of Ministers to Member States on the ECHR in university education and professional training; Rec(2006)12, September 27, 2006, of the Committee of Ministers to Member States on empowering children in the new information and communications environment; Rec(2007)17, November 21, 2007, of the Committee of Ministers to Member States on gender equality standards and mechanisms; Rec(2008)2, February 6, 2008, of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the ECtHR; Rec(2012)3, April 4, 2012, of the Committee of Ministers to Member States on the protection of human rights with regard to search engines; Rec(2012)9, September 12, 2012, of the Committee of Ministers to Member States on mediation as an effective tool for promoting respect for human rights and social inclusion of Roma.

[8] See Section 2.4 and the Vienna Convention on the Law of Treaties (hereinafter the VCLT), done at Vienna on May 23, 1969, entry into force on January 27, 1980, Article 31(1).

in Chapters 12 and 13, whereas the more descriptive analyses of case law are undertaken in Chapters 2 to 11. That being said, Chapters 2 to 11 also contain specific normative considerations, but then mostly only to the extent that they are necessary prerequisites for the global normative recommendations in the concluding Chapter 13. Certainly, many other specific legal questions arising under Article 13 and relationships between Article 13 and other rights and principles would have deserved a more independent normative analysis and evaluation. I can only hope that the descriptive and normative analyses that I have undertaken may serve as a fundament for further study.

In the remainder of this introductory chapter, I provide brief overviews of the content of Article 13 (Section 1.2) and the uncertainty and (evolving) development in the Court's case law (Section 1.3).

1.2 ARTICLE 13 IN BRIEF

Article 13 of the ECHR aims to enforce substantive Convention rights at the domestic level.

The English version reads:

> Article 13 – Right to an effective remedy
>
> > Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The French version reads:

> Article 13 – Droit à un recours effectif
>
> > Toute personne dont les droits et libertés reconnus dans la présente Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles.

The French wording *"recours"* only includes a right to effective access to a national authority that can determine whether substantive Convention rights have been violated, but the English wording "remedy" also includes a right to redress.[9] In the early legal literature, some claimed that the Court and the former

[9] See, for example, the definition in the *Webster's Encyclopedic Unabridged Dictionary* of the English Language, which holds that the wording "remedy" encompasses "to cure, relieve or heal … to restore to the natural or proper condition; put right: to remedy a matter" as well as "legal redress; the legal means of enforcing a right or redressing a wrong."

European Commission on Human Rights (hereinafter the Commission) had opted for an interpretation in line with the French wording,[10] but the subsequent case law confirms that Article 13 contains both a right to access to justice and a right to redress at the national level for violations of Convention rights.[11] The right to redress includes a right to enforcement of any redress awarded.[12]

The French wording "*a droit à l'octroi*" could indicate that the right to an effective remedy needs not to exist *per se* but could be granted or bestowed by a decision in individual cases. However, the English wording "shall have an effective remedy" includes an individual right that must exist *per se*.[13] The case law of the Court confirms that the English wording must be followed and that the inclusion of "*à l'octroi*" was merely stylistic.[14]

The wording further indicates that Article 13 only comes into play when other rights and freedoms in the Convention actually "are violated" ("*ont été violés*").[15] In early case law, Article 13 was understood in this manner. However, subsequent case law makes clear that it suffices that the principal claim – the violation of a substantive right – be arguable.[16] As a result, Article 13 contains a double standard of interference: (1) a substantive right must, arguably, have been violated and (2) the right to an effective remedy must have been violated.

Since Article 13 only comes into play if substantive rights in the Convention have, arguably, been violated, it is often stated that Article 13 is auxiliary to the substantive rights and,[17] in the extension, that Article 13 only provides a procedural right.[18] However, this conception is only fitting with regard to the right to access to justice, which concerns the process and form in which arguable (substantive) claims must be heard and decided at the domestic level.[19] The right to redress, in contrast, is a substantive and independent right, which grants the right to some form of (substantive and not merely procedural) redress.[20]

[10] See, for example, Raymond (1980) 166.
[11] See, for example, *Kudla* v. *Poland* (Grand Chamber 2000), para. 152.
[12] See Section 11.9. The UN International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200 (XXI) of December 16, 1966, entry into force March 23, 1976 (hereinafter the ICCPR), Article 2(3), explicitly distinguishes between access to justice, redress, and enforcement. See, also, for example, Shelton (2015) 16–19.
[13] See, for example, Raymond (1980) 162.
[14] See, for example, Raymond (1980) 165; Grote and Marauhn (2006) 1070.
[15] See, also, the latter part of Article 13: "has been committed" ("*aurait été commise*").
[16] See Chapter 7.
[17] See, for example, Matscher (1988) 319; Frowein and Peukert (2009) 391; Grabenwarter (2014) 329.
[18] See, for example, Mertens (1968) 454; Strasser (1988) 596; Békés (1998) 25; Lorenzen et al. (2011) 944.
[19] See, for example, Buyse (2008) 129; Shelton (2015) 16.
[20] See, for example, Antkowiak (2008) 356; David (2014) 263; Waters (2014) 3; Shelton (2015) 16, 19.

The latter part of the wording, "notwithstanding that the violation has been committed by persons acting in an official capacity," is, at first glance, confusing and seems unnecessary.[21] A violation could usually be traced back to some person or entity acting in an "official capacity": Why is it necessary to spell that out in plain language? However, the aim is to specify that the State must provide an effective remedy even if the individual causing the violation has some form of immunity according to national or international law.[22] Nevertheless, this wording has been used as an argument to exclude the challenging of primary legislation, as such, from the scope of application of Article 13 (Section 10.5.3.3). And some have used it as an argument in support of the view that the Convention must have direct horizontal effect (*Drittwirkung*) between third parties.[23] However, in the case law of the Court, there is no indication that Article 13 goes this far.[24] That being said, there must be a remedy against the State, or organs or persons of the State, when the State has violated positive obligations under the Convention.[25] In this sense, one could speak of an indirect horizontal effect.[26] And, depending on the remedies available at domestic level, Article 13 may require that procedures between private parties be initiated in order to achieve sufficient redress, for instance, sufficient compensation,[27] or because Article 13 requires effective investigations.[28]

However, Article 13 not only grants a right for the individual but is an important expression of the principle of subsidiarity upon which the system for the protection of human rights under the Convention is based.[29] Indeed, the primary responsibility for safeguarding Convention rights lies with the Contracting States and the Convention system is subsidiary to national systems for the safeguarding of human rights. Other important expressions of this principle are found in Articles 1, 35, and 46 of the Convention. In fact, these Articles, including Article 13, are considered to be the "key provisions underlying the Convention's human

[21] Similarly, Grote and Marauhn (2006) 1091.
[22] See, for example, Raymond (1980) 169–170; Matscher (1988) 329; White (2000) 195; Sinkondo (2004) 369–372; Pellonpää (2007a) 558; Jacobs et al. (2017) 148; Dijk et al. (2018) 1059.
[23] See, for example, Clapham (1993) 240–244.
[24] Similarly, Grabenwarter and Pabel (2012) 495.
[25] See, for example, Holoubek (1992) 151–155; White (2000) 195; Dijk et al. (2018) 1059.
[26] See, for example, Grote and Marauhn (2006) 1092.
[27] See Section 11.5 and, for example, Somers (2018).
[28] See Section 11.7.
[29] With the entry into force of Protocol no. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter Protocol 15), a reference to the principle of subsidiarity was included in the Preamble of the Convention; see Articles 1 and 7 of Protocol 15.

rights protection system."[30] A truly subsidiary protection would be realized if States actually fulfilled their primary obligation to secure Convention rights, as foreseen in Article 1, so that violations do not occur. But even if violations occur, it would not be necessary to turn to Strasbourg if they are remedied at home. To accommodate and allow States to realize this secondary goal, Article 35(1) provides that all domestic remedies must be exhausted before the Court may deal with the matter. Lastly, Article 46 obliges States to abide by the final judgment of the Court in any case to which they are parties and sets out a procedure for the supervision of the execution of the Court's judgment.

But subsidiarity also applies to the Court and other Convention organs. States are, for example, granted a certain leeway in the interpretation and application of the Convention, of which the margin of appreciation doctrine is the most well-known expression. Consequently, the Court's interpretation and application of Article 13, as an expression of subsidiarity, is central to the cooperative relationship between the international level (the Convention, the Court, and the Committee of Ministers) and the national level (in particular, courts, other national remedial authorities, legislators, and the governmental branch). I provide my (normative) answer as to what extent such systemic considerations should influence how the Court construes and applies Article 13 in the concluding chapter (Chapter 13).

1.3 UNCERTAINTY AND DEVELOPMENT

In international law, the right to an effective remedy is a relatively new phenomenon, which only appeared in international treaties in the aftermath of the Second World War.[31]

Ever since the inception of the Convention, there has been considerable doubt concerning the content and scope of the obligations arising from Article 13. The famous and much cited quotation from the dissenting opinion of Judges Matscher and Pinheiros Farinha in *Malone* v. *UK* (Plenary 1984) is illustrative: "We recognise that Article 13 constitutes one of the most obscure clauses in the Convention and that its application raises extremely difficult and complicated problems of interpretation. This is probably the reason why,

[30] *Guide to Good Practice in Respect of Domestic Remedies* (adopted by the Committee of Ministers on September 18, 2013) 7. Other expressions of subsidiarity are, for example, Article 34 of the ECHR and the Pilot judgment procedure.

[31] See, for example, Mertens (1973) 1. Also in legal literature, remedies have only recently attained attention at the international level. However, at the domestic level, in particular, in the U.S. Constitutional theory, there is a rich body of scholarship concerning the relationship between rights and remedies; see, for example, Starr (2008) 708 with further references. See, also, Roach (2021).

for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons."[32]

And even though the Court has dealt with Article 13 in a number of judgments and decisions thereafter, the content and scope remain uncertain.[33] In early years, most monist countries even held that the notion of effectiveness was so imprecise that it did not lend itself to direct applicability. Article 13 was not self-executing.[34]

Initially, the Court adopted a restrictive interpretation and application of Article 13.[35] In recent years, however, the Court has reinforced the scope and application of Article 13.[36] The most prominent example is the use of Article 13 in cases concerning excessive lengths of proceedings violating Article 6(1). Until *Kudla* v. *Poland* (Grand Chamber 2000), the Court held that Article 13 was consumed by Article 6(1), but then reconsidered its case law and found it necessary to examine whether Article 13 had also been violated.[37] The Court acknowledged that an aggregate of several remedies could satisfy Article 13, but found that the Polish Government had not indicated whether, and, if so how, the applicant could obtain relief – either preventive or compensatory – by taking recourse to the remedies proposed by the Polish Government.[38] The Court did not indicate the preventive and/or compensatory measures necessary to obtain appropriate relief, either generally (e.g. compensation is required under the following circumstances …) or concretely (e.g. compensation is required in cases such as this one). The choice of preventive and/or compensatory

[32] See, in a similar manner, the dissenting opinion of Judges Bindschedler-Rober, Gölcüklü, Matscher, and Spielmann in *James a.o.* v. *the UK* (Plenary 1986).

[33] See, as general expressions, for example, White (2000) 191; Pellonpää (2007a) 558; Malinverni (2009) 487. Keller and Sweet (2008) 24 claim that the case law of the Court concerning Article 13 has grown "dense and sophisticated," but they are, as far as I can see, a solitary exception. More generally, the topic of remedies is claimed to be "one of the most undeveloped areas of international law" that "cries out for analysis"; see Posner and Sykes (2011) 244, 245. See, also, Roach (2021) 4.

[34] See, for example, Mertens (1968) 463–464; Mertens (1973) 95. From the 1970s, as the case law of the Court grew more specific, monist countries increasingly held that Article 13 was self-executing; see, for example, Flauss (1991) 328. Thus, even though the case law of the Court is not "dense and sophisticated," it has grown sufficiently clear to render Article 13 self-executing.

[35] See Sections 4.3 and 12.3.2 and, for example, Lester (2011) 102.

[36] See Sections 4.3 and 4.5 and, for example, Helfer (2008) 142, 144–146; Christoffersen (2009) 362; Malinverni (2009) 487; Jacobs et al. (2017) 136. This development has been most significant in conjunction with Articles 2, 3, 5, and 6(1). The right to an effective remedy has also, in later years, been construed and applied more expansively in other international human-rights regimes; see, for example, David (2014).

[37] *Kudla* v. *Poland* (Grand Chamber 2000), paras. 150–156.

[38] Ibid., para. 159.

measures was, therefore, left within the margin of appreciation of the State. However, in *Scordino* v. *Italy* (no. 1) (Grand Chamber 2006), the Court went one step further and held that there is a "strong but rebuttable presumption" that excessively long proceedings occasion nonpecuniary damage.[39]

Judges in the Court have divergent opinions with regard to how this reinforcement should be performed (or not). A few examples from the case law are illustrative. In her dissenting opinion in *Zavoloka* v. *Latvia* (2009), Judge Ziemele, for example, held that whether the potential of Article 13 could be fulfilled in a different manner was debated within the Court, in particular when seen in the light of the Court's case load, which illustrated the necessity of improving domestic remedies in a number of States. In *Grosaru* v. *Romania* (2010), Judge Ziemele was more concrete and held that the Court should have elaborated specifically on what was required of the remedy in the case in hand.[40] In *Maksimov* v. *Russia* (2010), Judges Spielmann and Malinverni found that Russia had not provided an effective remedy to claim compensation for a violation of Article 3. They pointed to the principle of subsidiarity and held that the Court should develop its interpretation of Article 13 by requiring that an effective remedy included an examination based upon criteria set out by the Court so as to force States "to ensure that the Convention is effectively incorporated in the domestic court's application of the law."[41] And, in *Bozkır a.o.* v. *Turkey* (2013), Judge Keller argued that the independent nature and violation of Article 13 should lead to a larger amount of compensation under Article 41.[42]

At the same time, the Court is reinforcing the scope of its own remedial powers,[43] the most notable example being the introduction of the Pilot judgment procedure,[44] and increasingly includes procedural and remedial requirements under substantive Articles.[45]

The Court has provided little justification for reinforcing the scope and application of Article 13. But, when a justification is given, it usually includes a reference to the principle of subsidiarity and the case load of the Court.[46]

[39] *Scordino* v. *Italy* (no. 1) (Grand Chamber 2006), para. 204.
[40] Concurring opinion of Judge Ziemele in *Grosaru* v. *Romani* (2010).
[41] Partly dissenting opinion of Judges Spielmann and Malinverni in *Maksimov* v. *Russia* (2010).
[42] Partly dissenting opinion of Judge Keller in *Bozkır a.o.* v. *Turkey* (2013).
[43] See, for example, Flauss (2009); Leach (2013); Jahn (2014).
[44] The Pilot judgment procedure is a response to the proliferation of domestic structural and systemic violations capable of generating large numbers of applications to the Court; see, for example, the Information note on the Pilot judgment procedure issued by the Registrar of the ECtHR in 2009 (available at the website of the Court).
[45] See Section 13.2.
[46] See, for example, *Kudla* v. *Poland* (Grand Chamber 2000), paras. 148–149.

And even if no such reference is provided, the factual background is there for everyone to see: The Court is overwhelmed by applications, both well-founded and ill founded. Between the end of the 1990s and the years 2000–2011, the backlog was increasing rapidly and to an extent which threatened to strangle the Court. Indeed, by the end of 2010, the backlog had reached 139,650 cases, a growth of about 20,000 cases since the end of 2009,[47] and by the end of 2011, the backlog had reached 151,600 cases.[48] However, by the end of 2012, the backlog had been reduced to 128,100 cases, by the end of 2013, to 99,900 cases, by the end of 2014, to 69,900 cases, and by the end of 2015, to 64,850 cases. The main reason for this, however, was not a reduction of incoming applications, but the impact of the Single judge procedure introduced by Protocol 14 (now regulated in Articles 26 and 27 of the ECHR).[49] It is illustrative that in 2011, over 100,000 applications were allocated to a Single judge formation, a number, which by the end of 2015, was at 3,200 cases.[50] In addition, the Pilot judgment procedure has allowed the Court to "dispose of thousands of repetitive applications, either by sending them back to new domestic remedies, or on the basis of mass settlements offered by the respondent State."[51] Further, the Court and its Secretariat has initiated several other requirements, procedures, and changes to reduce the backlog and effectively deal with the case load.[52] Notwithstanding this, the number of applications remains extremely high. Thus, even though Court has become more efficient, the case load (and the case law) is evidence that many countries have considerable problems in the protection of human rights at national level. In fact, it seems as though the Court currently is able to deal with the incoming inadmissible and repetitive cases, whereas it still has a hurdle to overcome concerning admissible nonrepetitive cases. It is illustrative, that out of the 64,850 cases on the docket at the end of 2015, only 30,500 were repetitive cases, whereas 11,500 were priority cases, and 19,600 were normal nonrepetitive cases.[53] At the end of 2016, the Court's backlog had again

47 The Annual Report 2010 of the ECtHR 147.
48 The Annual Report 2011 of the ECtHR 153. The backlog peaked in September 2011, exceeding 160,000 cases; see the Annual Report 2011 6.
49 The Annual Report 2012 of the ECtHR 12. See, also, for example, Spielmann (2014) 26; Keller and Marti (2015) 829. Protocol 14 entered into force for all States on June 1, 2010.
50 The Annual Report 2015 of the ECtHR 5. Most of these cases were declared inadmissible.
51 Spielmann (2014) 29.
52 For instance, the adoption of a prioritization policy, under which the Court aims at concentrating its resources on cases which will have the most impact in securing the goals of the Convention and the cases raising the most serious issues of human-rights violations. The policy is available at the website of the Court. See, also, the Rules of the Court Article 41.
53 Annual Report 2015 of the ECtHR 5.