

# COMPLAINT MECHANISMS IN BORDER MANAGEMENT AND EXPULSION OPERATIONS IN EUROPE

EFFECTIVE REMEDIES FOR VICTIMS  
OF HUMAN RIGHTS VIOLATIONS?



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## List of Abbreviations

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CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EBCG	European Border and Coast Guard
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU Charter	Charter of Fundamental Rights of the European Union
EU	European Union
FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer
GANHRI	Global Alliance of National Human Rights Institutions
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
MS	European Union Member States
NGO	Non-governmental organisation
NHRI	National human rights institution
NPM	National Preventive Mechanism
SBC	Schengen Borders Code
SSR	Security Sector Reform
UN	United Nations
UNHCR	UN Refugee Agency (Office of the United Nations High Commissioner for Refugees)

## PREFACE

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Border control, surveillance operations and expulsion of irregular immigrants – particularly through return flights – can pose serious challenges to human rights. Is Europe properly equipped to ensure effective access to remedies for alleged rights violations or possible abuses of force against immigrants and asylum seekers?

This book examines whether adequate complaint mechanisms and bodies are in place and to what extent they succeed in monitoring and redressing human rights violations in the context of border management and joint return flights. It makes three main contributions to the current policy and academic debate.

First, it sheds light on the fragmentation of the human rights accountability regimes that currently apply to the various national and EU authorities and actors involved in border management and expulsions of irregular immigrants.

Second, it shows that while the ‘law on the books’ may formally recognise a set of fundamental rights for immigrants and asylum seekers, the ‘law in practice’ does not necessarily offer effective access to justice through complaint mechanisms in many European states.

Third, the book sets out a number of policy recommendations aimed at ensuring access to effective remedies for violations of the human rights of migrants and asylum seekers that might occur in extraterritorial and dispersed locations (such as in cooperation with or in territories of third countries), and in the context of joint return flights aimed at expelling irregular immigrants. Particular attention is paid to issues with access to justice in the context of activities undertaken by the new European Border and Coast Guard (Frontex).

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# INTRODUCTION

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Border control and surveillance activities and expulsion operations of irregular immigrants entail the adoption of actions or decisions that are particularly sensitive from a human rights perspective. These activities involve the use of executive powers – and in some cases even force, and their impact on human rights has been widely documented across Europe.<sup>1</sup>

By monitoring and reporting abuses, human rights treaty bodies and independent organisations contribute to the accountability of law enforcement authorities. A knowledge gap exists regarding the administrative remedies or ‘complaint mechanisms’ available to third country nationals – immigrants and asylum seekers – who may be victims of misconduct and violence or ill-treatment in the context of migration and border management practices.

The need to address this gap becomes particularly crucial, in particular in light of the process of progressive externalisation and militarisation of border management and migration control practices, and more generally in the wider context of deterioration in the rule of law across the EU. Is Europe properly equipped to ensure effective access to remedies for alleged rights violations or possible abuse of force against immigrants and asylum seekers? How can there be access to effective remedies for violations of human rights of migrants and asylum seekers that might occur in remote and dispersed locations such as the high sea, or in the context of joint return flights? How can the risks of impunity that arise from practical obstacles to monitoring and implementing respect of existing standards be reduced?

This book examines the existence and effectiveness of mechanisms that, without prejudice to formal judicial remedies, have the objective of overseeing, investigating and redressing human rights violations that occur in the context of border management and joint return flights. The geographical scope of the assessment covers a selection of Council of Europe (CoE) countries: Austria, Bulgaria, Greece, Hungary, Italy, Poland, Romania, Serbia, Slovakia, Spain and Turkey. The following research areas are investigated:

- First, the human rights responsibilities and related accountability regimes applicable to the wide range of authorities entrusted with the management of land, air, and sea borders, and the conduct of expulsion operations, and in particular, joint return flights.
- Second, the features that complaint mechanisms must possess in order to qualify as effective in light of the standards developed under the European Convention on Human

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<sup>1</sup> Among the many sources available see, for instance, Border Violence Monitoring, Statistical overview: January to November 2017, 01.12.2017.

Rights (ECHR)<sup>2</sup> and other regional and international legal instruments relevant to human rights.

- Third, the existence of institutions and bodies currently responsible for receiving and handling human rights complaints, the extent to which they are accessible in practice, and also whether they are entitled to conduct independent investigations and redress abuses.

**Section I** starts by providing an overview of the main human rights standards that delineate the boundaries of the executive powers of national authorities in border management activities and joint return operations. The overview takes into account the legal standards developed by the European Court of Human Rights (ECtHR), while also paying attention to the fundamental rights obligations enshrined in European Union (EU) primary and secondary legislation. It takes stock of the cases and circumstances in which human rights obligations apply to CoE State Parties' authorities conducting border control and border surveillance activities and/or expulsion operations. The section then analyses in depth the guarantees that oversight bodies and accountability mechanisms need to offer in order to secure the substance of the rights and freedoms enshrined in international and regional human rights instruments applicable to border management activities and joint return procedures. There is a particular focus on the structural and functional features that the different authorities responsible for receiving and handling complaints against decisions undertaken in the context of border checks and return procedures must exhibit in order to qualify as a 'complaint mechanism'. For the purposes of this book, the oversight bodies existing at the local, national, and supranational level qualify as 'complaint mechanisms' when i) they offer a form of protection which is supplementary to judicial remedies, and ii) are equipped with the powers and procedural guarantees required under the ECHR and other relevant human right instruments to ensure third country nationals a sufficient level of protection against abuses committed in the context of border management activities or during expulsion procedures.

**Section II** focuses on the analysis of the institutional landscape of actors responsible for the implementation of the multi-layered legal framework laying down the human rights obligations governing border management and expulsion procedures. The section highlights the gaps in protection deriving from the differences in the accountability regimes to which the various law enforcement and security actors currently participating in border control, border surveillance and expulsion operations are subject. It then identifies the different types of internal and external accountability bodies and institutions that the 11 countries studied in this book have created (if any) to allow complaints by third country nationals against human rights violations occurring in the context of border control, border surveillance and joint return operations. A

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<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950, as amended. Among the many sources available see, for instance, Border Violence Monitoring, A project documenting illegal push-backs and police violence inflicted by EU member state authorities, mainly on the borders of Serbia/Croatia and Serbia/Hungary, <https://www.borderviolence.eu/>.



dedicated case study addresses the current state of play in the implementation of the mechanism established under Article 72 of Regulation (EU) 2016/1624.<sup>3</sup>

**Section III** verifies whether the existing oversight bodies do in fact qualify as ‘complaint mechanisms’. It does so by testing the extent to which the structures and procedures established by the CoE meet existing standards on effective complaint mechanisms and grant access to justice and effective remedies to third country nationals whose human rights have been violated. Through scrutiny of the type of procedures that can be activated to prevent and redress abuses committed at the borders and in the context of returns, the section examines the role played by existing and available oversight bodies in monitoring and holding accountable national authorities responsible for abuses or misconduct. In particular, the section identifies a series of practical, legal, and procedural challenges currently affecting the possibility of lodging complaints and accessing effective remedies for human rights violations by law enforcement authorities and other security actors operating at land, air, and sea borders, or in the context of expulsion operations, and in particular joint return flights.

**The conclusions** highlight existing shortcomings in the human rights accountability regimes of the authorities of CoE State Parties involved in border and migration management. Particular attention is paid to the risks of impunity arising from the lack of robust independent monitoring bodies and effective complaint mechanisms. Based on key research findings, the book proposes a series of recommendations in the form of practical suggestions that could be adopted in developing a European system of ‘portable justice’. This system would aim at enhancing existing human rights protection instruments by primarily securing and improving access to effective judicial and non-judicial remedies against fundamental human rights abuses or cases of mistreatment suffered by individuals in the context of border control and surveillance, as well as joint return flights.

### Scope and methodology

The book pays attention to the *effectiveness* of mechanisms available for complaining about and accessing remedies for human rights violations that might occur throughout the performance of border management activities,<sup>4</sup> and in conducting joint return operations by air.<sup>5</sup> By doing so, the analysis concentrates on a selection of Southern (Greece, Italy, Spain),

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<sup>3</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

<sup>4</sup> In EU law, the concept of border management encompasses actions and/or decisions undertaken in the context of both: border control and border surveillance. See Monar, J., (2006), ‘The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the Integrated Management of External EU Borders’, in J. de Zwaan and F. A. N. J. Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of The Hague Programme*, T.M.C. Asser Press, The Hague, pp. 73-90.

<sup>5</sup> See Frontex (2016), *Guide for Joint Return Operations by Air* coordinated by Frontex, Warsaw, 12 May 2016. In the document, Joint Return Operation by Air is defined as an “operation aimed at the removal of illegally present third-country nationals by air. The initiative for such an operation is to be taken by one Member State, which will invite the participation of others”.

Central (Austria, Hungary Poland, Slovakia) and Eastern (Bulgaria, Romania, Serbia, Turkey) European countries that are CoE State Parties.

The 11 countries were selected to reflect the specific human rights accountability challenges that currently arise from the implementation of border management activities and joint expulsion operations across different European land, sea, and air borders. This selection also makes it possible to assess the extent to which different national legal systems and institutional frameworks foresee and allow the activation of complaints in accordance with the standards that different CoE institutions and bodies have developed (and to which all CoE State Parties are committed) in order to prevent and redress human rights violations experienced by individuals during border management and expulsion procedures.

The research is based on information collected through desk research and a set of semi-structured interviews with members of the European Committee for the Prevention of Torture (CPT), officials from the International Organization for Migration (IOM) and the The UN Refugee Agency (UNHCR), representatives from EU institutions and agencies, and non-governmental organisations (NGOs). An e-questionnaire facilitated gathering expert knowledge from scholars, civil society organisations, national human rights institutions (NHRIs), Ombudspersons, and law enforcement authorities operating in the 11 countries under study. A total of 29 responses to the questionnaire were received between August and November 2017. An Expert Workshop involving national experts from all countries covered was also held at the Council of Europe premises in Strasbourg on the 20<sup>th</sup> of November 2017 to present, test and complement the preliminary findings of the research.

A special mention should go to the valuable inputs received from the academics and practitioners who took part in the expert workshop and/or contributed to the data collection exercise conducted in the 11 countries. The authors would like to thank and acknowledge the country contributions provided by the following national experts: Dr. Iker Barbero (Spain); Dr. Lami Bertan Tokuzlu (Turkey); Dr. Ulrike Brandl (Austria); Dr. Giuseppe Campesi (Italy); Rados Djurovic (Serbia); Dr. Francina Esteve-Garcia (Spain); Dr. Mariona Illamola Dausà (Spain); András Léderer (Hungary); Dr. Eleni Koutsouraki (Greece); Barbora Messova (Slovakia); Dr. Madalina Moraru (Romania); Felicia Nica (Romania); Dr. Andriani Papadopoulou (Greece); Radostina Pavlova (Bulgaria); Vladimir Petronjevic (Serbia); Dr. Jari Pirjola (Finland); Diana Radoslavova (Bulgaria); Anna Serra Gironès (Spain); Zuzana Številová (Slovakia); Sonja Toskovic (Serbia); Dr. Judit Toth (Hungary); Daniel Witko (Poland).

# 1. EFFECTIVE COMPLAINT MECHANISMS IN LIGHT OF REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

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## Key findings

- **Portability of fundamental human rights safeguards:** The human rights obligations that derive from a country's participation in the CoE impose the observance of specific human rights standards and procedural guarantees applying to border management activities and expulsion operations. Responsibility to safeguard and comply with these human rights standards follow wherever State actors perform border controls, surveillance and migration management activities. In the CoE, this entails situations where authorities have *de facto* or *de jure* control (including extra-territorial jurisdiction) and, in the EU legal system, whenever their activities fall within the scope of EU law (*Portable Responsibility*). If a human rights violation occurs in a situation falling under such circumstances, the individuals concerned should be granted access to an effective right of complaint and seek administrative and judicial remedies before the competent authorities.
- **Third country nationals have the right to activate complaint mechanisms providing access to effective judicial and non-judicial remedies against human rights violations.** CoE State Parties have the obligation to develop oversight and redress mechanisms directed at receiving and handling complaints and provide judicial and non-judicial remedies against fundamental human rights abuses and cases of mistreatments or maladministration that actually occur in the context of border management activities and expulsion operations by air.
- An effective remedy can only be provided by a complaint mechanism that is **institutionally independent and accessible in practice**. There must also be an adequate capacity to conduct **thorough and prompt investigations based on evidence**. Only when an oversight body meets these minimum safeguards can it qualify as an effective complaint mechanism in line with the standards elaborated under regional, international and supranational human rights law. Specific standards apply to mechanisms for complaints procedures about abuses in the context of joint expulsions, where **complaints must also have a suspensive effect**.

## 1.1 A multi-layered human rights legal and policy framework

A wealth of human rights standards has been developed at the international and regional level with regard to sovereign decisions by states to allow or refuse entry and expel irregular immigrants. These legal standards apply both to border management and immigration control activities and contribute to defining state responsibilities *vis-à-vis* non-nationals who undergo checks at the borders, are apprehended in a situation of irregularity during border patrolling operations, or may be subjected to expulsion procedures by air.

### 1.1.1 The Scope of Jurisdiction under the ECHR

All the CoE State Parties are subject to the obligation to guarantee the set of rights and liberties enshrined in the ECHR when controlling the entry, residence and expulsion of aliens. These rights and liberties extend to every person within a State Party's jurisdiction (Article 1 ECHR). In accordance with settled European Court of Human Rights (ECtHR) case law, this also includes third country nationals or stateless persons that, being under the effective control of a CoE contracting party, are entitled to receive protection under the ECHR.<sup>6</sup> The entitlement arises when immigrants and/or asylum seekers enter into contact with a State Party's authorities, regardless of whether the executive action of the latter take place within or outside the national territory (e.g. in international waters).<sup>7</sup> The rights that the ECHR recognises for third country nationals include, *inter alia*, the right not to be deprived of life<sup>8</sup>, the right not to suffer ill-treatment amounting to torture,<sup>9</sup> as well as the right not to be unlawfully deprived of liberty.<sup>10</sup>

Responsibility to comply with these human rights therefore extends *beyond* the borders of CoE countries. The applicability of the ECHR is contingent on Article 1 ECHR, which states that "the High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention". On a number of occasions, the ECtHR has interpreted this provision to include certain instances of *extraterritorial exercise of jurisdiction*, especially where the country concerned exercises effective control of an area outside its national territory.<sup>11</sup>

In the landmark ruling of *Hirsi Jamaa and other v Italy*, the ECtHR held that – in the context of the 'push-back operations' to Libya by Italian armed forces – Italy had assumed both continuous and exclusive *de jure* and *de facto* control over the applicants.<sup>12</sup> The Strasbourg Court clearly established that practices of CoE country authorities, such as transferring a migrant boat to an intercepting patrol ship, evidently place the affected individual within the effective control of

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<sup>6</sup> European Court of Human Rights (ECtHR), *Issa and others v. Turkey*, 16.11.2004, (Application no. 31821/96), para. 71.

<sup>7</sup> *Ibid.*, paras 73-75.

<sup>8</sup> ECtHR, *Solomou et al. v. Turkey*, 24.06.2008.

<sup>9</sup> ECtHR, *Ribitsch v. Austria*, 4.12.1995.

<sup>10</sup> ECtHR, *Kuznetsov v. Ukraine*, 29.04.2003, and; ECtHR, *Ilascu et al. v. Russia and Moldova (GC)*, 8.07.2004.

<sup>11</sup> ECtHR, *Loizidou v Turkey (Preliminary Objections)*, para. 62.

<sup>12</sup> ECtHR, *Hirsi Jamaa et al. v. Italy (GC)*, 23.12.2012, paras. 73 and 81.

the relevant state.<sup>13</sup> More recently, the ECtHR has confirmed its *Hirsi* doctrine of *de jure* and *de facto* control in respect of extraterritorial jurisdiction in *N.D. and N.T. v Spain*.<sup>14</sup> In the latter case, the Strasbourg Court restated that the obligation of Spanish authorities to ensure ECHR standards derives from the effective control exercised over the third country nationals who trespass the fence built between Morocco and Spain, and does not depend on questions of territoriality (i.e. irrespective of whether the border fence is located in Spanish or Moroccan territory).

### 1.2.1 Portable responsibility under the EU Charter of Fundamental Rights

The safeguards provided under the ECHR are also guaranteed by the Charter of Fundamental Rights of the European Union (EU Charter), which has the same legal value as the EU Treaties. Article 52(3) of the Charter states that, without prejudice to a more extensive protection, the meaning and scope of the rights for which it provides shall be the same as those laid down by the ECHR.<sup>15</sup> At the same time, the EU Charter provides for even greater possibilities to control the action of agents of the EU and its member states (MS) when they act within the scope of EU law.<sup>16</sup> In particular, it spells out the rights and principles that apply to the authorities of EU MS when they implement EU law regulating border checks, border surveillance and returns.<sup>17</sup> In all cases where the administrative and law enforcement action of MS and EU agencies falls under the scope of Schengen rules and other relevant EU legal and policy instruments, the fundamental rights safeguards provided by the Charter apply, irrespective of the fact that such action is conducted outside the EU's geographical borders.<sup>18</sup>

The *material and personal* scope of application of the EU Charter aims at guaranteeing that the notion of 'responsibility' in the EU legal system follows a *functional or parallel* approach.<sup>19</sup> Compliance with the Charter must be maintained irrespective of *where* and under *whose*

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<sup>13</sup> See N.W. Frenzen, (2017), "The legality of Frontex operation practices", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human rights and the dark side of globalisation: Transnational law enforcement and migration control*, Routledge Studies in Human Rights, p. 305.

<sup>14</sup> ECtHR, *N.D. and N.T. v Spain*, 03.10.2017, para. 54.

<sup>15</sup> Among the most important rights provided by the EU Charter that are of particular relevance during border checks, there are: human dignity (Article 1); the prohibition of torture and inhuman or degrading treatment or punishment (Article 4); the right to liberty and security (Article 6); respect for private and family life (Article 7); the protection of personal data (Article 8); the right to asylum and protection in the event of removal, expulsion or extradition (Articles 18 and 19); non-discrimination (Article 21); the rights of the child (Article 24); the right to a good administration (Article 41); and the right to an effective remedy (Article 47).

<sup>16</sup> Article 51(1) of the Charter stresses that: "the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

<sup>17</sup> In line with Article 51 of the EU Charter, it has to be assessed on a case-by-case basis whether national activities in the field of border control are to be considered an implementation of Union law to which EU fundamental rights standards apply. See CJEU C-23/12, *Zakaria*, ECLI:EU:C:2013:24, paras 39-41.

<sup>18</sup> See V. Moreno-Lax and C. Costello (2014), "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in S. Peers et al. (eds) *The EU Charter of Fundamental Rights*, Oxford: Hart Publishing, pp.1700-1727.

<sup>19</sup> *Ibid.*, pp. 1657-1683.

*control* and executive actions effectively take place, and regardless of the territorial connection with the EU. This falls into what could be denominated as *portable responsibility*. And that is also the case even where EU law leaves discretion or margins of appreciation to MS in implementation phases: such discretion must be exercised in light of the EU Charter.

A restrictive interpretation of the scope of EU law might hamper the accountability of EU and non-EU actors currently involved in the field of border control and expulsions.<sup>20</sup> However, the scope of the fundamental rights obligations and related operational administrative standards applying to MS has progressively expanded, in particular through the integration of the Schengen *acquis* in the EU legal order, the establishment of common EU external borders, and the consequent adoption of so-called ‘flanking’ or ‘compensatory measures’.

The Schengen Borders Code (SBC)<sup>21</sup> establishes that the authorities of EU MS entrusted with border control and surveillance functions have the responsibility to ensure that the measures they undertake in the context of these activities fully respects human dignity, are proportionate to the objectives pursued, and do not discriminate on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.<sup>22</sup> The Regulation for the surveillance of EU external sea borders<sup>23</sup> also provides for human rights standards to be respected by authorities that conduct sea border patrolling activities including, for instance, boarding and stopping vessels, conducting a vessel to a third country, or handing over a vessel to the authorities of a third country.<sup>24</sup>

In the field of expulsions, the Return Directive subjects the use of coercive measures to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.<sup>25</sup> The Directive encourages the use of voluntary departures over forced removals<sup>26</sup>, and provides for a series of safeguards to which third country nationals in irregular situations are entitled to while their removal is pending.<sup>27</sup> Despite not being legally binding, the recently revised EU Return Handbook provides further indications “relating to the performance of duties of national authorities competent for carrying out return related tasks, including police, border guards, migration authorities, staff of detention facilities and monitoring bodies”. The main goal

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<sup>20</sup> See C. Costello (2016), “The Human Rights of Migrants and Refugees in European Law”, Oxford: Oxford University Press.

<sup>21</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>22</sup> See Article 7 SBC.

<sup>23</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>24</sup> For the fundamental rights challenges that emerge in the context of border surveillance at sea, see the European Union Agency for Fundamental Rights (FRA) (2013), *Fundamental rights at Europe’s southern sea borders*.

<sup>25</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Recital 13.

<sup>26</sup> *Ibid*, Article 7.

<sup>27</sup> *Ibid*, Article 14.

of the Handbook is to ensure respect of the fundamental rights set forth in the EU Return Directive.<sup>28</sup>

### *1.3.1 The right to an effective remedy and good administration, and the role of complaint mechanisms*

By ratifying the ECHR, and adopting and implementing other regional and international human rights instruments governing the management of borders and the enforcement of immigration legislation (including expulsions), CoE State Parties have willingly assumed a number of legal responsibilities that are both substantial and procedural in nature. Compliance with these human rights obligations is central to both the loyal and sincere cooperation between CoE State Parties, and the legitimacy of their action in international relations.

*Substantive obligations* entail the adoption and implementation of rules of conduct directed at ensuring that the States' authorities fully respect relevant standards regarding fundamental human rights protection in the performance of their border and migration management tasks. For instance, and with regard to the personal/institutional scope of the obligation to protect the rights enshrined in the ECHR (and in particular those embodied in Articles 2 and 3), the ECtHR has stated that the "higher authorities" of the Contracting States are under the duty to require their subordinates – including law enforcement authorities and the police – to comply with the Convention.<sup>29</sup>

*Procedural obligations* involve the design and development of oversight standards and mechanisms directed at delivering those standards in practice by receiving and handling complaints, and at providing effective remedies when these are not complied with in the context of border control procedures, border surveillance practices, and expulsion operations. Besides rights and freedoms, the ECHR also provides guarantees aimed at reinforcing the efficacy of these very rights and freedoms. Article 13 of the Convention provides the right to an effective remedy. The ECtHR has interpreted this provision of the Convention as a guarantee for everyone who claims that his/her rights and freedoms under the ECHR have been violated.<sup>30</sup> The rationale for Article 13 is precisely to secure the substance of the rights and freedoms guaranteed in the ECHR. According to the ECtHR, the remedy must not necessarily be of a judicial nature to enforce a substantial breach of human rights. In fact, through its jurisprudence, the Strasbourg Court has established that if judicial remedies are not provided, the effectiveness of a remedy depends on the specific "powers and procedural guarantees of

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<sup>28</sup> See European Commission, C(2017) 6505, ANNEX to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, Annex I.

<sup>29</sup> See, for instance, ECtHR, *Assanidzé v. Georgia*, 8.04.2004.

<sup>30</sup> ECtHR, *Klass et al. v. the Federal Republic of Germany*, 6.09.1978.

the alternative remedies” (i.e. administrative) provided by the CoE State Party institutional and legal system.<sup>31</sup>

Article 13 of the ECHR also gives effect to the principle of subsidiarity, namely by establishing that proper domestic remedies are made available to individuals before they have recourse to the ECtHR. This, in turn, translates into a positive obligation for State Parties to establish dedicated mechanisms for lodging administrative and judicial complaints through which a non-national may claim – before a national authority and according to national law – that a decision taken in the context of border check or border surveillance, or in the framework of an expulsion operation allegedly violates a Convention right, for instance, Article 2, 3, or 8 ECHR.<sup>32</sup>

A set of international standards or criteria have been progressively elaborated at the CoE and also at the EU and international level to clarify the features that ‘complaint instruments’ or ‘mechanisms’ should exhibit in order to address effectively allegations of human rights violations and misconduct/violence by border guards and other relevant law enforcement authorities in the scope of migration management activities.

#### 1.4.1 *Effective complaints mechanisms and investigations in light of the ECHR and the CPT*

ECtHR jurisprudence has helped in specifying what a *remedy* should look like in order to be considered effective in the meaning of the Convention. According to the Strasbourg Court’s case law, a remedy *vis-à-vis* claimed fundamental rights violations deriving from actions or decisions taken against third country nationals in the scope of border control activities and return operations must:

- **First, exist institutionally**, although it does not necessarily need to depend on a judicial authority, but can also be provided by other bodies of an administrative nature (e.g. an Ombudsperson) with the authority to ensure the effectiveness of the remedy in practice. This requires the power to conduct an effective investigation based, where necessary, on examinations by medical professionals into the allegations made by the complainant.<sup>33</sup>
- **Second, be adequate**, allowing the competent national authority to deal with the substance of the complaint and grant appropriate relief, through an assessment of the risks with reference to the facts which were known or ought to be known to the state (for instance, at the time of expulsion). For this scope, the scrutiny conducted by a national authority must be close, independent and rigorous,<sup>34</sup> and ensured without

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<sup>31</sup> See also D. Shelton (2014), “Art. 47 – Right to an Effective Remedy”, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, p. 1202.

<sup>32</sup> H. Lambert (2007), “The position of aliens in relation to the European Convention on Human Rights”, Human Rights File, No 8, Council of Europe Publishing, p. 59.

<sup>33</sup> ECtHR, *Silver et al. v. the United Kingdom*, 25.03.1983, para. 113. See also ECtHR *Leander v. Sweden*, 26.03.1987, paras. 29-30, and ECtHR, *Klass et al. v.*, para 67.

<sup>34</sup> ECtHR, *M.S.S. v. Belgium and Greece (GC)*, paras. 293 and 387.



regard to what the person may have done, for instance, to warrant expulsion or any perceived threat to the national security of the expelling state.<sup>35</sup>

- **Third, be available**, the remedy must be prompt, accessible and not hindered by the acts of the state authorities.<sup>36</sup> Promptness of the proceedings for the assessment of the complaint should not prevail over the effectiveness of the remedy. The ECtHR found that accelerated proceedings may lead to a superficial examination of the applicant's claim and deprive him/her of a fair and reasonable opportunity to challenge a decision.<sup>37</sup> With specific regard to Article 2 of the ECHR, the Strasbourg Court has clarified that in order to provide an effective remedy against a decision which allegedly violates the *non-refoulement* principle, a complaint mechanism must be not only be available in practice, provide for independent and rigorous scrutiny, and prompt response,<sup>38</sup> but it must also have an automatic suspensive effect.<sup>39</sup>

The ECtHR also stressed that a duty exists for the state to investigate allegations of serious ill-treatment committed by a state agent against aliens. The duty of states to pursue thorough investigations for ill-treatment of aliens also have also been extended to cases of alleged violation by private individuals.<sup>40</sup> According to the Strasbourg Court this entails "an obligation to provide a complete and sufficient explanation as to how the injuries were caused", and therefore requires official investigations to be conducted.<sup>41</sup> The ECtHR specified that in case of complaints brought against the police and engaging in particular Article 2 or 3 of the ECHR, investigations must meet the following standards:

- **Independence and impartiality**, excluding institutional or hierarchical connections between the investigators and the officer subject of the complaint.<sup>42</sup>
- **Thoroughness**, entailing the gathering of evidence that allow for the assessment of the facts of the case and the identification and punishment of those responsible.<sup>43</sup> The hearing of the officer as a suspect and critical analysis of his/her statements is also an obligation to fulfil in order to ensure effective investigations.<sup>44</sup>

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<sup>35</sup> Judgment of 25 September 1997, para 107.

<sup>36</sup> ECtHR, Muminov v. Russia, 11 .12.2008, para 100.

<sup>37</sup> ECtHR, I.M. v. France, 2.02.2012, paras 130, 147-14, and 154.

<sup>38</sup> See M.S.S. v. Belgium & Greece, paras 283-293.

<sup>39</sup> See Hirsi Jamaa et al. v. Italy, op. cit., paras 199-200; and ECtHR, Gebremedhin v. France, 26.04.2007, para 58; it is sufficient if one court has the option to decide before removal; a final decision of a court of last instance is not required.

<sup>40</sup> ECtHR, M.C. v. Bulgaria.

<sup>41</sup> ECtHR, Assenov et. al v. Bulgaria. 28.10.1998.

<sup>42</sup> ECtHR, Halat v. Turkey, 8.11.2011; Mocanu et al. v Romania, 17.09.2014.

<sup>43</sup> ECtHR, Aksoy v. Turkey, 18.12.1996; Alder v United Kingdom, 22.11.2011.

<sup>44</sup> ECtHR, Ramsahai v. The Netherlands, 15.05.2007.

- **Promptness**, to prevent risks of evidence loss through delay,<sup>45</sup> and maintain confidence in the rule of law.<sup>46</sup> Initial protection of potential evidence must also be ensured.<sup>47</sup>
- **Publicity, openness and transparency**, also allowing for the complainant to be involved in the complaints process in order to safeguard his or her legitimate interests.

From the overview provided above, it follows that the non-respect of procedural obligations specific to Article 3 (or Article 2) of the ECHR can result in a violation of Article 3 (or 2) “in just the same way as the non-respect of the substantive obligation would”.<sup>48</sup>

As for the safeguards relating to the expulsion of aliens (primarily regulated by Article 1 of Protocol no. 7 to the ECHR),<sup>49</sup> the ECtHR has also applied Article 13 in conjunction with other provisions of the Convention in order to clarify the type of remedies that must be made available by State Parties. For instance, it has stated that “where there is an arguable claim that such an expulsion may infringe the foreigner’s right to respect for family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation order” and of having the issues “examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality”.<sup>50</sup>

Beside the ECtHR, the CPT has also provided important guidance and indications as to the features that allow oversight instruments to be effective, and therefore qualify as ‘complaint mechanisms’. The CPT has in particular indicated the role that complaint mechanism should play in the context of immigration detention, and more specifically during the deportation of foreign nationals by air, as reported in the box below.

*Box 1. CPT recommendations on effective complaints mechanisms*

As a result of its most recent visits to Spain and Italy, the CPT reinstated the importance that during a joint removal operation, effective complaints procedures “both internal and external are set up to allow for any complaints from detainees about their treatment by law enforcement officers”.<sup>51</sup>

<sup>45</sup> ECtHR, *Kaya v. Turkey*, 19.02.1998.

<sup>46</sup> ECtHR, *Aydin v. Turkey*, 25.09.1997.

<sup>47</sup> ECtHR, *Alder v. United Kingdom*, 22.11.2011.

<sup>48</sup> See H. Lambert (2007), *op. cit.*, p. 59.

<sup>49</sup> This provision establishes that an alien lawfully resident can be expelled from the territory of a State Party only in pursuance of a decision reached in accordance with law and has the right to submit reasons against his expulsion, to have his case reviewed and to be legally represented. Such procedural safeguards can be restricted when the expulsion is necessary in the interests of public order or is grounded on reasons of national security. The provision is modelled on article 13 of the International Covenant on Civil and Political Rights.

<sup>50</sup> ECtHR, *Al-Nashif v. Bulgaria* 20.06.1992, para.133.

<sup>51</sup> See in particular, CPT Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 December 2015, CPT/Inf (2016) 33, p. 18.

The CPT has further specified that in order to qualify as “accessible in practice” such procedures must give returnees the possibility to file a complaint “either immediately upon arrival or on board the plane prior to arrival”.

In addition, it was confirmed that the external procedure should “meet the requirements of independence” and “offer guarantees that complaints will be dealt with effectively, expediently and thoroughly”.<sup>52</sup>

These are the necessary requirements, which according to the CPT, would allow for a complaint mechanism to effectively determine responsibilities, sanction those responsible, and prevent further rights violations.

Further guidance as to the nature, characteristics and specific role played by complaint mechanisms in the context of immigration detention, also in the framework of expulsion operations and removal procedures, has been elaborated through the work of a wide range of international, regional and national bodies and stakeholders including international and national monitoring bodies, United Nations Special Procedures, international organisations and civil society.<sup>53</sup>

Among the additional features that international and regional human rights institutions and bodies have recognised as essential for the effectiveness of complaint mechanisms in the context of immigration detention, and which also apply to expulsions procedures and joint return flights, two are of particular relevance: access to information (detainees ought to be informed of complaint procedures and understand how to access them);<sup>54</sup> and also procedural clarity and fairness, and respect to privacy and confidentiality.<sup>55</sup> Furthermore, when addressing their complaints, returnees should be free from intimidation and reprisals.<sup>56</sup> This also means that attempts to prevent complaints should not be tolerated.<sup>57</sup>

### 1.5.1 *Effective complaints in light of EU law*

In the EU legal system, a guarantee corresponding to Article 13 of the ECHR is provided under Article 47 of the EU Charter. This last provision expressly grants the right to an effective remedy to any person whose rights and freedoms protected under EU law have been violated, including in the context of border checks and return procedures. Since it imposes that the right to an effective remedy must be granted by “a tribunal”, and it does not only just refer to a remedy

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<sup>52</sup> Ibid.

<sup>53</sup> See Association for the Prevention of Torture, Practical manual on Monitoring Immigration Detention.

<sup>54</sup> United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, para 35.1 and 2.

<sup>55</sup> *Ibid.* para 36.

<sup>56</sup> See Council of Europe Committee Of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), para 70.4.

<sup>57</sup> Ibid.

before “a national authority”, Article 47 of the EU Charter seems to require a higher level of protection than that provided by Article 13 of the ECHR.<sup>58</sup>

Besides protecting “classic fundamental rights”, the EU Charter also requires administrative rights – and in particular the right to good administration (Article 41) – to be respected. This right applies to everyone within the scope of the Charter, including third-country nationals whose legal position is regulated by EU law in the context of border and expulsion procedures. Article 41 of the EU Charter is directed at EU institutions and bodies – including EU Agencies, like the European Border and Coast Guard (EBCG), but also applies as a general principle to MS authorities responsible for the implementation of EU law.

The fundamental right to good administration is of central importance when testing the effectiveness of complaint mechanisms and remedies in the scope of EU law. In fact, it requires that human rights considerations are taken appropriately into account by authorities responsible for implementing border control, border surveillance and/or return operations. It also entails a right for third country nationals to be heard before any individual measure that would affect him or her adversely is taken, and to have any damage caused by the EU institutions or their servants in the performance of their duties made good, in accordance with the general principles common to the laws of the MS. Being entrusted with the mandate to conduct inquiries into cases of maladministration by EU institutions, bodies, offices and agencies,<sup>59</sup> the European Ombudsman has an important role to play when it comes to monitoring and ensuring the respect of fundamental rights of migrants who are subject to forced returns to their countries of origin.<sup>60</sup>

At the same time, the characteristics of bodies responsible for handling complaints and the type of remedies they are entitled to grant against decisions undertaken in the context of border management and expulsions are specified in EU secondary legislation. This is the case for instance of the SBC (Article 14(3)), and the Return Directive (Article 13), as progressively interpreted by the Court of Justice of the European Union (CJEU). The latter has been repeatedly asked by means of requests for preliminary rulings to specify the nature (i.e. judicial or administrative) that national bodies handling complaints related, for instance, to a refusal of entry of an alien at the EU borders, must present.<sup>61</sup>

EU law provides indications with regard to the type of mechanisms that MS must put in place to allow third country nationals to complain about decisions undertaken in the context of border control procedures and returns of third country nationals. Article 14(3) of the SBC requires MS to grant third country nationals the possibility to appeal against a border guard’s

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<sup>58</sup> See D. Shelton (2014), *op. cit.*, p. 1210.

<sup>59</sup> See Articles 20, 24 and 228 of the Treaty on the Functioning of the European Union (TFEU) and Article 43 of the Charter of Fundamental Rights of the European Union.

<sup>60</sup> See, for instance, European Ombudsman Press Release no. 20/2014, *Fundamental rights and forced returns of migrants: Ombudsman opens investigation*, 22 October 2014.

<sup>61</sup> See J.J. Rijpma (2017), “External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory”, *European Papers*, Vol. 2, 2017, No 2, pp. 571-596.

decision refusing entry. While it is specified that complaints against such decisions shall not have a suspensive effect, no precise indication is given as to whether the complaint must satisfy any conditions of fair trial and effective remedy. In addition, no specification is provided in relation to the independence of the authority competent to receive the complaint.<sup>62</sup> At the same time, and with regard to the scope of the complaints allowed against a refusal of entry under the SBC, the CJEU has clarified that appeals against refusal of entry also include a right to challenge the way in which border checks are conducted.<sup>63</sup>

The Court has confirmed that MS must provide appropriate legal remedies for infringement of fundamental rights when a situation falls within the scope of EU law.<sup>64</sup> These situations include acts undertaken by border officials at the time of adoption of an entry decision, including when these acts are not directly related or relevant to the adoption of the entry decision. In fact, within the meaning of Article 6 of Regulation No 562/2006, border guards performing their duties, are required, *inter alia*, to fully respect human dignity. The Court has also specified that in cases of mistreatment suffered at the hand of national border guards, an effective remedy in the meaning of EU Charter Article 47 cannot be granted if complaints are only allowed before the same authority responsible for conducting checks at the EU borders, and when the decision undertaken by the latter with regard to the complaint is not subject to appeal. Therefore, it seems that an adequate level of protection can only be granted by allowing victims of mistreatments access to a court or an administrative body that, from an institutional and functional perspective, provides the same guarantees as a court.

With regard to third country nationals who are refused entry and consequently become subject to a return decision or an entry ban pursuant to the Return Directive, EU law provides that an “effective remedy” must be allowed before a “competent judicial or administrative body composed of members who are impartial and who enjoy safeguards of independence”.<sup>65</sup> Further guarantees apply when a third country national, who is either refused entry at the EU border or who is not entitled to stay within the territory of a MS, is detained for the purpose of his/her return. This includes situations where immigration detention is a result of border controls conducted at an airport located within the territory of the MS refusing entry.<sup>66</sup> In these cases, third country nationals have the right to be informed immediately about the possibility to engage proceedings by means of which the lawfulness of the detention can be subject to a prompt and speedy judicial review (article 15(2) of the Return Directive).

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<sup>62</sup> A similar provision is contained in the Visa Code. See article 32(2) Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

<sup>63</sup> CJEU, *Zakaria*, case C-23/12, 17.01.2013.

<sup>64</sup> *Ibid.*, para. 40.

<sup>65</sup> Article 13 of the Return Directive.

<sup>66</sup> See FRA Report on Fundamental rights at airports: border checks at five international airports in the European Union, p. 29.

## 2. BODIES AND INSTITUTIONS RESPONSIBLE FOR RECEIVING, HANDLING AND ADDRESSING HUMAN RIGHTS COMPLAINTS

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### Key findings

- **Human rights protection gaps emerge from the blurring of operational roles and mandates played by a multiplicity of different border and migration management professionals.** While (co)-operating under different capacities in border management activities and joint expulsion operations, the law enforcement authorities and defence actors of CoE State Parties are often subject to different domestic human rights oversight mechanisms and related accountability regimes.
- **Structural and functional limitations affect the internal oversight bodies established within law enforcement or security apparatuses.** In particular, the lack of independence that traditionally affects these oversight instruments also hampers their ability to investigate and redress complaints on human rights violations effectively. Therefore, these bodies cannot be qualified as ‘complaint mechanisms’.
- **Frontex: a substandard complaint mechanism.** It is subject to specific challenges and limitations that undermine the effectiveness of internal oversight mechanisms when it comes to human rights abuses occurring during border control, border surveillance and/or expulsion-related tasks. The procedure established under Article 72 of the EBCG Frontex Regulation does not allow for an appropriate and effective monitoring and assessment of human rights violations and complaints received in the context of Frontex EBCG operations.
- **Ombudsman institutions and national human rights commissions and bodies offer an uneven supplementary administrative protection to judicial remedies.** Intended to provide individuals with the possibility of submitting complaints for mistreatments and human rights abuses, the extent to which ombudspersons are able to conduct independent and thorough investigations, are accessible in practice, and are in a position to provide timely and effective remedies varies considerably across the 11 countries covered.
- **NHRIs meet all the UN Paris Principles in only 5 of the 11 countries under consideration.** To comply with these principles, a NHRI must be fully independent from the government, it must function regularly and effectively, and have adequate powers of investigation and the capacity to hear complaints and transmit them to the competent authorities. NHRIs are also required to develop relations with non-governmental and international organisations devoted to promoting and protecting the human rights of particularly vulnerable groups, including migrants and refugees.

- **Non-compliance with UN Paris Principles undermines the capacity of NHRIs to ensure the protection of human rights in line with standards provided under international human rights law** and has negative repercussions linked *inter alia* with exclusion from UN human rights processes and procedures.

## 1.2 Who does what in border control and expulsions? Multiple actors, different accountability regimes and protection gaps

The legal standards developed under the ECHR and the EU Charter contribute respectively to clarifying the human rights responsibilities of security actors vis-à-vis individuals undergoing border checks, apprehended in a situation of irregularity in the context of border patrolling, or subjected to return procedures. However, a series of structural shortcomings and implementation gaps are still likely to undermine the effectiveness of the supranational human rights safeguards developed to protect individuals from abuses that might occur in the context of border control, border surveillance, and expulsion operations.

Human rights accountability challenges emerge in the first place from the already multiple and increasing number of different authorities taking part in border control, border surveillance-related and migration management activities, and the consequent complexity of the legal and institutional background against which the activities of these actors take place.

The governance of border management and immigration control systems currently depends on the work and interactions of many formal (military, police, gendarmerie, intelligence, border guards) and informal (private actors, international organisations) security actors. In each of the 11 CoE State Parties considered, a wide range of security professionals is involved in border control, border surveillance, and expulsion-related functions.<sup>67</sup> These national authorities and security actors contribute, to different extents and in diverse operational contexts, to border checks, the surveillance of land and sea borders, and expulsion operations.<sup>68</sup>

A case in point is Greece, where border surveillance at sea mainly falls under the responsibility of the Hellenic Coast Guard, which has also law enforcement functions, but the latter is assisted by the Hellenic Navy. The institutional landscape is even more complex in Italy, where sea border patrols are carried out by five different authorities: the Border Police, Tax and Customs Police, Carabinieri, Coastguard, and the Navy. In some countries, executive functions related to border control, border surveillance or expulsions are performed by agents affiliated to one law enforcement agency acting under the control of different ministries. This is the case for

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<sup>67</sup> A comprehensive overview of the 11 countries' authorities entrusted with executive powers and (directly or indirectly) involved in border management and expulsion-related tasks is provided in Annex 1 of this book.

<sup>68</sup> The picture becomes even more complex if we consider that, at the wider EU level, there are over 50 national authorities currently assigned with tasks related to the implementation of the Schengen *acquis*. See List of national services responsible for border-controls for the purposes of Article 15(2) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2006/C 247/02.

example of the Guardia Civil in Spain.<sup>69</sup> As for expulsions procedures, their implementation not only relies on the coordination of different immigration and law enforcement authorities operating at the national and local level (e.g. Turkey), but also entails the involvement of support staff including officials of international organisations (e.g. IOM), private escorts and medical personnel.

The actors mentioned above are not only entrusted with diverse operational tasks and corresponding executive powers, but also act under the authority and supervision of different institutional structures (e.g. national ministries, executive directors, line managers, etc.). From the perspective of third country nationals who might be victim of abuses, the multiplication of border and immigration management-related actors (and the blurring between professionalised border authorities with police and even military actors) translates into a difficulty in identifying clearly which bodies, institutions and mechanisms are responsible for overseeing their actions and activities.

Ensuring human rights accountability of the various actors operating in the field of border management and returns is further complicated by the increasing participation of CoE State Parties in regional and international cooperation initiatives. Integrated border management systems are not only multi-actors and multi-agencies, the experience in the EU shows that they are also becoming increasingly transnational, as their functioning relies on cooperation between border and coast guards and other security players from a wide range of countries. The so-called EBCG (Frontex) joint operations provide an example of the way in which: i) various jurisdictions currently contribute to determining the legality of the actions of different national authorities involved in specific phases or aspects of border control, border surveillance or expulsion operations,<sup>70</sup> and; ii) diverse accountability regimes (and related oversight mechanisms) apply to the actors involved in these activities. Different (administrative and criminal law) accountability regimes (and related oversight systems) apply to the border and coast guards that, on a case-by-case basis, participate in EBCG operational activities. The differentiation under this “shared accountability” system is exacerbated by the current EBCG Regulation, through the important extension that this piece of legislation added to the executive powers of guest officers deployed in host MS.

### *Box 2. Different accountability regimes under the EBCG Regulation*

In the framework of EBCG Frontex joint operations, different EU MS authorities are pooled and deployed by their “home country” in other “hosting countries” along the EU’s external borders. The deployed members of EBCG teams have the capacity to “perform all task and exercise all powers for border control and return” (Article 40 of the EBCG Regulation).<sup>71</sup> Guest officers work under the command and control of the authorities of the hosting country, and the different agents composing the EBCG “operational teams” are responsible for acting

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<sup>69</sup> See Annex I of this book.

<sup>70</sup> Article 3(1) of the Frontex Code of Conduct expressly requires participants in Frontex operational activities to comply with international law, EU law and the national law of both home and host MS.

<sup>71</sup> Border guards deployed in other MS operational areas exercise the powers required to perform border checks, border surveillance (this includes interviewing undocumented persons, fingerprinting, consulting databases).



in line with the legal obligations provided in EU primary and secondary law provisions, as well as with the ethical and behavioural principles set forth in the Frontex Code of Conduct.<sup>72</sup>

At the same time, it is up to the home MS authorities to exercise control over their deployed personnel.<sup>73</sup> In practice, this means that the various agents deployed in a Frontex operational activity remain subject to the oversight mechanisms specifically applying to the national institution with which they are affiliated. This is also confirmed by Article 21(5) of the ECBG Regulation, which stresses that it is upon the home country to provide “appropriate disciplinary or other measures” which, *in accordance with national law*, should apply to violations of fundamental rights or international protection obligations committed by their border guards. Article 21(2) of the Frontex Code of Conduct further specifies that it is up to the “relevant authority of the Member State to use its powers regarding the necessary disciplinary measures and, if applicable, suspend or remove the person concerned from the respective pool for a defined period”.<sup>74</sup>

Human rights protection issues might also arise from the blurring of the operational roles played by the variety of law enforcement authorities and security and defence actors that, while acting under different legal frameworks, institutional mandates, and operational capacities, directly or indirectly participate in border and/or immigration management-related activities.

For example, different CoE countries have frigates or officers deployed in EBCG’s Frontex sea operations such as Triton, Poseidon Sea, Hera, Indalo, and Minerva. At the same time, CoE country navies also take part in Operation EUNAVFOR MED Sophia. The latter constitutes an EU Common Security and Defence Policy (CSDP) initiative, but it is also likely to entail the detection of traffickers and rescues at sea.<sup>75</sup> At the same time, EU standards (see above paragraph 1.2) were specifically designed for MS professional border guards. This means the military of CoE countries that do not participate in the implementation of the Schengen *acquis* remain exempt from its legal obligations, behavioural standards and scrutiny systems.<sup>76</sup>

Similar challenges also arise from the ever-prominent operational involvement of authorities from third (non-CoE and non-EU) countries in border control and border surveillance activities

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<sup>72</sup> The Code of Conduct applies to all Frontex operational activities, including those which take place outside the territory of the Union and, to all persons participating in them (Article 1).

<sup>73</sup> For example, in the Frontex Joint Operation EPN Hera, national officials responsible for maritime and aerial assets deployed at sea acted under the ‘command and control’ of their respective home MS. See Frontex Operational Plan Joint Operation EPN Hera 2014, 2014/SBS/03.

<sup>74</sup> Article 21(2) further stresses that “Only if the continued engagement of this person jeopardises the Frontex operational activity in question, the Executive Director may decide to suspend or remove him or her from that activity”.

<sup>75</sup> For an update of recent developments in this respect, see Secretary-General of the European Commission, Second report on the implementation of the EU Maritime Security Strategy Action Plan, Joint Staff Working Document, SWD(2016) 238 final, Brussels, 15.06.2017, p. 32.

<sup>76</sup> See FRA (2013), Fundamental rights at Europe’s Southern Sea Borders, p. 37.

directed at preventing irregular border crossings of migrants and asylum seekers, as well as in conducting expulsion operations.<sup>77</sup> The exact role and actual responsibilities of foreign authorities acting *de facto* as EU external border agents remain to a large extent unclear. This is also due to the fact that their missions are often covered by “soft law” instruments, such as Council Decisions, declarations, working agreements, memoranda of understanding and technical arrangements which substantially escape both democratic and judicial scrutiny.<sup>78</sup> At the same time, partial references in EU legislative texts – such as the EBCG Regulation – cannot address the problems related to the identification of the authority responsible for receiving complaints about fundamental rights violations committed by third countries authorities, nor solve the issue related to the uncertainty in the accountability regimes applicable to the different actors involved in border management and expulsion operations.<sup>79</sup>

## 2.2 Existing oversight systems responsible for receiving human rights complaints

The determination of responsibility for actions or omissions committed by police services and other publicly authorised and/or controlled bodies responsible for “maintaining law and order in civil society” requires the establishment of dedicated oversight systems and complaint mechanisms. The analysis conducted in the previous sections of this book clarified how accountability should be ensured in all situations where CoE State Parties’ law enforcement actors enjoy discretion in the use of force *vis-à-vis* individuals, regardless of the specific operational contexts (e.g. international borders, or in the context of return flights) when such discretion is exercised. This is further confirmed by the explanatory memorandum annexed to the European Code of Police Ethics.<sup>80</sup>

At the same time, there are a multiplicity of accountability structures, operating at different levels of control. The Organisation for Security Cooperation in Europe (OSCE), for instance, has identified “five levels of supervision”, which include “internal affairs, external oversight, Parliamentary oversight, police/media policies and procedures, and local police/community relations”.<sup>81</sup> However, it is not clear *which mechanisms should apply to which element of the border management and immigration control systems*, which constitutes a far-reaching gap.

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<sup>77</sup> As recently reinstated by Frontex, measures in third countries and cooperation with neighbours are considered as “essential components” of the so-called EU integrated border management approach, and complement EU external border control and other security measures within the EU areas of free movement. See Frontex Report to the European Parliament on Frontex cooperation with third countries in 2016. Since the adoption of the EBCG regulation, the agency can also carry out joint operations on the territory of third countries neighbouring at least one MS (Article 54 EBCG Regulation).

<sup>78</sup> See S. Carrera, L. Den Hertog and M. Stefan (2017), “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, CEPS Policy Insight No 2017-15, April 2017.

<sup>79</sup> See S. Carrera, M. Stefan et al. (2018), “The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016”, Study for the European Parliament LIBE Committee, Policy Department for Citizens' Rights and Constitutional Affairs, p. 43.

<sup>80</sup> See Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, and explanatory memorandum.

<sup>81</sup> See OSCE (2008), *Guidebook on Democratic Policing*, by the Senior Police Adviser to the OSCE Secretary General, Vienna, May 2008, 2nd Edition.

This section identifies the bodies and institutions currently responsible for receiving and handling complaints related to human rights violations in the context of border management activities and return operations. The analysis of the structural and functional features of these bodies and institutions is also required to clarify which, among these structures, qualify as an *effective complaint mechanism* in light of the human rights standards analysed in the previous section.

### 2.1.2 Human rights accountability and the role of internal complaint mechanisms

When it comes to the accountability of law enforcement authorities and the wide range of security actors, a first level of control is exercised by the internal oversight bodies created within the organisation performing border control, border surveillance and/or expulsion operations, and responsible for following up cases of abuses and violations of fundamental rights committed by their agents. In the 11 countries covered by this book, mechanisms of this type are established, for instance, in Austria, where the Federal States' Security Police Directorates are competent to receive complaints against abuses committed by the Austrian National Border Police in the context of border control and apprehension procedures.<sup>82</sup>

However, among the CoE countries analysed in this book, there are other examples of internal oversight systems and 'complaint mechanisms' established within law enforcement organisations responsible for border control, border surveillance, and expulsion operations. These include, for instance, the audit body established within the Hellenic Police, as well as the Unit for Complaints, Applications and Administrative Control Department established at the Polish Border Guard headquarters, and the Section of Control and Inspection Service of the Ministry of the Interior of the Slovak Republic.

In the field of Security Sector Reform (SSR), it is often argued that internal oversight mechanisms constitute an integral part of the "conglomerate of processes" through which security actors can be held accountable for the fundamental rights violations for which they are responsible.<sup>83</sup> Internal accountability relies in particular on an "internal chain of command" that includes both a systematic reporting system and a functioning disciplinary system. By allowing colleagues to report abuses, and affected individuals to lodge complaints with oversight bodies or supervisors within the force, these internal mechanisms can contribute to monitoring and improving human rights standards in the implementation of the executive powers of these agencies.<sup>84</sup> At the same time, there are a number of limitations that affect the capacity of internal oversight systems to ensure accountability of law enforcement and security actors

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<sup>82</sup> According to the Austrian expert respondent of the e-survey developed for this book, there are no other authorities responsible for receiving such complaints except when: i) the complaint is against a decision undertaken in the framework of return operations and concerning asylum seekers (for which the BFA is competent); or ii) the complainant qualifies as eligible to contact the Ombudsperson for a possibility of supervision.

<sup>83</sup> See United Nation Office on Drugs and Crime (UNODC), *Handbook on Police Accountability, Oversight and Integrity*, Criminal Justice Handbook Series, United Nations Publications, Vienna, 2011, p. 12.

<sup>84</sup> *Ibid*, p. 75-76.

responsible for human rights violations committed in the context of border control, border surveillance or expulsion operations.

In the first place, the capacity to thoroughly assess responsibilities is lacking when complaints are exclusively handled by internal oversight bodies or the line of command from the same executive authority to which the agent implicated in a case of alleged of human rights violation is affiliated.<sup>85</sup> As “internal discipline, hierarchy, as well as the collegial loyalty” constitute typical features of law enforcement and security organisations,<sup>86</sup> the integrity and accountability of agents within police and defence forces cannot depend solely on internal oversight systems and complaint mechanisms. If the above observation applies to the so-called security sector in general, specific challenges and limitations further undermine the effectiveness of internal complaint mechanisms when it comes to human rights abuses that might occur during the performance of border control, border surveillance and/or expulsion-related tasks.

In fact, these activities are often implemented in widely dispersed and ‘out-of-sight’ locations and operative contexts (e.g. border surveillance operations at sea). Also, operators from the private sector (e.g. escorts and medical staff involved in forced return flights) as well as community-based militias (e.g. the so-called ‘border hunters’ in Hungary) have been progressively co-opted into border-management and policing work. These elements further hamper the role and potential of traditional internal police accountability mechanisms in preventing abuses and redressing complaints concerning human rights violations that might occur at the hand of the different actors involved in border control, border surveillance or returns operations.

### 2.2.2 *The Frontex complaint mechanism*

The manifold limitations that affect the capacity of internal oversight systems to effectively handle complaints related to human rights violations committed in the contexts of border and expulsion procedures emerge when analysing the mechanism established under Article 72 of the EBCG Regulation.

As an EU agency, Frontex is under the obligation to perform its tasks in line with the standards set forth in the EU Charter, and is therefore required to ensure the protection of the fundamental rights (e.g. physical integrity and dignity, asylum and international protection, *non-refoulement*, effective remedy and the protection of personal data) that might be put at risk during the implementation of its activities. The obligation to respect the human rights standards enshrined in EU primary and secondary legislation currently applies to all the different EU and non-EU authorities participating in EBCG operations.

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<sup>85</sup> See, for instance, Council of Europe, Commissioner for Human Rights. Opinion of the Commissioner for Human Rights concerning independent and effective determination of complaints against the police. CommDH(2009)4. Strasbourg: Council of Europe, 12 March 2009.

<sup>86</sup> See M. den Boer and R. Fernhout (2008), “Policing the Police, Police Oversight Mechanisms in Europe: Towards a Comparative Overview of Ombudsmen and Their Competencies”, Background Report Presented at the workshop “Improving the Role of the Police in Asia and Europe”, Delhi, India, 3-4 December 2008.

Since the establishment of the agency, important improvements have been made to ensure compliance with existing EU and international human rights standards applying to Frontex activities. In particular, the adoption of the agency's Fundamental Rights Strategy<sup>87</sup> and the Codes of Conduct,<sup>88</sup> the appointment of the Fundamental Rights Officer (FRO)<sup>89</sup> and the setup of the Frontex Consultative Forum<sup>90</sup> contribute to adding value to the agency's role in ensuring that human rights safeguards are duly taken into account in the implementation of EU border control, border surveillance and returns procedures.

Most recently, Regulation 2016/1624/EU has not only expanded the operational mandate of the agency,<sup>91</sup> but also incorporated new safeguards in response to the preoccupations expressed by EU bodies including the European Ombudsman<sup>92</sup> and institutions including the European Parliament<sup>93</sup> with regard to the human rights obligations of the actors participating in the activities of Frontex. Article 72 of Regulation EU/1624/2016, in particular, established a mechanism designed to allow migrants and asylum seekers the possibility to lodge individual complaints about fundamental rights violations committed by staff involved in Frontex activities.<sup>94</sup>

The accountability challenges that, before the entry into force of the EBCG Regulation, arose from the lack of a mechanism to deal with complaints on fundamental rights infringements have been pointed out widely.<sup>95</sup> As Box 3 describes, it was in particular the European Ombudsman that highlighted the lack of an up-to-standards complaint mechanism as one of the main shortcomings affecting the overall accountability regime at Frontex from the perspective of the right of good administration.

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<sup>87</sup> Frontex (2011), Frontex Fundamental Rights Strategy, Endorsed by the Frontex Management Board on 31 March 2011.

<sup>88</sup> Article 35 EBCG Regulation.

<sup>89</sup> Article 70 EBCG Regulation.

<sup>90</sup> Article 71 EBCG Regulation.

<sup>91</sup> S. Carrera, S. Blockmans, J.P. Cassarino, D. Gros and E. Guild (2016), "The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean?", CEPS Task Force Report, CEPS, Brussels.

<sup>92</sup> See the Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12 November 2013.

<sup>93</sup> See European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI)).

<sup>94</sup> According to Article 2(b) of the Frontex Code of conduct, this includes "... any activity coordinated or led by Frontex within the framework of its tasks as described in the Frontex Regulation". According to the EBCG regulation, these activities encompass: Joint Operations, Pilot Projects, Joint Return Operations, Rapid Border Interventions, the deployment of Migration Management Support Team, but also Return Operations, Return Interventions, and Trainings.

<sup>95</sup> See, for instance, M. Fink (2016), "A "Blind Spot" in the Framework of International Responsibility? Third Party Responsibility for Human Rights Violations: The Case of Frontex", in T. Gammeltoft-Hansen and J. Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement*.

*Box 3. Frontex complaint mechanism in light of the European Ombudsman's own inquiry*

In its own-initiative inquiry concerning Frontex,<sup>96</sup> the European Ombudsman stressed the necessity of setting up a procedure for individuals to claim a breach of their fundamental rights directly. The Ombudsman clarified that such a complaint mechanism was needed to complement the system of incident reporting from Frontex staff and guest officers, and integrate the overall set of “in-house instruments” that the Fundamental Rights Strategy and the Codes of Conduct put in place to monitor compliance with human rights standards applying to Frontex activities.<sup>97</sup> The Ombudsman clarified that reporting and complaint mechanisms are not alternatives, but mutually reinforce each other in guaranteeing the effective protection of fundamental rights.<sup>98</sup>

In stressing the need for a “genuine complaint mechanism”, the European Ombudsman highlighted the importance of establishing transparent procedures to be followed by those responsible for assessing human rights abuses allegations in a way that avoids “large margins of discretion”.<sup>99</sup> It was also recommended that the complaint mechanism be open to all persons concerned, and namely: all those obliged to report human rights violations under EU or national rules; individuals directly affected by infringements; as well as those who become aware of them, including journalists, NGOs, etc.<sup>100</sup> In the view of the Ombudsman, allowing the submission of so-called “public interest complaints” would have aided the agency – and, in particular, the FRO – in its duty to consider infringements of fundamental rights in all Frontex activities.

The need to set up a procedure for handling individual human rights complaints was reiterated by the European Parliament.<sup>101</sup> It is reasonable to consider that, with the introduction of Article 72 in the current EBCG Regulation, the EU co-legislator intended to fill the gaps that the absence of any complaint procedure left in the observance of fundamental rights obligations at Frontex. However, the way in which this mechanism is currently designed is profoundly different from the one indicated (and recommended) by the European Ombudsman in its assessment.

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<sup>96</sup>See Decision of the European Ombudsman closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), 12.11.2013.

<sup>97</sup> These instruments include the Consultative Forum, the FRO, the coordinating officer, and the mechanism for suspending and terminating joint operations and pilot projects with the Executive Director making the final decision.

<sup>98</sup> Point 79 of the Ombudsman's assessment.

<sup>99</sup> Point 78 of the Ombudsman's assessment.

<sup>100</sup> Point 81 of the Ombudsman's assessment.

<sup>101</sup> European Parliament resolution of 2 December 2015 on the Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex (2014/2215(INI)).

Firstly, only individual complaints are allowed under the current procedures.<sup>102</sup> This contradicts the recommendation to make the Frontex complaint mechanism available to all stakeholders with a legitimate interest to activate a procedure directed at assessing responsibilities for human rights violations. Furthermore, in order to be considered admissible, complaints cannot be lodged anonymously.<sup>103</sup> The choice of making anonymous complaints inadmissible by law can be explained in light of the objective of avoiding abuses of the procedure. However, this might hamper the objective of encouraging possible victims of human rights violations to activate the procedures.<sup>104</sup> The requirement to submit complaints in writing<sup>105</sup> also constitutes a limitation, as it prevents the possibility of victims activating the complaint procedure directly when the fundamental right abuse actually takes place. It is striking to note that while cases of human rights violations involving border and coast guards participating in Frontex activities are constantly recorded through the Frontex Serious Incident reporting system,<sup>106</sup> only 2 complaints were received by the agency in 2016, and 13 in 2017.<sup>107</sup>

Secondly, the complaint procedure largely relies on the discretionary power of internal oversight bodies. While the responsibility for handling different phases/aspects of the complaints received by the agency is entrusted to the FRO, doubts persist as to the real capacity of this body to act independently, and in ways that might not always be in the agency's direct interest. The FRO remains an ordinary Frontex employee required to report to the Frontex Management Board<sup>108</sup> and, in the framework of the procedure established under Article 72 of the EBCG Regulation, to the Executive Director of the agency. The lack of independence in the Frontex complaint procedure is especially evident when it comes to fundamental right allegations concerning a staff member of the agency. When considered admissible by the FRO, these complaints are then subjected to the scrutiny of the Executive Director,<sup>109</sup> who has the power to conduct appropriate investigations, ensure follow up and take decisions – with no guarantee of impartiality or transparency.

This short-coming becomes most significant when considering the limitations in the current EBCG when ensuring the suspension of a Frontex operation following provision by the Consultative Forum of sufficient evidence about fundamental human rights violations in specific MS border control, surveillance and expulsion activities: handling is currently left exclusively in the hands of the Frontex Executive Director (Article 25.2 of the Regulation). Similar challenges also emerge when human rights complaints received by Frontex concern the

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<sup>102</sup> Article 3 of the Agency's Rules on the Complaint Mechanism.

<sup>103</sup> Article 5(2) of the Agency's Rules on the Complaint Mechanism.

<sup>104</sup> As confirmed by the information collected through the survey conducted in the framework of this book, anonymity was indicated among the main reasons for declaring complaint inadmissible.

<sup>105</sup> Article 5(1) of the Agency's Rules on the Complaint Mechanism.

<sup>106</sup> As of 31.07.2017, the agency received 561 serious incident reports. See Frontex response to Request for access to Documents. ([www.asktheeu.org/en/request/reports\\_of\\_violation\\_of\\_frontex#incoming-14459](http://www.asktheeu.org/en/request/reports_of_violation_of_frontex#incoming-14459)).

<sup>107</sup> Figures provided by the FRO during interviews conducted in the framework of this book.

<sup>108</sup> Article 71(2) EBCG Regulation.

<sup>109</sup> Article 72(5) EBCG Regulation.

members of national teams participating in the agency's operational activities. In these cases, admissible complaints are forwarded by the FRO to "home Member State" of the national border or coast guard against whom complaints are brought.<sup>110</sup> For such matters, the FRO has asked MS to identify their respective contact points at the law enforcement authorities from which national agents can be pooled by Frontex, as well as the MS body that is "competent for fundamental rights".

However, there is a general lack of clarity regarding the institutions that, at the national or local level and on a case-by-case basis, are required and competent to conduct investigations and provide remedies. The extent to which national human rights institutions are actually involved in the assessment of the complaints is particularly unclear. The EBCG Regulation only requires the FRO to "inform" these authorities of the ongoing procedure. Furthermore, human rights institutions that are competent to receive and follow up complaints related to violations of human rights of aliens occurring in the context of border control, border surveillance and expulsion operations do not always exist at the national level.<sup>111</sup>

Thirdly, despite the fact that the FRO is responsible for monitoring the final decision and the "appropriate follow-up" by the Executive Director or the MS, the Regulation fails to specify the nature of an "appropriate follow-up". In this respect, the Regulation does not provide clarifications as to the concrete actions or measures that the FRO can undertake, for instance, to prompt and "ensure" thorough investigations into the complaints by the agency or the national authorities concerned.

Given the uncertain and ultimately limited power of the FRO, it is reasonable to conclude that the practical relevance of the Frontex complaints mechanism (i.e. its capacity to identify responsibility and provide for remedies) essentially depends on the willingness of the agency's Executive Director or that of the national authorities concerned.<sup>112</sup> The actual role and function played by the Frontex complaint mechanism is clearly limited by the fact that this procedure only covers cases of human rights infringements committed by authorities performing border control, border surveillance or expulsion-related tasks in the framework of the agency's activity. However, EU MS conduct parallel border surveillance activities which, while still falling within the scope of the SBC and subject to the EU Charter, take place outside the remit of Frontex operations.

Moreover, this is particularly problematic when MS authorities performing maritime surveillance are defence or military authorities. A case in point is provided by the Common Defence and Security Policy (CDSP) (EUNAVFOR MED) Operation Sophia. While the military actors participating in this operation are mostly mandated to fight against smugglers, they may

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<sup>110</sup> Article 72(7) EBCG Regulation.

<sup>111</sup> This is the case of Italy, for instance. See Annex 2 of this book.

<sup>112</sup> See, for example, Parliamentary Assembly of the Council of Europe, "Frontex: human rights responsibilities", Report of 8 April 2013, Doc. 13161.



well conduct search and rescue operations at sea during their deployment.<sup>113</sup> It is important to note here that they are not subject to the same fundamental rights standards, codes of conduct, and oversight mechanisms that apply when these activities are performed by authorities participating in implementation of the EBCG Regulation. Victims of fundamental rights violations occurring at the hands of the authorities involved in Operation Sophia are not allowed to seek the same remedies that would be available against abuses committed in the framework of an EBCG operational activity.<sup>114</sup>

### 2.3.2 *The role of national human rights institutions and bodies*

Legally binding provisions contained in regional human rights instruments (ECHR and CPT), EU primary law (the EU Charter) and secondary legislation (including the SBC and the Return Directive), as well as provisions in documents that are not legally binding, offer clear and authoritative indications as to the features and functions that instruments of redress must possess in order to qualify as ‘complaint mechanisms’ and effectively contribute to keeping law enforcement authorities accountable in respect of human rights obligations. These features also help delineate the differences that exist between complaint mechanisms and: i) the internal oversight systems analysed in the previous paragraph; or ii) other instruments and bodies that participate in the protection of third country nationals from risks of human rights violations in the context of border control and expulsion procedures.

Complaints bodies cannot substitute for other criminal and/or judicial remedies. If complaints mechanisms are intended to provide individuals (and in some cases organisations) with the possibility of accessing and activating procedures before an authority responsible for following up allegations of mistreatment and human rights abuses, their role is to offer a form of administrative protection which is *supplementary to the judicial remedies* that must still be made available at the domestic and supranational level.<sup>115</sup> For example, if judicial remedies are required to obtain protection in the meaning of Article 47 of the EU Charter, the right to good administration enshrined in Article 41 should be respected through the right of individuals to lodge complaints with other bodies of administrative and/or quasi-judicial nature.

In many European Countries, these bodies are represented by Ombudspersons and NHRIs operating at the national or sub-national levels of government, which are responsible for handling cases of mistreatment or unlawful behaviour from public authorities, and often act on grounds that also cover violations of rights, including human rights.<sup>116</sup> Out of the 11 countries

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<sup>113</sup> See G. Bevilacqua (2017), “Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities”, in G. Andreone, *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests*, Springer Open.

<sup>114</sup> Article 274 of TFEU provides: “Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States”.

<sup>115</sup> United National General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 76th plenary meeting, 9 December 1988. See Principle 33, para 4.

<sup>116</sup> See C.L. Reif (2004), *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff, 2004.

covered by this book, all but Italy have established institutions before which complaints can be lodged by third country nationals alleging a violation of their fundamental rights in the context of border controls and surveillance, or expulsion operations.

An overview of these bodies and their mandate to receive and handle complaints concerning human rights violations suffered during border control procedures, border surveillance activities, or during returns, is provided in Annex 2 of this book. The overview shows that the majority of ombudsmen established in the 11 CoE State Parties under consideration is formally and generally entitled to receive and address complaints related to fundamental rights infringements committed by public authorities in the context of border control, border surveillance, and expulsion operations. However, the exact role played by each of these institutions varies significantly from country to country.

A number of different factors contribute to shaping the conditions and the extent to which Ombudspersons are able to conduct independent and thorough investigations, but also accessible in practice, and are entitled to provide a timely and effective response to complainants presenting a human rights violation in line with the previously examined regional and international standards. It is the normative framework and distribution of competences among different authorities responsible for overseeing border control, border surveillance or expulsion operations and for handling complaints and providing remedies at the local and national level that determine the specific competences, ways of working, and powers of the ombudsperson in dealing with human rights abuses. In this respect, the 11 countries considered in this book adopt a variety of different 'models', which are by and large context-specific.

In Italy, for instance, an independent national human rights institution does not exist, and a national ombudsperson for the people deprived of their personal freedom was only established in 2013.<sup>117</sup> Acting as a National Preventive Mechanism (NPM) under the Optional Protocol to the UN Convention Against Torture (CAT),<sup>118</sup> the National Guarantor has since 2016 the power to visit any place of detention, including detention centres and police premises at the border, but it is not vested with the power to receive and investigate individual complaints. In other countries, in contrast, the Ombudsman functions both as a complaint mechanism and human rights monitor in its capacity as a NPM. This is the case, for example, of Austria, Bulgaria, Greece, and Hungary, where the ombudsman oversees the implementation of the CAT, but is also entitled to receive and investigate complaints, and in some cases can recommend or prescribe different forms of reparations (e.g. the release of third country nationals when it is found that their detention is arbitrary or unlawful; or the payment of compensation) in case of abuse.

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<sup>117</sup> This body has been established by law no. 10 of 10.02.2014.

<sup>118</sup> The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Optional Protocol - OPCAT) provides for the establishment of National Preventive Mechanisms (NPMs) to monitor State Parties implementation of the CAT. The OPCAT also gives guidance concerning the NPMs mandate and powers. The most relevant of these provisions are Article 3, 4, 17-23, 29 and 35.

If certain conditions are met, the attribution of these two functions (i.e. monitoring and handling of complaints) to the same human rights institution can significantly enhance its role in contesting the impunity of those responsible for human rights violations. Affected individuals might be allowed to activate a human rights complaint procedure directly during the visit of an Ombudsman mission to the locality. The latter, might also be better positioned to start *ex officio* its own investigations to assess responsibilities for infringements of human rights standards observed in places where forced return operations are implemented.

At the same time, protection gaps arise from the fact that the oversight tasks performed by different national human rights bodies in their capacity as NPMs are by definition limited to abuses perpetrated in the framework of *immigration detention*, and therefore can only effectively cover human rights violations occurring in the scope of expulsion operations. Thus, this limited monitoring mandate excludes the possibility for the institution to be effective in overseeing, preventing and redressing human rights violations that might occur in the context of *border control or surveillance activities*.

Furthermore, accountability issues related to the combination of monitoring and complaint mechanism functions can arise when the responsible institution is not fully independent from the executive, and therefore cannot guarantee an adequate level of impartiality *vis-à-vis* the law enforcement authorities being monitored and the human rights allegations made against them. In a comparative analysis, the ways in which a complaint can be brought before this body and whether the latter can independently start its own investigation often depend on the specific legal frameworks adopted in different national systems. In this respect, the 11 CoE State Parties considered in the framework of this book present significant variations.

In Hungary, a complaint (petition) before the ombudsman can be lodged only if the complainant has exhausted the available administrative legal remedies (excluding the judicial review of an administrative decision), or if no legal remedy is available to the complainant. Furthermore, the complaint cannot be processed if more than a year passed since the notification of the final administrative decision, or in cases where the identity of the complainant has not been revealed by him/herself. In Austria, complaints against human rights abuses committed in the framework of procedures related to denial of entry and apprehension (up to 14 days) have to be filed before the Security Police Directorates in the Federal States. On the other hand, the Austrian Ombudsman Board cannot handle complaints regarding cases which involve a procedure that has not yet been concluded, unless they relate, for example, to the duration of the proceedings, errors with deliveries, refusal to provide information or gross discourtesy on the part of officials.

In Bulgaria, the Ombudsman has a duty to report fundamental rights violations (e.g. abuse of force, ill-treatment, etc.) witnessed in the context of border control, border surveillance and return operations before the Ministry of Interior of the Republic of Bulgaria. However, the office of the Ombudsman does not seem to be under a procedural duty to conduct official investigations entailing the gathering of adequate evidence for the assessment of the facts of the case and the identification of those responsible. In Greece, investigations against human rights violations occurring in the context of border management or forced removals can be

activated *ex officio*, but this decision remains discretionary and ultimately depends upon the Greek Ombudsman.

Overall, it is concerning to note that while the ombudsman institutions (along with national human rights commissions and institutes) of the 11 countries covered in this book are progressively entrusted with an explicit human rights protection mandate in their legal framework,<sup>119</sup> only in 5 cases (namely Greece, Hungary, Poland Serbia, Spain) do they actually comply with all the UN Paris Principles.<sup>120</sup> These principles constitute a set of core minimum criteria clarifying the status and model of functioning of national institutions for the protection and promotion of human rights, and their fulfilment is assessed on a case-by-case basis by the Global Alliance of National Human Rights Institutions (GANHRI).<sup>121</sup>

A key feature for a NHRI to be compliant with the UN Paris Principles is its independence from the government. Also, the body or institution must be characterised by regular and effective functioning and have adequate powers of investigation, and the capacity to hear complaints and transmit them to the competent authorities. In terms of methods of operation, it is also required that, in their work, national institutions develop relations with the non-governmental organisations devoted to promoting and protecting human right of particularly vulnerable groups (including migrant workers, and refugees). Compliance with the Paris Principles is also assessed on the basis of a NHRI's role in national contexts where democratic protections in the country are under threat, and in light of their actual contribution to protect and promote the human rights of all persons, especially those most affected by state's conduct. In the 2014 to 2015 period, for instance, both Albania's People's Advocate and Serbia's Protector of Citizens were praised for their effectiveness "despite the challenging political environment" in which they operate.<sup>122</sup>

While GANHRI is not explicit on which issues, or how many problems underlie the specific ranking (under A or B category) of a specific NHRI, the fact that NHRIs in Austria, Bulgaria and Slovakia do not currently qualify for an A-Status in the GANHRI accreditation chart automatically indicates the weaknesses of these institutions in terms of compliance with the Paris Principles. In the cases of the human rights bodies established in Italy, Romania, and Turkey, their exclusion from the GANHRI accreditation chart appears to arise from the fact that their structure, mandate, powers, and/or relation with the executive does not allow them to be qualified as NHRIs. On the other hand, Greece's Ombudsman and Slovakia's Public Defender

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<sup>119</sup> To date, EU member states with NHRIs include: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

<sup>120</sup> See United Nations General Assembly, Principles Relating to the Status of National Institutions (Paris Principles), UN GA Res 48/134, UN Doc A/RES/48/134 (1993).

<sup>121</sup> See Article 5, and Section 5 of the GANHRI Statute [version adopted on 7 March 2017].

<sup>122</sup> See, respectively: ICC/GANHRI, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) (Geneva: October 27-31, 2014) [ICC/GANHRI October 2014 Accreditation Recommendations] (Ukraine (A), Hungary (A), Russia (A), Albania (A), Finland (A)), and; ICC/GANHRI, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) (Geneva: March 16-20, 2015) [ICC/GANHRI March 2015 Accreditation Recommendations] (Ecuador (A), Serbia (A), Uruguay (deferred), Latvia (A)).

cannot currently obtain an accreditation due to the earlier accreditation of another country's human rights commission or other national institution.<sup>123</sup>

While the Paris Principles are non-binding, a wide consensus exists among the international human rights community – comprising states, international organisations and civil society actors – that only NHRIs in full compliance with the UN Paris Principles should be entrusted by states in protecting and promoting human rights at the domestic level.<sup>124</sup> Regional organisations including the Council of Europe<sup>125</sup> as well as the European Union Agency for Fundamental Rights (FRA) have also adopted full compliance with the Paris Principles as the standard for evaluating human rights institutions as being effective.

Beside the reputational consequences associated with the failure to meet the Paris Principles, the exclusion of a NHRI from the list of A-rated institutions has negative repercussions linked with the consequent exclusion from UN human rights processes and procedures. In fact, one of the essential requirements of the Paris Principle is the interaction of NHRIs with the international human rights system, as NHRIs are required to assist, facilitate and participate in country visits by United Nations experts, “including special procedures mandate holders, treaty bodies, fact finding missions and commissions of inquiry”.<sup>126</sup> They are also expected to contribute to “monitoring and promoting the implementation of relevant recommendations originating from the human rights system”.<sup>127</sup> Thus, full compliance of NHRIs with the Paris Principles is also essential in order to ensure the protection of human rights through the implementation of the protection system established under relevant international human rights treaties.

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<sup>123</sup> In fact, in its General Observation 6.6, GANHRI “acknowledges and encourages the trend towards a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution.” See Report and Recommendations of the Session of the Sub-Committee on Accreditation (Geneva: November 18-22, 2013), Annex III [GANHRI GOs].

<sup>124</sup> See L. Reif (2016), “Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations”, Paper presented at the 11<sup>th</sup> World Conference of the International Ombudsman Institute, Breakout Session II: Human rights based approach to the Ombudsman's work - part 1, p. 95.

<sup>125</sup> See COE Parliamentary Assembly Res 1959, “Strengthening the institution of ombudsman in Europe” (2013) art 4.5 (Assembly calls on COE member states with ombudsman institutions to consider seeking their accreditation at the ICC [now GANHRI] in light of the Paris Principles).

<sup>126</sup> GANHRI General Observation no 1.4 “Interaction with the international human rights system”.

<sup>127</sup> Ibid.

### 2.4.2 Complaint mechanisms and International Human Rights Treaty Bodies

Currently, there are 8 UN treaty bodies (ICCPR,<sup>128</sup> CESCR,<sup>129</sup> CAT,<sup>130</sup> CERD,<sup>131</sup> CEDAW,<sup>132</sup> CRPD,<sup>133</sup> CED,<sup>134</sup> and CRC<sup>135</sup>) which may, under certain conditions, consider complaints (or communications) from individuals alleging violations of a right protected by a specific convention. The individual complaint mechanism for the Committee on Migrant Workers (CMW) has been provided for in the covenant of reference, but it has not yet entered into force – since the minimum number of required declarations (i.e. 10) have not yet been made by the convention's signatory parties.

Under the UN human rights system individual complaints are optional. This means that in order for an individual complaint to be raised against a state party, the latter has to recognise the treaty body's competence to receive the complaints. This happens by the mean of ratifying an additional protocol (in the case of ICCPR, CEDAW, CRPD, ICESCR and CRC), or through the submission of a declaration to the treaty (in the case of CERD, CAT, CED and CMW). The table below identifies the CoE State Parties considered in the framework of this book that currently recognise the competence of UN treaty bodies to receive individual complaints.

*Competence of UN treaty bodies to receive individual complaints (overview based on acceptance by CoE State Parties)*

	Study Countries										
	Austria	Bulgaria	Greece	Hungary	Italy	Poland	Romania	Serbia	Slovakia	Spain	Turkey
CCPR	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
CESCR	--	--	--	--	✓	--	--	--	✓	✓	--
CAT	--	--	✓	✓	✓	✓	--	✓	✓	✓	✓
CERD	--	✓	--	✓	✓	✓	✓ <sup>136</sup>	✓	✓	✓	--
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRPD	✓	✗	✓	✓	✓	--	✗	✓	✓	✓	✓
CRC	✗	--	--	--	✓	✗	✗	✗	✓	✓	✗
CED	✓	--	--	--	--	--	--	✓	✓	✓	--

Despite featuring some procedural variations, the different complaint mechanisms operate in a largely similar way. A series of preliminary requirements must be met in order for the

<sup>128</sup> International Covenant on Civil and Political Rights.

<sup>129</sup> International Covenant on Economic, Social and Cultural Rights.

<sup>130</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>131</sup> International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>132</sup> Convention on the Elimination of All Forms of Discrimination against Women.

<sup>133</sup> Convention on the Rights of Persons with Disabilities.

<sup>134</sup> International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>135</sup> Convention on the Rights of the Child.

<sup>136</sup> Romania considers that declaration does not confer to the Committee on the Elimination of Racial Discrimination the competence of examining complaints invoking infringements of collective rights. The national body competent to receive and to examine complaints in accordance with article 14 paragraph 2 of the ICERD is the National Council for Combating Discrimination established by the Government Decision no. 1194 of 2001.

individual complaint to be registered by the competent UN human rights body as a case for consideration.

First, before making a complaint to a treaty body, individuals must first exhaust domestic remedies. This means that the complaint has first to be taken before the local courts and authorities and up to the highest available instance in the State party against which the complaint is directed. However, the committee may decide to derogate this general admissibility requirement when the claimant can prove that proceedings at the national level have been unreasonably prolonged, or remedies are unavailable or appear plainly ineffective.

In most cases, the possibility of having a complaint considered by a UN treaty body is also conditional on the exclusion of the activation of other relevant remedies “on the same matter” provided under other existing international and supranational legal frameworks (such as the ECHR) to which the concerned country is party. For example, in order for the CCPR to consider any complaint from an individual regarding alleged violations of his/her rights, countries such as Austria, Italy, Poland, Romania, Slovakia, Spain and Turkey require that the same matter does not constitute or has not previously constituted the object of an examination under another procedure of international investigation or settlement.<sup>137</sup> The admissibility of the complaint is decided upon the satisfaction of the requirements indicated above, but the complainant must also:

Prove that he/she is individually affected by a law, policy, practice, act or omission of the state party against which the complaint is lodged;

Prove that the claim concerns a right protected by the treaty for implementation of which the committee is responsible;

Prove that the claim does not require the committee to act as an appellate instance with respect to national courts and tribunals, as the UN treaty bodies cannot examine previous determinations of administrative, civil or criminal liability of individuals, nor can they review the question of innocence or guilt.

At any stage before the case is considered, some Committees (e.g. CAT) may issue a request to the State party for “interim measures” in order to prevent any irreparable harm (such as, for example, the deportation of an individual facing a risk of torture) that the alleged victim could face while the complaint is being decided.<sup>138</sup> The CAT’s yearly reports account how complainants frequently request preventive protection, particularly in cases concerning

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<sup>137</sup> The CCPR understands “the same matter” as a complaint relating to the same author, the same facts and the same substantive rights. However, facts that have been submitted to another international mechanism can be brought before the Committee if: i) the Covenant provides for a broader protection; ii) complaints submitted to other international mechanisms have been dismissed by on procedural grounds.

<sup>138</sup> If the complainant wishes the Committee to consider a request for interim measures, he/she should state it explicitly, and explain in detail the reasons why such action is necessary. See OHCHR, Fact Sheet No. 17.

imminent expulsion or extradition, where they allege a violation of article 3 of the Convention.<sup>139</sup>

The Committees generally review the merit of the complaint in a closed session, jointly with the admissibility assessment. Assessment of the merits is conducted on the basis of (written) allegations by the parties, as committees cannot seek independent verification of the facts. Both parties are given the opportunity to comment on the counter-party's allegations within a set timeframe.

Although in some respects the UN individual complaint mechanisms can be qualified as 'quasi-judicial', committee decisions cannot be directly enforced. Rather, decisions present an authoritative interpretation of the treaty and contain recommendations for State parties to take action based on the case. Where the competent committee finds that a violation has taken place, the State party is required to provide information within a particular time frame (e.g. 90 days for the CAT) on actions taken to implement the recommendations. Committees then monitor the follow-up process, and a complaint case remains open until satisfactory measures are considered to have been taken. If the State party fails to take appropriate action, the case is kept under consideration by the Committee under the follow-up procedure.

In addition to the individual complaint mechanisms referred to above, the Human Rights Council Complaint Procedure (previously known as the 1503 procedure) considers complaints submitted to special rapporteurs or working groups of the Human Rights Council. This procedure not only addresses complaints submitted by individuals, but also groups or non-governmental organisations that either represent individuals claiming to have been victims of human rights violations, or have direct, reliable knowledge of such violations.

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<sup>139</sup> See *inter alia*, Committee against Torture Report to the General Assembly, Fifty-third session (3-28 November 2014) and Fifty-fourth session (20 April-15 May 2015), A/70/44.



### 3. CROSS-CUTTING ISSUES AFFECTING THE EFFECTIVENESS OF COMPLAINT MECHANISMS

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#### Key findings

- Most of the internal and external oversight bodies and institutions established in the 11 CoE countries considered do not meet the existing regional and international standards required to qualify as an effective ‘complaint mechanism’. There are clear shortcomings in the independence and effective investigative powers of the oversight bodies established within the legal and institutional systems considered. These shortcomings undermine the capacity of existing administrative bodies to complement the judicial oversight that must still be made available at the domestic and supranational level.
- The absence of systematic and independent monitoring of border management activities and expulsion operations generates substantial difficulties in documenting and reporting abuses and human rights violations. It hinders affected individuals in accessing effective complaint procedures and justice. The lack of systematic human rights monitoring and reporting mechanisms also hampers the possibility of collecting information and generating evidence that can be presented before and assessed by existing complaint bodies. To reduce protection gaps, referral and collaboration between monitors and the actors responsible for handling complaints should be further developed and strengthened.
- Practical and legal obstacles make it difficult to access existing administrative redress. In most of the 11 countries considered, difficulties derive mainly from the lack of information about the right to complain, the lack of knowledge of the language of the country where the complainant has been exposed to mistreatment, and the lack of legal representation or assistance. This is not in line with the level of transparency required for a complaint mechanism to satisfy existing international and regional human rights standards. The fact that complaints do not have a suspensive effect over actions or decisions adopted in the context of border control or border surveillance in most of the 11 countries analysed also severely limits accessibility to oversight mechanisms.
- The possibility of lodging complaints is also reduced when the complainant is no longer in the territory of the country responsible for assessing the human rights responsibilities of its border or coast guards. This might occur when the complaint procedures established under national law do not allow complaints to be lodged from abroad, or where the length of proceedings constitutes a disincentive for foreigners to activate a complaint, or when complainants may fear penalisation or negative consequences when presenting a complaint.

- **Poor quality of follow-ups to human rights complaints and limited transparency in the assessment of responsibilities also undermine the possibility of obtaining effective remedies.** Even when they exist, complaint mechanisms that are not fully independent from the executive cannot guarantee an adequate level of effectiveness and impartiality *vis-à-vis* the law enforcement authorities being monitored and the human rights allegations made against them.

### 1.3 The need for up-to-standard complaint mechanisms and cross-cutting challenges

The analysis conducted in the previous sections has made clear that CoE's State Parties must establish dedicated administrative bodies or institutions entrusted with the competence to receive human rights complaints. These accountability mechanisms must not only exist, but also have the power to investigate and redress abuses suffered by third country nationals in the context of border management and expulsion procedures.

The role of these bodies and institutions is not to substitute other criminal and legal remedies. Rather, their function is to offer a form of protection supplementary to the judicial oversight systems that must still be made available at the domestic and supranational level. At the same time, in order to be qualified as 'complaint mechanism', these oversight bodies and institutions must meet a series of substantial and procedural standards. Independence, accessibility in practice, promptness and thoroughness in follow-up procedures are among the main features that an oversight body must possess in order to address the human rights complaints of irregular migrants and asylum seekers effectively.

The research conducted in the framework of this paper has shown that the internal oversight bodies established within law enforcement or security apparatuses cannot be qualified as 'complaint mechanisms'. In fact, they fail the 'effectiveness test' on account of their lack of impartiality and transparency, and due to the large margin of discretion left to the competent authorities as to whether and how to follow up the complaints received. On the other hand, the actual features and exact role played by different Ombudspersons, Human Rights Institutions, and other accountability bodies varies significantly across the 11 countries considered. Furthermore, it has been observed how different human rights accountability regimes apply to the multitude of law enforcement authorities currently performing border management and/or expulsion-related tasks.

Despite this fragmented landscape, a series of cross-cutting challenges have been identified as affecting the effectiveness of the accountability bodies and procedures created to address fundamental rights violations that might occur in the context of border control, border surveillance and return operations. The following cross-cutting challenges are broadly identified and presented in the following paragraphs.

### 1.1.3 Weak links between independent monitoring and complaint mechanisms

If the use of violence or disproportionate force by law enforcement and other security players has traditionally represented one of the most challenging forms of abuse of power that require tackling, a further set of legal and practical obstacles hampers individuals and organisations in activating complaint mechanisms in the context of border control, border surveillance and return operations. In the first place, the multiplication of security players operating in the field of border and immigration management poses serious challenges in terms of who is responsible for what (and responsibility often shifts in cases where incidents take place) and a consistent implementation of existing human rights and administrative standards. In particular, it emerged how the various actors currently participating in border control, border surveillance and/or expulsion operations are not captured by the same oversight and accountability systems.

The overview of the multiplicity of law enforcement actors currently participating in the surveillance of the EU's external borders, or coordinating the implementation of joint return flights of irregular migrants, has shown that the complaint mechanisms available to individuals varies significantly, and remains by and large extremely limited in practice. This means that different complaint procedures can be activated depending not only on the specific authority to which the agent that adopted the action or decision leading to a human rights abuse is affiliated (e.g. national police forces, coast guards, military, or civilians including doctors, private security companies, etc.), but also on the type of mission and/or framework of cooperation within which the action or decision leading to a fundamental rights infringement was adopted (e.g. Frontex joint operation, CDSP activities, international cooperation falling outside EU law, etc.).

Further accountability challenges derive from the specific contexts in which border control, border surveillance, and expulsion procedures take place. The absence of a systematic independent monitoring of border control and surveillance activities, including those performed in remote and unsafe contexts such as the blue and green borders inside and outside state territories, not only generates substantial difficulties in documenting and reporting abuses, but also hinders the possibility of collecting information and generating the necessary evidence to bring to the attention of existing complaint bodies. The establishment of strong links between independent monitoring and independent complaint bodies appears therefore to constitute an essential *precondition* for preventing and redressing human rights abuses and for complaint mechanisms to be effective.

While performing different functions, monitoring actors and complaint mechanisms have the objective of ensuring that the protection standards granted to aliens under international and regional human rights law and national legislation are not merely formal, but 'effective' and 'practical'. For example, a monitoring body may be in possession of information that provides grounds for commencing a complaint procedure, or that might be central to the investigations in that respect. In these situations, referral and collaboration between monitors and the actors responsible for handling complaints (including civil society organisations specialised in access to legal aid) constitute a critical element to ensuring the accountability of law enforcement

authorities and other state actors, especially if the monitoring body encounters resistance with regard to the implementation of its recommendations.

However, the protection gaps that the absence of independent human rights monitors generates in terms of accessibility to complaint mechanisms and effective investigations are likely to widen. This appears evident not only from the latest policy initiatives directed at the policing (if not the criminalisation) of civil society actors operating in the field,<sup>140</sup> but also from the increasing adoption of exceptional measures (such as the reintroduction of internal Schengen borders checks), offensive border management infrastructures (e.g. barbed-wired fences on the Hungarian-Serbian border),<sup>141</sup> and legalisation of ‘push-backs’ of asylum seekers in countries like Spain.<sup>142</sup>

Also, for cases of human rights violations occurring in the context of expulsion operations, and in particular during the implementation of joint return flights, the possibility of activating complaint mechanisms is undermined by the lack of a systematic and truly independent monitoring system. In this regard, it must be noted how EU law prescribes precise indications as to the standards that a monitoring mechanism must possess in order to qualify as effective, at least in the field of forced return. In fact, pursuant to Article 8(6) of the Return Directive,<sup>143</sup> MS must identify and appoint independent forced-return monitors (i.e. not by an agency belonging to the branch of government responsible for return). The latter must be granted effective access to all return operations and not only perform its function ad hoc. As such, monitors are required to be present, assist and report on actual and potential operational and structural shortcomings affecting return operations and thereby reduce the risks of human rights abuses.<sup>144</sup>

At the same time, the FRA overview of the state of play in 28 EU Member States shows that, to date, there are still four states where effective forced return monitoring systems are not in place.<sup>145</sup> For instance, interviews conducted in the framework of this book with representatives of EU institutions and officials of EU agencies confirmed that independent monitors were only

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<sup>140</sup> See Ansa, “NGO migrant rescue ship seized, 3 probed: ProActiva Open Arms at centre of new investigation”, 19.03.2018.

<sup>141</sup> See S. Carrera, M. Stefan et al. (2018), “The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework since 2016”, op. cit., pp. 25-36.

<sup>142</sup> In Spain, so-called expresses expulsion procedures are being actively executed by police forces that return migrants and potential asylum seekers in the country of transit without court hearing, without placing the foreigner in detention, without legal defence and within the delay of 72 hours.

<sup>143</sup> For example, Article 8(6) of the EU Return Directive requires Member States to provide for an “effective forced-return monitoring system”. The rationale of the provision is to make monitoring of forced return operation automatic in order to avoid that some people are wrongfully returned. The objective, to ensure that European human rights and fundamental freedom standards are respected during forced returns operations.

<sup>144</sup> Other conditions for an effective monitoring mechanism entails: the duty to immediately inform monitors of impending return operations; sufficient funding; cooperation between all stakeholders; monitors should be able to decide which cases to monitor; observation duties may be extended to the review of medical files; monitors should facilitate “constructive work relationships” with enforcement authorities; monitoring reports should be systematically taken into account by the authorities.

<sup>145</sup> See FRA (2016), Forced return monitoring systems – State of play in 28 EU Member States (updated 26/4/2016).

present in 54% of joint return operations supported by Frontex. Interviews conducted for the purposes of this book also revealed that in some EU countries the development of an up-to-standards monitoring system was delayed because of the fact that the legal framework at the national level prevented the appointment of monitoring bodies not affiliated or recognised by the country's governmental authorities. This means that, depending on the specific EU country from where migrants are returned, their rights will not be safeguarded in a consistent way.

### *1.2.3 Accessibility, adequacy and effective follow up*

By ratifying or acceding to the ECHR, State Parties accept the Convention's system of compulsory jurisdiction. The latter is based on the power of the European Court of Human Rights (ECtHR) to issue legally binding judgements on cases concerning violations of the human rights set forth in the ECHR.<sup>146</sup> Based on articles 33 and 34, the Court can receive complaints from both NGOs and individuals.

Any individual who alleges having been the victim of a violation of a right encompassed in the ECHR within the jurisdiction of a State Party is entitled to lodge an application with the Court. The ECHR requires certain conditions to be met in order for applications to be admissible. The main admissibility requirements include *inter alia* the subsistence of a (direct or indirect) victim status (Article 34 ECHR) and the prior exhaustion of domestic remedies (Article 35 para 1 ECHR).<sup>147</sup> The 'exhaustion of domestic remedies' requirement implies the existence and previous activation of available redress mechanisms provided at the national level for the ECHR violation involved in the complaint. This is based on the assumption, reflected in Article 13 ECHR, that State Parties grant the possibility for a complaint to be brought before: a relevant civil, criminal, or administrative court or body, followed by an appeal where applicable, and even a further appeal to a higher court such as a Supreme Court or Constitutional court, if one exists.

As the Court has stressed, this requirement is intrinsic to the subsidiary nature of the Convention machinery,<sup>148</sup> and constitutes an indispensable part of the functioning of its protection system, which applies regardless of whether the ECHR's provisions have been transposed into national law.<sup>149</sup> The importance of establishing domestic remedies to ensure 'effective' protection of fundamental rights standards in the scope of the ECHR, and more

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<sup>146</sup> Whereas the Court issues a final judgment on the existence of a violation of the Convention, the respondent State, and sometimes even other States, are often required to take legislative or other regulatory measures to comply with the Court's judgment and the domestic courts to adapt their case-law. Judgments may also impose payment of just satisfaction to the applicants and/or adoption of concrete measures in order to redress the violations found (e.g. release from custody, re-opening of proceedings, restitution of property). The Committee of Ministers of the Council of Europe supervises the correct execution of the Court's judgments.

<sup>147</sup> Other admissibility criteria include: application cannot be lodged under a false name or by falsifying documents, or using an abusive language (article 35 para 3 ECHR); the same application cannot have already been submitted to the Strasbourg Court, or lodged before an international body such as the UN Human Rights Committee (article 35 para 2 ECHR).

<sup>148</sup> ECtHR (GC), *Demopoulos and Others v. Turkey*, Admissibility Decision, 01.03.2010, para 69 and 97.

<sup>149</sup> ECtHR, *Eberhard and M. v. Slovenia*, 01.12.2009.

specifically in the context of border control, border surveillance and expulsion operations, has also been stressed by other CoE human rights institutions and bodies. These include, in particular, the CPT, the Parliamentary Assembly of the Council of Europe, and the Commissioner for Human Rights, which are responsible for monitoring the implementation of existing CoE human rights instruments and contributing to the right of petition under the ECHR.

The analysis of the standards applying to the field of border control, border surveillance and expulsions as provided for in EU primary and secondary legislation, and progressively interpreted by the CJEU has also clarified what an effective complaint mechanism should look like. Domestic remedies must not only exist, but should also be accessible *in practice*, be capable of ensuring independent and thorough investigations and providing redress in respect of the applicant's allegation, and offer a reasonable prospect of success. In determining whether any particular remedy meets these effectiveness standards (i.e. existence, independence adequacy, and availability), regard must be given to the particular circumstances of the individual case. As illustrated in this book, the ECtHR has also stressed that a remedy cannot be considered effective when it depends on the exercise of discretion by an intermediary and is not directly accessible to the applicant.<sup>150</sup>

At the same time, a series of shortcomings emerge when looking at the complaint mechanisms existing in the 11 countries under consideration. The information collected through desk research and the inputs provided by the national and legal experts from the 11 countries who contributed to this research through the e-questionnaire and expert workshop clearly shows that the extent to which complaint procedures are accessible in practice is significantly reduced by different factors, notably the lack of information available to complainants about their right to complain and the heavily bureaucratic procedures for lodging complaints.

Other obstacles to accessibility arise from the lack of knowledge of the language of the country where the complainant has been exposed to mistreatment and the lack of legal representation or assistance.<sup>151</sup> The individuals concerned are also often deprived of the material possibility to access legal aid (which is usually provided by civil society actors), due to the fact that they do not possess or have been deprived by the police of mobile phones or mobile phone batteries, or because even the issuing of entry permits to border areas by state authorities takes a considerable amount of time. A key means for ensuring accessibility would be finding other ways and procedures to lodge complaints such as oral complaints – not necessarily in a formal or written form, so as to make the entire procedure simpler and more user-friendly for complainants.

More generally, the responses to the e-questionnaire and the discussions during the expert seminar demonstrated that legal aid is particularly difficult to obtain when the individual affected by a human rights violation has already been expelled, pushed back, or is no longer physically present in the country.<sup>152</sup> This poses a profound challenge for the practicable delivery

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<sup>150</sup> ECtHR (GC), *Tănase v. Moldova*, 27.04.2010.

<sup>151</sup> Expert replies from Austria, Bulgaria, Greece, Hungary, Italy, Poland, Romania and Spain.

<sup>152</sup> Expert replies from Greece, Hungary and Spain.

of the 'portable responsibility' inherent to MS compliance with the fundamental human rights obligations studied in this book. In Italy, for instance, immigrants and asylum seekers often run the risk of being expelled even before they are given the possibility of lodging an asylum application. Identifying and *tracking back* the victim of a human rights violation who has been refused entry, pushed back, or expelled are difficult as a result. The complexity and costs involved in reaching out to undocumented victims of abuses after they have left a country's territory often lead to the expiry of the terms prescribed by national law to lodge a complaint.<sup>153</sup> In some countries, and in Italy and Spain in particular, the activation of complaints was only possible because certain NGOs providing legal aid to migrants and asylum seekers actively searched for the victims of abuses and witnesses in their countries of origin or return. E-questionnaire responses confirmed the key role played by civil society in ensuring the effectiveness of instruments for monitoring, reporting and redress, including bringing violations before justice. Priority should be given to ensuring access to civil society actors to relevant sites and wherever border controls/surveillance and joint expulsion flights take place.

To a very large extent, difficulties related to the accessibility of complaint mechanisms also arise from the fact that, in most of the 11 countries analysed, complaints do not have a suspensive effect over actions or decisions adopted in the context of border control or surveillance. In EU MS, complaints against return decisions do have a suspensive effect, although this can be excluded on the ground of exceptions, such as for instance the threat of imminent danger for public security that might derive from the presence of an alien in the territory of the state. Also, in some countries it seems that the authorities entitled to review the return/removal order are not an independent judicial authority. Furthermore, in some cases complaints procedures can only be lodged if the complainant is physically present on the territory of the county.<sup>154</sup> And even then, access to effective complaint procedures is not systematically granted. Legal practitioners from Italy have recently reported a case where the only means left to third country nationals to avoid their return to a country where a risk of inhuman and degrading treatment exists (i.e. Sudan), was to physically resist their deportation on board the flight.<sup>155</sup>

Several expert respondents to the e-questionnaire indicated the length of proceedings as a disincentive to foreigners activating a complaint.<sup>156</sup> Litigation takes time. This contradicts the requirement according to which, in order to be effective, a complaint mechanism should not only be accessible, but also provide for prompt and expeditious and yet thorough investigation and handling of the case. During border control land surveillance operations and expulsion procedures, the possibility of collecting the information required to document abuses remains very limited. Documenting human rights violations (such as for instance physical violence or mistreatment) represents an additional challenge undermining the ability of victims of abuses

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<sup>153</sup> Expert replies from Austria, Spain and Italy.

<sup>154</sup> Expert reply from Slovakia.

<sup>155</sup> See Statewatch, Italy/Sudan: ASGI and ARCI appeal against mass deportation to Sudan deemed admissible by the ECtHR, 12.01.2018.

<sup>156</sup> Expert replies from Hungary and Poland.

to lodge a complaint and obtain an effective remedy. The independence of personnel carrying out medical checks is therefore of central importance.

National experts highlighted that an additional challenge is the fact that the anonymity of potential victims is not always guaranteed. However, these individuals may well be in fear of reprisal and intimidation if their identity were to become known. Third country nationals usually dismay authorities and do not want to engage in formal complaint procedures – their priority is ‘to make it’ (cross the border and reach their desired destination), not to submit a claim which may potentially jeopardise their journeys and dreams. The specific needs of vulnerable groups (such as minors, persons affected by disability, LGBT, etc.) are not properly taken into consideration, which constitutes another area of concern across the countries investigated.

The lack of independent monitoring in the context, for instance, of border surveillance at sea does not only mean that the material protection of the rights of third country nationals has to rely exclusively on the good conduct of the police or border authorities. The lack of documentation that affects in particular (but not exclusively) incidents that occur in the context of border surveillance also makes it difficult for prosecutors (and other similarly entitled judicial or quasi-judicial actors) to start *ex officio* complaint procedures regarding a human rights violation that might have occurred during the conduct of border control, border surveillance, or joint return flights.<sup>157</sup>

In at least two of the countries considered in this book, namely Turkey and Hungary, the difficulty of obtaining a proper remedy is also linked to the lack of adequate investigations by the authority responsible for handling complaints. In the case of Turkey, the overall transparency of the procedures related, for instance, to complaints brought against deportation orders is furthermore undermined by the fact that the decisions of the administrative courts responsible for deciding such cases are not made public. Recent socio-legal analysis shows that even in EU MS such as Italy (quasi)-judicial remedies provided by the so-called “*Giudice di Pace*” against, for instance, arbitrary detention of migrants and asylum seekers are of poor quality.<sup>158</sup>

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<sup>157</sup> In most of the 11 countries covered, an investigation related to human rights violations occurring in the context of border control border surveillance and /or expulsion operations starts *ex officio* when the incident is qualified as a criminal offence under national legislation.

<sup>158</sup> See, for instance, F. Mastromartino, E. Rigo and M. Veglio (2017), “Lexium, Osservatorio sulla Giurisprudenza in materia di Immigrazione del Giudice di Pace: Sintesi Rapporto 2015”, in *Diritto, Immigrazione e Cittadinanza*, Fascicolo N. 2/2017.



## CONCLUSIONS AND RECOMMENDATIONS

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This book has highlighted the importance for CoE State Parties of ensuring effective complaint mechanisms for alleged human rights violations in the context of border management and joint return flights. It has provided evidence substantiating the existence of structural and functional shortcomings affecting existing instruments and bodies established at the international, regional as well as national level to deal with human rights violations at international borders, or in the context of expulsion procedures. In light of the findings obtained through the analysis, the following set of conclusions can be drawn:

- **First, independent human rights monitoring is lacking** in the context of border control procedures and border surveillance activities. Independent monitoring mechanisms also need to be strengthened in the framework of expulsion procedures, and in particular in the context of joint removal operations. Such monitoring systems are especially necessary in ensuring a systematic implementation of the right of good administration. As no ‘Border Monitor’ exists at the CoE level, sufficient human and financial resources need to be allocated to overcoming obstacles that arise from the current fragmentation in the monitoring systems of different states. Independent monitoring of all Frontex operational activities is also not ensured. Representatives of the Frontex Consultative Forum are not systematically present at relevant sites where ‘control’ takes place, including on the high seas and in third countries. Even when evidence of human rights violations is provided, the Frontex Executive Director is not under the obligation to suspend the operations concerned. Furthermore, the FRO does not have the power to monitor the follow-up of the complaint by the relevant authorities in MS, and cannot bring the issue before the European Ombudsman in cases of inadequate follow-up.
- **Second, systematic access to legal aid and a lawyer is not fully ensured.** CoE State Parties appear not to be fulfilling their commitment to full access and provision of information to relevant civil society and international organisations so as to ensure and strengthen access to legal aid. Also, the lack of a systematic monitoring system undermines the provision of information about the availability of national and supranational avenues for complaints and makes it difficult for individuals affected by a human rights violation to liaise with existing complaint institutions or bodies. At the EU level, further guidance is needed to ensure that the standards set forth in the EU Directive on Victims of Crime<sup>159</sup> are extended to and also applicable in the scope of border control/surveillance and expulsion procedures.

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<sup>159</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

- **Third, legal and procedural obstacles reduce the availability in practice of complaint mechanisms.** In particular, the possibility to lodge anonymous complaints is often not guaranteed to victims of human rights abuses. This often translates into disincentives to activating complaint procedures by the individuals concerned, as third country nationals fear reprisals, as well as confiscation of personal assets and belongings. Moreover, the inadmissibility of oral complaints prevents third country nationals from activating formal complaint procedures at the moment when the actual human rights abuse takes place. Also, complaints against push-back decisions do not have a suspensive effect. In some cases, a suspensive effect is also lacking for complaints lodged against return decisions. In cases where a push-back happens despite a complaint being raised, the state implementing the *refoulement* is not currently under a clear obligation to accept the affected individual back.
- **Fourth, a system of portable justice, analogous to those already developed, for instance in the US,<sup>160</sup> does not exist at the European level.** Those whose fundamental human rights have been violated during border controls and return processes are not systematically monitored and are extremely difficult to contact for prosecutors, human rights institutions and NGOs providing legal aid. This significantly undermines the ability of victims to testify against perpetrators of crimes and human rights violations (for instance, through video channels). Civil society actors have a key role to play in the implementation of this system, but require financial support in order to become more active. This would also permit better monitoring of standards implementation and compliance with and execution of ECtHR landmark judgments by CoE State Parties. The establishment of public interest complaints could also be envisaged. The use of oral complaints and of electronic tools would in particular allow affected individuals to report violations and lodged complaints before, during and after return. For this purpose, the development of user-friendly electronic tools could be considered, for instance in the form of mobile applications, but also by the creation of dedicated Internet pages making electronic complaint forms available in different languages.
- **Fifth, reporting and registering of incidents occurring in border operations and expulsion-related activities is not ensured.** Not all personnel who carry out border control, border surveillance and return operations are always clearly identifiable to migrants by means of names or personnel numbers. This makes reporting human rights violations to competent authorities more difficult. Aggregated and disaggregated data on human rights incidents are not comprehensively collected, while their collection would not only facilitate effective and thorough investigations with a view to understanding causes, and sanctioning and preventing such practices, but also protect staff against unfounded allegations. Data protection-compliant video recordings systems could be provided in order, in particular in the context of border surveillance and joint return flights, to

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<sup>160</sup> Similar examples have been developed in the field of labour migration law by the Global Workers Justice Alliance (New Name: Justice in Motion) and Centro de Derechos del Migrante (Mexico): Network of Lawyers Example of countries in Central America.

gather evidence of instances of excessive use of force, assault and other forms of violence, torture, ill treatment, and any other human rights violations and abuses perpetrated by border authorities and private actors. These recordings should be available for periods of time commensurate with the usual length of procedures for lodging complaints so that they can be used to substantiate allegations of human rights violations.

- **Sixth, limited powers and independence of complaint bodies and human rights institutions prevent an effective follow-up of complaints.** Also, cooperation between NHRIs and international bodies such as the CPT and UN Human Rights Treaty Bodies such as the Office of the High Commissioner for Human Rights (OHCHR) remain to date rather limited. Enhanced cooperation among national, regional and international human rights institutions could increase the effectiveness of these bodies and institutions as they carry out field visits, receive and consider direct complaints from victims of human rights violations, and appeal to governments on behalf of victims. At the EU level, the Frontex Fundamental Rights Officer, should be endowed with greater human resources, and mandated with a wider power to conduct thorough and systematic follow-up monitoring of national complaints, thereby enabling Frontex to properly monitor how human rights complaints are followed up domestically by the responsible institutions established at the national and/or local level.
- **Seventh, need for clearer human rights obligations in the field of complaints mechanisms.** To date, the CoE Committee of Ministers' 20 Guidelines on Forced Returns provide only limited indications as to the operational standards to be respected by CoE State Parties in order to ensure access to effective complaint mechanisms. The role and responsibilities of medical staff in the framework of forced returns also needs to be better defined, especially in relation to the assessment of the "fit to fly" status of returnees. Furthermore, indications as to the practical measures to be undertaken by authorities of CoE countries in order to ensure third country nationals access to effective complaint mechanisms are completely lacking when it comes to border surveillance activities and third country cooperation. A new set of comprehensive guidelines could therefore be developed and also tailored in a way that would take the special needs of vulnerable groups such as children or person with disabilities more thoroughly into account. This should go hand-to-hand with the increase of financial support, for instance from the EU budget, for the work of civil society actors specialised in access to justice and rights, and currently acting as watchdogs or human rights monitors when EU Agencies perform tasks in third countries. This aspect is particularly relevant as investigative field work is proving to be an essential tool for documenting human rights abuses in remote or third country locations.

## ANNEX 1.

### OVERVIEW OF THE AUTHORITIES PERFORMING BORDER CONTROL AND EXPULSIONS-RELATED DUTIES IN THE 11 COE COUNTRIES IN THIS STUDY<sup>161</sup>

Country	Authority	Functions/competences
<b>Austria</b>	Austrian National Police - Border control and Aliens Police (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control at border crossing points</li> <li>• Border surveillance</li> <li>• Apprehension and returns<sup>162</sup></li> </ul>
	Military (Ministry of Defense)	<ul style="list-style-type: none"> <li>• Participates in border surveillance duties in support of the police</li> </ul>
<b>Bulgaria</b>	Border Police and Migration Directorate (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control at border crossing points</li> <li>• Border surveillance</li> <li>• Apprehension and returns</li> </ul>
	Navy (Ministry of Defence)	<ul style="list-style-type: none"> <li>• Contributing to maritime border control and surveillance and search and rescue operations</li> </ul>
<b>Greece</b>	Hellenic Police (Border Police Units)	<ul style="list-style-type: none"> <li>• Border control (illegal migration as well as cross-border crime)</li> <li>• Border surveillance</li> <li>• Apprehension and returns</li> </ul>
	Hellenic Coast Guard	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> </ul>
	Hellenic Navy (Ministry of Defence)	<ul style="list-style-type: none"> <li>• Border surveillance at sea</li> </ul>
<b>Hungary</b>	Border Guard	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> </ul>
	National Police (Immigration and Asylum Office)	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> <li>• Apprehension and returns</li> </ul>
	Customs	<ul style="list-style-type: none"> <li>• Development and maintenance of the land border crossing points with Ukraine, Serbia-Montenegro, Croatia and Romania</li> </ul>
<b>Italy</b>	Border Police (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control and immigration management (land borders, sea borders and air borders)</li> </ul>

<sup>161</sup> The overview is based on information collected through desk research, and the inputs received by experts and practitioners from the 11 countries covered in this book. For a complete list of the authorities that, at the EU level, are currently assigned with tasks related to the implementation of the Schengen *acquis*, see List of national services responsible for border-controls for the purposes of Article 15(2) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2006/C 247/02.

<sup>162</sup> Except when the matter falls under the competence of the BFA.

		<ul style="list-style-type: none"> <li>• Border surveillance and patrolling (sea borders)<sup>163</sup></li> <li>• Expulsions (enforcing forced removals)</li> </ul>
	Tax and Custom Police (Ministry of Finance)	<ul style="list-style-type: none"> <li>• Border control functions (land, air, sea borders)</li> </ul>
	Carabinieri (Ministry of Defence)	<ul style="list-style-type: none"> <li>• Border control functions (land, air, sea borders)</li> </ul>
	Coastguard (Ministry of Transportation and Infrastructure)	<ul style="list-style-type: none"> <li>• Border surveillance (including preventing and countering “illegal trade in migrants”, coordination of rescue operations at sea<sup>164</sup>) in territorial waters and contiguous zones.</li> <li>• Border control (the Harbour Offices)</li> </ul>
	Navy (Ministry of Defence)	<ul style="list-style-type: none"> <li>• Border surveillance of international waters</li> </ul>
<b>Poland</b>	Polish Border Guard	<ul style="list-style-type: none"> <li>• Border control functions at EU external border crossing points (land and air)</li> <li>• Border patrol of the sections of the Polish state border forming the EU/Schengen external border.</li> </ul>
	National Police	<ul style="list-style-type: none"> <li>• Apprehension and returns</li> </ul>
<b>Romania</b>	Romanian Border Police	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> <li>• Apprehension and returns</li> </ul>
<b>Serbia</b>	Border Police (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> <li>• Apprehension and returns (coordinated by the Directorate of Administration of the Serbian Ministry of Interior)</li> </ul>
	Army (Ministry of Defence)	<ul style="list-style-type: none"> <li>• Border surveillance</li> </ul>
<b>Spain</b>	Guardia Civil (Ministry of Interior and Ministry of Defence)	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> </ul>
	National Police (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Apprehension and returns</li> </ul>
<b>Slovakia</b>	Alien Police (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> <li>• Expulsion of aliens, readmission</li> </ul>
<b>Turkey</b>	Police Directorates (Ministry of Interior)	<ul style="list-style-type: none"> <li>• Border control (Directorate General of Security)</li> <li>• Border surveillance (Directorate General of Security)</li> <li>• Apprehension and Returns (Directorate General for Migration Management)</li> </ul>
	Gendarmerie General Command - Border Units (Turkish Armed Forces)	<ul style="list-style-type: none"> <li>• Border control</li> <li>• Border surveillance</li> </ul>
	Coast Guard Command (Turkish Armed Forces)	<ul style="list-style-type: none"> <li>• Border control (sea borders)</li> <li>• Border surveillance (including search and rescue)</li> </ul>

<sup>163</sup> Police officials transmit all information and data concerning vessels suspected of migrant smuggling to the Department of Public Security (Central Directorate of Immigration and Border Police), which performs coordination tasks.

<sup>164</sup> The responsibility entrusted to the Italian Coast Guard for performing search and rescue operations does not exclude the carrying out of police activities by the same authority in parallel.

## ANNEX 2.

### OVERVIEW OF THE INSTITUTIONS COMPETENT TO RECEIVE HUMAN RIGHTS COMPLAINTS (NON-JUDICIAL) IN THE 11 CoE COUNTRIES IN THIS STUDY<sup>165</sup>

Country	Institution	Function/competence
<b>Austria</b>	Austrian Ombudsman Board (NHRI – B)	<ul style="list-style-type: none"> <li>Complaints against the police regarding injustices or maladministration with asylum procedures, visas, settlement procedures or the rights of foreigners.</li> <li>Complaints against direct orders issued and coercive measures carried out during police operations such as large-scale raids.</li> <li>Own investigations on abuses committed during forced returns of individuals.</li> </ul>
<b>Bulgaria</b>	Ombudsman of the Republic of Bulgaria (NHRI – B)	<ul style="list-style-type: none"> <li>Complaints about human rights violations in the context of border control and border surveillance activities, and return operations. Including complaints by foreign nationals about abuses of rights or freedoms at the hands of any public authority.</li> </ul>
	National Commission for Combating Traffic in Human Beings	<ul style="list-style-type: none"> <li>Complaints related to human rights violations occurring in the context of border control, border surveillance, and/or return operations.</li> </ul>
<b>Greece</b>	The Greek Ombudsperson (Human Rights Department)	<ul style="list-style-type: none"> <li>Complaints regarding violations of the rights of immigrants; right to political asylum and rights to entry and residence of aliens; personal freedom; discrimination on grounds of nationality or ethnic origin; infringements of the right to appeal to administrative authorities and to access to judicial protection.</li> </ul>
<b>Hungary</b>	The Office of the Commissioner for Fundamental Rights (NRHI - A)	<ul style="list-style-type: none"> <li>Complaints regarding fundamental rights violations or imminent danger of violation by a public authority (e.g. Hungarian defence forces; law enforcement actors, or a body acting under the authority of another body) including in the context of border control and return operations.</li> </ul>
<b>Italy</b>	National Guarantor for Person Deprived of Liberty	<ul style="list-style-type: none"> <li>NA</li> </ul>
	“Giudice di Pace”	<ul style="list-style-type: none"> <li>Complaints against expulsion orders.</li> </ul>
<b>Poland</b>	Commissioner for Human Rights (NHRI - A)	<ul style="list-style-type: none"> <li>Complaints related to the freedom and human rights specified in the Constitution and other normative acts from any person requesting for assistance in protecting</li> </ul>

<sup>165</sup> The overview is based on information collected through desk research and the inputs received from experts and practitioners from the 11 countries covered in this book.

		their freedoms or rights from infringement by public authorities.
<b>Romania</b>	Romanian Ombudsman	<ul style="list-style-type: none"> <li>Complaints submitted by individuals harmed by violations of their rights and freedoms by public administration authorities. Including complaints related to mistreatments in the context of border control, border surveillance and expulsion procedures at the hands of public authorities.</li> </ul>
<b>Serbia</b>	Ombudsman of the Republic of Serbia, (NHRI – A)	<ul style="list-style-type: none"> <li>Receive, investigate, assess complaints regarding cases of human rights violations deriving from border control, border surveillance, or return operations conducted by agents of the Police.</li> </ul>
<b>Slovakia</b>	Office Of The Public Defender Of Rights (Ombudsman) (NHRI - B)	<ul style="list-style-type: none"> <li>Complaints about human rights violations in the context of border controls, border surveillance and returns.</li> <li>Complaints might be related to detention decisions, decisions to refuse entry, decisions on return, decisions to ban entry, excessive use of force, ill/treatment.</li> </ul>
<b>Spain</b>	Ombudsman (Defensor del Pueblo) (NHRI – A)	<ul style="list-style-type: none"> <li>Complaints by foreigners related to fundamental rights violations through administrative actions or decisions of anybody within the General Administration, including the police.</li> </ul>
	Regional Ombudsman (e.g. Síndic de Greuges, Ararteko, Valedor do Pobo)	<ul style="list-style-type: none"> <li>Complaints on matters under their responsibility (e.g. regional police, autonomous communities, prisons).</li> </ul>
	NGOs, associations and Lawyers' Bar Associations	<ul style="list-style-type: none"> <li>Can receive complaints, and they can communicate them to the Prosecutors Office (Fiscalía).</li> </ul>
<b>Turkey</b>	Turkish Ombudsman	<ul style="list-style-type: none"> <li>NA</li> </ul>
	Human Rights and Equality Institution of Turkey (NHRI - C)	<ul style="list-style-type: none"> <li>NA</li> </ul>

Border control, surveillance operations and expulsion of irregular immigrants – particularly through return flights – can pose serious human rights challenges. This book examines whether Europe is properly equipped to ensure effective access to remedies for alleged rights violations or possible abuses of force against immigrants and asylum seekers.

It sheds light on the fragmentation of the human rights accountability regimes and shows that while the ‘law on the books’ may formally recognise a set of fundamental rights for immigrants and asylum seekers, the ‘law in practice’ does not necessarily offer adequate complaint mechanisms in many European countries. Finally, the book sets out a number of policy recommendations, paying particular attention to addressing human rights accountability issues in the context of activities undertaken by the new European Border and Coast Guard (Frontex).

