

EUROPEAN STANDARDS ON LEGAL REMEDIES, COMPLAINTS MECHANISMS AND EFFECTIVE INVESTIGATIONS AT BORDERS

This note sets out human rights standards stemming from both the European Convention on Human Rights and European Union (EU) law that apply to effective remedies for human rights violations at borders, together with those on complaints mechanisms and investigations into complaints of rights violations at borders.

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Introduction

Everyone within the jurisdiction of any of the Council of Europe's 47 member states enjoys the protection of the [European Convention on Human Rights](#) ('ECHR', Article 1). Entitlement to these protections arises when an individual encounters state authorities and comes under their effective control, regardless of whether that contact is within or outside of national territory.¹

Protection afforded by the ECHR includes the right not to be deprived of life (Article 2), the right not to be subjected to torture or other forms of ill-treatment (Article 3), the right not to be subjected to slavery or human trafficking (Article 4), the right not to be unlawfully or arbitrarily detained (Article 5), and the right to respect for private and family life (Article 8). [Protocol No. 4](#) to the ECHR prohibits the collective expulsion of aliens (Article 4). The enjoyment of these rights must be secured without discrimination based on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14).

Where an individual has an arguable claim that a right under the ECHR or its Protocols has been breached, the ECHR stipulates that an **effective remedy** must be available (Article 13). States have an obligation to establish dedicated mechanisms for lodging administrative and judicial complaints through which migrants, asylum applicants and refugees can submit allegations of rights violations at borders. Where arguable complaints of violations of ECHR rights are made, states have a duty to conduct an **effective investigation** into those allegations.

In this note, the obligations stemming from the ECHR are presented together with the relevant **European Union (EU) law standards**, which flow, in particular, from Article 41 (right to good administration) and Article 47 (right to an effective remedy and to a fair trial) of the [Charter of Fundamental Rights of the European Union](#) ('the Charter'). Practitioners in EU Member States should consult both European legal orders.

Right to an effective remedy

Under the ECHR, Article 13, which is also applicable to immigration cases, grants individuals the right to access an effective remedy at the national level – before having to seek a remedy at the international level² – to deal with the substance of a complaint under the ECHR and to grant appropriate relief. The nature of the remedy required to satisfy the 'effectiveness' criteria will vary depending on the alleged violation.³

An effective remedy should include the following criteria:

- i. The remedy must be **effective in practice as well as in law**.⁴ It should be capable of preventing or stopping the alleged violation or providing suitable redress.⁵ It is not enough for remedies to be theoretically available; they must be accessible in practice and not hindered by the acts or omissions of state authorities.⁶ The promptness of the complaints procedures should not be prioritized over the effectiveness of the remedy.⁷
- ii. If a single remedy does not entirely satisfy the requirements of Article 13 of the ECHR on its own, the **aggregate of remedies** provided under domestic law may do so.⁸
- iii. Where there are substantial grounds for fearing that the deportation of a person will result in a real risk of treatment contrary to Article 2 or Article 3 of the ECHR, there must be **independent and rigorous scrutiny**⁹ of any complaint made by that person, and the remedy must also have **automatic suspensive effect**.¹⁰ The assessment of whether there is an arguable claim of a risk to life or limb should be carried out by a competent national authority;¹¹ it is not appropriate that this initial assessment be conducted by border guards who are ill-equipped to apply the relevant legal principles.¹²

Under EU law, Article 47 of the Charter provides a 'right to an effective remedy and to a fair trial'. The first subparagraph of Article 47 is based on Article 13 of the ECHR, which ensures the right to an 'effective remedy before a national authority.' The Charter, however, requires, that the review be done by a tribunal, whereas Article 13 of the ECHR only requires a review before a national authority.¹³

The second paragraph of Article 47 of the Charter is based on Article 6 of the ECHR, which guarantees the right to a fair trial but only in the determination of civil rights or obligations, or any criminal charge. This has precluded the application of Article 6 of the ECHR to

immigration and asylum cases, since they do not involve the determination of a civil right or obligation.¹⁴ Article 47 of the Charter makes no such distinction.

More specifically, Article 4 (4) of the [Return Directive](#) (Directive 2008/115/EC)¹⁵ sets out minimum rights that are to be applied to persons apprehended or intercepted in connection with irregular border crossing, even if a Member State opted for not applying the Directive to these “border cases”. Their treatment cannot be less favourable than that of other migrants in an irregular situation, including as regards the use of coercive measures. The principle of *non-refoulement* must be respected at all times. In case of violations of these rights, guaranteed by EU law, there must be an effective judicial remedy under Article 47 of the Charter. An effective judicial review must be available for all decisions, even if not expressly provided for under national law. In the absence of such national rules, the national courts are entitled to hear an action seeking to challenge the return measure at the border.¹⁶

Under Article 14 (3) of the [Schengen Borders Code](#) (Regulation (EU) 2016/399),¹⁷ persons refused entry at border crossing points have a right to appeal. Border guards must provide the person concerned with a written list of contact points who can give information on professionals providing legal assistance. In case the appeal concludes that refusal of entry was ill-founded, a cancelled entry stamp¹⁸ has to be corrected, and authorities have to make any other necessary cancellations and corrections.¹⁹

Border guards performing their duties are required to fully respect human dignity (recital (7) and Article 7 (1) of the [Schengen Borders Code](#)). Member States’ domestic legal systems must provide for appropriate remedies against infringements, in line with the Charter – if the situation falls within the scope of EU law – or in line with the ECHR – if it does not.²⁰

Complaints mechanisms

Under the ECHR, to access an effective remedy, individuals must first be able to lodge a complaint before a complaints mechanism capable of establishing the violation of an ECHR right and any liability of state officials or bodies for that violation.²¹

The following are characteristics of an effective complaints mechanism:

- i. The complaints mechanism **does not need to be a judicial body**.²² Where it is not a judicial body, it should adhere to similar standards, namely independence, procedural safeguards, and the power to deliver an enforceable decision.
- ii. The authority should be **independent**.²³ To maintain independence, it should be, in so far as possible, unconnected and separate from law enforcement agencies.²⁴ The mechanism should enjoy a level of independence capable of protecting against any abuse of authority.²⁵
- iii. The mechanisms should provide **procedural safeguards** to the complainant.²⁶ Sufficient procedural safeguards under Article 13 of the ECHR include access to judicial review of competent authorities’ decisions and, where necessary, access to legal representation.²⁷
- iv. The mechanism should be capable of delivering a **legally binding, enforceable decision**.²⁸
- v. Complaints mechanisms should **process complaints thoroughly and expeditiously**. Where complaints are upheld, they should lead to the violations identified being remedied, responsibility for the violations being determined, and where necessary,

a sanction being imposed on those responsible.²⁹ Where a complaint is found to be inadmissible, the complainant should be informed of the reasons for the inadmissibility, and where applicable, be provided information on further options to address their concerns.³⁰

- vi. There should be **no excessively restrictive barriers to lodging a complaint** and the mechanism should be **genuinely accessible**.³¹ Individuals should receive information in a language they understand, and have a clear understanding of the ways they can exercise their right to lodge a complaint.³²
- vii. **Direct and confidential access** to the mechanism should be ensured.³³ Individuals lodging complaints should be **free from intimidation and reprisals**; attempts by authorities to prevent complaints reaching the complaints body, intimidatory behaviour and retaliatory actions should be subject to sanctions.³⁴

In Council of Europe member states, **national human rights institutions and/or ombuds institutions** can provide support for individuals to enforce their rights by facilitating their access to legal remedies and receiving individual complaints.³⁵

Under EU law, individual complaints against inappropriate behaviour, misconduct or ill-treatment by any EU agency, including the European Border and Coast Guard Agency (Frontex) at the borders, can be lodged with the [European Ombudsman](#).³⁶ The European Ombudsman represents an independent, impartial and easily accessible control mechanism of the EU administration who deals with cases of ‘maladministration’ by the EU institutions, offices, agencies or other bodies. The European Ombudsman cannot deal with complaints against other institutions or national governments but would pass on complaints to an appropriate authority if it received such cases.

More specifically, in the context of border management operations carried out by Frontex, its founding regulation ([European Border and Coast Guard Regulation \(EU\) 2019/1896](#)) sets out a complaints mechanism (Article 111 of the Regulation). Frontex has been deploying operational staff on the ground and these ‘EU officers’ may have direct interactions with migrants, asylum applicants and refugees at external borders. This complaints mechanism allows anybody directly affected by the actions of staff involved in a Frontex operation to submit a complaint if the person considers him or herself to have been the subject of a breach of his/her fundamental rights due to those actions. A third party representing such person could also submit a complaint.

The Frontex Fundamental Rights Officer reviews the admissibility of a complaint and registers admissible complaints. The Fundamental Rights Officer then forwards all registered complaints to Frontex’s Executive Director and forwards complaints against national officers deployed to Frontex operations to the person’s home Member State. In addition, the Fundamental Rights Officer informs the relevant authority or body competent for fundamental rights in a Member State and should ensure a follow-up by the agency or that Member State.

Effective investigations

Under the ECHR, states must carry out an effective official investigation where individuals make arguable complaints of rights violations, notably under Articles 2, 3, 4, and 5 of the ECHR. The precise scope of the obligation varies based on the nature of the alleged violation.³⁷

For an investigation to be effective, it must have the following characteristics:

- i. Investigation **must not depend on a complaint from the victim or next of kin** and authorities should **act on their own initiative** where reasonable allegations of ill-treatment arise.³⁸
- ii. Those responsible for carrying out the investigation must be **independent** of those implicated in the events. There should be no institutional, hierarchical, or practical connection between investigators and authorities subject to the complaint.³⁹
- iii. The investigation must be **adequate**.⁴⁰ It must be capable of establishing the facts, determining whether any use of force was justified, and of identifying and where appropriate, punishing those responsible.⁴¹ Authorities must take all reasonable steps to secure relevant evidence, and in this respect full cooperation from state agents is expected.⁴²
- iv. The investigation must satisfy the requirements of **promptness and reasonable expedition**. A prompt response by authorities is key to maintaining public confidence in the authorities' respect for rule of law and to preventing the appearance of tolerance towards unlawful acts.⁴³ An expeditious investigation also prevents the loss of evidence due to delay.⁴⁴
- v. The investigation must be **thorough** and make serious attempts to uncover what happened. The conclusions of the investigation must be based on an **objective and impartial analysis** of all relevant elements; authorities should not rely on hasty or ill-founded conclusions as a basis for concluding or closing their investigation.⁴⁵ The European Court of Human Rights has underlined that failing to follow an obvious line of inquiry decisively undermines the investigation's ability to establish the circumstances of the case and the identity of those responsible.⁴⁶
- vi. During investigations into violent incidents, state authorities have the additional duty to take all reasonable steps to **unmask any racist motives** and to establish whether ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. It may constitute unjustified treatment irreconcilable with Article 14 of the ECHR.⁴⁷
- vii. The investigation should remain **accessible to the victim or victim's next of kin**; they should be involved in the procedure to the extent necessary to safeguard their legitimate interests.⁴⁸
- viii. There must be a sufficient element of **public scrutiny** of the investigation to **secure accountability in practice** as well as in theory.⁴⁹ The degree of scrutiny deemed sufficient will vary from case to case.⁵⁰ The requirement for public scrutiny should not be regarded as automatic, particularly where disclosure of documentation may involve sensitive information that could have prejudicial effects on individuals or on the investigation.⁵¹
- ix. Investigating authorities **must cooperate with the relevant authorities of other states** regarding the investigation of events which occurred outside their territories; this is particularly crucial in cross-border cases. It may include taking steps to seek and afford assistance with securing relevant evidence located in other jurisdictions, or where the perpetrators are outside its jurisdiction, to seek their extradition.⁵²

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- ¹ ECtHR, *Loizidou v. Turkey* [GC], No. 15318/89, 18 December 1996, para. 52.
- ² ECtHR, *Kudła v. Poland* [GC], No. 30210/96 2000, 26 October 2000, para. 152.
- ³ ECtHR, *Budayeva and Others v. Russia*, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, paras. 190-191.
- ⁴ ECtHR, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, No. 39630/09, 13 December 2012, para. 255.
- ⁵ ECtHR, *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 158; *Ramirez Sanchez v. France* [GC], No. 59450/00, 4 July 2006, para. 160
- ⁶ ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, No. 46477/99, 14 March 2002, para 96; *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, para. 95.
- ⁷ ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, para. 147.
- ⁸ ECtHR, *De Souza Ribeiro v. France* [GC], No. 22689/07, 13 December 2012, para. 79; *Kudła v. Poland*, No. 30210/96, 26 October 2000, para. 157.
- ⁹ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 198; *Gebremedhin [Geberamadhien] v. France*, No. 25389/05, 26 April 2007, para. 58.
- ¹⁰ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 200; *Gebremedhin [Geberamadhien] v. France*, No. 25389/05, 26 April 2007, para. 67.
- ¹¹ ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17, 43643/17, 23 July 2020, paras. 169 and 178.
- ¹² ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17, 43643/17, 23 July 2020, paras. 189, 208-209.
- ¹³ *Explanations relating to the Charter of Fundamental Rights* (2007/C 303/02), OJ 2007 C 303 /17.
- ¹⁴ ECtHR, *Maaouia v. France* [GC], No. 39652/98, 5 October 2000, paras. 38-39.
- ¹⁵ The Return Directive applies to all EU Member States but Ireland, as well as to the four Schengen associated countries (Iceland, Liechtenstein, Norway and Switzerland).
- ¹⁶ CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* [GC], 14 May 2020, paras. 124-130.
- ¹⁷ The Schengen Borders Code binds all 27 EU Member States but Ireland, as well as the four Schengen associated countries (Iceland, Liechtenstein, Norway and Switzerland).
- ¹⁸ In case of refusal of entry, this obligation to affix an entry stamp on the passport, cancelled by a cross derives from Annex V, Part A of the Schengen Borders Code (see point 1 (b)).
- ¹⁹ Detailed rules governing refusal of entry are given in Annex V, Part A of the Schengen Borders Code; and in the non-binding Commission recommendation called "Schengen Handbook" (C(2019) 7131 final, Brussels, 8 October 2019), Part Two – 1.3 (border checks), and 8.4, 8.7 (refusal of entry).
- ²⁰ CJEU, C-23/12, *Mohamad Zakaria*, 17 January 2013.
- ²¹ ECtHR, *Lithgow and Others v. United Kingdom*, No. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, 8 July 1986, para. 205; *T.P. and K.M. v. the United Kingdom* [GC], No 28945/95, 10 May 2001, para. 107.
- ²² ECtHR, *Klass and Others v. Germany*, No. 5029/71, 6 September 1978, para. 67; *Rotaru v. Romania* [GC], No. 28341/95, 4 May 2000, para 69; *Driza v. Albania*, No. 33771/02, 13 November 2007, para. 116.
- ²³ ECtHR, *Leander v. Sweden*, No, 9248/81, 26 March 1987, para. 77.
- ²⁴ European Committee on the Prevention of Torture ('CPT') (2017), *27th General Report on activities*, section on 'Complaints mechanisms', para. 87.
- ²⁵ ECtHR, *Khan v. the United Kingdom*, No. 35394/97, 4 October 2000, paras. 44-47.
- ²⁶ ECtHR, *De Souza Ribeiro v. France* [GC], No. 22689/07, 13 December 2012, para. 79; *Allanazarova v. Russia*, No. 46721/15, 14 February 2017, para. 93.

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- ²⁷ ECtHR, *Chahal v. the United Kingdom* [GC], No. 22414/93, 15 November 1996, paras. 152-154.
- ²⁸ ECtHR, *Silver and Others v. the United Kingdom* [GC], Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, 25 March 1983, paras. 114-115; *Leander v. Sweden*, No. 9248/81, 26 March 1987, para. 82.
- ²⁹ CPT 27th General Report, para. 86.
- ³⁰ CPT 27th General Report, para. 88.
- ³¹ ECtHR, *Camenzind v. Switzerland*, Nos. 136/1996/755/954, 16 December 1997, para. 54.
- ³² CPT 27th General Report, paras. 79 and 80.
- ³³ CPT 27th General Report, para. 84.
- ³⁴ CPT 27th General Report, para. 85.
- ³⁵ Council of Europe Committee of Ministers, Recommendation [CM/Rec\(2021\)1](#) of the Committee of Ministers to member States on the development and strengthening of effective, pluralist and independent national human rights institutions (Adopted by the Committee of Ministers on 31 March 2021 at the 1400th meeting of the Ministers' Deputies), part. II; Council of Europe Committee of Ministers, Recommendation [CM/Rec\(2019\)6](#) of the Committee of Ministers to member states on the development of the Ombudsman institution (Adopted by the Committee of Ministers on 16 October 2019 at the 1357th meeting of the Ministers' Deputies), paras. 5 and 8.
- ³⁶ [Treaty on the Functioning of the European Union](#), Articles 20, 24 and 228.
- ³⁷ See European Court of Human Rights Guides on [Article 2](#), [Article 4](#) and [Article 13](#); and Department for the Execution of ECtHR Judgments (2020), [Thematic factsheet on effective investigations into death or ill-treatment by security forces](#).
- ³⁸ ECtHR, *Al-Skeini and Others v. the United Kingdom* [GC], No. 55721/07, 7 July 2011, para. 165.
- ³⁹ ECtHR, *Halat v. Turkey*, No. 23607/08, 8 November 2011, para. 51; *Najafli v. Azerbaijan*, 2 October 2012, No. 2594/07, paras. 52-54; *Mocanu and Others v. Romania* [GC], Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, para. 320.
- ⁴⁰ ECtHR, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, 15 May 2007, para. 324.
- ⁴¹ ECtHR, *Armani Da Silva v. the United Kingdom* [GC], No. 5878/08, 30 March 2016, para. 243.
- ⁴² ECtHR, *Aksoy v. Turkey*, No. 21987/93, 18 December 1996, para. 99; *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, 3 June 2004, para. 134.
- ⁴³ ECtHR, *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, 3 June 2004, para. 136; *Al-Skeini and others v. the United Kingdom* [GC], No. 55721/07, 7 July 2011, para. 167; *Tahsin Acar v. Turkey* [GC], No. 26307/95, 8 April 2004, para. 224.
- ⁴⁴ ECtHR, *Mikheyev v. Russia*, No. 77617/01, 26 January 2006, paras. 108-109.
- ⁴⁵ ECtHR, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, No. 39630/09, 13 December 2012, para. 183.
- ⁴⁶ ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], No. 24014/05, 14 April 2015, para. 175.
- ⁴⁷ ECtHR, *Nachova and Others v. Bulgaria* [GC], No. 43577/98, 6 July 2005, para. 160.
- ⁴⁸ CPT 14th General Report (2003-2004), para. 36.
- ⁴⁹ ECtHR, *Ramsahai and Others v. the Netherlands* [GC], No. 52391/99, 15 May 2007, para. 353.
- ⁵⁰ ECtHR, *Bati and Others v. Turkey*, Nos. 33097/96 and 57834/00, 3 June 2004, para. 137.
- ⁵¹ ECtHR, *Giuliani and Gaggio v. Italy* [GC], No. 23458/02, 24 March 2011, para. 304.
- ⁵² ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, paras. 241 and 245.

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