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Article 3 of the ECHR, Migrants and Asylum Seekers: Ensuring Protection from ILL-Treatment

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I. Introduction

The Refugee crisis started in 2015 and 2016 when the Balkan refugee route was opened. During these two years, Europe faced the greatest refugee crisis since the Second World War.[1] The European countries filed 2.5 million asylum applications in 2015 and 2016.[2] Recently, after the collapse of the Afghanistan Republic government in August 2021 and Russia's invasion of Ukraine in February 2022, the refugee movement towards European countries has increased significantly.[3] Some EU countries, such as Hungary, Austria, and Romania have considered increasing national border security to stop the flow of people, particularly those from non-European countries.[4] There are many cases of inhuman treatment registered against the refugees in the borders and detention facilities. The Council of the European Anti-Torture Committee (now CPT) reported ill-treatment, such as punching and beating with sticks, weapons and truncheons by police and border guards against the people trying to cross the borders. Also, these people were subject to pushback and expulsion from the European territories by either land or sea without having their asylum claims heard.[5] The inhuman treatment, particularly by the member states of the Council of Europe officials, brought the attention of the European Court of Human Rights (now ECtHR) under Article 3 of the European Convention on Human Rights (now ECHR). The protection afforded by Article 3 of the ECHR preserves the fundamental values of democratic societies, which reinforce the commitment of the Council of Europe members to uphold human dignity.[6]

This essay explores how Article 3 of the ECHR addressed the migrants, asylum seekers and refugee's protection against ill-treatment, torture, inhuman and degrading treatment or punishment. Also, it evaluates how Article 3 of the ECHR has been effectively implemented and what the key obstacles to the application of this Article will be. To address these questions, this essay is structured in four parts. The first part delves into the scope of Article 3 and briefly explains the torture, inhuman and degrading treatment and punishments. Also, it describes the absolute nature of Article 3 of the ECHR. The second part discusses the challenges of migrants and asylum seekers in terms of suffering ill-treatment during their pathway; additionally, it discusses the significance of Article 3 in protecting them against torture and inhuman and degrading treatment. The third part evaluates the implementation status of Article 3 of the ECHR and explores the critical obstacles towards the effective implementation of Article 3. Finally, the fourth part suggests recommendations for effectively implementing Article 3 of the ECHR within the territories of member states.

II. The Scope and Absolute Nature of Article 3 of the ECHR

Article 3 of the ECHR prohibits subjecting individuals to torture, inhuman or degrading treatment or punishment.[7] Also, under Article 1 of the ECHR, the member states are obliged to secure the rights and

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[1] Boštjan Nedoh, 'Mass Migrations as a Messianic Event? Rereading Agamben's State of Exception in Light of the Refugee Crisis in Europe' (2022) 18 Law, Culture and the Humanities 272, 272.

[2] Etienne Piguet, 'The 'Refugee Crisis' in Europe: Shortening Distances, Containment, and Asymmetry of Rights—a Tentative Interpretation of the 2015–16 Events' (2021) 34 Journal of Refugee Studies 1577, 276.

[3] Matías Ibañez Sales, ' The Refugee Crisis' Double Standards: Media Framing and the Proliferation of Positive and Negative Narratives During the Ukrainian and Syrian Crises', 1.

[4] Adrian Otovescu and Maria-Cristina Otovescu, 'The Refugee Crisis in Europe and Addressed Solutions' (2017) 17 Journal of Community Positive Practices 63, 63.

[5] Jennifer Rankin, 'Refugees Subject to Widespread Physical Ill-Treatment, Council of Europe Finds' *The Guardian* (30 March 2023) <https://www.theguardian.com/world/2023/mar/30/refugees-widespread-physical-ill-treatment-council-of-europe> accessed 15 February 2024.

[6] Kristiāna Jana Biksone, 'Violations of Article 3 of the ECHR in the Detention Conditions of Migrant Minors' <http://dspace.lu.lv/dspace/handle/7/65116> accessed 14 February 2024, 7.

[7] European Convention on Human Rights, Article 3.

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freedoms of everyone set out in the Convention within their jurisdiction[8]. In addition to that, the nature of Article 3 has been recognized as non-derogate or obsolete rights[9].

a) The Scope of Article 3 of the ECHR

Article 3 of ECHR indicates the prohibition of all three types of ill-treatment, including torture, inhuman and degrading treatment or punishment.[10] The ECHR has not explained inhuman treatment, degrading treatment, or punishment. Yet, European Human Rights Judicial bodies, ECtHR and the European Commission of Human Rights, have produced definitions of these terms by deciding on case laws.[11] Punishment has an ordinary meaning, but this term and the term of treatment are often not subject to separate analysis. Sometimes, the ECtHR categorises the punishment as inhuman or degrading treatment taken to gather.[12]

The Guide on Article 3 of the European Convention on Human Rights, developed by the Registry of the Council of Europe, divides the scope of prohibited treatment under Article 3 into three parts: torture, Inhuman or punishment and degrading treatment or punishment.

i. *Torture*

The ECHR didn't define the term torture; however, the ECtHR defined the definition of torture in its case law. The Court, in the case of Ireland v UK, defined torture "as deliberate inhuman treatment causing severe and cruel suffering".[13] For the determination of torture from other ill-treatment embodied in Article 3, the considers the element of intention and severity of treatment causing severe and cruel suffering. Some of the ill-treatment which were recognized by the Court as torture include rape committed by security forces while in detention[14] or by a coastguard responsible for supervising an illegal immigrant[15], suspension from arms causing paralysis of both arms of the detainees[16], a sustained state of physical pain and anxiety resulting from uncertainty about their fate and the severity of the violence they had endured.[17], forced feeding to the detainee on hunger strikes without justification[18], beating and using excessive force by police for dispersal of demonstrations[19].

ii. *Inhuman Treatment or Punishment*

The implication of inhuman treatment comprises a material (objective) element and a deliberate (subjective) element. The material element is described as severe pain or suffering, either physical or mental, while the deliberate element is described as deliberateness.[20] It is worth noting that the concept of inhuman treatment, as understood by the ECtHR, has evolved. The requirement of deliberateness (subjective element) of the inhuman treatment diminished in importance in recent case laws. As a consequence of this evolution, the material element, severe pain or suffering, whether physical or mental, becomes essential.

The Strasbourg case law has identified inhuman treatment such as wall-standing, hooding, subjection to noise, deprivation of sleep, food, and drink over interrogation. Additionally, use of force during arrest, bodily injuries during police custody and exposure of a person to the death row phenomenon also demonstrate the inhuman treatment.[21] Additionally, the case laws identified the inhuman treatment as a failure to provide adequate medical treatment[22], destroying a person's home by security forces,[23] depriving the people of livelihood and forcing them to leave their village[24], and serving life sentences for a long time in poor conditions under a restrictive regime.[25]

iii. *Degrading Treatment or Punishment*

Lowering a person in rank, position, reputation or character in his own or other eyes can be defined as degrading treatment[26]. In a broader definition, "Inhuman degrading requires for the act to be humiliating or debasing for the individual, showing a lack of respect for, or diminishing, his or her human dignity, or arousing feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance".[27] Also, the case laws recognized the degrading treatment as arresting a person while

[8] Ibid, Article1.
[9] Biksone (n 6), 9.
[10] Bernadette Rainey author, *Jacobs, White and Ovey, The European Convention on Human Rights,* (Sixth edn, OUP Press 2014), 169.
[11] Ibid (n 6), 12.
[12] Ibid (n10), 170.
[13] Author D J Harris (David John), *Harris, O'Boyle & Warbick Law of the European Convention on Human Rights*. (Fifth edition / David Harris LLM, PhD, CMG, Michael O'Boyle LLB, LLM, LLD(HON), Ed Bates LLB, LLM, PhD, Carla M Buckley LLB, LLM; chapters 2 and 3 by Krešimir Kamber, PhD; chapter 11 by Zoë Bryanston-Cross; chapter 12 by Peter Cumper LLB, LLM; chapter 22 by Heather Green LLB, PhD, Oxford University Press 2023), 245.
[14] *Aydın v Turkey* [1997] ECtHR 23178/94.
[15] *Zontul v Greece* [2012] ECtHR 12294/07.
[16] *Aksoy v Turkey* [1996] ECtHR 21987/93.
[17] *Batı and Others v Turkey* [2004] ECtHR 33097/96 and 57834/00.
[18] *Nevmerzhitsky v Ukraine* [2005] ECtHR 54825/00.
[19] *Lutsenko and Verbytskyy v Ukraine* [2021] ECtHR 12482/14 and 39800/14.
[20] Alberta Fabbricotti, 'The Concept of Inhuman and Degrading Treatment in International Law and Its Application in Asylum Cases' (20 March 1998) <https://papers.ssrn.com/abstract=3356614> accessed 14 February 2024, 9.
[21] Ibid (9-10).
[22] Hélène Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 Refugee Survey Quarterly 39, 49.
[23] *Selçuk and Asker v Turkey* [1998] ECtHR 23184/94 and 23185/94.
[24] *Hasan İlhan v Turkey* [2004] ECtHR 22494/93.
[25] 'Guide on Article 3 of the European Convention on Human Rights-Prohibition of Torture' <https://www.echr.coe.int/d/guide_art_3_eng>, 16.
[26] Fabbricotti (n 20), 11.
[27] Biksone (n 6), 12.

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permitting him to change his soiled clothes[28], shaving the hair of prisoners by prison administration without justification, confiscating the glasses of detainees who have vision problems without justification, using force to search the home of a person which is not strictly necessary, keeping a detainee in a severely overcrowded and unsanitary environment in prison, stripped naked of a person in front of a female prison officer, detention of an asylum seeker for three months because of a pending application with no any recreational activities and proper meals, Handcuffing a migrant during a bus journey lasting about 20 hours in the context of forced deportation, detaining a severely disabled person in inappropriate conditions such cold environment and not proper access to bed and toilet.[29]

The distinction between torture and other ill-treatment, such as inhuman treatment or punishment and degrading treatment, drives from the intensity of the suffering inflicted.[30] Sometimes, the ECtHR doesn't distinguish between these terms. For example, in the case of Il v Bulgaria, the ill-treatment detention of an individual for three months in a small cell without any natural light and satisfactory ventilation, coupled with poor sanitary facilities and no provision for spending time outside of his cell, categorized as inhuman and degrading treatment by the Court.[31]

b) The Absolute Nature of Article 3 of the ECHR

Before assessing the competency of a case, the court repatriated "Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, regardless of the circumstances and victim's behaviour". Also, the court declares, "The Convention prohibits, in absolute terms, torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation from it even in the event of a public emergency threatening nation's life".[32] On this basis, the member states cannot breach Article 3 of the ECHR even if they need to fight terrorism or organized crimes or to save someone's life.[33] Additionally, breaching this Article to protect public order, health or morals, public safety, and national security is not permissible.[34] The absolute nature of Article 3 of the ECHR demonstrates three key elements: admitting no qualification or exception, no subject to derogation, and applying to everyone. Absolute rights can never be justifiable and should be fulfilled without exception.[35]

III. The Ill-Treatment Against Migrants and Asylum Seekers and the Significance of Article 3 of the ECHR in Protecting them Against Ill-Treatment

The issue of refugees has been one of the most critical challenges for many member states of the Council of Europe. After the Second World War, thousands of people, particularly from the conflict-affected countries, immigrated to the Europe. Still, the central refugee crisis started in 2015 and 2016 when the Balkan refugee route was opened.[36] To overcome the refugee crisis, some of the Council of Europe State Parties adopted strict policies related to avoiding the movement of migrants and asylum seekers towards their borders. Additionally, many cases of human rights violations are reported against the refugees, especially by security officials at borders, detention facilities and inside the territories of member states.

a) The Ill-Treatment Against the Migrants and Asylum Seekers

This topic mainly focuses on the forced removal of migrants and asylum seekers at the Council of Europe member states' borders and ill-treatment against them, especially in times of pushback and keeping them in detention facilities.

i. *Forced Removal (Pushbacks)*

The migrants, asylum seekers and refugees who flee persecution experience super difficulties in reaching Europe. They come through many dangerous routes, such as the Central Mediterranean, which is among the deadliest migration routes in the world. It is estimated that since 2014, more than 22000 persons have died, while more than 2000 died or were missing in 2023.[37] Multiple cases show that when foreign nationals reach the borders of Council Europe member states, they are forcibly pushed back, which is an issue that

[28] Lambert (n 22), 49.
[29] 'Guide on Article 3 of the European Convention on Human Rights-Prohibition of Torture' (n 25), 9-10.
[30] Ibid, 8.
[31] Bernadette Rainey Author (n 10), 175.
[32] Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute: The Undermining of Article 3 ECHR in Ahmad v UK Case' (2013) 76 Modern Law Review 589, 592.
[33] Author D J Harris (David John), *Harris, O'Boyle & Warbick Law of the European Convention on Human Rights.* (Fifth edition / David Harris LLM, PhD, CMG, Michael O'Boyle LLB, LLM, LLD(HON), Ed Bates LLB, LLM, PhD, Carla M Buckley LLB, LLM; chapters 2 and 3 by Krešimir Kamber, PhD; chapter 11 by Zoë Bryanston-Cross; chapter 12 by Peter Cumper LLB, LLM; chapter 22 by Heather Green LLB, PhD, Oxford University Press 2023), 242.
[34] Elaine Webster, Author, *Dignity, Degrading Treatment and Torture in Human Rights Law: The Ends of Article 3 of the European Convention on Human Rights* (Routledge, Taylor & Francis Group 2018), 29.
[35] Ibid, 29.
[36] Nedoh (n 1), 272.
[37] Dunja Mijatović, 'REPORT FOLLOWING HER VISIT TO ITALY FROM 19 TO 23 JUNE 2023' [2023] COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE, 7.

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constitutes one of the most significant human rights concerns from the perspective of the Commissioner for Human Rights of the Council of Europe.[38] According to a Human Rights Watch report, based on the police statistics from January to August 2022, Hungarian border officials carried out over 900,000 unlawful pushbacks.[39] Pushbacks are aimed at distancing a person from the state's territory and depriving them of access to the protection recognized by the state's domestic laws. Pushbacks are increasingly violent way, becoming normalized in Europe and turning into systematically applied measures. Pushbacks are carried out at both sea and land borders. This practice generally involves multiple violations of human rights, including the prohibition of torture or inhuman or degrading treatment or punishment.[40]

ii. *Inhuman Treatment at the Time of Pushback*

The foreign nationals experienced physical ill-treatment at the time of their pushbacks, such as beating, punches, slaps, and blows with truncheons, barrels of automatic weapons, wooden sticks or the branches of trees. These actions have been committed by police, border guards, members of the Coast Guard or other law enforcement officials. At the same time, they removed their identification tags and police insignia and wore balaclavas to hide their identity. Also, CPT recorded horrible ill-treatment such as firing bullets close to the persons lying on the ground, pushing the hands tied people into reverse, forcing them to walk barefoot and naked across the borders, using un-muzzled dogs to capture the foreign nationals, deprivation of food and water for a prolonged period. These actions were fulfilled as a threat against the foreign nationals' physical integrity and humiliation. CPT has also reported the appalling and unsafe conditions of foreign nationals during their removal, crammed into the back of police vans, and denied food and water or access to the toilet for prolonged periods. The CPT has also documented medical evidence, such as the classic "tram-line" hematomas on various parts of foreign nationals' bodies and dog-bit wounds on their limbs; additionally, the CPT affirmed the excessive use of force during pushbacks.[41] Amnesty International also reported the arbitrary arrest, abuse of voluntary repatriation, use of unlawful firearms to return the refugees from borders, and forced expulsion of refugees through land and sea borders[42]. Furthermore, the United Nations Special Rapporteur on the Human Rights of Migrants affirmed that pushing migrants back and forth, use of water cannons, destruction of the migrants' electronic devices, use of attack dogs and pushing and threatening weapons against migrants by Poland officials. The perpetrated actions caused stress and trauma to the migrants.[43]

iii. *Ill-treatment in Detention Facilities*

The CPT reported the prolonged and informal detention of arrested foreign nationals and kept them in inadequate condition before removing them. Also, the Court consistently described the deplorable material conditions in informal detention places and police and border guard stations. In several instances, families with children, unaccompanied or separated children and other vulnerable people are held in conditions that amount to inhuman and degrading treatment in detention. The migrants, including children and pregnant women, remained in close detention facilities. Most didn't know how long they spent in detention; meanwhile, they couldn't access information about the asylum proceedings. It caused a significant amount of distress and anxiety and caused them psychological problems.[44]

The ill-treatment, as mentioned earlier, against foreign nationals, migrants, and asylum seekers violated Article 3 of ECHR. This Article prohibited any torture, inhuman and degrading treatment against anyone, including migrants and asylum seekers and forcibly pushback to a country where there are substantial grounds for ill-treatment and persecution.

b) *The Significance of Article 3 of the ECHR in Protecting Asylum Seekers and Migrants Against Ill-Treatment*

The Article 3 ECHR is designed to safeguard the treatment of everyone within the territory of the member states of the Council of Europe to individuals, including migrants and asylum seekers. The Convention allows the victims of a breach of the Convention to bring applications against violator states. Under Article 34 of the ECHR, the Court receives applications from any person, non-governmental organization, or group of individuals, regardless of their nationality, claiming to be the victim of a violation due to the breach of the Convention.[45] This Article permits the victims of foreign

[38] Dunja Mijatović, (n 37), 17.
[39] Human Rights Watch, *World Report 2023 | Human Rights Watch* (2023) <https://www.hrw.org/world-report/2023> accessed 28 February 2024, 290.
[40] 'Pushed beyond the Limits Four Areas for Urgent Action to End Human Rights Violations at Europe's Borders' (Council of Europe 2022) <https://rm.coe.int/protecting-the-right-to-health-through-inclusive-and-resilient-health-/1680a177ad>, 15-17.
[41] '32nd General Report of the CPT 1 January - 31 December 2022' (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2023) <https://rm.coe.int/1680aabe2b>, 27.
[42] Amnesty International (ed), *Amnesty International Report 2022/23: The State of the World's Human Rights* (Amnesty International Ltd 2023).
[43] 'A/HRC/53/26/ADD.1: Visit to Poland - Report of the Special Rapporteur on the Human Rights of Migrants, Felipe González Morales' (*OHCHR*) <https://www.ohchr.org/en/documents/country-reports/ahrc5326add1-visit-poland-report-special-rapporteur-human-rights-migrants> accessed 29 February 2024.
[44] 'A/HRC/53/26/ADD.1: Visit to Poland - Report of the Special Rapporteur on the Human Rights of Migrants (n43), 15.
[45] D J Harris (David John) (n 13), 5.

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nationals, including migrants, asylum seekers, and refugees, to apply to the Court to ensure their human rights protection based on the ECHR. The ECHR, under Article 46, made mandatory the Court's judgements upon the Council of Europe member states.[46] Based on Article 3 of ECHR, the ECtHR has obliged states to protect migrants and asylum seekers from expulsion to unsafe countries and to prohibit ill-treatment within their territories or jurisdictions.[47] This Article has played an essential role in safeguarding third nationals against returning them to dangerous countries and ill-treatment in detention facilities.

i. *Article 3 ECHR and its application to the Principle of Non-refoulement*

Non-refoulement is extremely important for protecting migrants and asylum seekers against probable persecution. It is irrespective of whether or not an individual has been formally recognized as a refugee; also, it does not matter how an asylum seeker comes to the territory or jurisdiction of a country. According to this principle, if asylum seekers are forcibly returned to a country where they have well-founded persecution or face a substantial risk of torture, then it will be defilement contrary to international law.[48] The principle of non-refoulement played a significant role in not returning the asylum seekers to their countries of origin where they were at risk of persecution. Many disappointed asylum seekers by petitioning the ECtHR under Article 3 of ECHR, challenged the EU common asylum laws during the first decade of the twenty-first century while at the first Court was reluctant to condemn the EU aborning asylum arrangement.[49] The ECHR does not explicitly refer to the principle of non-refoulement but accepts the prohibition of refoulement as a fundamental right under Article 3; therefore, according to this principle, the ECtHR prohibits the deportation and expulsion of asylum seekers to the countries where they are persecuted.[50] Indeed, the Court developed an expansive jurisprudence related to circumstances under Article 3 of ECHR that required non-refoulement protection. In another example, even the court prohibited returning the asylum seekers to a safe part of a country because that unstable situation will force them to move to unsafe areas of the country where their safety is in danger. Also, the Court not only considered the ongoing conflict as a reason for the safety of an asylum seeker, but it also prohibited the return of asylum seekers because of the existing inhuman tradition and non-balance of power in family life. For example, the Court ruled that Sweden could not return a rejected Afghan asylum seeker to Afghanistan due to her decision to divorce her Afghan husband while they were living in Sweden. Returning to Afghanistan might face this asylum seeker's inhuman, degrading treatment or punishment by her husband based on local tradition and religious issues. Also, the Court prohibited the United Kingdom from returning a Sikh separatist accused of violence to India because he would face inhuman, degrading treatment or punishment because of his political thoughts and performances.[51]

The court's decisions indicate that for the application of non-refoulement principles, the member states cannot rely only on the general situation of a country regarding peace and war; they must consider other grounds and ensure that returning asylum seekers will not confront persecution. According to this principle, the states must assess the third country where an asylum seeker will be returned. In the case of Ilias and Ahmed group v. Hungary, the Committee urged the Hungary authorities to re-assess the legislative presumption of a safe third country concerning Serbia, terminate collective expulsion, and introduce an adequate remedy.[52]

ii. *Protecting the Migrants and Asylum Seekers Against Ill-treatment in Detention Facilities*

Article 3 ECHR established principles regarding the conditions of detention of those awaiting expulsion or detention by immigration authorities.[53] Under Article 3, the states must ensure that prisoners are detained with respect for their human dignity and that their health and well-being are adequately secured.[54] According to the decision of ECtHR, the conditions in which a person is detained can constitute inhuman or degrading treatment within the meaning of Article 3 of ECHR, even though the authorities have no intention to debase the detainees. The Court underscores that anyone deprived of liberty should be treated with dignity. ECtHR prohibited any excessive physical force, forced shaving off of detainees' hair, and any physical harm, such as severe bruises, whilst in detention in police custody. For the Court, the protection of the physical integrity of individuals is a priority, and nothing can justify it. The member states are obliged to take positive steps to improve the conditions of detentions to ensure the rights

[46] D J Harris (David John) (n 13), 5.
[47] Lambert (n 22), 52.
[48] Guy S Goodwin-Gill, *The Refugee in International Law* (3rd ed., Oxford University Press 2007), 233.
[49] Maryellen Fullerton, 'Refugees and the Primacy of European Human Rights Law' (2017) 21 UCLA Journal of International Law and Foreign Affairs 45, 64.
[50] P Heijer Boeles, *European Migration Law* (2nd edition., Intersentia 2014), 343.
[51] Ibid(49), 64.
[52] 'Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022:16th Annual Report of the Committee of Ministers' (Committee of Ministers of the Council of Europe 2023) <https://www.coe.int/en/web/execution/annual-reports>, 42.
[53] Bernadette Rainey Author (n 10), 186.
[54] William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Incorporated 2015) <http://ebookcentral.proquest.com/lib/nuig/detail.action?docID=4310766> accessed 18 March 2024, 85.

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of detainees. The Court recognized that all forms of solitary confinement without suitable mental and physical motivation resulted in the deterioration of the mental faculties and social abilities of detainees.[55] Also, the detention should be compatible with the health conditions of the detainees, such as serious illness.[56] In the case of Feilazoo v. Malta, the Committee urged the improvement of living conditions in the Safi Detention Centers. The Committee asked the authorities to provide reports or assessments of these improvements and their impact on other detention centers used for the detention of migrants. Additionally, the Committee urged the adoption of the law on the confidentiality of correspondence of detained migrants and the length of detention pending deportation.[57] In another example, in Mozer v. Moldova and Russia, the detainees recognized that they deserved physical well-being and medical care in detention facilities.[58]

IV. Implementation Status and the Key Obstacles to the Effective Implementation of Article 3 of the ECHR

a) Implementation Status of Article 3 of the ECHR

The ECHR provided a better enforcement mechanism than other international human rights treaties. The ECHR enforcement mechanism designated the ECtHR and the Committee of Ministers of the Council of Europe to ensure that the human rights of individuals are protected. [59] The Committee of Ministers, composed of the government's representatives, is considered the most crucial body to supervise the execution of the Court judgement within the Contracting states.[60] ECtHR is changed to a cornerstone for protecting the fundamental rights of individuals within the Council of Europe member states' territories. To ensure justice, this judicial body reviews thousands of applications per year. For example, in 2022, 45500 and in 2023, 34650 applications were registered to a judicial formation. Over these two years, the Court decided on 11099 applications.[61] This number includes all individuals, including foreign nationals, migrants, and asylum seekers. The Committee of Ministers of the Council of Europe has been obliged to ensure that the Court judgements are well-executed. Despite the efforts of ECtHR and the Committee of Ministers, the reports of the CPT, Europe Commissioner for Human Rights and INGOs, show that pushbacks through sea and land an increasingly violent way, becoming normalized in Europe. Law enforcement officials, border guards, coast guard, and others committed different types of torture, inhuman or degrading treatment or punishment at the time of pushback.[62] Furthermore, the foreign nationals experienced poor living conditions and ill-treatment in detention facilities.[63] This situation shows that Article 3 of ECHR has not been implemented effectively.

b) The Key Obstacles to the Effective Implementation of Article 3 of the ECHR

The essay outlined the below impediment to the effective implementation of Article 3 of ECHR:

i. *Poor enforcement of the ECtHR Judgement*

However, the human rights protection system based on the ECHR is the most effective regional system compared to other regional mechanisms. Still, its effectiveness is seriously weakened by the problems raised by the weak implementation of the ECtHR judgement. This problem might be because of the Committee of Ministry's involvement in the Court's decision-making supervisory mechanism as the only institution.[64] The Committee of Ministers cannot force to implement the Court decision to the states. Although the Committee has some soft sanctions in its toolkit, it rarely exceeds resolutions demanding execution. The last and most potent sanction is an expulsion from the Council of Europe, but except for Russia, a separate case, it has not yet been used. With such a weak enforcement mechanism, the Court is limited to imposing its judgement effectively. The Committee of Ministers faces fewer challenges in enforcing the Court judgement regarding monetary compensation or individual measures. Still, general measures are almost tricky and controversial.[65] For example, In 2022, among pending execution cases, 1299 were leading cases or those that disclose a problem in law or practice. Such cases often need the adoption of general measures to prevent a recurrence of the human rights violation. It is worth noting that addressing leading cases is essential to avoiding an increased backlog of repetitive instances,

[55] Lambert (n 22), 50.
[56] *Mouisel v France* [2002] ECtHR 67263/01.
[57] 'Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022:16th Annual Report of the Committee of Ministers' (n 54), 42.
[58] 'Guide on Article 3 of the European Convention on Human Rights-Prohibition of Torture' (n 25).
[59] D J Harris (David John) (n 13), 5.
[60] Jerzy Jaskiernia, 'Actual challenges for the implementation of judgments of the European Court of Human Rights' (2022) 48 Review of European and Comparative Law 103, 104.
[61] 'Analysis of Statistics 2023' [2024] European Court of Human Rights <https://www.echr.coe.int/documents/d/echr/stats-analysis-2023-eng>, 3.
[62] 'Pushed beyond the Limits Four Areas for Urgent Action to End Human Rights Violations at Europe's Borders' (Council of Europe 2022) <https://rm.coe.int/protecting-the-right-to-health-through-inclusive-and-resilient-health-/1680a177ad>, 15-17.
[63] 'A/HRC/53/26/ADD.1: Visit to Poland - Report of the Special Rapporteur on the Human Rights of Migrants (n43), 15.
[64] Ibid (n60), 105.
[65] Kanstantsin Dzehtsiarou author, *Can the European Court of Human Rights Shape European Public Order?* (Cambridge University Press 2022), 16-17.

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which made up 84% of ECtHR judgments from the last five years.[66]

ii. *Political and Legal Complexity*

The Committee of Ministers examined that the political and legal complexity continues to increase. The Court decides some cases, but the member states are not interested in executing the judgement; however, the Committee of Minister remind them multiple times.[67] Also, regarding the pending cases, the Parliamentary Assembly expressed concern about the slow progress towards implementing the Court judgements. Related to this concern, the Assembly issued Resolution 2949 (2023) and called the states to enforce the judgement in good faith and without delay.[68] Although the Assembly, as a highly authorized body of legislation of the Council of Europe, underscored to provide effective domestic remedies and fulfil their obligation based on the Convention, some states failed to implement their obligation due to a lack of political will.[69]The reluctance of member states due to political dimensions and complexities is an explicit example of breaching the Convention, including Article 3 by member states.

iii. *Limited Capacity of the Council of Europe Member States*

The Committee of Ministers examined that at the end of 2022, there was a new record number of 2257 cases, including those related to Article 3 of the ECHR. On that information, the respondent states that the Committee of Ministers did not submit payment of just satisfaction. Also, there was an increased delay in submitting state action plans within the designated deadline; for example, for not meeting the deadline, the DEJ sent 92 reminder letters to 17 states in 2022 and 84 reminder letters to 16 states in 2021. The Committee believes these deficiencies are linked to the state's insufficient capacity to take prompt and timely measures for the complete and effective execution of the Court's judgements due to the low status or lack of resources of national coordinators.[70]

iv. *High Number of Applications*

In addition to transmitting the new judgement to the Committee of Ministers by the Court, there are many pending applications before the Court. For example, according to the recent court report, only 67300 applications are registered as pending cases before a judicial formation till 29 February 2024, while the court decided on 5882 applications in 2024[71]. However, there is not available data on the number of asylum seekers, migrants, and refugee applications. Still, given the large movement of foreign nationals, particularly to Turkey and the borders of Europe, combined with the widespread practice of illegal expulsion and detention, it is believed that a significant number of the pending applications may be lodged before the court.

V. Recommendations

For effective and timely implementation of Article 3 of the ECHR, this essay suggests the following recommendations:

a) *Developing National Investigation, Compliance and Monitoring Mechanism*

According to the report of CPT, the member states only carried out a few investigations into allegations of physical ill-treatment and other forms of inhuman and degrading treatment, which do not comply with the criteria of effectiveness. Also, there was no effective and independent system for systematically monitoring border control activities. The CPT reports that the detained interviewed foreign nationals could not lodge complaints due to a lack of an effective compliance mechanism. The absence of an effective monitoring and investigation mechanism by the member states entailed that the perpetrators were not identified, and the cycle of ill-treatment remains unchallenged.[72] It is believed that the states should develop an independent investigation, compliance and monitoring mechanism to systematically oversee the situation of foreign nationals at the borders, punish the perpetrators' officials, and prepare to implement Article 3 ECHR.

b) *Establishing a Joint Committee for the Implementation of Article 3 of the ECHR*

As mentioned, there have been delays in executing a judgement or a lack of implementation of cases, including cases of migrants and asylum seekers violating their rights under Article 3. It is believed that

[66] 'Committee on Legal Affairs and Human Rights: Implementation of Judgments of the European Court of Human Rights – 12th Report' (Parliamentary Assembly 2023) <https://rm.coe.int/implementation-of-judgments-of-the-european-court-of-human-rights-12th/1680ad0083>, 3

[67] 'Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022:16th Annual Report of the Committee of Ministers' (Committee of Ministers of the Council of Europe 2023) <https://www.coe.int/en/web/execution/annual-reports>, 12.

[68] 'Committee on Legal Affairs and Human Rights: Implementation of Judgments of the European Court of Human Rights – 12th Report' (Parliamentary Assembly 2023) <https://rm.coe.int/implementation-of-judgments-of-the-european-court-of-human-rights-12th/1680ad0083>, 2.

[69] 'Supervision of the Execution of Judgements and Decision of the European Court of Human Rights 2022:15th Annual Report of the Committee of Ministers' (Committee of Ministers of the Council of Europe 2022) <https://www.coe.int/en/web/execution/annual-reports>, 8.

[70] 'Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022:16th Annual Report of the Committee of Ministers' (n 64), 13.

[71] ECtHR, 'Statistics, <https://www.echr.coe.int/statistical-reports> accessed 16 March 2024.

[72] '32nd General Report of the CPT 1 January - 31 December 2022' (n 41), 32

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only the involvement of the Committee of Ministers to reinforce the execution of cases is insufficient.[73] For the effective enforcement of the prohibition of torture, inhuman or degrading treatment under Article 3, the CPT, the European Commissioner for Human Rights, and the Parliamentary Assembly should be involved. This essay suggests that to effectively implement Article 3 of the ECHR, a Joint Committee should be established under the lead of the Committee of Ministers from the mentioned bodies. They can push the states to perform and monitor the Court's judgements. Also, the Committee should develop further toolkits to ensure that states have national coordination mechanisms and timely perform the Court judgement.[74]

c) *Strengthening the Roles of Civil Society for the Implementation of Article 3 of the ECHR*

ECHR and the rules of the Court explicitly afford civil society and human rights defenders access, either as direct victims or in the form of third-party intervention. Social activists can play a significant role in representing an applicant and providing a general support structure to the Convention system. They can play their roles in educating the public, including migrants and asylum seekers, about their rights based on the Convention, assisting them in seeking legal advice and collaborating with other NGOs and legal advocates to ensure their rights.[75] In addition, civil society can play a crucial role in the effective implementation of Article 3 ECHR, monitoring the execution of judgements and ensuring that the rights of migrants and asylum seekers are protected against torture, inhuman or degrading treatment and unlawful expulsions.

VI. Conclusion

Article 3 of the ECHR recognizes the rights of third-country nationals, including migrants, asylum seekers and refugees, against torture, inhuman and degrading treatment or punishment. The right under Article 3 of the ECHR was recognized as obsolete or non-derogate, which should not be violated even in a state of emergency or for public orders and national security. This essay found that despite the conventional solid support from the migrants and asylum seekers, they have experienced horrible, inhuman and degrading treatment, particularly at the time of forced pushback and staying in detention facilities. Article 3 of EHCR affirms the non-refoulement principle and provides sufficient protection for migrants and asylum seekers against forcible expulsion to unsafe countries, safeguarding their rights in detention facilities. In terms of the ECHR implementation, this essay concludes that poor enforcement of the ECtHR Judgement, political and legal complexity within member states, insufficient capacity and a high number of new and pending execution applications are vital obstacles that impact the effective implementation of Article 3 of the ECHR within the territories of the member states. For the excellent implementation of Article 3 of the Convention, this essay recommends that the member states should develop national investigation, compliance and monitoring mechanisms to monitor the situation of migrants and asylum seekers, particularly at their borders and detention centres and perfume the pending judgements of ECtHR within their territories and jurisdiction. Furthermore, the Council of Europe should establish a joint committee composed of the Committee of Ministries, CPT, European Commissioner for Human Rights and Parliamentary Assembly to systemically monitor the execution of the Court's judgement, provide toolkits and sanction to ensure that the States Parties fulfil their obligation under Article 3 of the ECHR. Finally, the Author believes that by strengthening the role of civil society in monitoring the execution of pending cases and the situation of migrants and asylum seekers, the ground for effective implementation of Article 3 of the ECHR will be prepared.

[73] Jaskiernia (n 60), 103.

[74] 'Committee on Legal Affairs and Human Rights: Implementation of Judgments of the European Court of Human Rights – 12th Report' (n 68), 2.

[75] Rachel Cichowski, 'Civil Society and the European Court of Human Rights' (2010) <https://papers.ssrn.com/abstract=1643604> accessed 17 March 2024, 14.

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Conflict of Interest Statement
The author declares no conflict of interest.

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