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*Elżbieta Morawska**

THE PRINCIPLES OF SUBSIDIARITY AND EFFECTIVENESS: TWO PILLARS OF AN EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS WITHIN THE MEANING OF ARTICLE 13 ECHR

Abstract: *The purpose of this article is to determine the relationship between the principles of subsidiarity and effectiveness and an effective remedy for the excessive length of proceedings within the legal order of the European Convention on Human Rights. The article assumes that these key principles of the ECHR's legal order have an impact on such a remedy, both in the normative and practical dimensions. This assumption has helped explain many aspects of the Strasbourg case law regarding this remedy. Concerning the relationship of this remedy with the principle of subsidiarity, it raises issues such as: the "reinforcing" of Art. 6 § 1; the "close affinity" of Arts. 13 and 35 § 1; and the arguability test. In turn, through the prism of the principle of effectiveness, the reasonableness criterion and the requirement of diligence in the proceedings are presented, followed by the obligations of States to prevent lengthiness of proceedings and the obligations concerning adequate and sufficient redress for such an excessive length of proceedings. The analysis shows that an effective remedy with respect to the excessive length of proceedings is not a definitive normative item, as the Court consistently adds new elements to its complex structure, taking into account complaints regarding the law and practice of States Parties in the prevention of and compensation for proceedings of an excessive length.*

Keywords: European Convention on Human Rights, European Court of Human Rights, excessive length of proceeding, principle of effectiveness, principle of subsidiarity, right to an effective remedy regarding a hearing within a reasonable time

INTRODUCTION

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms – commonly referred to as the European Convention on Human Rights (Convention or ECHR),[1] was the first multilateral treaty signed by the Member States of the

* Associate Professor (dr. habil.), University Cardinal Stefan Wyszyński in Warsaw; e-mail: e.morawska@uksw.edu.pl; ORCID: 0000-0001-7299-0320.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No. 005.

Council of Europe (CoE).[2] The Convention was designed to give the fullest possible expression to the idea of creating a legally-binding, international instrument whose primary purpose would be to protect the rights and fundamental freedoms of persons within the jurisdiction of the States Parties thereto.[3]

As a result of the gradual expansion of the basic catalogue of human rights and fundamental freedoms and the strengthening of the European Court of Human Rights (Court or ECtHR), the ECHR, characteristic in its conception, has evolved into a complex (expanded) human rights legal order, with the Court being an important element of this order. Established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols" (Art. 19 ECHR), the Court has contributed, through a progressive approach and expansive reach, to reinforcing this order. Meanwhile its case law has become a major source of knowledge and findings regarding the nature and content of human rights and fundamental freedoms and the related obligations of the State Parties to the ECHR.

The purpose of the analysis carried out in this article is to show the process of strengthening the legal order of the ECHR through the prism of the right to an effective remedy regarding the length of proceedings, within the meaning of Art. 13 ECHR.

It is important at the outset to clarify the scope of the present study. This study is not intended to provide a detailed description of the ECtHR case law as such, but rather is an attempt to answer the question about the kind of reciprocal relationships that exist between effective remedies against excessive length of proceedings, the subsidiarity principle and the margin of appreciation, the effectiveness principle, and the nature and structure of the obligations to provide with an effective legal remedy for the excessive length of proceedings within the meaning of Art. 13 ECHR. The solution to these research problems required posing several detailed research questions: definitional, praxeological, and explanatory, not least as they are general problems that go beyond implicit concrete facts of the cases in accordance with Art. 34 ECHR. This is because the Court rulings "issued in an individual case will nevertheless at least to some extent establish a precedent (…) valid for all Contracting States."[4]

At this point, it seems necessary to draw attention to an important language disparity. The English version of Art. 13 ECHR employs the term *remedy,* whereas the French version of Art. 13 uses the term *recours*. The problem is not merely terminological if we consider that *remedy* includes not only procedural guarantees but also the right to compensation or just satisfaction, while the same cannot be said of the French term *recours*.

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[2] Statute of the Council of Europe, CETS, No. 001.

[3] P.-H. Teitgen in: *Collected Edition of the "Travaux Préparatoires" of the ECHR*, vol. 1, The Hague: 1975, pp. 292-294; *see also* E.H. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności* [Positive obligations of States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms], UKSW University Press, Warszawa: 2016, pp. 30 et seq.

[4] ECtHR, *Pentiacova and Others v. Moldovia* (App. No. 14462/03), 4 January 2005; *Sentges v. the Netherlands*, (App. No. 27677/02), 8 July 2003.

In fact, the recognition that it provides grounds for seeking damages is not unquestionable.[5] In addition, in anticipation of further specific comments, let us note that the term *remedy* is more faithful to the interpretation of Art. 13 ECHR, which requires of the States Parties to establish a remedy that, first, enables "the national authority dealing with the case […] to consider the substance of the Convention complaint, in line with the principles laid down in the Court's case law,"[6] and second, makes possible a decision to grant relief appropriate to the circumstances of the case.[7]

Three general arguments justify the choice of issues identified in the title of the article. First, the effectiveness and credibility of the Convention largely depends on the effectiveness of the remedies provided to redress violations of its provisions, including the right to be heard within a "reasonable time." Secondly, excessive delays in resolving legal disputes constitute a significant danger, in particular for public confidence in the capacity of the States Parties to administer justice. This, in turn, reflects negatively on respect for the rule of law, which is one of the three fundamental pillars of the Council of Europe, the other two being democracy and respect for human rights.[8] Thirdly, the need for an analysis of the problem at hand is further supported by the fact that overstepping the reasonable time requirement of Art. 6 ECHR may result in (procedural) breaches of other conventional human rights or freedoms, such as the right to life or the prohibition of ill-treatment (e.g. in the case of unjustified slow investigations into charges, death or ill-treatment, respectively), the right to liberty and security (in the case of the lack of a speedy decision by a court on a habeas corpus action), or the right to respect for the private and family life (in the case of undue delays in custody proceedings which may result in de facto determination of the issue submitted to court before it has held its hearing). Thus, delays in resolving legal disputes have been "one of the most arguable issues before the ECtHR."[9]

The problem of excessive length of proceedings occurs in all States Parties, albeit to a different degree: for some States it is a generalized, systemic problem, while for others

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[5] J. Raymond, *A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights*, 5 Human Rights Review 161 (1980), p. 165; *see also* A. Randelzhofer, C. Tomuschat, *State Responsibility and the Reparation in Instance of Grave Violations of Human Rights*, Martinus Nijhoff Publishers, The Hague: 1999, pp. 33-34.

[6] ECtHR, *Kiril Ivanov v. Bulgaria* (App. No. 17599/07), 11 January 2018, para. 59; *see* others, e.g. based on the right to respect for private and family life: ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 May 2018, para. 42.

[7] ECtHR, *Aksoy v. Turkey* (App. No. 21987/93), 18 December 1996, para. 95.

[8] ECtHR, *H. v. France* (App. No. 10073/82), 24 August 1989, para. 58; *see also* F. Tulkens, *The Right to a Trial within a Reasonable Time: Problems and Solutions*, in: Venice Commission, *Can Excessive Length of Proceedings Be Remedied?*, Strasbourg: 2007, pp. 335, 342; F. Sudre, *Droit européen et international des droits de l'homme*, Presses Universitaires de France, Paris: 2006, p. 391.

[9] M.W. Janis, R. Kay, A. Bradley, *European Human Rights Law: Text and Material*, Oxford University Press, Oxford: 2000, p. 454; similarly O. Jacot-Guillarmod, *Rights Related to Good Administration of Justice (Article 6)*, in: R. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993, pp. 381 and 394-395; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, Cambridge: 2006, pp. 39 and 76.

it should be seen rather as a sporadic dysfunction of an otherwise effective system of administration of justice. Unfortunately, Poland is one of the States Parties where it is a systemic problem.

The Court data shows that nearly half of the judgments delivered in Polish cases relate to Art. 6 ECHR, including the right to a fair trial or the length of proceedings.[10] Among these cases is *Kudła v. Poland*, a leading length-of-proceedings case in the Court's case law. It was only in 2015 that the CoE's Committee of Ministers terminated supervision over the implementation of its findings.[11] However, the resolution putting an end to this supervision indicates that the CoE's Committee of Ministers did so mostly to allow for supervision over the implementation of other Polish length-of-proceedings cases, most notably, *Rutkowski and Others v. Poland*, ruled upon by the Court in a pilot-judgment procedure.[12]

One can agree with K. Drzewicki that the case of *Kudła v. Poland* of 2000 deserves recognition because "although several years have passed since the Court's judgment, many of the implications of the excessive length of court proceedings remain valid in Poland."[13] Nevertheless, in this article particular topics related to the excessive length of court proceedings in Poland and the Polish provisions on complaints about the breach of the right to have a case examined in judicial proceedings without undue delay of 2004 (the 2004 Act)[14] together with its amendment in 2016 (the 2016 Amendment), are not considered in great detail. However, the *Kudła* case is relatively often cited in the article because of its special significance for the relationship between effective remedies against the excessive length of proceedings within the meaning of Art. 13 ECHR and the principle of subsidiarity. The *Kudła* case was characterised by the Court as having "stressed the importance of the rules relating to the subsidiarity principle so that individuals are not systematically forced to refer to the Court in Strasbourg complaints that could otherwise, and in the Court's opinion more appropriately, have been addressed in the first place within the national legal system."[15] The *Kudła* case therefore seems to be a strong example of the role of the Court in shaping the concept of subsidiarity and its limits.

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[10] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.009.

[11] Final Resolution CM/ResDH (2015)248: *Execution of the judgments of the European Court of Human Rights 205 cases against Poland*. Adopted by the Committee of Ministers on 9 December 2015 at the 1243rd meeting of the Ministers' Deputies.

[12] ECtHR, *Rutkowski and Others v. Poland* (App. No. 72287/10), 7 July 2015, paras. 184 *et seq.*

[13] K. Drzewicki, *Sprawa Kudła v. Poland z 2000 r. Istota przewlekłości postępowań sądowych* [Kudla v. Poland case of 2000: The essence of the excessive lenght of judicial proceedings], in: E.H. Morawska (ed.), *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, C.H. Beck, Warszawa: 2019, p. 89.

[14] The Act was adopted on June 17, 2004. Originally, it was entitled *Act on Complaint on Infringement of a Party's Right to Examine a Case in Court Proceedings without Unreasonable Delay* (Journal of Laws, No. 179, item 1843); current consolidated text: Journal of Laws of 2018, item 75.

[15] ECtHR, *Luli and Others v. Albania* (App. Nos. 64480/09, 64482/09, 12874/10... *e.a.*), 1 April 2014, para. 188.

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1. THE PRINCIPLE OF SUBSIDIARITY WITHIN THE LEGAL ORDER OF THE ECHR

The principle of subsidiarity is one of the basic structural principles of the Convention mechanism.[16]

1.1. Legal basis of the principle of subsidiarity

Having said the above, the principle of subsidiarity is not explicitly mentioned in the Convention. In a sense, therefore, it has an implicit character.[17] Moreover, H. Petzold's research shows that the issue of the principle of subsidiarity was not even raised in discussions during the course of drafting the Convention.[18] If so, then it must be considered to have been formulated by the Convention bodies and is in some sense implied. Its normative foundations were identified by the Convention bodies through the joint reading of Art. 1 (obligation to respect human rights), Art. 13 (right to an effective remedy) and Art. 35 § 1 (admissibility criteria) of the Convention,[19] giving rise over time to a general case law principle which states the following:

> By virtue of Article 1 of the Convention (which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention"), the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights.[20]

[16] *See e.g.* R. Clayton, H. Tomlinson, *The Law of Human Rights,* Oxford University Press, Oxford: 2000; R.S.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993; J. Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights*, 19 Human Rights Law Journal 30 (1998), pp. 30-31; D. Shelton, *Remedies in International Human Rights Law,* Oxford University Press, Oxford: 2006, p. 124; F. De Santis di Nicola, *Principle of Subsidiarity and 'Embeddedness' of the European Convention on Human Rights in the Field of the Reasonable-Time Requirement: The Italian Case*, 18(1) Jurisprudence (2011), p. 7; *see also* leading studies on the mechanism of the Convention, e.g. D. Harris, M. O'Boyle, E. Bates, C. Buckley in: D. Harris, M. O'Boyle, C. Warbrick (eds.), *Law of the European Convention on Human Rights*, Oxford University Press, Oxford: 2009, p. 13; P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford: 2005, p. 161; Sudre, *supra* note 8, p. 200.

[17] M. Tumay, *The Subsidiary Protection of European Convention on Human Rights*; available at: https://dergipark.org.tr/tr/pub/suhfd/issue/26643/281189 (accessed 30 June 2020), p. 207; it is still of this nature because Protocol 15 to the ECHR, opened for signature on 24 June 2013, amending the preamble to the ECHR by adding a reference to the principle of subsidiarity and the Strasbourg doctrine of the margin of appreciation of States Parties has not yet entered into force; *see* Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213.

[18] Petzold, *supra* note 16, p. 42.

[19] ECtHR, *Kudła v. Poland* (App. No. 30210/96), 26 October 2000, para. 152; it can be added that in this context Art. 41 ECHR is indicated as a normative basis as well; *see also* Tumay, *supra* note 17, pp. 208-209.

[20] *Kudła*, para. 152; *Rutkowski and Others*, para. 173.

These three provisions of the Convention providing the legal basis for the principle of subsidiarity have also been indicated in more recent cases, although in a less extensive manner. This is demonstrated, for example, in the *Kislov v. Russia* case, in which the Court referred to them, stating that

> [b]y virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention.[21]

1.2. The two dimensions of the principle of subsidiarity

The academic literature draws attention to the dual-dimensionality of subsidiarity in the legal order of the Convention. The first dimension is referred to as procedural, or formal, and it means that before lodging a complaint to the Convention bodies (currently this concerns only the Court), each applicant must first have their complaint heard before the competent national institutions which afford within their scope a measure that can be considered an effective domestic remedy, depending on the circumstances of the case. The second dimension is material, or substantive, and it consists of three assumptions.[22]

According to the first, national courts play a fundamental role in the interpretation of national law. Hence, "it is not for this Court to take the place of the competent national courts in the interpretation of domestic law."[23] Secondly, the Convention may imply "a duty of specific conduct on the part of the competent national authority."[24] Lastly, the third assumption relates to the doctrine of the margin of appreciation. As H. Petzold noted, "this margin of appreciation stems directly from the principle of subsidiarity (...) It is a natural product of the principle of subsidiarity; it is a technique developed to allocate decision-making authority to the proper body in the Convention scheme, to delineate in concrete cases the boundary between "primary" national discretion and the subsidiary international supervision."[25] In the Court's words:

> The domestic margin of appreciation thus goes hand in hand with a European supervision (…). However, the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties

[21] ECtHR, *Kislov v. Russia* (App. No. 3598/10), 9 July 2019, para. 133.

[22] H. Petzold, *The Convention and the Principle of Subsidiarity*, in: R. Macdonald, F. Matscher, H. Petzold, (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993, p. 60; *see also* D. Shelton, *Subsidiarity, Democracy and Human Rights,* in: D. Gomien (ed.), *Broadening the Frontiers of Human Rights*: *Essays in Honour of Asjbørn Eide*, Oxford University Press, Oxford: 1993, pp. 43-44.

[23] ECtHR, *Kay and Others v. the UK* (App. No. 37341/06), 21 September 2010, para. 69; The Court made such findings for the first time in the case: ECtHR, *Handyside v. the UK* (App. No. 5493/72), 7 December 1976, para. 50.

[24] Petzold, *supra* note 16, p. 52.

[25] *Ibidem*, p. 59.

> it enshrines. The institutions created by it make their own contribution to this task, but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.[26]

The studies, although limited due to the scope of this article, clearly show that the Court is not at all shy about referring to the principle of subsidiarity, thus prompting the observation that this principle has not been reduced to a tool limiting the Court's powers.

The Court first cites "subsidiarity" as the limit of its control over the findings and assessments made by the competent national authority[27] and as the basis of its supervisory function regarding such findings and assessments.[28] Secondly, "subsidiarity" is used as a justification for the earlier exhaustion of domestic remedies by the applicant,[29] and thirdly, it is recognized as confirming the need to ensure the effective protection at the national level of the rights and fundamental freedoms set forth in the Convention.[30]

Additionally, the Court has indicated a connection between the pilot judgment procedure and the principle of subsidiarity, stating that

> the pilot-judgment procedure allows "the speediest possible redress to be granted at domestic level to the large number of people suffering from the general problem identified in the pilot judgment, thus implementing the principle of subsidiarity which underpins the Convention system" (…). It also reduces the threat to the effective functioning of the Convention system by reducing the number of similar applications brought before the Court.[31]

2. THE PRINCIPLE OF SUBSIDIARITY AND THE RIGHT TO AN EFFECTIVE REMEDY FOR THE EXCESSIVE LENGTH OF PROCEEDINGS WITHIN THE LEGAL ORDER OF THE ECHR

The right to an effective remedy, guaranteed under Art. 13 ECHR, plays a particularly significant role in the context of the principle of subsidiarity and therefore the

[26] *Handyside*, para. 48.

[27] ECtHR, *Mc Farlane v. Ireland* (App. No. 31333/06), 10 September 2010, paras. 88-92.

[28] The Court used to note that national authorities are better placed than international courts to assess the facts of a case. Nevertheless, when assessing and discussing the matter, they must apply standards in accordance with the principles set out in the Convention as developed in the Court's case law; it did so, for example, in the cases: *Krawczak v. Poland* (App. No. 40387/06), 8 April 2008, para. 37; *Mc Farlane*, paras. 112-113.

[29] *Mc Farlane*, para. 112; *see also* the joint dissenting opinion, submitted by judges: A. Gyulumyan, I. Ziemele, L. Bianku and A. Power, point 5.

[30] *Mc Farlane*, para. 12; *see also* dissenting opinion, which was submitted by a judge L. Guerra; and M. Balcerzak, *Concept of General Effective Remedy in the Case Law of the ECHR and the Perspective of Polish Legal Order*, in: *Disfunctions of Polish Law: How to Improve the System of Legal Remedies in Poland,* Ministerstwo Spraw Zagranicznych – Departament do Spraw Postępowań przed Międzynarodowymi Organami, Warszawa: 2016, pp. 234-238.

[31] ECtHR, *Igranov and Others v. Russia* (App. Nos. 42399/13, 24051/14, 36747/14... e.a.), 20 March 2018, para. 5; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 134.

"embedding" of the Convention in the States Parties' respective legal systems.[32] As the Court has repeatedly emphasized, "Art. 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the national legal system."[33]

2.1. The principle of subsidiarity and the "reinforcing" of Article 6 § 1 ECHR

The right to an effective remedy is claimed to permeate the entire Convention system, giving it a real and effective dimension. It fulfils its guarantee and performs its protective function in the event of violations or when the State undertakes ineffective actions or none at all. In this sense, the right to an effective remedy is ancillary by default, affording the person subject to the jurisdiction of a State Party the self-enforcement at national level of the effects violations of Convention rights and freedoms. It is therefore justified to refer to availability in the context of this right, as it is used in connection with Convention rights or freedoms. It is precisely because of that fact that its accessory character should be mentioned.[34]

However, these comments cannot be directly related to the relationship between Art. 6 ECHR and Art. 13 ECHR, for until recently the Convention bodies considered that the allegations that a national legal system lacked the competence to examine an excessive length-of-proceedings claim,[35] or of the absence of any measures to shorten or terminate the excessive length of proceedings[36] should be settled on the basis of Art. 6 § 1 and not Art. 13. Two arguments were cited in support of this proposition. First, the Convention bodies assumed that the guarantees provided for in Art. 6 § 1 are stricter than those of Art. 13, and consequently that the guarantees of the latter are completely "absorbed" by the former.[37]

Accordingly, in the event of an alleged violation of Art. 6 § 1 ECHR, it was not considered necessary to establish a violation of Art. 13 since the requirements provided for in Art. 6 § 1 constitute *lex specialis* to the requirements of Art. 13 of the ECHR, which is recognized as *lex generalis* and, being less strict, they are absorbed by the requirements of Art. 6 § 1.[38]

[32] D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe: 1999, p. 336; L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law 125 (2008), pp. 128-29; *see also* other cases, among others: *Rutkowski and Others*, para 175; *G.I.E.M. S.R.L. and Others v. Italy* (App. No. 1828/06 34163/07 19029/11), 28 June 2018, paras. 81-84 and the partly concurring and partly dissenting opinion, which was submitted by a judge Pinto de Albuquerque, points 81-84.

[33] *Aksoy*, para. 95.

[34] ECtHR, *Muminov v. Russia* (App. No. 42502/06), 11 December 2008, para. 105; *A. v. the Netherlands* (App. No. 4900/06), 20 July 2010; *Othman (Abu Qatada) v. the UK* (8139/09), 17 January 2012.

[35] ECtHR, *Giuseppe Tripodi v. Italy* (App. No. 40946/98), 25 January 2000, para. 15.

[36] ECtHR, *Bouilly v. France* (App. No. 38952/97), 7 December 1999, para. 7.

[37] ECtHR, *Airey v. Ireland* (App. No. 6289/73), 9 October 1979, para. 35.

[38] ECtHR, *Kamasinski v. Austria* (App. No. 9783/82), 19 December 1989, para. 110.

The Court substantially departed from this approach to the application of Art. 13 as regards complaints about excessive delays in domestic court proceedings in the *Kudła* case.[39] According to the Court's findings in that case, the scope of the right to an effective remedy encompasses the procedural requirement of "a hearing within a reasonable time", separate from the requirements set forth in Art. 6 § 1 ECHR.[40] As a result, the Court found that the applicants alleging a violation of Art. 6 § 1 due to excessive delays before national courts in determining their "civil rights" or "criminal charges" could also invoke Art. 13 regarding a separate violation of the right to an effective remedy in the absence of a national mechanism for dealing with complaints about excessive delays in the national judicial system. In the Court's opinion, the requirements of Art. 13 should be considered as "reinforcing" those of Art. 6 § 1, rather than being absorbed by the Art. 6 § 1 obligation to prohibit inordinate delays in legal proceedings.[41]

In justifying this change, the Court largely relied on the principle of subsidiarity, and in particular on two aspects thereof. The first argument results from the Court's belief that "excessive delays in the administration of justice amount to an important danger to the rule of law."[42] The second argument relates to the factual situation in which the Court operated, and continues to operate to this day, referring more specifically to the massive number of pending applications, including in particular complaints regarding the violation of the reasonable-time requirement,[43] which the Court saw as realistically jeopardizing the effectiveness of the Convention mechanism as a whole.[44] The Court thus inferred that the lack of an effective remedy in the event of an excessive length of proceedings forces persons subject to the jurisdiction of States Parties to continually lodge complaints to the Court, while their applications could be dealt with in a more appropriate manner, primarily within the national legal system.[45]

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[39] *Kudła*, paras. 146-149.

[40] ECtHR, *D. M. v. Poland* (App. No. 13557/02), 14 October 2003, para. 47.

[41] *Kudła*, para. 152.

[42] ECtHR, *Charzyński v. Poland* (App. No. 15212/03), 1 March 2005, para. 40; ECtHR, *Sürmeli v. Germany* (App. No. 75529/01), 8 June 2006, para. 104.

[43] *Charzyński*, para. 40; ECtHR, *Michalak v. Poland* (App. No. 24549/03), 1 March 2005, para. 41.

[44] In the opinion of judge J. Casadeval, the above risk determined the interpretation of Art. 6 § 1 ECHR and Art. 13 ECHR in the *Kudła* case. *See* point 3 of the partly dissenting opinion of judge J. Casadeval to the judgment in this case; the academic literature also draws attention to the above circumstances of the settlement in the *Kudła* case. *See. e.g.* L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law 125 (2008), p. 146; Ph. Frumer, *Le recours effectif devant une instance nationale pour dépassement du délai raisonnable. Un revirement dans la jurisprudence de la Cour Européenne des Droits de L'homme*, 77 Journal des tribunaux. Droit européen 49 (2001), p. 53; J.-F. Flauss, *Le droit à un recours effectif au secours de la règle du délai raisonnable. Un revirement de jurisprudence historique*, 49 Revue trimestrielle des Droits de l'Homme 169 (2002), p. 179, 183; M.-A. Beernaert, *De l'épuisement des voies de recours internes en cas de dépassement du délai raisonnable*, 60 Revue trimestrielle des Droits de l'Homme 905 (2004), pp. 905-906.

[45] *Charzyński*, para. 40.

Due to the limited framework of this article we cannot analyze in detail the process and the effects of this separation of the reasonable-time requirement.[46] However, two issues seem to be of relevance to our considerations. First, prompted by the new interpretation of the relationship between Arts. 6 § 1 and 13 ECHR, the Court imposed a new obligation on the States Parties to the Convention to establish an effective remedy within the meaning of Art. 13 ECHR regarding the right to "a hearing within a reasonable time."[47] Secondly, this obligation imposed on the States Parties corresponds to the right of each person, separately ensured by the Convention, to an effective remedy as regards the right to "a hearing within a reasonable time." It should be noted that the provision in question does not deprive persons subject to the jurisdiction of the States Parties to the Convention of the right to lodge a complaint to the Court alleging a violation of Art. 6 § 1 ECHR arising from the breach of the reasonable-time requirement. This claim may be presented independently of the allegation under Art. 13 ECHR, since it concerns a different legal area.[48] In addition, in the absence of such a remedy in the national legal system, an application may be brought only on the basis of Art. 6 § 1 ECHR.[49]

This way of defining the right to an effective remedy in terms of the scope of the admissibility of a length-of-proceedings complaint makes it one of the Convention's implied rights. In addition, contrary to the literal wording of Art. 13 ECHR, the Court found that it is not an absolute right and that the context of its alleged violation may result in "inherent limitations/implied restrictions" in terms of recourse.[50] As J.G. Merrills aptly explains, a relationship is at play here where, by defining rights not explicitly guaranteed under the Convention, the Court assumes the obligation to outline their limits.[51] Therefore, the Court would argue in favour of the implied restrictions of Art. 13 being kept to a minimum.[52]

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[46] These issues are the subject of in-depth discussion. *See* the relatively recent analysis of these issues in a monograph edited by E.H. Morawska, *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.* [Poland in front of the European Court of Human Rights. Leading cases: Kudła v. Poland of 2000], C.H. Beck, Warszawa: 2019.

[47] *D. M.*, para. 50.

[48] To give an example: ECtHR, *FIL LLC v. Armenia* (App. No. 18526/13), 31 January 2019; *Cosmos Maritime Trading and Shipping Agency v. Ukraine* (App. No. 53427/09), 27 June 2019, paras. 83-91; in Polish cases, *see Wcisło and Cabaj v. Poland* (App. Nos. 49725/11, 79950/13), 8 November 2018.

[49] *See* relatively recent case *Liblik and Others v. Estonia* (App. Nos. 173/15… *e.a.*), 28 May 2019.

[50] Expanding on this, the Court added that "In such circumstances Article 13 is not treated as being inapplicable but its requirement of an "effective remedy" is to be read as meaning "a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]"; *see Kudła*, para. 151. The Court has already made such findings in the case of *Klass and Others v. Germany* (App. No. 5029/71), 6 September 1978, para. 69.

[51] J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester: 1995, p. 88.

[52] *Kudła*, para. 152.

2.2. The principle of subsidiarity and the "close affinity" of ECHR

Separation of the guarantee to be heard within a "reasonable time" from Art. 6 § 1 ECHR has a specific and tangible impact on the practice of admissibility of complaints regarding the length of proceedings in relation to the condition of exhaustion of domestic remedies referred to in Art. 35 § 1 ECHR.

The exhaustion of domestic remedies is examined as a prerequisite at the admissibility stage, but only if the applicant has alleged a violation of ECHR without having recourse to ECHR. On the other hand, in the event of an application combining these two allegations (violations of both Art. 13 and Art. 6 § 1), in response to the Government's preliminary objection of non-exhaustion of domestic remedies in relation to the complaint under Art. 6 § 1, the Court tends to assume that the non-exhaustion of domestic remedies under Art. 6 § 1 is closely linked to the merits of the complaint regarding Art. 13, and as such should be included in the substantive settlement of the complaint's admissibility based on Art. 13.[53] The transition to the merits of such an application is usually preceded by a statement that the application concerning the length of proceedings and the lack of an effective remedy "is not manifestly ill-founded within the meaning of Article 3 § 3(a) of the Convention", and that "it is not inadmissible on any other grounds" and "must therefore be declared admissible."[54] Should the violation of Art. 13 be found in connection with Art. 6 § 1 ECHR, the Government's allegations regarding the non-exhaustion of domestic remedies (under Art. 6 § 1) would be dismissed.[55] Thus, for the condition of admissibility to be fulfilled under Art. 35 § 1, the issue of violation of Art. 13 becomes decisive.

This practice has far-reaching consequences in both procedural and substantive terms, and its basis should be traced in the case law, in particular in the principle of subsidiarity and the joint reading of Arts. 1, 13 and 35 § 1 ECHR. This determination prompted the assumption of a close affinity between Arts. 13 and 35 § 1, while the objects of Art. 35 § 1, i.e. to afford the State the possibility of preventing or making right the violations alleged against them[56] before they are presented to the Court, correspond to the assumption reflected in Art. 13 ECHR about there being an effective remedy for the alleged violation in the State Party's domestic legal system.[57]

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[53] ECtHR, *Balogh and Others v. Slovakia* (App. No. 35142/15), 31 January 2018, para. 43; *Wcisło and Cabaj*, paras. 167-168; *FIL LLC*, para. 44; *Engelhardt v. Slovakia* (App. No. 12085/16), 31 August 2018, para. 53.

[54] *FIL LLC*, para. 45. The Court puts it as follows: "The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible." The Court did so even in the relatively recent case of *Cosmos Maritime Trading and Shipping Agency*, para. 67.

[55] *Balogh and Others*, para. 67.

[56] ECtHR, *Cardot v. France* (App. No. 11069/84), 19 March 1991, para. 36; *Civet v. France* (App. No. 29340/95), 28 September 1999, para. 44; *Akdivar and Others v. Turkey* (App. No. 21893/93), 16 September 1996, para. 65; *Haghilo v. Cyprus* (App. No. 47920/12), 26 March 2019, para. 134.

[57] *Kudła*, para 52. The Court took a similar position in several subsequent cases, including the case of *Balogh and Others*, para. 42.

It is therefore appropriate to address the question about the effects of this practice on the admissibility of length-of-proceedings complaints. First and foremost, the premise of the "manifestly ill-founded" under Art. 13 ECHR and the scope of application of art. 13 plays a key role.[58] This in turn leads to what is termed as a claim's "arguability." The existing case law suggests that Art. 13 applies only to an "'arguable complaint' under the Convention."[59]

2.3. The principle of subsidiarity and the arguability test

As a rule, the arguability test serves a limiting function. As a result of its application, the right to a remedy set forth in Art. 13 does not concern all alleged violations of the Convention, but only those which may be considered arguable within the meaning of the Convention.[60] Consequently, Art. 13 imposes on the States Parties the obligation to provide a domestic remedy to "deal with the substance of an 'arguable complaint' under the Convention",[61] implying it is a Convention complaint which, as such, may be regarded as an arguable complaint.[62]

It is difficult to say exactly what arguability is,[63] since the Court has avoided formulating a general definition of the concept, claiming that it should be determined "in the light of the particular facts and the nature of the legal issue or issues raised."[64] At the same time however, the threshold of admissibility based on arguability seems to be relatively low,[65] especially given the fact that declaring a violation of the Convention is not, at the current stage of the Court's case law, a prerequisite for its fulfilment.[66] Consequently, the admissibility of a complaint is not so much about a *prima facie* violation,

[58] ECtHR, *Powell and Rayner v. the UK* (App. No. 9310/81), 21 February 1990, para. 33.

[59] ECtHR, *Silver and Others v. the UK* (App. Nos. 5947/72 *e.a.*), 25 March 1983, para. 113(a); *Kudła*, para 157; *Čonka v. Belgium* (App. No. 51564/99), 5 February 2002; *see also* the ECHR decision on the admissibility of this application of 31 March 2001; *A. v. The Netherlands* (App. No. 4900/06), 20 July 2010, para. 155; *Adam v. Romania* (App. No. 30474/15), 25 September 2018, para. 22.

[60] ECtHR, *De Bruin v. the Netherlands* (App. No. 9765/09), 17 September 2013, paras. 61-62.

[61] ECtHR, *Bazjaks v. Latvia* (App. No. 71572/01), 19 October 2010, para. 127; *Matei and Badea v. Romania* (App. Nos. 30357/15 *e.a.*), 9 October 2018, para. 24; *Amrahov v. Armenia* (App. No. 49169/16), 26 February 2019, para. 36.

[62] ECtHR, *Abu Zubaydah v. Lithuania* (App. No. 46454/11), 31 May 2018, paras. 672-673.

[63] F. J. Hampson, *The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights*, 39(4) International and Comparative Law Quarterly 891 (1990).

[64] ECtHR, *Boyle and Rice v. the UK* (App. Nos. 9659/82, 9658/82), 27 April 1988, para. 55.

[65] The Court differed significantly from the Commission because in its view an "arguable complaint" was a complaint related to the Convention in a way that required substantive settlement. In this context, *see* the case of *Boyle and Rice*, para. 55; *see also* R.C.A. White, C. Ovey, F.G. Jacobs, *Jacobs, White & Ovey, The European Convention on Human Rights*, Oxford University Press, Oxford: 2010, p. 134.

[66] The Court changed its view in this regard in the case of *Klass and Others*: "Article 13 (…) read literally, seems to say that a person is entitled to a national remedy only if a «violation» has occurred. However, a person cannot establish a «violation» before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, (…) Article 13 (…) must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated" (para. 64).

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but rather a *prima facie* arguability.[67] By specifying the content of a claim's arguability test in relation to the length of proceedings, the Court focuses on the duration of the proceedings for each case.[68] For example, if court proceedings have lasted more than sixteen years, then considering Art. 6 § 1 ECHR the complaint is *prima facie* arguable.[69] Accordingly, the applicant is entitled to an effective remedy regarding the length of proceedings.[70]

3. THE PRINCIPLE OF EFFECTIVENESS WITHIN THE LEGAL ORDER OF THE ECHR

In order to better understand the essence of the criterion of effectiveness in constructing a remedy for the excessive length of proceedings, it seems necessary to look at the principle of effectiveness as one of the most important principles determining international law, and take into account that the Court, recognizing the primacy of this principle in the interpretation of the Convention, has adopted its own "doctrine of effectiveness."

The literature indicates a number of elements explaining the meaning of this doctrine. H. Thirlway, for example, argues it has two basic elements. The first element assumes that in the process of interpreting a treaty (or another international document) it should be borne in mind that all its provisions are to be read as established with the intention of giving them a specific meaning (they have been set out to perform a specific role) and therefore preserving their intended meaning is necessary, meaning a court interpretation is questionable if it does not reflect that meaning.

The second element is the rule according to which a treaty as a whole and its individual provisions must be read as established for the final realization of their object. This thus echoes the Roman maxim *ut res magis valeat quam pereat*,[71] which we can find in the definition of effectiveness put forward by G. Fitzmaurice, in the light of which

> effectiveness (*ut res magis valeat quam pereat*) indicates that treaties must be interpreted in terms of their declared or ulterior objects and purposes; individual provisions should be interpreted so as to reflect the fullest effect, consistent with the ordinary meaning of

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[67] *See also* M. Balcerzak, *Konstrukcja prawa do skutecznego środka odwoławczego (right to an effective remedy) w uniwersalnym i regionalnych systemach ochrony praw człowieka*, in: J. Białocerkiewicz, M. Balcerzak, A. Czeczko-Durlak (eds.), *Księga jubileuszowa Profesora Tadeusza Jasudowicza*, Toruń: 2004, p. 50.

[68] ECtHR, *A. K. v. Liechtenstein (No. 2)* (App. No. 10722/13), 18 February 2016, para. 88.

[69] *Sürmeli*, para. 102.

[70] ECtHR, *Vlad and Others v. Romania* (App. Nos. 40756/06 *e. a.*), 26 November 2013, para. 113.

[71] M. Fitzmaurice, P. Merkouris, *Cannons of Treaty Interpretation*, in: M. Fitzmaurice, O. Elias, P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on the Law of Treaties*, Brill, Leiden: 2010, pp. 154-155; A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements: theory and practice], PWN, Warszawa: 2006, p. 345.

words and other parts of the text and in such a way that raison d'être and meaning can be attributed to each part of the text.[72]

3.1. The special character of the Convention

The principle of effectiveness (*effet utile*) was not explicitly stated in the 1969 Vienna Convention on the Law of Treaties (VCLT), although it is assumed that it results implicitly from Art. 31.1 VCLT, which states that a treaty should be interpreted, *inter alia*, in the light of its object and purpose.[73]

Thus, the interpretation of the provisions of a treaty in the light of its object and purpose makes it necessary to refer to their effectiveness (*effet utile*).[74] In the process of interpreting a treaty, the fundamental subordination to its object and purpose has specific effects. In this process the subjective intention of the parties to the treaty and the reflection of this intention in its text becomes of secondary importance.[75] Advocates of the teleological school of thought deem it permissible to go beyond the text of the treaty, not because of the need to determine the intention of the parties but rather to achieve the purpose for which it was established.[76] These observations are confirmed by ECtHR case law, e.g. in *Soering v. the UK*, in which the Court held that

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.[77]

In this way, the principle of effectiveness (*effet utile*), understood as the practical effectiveness of the Convention, is linked to the idea of a collective guarantee of human rights and fundamental freedoms, thus confirming the Convention's object, namely human rights and fundamental human freedoms, and purpose, i.e. ensuring the practical effectiveness of the collective guarantee. The consequence of this teleological approach is emphasis on the object and purpose, as a result of which the ECtHR, like any

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[72] G. Fitzmaurice, *Treaty Interpretation and Other Treaty Points, 1951-1954*, 33 British Yearbook of International Law 2003 (1957); it is also present in the ECHR jurisprudence; *see e.g.* EComPC decision in the case *Chrysostomos, Papachrysostomou and Loizidou v. Turkey* of 1991, para. 47.

[73] *See* the comments on the work of the International Law Committee on Art. 31 of the Vienna Convention on the Law of Treaties: M.K. Yassen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des Traités*, Martinus Nijhoff Publishers, Dordrecht: 1976 (*Chapitre VII: L'effet utile: le principle ut res magis valeat quam pereat*, p. 71 et seq.); as regards the reasons for this, *see* Wyrozumska, *supra* note 71, p. 347; P. Merkouris, *Article 31 (3) (c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Brill, Leiden: 2015, p. 211, fn. 861.

[74] Wyrozumska, *supra* note 71, p. 347.

[75] Judge G. Fitzmaurice clearly expressed this opinion in a separate opinion in the ECtHR *National Union Belgian Police v. Belgium* judgment.

[76] M. Frankowska, *Prawo traktatów* [Law of treaties], Wydawnictwo SGH, Warszawa: 1979, p. 122.

[77] ECtHR, *Soering v. the UK* (App. No. 14038/88), 7 July 1989, para. 87.

other teleological interpreter, "will attempt to subordinate all interpretative efforts to the object and purpose for which a contract has been entered into."[78] In other words, it will seek to ensure that the object and purpose of the Convention are fulfilled to the greatest extent possible while marginalizing the need to determine whether States Parties indeed intended to make such, not any other commitment.[79]

3.2. The dynamic object and purpose of the Convention

Given the above, it is obvious that the object and purpose of the Convention play a central role in the interpretation of its provisions. Although this idea expresses what is referred to as the essence of the treaty,[80] our case law analysis shows that the ECtHR gave this directive a broader meaning and considered it, as R. Bernhardt put it, as "entering certain dynamism."[81] This is because the ECHR interpretation must be "dynamic", that is, carried out based on changes occurring in social and political foundations,[82] as a consequence of which "its [substantive and procedural] provisions cannot be interpreted solely in accordance with the intentions of its authors from more than 40 years ago." The Court found additional justification for this approach in the provisions of the preamble to the ECHR, which mention "the maintenance and further realisation of Human Rights and Fundamental Freedoms." As explained by judge F. Tulkens, "this 'maintenance' requires in particular that the rights and freedoms contained in the Convention be effective in the face of changing circumstances. Whereas 'development' allows a certain degree of innovation and creativity, as a result of which the scope of the Convention's guarantees may be expanded."[83]

Therefore, the ECtHR decided that the provisions of the Convention should be interpreted so that the guarantees of its human rights and fundamental freedoms are not "theoretical or illusory", but instead, "practical and effective" and confirmed in a given case.[84] In turn, the rules of evolutionary interpretation require that the Convention be

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[78] Frankowska, *supra* note 76, p. 122.

[79] ECtHR, *Loizidou v. Turkey* (App. No. 15318/89), 23 March 1995, para. 71; *Mamatkulov and Askarov v. Turkey* (46827/99, 46951/99), 4 February 2005, para. 121 (with regard to Art. 34); A. Mowbray, *The Creativity of the European Court of Human Rights*, 5(1) Human Rights Law Journal 57 (2005), pp. 62-63, 264; D. Rietiker, *The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis*, 79(2) Nordic Journal of International Law 245 (2010), p. 264.

[80] *See* ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 1951, p. 15.

[81] R. Bernhardt stated in this context that: "The object and purpose of the treaty plays a central role in treaty interpretation." *See* R. Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights*, 42 German Yearbook of International Law 11 (1999), p. 16.

[82] C. Ovey, R. C. A. White, F. G. Jacobs (eds.), *The European Convention on Human Rights*, Oxford University Press, Oxford: 2014, p. 46; *see also* M.N. Shaw, *Prawo międzynarodowe* [International law], Książka i Wiedza, Warszawa: 2008, p. 586.

[83] *See* the dissenting opinion of judge F. Tulkens to the ECtHR judgment in the case of *Stummer v. Austria* (App. No. 37452/02), 7 July 2011, paras. 3-4.

[84] *Airey*, para. 24.

treated as a living instrument, the provisions of which should be interpreted in the light of present-day conditions.[85]

The practical and effective assurance of the rights and fundamental freedoms of persons under the jurisdiction of States Parties requires considering social and economic changes broadly understood, as well as scientific and technical progress, thus pointing to an approach sensitive to contemporary threats to ensuring the rights and fundamental freedoms contained in the Convention[86]. Consequently, the fact that the authors of the Convention did not address a given issue must not prevent it from being considered as one that falls within the scope of the Convention.[87]

3.3. In dubio pro rights and freedoms

Additionally, this triggers a broad interpretation of human rights and fundamental freedoms and a simultaneous narrow interpretation of their exceptions and limitations,[88] making it a restrictive interpretation not so much towards individual rights as to the limits of their permissible violations by States Parties.[89]

The Court deemed it necessary to seek an interpretation that is "most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties,"[90] for "the overarching function of the Convention is to protect the rights of individuals, and not to establish mutual obligations between States, which will be interpreted restrictively, taking into account their sovereignty."[91]

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[85] ECtHR, *Marckx v. Belgium* (App. No. 6833/74), 13 June 1979, para. 30; the case of *Tyrer v. the UK* (App. No. 5856/72), 25 April 1978, was the case in which the ECtHR for the first time formulated these rules of evolutionary interpretation (*see* para. 31). M. Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka* [The problem of precedence in international human rights law], Toruń: 2008, pp. 177-179.

[86] Bernhardt, *supra* note 81, p. 12; Mowbray, *supra* note 79, p. 72; Rietiker, *supra* note 79, p. 261.

[87] ECtHR, *Matthews v. the UK* (App. No. 24833/94), 18 February 1999, para. 39.

[88] P. van Dijk, F. van Hoof, (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerpen: 1998, pp. 73-74; R. Bernhardt states similarly that "the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictive on State activities on the other" (Bernhardt, *supra* note 83, p. 14).

[89] Rietiker, *supra* note 79, p. 259; EComHR stated that "a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of this treaty"; *see* EComHR, *East African Asians v. the UK* (App. Nos. 4403/70 *et al.*), 14 December 1973, para. 192; the academic literature, however, notes that a restrictive interpretation as such is, among other methods, not accepted in international law and has no basis in the VCLT of 1969; this opinion is shared by I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 1998, p. 636; Bernhardt, *supra* note 81, p. 14.

[90] ECtHR, *Wemhoff v. Germany* (App. No. 2122/64), 27 June 1968, para. 8; the academic literature points out that "such argument, which emphasizes the character of the Convention as a contract by which sovereign States agreed to limitations upon their sovereignty, has now totally given way to an approach that focuses upon the Convention's law-making character." *See* Harris, O'Boyle, Warbrick, *supra* note 16, p. 7.

[91] EComHR, *Belgian Linguistic Case* (App. No. 1474/62), Report, p. 25.

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The interpretation of the Convention is therefore non-restrictive as regards certain values, namely human rights.[92]

4. THE EFFECTIVENESS OF REMEDIES FOR THE EXCESSIVE LENGTH OF PROCEEDINGS

The effectiveness of the Convention largely depends on the effectiveness of the remedies which are provided to redress violations of its provisions.[93]

In this context, attention should be drawn to the rulings of the Court in *Nicolae Virgiliu Tănase v. Romania*, where the Court, in defining the criterion of the effectiveness of a domestic remedy, stated that the "remedy must in any event be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State."[94] This statement is, however, difficult to find in cases concerning the "effectiveness" of remedies in cases concerning the length of proceedings pursuant to Art. 13 ECHR,[95] as the Court determined separate criteria for such cases.

Bearing in mind our previous comments regarding subsidiarity and the margin of appreciation afforded to States, it is understandable why the Court defines these cases not by indicating the specific form of a remedy, but by indicating the objects of their application, while emphasizing the need for the authorities to comply with Art. 6 § 1 ECHR and thus exercise *special diligence* in the conduct of such proceedings.[96]

4.1. Reasonableness and diligence in the proceedings

States Parties are therefore obliged to "make every effort" to avoid lengthiness, assuming that there may be objective reasons why this may not be possible.[97] The above remarks are justified in Art. 6 § 1 ECHR, which requires proceedings to be conducted "within a reasonable time."

In accordance with the principle of subsidiarity, when assessing the reasonableness of the length of proceedings, account must be taken of the circumstances of the case

[92] L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s),* 21(3) European Journal of International Law 681 (2010), pp. 684-686.

[93] The right to a remedy with respect an arguable claim of a violation of a fundamental right or freedom is expressly guaranteed by almost all international human rights instruments. *See e.g.*, in addition to Art. 13 of the ECHR, Art. 8 of the Universal Declaration on Human Rights and Freedoms, Art. 2.3 of the International Covenant on Civil and Political Rights, Art. 6 of the Convention on the Elimination of Racial Discrimination, and Art. 6 of the Convention on the Elimination of All Forms of Discrimination against Women.

[94] ECtHR, *Nicolae Virgiliu Tănase v. Romania* (App. No. 41720/13), 25 June 2019, para. 218.

[95] *Sürmeli*, para. 100; *FIL LLC*, para. 47.

[96] *Kudła*, para. 130; *Rutkowski and Others*, para. 184.

[97] R. Pisillo Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 German Yearbook of International Law 9 (1992), p. 48 *mutatis mutandis*.

on one hand, and the criteria set out in the Court's case law on the other. As the Court recently stated in the *Raspopović and Others v. Montenegro* case, this will depend in particular on: the complexity of the case, the applicant's conduct and that of the competent authorities, and the importance of what is at stake for the applicant (the parties) in the dispute.[98]

However, the notion of reasonableness must also reflect the necessary balance between prompt and fair proceedings. In this regard, States Parties must strike a middle ground between procedural guarantees, which necessarily entail the existence of periods that cannot be shortened, and the concern for prompt justice. Therefore, situations may arise that justify delays in proceedings, e.g. where the protection of defence interests and the proper administration of justice so require. What is needed, therefore, is for the actions (or lack thereof) undertaken by state authorities in a given situation to judiciously act and prevent as far as possible, burdensome extensions of the length of proceedings. In this way the criterion of reasonableness has been applied to the criterion of due diligence in conducting proceedings.

Due diligence plays an important role in the good faith clause. A State acts in good faith when it could not, despite having exercised due diligence, fulfil its statutory obligations. *A contrario*, if due diligence has not been exercised at all by a State, it is then considered to have acted in bad faith. Therefore, due diligence is an element of good faith. The Court has issued many guidelines as to what this should mean in practice, although this has not been translated into a catalogue of specific actions, the performance of which could determine the possibility of recognizing the undertaking of such actions as being implemented with due diligence. It is in fact impossible to develop such a catalogue, given that due diligence depends on the circumstances of the case, the type and specifics of the law, and the basic human freedoms at stake.

In assessing a State's commitment to due diligence in a given case, it should be born in mind that, at present, "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[99]

There is therefore no single, constant, required level of due diligence, all the more so because there are persons and situations in which the Court expects States Parties to conduct *special diligence*. In terms of the right to be heard within a "reasonable time" it is required, for instance, in cases when parties to the proceedings are affected by

[98] ECtHR, *Scordino v. Italy* (App. No. 36813/97), 29 March 2006, para. 177; *Raspopović and Others v. Montenegro* (App. Nos. 58942/11, 14361/13, 71006/13), 26 March 2020, para. 7.

[99] ECtHR, *Henaf v. France* (App. No. 65436/01), 27 November 2003, para. 55; these findings relate not only to Art. 8 ECHR, but also to other human rights and fundamental freedoms. *Cf.* the cases of *Mangouras v. Spain* (App. No. 12050/04), 28 September 2010, para. 87; *Demir and Baykara v. Turkey* (App. No. 34503/97), 12 November 2008, para. 146; and *Siliadin v. France* (App. No. 73316/01), 26 July 2005, para. 121.

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illnesses, or in labour disputes, child-care cases[100] and claims of compensation for health damage allegedly resulting from medical malpractice.[101] It is also generally required in criminal cases, in particular when the accused is detained on remand.[102]

4.2. Obligations of States to provide effective remedies for the excessive length of proceedings

Returning to the issue of the effectiveness of remedies against the excessive length of proceedings within the meaning of Art. 13 ECHR, it should be noted that in general the "doctrine of effectiveness" is analysed in the context of either "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (...)."[103] The Court therefore sets forth two objectives for a domestic remedy, pointing out in further rulings that prevention is of paramount importance. In fact, with respect of the length of proceedings the Court tends to state that "the best solution in absolute terms is indisputably, as in many spheres, prevention."[104] The above two elements constitute the content of the State's obligations arising from Art. 13 ECHR in the context of excessive length of proceedings.[105]

In this context it is also important to note that in accordance with the principle of subsidiarity and directly related to it the concept of margin of appreciation, States have some discretion as to the means and manner of carrying out their duties.[106] As a consequence, the Court declares respect for the procedural autonomy of the State even when it sets limits on it. Most importantly, this does not need to be one single remedy, but could be an aggregate or a combination of remedies which, by creating a specific mechanism, can function either together within a set or independently.[107] Furthermore, the Court points out that not all these remedies need to be strictly judicial remedies, although it adds that the procedural guarantees inherent in judicial authority are important in assessing their effectiveness.[108] As a result, a conclusion can be drawn that, in the Court's view, judicial remedies allow the State to best fulfil this obligation.[109]

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[100] *See e.g.* ECtHR, *H. v.* UK (App. No. 9580/81), 8 July 1987, para. 83; ECtHR, *Olsson v. Sweden (no. 2)* (App. No. 13441/87), 27 November 1992, para. 103; *Hokkanen v. Finland* (App. No. 19823/92), 23 August 1994, para. 72; *Ruotolo v. Italy* (App. No. 12460/86), 27/02/1992, para. 17.

[101] ECtHR, *Marchenko v. Russia* (App. No. 29510/04), 5 October 2006, para. 40.

[102] ECtHR, *Debboub v. France* (App. No. 37786/97), 9 November 1999, para. 46.

[103] *Kudła*, para. 158; *Charzyński*, para. 33; ECtHR, *Stefan Kozlowski v. Poland* (App. No. 30072/04), 22 April 2008, para. 35; *Krawczak*, para. 35.

[104] *Sürmeli*, para. 100.

[105] ECtHR, *Stanev v. Bulgaria* (App. No. 36760/06), 17 January 2012, para. 217.

[106] *Aksoy*, para. 95; *see generally* Morawska, *supra* note 3, p. 201.

[107] ECtHR, *Tagayeva and Others v. Russia* (App. Nos. 26562/07 *et al.*), 13 April 2017, para. 621; the Court has expressed a similar views in previous cases: *Abramiuc v. Romania* (App. No. 37411/02), 24 February 2009, para. 119; *Futro v. Poland* (App. No. 51832/99), 3 June 2003; *Kołodziej v. Poland* (App. No. 47995/99), 18 October 2005; *Szablińska v. Poland* (App. No. 52462/99), 2 February 2006; *Olędzki v. Poland* (App. No. 3715/03), 4 January 2008.

[108] ECtHR, *Rotaru v. Romania* (App. No. 28341/95), 4 May 2000, para. 69.

[109] *See also* Greer, *supra* note 9, p. 8.

By affording a margin of appreciation to States regarding the way of fulfilling their obligations under Art. 13 ECHR in the context of the excessive length of proceedings, the Court also admits that the scope of this obligation is not uniform but rather depends on the nature of the allegations contained in a complaint lodged by the applicant(s).[110] The Court's case law confirms that this applies to both the form of this remedy as well as the way the State operates and the method of granting appropriate relief.[111] In either case, however, this remedy must be "effective"[112] in practice as well as in law,[113] and the criteria for this effectiveness are determined by the Court.[114]

Considering the above remarks, the question once again arises as to the actual limits of the discretion awarded to States by the Court as regards the fulfilment of their obligations under Art. 13 ECHR, with the effectiveness of domestic remedies being of particular importance.

4.3. Effectiveness in preventing the lengthiness of proceedings

In view of the foregoing, it must be noted that the effectiveness of the remedy at issue cannot be reduced to "the certainty of a favourable outcome for the applicant."[115] The need for such clarification is due to the large number of complaints in which the applicants, such as in *Jarmuż v. Poland*, took advantage of what the Court considered to be an effective domestic remedy available to them only to see the disputed case not resolved in their favour.[116] It seems that this statement expresses a general reasoning of the Court, which it invokes not only with regard to the length of proceedings. For example, the Court has determined that "neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party or a right to *private revenge*."[117]

Therefore, the Court approaches the length-of-proceedings issue in terms of political or systemic solutions, especially in that "Article 6 § 1 imposes on the Contracting

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[110] *Aksoy*, para. 95; ECtHR, *Stanev v. Bulgaria* (App. No. 36760/06), 17 January 2012, para. 217; and in two relatively recent cases: ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 July 2018, para. 38; and *Balogh and Others*, para. 48.

[111] This "essence" depends on the specifics of the Convention right, and consequently it varies: it is different, for example, in the case of the right to life (Art. 2 ECHR) or the prohibition of ill-treatment (Art. 3 ECHR); *see* respectively: *Aksoy*, paras. 95-100; ECtHR, *Tanrikulu v. Turkey* (App. No. 23763/94), 8 July 1999, para. 117; *Tagayeva and Others*, para. 149.

[112] *G.I.E.M. S.R.L.*, para. 306; ECtHR, *Zvolský* and *Zvolská v. the Czech Republic* (App. No. 46129/99), 12 November 2002, para. 40.

[113] ECtHR, *Mentes and Others v. Turkey* (App. No. 23186/94), 28 November 1997, para. 89; *Stanev v. Bulgaria,* (App. No. 36760/06), 17 January 2012, paras. 48, 217.

[114] *Krawczak*, para. 40.

[115] *Kudła*, para. 157; ECtHR, *Gorkiewicz* v. *Poland* (App. No. 41663/04), 13 January 2009, para. 28; and in many subsequent cases, including the cases of *Charzyński*, para. 38; ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 July 2018, para. 38; *Rudzis v. Poland* (App. No. 60347/10), 26 March 2019, para. 27.

[116] ECtHR, *Jarmuż v. Poland* (App. No. 63696/12), 13 June 2019.

[117] *Tagayeva and Others*, para. 623; ECtHR, *Bacciocchi v. San Marino* (App. No. 23327/16), 4 December 2018, para. 40.

States a duty to organise their judicial systems so that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time."[118] This approach can be observed in the way the relationship between the two main objectives of a remedy, namely prevention and redress, are determined. Because of the systemic dimension, preventing the excessively long settlement of cases is of paramount importance. The systemic nature of preventive remedies means that they cannot be reduced by a State to remedies applicable in just one case, but their objective is to prevent the lengthiness of the same category of specific case proceedings also in the future. As they are intended to prevent unjustifiable delays, they are not limited to repairing the breach *posteriori*.[119] For these reasons, remedies aiming to expedite the proceedings have an advantage over remedies affording only compensation,[120] and they are considered the "best solution" since they can prevent further delays.[121]

The primary importance of preventing delays or expediting court proceedings should also be viewed through the prism of the effectiveness of the Convention mechanism itself and the justification for isolating the reasonable-time requirement under Art. 6 § 1 ECHR. In other words, if a State effectively prevents the lengthiness of its courts' proceedings, then persons entitled to lodge individual complaints will no longer have to lodge them to the Court and will instead have their applications resolved within the boundaries of a national legal system.

4.4. Effectiveness of compensation for the excessive length of proceedings

However, in a situation where given proceedings have clearly already been excessively long,[122] other remedies are necessary to appropriately repair the breach, given that remedies aimed only at expediting the proceedings may prove inadequate.[123] In that case, States may seek to jointly establish two types of remedies, one designed to both expedite the proceedings and afford compensation,[124] and the other being a purely compensatory remedy.[125] Admittedly, the latter has no preventive element, but due to the wide margin of appreciation afforded to States and the alternative nature of the remedies referred to in Art. 13 ECHR,[126] the Court has no grounds to question its effectiveness immediately.[127] On the other hand, the Court is required to verify whether the way in which the domestic law is interpreted and applied "produces consequences that

[118] ECtHR, *Cocchiarella v. Italy* (App. No. 64886/01), 29 March 2006, para. 74.

[119] *Ibidem*.

[120] *Sürmeli*, para. 100; ECtHR, *Borzhonov v. Russia* (App. No. 18274/04), 22 January 2009, para. 34; ECtHR, *Krasuski v. Poland* (App. No. 61444/00), 14 June 2005, para. 66.

[121] *Scordino v. Italy*, para. 183.

[122] *Ibidem*, paras. 183-187; *Cocchiarella*, paras. 74-78.

[123] *Istvan and Istvanova v. Slovakia*, para. 82; *see also* the case *Engelhardt*, para. 58.

[124] *Sürmeli*, para. 100.

[125] *Scordino*, paras. 183-187; *Cocchiarella*, paras. 74-78; *FIL LLC*, para. 47.

[126] *Kudła*, paras. 158-159.

[127] *Cocchiarella*, para. 41; ECtHR, *Wasserman v. Russia (No. 2)* (App. No. 21071/05), 10 April 2008, para. 48.

are consistent with the principles of the Convention, as interpreted in the light of the Court's case law."[128] Elaborating on the foregoing, the Court has set forth five general criteria for the effectiveness, adequacy, or accessibility of these remedies. These are:

- an action for compensation must be heard within a reasonable time;
- the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Art. 6 of the Convention;
- the rules regarding legal costs must not place an excessive burden on litigants where their action is justified;
- the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.[129]

The above criteria should be viewed through the prism of the distinction between material damages and non-material damages, since the Court assumed the existence of a strong, albeit rebuttable, presumption of non-pecuniary damage in the event of excessively long proceedings. Therefore, a State may rebut this presumption and waive relief, or grant it in the minimum required amount, but in either case it is obliged to properly justify its decision.[130] Clearly, this has a significant impact on the above-mentioned distribution of the burden of proof (i.e. the rebuttable presumption) in proceedings before the Court.

Insofar as concerns compensation for damages caused by the excessive length of proceedings, two elements must be taken into consideration. The first is the Court's verification of civil law mechanisms in the area of actions for damages against the State on account of the excessive length of the proceedings.[131] The case law shows that the Court expects the practice of national courts to provide for "a sufficient level of certainty to become an *effective remedy* within the meaning of Art. 13 ECHR for an applicant alleging a violation of the right to a hearing within a reasonable time (…)."[132] On the other hand, this mechanism can be considered a remedy in the scope of the excessive length of court proceedings, provided that it is effective, sufficient and accessible, whereas the assessment of its sufficiency may depend on the delay of the proceedings and the level of compensation.[133] This, however, is not meant to ensure a favourable outcome to the applicant, which in this case would be receiving an expected amount of compensation.[134]

The second issue concerns the applicant's victim status as a result of the violation of the reasonable-time requirement arising from Art. 6 § 1 ECHR, which is required

[128] *Scordino*, paras. 187-191; *Wasserman*, para. 49.

[129] *Wasserman*, para. 49.

[130] *Scordino*, paras. 203-204; *Wasserman*, paras. 49-50; *Rutkowski and Others*, para. 181.

[131] In relation to Poland, the key mechanism is the mechanism based on Art. 417 of the Civil Code. Journal of Laws of 1964 No. 16 item 93; current consolidated text: Journal of Laws of 2019, item 1145.

[132] *Krasuski v. Poland*, para. 72.

[133] ECtHR, *Istvan and Istvanova v. Slovakia* (App. No. 30189/07), 12 June 2012, para. 68.

[134] *Rudzis*, para. 27.

under Art. 34 ECHR.[135] The limited framework of this article will not allow us to explore this issue in great detail, but suffice it to say that certain rules determining the amount of compensation must be provided in redress cases. First of all, let us consider the Court's declaration that the State is not obliged to award compensation of the same amount as is usually awarded in similar cases regarding just satisfaction. The State is nonetheless obliged to afford damages which the Court may consider to be "sufficient and adequate redress."[136] Consequently, the Court expects that the amount of that compensation is comparable to that of just satisfaction,[137] and that it should not be "manifestly inadequate" given the circumstances of the case and the case law.[138]

The compensation amount and victim status in the event of obtaining by the applicant of compensation at the national level inevitably leads us to the practice of Polish courts regarding the application of the 2004 Act.[139] This practice consists in the so-called fragmentation of the proceedings and comes down to limiting the examination of the lengthiness of proceedings "to the court instance at which the case was currently pending, notwithstanding the prior instances."[140] In 2005, the ECtHR recognized the practice at issue as incompatible with both the object of the 2004 Act and its case law, as courts examining length-of-proceedings complaints should consider all stages of the proceedings conducted to that end.[141] That practice was also "a principal reason for the deficient operation of a complaint under the 2004 Act in the subsequent years."[142]

The problem just discussed is eagerly debated by both academics and the public, but for the purposes of our analysis it is crucial to answer the question of the impact of the fragmentation of proceedings on the effectiveness of the remedy and on granting victim status to the applicant within the meaning of Art. 34 § 1 ECHR. The answer to this question is rather obvious. First of all, the fragmentation of proceedings allowed courts to declare certain complaints alleging excessive length of procedures as ill-founded and consequently dismiss them.[143] Consequently, the fragmentation of the proceedings allowed for only a partial admittance of the length-of-proceedings complaint, which in turn resulted in the awarding of a "sum of money", as provided for in the 2004 Act, in an amount corresponding to a small fraction of the sum that the Court would

[135] In this context, attention should be drawn to the relatively recent case of *Chiarello v. Germany* (497/17), 20 June 2019, in which the Court found that "In the Court's view, the issue whether the applicant is deprived of his status as a victim within the meaning of Article 34 of the Convention is closely linked to the question raised with respect to his complaint under Article 6 § 1 of the Convention about the length of the proceedings. It therefore joins this issue to the merits of the application" (para. 38).

[136] *Ibidem,* para. 59.

[137] *Engelhardt*, para. 50.

[138] ECtHR, *Horvathova v. Slovakia* (App. No. 74456/01), 17 May 2005, para. 32.

[139] *See supra* note 14.

[140] *Rutkowski and Others*, para. 181

[141] The Court pointed out the issue for the first time in the case of *Majewski v. Poland* (App. No. 52690/99), 11 October 2005, para. 35.

[142] *Rutkowski and Others*, para. 215.

[143] *Ibidem,* 181.

have granted taking into account the entire period of consideration of the case (that is, the duration of the trial).[144] This sum was ultimately considered by the Court to be "manifestly inadequate" given the circumstances of the case and case law standards.

Thus, neither obtainment of the amount indicated nor dismissal of the complaint as a result of the fragmentation and the failure to consider the proceedings in their entirety deprived the applicants of victim status under the Convention.[145] Regrettably, the above finding reaches well beyond one case. At present, "the principal cause behind the violation [by Poland] of Article 13 is in the Polish courts' non-compliance with the Court's case law setting out standards for sufficient and appropriate redress [for the excessive length of court proceedings]."[146] So, the handling of court practice in the area of fragmentation of the proceedings has not solved the problem of lengthiness in the Polish judiciary. On the contrary, this problem was recognized by the Court as indicative of a structural or systemic dysfunction of the Polish judiciary.[147]

As part of the procedure for executing the pilot judgment delivered in the *Rutkowski and Others* case, the 2004 Act was amended on 30 November 2016 (the 2016 amendment). It obliges Polish courts to apply the 2004 Act in accordance with the standards deriving from the Convention.[148] In addition, it imposes on Polish courts the obligation to assess the rationality of the length of the proceedings as a whole (and not fragments, as had been the earlier practice) and sets a minimum level of compensation in the event of delays.

In accordance with the 2016 amendment, the minimum amount of compensation is not less than PLN 500 for each year of the duration of the proceedings to date, irrespective of how many stages of the proceedings were affected by the overall length of the proceedings. The 2016 Amendment provides for two possibilities for increasing this

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[144] *Ibidem*.

[145] *Ibidem,* paras. 27, 48, 74; the Court stated that the applicant Rutkowski would lose his status as a victim if the domestic court awarded him PLN 13,200 for nearly 8 years of protracted criminal proceedings (paras. 14-27). In turn, the applicant Orlikowski would lose his status as a victim in a civil case if he obtained approximately PLN 1,000 for each year of the proceedings (paras. 30-48);

[146] Para. 217. The Court's assessment of the practice of Polish courts is extremely critical. The Tribunal explicitly speaks of the reluctance of Polish courts to grant appropriately higher amounts for excessive length of proceedings; the amounts awarded by Polish courts correspond to 7% to 25% of the amount usually awarded by the Court. Moreover, the reasons for this reluctance were not found in the provisions of the 2004 Act or in the inability of Polish courts to exercise a proper margin of appreciation in assessing the relevant circumstances of lengthiness.

[147] The Court stated this in the *Rutkowski and Others* case.

[148] In this context, the speech of the former ECtHR judge L. Garlicki during the 9th Warsaw Seminar was extremely important. He underlined that "The model manner of the judicial implementation of the ECHR jurisprudence of the ECHR must be based on the knowledge of the jurisprudence, the respect for the legal authority of the entire jurisprudence of the ECHR, as well as good faith in its implementation and use." *See* L. Garlicki, *Model Manner of the Judicial Implementation of the European Convention and the Jurisprudence of the Strasbourg Court*, in: *Disfunctions of Polish Law: How to Improve the System of Legal Remedies in Poland*, Ministerstwo Spraw Zagranicznych – Departament do spraw Postępowań przed Międzynarodowymi Organami, Warszawa: 2016, pp. 186-198.

amount; namely the specific importance of the case for the applicant and the applicant's failure to contribute to the length of the case. Moreover, the amount already awarded to the applicant in the same case would be credited towards that amount. The minimum amount of compensation indicated in the amendment in the event of excessive length of proceedings raises reservations as to its compliance with the Convention. Let us consider the case *Rutkowski and Others v. Poland*, where the ECtHR pointed out that the average amount of compensation for each year of protracted proceedings should be at least PLN 1,000, and even higher, approximately PLN 1,600, in the case of protracted criminal proceedings.

Thus, it is very probable that the 2016 amendment to the 2004 Act will not change the assessment of the practice of Polish courts regarding compensation in the event of excessive length of proceedings. It may still not constitute 'adequate and sufficient redress' within the meaning of the standards set out in the ECtHR case law.

CONCLUSIONS

The analysis clearly shows that "the relevant principles relating to the application of Art. 13 ECHR to complaints about a violation of the right to a hearing within a reasonable time have been set out in a number of judgments."[149] On one hand, it is true that these are well-established in the case law, but on the other hand they are not always applied by the Court in an equal manner and with equal frequency. Moreover, they are neither sufficiently justified nor consistent,[150] with their content consisting essentially of indefinite terms and evaluation criteria combined with concepts understood in an autonomous way or even not at all defined in the case law. In spite of this, these principles provide a reference model for the interpretation and application of the States Parties' national law, and failure to comply with them may lead to a violation of the Convention. This is a significant burden for the States Parties, including for Poland.

Let us note once again that the current interpretation of Art. 13 ECHR in the Strasbourg jurisprudence is the result of its profound evolution over time. As indicated, the Convention bodies initially did not attach so much significance to Art. 13 ECHR and followed the concept of absorbing the scope of the right to an effective remedy by the guarantees of Art. 6 § 1 ECHR, or under Art. 5 § 4 and § 5 ECHR.[151] This approach

[149] The Court underlined it *expressis verbis*. *Cf*, the case of *Wcisło and Cabaj*, para. 140.

[150] More on this issue, e.g. J.H. Gerards, *Judicial Deliberations in the European Court of Human Rights*, in: N. Huls, M. Adams, J. Bomhoff, (eds.), *The Legitimacy of Highest Courts' Rulings*, Brill, The Hague: 2008, pp. 1 et seq.

[151] Regarding this issue, the Court also assumed that "the more specific guarantees of Article 5 §§ 4 and 5 of the Convention, being a *lex specialis* in relation to Article 13, absorb its requirements; (…) no separate issue arises in respect of Article 13, read in conjunction with Article 5 of the Convention"; *see* the cases of: *Zhebrailova and Others v. Russia* (App. No. 40166/07), 26 March 2015, para. 84; *Tsakoyevy v. Russia* (App. No. 16397/07), 2 October 2018, para. 149; *Alikhanovy v. Russia* (App. No. 17054/06), 28 August 2018, para. 106.

adopted by the Court was generally accepted and it was not until 1979 that the first voices of criticism emerged in connection with its application in *Airey v. Ireland*, one of the leading cases in the Court's case law.[152] These voices were expressed in the divergent dissenting opinions of judges P. O'Donoghue, Thor Vilhjàlmsson, and D. Evrigenis. Further reservations were expressed a few years later by judges J. Pinheiro Farinha and J. De Meyer in *W. v. The UK*. In their dissenting opinion they stated the following:

> We are not quite sure that such examination was made superfluous by the finding of a violation, in the case of the applicant, of the entitlement to a hearing by a tribunal within the meaning of Article 6 § 1 (art. 6-1). Are the "less strict" requirements of Article 13 (art. 13) truly "absorbed" by those of Article 6 § 1 (art. 6-1) [10]? Do these provisions really "overlap"? It appears to us that the relationship between the right to be heard by a tribunal, within the meaning of Article 6 § 1 (art. 6-1), and the right to an effective remedy before a national authority, within the meaning of Article 13 (art. 13), should be considered more thoroughly.[153]

Gradually, the doctrine would become more critical of this practice of the Court.[154] However, it was not until the *Kudła* case that the Court confirmed the autonomous position of Art. 13 ECHR regarding the excessive length of proceedings, announcing that:

> The time has come to review its case law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1.[155]

One of the main causes of the "autonomy" acquired by Art. 13 of the Convention over time was the Court's overload with length-of-proceedings complaints. Explaining the reasons for this state of affairs, in *Scordino v. Italy* the Court issued following statement:

> the reason [the Court] has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the «reasonable time» requirement under Article 6 § 1 and have not provided a domestic remedy for this type of complaint.[156]

A more specific answer to the question whether this state of affairs has changed over the past years may be sought in the Court's findings in *Rutkowski and Others v. Poland*, in which it noted that the practice of Polish courts regarding a domestic remedy in connection with the excessive length of proceedings

> is not only incompatible with Article 13 but has also led to a practical reversal of the respective roles to be played by the Court and the national courts in the Convention system. It has upset the balance of responsibilities between the respondent State and the Court (…) In that regard, the Court would once again reiterate that, in accordance

[152] *See supra* note 37.

[153] ECtHR, *W. v. the UK* (App. No. 9749/82), 8 July 1987.

[154] *See* numerous references in the book by T. Barkhuysena, *Artikel 13 EVRM effectieve nationale rechtsbescherming bij schending van mensenrechten*, Koninklijke Vermande, Lelystad: 1998.

[155] *W.*, para. 148.

[156] *Scordino*, paras. 174-175.

> with Article 1, the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities and that the machinery of complaint to the Court is only subsidiary to the national systems safeguarding human rights (…).[157]

The above findings of the Court should be read as nothing short of an appeal addressed to the States Parties to the Convention for a proper reading of the subsidiarity principle of the Convsystem and for taking action in the area of human rights protection. Only then will persons subject to their jurisdiction not be forced to seek protection of their rights at the international level. In other words, it is not the ECtHR, but the national courts that should be the leading and natural defenders of human rights.

The underlying idea of shared responsibility for the protection of Convention rights has not gone unnoticed by the States Parties to the Convention. As stated in the Copenhagen Declaration of 2018, this idea is "is vital to the proper functioning of the Convention system and, as the ultimate goal, the more effective protection of human rights in Europe." However, its implementation requires "creating and improving effective domestic remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention, especially in situations of serious systemic or structural problems."[158] Considering the above analysis, it is difficult to disagree with these statements.

[157] *Rutkowski and Others*, para. 219.

[158] The Copenhagen Declaration on the reform of the European Convention on Human Rights system. It has been agreed by the 47 Member States of the Council of Europe on 13 April 2018. For more details *see* https://bit.ly/3e2dAwE (accessed 30 June 2020).