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Human Rights Institute

Toolkit for Defence Lawyers: Applying the Méndez Principles in Legal Practice

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Forewords

As Secretary General of the Association for the Prevention of Torture (APT), I am pleased to introduce this toolkit on the Méndez Principles for defence lawyers. The Méndez Principles - formally the Principles on Effective Interviewing for Investigations and Information Gathering - provide a framework for effective interviewing of suspects in police custody (and beyond), which is inseparable from the respect for legal and procedural safeguards to prevent torture and ill-treatment.

Defence lawyers can play a decisive role in upholding the rights of people facing coercive interrogation practices. Lawyers are often the first independent actors to engage with individuals at risk, placing them in a unique position to ensure the application of safeguards, detect abuse and trigger protection mechanisms. Your actions can shape both individual outcomes and broader institutional practices by advocating for systemic reforms that strengthen both prevention and accountability. This toolkit aims to support lawyers in putting the Méndez Principles into practice. I hope you find it valuable in your work and draw inspiration from it, while recognising that not all of the content will be directly applicable in diverse national legal contexts. I commend the dedication of legal professionals worldwide working to upholding human rights, protecting dignity, and advancing fair and effective criminal justice systems.

Nicole Hogg
Secretary General, Association for the Prevention of Torture

During my career as a criminal defence barrister, I have witnessed first-hand the impact of coercive interrogations on suspects and criminal justice systems. As lawyers, we know that evidence tainted by coercion is inherently unreliable and should not be admitted by courts of law. While being acutely aware of the significant restrictions and challenges that defence lawyers face globally, we have a crucial role in identifying and challenging tainted evidence, for which we develop antennae as we become more experienced in the law. It is also imperative that we insist on the rigorous application of legal and procedural safeguards to prevent such mistreatment from occurring in the first place. The Méndez Principles offer lawyers a framework to contest coercive practices and advocate for their replacement with rapport-based interviewing and associated safeguards, both within and outside of the courtroom. I hope that this toolkit is of assistance in this regard and commend the courage and commitment of lawyers, legal aid providers, and bar associations worldwide who strive to protect the rights of their clients, promote the cause of justice, and uphold human rights and the rule of law.

Baroness Helena Kennedy LT KC
Director, International Bar Association's Human Rights Institute

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I. Introduction

The prohibition of torture and cruel, inhuman or degrading treatment or punishment (otherwise known as 'ill-treatment') is absolute, binding on all States, and applies in all circumstances.[1] Coercive interrogation methods or other actions that aim to humiliate, arouse fear, obtain information or force confessions from interviewees by means of duress or threats – or otherwise impair an interviewee's capacity or decision for judgement – can amount to torture or ill-treatment.[2]

The Principles on Effective Interviewing for Investigations and Information Gathering, also known as the Méndez Principles, were initiated by Professor Juan E. Méndez, former UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SRT). They draw on his extensive experience documenting abusive practices worldwide and were informed by the findings of the SRT's 2016 thematic report, which highlighted the risks of coercion, torture and false confessions, and emphasised the need for rights-based, evidence-focused approaches.

Under the Méndez Principles, defence lawyers are not just legal representatives; they are key guardians of humane, lawful interviewing, helping to ensure that evidence is obtained lawfully, ethically, voluntarily, and reliably. Lawyers play a key role in safeguarding their clients against torture and ill-treatment, challenging coerced evidence, and promoting fair and lawful outcomes. Lawyers, as well as other legal professionals such as prosecutors and judges, should be briefed on effective interviewing. This helps develop a common understanding of their respective roles and challenges and facilitates external monitoring or assessment if complaints arise.[3] A lawyer present during an interview serves as a legal resource, an eyewitness to the fairness of the process, and a safeguard against misunderstandings, misrepresentations, and any attempt to conduct the interview unlawfully. These functions serve to enhance the evidentiary value of the information gathered during the interview.[4]

This toolkit, based on regional and international human rights law, standards, and norms, distils the most relevant tenets of the Méndez Principles, and corresponding legal and ethical frameworks, for defence lawyers, legal aid providers, and bar associations. It seeks to support defence practitioners with using the Méndez Principles in legal practice and in advocacy for a fairer criminal justice system in their own context. However, it also recognises the wide variance in criminal law, procedure, and practice, and the significant constraints and challenges facing defence lawyers worldwide,

1 Art. 7 of the ICCPR; art. 2 of the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT); art. 3 common to the Geneva Conventions of 1949.

2 Art. 16 of the UNCAT; A/71/298, para. 44; *Selmouni v. France*, (ECtHR), No. 25803/94, Judgment, (1999), paras. 102-105; Méndez Principles, para. 38.

3 Méndez Principles, para. 159.

4 Méndez Principles, para. 108.

including - for example - around access to clients, confidential communications, and disclosure. The toolkit provides an overview of international standards on challenging the use of evidence obtained in breach of the law and considers redress for interview-related wrongdoing. It shares legal strategies and arguments, comparative jurisprudence and guidance on working with independent medical experts and cooperating with oversight and other mechanisms where available. Overall, the toolkit seeks to assist practitioners in identifying best practice, as per international and regional frameworks, in systematically reducing the risks of torture or ill-treatment and promoting the integrity of the justice system within the realities in which they operate.

For the purpose of this toolkit, *interrogation* is understood as questioning conducted by law enforcement or security authorities, usually aimed at obtaining a confession or admission, and often associated with coercive or accusatory techniques.[5] *Interviewing* is understood as questioning victims, witnesses, or suspects in a manner that seeks to obtain information rather than confessions, emphasising accuracy and voluntary cooperation.

5 This is without prejudice to jurisdictions that use the terminology 'interrogation' to refer to the neutral process of interviewing during criminal investigations in a non-coercive manner to gather accurate and reliable information. See Méndez Principles, para. 16 and footnote 4.

II. Overview of the Méndez Principles

The first moments of custody is a period in which the risks of torture and ill-treatment are particularly high.[6] People deprived of liberty are inherently vulnerable in these moments, when they may be isolated, unaware of their rights, and under intense pressure. Coercive practices during this critical period such as intimidation, threats, or physical and psychological abuse can lead to false confessions, unreliable information, and serious miscarriages of justice. The Méndez Principles were developed to address these risks, providing clear guidance to prevent abuse while ensuring that investigative and intelligence-gathering processes remain effective. They contain six principles that contribute to a criminal justice system that respects and protects human rights and promote an effective interviewing framework supported by the implementation of legal and procedural safeguards.

It should be noted that the Méndez Principles do not contain any new legal obligations on States. Rather, they help States implement their existing obligations to prevent torture and ill-treatment. They also help States to review and improve their interrogation rules, instructions, methods and practices, in line with international law including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[7] The six principles are as follows:

1. Foundations

Effective interviewing is instructed by science, law and ethics. Regardless of the interview model that an institution decides to create or use, that model must draw on scientific evidence that it works, and it must be grounded in legal and ethical standards.[8] On the scientific foundation, it should be noted that global research has shown that coercion does not bring out accurate information when considering the human memory. Most importantly, it increases the risks of false confessions.[9] Further information on this is provided in Section V(A) of this toolkit. On the legal

6 Richard Carver, Lisa Handley, Does Torture Prevention Work?, Liverpool University Press, Liverpool, July 2016.

7 Association for the Prevention of Torture. (2024). *The Méndez Principles on effective interviewing: A tool for the implementation of the United Nations Convention against Torture*. https://www.apt.ch/our-prioritiesdignity-and-fairness-criminal-justice-system/principles-effective-interviewing

8 Méndez Principles, Principle 1 – On Foundations, p. 6.

9 G.H. Gudjonsson, The Psychology of False Confessions: Forty Years of Science and Practice (Hoboken, NJ, John Wiley & Sons, 2018); A. Vrij, C.A. Meissner, S.M. Kassin, C.A. Morgan III, R.P. Fisher, & S.M. Kleinman, "Psychological perspectives on interrogation", Perspectives on Psychological Science, vol. 12, No. 6 (September 2017); S. O'Mara, Why Torture Doesn't Work: The Neuroscience of Interrogation (Cambridge, Harvard University Press, 2015); S.M. Kassin, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo, & A.D. Redlich, "Police-induced confessions: risk factors and recommendations", Law & Human Behavior, vol. 34, No. 1 (February 2010).

foundation, international law is clear that the prohibition of torture is *jus cogens*.[10] It is absolute, binding on all States regardless of whether they are party or not to the various human rights treaties, and applies in all circumstances with no derogation possible.[11] On the ethical foundation, the Principles call for a commitment to conducting interviews in an ethical manner. The humane treatment of all people, regardless of whether or not they are charged with a criminal offence, must guide an interviewing framework of a country's law enforcement practice.

2. Practice

Effective interviewing is a comprehensive process for gathering accurate and reliable information while implementing associated legal and procedural safeguards.[12] They should not be *ad hoc* conversations but carefully planned, structured, and professional processes. The aim is to obtain accurate and reliable information that can inform investigations, rather than to extract a confession.[13] Rapport-building, open-ended questions, and neutrality are key elements of this approach. Most importantly, this Principle requires that at all stages of the interview process, the relevant authority implements those legal and procedural safeguards that international research has shown reduces the risks of torture or ill-treatment. These safeguards are listed in Section III(B) of this toolkit.[14] This ensures that interviews are both effective and respectful of rights. More information on practice can be found in Section III of this toolkit as it is the key substance that defence lawyers should monitor for compliance.

3. Vulnerability

Effective interviewing requires identifying and addressing the needs of interviewees in situations of heightened vulnerability.[15] While recognising that "vulnerability" is a dynamic and evolving concept, some interviewees will experience heightened vulnerability to pressure, manipulation or misunderstanding, including children, people with intellectual disabilities, or people with difficulties in understanding or communicating (including due to language barriers). Other factors or situational features - such as health status, immigration status or prior traumatic experiences - may also heighten an individual's vulnerability. This Principle emphasises identifying such vulnerabilities early and implementing enhanced protections and special measures to address the individual's specific needs.[16] This may require additional safeguards, support persons, or modified questioning techniques. Acknowledging and accommodating vulnerability helps secure both the dignity of the person and the reliability of the information obtained.

10 International Law Commission, Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens) (A/CN.4/727) (2019).

11 Above n 1.

12 Méndez Principles, Principle 2 – On Practice, p 15.

13 Méndez Principles, para. 58.

14 Méndez Principles, paras. 61-91.

15 Méndez Principles, Principle 3 – On Vulnerabilities, p 28.

16 Méndez Principles, para. 142.

4. Training

Effective interviewing is a professional undertaking that requires specific training.[17] All personnel who conduct interviews, including police and other law enforcement officers as well as intelligence and military personnel, should receive specific and continuous training in effective interviewing.[18]

5. Accountability

Effective interviewing requires transparent and accountable institutions.[19] Article 11 of the UNCAT requires authorities to keep a systematic, thorough and broad review of existing rules, instructions, methods and practices related to interviewing.[20] All interviewing processes must be transparent, subject to clear record-keeping, and open to oversight. This includes proper documentation, preferably with the use of audio-visual technology, and the availability of complaints mechanisms.[21] Accountability ensures that abusive practices can be detected and addressed, and that interviewers operate within lawful and professional boundaries.

6. Implementation

The implementation of effective interviewing requires robust national measures.[22] For the Principles to be effective, they must be embedded within institutions, not just practiced by individual interviewers. This requires leadership commitment, adequate resources, and clear policies that support non-coercive interviewing, whichever model becomes the standard in a particular given jurisdiction.[23]

For defence lawyers, the real value of the Méndez Principles lies in how they work hand in hand with the core safeguards, while providing a framework to advocate for a system of non-coercive and rapport-based interviewing. Rights like access to a lawyer, notification of a relative or third party, independent medical examination, and prompt judicial oversight are not isolated guarantees. They form a series of protections that must be constantly upheld. At the same time, lawyers should press for interviewing practices that replace interrogation with structured, rapport-based methods, which both safeguard dignity and produce more reliable evidence. Overall, defence lawyers should insist on these main elements to help build a justice system that is lawful, fair, and effective.

17 Méndez Principles, Principle 4 – On Training, p. 32.

18 Méndez Principles, para. 149.

19 Méndez Principles, Principle 5 – On Accountability, p. 35.

20 Art. 11 of the UNCAT; see also A/HRC/RES/31/31, paras. 11-12; A/HRC/RES/46/15, para. 10.

21 Méndez Principles, paras. 176, 179, 194-200.

22 Méndez Principles, Principle 6 – On Implementation, p. 40.

23 Méndez Principles, paras. 204-224.

III. Legal and Ethical Framework

A. International and regional human rights law and standards

The Méndez Principles are grounded in international human rights law and standards. The modern human rights framework begins with the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948. While not legally binding, it established the foundational principles that govern arrest, detention and criminal proceedings worldwide. Article 5 prohibits torture and cruel, inhuman or degrading treatment. Article 9 prohibits arbitrary arrest or detention. Articles 10 and 11 guarantee the right to a fair hearing and the presumption of innocence. These provisions set the normative baseline for subsequent binding treaties.

The International Covenant on Civil and Political Rights (ICCPR) transformed those foundational principles into legal obligations. Most of the world's States are party to this Covenant.[24] Article 7 reiterates the absolute prohibition of torture and ill-treatment. Article 9 establishes core safeguards at the moment of arrest: individuals must be informed of the reasons for arrest (Article 9(2)), brought promptly before a judge (Article 9(3)), and able to challenge the lawfulness of detention (Article 9(4)). Fair trial guarantees are further elaborated in Article 14 of the ICCPR. These include the right to be informed promptly and in detail of charges (Article 14(3)(a)), to adequate time and facilities to prepare a defence and communicate with counsel (Article 14(3)(b)), to legal assistance of one's own choosing and legal aid where required (Article 14(3)(d)), to free interpretation (Article 14(3)(f)), and not to be compelled to testify against oneself or confess guilt (Article 14(3)(g)). The latter is especially key in the shift away from confession-driven interrogation systems.

The ICCPR operates alongside the UNCAT. Of relevance to where the Méndez Principles draws much of its starting point is Articles 2 and 16, which require States to take effective measures to prevent torture and ill-treatment, respectively. Article 11 obliges States to review interrogation rules and detention practices. Article 15 prohibits the use of evidence obtained through torture, commonly known as the exclusionary rule.

Regional systems reinforce these protections. In Europe, the European Convention on Human Rights (ECHR) prohibits torture and ill-treatment (Article 3), protects liberty (Article 5), and guarantees fair trial rights including access to counsel and interpretation (Article 6). In Africa, the African Charter on Human and Peoples' Rights prohibits torture and ill-treatment (Article 5), protects liberty (Article 6), and guarantees the right to defence (Article 7), further elaborated in the Robben Island and Luanda Guidelines. In the Americas, the American Convention on Human

24 There are 175 states parties to the ICCPR as of April 2026.

Rights protects humane treatment (Article 5), liberty (Article 7), and detailed fair trial guarantees including the right not to be compelled to confess (Article 8), complemented by the Inter-American Convention to Prevent and Punish Torture.

The legal norms essential to the practical implementation of the interviewing framework set out in the Méndez Principles are firmly anchored in international law and standards, including customary law, relevant treaty obligations, and authoritative jurisprudence and guidance at the international and regional levels. These laws and standards provide a universal legal foundation across jurisdictions, while allowing for domestic incorporation and implementation in ways that respect the diversity of national legal procedures and institutions.

B. Key safeguards called for in the Méndez Principles

Legal and procedural safeguards grounded in international legal norms are an essential component of the interviewing process. Their effective implementation before, during, and after the interview contributes to the success of the process, by ensuring respect for human rights and enhancing the reliability and evidentiary value of the information obtained.

Safeguards increase the likelihood of professional, effective interviews and the observance of fair treatment throughout the information-gathering and judicial processes. It is in the interest of authorities, including interviewers, to ensure that interviewees are treated with dignity and due respect for the relevant legal standards because it produces legally sound outcomes.

According to the Méndez Principles, law enforcement authorities must ensure the effective implementation of the following safeguards throughout the interview process:[25]

a. Right to information about rights
b. Right to remain silent
c. Right to information about the reasons for arrest and any charges at the time of the arrest
d. Access to interpretation
e. Right to notify a relative or third party of one's detention
f. Right of access to a lawyer of one's own choosing, or through legal aid, from the outset of deprivation of liberty
g. Right of access to a doctor and an independent medical examination
h. Right to contact with the outside world
i. Registration of persons held in detention
j. Full recording of the interview
k. Right to review and sign the interview record
l. Right to be brought promptly before a judge or other judicial authority
m. Access to effective and independent complaints mechanisms and oversight.

25 Méndez Principles, para. 62, referencing: A/HRC/RES/31/31; A/HRC/RES/46/15, paras. 4 and 5.

Most of the safeguards contained in this list are not new or recent. They have long been part of the set of fair trial rights considered as international best practice. Many are already part of the set of fair trial rights contained within the ICCPR.[26] One procedural safeguard which is not contained in any international human rights obligation is the procedural safeguard on the recording of interviews, preferably with the use of audio-video technology. While not a legal obligation, audio-visual recording is particularly helpful as it provides an objective and complete account of what transpired during the moments of questioning.[27] When implemented consistently and stored securely, audio-video recordings protect both interviewees and interviewers, deter coercion or other prohibited practices and strengthen the evidentiary value of any statements. One of the added values of the Méndez Principles is that they explain how the integration of safeguards into interviewing improves the effectiveness and fairness of the process of gathering information.

The effectiveness of these safeguards is reinforced by a robust adherence to the exclusionary rule, requiring courts to reject any evidence obtained through torture or ill-treatment (see Section IV(C) for more on this).[28] Together, defence lawyers advocating for the respect of safeguards and routine application of the exclusionary rule creates strong incentives for lawful and ethical practices while helping to ensure that only reliable and voluntary information is used in the administration of justice.

26 ICCPR, Articles 9, 14, 17. See also: Human Rights Committee, General Comment No. 32: Article 14, Right to equality before courts and tribunals and to a fair trial, 23 August 2007.

27 Audio-visual recording should include both the interviewer(s) and interviewee in the video frame. A focus only on the interviewee distorts the perceptions of those who may subsequently view the video (e.g., judges or juries), see G.D. Lassiter, L.J. Ware, M.J. Lindberg, & J.J. Ratcliff, "Videotaping custodial interrogations: toward a scientifically based policy", in Police Interrogations and False Confessions, Lassiter & Meissner, eds. (2010).

28 UNCAT, Article 15.

IV. The Role of Defence Lawyers under the Méndez Principles

For defence lawyers, your role under the Méndez Principles means that you advocate for the effective implementation of legal and procedural safeguards owed to every person in custody, and to ensure that coercive interrogations do not occur. Notification of family or third parties, immediate access to counsel, independent medical examination, and prompt appearance before a judge are not optional. All national legal systems should provide for these rights. They are interconnected rights that require close monitoring from the very start of a case. At the same time, lawyers should press for interviews that follow structured, rapport-based approaches rather than coercive interrogation, since these methods both protect dignity and ensure reliability of evidence.

Acting as the first line of defence, lawyers play a critical role in making sure these safeguards and interviewing standards are respected in practice. This includes by protecting against coercion; ensuring legal and procedural safeguards; monitoring interviewing practices; advising clients; promoting fair trial rights and, where necessary, engaging accountability mechanisms. The following section sets out key steps to take as soon as you are assigned to a defendant.

A. During questioning/interviews

1. Preparations for and presence during interviews

Once you are notified of a potential new client or made aware of an upcoming police interview, allocate sufficient time not only to attend but to prepare strategically, with the mindset of ensuring every aspect of the process complies with the Méndez Principles. This includes familiarising yourself with the client's background, any heightened vulnerabilities, and any red flags about police conduct raised at the time of arrest. Early preparation ensures you can meaningfully prevent coercive or abusive practices from the outset.

a. If you have already received an initial prosecution file, it is imperative to review this thoroughly prior to attending the client meeting. This includes going through the contemporaneous notes taken by police, subsequent notes taken, looking for inconsistencies, and all the alleged evidence available. In particular, be cautious where a confession or any voluntary statement that leads to evidence being discovered has already taken place. This includes in the context of any so-called 'informal talks'.[29]

29 This refers to any communication between an official and a suspect, witness, victim or other person of interest outside an official interview.

b. Assess whether your client has any heightened vulnerabilities (e.g. age, gender, language, disability, minority group, etc.).

c. Insist that you attend every interview with the client. The presence of a lawyer alone can deter abuse.

d. You should have sufficient time to confer with your client in a confidential setting before the interview.

e. Object to any attempts to proceed without counsel.

f. Prior to the interview, the interviewer should always advise your client and yourself how the interview will be recorded and obtain their free and informed consent.

g. Once in the interview room, stand ready to observe procedures, advise your client and intervene if there is a risk of coercion or abuse. An effective interviewer should establish a respectful and professional working relationship with you. You are entitled to ask questions, solicit clarifications, contest evidence presented, challenge unfair questions or abusive behaviour on the part of the interviewer, and be generally vigilant of your client's rights.

h. Take notes on the interview setting, duration, participants, and any irregularities.

i. Take note of whether officers follow a non-coercive interview model and whether your client appears fatigued, medicated, hungry, intimidated, or confused.

j. Be prepared to intervene if questioning becomes confrontational, repetitive, suggestive, or coercive.

k. Advise your client discreetly when needed and ensure they understand they can pause the interview, for instance to rest or consult in private. A refusal to accept a request from your client or yourself for a break may affect the reliability of information gathered from the interview.

l. These observations may be critical if you later challenge the process as part of a pre-trial application.

m. The interviewer should review the information obtained during the interview with your client and yourself and, where a written record (as opposed to an audio/video recording) has been made, invite them to sign as a confirmation of the record's accuracy. Any amendments should be recorded, and if relevant, any refusal of your client to sign the interview record. A copy of any written record should be provided to your client and yourself.

n. If the interviewer insists on proceeding with an illegal or unethical act, you should refuse to allow the interview to continue. Never leave the interview location without your client being protected from possible ill-treatment.

o. Demand that you maintain your access to the outside world if you need to report any illegality or violence at the time of the interview.

2. Working with support persons

a. The Méndez Principles emphasise communication, understanding, assessing and addressing situations of heightened vulnerability; support persons are essential to fulfilling these requirements. If your client has a particular heightened vulnerability, you should arrange for interpreters, health professionals, or appropriate adults to assist.

b. Brief support persons on their role. Explain that their role is to ensure accurate communication and reduce vulnerability, not to influence testimony or interfere with the process.

c. Make sure they understand confidentiality obligations and ensure they are independent from police or investigative authorities.

d. Ensure your client feels safe and able to express themselves freely. Their confidence can reduce the likelihood of coercion and increase the reliability of their account.

3. Access to information

a. Confirm that your client has genuine and timely access to all procedural information, case materials, custody records, and relevant documents before the interview. Restrictions on access to case information increase the risk of coercion and compromise meaningful defence preparation.

b. Remind your client clearly and calmly about their core rights: the right to remain silent, the right not to self-incriminate, the right to legal advice, and the right to challenge evidence obtained improperly or unlawfully. Walk them through what an interview entails, what behaviours to expect from officers, and how they can assert their rights during questioning.

c. Monitor whether authorities respect these rights in practice. If officers attempt to rush proceedings, deny access to files, withhold evidence, discourage the client from speaking with you, or induce waivers through promises or threats, intervene immediately. Such behaviour is inconsistent with both international safeguards and the Méndez Principles.

d. Avoid any suggestion about the defence strategy being offered by investigative agents. Any and all measures related to the defence of the client must come exclusively from you as their lawyer.

4. Waiver of the right to a lawyer

You may be told that your client waived their right to a lawyer prior to meeting you, whether this is at the police station or at court after the interview has already been conducted. This claim must always be treated with caution.

a. A waiver is only valid if it is fully informed, unequivocal, voluntary, and not the product of intimidation, misunderstanding, or inducement. It must also be properly recorded and signed by the client. Challenge the circumstances surrounding any alleged waiver.

b. Ask the client directly whether they understand what a waiver means, and whether any officer pressured, threatened, promised, or misled them. Make sure that when you ask this, you are in a completely private setting where the client feels free to speak to you freely.

c. Explore whether they felt afraid, confused, rushed, or unsure when the waiver occurred. Keep in mind that your client may have had language barriers, lower levels of understanding or intellectual disabilities, placing them at heightened risk of involuntary or coerced waivers.

d. Document every detail surrounding the waiver, including the environment, timing, officer behaviour, and the client's emotional state. If any irregularity or pressure is identified, be

prepared to challenge the validity of the waiver and seek exclusion of any subsequent statements. Courts increasingly recognise that coerced waivers undermine both fair trial rights and the reliability of evidence.

e. A waiver can be revoked at any time. If an interviewee requires the presence of a lawyer, even if they have previously waived that right, the interview should be suspended until a lawyer is present.

f. Children cannot waive their right to a lawyer. The presence of a lawyer is compulsory for children interviewed as suspects.

g. The authority conducting the interview can never dismiss a lawyer for any justification.

B. Identifying torture and ill-treatment of defendants

1. Duty to the client

Defence lawyers have an immediate, overriding duty to ensure the protection of their client's rights. This includes proactively investigating whether mistreatment, coercion, or undue pressure may have occurred. This is not only in the interview room but also during arrest, transportation, or while in holding cells. Early identification is critical because evidence of abuse can quickly disappear.

a. Create a safe and confidential atmosphere in which the client feels comfortable disclosing mistreatment. Many detainees fear retaliation or assume that ill-treatment is "normal".

b. A trauma-informed approach encourages disclosure. This means open and patient listening, clear explanations, and reassurance of your duty to the client.

c. Ask open-ended questions about every phase of custody: arrest, transport, time in the police station, interviews, cell conditions, and access to food, water, medical care, and rest.

d. Many abusive practices occur before lawyers become involved, so your inquiries must be systematic and comprehensive.

e. Pay attention to signs of fear, hesitation, or inconsistencies that may suggest coercion or shock.

2. Properly ascertaining whether any admissions, statements, or evidence were obtained through coercion

a. Lawyers should systematically inquire about the circumstances of arrest, transfer, interview, and detention.

b. Ask the defendant about what happened from the moment of arrest, through to the transport to the police station, to the time that you arrived.

c. If your first meeting is at a court cell, then ask for an account covering the transfers from the police station to the court cell too.

d. The aim of this is to assess whether any statement or evidence which may have been seen to be given freely was actually obtained as a result of conditions incompatible with the Méndez Principles.

3. Document allegations and obtain corroboration

a. Where a defendant reports torture or ill-treatment, record their account in immediate, detailed, chronological form.

b. Encourage them to describe not only what happened but also how they felt, what they saw, heard, or smelled, and any sensory or psychological effects. This helps establish consistency and credibility later.

c. Document the date, time, location, identity of officers involved, specific methods used, instruments (if any), threats made, and any degrading treatment. Include physical symptoms such as pain, bruising, dizziness, or difficulty moving, as well as psychological signs such as anxiety, panic, confusion, or withdrawal.

d. Seek corroborating evidence using all available sources. Request a prompt medical examination by an independent clinician trained in the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)[30] (see Section V(B) below).

e. Take or request photographs of visible injuries and any other relevant evidence. Look for witnesses such as co-detainees, family members present at arrest, neighbours, or medical staff. Review custody records, interview logs, CCTV coverage, and any audio-video recordings of interviews. If authorities refuse to disclose such materials or document evidence, record the refusal. It may support later challenges.

f. Rigorous documentation not only supports the client's individual case, but also contributes to systemic accountability and strengthens torture prevention as a whole.

4. Strategies available for immediate action

a. Where torture or ill-treatment is suspected, defence lawyers must act swiftly and decisively. Delays can result in lost evidence, increased risk to the client, and undermined procedural fairness.

b. File urgent motions to exclude evidence obtained through coercion, drawing on national evidentiary rules, with reference to the exclusionary rule under international law where strategic. Early challenges can shift the burden onto the prosecution to defend the legality of the evidence.

c. Request an immediate, independent medical examination in writing, preferably by a clinician familiar with the Istanbul Protocol. Ensure that the report is properly recorded and preserved.

d. Demand the preservation and disclosure of all relevant materials, including custody registers, CCTV footage, body-worn camera footage, physical evidence, and all interview recordings. Absence of such materials or unexplained gaps can itself indicate procedural violations.

e. Notify the competent judicial authorities of any allegations at the earliest opportunity. Request judicial oversight of treatment and detention conditions and judicial intervention to order protective measures.

f. Seek the client's transfer to a safer location or release if continued detention places them at risk.

30 United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), at https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf

g. Submit complaints to independent oversight bodies, such as national human rights institutions, police complaints authorities, or anti-corruption agencies where appropriate. These complaints not only protect your client but also feed into broader accountability mechanisms.

C. The exclusionary rule: Challenging the use of evidence obtained in breach of the law

International law prohibits reliance on torture-tainted evidence because: "(a) statements made as a result of torture are involuntary, inherently unreliable and violate the right to a fair trial; (b) to rely on such evidence undermines the rights of the torture victim [including the right to remain silent and the presumption of innocence]; (c) it indirectly legitimises torture [undermining the absolute *jus cogens* prohibition of torture, from which the rule derives] and in so doing taints the justice system; and (d) prohibiting reliance on the fruits of torture acts as a form of deterrence and prevention [by removing an incentive to torture]."[31]

As per the UN Basic Principles on the Role of Lawyers, "in protecting the rights of their clients and in promoting the cause of justice, [lawyers shall, *inter alia*] seek to uphold human rights and fundamental freedoms recognized by national and international law".[32] As part of their duties towards their clients, lawyers should be able to, *inter alia*, take "legal action to protect their interests",[33] including filing motions to challenge and exclude evidence obtained in breach of the law.

1. Scope of the exclusionary rule under international law

The exclusionary rule is an integral part of the absolute international legal prohibition against torture and well established under international law – as an express rule under Article 15 of the UNCAT, an implied rule under the ICCPR,[34] and a norm of customary international law.[35] It is likewise reflected in regional human rights conventions and standards.[36]

Article 15 of the UNCAT holds that: *"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."*

For the purpose of this toolkit, the following section will focus on evidence tainted by torture and ill-treatment within the context of criminal justice proceedings. However, the exclusionary rule is not confined to such contexts and also covers, *inter alia*, asylum and refugee determinations, immigration boards, extradition proceedings and military commissions.[37] The SRT has held that the

31 Fair Trials and REDRESS, Tainted by Torture. Examining the use of torture evidence (2018) pg. 8.

32 UN Basic Principles on the Role of Lawyers (1990) para. 14.

33 *Ibid*., para. 13(b).

34 UN Human Rights Committee, General Comment No. 7 (Article 7: Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment) (1982) para. 1; UN Human Rights Committee, General Comment No. 13 (Article 14: Administration of Justice, Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law) (1984) para. 14; UN Human Rights Committee, General Comment No. 20 (Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) para. 12; UN Human Rights Committee, General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (2007) paras. 6, 41.

35 UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, para. 17; UNSRT Juan Méndez, Follow up report: Missions to the Republic of Tajikistan and Tunisia (27 February 2015) UN Doc A/HRC/28/68/Add.2, para. 75. See also: Article 12, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975); Principle 27, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).

36 See, e.g., Article 10, Inter-American Convention to Prevent and Punish Torture (1985); Article 29 (Basic Procedural Safeguards for those Deprived of their Liberty), Robben Island Guidelines (2002); Section N(6)(d)(1), African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003).

37 M. Nowak, M. Birk, and G. Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commen-*

scope of application of the rule covers "any formal decision-making by State officials based on any type of information"; this should be "interpreted in good faith and applied by way of analogy to the collection, sharing and receiving of information tainted by torture, including information obtained by other ill-treatment, even if not used in 'proceedings' as narrowly defined."[38]

As the prohibition against torture and ill-treatment is absolute and non-derogable, it follows that the exclusionary rule must also be observed in all circumstances where torture or ill-treatment has occurred.[39] National legislation must ensure the mandatory exclusion of tainted evidence, prohibiting the exercise of discretion by national authorities where torture or ill-treatment is alleged.[40] The exclusionary rule therefore covers, *inter alia*:

- Confessions and other statements obtained by both torture and ill-treatment,[41] irrespective of the probative value of the statements and whether their use was decisive in securing the defendant's conviction. Of note, the UN Human Rights Committee (HRCttee) has extended this to "any other form of compulsion"[42] and the SRT to any form of coercion.[43] The Inter-American Court of Human Rights (IACtHR) considers "duress of any kind" in line with Article 8(3) of the ACHR,[44] and the African Commission on Human and Peoples' Rights' (ACHPR) Luanda Guidelines specify that prohibited treatment includes: "violence, threats, intimidation, and methods of questioning that impair his or her capacity of decision or his or her judgment."[45]
- Confessions and other statements made by both defendants and third parties, such as a witness or a co-defendant, that incriminate the defendant.[46]

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tary (2nd edition, OUP 2019) pgs. 426, para. 35, and 430, paras. 43-44. See, e.g., UN Committee against Torture, Concluding Observations: Canada (2012) UN Doc CAT/C/CAN/CO/6, para. 12 and Conclusions and Recommendations: UK (2004) UN Doc CAT/C/CR/33/3, para. 4(a)(i), while noting that the practice of the UN Committee against Torture is not consistent on this point (*UN CAT Commentary*, pg. 427, para. 37), referring to 'judicial proceedings', 'court proceedings', 'legal proceedings', or 'any proceeding whatsoever'.

38 Former UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, paras. 30, 47, 74, 82(c).

39 UN Committee against Torture, General Comment No. 2 on the implementation of Article 2 (2007) para. 6; Former UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, para. 22; Méndez Principles, para. 39.

40 UN Committee against Torture, Report on Mexico (25 May 2003) UN Doc CAT/C/75, para. 220(f); UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, above n 38, para. 82(d).

41 See, e.g., Article 12, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975); UN Committee against Torture, General Comment No. 2 on the implementation of article 2 by States parties (2007) para. 6; UN Committee against Torture, Concluding Observation: Belgium (25 August 2021) UN Doc CAT/C/BEL/CO/4, para. 38; UN Committee against Torture, Concluding Observations: Poland (29 August 2019) UN Doc CAT/C/POL/CO/7, para. 12(a); UN Committee against Torture, Concluding Observations: Finland (2017) UN Doc CAT/C/FIN/CO/7, para. 11; UN Human Rights Committee, General Comment No. 13 (Article 14: Right to equality before courts and tribunals and to a fair trial) (1984) para. 14; UN Human Rights Committee, General Comment No. 20 (Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) para. 12; UN Human Rights Committee, General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (2007) para. 41; UNSRT Sir Nigel Rodley, Interim Report (1 October 1999) UN Doc A/54/426, para. 12(e); UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, para. 26; ECtHR, *Gäfgen v. Germany* (1 June 2010) app. no. 22978/05, para. 166; African Commission on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (2002) Guideline 29; American Convention on Human Rights, Article 8(3); Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) Principle V.

42 UN Human Rights Committee, General Comment No. 13 (Article 14: Right to equality before courts and tribunals and to a fair trial) (1984) para. 14.

43 UNSRT Juan Méndez, Interim Report (5 August 2016) UN Doc A/71/298, para. 97.

44 IACtHR, *Cabrera García and Montiel Flores vs. Mexico* (26 November 2010) para. 166.

45 African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) (2014) Guideline 9(c). See also: African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) Section N(6)(d)(i).

46 See, e.g., UN Committee against Torture, *Ktiti v. Morocco* (Communication No. 419/2010) (July 2011) para. 8.8; *Mikel Kabikoitz Carrera Sarobe v. France* (Communication No. 675/2015) (January 2018) paras. 10.1 – 12; ECtHR, *El Haski v Belgium* (25 September 2012) app. no. 649/08, para. 85.

If there is compelling evidence that a person has been subjected to torture or ill-treatment, the fact that this person confirms or makes a subsequent confession should not automatically lead to the conclusion that the confession is valid. This is because a subsequent confession/statement may be the consequence of the mistreatment suffered by the person and the fear that remains thereafter.[47] The IACtHR has emphasised that "any act of torture that may have occurred prior to a defendant making a statement could have an impact at the time when the statement is rendered".[48] Similarly, the HRCttee has found that courts' inference that a victim's allegations lack credibility due to their failure to complain of ill-treatment before a magistrate is manifestly unsustainable in light of their expected return to police detention.[49]

There are inconsistent positions on the application of the exclusionary rule to indirect (derivative/real) evidence, the so-called "fruits of the poisonous tree" doctrine. At the international level, the HRCttee and the SRT have held that the exclusionary rule extends to all evidence, including evidence that was subsequently obtained through legal means but originated in an act of torture or ill-treatment.[50]

The UN Committee against Torture (CAT) has never explicitly pronounced itself on the matter, but its practice appears to hold that evidence deriving from torture and ill-treatment is covered by Article 15 and, thus, is inadmissible.[51]

At the regional level, the IACtHR has held that: "[T]he absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule".[52]

Section N(6)(d)(i) of the ACHPR Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles on Fair Trial in Africa) explicitly prohibits the admission of confessions *or other evidence* obtained through any form of coercion or force.

However, the European Court of Human Rights (ECtHR) distinguishes between real evidence obtained by torture and by ill-treatment. In *Jalloh v. Germany* (2006), the Court held that real evidence obtained as a direct result of torture should never be admissible, irrespective of its probative value.[53]

In *Gäfgen v. Germany* (2010), the Court held that real evidence obtained by ill-treatment falling short of torture may be admissible, provided it does not have a direct impact on the conviction and sentencing.[54] On the facts, the Court considered that the defendant's second confession at trial "broke the causal chain" between the prohibited interrogation methods and the conviction/sentence regarding the impugned real evidence.[55] The Court found no violation of Article 6 (fair

47 European Court of Human Rights, *Harutyunyan v Armenia* (28 June 2007) app. no. 36549/03, para. 65; Inter-American Court of Human Rights, *Cabrera García and Montiel Flores v. Mexico* (26 November 2010) paras. 173 - 174.

48 Inter-American Court of Human Rights, *García Cruz and Sánchez Silvestre v. Mexico* (26 November 2013) para. 58.

49 UN Human Rights Committee, *Singarasa v Sri Lanka* (Communication 1033/2001) (21 July 2004) para. 7.4.

50 UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, above n 38, para. 29; UN Human Rights Committee, General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (2007) para. 6.

51 See, e.g., UN Committee against Torture, Guidelines on the Form and Content of Initial Reports under Article 19 to be Submitted by States Parties to the Convention (2005) UN Doc CAT/C/4/Rev.3, para. 24; UN Committee against Torture, Concluding Observations: Belgium (25 August 2021) UN Doc CAT/C/BEL/CO/4, para. 38.

52 IACtHR, *Cabrera García and Montiel Flores vs. Mexico* (26 November 2010) para. 167.

53 ECtHR, *Jalloh v. Germany* (11 July 2006) app. no. 54810/00, para. 105.

54 ECtHR, *Gäfgen v. Germany* (1 June 2010) app. no. 22978/05, paras. 178 – 180. See also: ECtHR, *El Haski v Belgium* (25 September 2012) app no. 649/08, para. 85.

55 *Ibid.*, para. 180.

trial) of the ECHR because the Article 3 (prohibition of torture and ill-treatment) breach was not connected to this second confession.[56]

In a partly dissenting opinion, six judges held *inter alia*: "From the moment of arrest to the handing down of sentence, criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings ...".[57]

2. Burden and standard of proof under international standards

To establish whether evidence has been obtained as a result of torture or ill-treatment, international standards hold that there should be two distinct stages: (1) the initial stage of triggering the procedure, for which the applicant shoulders the burden of proof or is initiated by the judge; and (2) the subsequent stage of establishing whether or not the evidence was obtained by torture, for which the State – or, more specifically, the authority seeking to rely on the evidence - shoulders the burden of proof.[58]

Regarding (1), while judges can and should challenge evidence of their own volition, defendants' lawyers can also make a "*prima facie*" claim. The defendant should not be required to prove their *prima facie* claim beyond reasonable doubt.[59] Rather, they must demonstrate that their allegation of torture or ill-treatment is "well-founded".[60] The SRT has interpreted this as there being "plausible reasons to believe that there is a real risk of torture or ill-treatment".[61] Expecting or requiring a medical examination or witness testimony generally goes beyond demonstrating that there is a real risk.[62]

Regarding (2), in the context of criminal trials, the burden of proof should then shift to the prosecution and/or the courts to prove beyond reasonable doubt that the evidence was not obtained by unlawful means, including torture or ill-treatment, for it to be admitted.[63] For example, in cases of confessions, the prosecution must prove beyond reasonable doubt that it was given voluntarily of the defendant's own free will. Where there are different medical expert opinions, care must be taken to ensure that the burden of proof does not shift back to the defendant in practice.[64]

The above issues may be exacerbated in civil law jurisdictions, where the standard of proof tends to be communicated as the judge's "innermost conviction", permitting greater discretion in de-

56 *Ibid.,* paras. 181–188.

57 *Ibid.,* Joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, paras. 5, 10.

58 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pgs. 30–31; CTI, UNCAT Exclusionary Rule Tool 8/2020: Non-Admission of Evidence Obtained by Torture and Ill-Treatment: Procedures and Practices (2020) pg. 9; Fair Trials and OSCE ODIHR, Eliminating incentives for torture in the OSCE region: Baseline study and practical guidance (2020) para. 35. See also: UN Committee against Torture, *P.E v France* (Communication No. 193/2001) (December 2002) para. 6.3.

59 Fair Trials and OSCE ODIHR, Eliminating incentives for torture in the OSCE region: Baseline study and practical guidance (2020) para. 36, 38-39.

60 UN Committee against Torture, *GK v. Switzerland* (Communication No. 219/2002) (2003) para. 6.11; UN Human Rights Committee, *Deolall v Guyana* (Communication No. 912/2000) (2004) paras. 5.1 – 5.2.

61 UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, above n 38, para. 33. See also: ECtHR, *El Haski v Belgium* (25 September 2012) app. no. 649/08, para. 88.

62 Fair Trials and OSCE ODIHR, "Eliminating Incentives for Torture," above n 59, para. 40.

63 SRT Sir Nigel Rodley, Interim Report (3 July 2001) UN Doc A/56/156, para. 39(j); SRT Manfred Nowak, Interim Report (14 August 2006) UN Doc A/61/259, para. 64; UN Human Rights Committee, *Singarasa v Sri Lanka* (Communication 1033/2001) (21 July 2004) para. 7.4; UN Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)* (2007) para. 41; IACtHR, *Cabrera García and Montiel Flores vs. Mexico* (26 November 2010) paras. 136, 176.

64 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pg. 35.

termining whether to exclude evidence.[65] Common law jurisdictions have clearer procedures and standards for reversing the burden of proof and the requisite standard of proof.[66] Irrespective of the legal system, the decision to exclude tainted evidence should not depend on the outcome of any criminal investigation into the alleged torture or ill-treatment itself.[67]

3. Legal mechanisms for exclusion

Article 15 of the UNCAT implies a positive obligation for States to ascertain whether or not statements admitted as evidence in any proceedings for which they have jurisdiction have been made as a result of torture.[68] The CAT has found a violation of Article 15 where States have failed to verify the substance of a claim that a confession has been obtained under torture and used those confessions in judicial proceedings against the defendant.[69] This includes where courts have failed to, *inter alia*, "give serious consideration to...allegations of torture when convicting [defendants] on the basis of...confessions".[70]

International human rights law permits State discretion regarding the specific nature of exclusionary procedures in national jurisdictions.[71] However, courts must have an independent procedure to ascertain whether a confession was made voluntarily.[72] National frameworks should define clear steps to be taken by courts if evidence appears to have been obtained through torture or ill-treatment and establish mechanisms by which evidence may be declared inadmissible.[73] This can take the form of judicial directives, codes of practice, protocols, instructions or guidance notes, although such guidance is often lacking in practice.[74] Furthermore, the process for deciding whether or not to exclude evidence must meet international fair trial standards. These include: the determination being made by an independent and impartial tribunal; an oral public hearing; right to effective legal representation, including confidential communications; timely disclosure of material evidence; right to call and examine witnesses; and translation and interpretation where needed.[75]

In practice, the identification and exclusion of tainted evidence can occur at different points in judicial proceedings depending on the type of legal system, relevant laws, and judicial practice. This can include during pre-trial or preliminary hearings to allow early challenges or as a *voir dire*, a trial within a trial. Often, "the trigger will be the attempt by a prosecutor to introduce confession evidence at the start of the trial or just in advance of it".[76]

65 Fair Trials and OSCE ODIHR, "Eliminating Incentives for Torture," above n 59, para. 42.

66 *Ibid.*, para. 46.

67 *Ibid.*, paras. 36, 38.

68 UN CAT, *P.E v France* (Communication No. 193/2001) (December 2002) para. 6.3.

69 See, e.g., UN Committee against Torture, *Déogratias Niyonzima v. Burundi* (Communication No. 514/2012) (January 2015) para. 8.7; *Abdulrahman Kabura v Burundi* (Communication No. 549/2013) (January 2017) para. 7.7; *Ennaâma Asfari v. Morocco* (Communication No. 606/2014) (April 2017) para. 13.8; *Rached Jaïdane v. Tunisia* (Communication No. 654/2015) (October 2017) para. 7.13; *Danil Gabdulkhakov v. Russia* (Communication No. 637/2014) (June 2018) para. 9.6.

70 UN Committee against Torture, *Ali Aarrass v Morocco* (Communication No. 477/2011) (June 2014) paras. 10.8.

71 Fair Trials and OSCE ODIHR, "Eliminating Incentives for Torture," above n 59, para. 36.

72 UN Committee against Torture, Report on Mexico (May 2003) UN Doc CAT/C/75, para. 202.

73 UN CAT, Concluding Observations: Russia (2007) UN Doc CAT/C/RUS/CO/4, para. 21; UNSRT Juan Méndez, Report (10 April 2014) UN Doc A/HRC/25/60, above n 38, para. 24. See also: UN CAT, Articles 2(1) and 16; IACPPT, Article 6.

74 REDRESS, Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings and Options Going Forward (2016) pg. 35.

75 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pg. 29.

76 *Ibid.*, pg. 28.

4. Successful national cases challenging tainted evidence

In addition to the jurisprudence discussed elsewhere in this toolkit, tainted evidence has been successfully challenged before national courts in the following non-exhaustive cases:

- **South Africa: Supreme Court of Appeal, *S v Mthembu* (2008)**

In the first case of its kind since the advent of constitutional democracy in South Africa, the Supreme Court of Appeal considered the admissibility of real evidence obtained by torture from a third party.[77] Central to the issue was Article 35(5) of the Constitution: "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[78]

Noting that the Constitution absolutely prohibits torture, the judge found that the police's use of electric shocks against a third party to obtain real evidence fell within this prohibition.[79] Drawing on Article 15 of the UNCAT and comparative jurisprudence, the Court ruled that evidence obtained by torture is inadmissible, holding that:

"*To admit [the third party's] testimony regarding the [real evidence] would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.*"[80]

This is the case even where the third party testifies apparently voluntarily years after the torture, it being apparent that "its fearsome and traumatic effects were still with him".[81] The judge was of the view that "there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably."[82]

- **Zimbabwe: Supreme Court, *Jestina Mukoko v the Attorney-General* (2012)**

The Supreme Court of Zimbabwe held that Section 15(1) of the Constitution (right not to be subjected to torture or to inhuman or degrading treatment) contains an obligation not to admit or use in any legal proceedings, information or evidence obtained by torture or ill-treatment from an accused person, defendant, or any third party.[83] It determined that the onus is on the applicant to establish, on a balance of probabilities, that the information or evidence used by the public prosecutor to charge and prosecute the accused for a criminal offence was obtained by torture or ill-treatment. It is then for the State to prove beyond reasonable doubt that the decision to charge and prosecute the criminal offence was taken upon consideration of independent information or evidence lawfully obtained and on which reasonable suspicion of them having committed the criminal offence was based.[84]

Public prosecutors' reliance on information or evidence obtained by torture or ill-treatment in deciding to charge and prosecute the applicant results in a breach of Sections 13(1) (right not to

77 Supreme Court of Appeal of South Africa, *S v Mthembu* (379/07) [2008] ZASCA 51, para. 27.

78 *Ibid.*, para. 21.

79 *Ibid.*, paras. 28–31, 33.

80 *Ibid.*, para. 36.

81 *Ibid.*, para. 34.

82 *Ibid.*

83 Supreme Court of Zimbabwe, *Jestina Mukoko v the Attorney-General* (2012) Judgment No. SC 11/12, pgs. 30 – 36.

84 *Ibid.*, pgs. 37–38.

be arbitrarily deprived of personal liberty), 15(1), and 18(1) (right to the protection of the law) of the Constitution.[85]

- **Kenya: High Court,** *Republic Prosecutor v Elly Waga Omondi* **(2015)**

In a trial within a trial to determine the voluntariness of a statement, the judge noted that the onus of proving voluntariness of a retracted statement lies with the prosecution, by tendering evidence to show that all the relevant legal requirements have been met.[86] On the facts, the judge did not find evidence that the officer recording the statement sought to know whether the accused had been threatened, coerced, or tortured before he was brought to his office.[87] The judge held that "[c]are was not taken to ensure that the accused was not threatened before [he recorded the confession] and it is obvious that the [mandatory] requirements to have a third party present under section 25A Evidence Act were not followed."[88] In conclusion, the judge found that the prosecution had failed to discharge the burden of proof and show that the statement was made voluntarily. The judge emphasised that "[a]ll that the accused needs to do is to raise doubts in the court's mind about the voluntariness of such a statement which in my view has been done in this case" and ordered that the statement is inadmissible in evidence.[89]

- **USA: Military Commissions Trial Judiciary,** *Ruling on Mr. al Baluchi's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture* **(2025)**

A Guantanamo Bay military judge granted a defendant's motion to suppress certain statements allegedly made to FBI agents in January 2007 that prosecutors had intended to introduce as evidence against him, holding that the statements were irreconcilably tainted by his earlier torture and ill-treatment in the CIA's Rendition, Detention, and Interrogation (RDI) program and were thus inadmissible. In the ruling, the judge made findings on, *inter alia*, coordination between the FBI and CIA, which was relevant to the motion for suppression because prosecutors had argued that the 2007 statements were admissible, both because enough time had passed since the worst of his treatment and because the statements were made to the FBI, not the CIA. The judge also noted that the conditions of detention at Guantanamo Bay were "markedly similar to those at previous RDI locations".[90]

The judge held that prosecutors had not proven that there had been "sufficient attenuation" between the defendant's 2003 statements while in the RDI program and his 2007 statements to the FBI.[91] The judge was "not convinced" that the 2007 statements would have been obtained were it not for the defendant's "prior experience being tortured, abused, and conditioned in the RDI program" and that subsequent events were "insufficient to attenuate the lingering taint" of his treatment.[92] The judge concluded that the statements were not given voluntarily and were thus inadmissible under the Military Commissions Rules of Evidence, which, *inter alia*, prohibit statements "obtained by the use of torture, or by cruel, inhuman, or degrading treatment" and require statements to be voluntary.[93]

85 *Ibid.*, pgs. 38–40.

86 High Court of Kenya, *Republic Prosecutor v Elly Waga Omondi*, Criminal Case No. 24 of 2012, Ruling in Trial within Trial (11 May 2015) pg. 4.

87 *Ibid.*, pg. 3.

88 *Ibid.*, pg. 4.

89 *Ibid.*

90 Military Commissions Trial Judiciary, *Ruling on Mr. al Baluchi's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture* (2025) pg. 61.

91 *Ibid.*, pg. 104.

92 *Ibid.*, pg. 105.

93 *Ibid.*, pgs. 107–109. See also pgs. 75–77.

5. Procedural rights at the pre-trial and trial stages

Depending on the national legal framework, it may also be possible to challenge the use of evidence where procedural rights and safeguards were violated at the pre-trial and/or trial stages. Examples of such legal strategies and arguments are included in Section V(A) on Resources for Legal Practice below.

D. Pursuing redress for interview-related wrongdoing

International law requires that victims and survivors of torture and ill-treatment can access a national complaints procedure that has the capacity to grant an effective remedy, including adequate and effective reparation (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition).[94] This core international human rights obligation, which is comprised of both procedural and substantive elements, promotes both State accountability and the restoration of dignity to victims and survivors, their families and dependents, and any other person who has suffered harm.

Central to restitution is the exclusion of evidence obtained through torture or ill-treatment.[95] The Méndez Principles stress that excluding evidence obtained under torture or ill-treatment is an interviewee's right and accordingly constitutes an effective remedy against wrongdoing by interviewers.[96] Other forms of restitution include vacating arrest warrants, quashing charges, staying proceedings, annulling convictions, releasing individuals from prison, and expunging criminal records.[97]

Beyond the use of legal mechanisms to challenge and exclude tainted evidence within a criminal trial, lawyers can assist their clients in pursuing redress for interview-related wrongdoing, whether through torture or ill-treatment, coercion or procedural violations, via a range of other avenues, noting that multiple forms of reparation are typically required to respond to the harms caused by torture and ill-treatment. Some of these avenues at the national, regional and international level are set out below.

1. National complaint mechanisms

Some jurisdictions provide for constitutional fundamental rights petitions. For example, in Kenya, after relying on Articles 22 (Enforcement of Bill of Rights) and 23 (Authority of courts to uphold and enforce the Bill of Rights) of the Constitution for jurisdictional purposes, petitioners can rely on Articles 49(1)(d) and 50(2)(l) of the Constitution to plead a violation of specific fundamental rights. The former establishes the right of arrested persons to not be compelled to make any confession or admission that could be used in evidence against them. This is mostly appropriate for any such occurrence thereof before or during the trial period outside of the confines of a court. The latter establishes the right to refuse to give self-incriminating evidence during trial in a court of law.

In Mexico, the legal remedy of *juicio de amparo* allows victims to request the protection of the federal judiciary to ensure that allegations of torture are investigated, the affected person is protected, and the violations committed are remedied. In *Amparo en revisión 703/2012* (2013), the

94 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pg. 55. See also, e.g., UDHR, Article 8; ICCPR, Article 2; UNCAT, Articles 13 and 14(1). For further information on the means of reparation in the context of forced confessions and the underlying acts of torture, see: Fair Trials and REDRESS, "Tainted by Torture," above n 31, pgs. 55–57.

95 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pg. 56.

96 Méndez Principles, Principle 5, para. 203.

97 Fair Trials and REDRESS, "Tainted by Torture," above n 31, pg. 56. See also: IACtHR, *Bayarri v. Argentina* (30 October 2008) para. 108; IACtHR, *Omar Humberto Maldonado Vargas et al. v. Chile* (2 September 2015) paras. 167 and 170.

Supreme Court of Mexico established that confessions obtained under torture are inadmissible, dismissed the case against the victim, and ordered his immediate release.

Lawyers can also bring civil actions for pecuniary and non-pecuniary damages before national courts, using tort law and/or human rights legislation.[98]

Beyond court mechanisms, national human rights institutions, ombudspersons, inspectorates, and administrative complaints bodies may have mandates to investigate unlawful conduct and/or complaints procedures.

Finally, law enforcement and other investigative bodies may have internal affairs units or professional standards departments that can investigate and sanction unlawful conduct. For example, in Ukraine, the Prosecutor General's Office has a Department of Procedural Guidance in Criminal Proceedings on Torture and Other Serious Violations of Citizens' Rights by Law Enforcement Agencies. The Department is mandated to, *inter alia*, ensure oversight of legislative compliance by law enforcement during pre-trial investigations in criminal proceedings.[99]

2. Regional complaint mechanisms

Subject to meeting the admissibility criteria,[100] lawyers can bring cases of interview-related wrongdoing before the African, European, and Inter-American regional human rights systems, as exemplified below:

A. African Commission and Court on Human and Peoples' Rights

In the case of *Malawi African Association and Others v. Mauritania* (2000), the ACHPR found that the national tribunal's reliance on forced statements in reaching its verdicts against the accused constituted a violation of the right to the presumption of innocence.[101]

In *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* (2011), the African Commission held that "once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment."[102] On the facts of the case, the Commission found that the victims' allegations of torture and ill-treatment were consistent with the circumstances of their case, including the incommunicado nature of their detention and the report of the Forensic Medical Authority, which, at a minimum, indicated a risk of ill-treatment. Despite this, their confessions had been admitted as evidence and formed at least part of the basis of their convictions. The Commission found that the reliance on such evidence violated Article 7 (right to a fair trial) of the African Charter on Human and Peoples' Rights.[103]

98 See, e.g., REDRESS, Guide to Justice, Accountability and Reparations for Survivors of Torture: Information for UK-based survivors of torture seeking justice (2022) pgs. 13-15; REDRESS, Practice Note 12: Compensation for Victims of Torture (2024).

99 Interim Report on Implementation of the Recommendations Received by Ukraine Within the Third Cycle of the Universal Periodic Review (2020) para. 102.

100 See, e.g., OMCT, The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and Their Advocates (2014, 2nd edition), Part C (Protection against Torture: Procedures before the African Commission and African Human Rights Court); OMCT, The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System: A Handbook for Victims and Their Advocates (2014, 2nd edition), Part 2 (Submitting a Communication); European Court of Human Rights, Practical Guide on Admissibility Criteria (August 2025).

101 ACHPR, *Malawi African Association and Others v. Mauritania* (Communication 54/91) (11 May 2000) para. 95.

102 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* (Communication 334/2006) (3 March 2011) para. 218.

103 *Ibid.*, para. 219. See also: *Ibrahim Almaz Deng & 6 Others (Represented by the Institute for Human Rights and Development in Africa) v Republic of the Sudan* (Communication 470/14) [2022] ACHPR 9 (13 May 2022) paras. 180 - 183.

B. European Court of Human Rights

The ECtHR has considered interview-related wrongdoing in a broad range of circumstances, including *Jalloh v. Germany* (2006) and *Gäfgen v. Germany* (2010) referenced above.

Additionally, in *Harutyunyan v Armenia* (2007), the ECtHR held that, *inter alia*, the use of witnesses' statements that had been extracted under torture, as had been established by domestic courts, and which had been used at the applicant's trial to secure his conviction for murder, rendered the trial as a whole unfair. Noting that admissibility of evidence is primarily a matter for national law, the ECtHR considered whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.[104] The Court held that incriminating evidence obtained as a result of torture should never be relied on as proof of guilt, irrespective of its probative value.[105] Any other conclusion indirectly legitimises the conduct prohibited by Article 3 (prohibition of torture and ill-treatment) and "afford[s] brutality the cloak of law".[106] The Court concluded that, regardless of the impact the statements obtained under torture had on the outcome of the applicant's criminal proceedings, the use of such evidence rendered his trial as a whole unfair, finding a violation of Article 6(1) (right to a fair trial) of the ECHR.[107]

In the case of *Kaçiu and Kotorri v Albania* (2013), the first applicant was tortured into making self-incriminating statements, which served as the sole basis for his conviction.[108] In this regard, the Court found a violation of Article 6(1) (right to a fair trial) in conjunction with Article 6(3)(c) (right to legal assistance) of the ECHR.[109] The second applicant was convicted, *inter alia*, on the basis of the first applicant's tainted statements.[110] The ECtHR concluded that "the admission in evidence of incriminating statements obtained from a third party as a result of torture renders the proceedings as a whole unfair, irrespective of whether such evidence was decisive for securing the applicant's own conviction".[111]

The Court has also held that an applicant's self-incriminating statements that were obtained by ill-treatment (as opposed to torture) in breach of Article 3 (prohibition of torture and ill-treatment), irrespective of the classification, and which were used at their trial, regardless of their probative value, also renders the trial as a whole unfair.[112]

104 European Court of Human Rights, *Harutyunyan v Armenia* (28 June 2007) app. no. 36549/03, paras. 60 – 61.

105 *Ibid.*, para. 63.

106 *Ibid.*

107 *Ibid.*, para. 66.

108 European Court of Human Rights, *Kaçiu and Kotorri v Albania* (9 December 2013) app. nos. 33192/07 and 33194/07, paras. 118 – 121.

109 *Ibid.*, para. 121.

110 *Ibid.*, para. 122.

111 *Ibid.*, para. 128.

112 See, for example, ECtHR, *Levinţa v. Moldova* (16 December 2008) app. no. 17332/03; *Stanimirović v. Serbia* (18 October 2011) app. no. 26088/06; *Iordan Petrov v. Bulgaria* (24 January 2012) app. no. 22926/04; *Grigoryev v. Ukraine* (15 May 2012) app. no. 51671/07; *Hajnal v. Serbia* (19 June 2012) app. no. 36937/06. The only exception to this case law is *Alchagin v. Russia* (17 January 2012) app. no. 20212/05, whereby a confession statement that had been extracted as a result of inhuman and degrading treatment contrary to Article 3 did not lead to an automatic violation of the applicant's overall trial, on account of the fact that the confession statement had been initially made in the presence of a lawyer, that it was maintained at the trial and that the applicant's rights of defence were secured at the trial.

C. Inter-American Commission and Court of Human Rights

In the case of *Bayarri v. Argentina* (2008), the victim was held in preventive detention for almost 13 years based on a confession obtained by torture,[113] the use of which the IACtHR found to be in violation of Article 8(2)(g) of the ACHR (right not to be compelled to be a witness against oneself or to plead guilty).[114] The Federal National Criminal and Correctional Appeals Chamber declared that this confession was invalid and annulled the procedural actions arising therefrom.[115] The IACtHR noted that this constituted an effective measure to end the consequences of the violation of judicial guarantees.[116] Having established that the victim was subjected to criminal proceedings that violated his right to due process and was subsequently acquitted by national judicial authorities, the Court ordered Argentina to, *inter alia*, eliminate all criminal records against him related to the proceedings.[117]

In *Cabrera García and Montiel Flores v. Mexico* (2010), the IACtHR emphasised that "[t]he annulment of [tainted] evidence is a necessary means to discourage the application of any form of coercion."[118] The Court also reiterated that "the situations of defenselessness and vulnerability felt by an individual when detained and subjected to cruel, inhuman and degrading treatment in order to wear down that individual's psychological resistance and force him to incriminate himself, can produce feelings of fear, anguish and inferiority capable of humiliating and overwhelming an individual and possibly breaking his physical and moral resistance."[119]

On the facts, the Court concluded that the victims were subjected to cruel treatment "in order to break down their psychological resistance and force them to incriminate themselves or confess to certain illegal activities".[120] This cruel treatment had an impact on the victims' first statements before the Public Prosecutor's Office and a subsequent statement before the competent court, which had placed the burden of proof on the victims to show that violence was used as a means to extract a confession.[121] The IACtHR reiterated that the burden of proof rests with the State and concluded that the domestic courts should have completely excluded all the statements before the Public Prosecutor's Office and the competent court, given that the existence of cruel and inhuman treatment disqualified the use of such evidence, according to international standards.[122] The Court found a violation of Article 8(3) (confession is only valid if made without coercion of any kind) in relation to Article 1(1) of the ACHR (obligation to respect rights).

In *García Cruz and Sánchez Silvestre v. Mexico* (2013), the victims were criminally prosecuted and convicted of a range of offences after being tortured to force them to confess.[123] National criminal courts subsequently overturned the criminal convictions, ultimately issuing an acquittal and ordering their release almost 16 years after the violations occurred.[124] In a friendly settlement agreement, Mexico acknowledged responsibility for, *inter alia*, "the violation of the principle of presumption of innocence protected in Article 8(2) of the Convention and the guarantees protected in Article 8(2)(g) and 8(3) of the same instrument, as well as Article 10 of the Inter-American Convention to Pre-

113 Inter-American Court of Human Rights, *Bayarri v Argentina* (30 October 2008) paras. 71, 87.
114 *Ibid.*, para. 109.
115 *Ibid.*, para. 83.
116 *Ibid.*, para. 108.
117 *Ibid.*, para. 180.
118 Inter-American Court of Human Rights, *Cabrera García and Montiel Flores v. Mexico* (26 November 2010) para. 166.
119 *Ibid.*, para. 174.
120 *Ibid.*, para. 175. See also, para. 134.
121 *Ibid.*, paras. 175–176.
122 *Ibid.*, paras. 176–177.
123 Inter-American Court of Human Rights, *García Cruz and Sánchez Silvestre v. Mexico* (26 November 2013) paras. 33 - 35.
124 *Ibid.*, paras. 51, 61.

vent and Punish Torture, because ""in both criminal cases [the] courts accepted the prosecution statements ... to establish the criminal responsibility of the defendants, indicating that there was no evidence of torture," "placing the burden of proof on them and presuming [them] to be guilty." The courts did not comply with the requirement to completely exclude "the statements made to the Public Prosecutor and the judicial statement ..." "given that according to international standards the existence of torture invalidated the use of this evidence.""[125]

Regarding reparation, as a measure of restitution, the Court recalled that all legal, administrative, criminal and police records against the victims in relation to the case should be eliminated.[126] As a measure of guarantees of non-repetition, the Court considered training for judicial officers to be particularly important "given that some of the violations in this case are derived from the failure of the judicial authorities and the Public Prosecutor to investigate the allegations of torture as well as their use of incriminating statements made by the victims while under torture to uphold the criminal convictions".[127]

In the case of *Omar Humberto Maldonado Vargas et al. v. Chile* (2015), the victims were tortured and ill-treated to extract confessions, before being tried and convicted of a series of criminal offences before a court-martial during the Chilean military dictatorship.[128] Due to temporal jurisdiction limitations, the IACtHR could only consider whether the victims could "rely on an adequate and effective remedy to review their convictions that had been handed down in a military criminal trial that took into account evidence obtained through torture."[129] The Court considered this question in relation to two different time periods: 1) before the 2005 constitutional reform that accorded the Supreme Court jurisdiction to examine judgments relating to courts-martial decisions; and (2) after 2005 and the aforementioned constitutional reform.[130] In relation to (1), the Court found Chile responsible for violating Article 25(1) (right to an effective judicial remedy), in relation to both Article 1(1) (obligation to respect rights) and Article 2 (adoption of domestic legal provisions to give effect to rights and freedoms) of the ACHR.[131] In relation to (2), the Court found a violation of Article 2 in relation to Article 25 of the ACHR.[132]

Regarding reparation, as a measure of restitution, the Court ordered Chile to provide the victims with an effective and rapid mechanism to review and/or annul the judgments handed down against them.[133] As a guarantee of non-repetition, the Court ordered Chile to "adopt the legislative, administrative and any other measure appropriate to make a mechanism available to those convicted by courts-martial during the Chilean military dictatorship that is effective to review and annul the guilty verdicts delivered in proceedings that took into account evidence and/or confessions obtained through torture."[134]

125 *Ibid.*, para. 55(iii).

126 *Ibid.*, paras. 72–73.

127 *Ibid.*, para. 93.

128 Inter-American Court of Human Rights, *Omar Humberto Maldonado Vargas et al. v. Chile* (2 September 2015) paras. 19, 29 - 39.

129 *Ibid.*, para. 118.

130 *Ibid.*, paras. 126–142.

131 *Ibid.*, para. 132.

132 *Ibid.*, para. 142.

133 *Ibid.*, para. 167.

134 *Ibid.*, para. 170.

3. International complaint mechanisms

Subject to meeting the admissibility criteria,[135] lawyers can bring individual communications before the CAT and the HRCttee where State parties have made the necessary declarations under Article 22 of the UNCAT and Article 41 of the ICCPR respectively.

The CAT has held that the general nature of Article 15 of the UNCAT derives from the absolute nature of the prohibition of torture and therefore implies an obligation for any State party to verify that statements included in proceedings under its jurisdiction were not obtained through torture.[136] The Committee has found violations of Article 15 of the UNCAT where State parties fail to undertake any such verification and use such statements, both oral and written, in judicial proceedings against the complainant.[137] In *Bani v Morocco* (2022) and *Laaroussi v Morocco* (2022), the Committee held that a medical examination that was not carried out in accordance with the Istanbul Protocol was insufficient verification.[138] Across these two cases, the Committee urged the State party to, *inter alia*, initiate a thorough and impartial investigation into the incidents in question in full conformity with the Istanbul Protocol; provide the complainant and his family with fair and adequate compensation; refrain from any form of pressure, intimidation or reprisals likely to harm the physical and moral integrity of the complainant; and enable the complainant to receive visits from his family, counsel, and doctor of his choice in prison.[139]

In *Gabdulkhakov v Russian Federation* (2018), the CAT found that the trial court failed to thoroughly assess the complainant's claims that his self-incriminatory statements were extracted under torture before presenting them as evidence to the jury.[140] On the facts, the trial court did not address, *inter alia*, the complainant's claims about spending many hours in the cold without proper clothing, or his fear for his wife who was also undressed and constantly threatened with sexual violence.[141] The Committee urged the State party to provide the complainant with an effective remedy, including, *inter alia*, a retrial "in accordance with the principle laid out in [Article 15 of the UNCAT]" and preventing the recurrence of any such violations in the future.[142]

135 See, e.g., OMCT, A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies: Seeking Remedies for Torture Victims (2014, 2nd edition) Part II: Procedures of the Human Rights Committee and the Committee Against Torture.

136 UN Committee against Torture, *P.E. v. France* (Communication No. 193/2001) (21 November 2002) paras. 6.3; UN Committee against Torture, *Ktiti v. Morocco* (Communication No. 419/2010) (26 May 2011) para. 8.8. See also: UN Committee against Torture, *G.K. v. Switzerland* (Communication No. 219/2002) (7 May 2003) paras. 6.9 – 6.12, 7.

137 UN Committee against Torture, *Jacqueline Castillo Ortiz v Mexico* (Communication No. 1114/2021) (17 April 2025) para. 8.5; *Alexis Turikukiye v Burundi* (Communication No. 911/2019) (10 April 2025) para 9.8; *Shamil Guseinov v Russian Federation* (Communication No. 975/2020) (11 November 2022) para. 7.3; *Sidi Abdallah Abbahah v Morocco* (Communication No. 871/2018) (24 November 2021) para. 11.11; *Omar N'Dour v Morocco* (Communication No. 650/2015) (19 November 2021) para. 11.8; *Damián Gallardo Martínez et. al. v Mexico* (Communication No. 992/2020) (18 November 2021) para 7.12; *A.N. v Burundi* (Communication No. 612/2014) (2 May 2017) para. 7.10; *Ennaâma Asfari v Morocco* (Communication No. 606/2014) (15 November 2016) para. 13.8; *Abdulrahman Kabura v Burundi* (Communication No. 549/2013 (11 November 2016) para. 7.7; *Rached Jaïdane v Tunisia* (Communication No. 654/2015) (11 August 2017) para. 7.13; *Ramiro Ramírez Martínez et. al. v Mexico* (Communication No. 500/2012) (4 August 2015) para. 17.11; *Déogratias Niyonzima v Burundi* (Communication No. 514/2012) (21 November 2014) para. 8.7.

Of note, in *Sergei Kirsanov v Russia* (Communication No. 478/2011) (2014), the UN Committee against Torture refused to apply Article 15 in the context of conditions of detention in a temporary confinement ward that amounted to ill-treatment under Article 16 (para. 11.2), noting: "[w]ith regard to the alleged violations of articles 14 and 15 of the Convention, the Committee notes that the scope of application of the said provisions only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention, though specifically referring to articles 10, 11, 12 and 13, does not mention articles 14 and 15 of the Convention. . ." (para. 11.4).

138 UN Committee against Torture, *Mohamed Bani v Morocco* (Communication No. 999/2020) (2 November 2022) para. 7.10; *Abdel Jalil Laaroussi v Morocco* (Communication No. 891/2018) (15 July 2022) para. 8.10. On the Istanbul Protocol, see Section V(B) of this toolkit.

139 UN Committee against Torture, *Mohamed Bani v Morocco* (Communication No. 999/2020) (2 November 2022) para. 9; *Abdel Jalil Laaroussi v Morocco* (Communication No. 891/2018) (15 July 2022) para. 10.

140 UN Committee against Torture, *Danil Gabdulkhakov v Russian Federation* (Communication No. 637/2014) (17 May 2018) para. 9.6.

141 *Ibid.*

142 *Ibid.*, para. 11.

The HRCttee has considered forced confessions in relation to Articles 14(1), 14(2), and 14(3)(g) of the ICCPR (right to a fair trial, right to presumption of innocence, and right against self-incrimination respectively), sometimes in conjunction with Article 7 of the ICCPR (prohibition of torture and ill-treatment).[143] In *Berry v Jamaica* (1994), the HRCttee held that the right against self-incrimination must be understood in terms of the absence of any direct or indirect physical or psychological coercion by the investigating authorities on the accused with a view to obtaining a confession of guilt.[144] The Committee was of the view that the complainant was entitled to an appropriate remedy entailing his release.[145]

In *Singarasa v Sri Lanka* (2004) and *Deolall v Guyana* (2004), the HRCttee held that it is implicit in the right against self-incrimination that the prosecution prove that the confession was made without duress.[146] Placing the burden on the victim to prove that their confession was made under duress violates Articles 14(2) and 14(3)(g), read together with Articles 2(3) and 7 of the ICCPR.[147] In the former case, the Committee held that an effective and appropriate remedy included release or retrial and compensation.[148] In the latter, it held that this included release or commutation.[149]

143 See, e.g., UN Human Rights Committee, *Kurbanova v Tajikistan* (Communication 1096/2002) (6 November 2003) paras. 7.4 – 7.5; *Shukurova v Tajikistan* (Communication 1044/2002) (17 March 2006) paras. 8.2 - 8.3.

144 UN Human Rights Committee, *Berry v Jamaica* (Communication 330/1988) (7 April 1994) para. 11.7. See also: *Kelly v. Jamaica* (Communication No. 253/1987) (8 April 1991) para. 5.5 (noting that the Committee was unable to conclude a violation on the facts of the case).

145 *Ibid.,* para. 14.

146 UN Human Rights Committee, *Singarasa v Sri Lanka* (Communication 1033/2001) (21 July 2004) para. 7.4; *Deolall v Guyana* (Communication No. 912/2000) (1 November 2004) paras. 5.1 – 5.2.

147 UN Human Rights Committee, *Singarasa v Sri Lanka* (Communication 1033/2001) (21 July 2004) para. 7.4.

148 *Ibid.,* para. 7.6.

149 UN Human Rights Committee, *Deolall v Guyana* (Communication No. 912/2000) (1 November 2004) para. 7.

V. Resources for Legal Practice

A. Legal strategies and arguments

Lawyers must rigorously challenge the admissibility of tainted evidence. Legal strategies and arguments can be drawn from a combination of avenues and legal frameworks, including constitutional rights, anti-torture, fair trial, criminal procedure and evidence legislation, and authoritative judicial precedents. The construction of compelling arguments involves not only leveraging existing case law but also identifying gaps or inconsistencies in national laws or cases that may undermine legal and procedural safeguards against such evidence.[150] In addition to individual cases, strategic litigation challenging coercive practices can serve as a catalyst for broader institutional reforms.[151] Finally, where strategic and admissible in the country context, defence lawyers should encourage dynamic interpretation of national laws in line with international human rights standards, referencing both international law and comparative jurisprudence in their motions.

1. Model arguments referencing scientific research

Irrespective of the type of case, lawyers are encouraged to present scientific research on the unreliability of coerced statements in their legal submissions. The Méndez Principles detail significant evidence that the application of coercion can both initially enhance resistance on the part of the interviewee and, if continually applied, lead to the provision of false information or a false confession.[152] Examples include:[153]

- The use of coercive interviewing methods is more likely to lessen the interviewee's propensity to cooperate during an interview and to create resistance on the part of the interviewee, even when they might otherwise have chosen to answer questions.[154]
- Coercive techniques interfere with and may damage the memory-retrieval capacity of the brain.[155]

150 Regional Guidelines for Lawyers Representing Individuals Facing the Death Penalty and Execution in Asia (26 March 2025) pg. 14, *mutatis mutandis*.

151 *Ibid*, pg. 12, *mutatis mutandis*.

152 Méndez Principles, Principle 1, para. 21.

153 For more detailed information on research on ineffective practice, see: Méndez Principles, Principle 1, paras. 21 – 28. For research on effective practice, see: Méndez Principles, Principle 1, paras. 29 – 35.

154 Méndez Principles, Principle 1, para. 23.

155 Méndez Principles, Principle 1, para. 21.

- The threat or enactment of physical harm to an interviewee induces heightened states of stress, which impair memory retrieval and lead to diminished recall of accurate or reliable information.[156]
- Psychologically coercive questioning methods, such as manipulating an interviewee's perception of culpability (e.g. by presenting false evidence), or their perceptions of the consequences associated with a confession (e.g. downplaying or exaggerating the consequences associated with conviction of the alleged crime, implying leniency, or offering moral justifications), have been shown to produce incorrect information and increase rates of false confessions.[157]
- Leading or suggestive questions have been shown to contaminate the interviewee's memory and corrupt the accounts they provide.[158]

The validity of these arguments has been recognised in at least three cases at the national level to date. The judges in these cases noted that inappropriate techniques call into question the probative value of the information obtained and that the Méndez Principles offer a framework for gathering more reliable information:

- Appeal decision, *Auto TP-SA 1296 de 2022* (2022): The Colombian Special Jurisdiction for Peace (SJP) noted that "[a]n inadequately prepared interview or one that does not use appropriate questioning techniques may also affect the substance, sufficiency and clarity of the information provided by those appearing before the SJP. Vague, general, suggestive or repetitive questions ...can lead the person appearing to give equally vague, superfluous or general accounts or, even when they are able and willing to do so, to refrain from providing relevant and new personal and contextual information ... The same may occur when the interviewer approaches the interview with the sole intention of obtaining a confession. In such cases, according to the [Méndez Principles], the interviewer is likely to be influenced by the so-called "confirmation bias" and believes that, ... to fulfil the duty to provide the truth, only information provided by the interviewee that confirms "his or her belief of guilt " is useful, relevant or truthful."[159]
- Special Appeal 2123334 – MG (2022): The Superior Tribunal of Justice of Brazil referenced the Méndez Principles in noting the settled science on the unreliability of confession-driven questioning:[160]

  > we can see that the problem lies in the logic obsessed with confessions. This needs to be abandoned so that, in its place, a well-oriented investigation model can be built, seriously committed to the diversity of hypotheses to be explored, with the search for a multiplicity of informative or probative elements that can contribute to the best reconstruction of the procedurally valid truth

- Habeas Corpus No 915025 - SP (2024): The Superior Tribunal of Justice of Brazil referenced the Méndez Principles as "a set of measures that should ideally be adopted to collect more epistemically reliable statements".[161]

156 Méndez Principles, Principle 1, para. 24.

157 Méndez Principles, Principle 1, para. 24.

158 Méndez Principles, Principle 1, para. 25.

159 Colombian Special Jurisdiction for Peace, Appeal Decision, Auto TP-SA 1296 de 2022 (23 November 2022), para. 24. Visit https://www.apt.ch/our-priorities/dignity-and-fairness-criminal-justice-system/principles-effective-interviewing to access APT's compilation "United Nations, regional and national documents/jurisprudence referring to the Principles on Effective Interviewing for Investigations and Information Gathering (Méndez Principles)" and read APT's unofficial translation of the relevant judgment.

160 Brazil, Superior Tribunal of Justice, Special Appeal 2123334 – MG (2022/0137982-5).

161 Brazilian Superior Court of Justice, Habeas Corpus No. 915025 - SP (2024/0181816-3) (24 March 2025), p. 15. Visit https://www.apt.ch/our-priorities/dignity-and-fairness-criminal-justice-system/principles-effective-interviewing to access APT's compilation "United Nations, regional and national documents/jurisprudence referring to the Principles on Effective In-

Lawyers should cite these decisions to demonstrate that the Méndez Principles are not merely aspirational standards but carry legal weight in adversarial proceedings, having been relied upon by courts to assess the reliability of evidence obtained through questioning. Where a client's case turns on the admissibility or probative value of statements gathered through coercive or confession-driven techniques, these judgments provide a compelling foundation for challenging such evidence and urging investigative or judicial bodies to adopt the Méndez Principles framework.

2. Comparative jurisprudence challenging procedural violations

Lawyers can also challenge procedural violations that lead and/or contribute to forced confessions, as well as non-compliance with associated safeguards,[162] and argue that the impact and/or risk renders any resulting confession inadmissible *per se*. Examples from comparative and regional jurisprudence include:

- *Salduz v Turkey* (2008): The ECtHR held that "[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."[163]
- *Egyptian Initiative for Personal Rights and Interights v. Egypt* (2011): The ACHPR held that "...where a confession is obtained in the absence of certain procedural guarantees against [torture or ill-treatment], for example during incommunicado detention, it should not be admitted as evidence."[164]
- *Amparo en revisión 703/2012* (2013): The Supreme Court of Mexico held that "if the detention was unlawful, the evidence obtained by means of it would also be legally invalid, in accordance with the principles of due process and lawful evidence gathering".[165]
- *Shavargo McPhee (Appellant) v The Queen (Respondent) (Bahamas)* (2016): The Judicial Committee of the Privy Council noted that: "[The] requirement for a scrupulous record of all interviews with a suspect is a critical part of modern policing. Experience the world over has shown the damage that can be done to the criminal process by informal interrogations or assertions of informal admissions and/or by allegations that such conversations have taken place. The rule requiring a record is both a very necessary protection of suspects and also designed for the protection of police officers against unfounded allegations, all too easily made

terviewing for Investigations and Information Gathering (Méndez Principles)" and read APT's unofficial translation of the relevant judgment.

162 See also, e.g., UNSRT Juan Méndez, Interim Report (5 August 2016) UN Doc A/71/298, para. 100: "National laws must provide for the exclusion of all evidence obtained in violation of safeguards designed to prevent mistreatment ... , such as confessions or incriminating statements obtained in violation of one 's rights to be informed of his or her rights and legal status before questioning, or duly warned that his or her words may be recorded and used in evidence against him or her. Evidence should also be excluded when access to counsel is unduly delayed or denied, or involuntarily waived; whenever specific safeguards applicable to the questioning of vulnerable persons are infringed; and when persons are denied adequate breaks and periods of rest during interviews save compelling circumstances..."

163 ECtHR, *Salduz v Turkey* (27 November 2008) app no. 36391/02, para. 55. Of note, UN Special Rapporteurs on Torture have also noted that national legislation must only accept confessions when made in the presence of competent and independent counsel (and support persons when appropriate) and confirmed before an independent judge: UNSRT Juan Méndez, Interim Report (5 August 2016) UN Doc A/71/298, para. 99; UNSRT Manfred Nowak, Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention (5 February 2010) UN Doc A/HRC/13/39/Add.5, para. 101.

164 ACHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (Comm No 334/2006) (3 March 2011) para. 218. Of note, UN Special Rapporteurs have also held that if doubts arise about the voluntariness of a person's statements, for example, when no information about the circumstances of the statement is available or when pursuant to arbitrary, secret or incommunicado detention, the statement should be excluded regardless of direct evidence or knowledge of abuse: UNSRT Juan Méndez, Interim Report (5 August 2016) UN Doc A/71/298, para. 99; UN Special Rapporteur on Protection of human rights and fundamental freedoms while countering terrorism Martin Scheinin, Report (6 August 2008) UN Doc A/63/223, para. 45(d).

165 Mexican Supreme Court of Justice, *Amparo en revisión 703/2012*, para. 95. Unofficial translation.

by those who have little to lose and, in the absence of a record, extremely difficult to refute. In sum, the rule is a vital feature of a system which aims to convict the guilty and acquit those whose guilt is not proved. It is central to the fairness of the process."[166]

- *Federal Republic of Nigeria v. Akaeze* (2024): The Supreme Court of Nigeria mandated that law enforcement officers must electronically record suspects' confessional statements in audio-visual formats during criminal investigations to be admissible.[167]

B. Working with independent medical experts

The Istanbul Protocol - formally entitled "Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2022 edition)" - is the international standard for the effective investigation and documentation of torture and ill-treatment. Developed by medical, legal, and human rights experts, it provides detailed guidance on how to conduct impartial examinations, record physical and psychological evidence, and assess consistency between allegations and clinical findings. Its purpose is not only to document harm but to ensure that such evidence can be used credibly in legal proceedings to support accountability and protection of victims.

For defence lawyers, it will be useful to familiarise yourselves with the guide by the International Rehabilitation Council for Torture Victims: *Action against torture, A practical guide to the Istanbul Protocol – for lawyers*.[168] In short, the steps to take are as follows:

a. Defence lawyers should request an independent medical examination as early as possible when there is suspicion of torture or ill-treatment.

b. Remind authorities that the Istanbul Protocol (IP) sets the international standard for such examinations.

c. Ensure the examiner is properly qualified, ideally a clinician trained in IP-compliant forensic documentation, and independent. They should not be employed by the detaining authority.

d. Explain the purpose of the examination to your client, including the importance of giving a full account of physical and psychological symptoms consistent with IP guidelines.

e. Secure and preserve all medical records, including initial assessments at arrest, emergency treatment notes, and any documentation of injuries - these may later support an IP-based medico-legal evaluation.

f. Ask the medical expert to assess both physical and psychological findings, as the Istanbul Protocol emphasises that torture may leave non-visible or delayed psychological injuries.

g. Provide the medical expert with relevant case information, such as the client's account of events, timeline of detention, and any known methods of alleged abuse, so the expert can analyse consistency under IP standards.

h. Request that the report follow the structure and evidentiary approach set out in the Istanbul Protocol, including clear descriptions of injuries, clinical reasoning, and an assessment of consistency between findings and allegations.

i. Review the draft medico-legal report with the expert, ensuring accuracy, completeness, and

166 Judicial Committee of the Privy Council, *Shavargo McPhee (Appellant) v The Queen (Respondent) (Bahamas)* [2016] UKPC 29, Privy Council Appeal No 0040 of 2015, para. 10.

167 Supreme Court of Nigeria, *Federal Republic of Nigeria v. Akaeze* [2024] 12 NWLR (Pt. 1951) 1 (unreported).

168 International Rehabilitation Council for Torture Victims (IRCT), Action against torture, A practical guide to the Istanbul Protocol – for lawyers (2009).

alignment with IP principles before submission to authorities or courts.

j. Use the report proactively in legal strategy, such as arguing for exclusion of coerced evidence, challenging the conditions of detention, or requesting protective measures for the client.

k. Prepare the expert for potential testimony, including explaining courtroom procedure and reinforcing the importance of staying within the objective, methodological boundaries prescribed by the Istanbul Protocol.

C. Participation in review processes and cooperation with oversight bodies

Through lawyers' first-hand insights into issues in criminal justice systems that undermine access to justice, the right to a fair trial, and the prohibition of torture and ill-treatment, lawyers and their professional associations can provide an authoritative and persuasive voice in calling for systematic reform.

Lawyers and their professional associations can engage with review processes and oversight mechanisms where they exist, or advocate for their establishment where they do not. They can also actively participate in the corresponding development, enactment, and publication of law and policy, in the following illustrative areas:

- **Review processes:** International standards require States to systematically review their legal frameworks, as well as enact and publish laws, decrees, and policy documents that regulate the treatment of persons being questioned, including how the interviewing process is carried out and the implementation of associated safeguards.[169] In Thailand for example, Section 14 of the Royal Thai Police Act 2022 creates a National Policy Board with the mandate to review the country's policing practices.[170] Lawyers may seek out similar bodies in their respective jurisdictions to advocate for improved practices in line with the Méndez Principles. Lawyers can participate in consultations and submit expert opinions and evidence to such review processes. They can highlight legislative lacunae, comment on draft laws, and advocate for the ratification of relevant international treaties.
- **External oversight bodies:** Lawyers and their professional associations can help build a clearer understanding of systematic practices and structural concerns by providing confidential information on cases of interview-related wrongdoing, and/or on the application of safeguards in practice, to institutions mandated to oversee treatment during and conditions of deprivation of liberty. This includes National Preventive Mechanisms and National Human Rights Institutions. The provision of such information must be with the informed consent of the victim/survivor and in accordance with the principle of do no harm, or in an anonymised/aggregated manner that does not permit the identification of individuals or breach lawyer-client confidentiality.

Furthermore, some countries have mechanisms to oversee legislative compliance with specific anti-torture legislation, with which lawyers and professional associations can engage. For example, Section 20 of the Anti-Torture Act (2009) in the Philippines foresees an Oversight Committee to monitor and oversee the implementation of the Act. While lawyers are not part of the Committee, they may seek to address the Committee to advocate for improved practices.

169 Méndez Principles, paras. 207 - 208.

170 Royal Thai Police Act 2022, at https://www.royalthaipolice.go.th/downloads/article/law65/13964-1610eng.pdf

D. Cooperation with other criminal justice stakeholders

Maintaining professional working relations with judges and prosecutors is essential to ensuring the smooth functioning of the legal system. Issues impacting the operation of the justice system and the corresponding development and/or amendment of rules and guidance, including court procedures and practices, should be formally raised with the judiciary and prosecutorial authorities through regular meetings. Such meetings can take the form of working groups, joint committees, and task forces, as well as Bench and Bar meetings, forums, and conferences. Such exchanges can facilitate the identification or development of appropriate responses, including the creation or amendment of relevant rules and guidance documents in line with the Méndez Principles.

Finally, cooperation with civil society is critical in the fight against torture and against interview-related wrongdoing. This can take a myriad of forms, depending on the national context. Meaningful engagement should extend not only to human rights organisations and professional associations, but also to torture survivors, victims' groups, and survivor-led associations, whose lived experience can provide unique insight into patterns of abuse, barriers to reporting, and the practical failures of safeguards in detention and interrogation settings.

For defence lawyers, such cooperation can bring tangible benefits. Survivors' perspectives can assist lawyers to better understand trauma, identify indicators of coercion, and adopt more victim-centred and trauma-informed approaches to legal representation. Survivors' networks may also assist in understanding the long-term impacts of torture and the types of remedies most valued by victims. Civil society organisations may help identify systemic trends, provide country-specific documentation, connect clients with independent medical, psychological, or rehabilitation services, and support referrals for protection where reprisals are feared. Lawyers can in turn support strategic litigation brought by human rights organisations, while professional associations and expert groups can provide specialised advice and training on domestic and international law, forensic documentation, trauma-informed interviewing, and effective remedies. Through these partnerships, lawyers are often better placed not only to represent individual clients, but also to contribute to broader institutional reform and prevention efforts.

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