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Right to complain about mistreatment in criminal interviews and interrogations following international and EU law and the Méndez Principles

Introduction

The protection of suspect rights in criminal legal proceedings is the subject of numerous norms, rules and standards defined by universal and regional international agreements, European Union law and national laws. The foundation for protection of individual rights is embedded in the Universal Declaration of Human Rights¹, the International Covenant on Civil and Political Rights², the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³, the Convention on the Rights of

¹ Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217A, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed: 25.06.2024).

² International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> (accessed: 25.06.2024).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984 by General Assembly Resolution 39/46, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> (accessed: 25.06.2024).

the Child⁴, the Convention on the Elimination of All Forms of Discrimination against Women⁵, and the Convention on the Rights of Persons with Disabilities⁶. In addition, the Council of Europe members signed the European Convention on Human Rights⁷ providing the list of human rights to be protected by Council members. Finally, in the European Union, the Treaty on the European Union⁸, the Treaty on the Functioning of the European Union (TFEU)⁹ and the Charter of Fundamental Rights of the European Union¹⁰ form the framework for human rights protection in criminal proceedings in EU member states. Implementation of those rights is specified in EU Regulations and directives.

However, it should be noted that the main actors in ensuring suspects' rights protection are states, which, under the guidance of International and regional laws, ensure human rights protection by applying national laws. Following International and EU laws, the national authorities must ensure, among other things, that interviews and interrogations conducted in connection with and during criminal investigations adhere to internationally recognised human rights and legal guarantees, particularly regarding the prevention of torture and other forms of ill-treatment.

Stressing the importance of ensuring suspects' rights protection during the interviews and interrogations, the Principles on Effective Interviewing for Investigations and Information Gathering were developed under the auspices of the United Nations and adopted in May 2021 (hereinafter referred to as the Méndez Principles or just the Principles)¹¹. The Principles provide a systematic overview of the commonly agreed international standards, norms, and

⁴ Convention on the Rights of the Child adopted on 20 November 1989 by General Assembly Resolution 44/25, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed: 25.06.2024).

⁵ Convention on the Elimination of All Forms of Discrimination against Women adopted on 18 December 1979 by United Nations General Assembly, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (accessed: 25.06.2024).

⁶ Convention on the Rights of Persons with Disabilities adopted on 12 December 2006 by the General Assembly Resolution A/RES/61/106, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> (accessed: 25.06.2024).

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, <https://www.coe.int/en/web/human-rights-convention> (accessed: 25.06.2024).

⁸ Treaty on European Union (EU Treaty) (consolidated version of 2016, OJ C 202, 7.6.2016, p. 1).

⁹ Treaty on the Functioning of the European Union (TFEU) (consolidated version of 2016, OJ C 202, 7.6.2016, p. 1).

¹⁰ Charter of Fundamental Rights of the European Union (2000/C 364/01), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT> (accessed: 25.06.2024).

¹¹ Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, <https://interviewingprinciples.com> (accessed: 25.06.2024). More about the history of their adoption and internal structure: D. Solodov, I. Laurinaitytė, *Implementation of the UN's principles on effective interviewing and interrogation – perspectives for Poland and Lithuania (COST Action CA22128: IMPLEMENDEZ)*, „Studia Prawnoustrojowe” 2024, No. 63, pp. 399–414.

rules for the protection of the rights of individuals involved in criminal proceedings. Among the recommendations provided, the Mendes Principles indicate a requirement for the state to establish a complaint proceeding to ensure the interviewee's right to complain about torture or cruel, inhuman or degrading treatment during the pretrial proceeding in criminal cases.

Considering this, the question arises as to what conditions the complaint mechanism must meet to protect individual rights and be effective. To answer this question, this paper aims to determine the requirements that must be met in the complaint mechanism to prevent torture or cruel, inhuman, or degrading treatment in the pretrial proceeding.

To achieve the aim, three objectives have been set: 1) analyse the right to complain, recommended by Méndez principles, in light of International and EU obligations; 2) identify and analyse conditions for effective complaint proceedings; 3) discuss problematic issues in ensuring effective complaint mechanisms.

The paper examines the requirements established in international and EU law, policy documents, guidelines, and recommendations of international organisations.

This paper consists of three parts. The first part is dedicated to analysing the International, regional, and EU laws and policy documents of international organisations and how the recommendations and complaint mechanisms provided by the Méndez Principles contribute to the implementation of International and EU law requirements. The second part provides a list of conditions to be fulfilled to ensure an effective complaint mechanism and analyses these conditions. The third part discusses problematic issues to be solved while establishing an effective complaint mechanism.

Right to complain following the Méndez principles in the context of International and EU obligations

A large number of international conventions and the Charter of Fundamental Rights of the European Union (Art. 4)¹² stress that no one can be subjected to torture or cruel, inhuman or degrading treatment or punishment, including such treatment during pre-trial investigation in criminal proceedings (Art. 5 of the Universal Declaration of Human Rights, Art. 7 of the International Covenant on Civil and Political Rights, Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 15 of the Convention on the Rights of Persons with Disabilities, Art. 3 of the European Convention on Human Rights). Any order from a superior officer or a public authority cannot be invoked as a justification for

¹² Charter of Fundamental Rights of the European Union of 2016 (OJ C 202, 7.6.2016).

torture (Art. 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

The objectives indicated in the conventions are continuously supported by the United Nations. The 2000 Declaration of the UN General Assembly started with a general declaration about each state's responsibility to establish and maintain a fair, responsible, ethical, and efficient criminal justice system (§ 3 of the Vienna Declaration on Crime and Justice¹³). The 2005 Declaration went further, indicating each state's commitment to developing and maintaining humane treatment of all those in pretrial and correctional facilities following applicable international standards (§ 8 of the Bangkok Declaration on Synergies and Responses¹⁴). The 2010 Declaration recognised the responsibility of each state to maintain an effective, fair, accountable, and humane criminal justice system (§ 2 of the Salvador Declaration on Comprehensive Strategies for Global Challenges¹⁵). The 2015 Declaration reaffirmed states' commitment and strong political will to support effective, fair, humane and accountable criminal justice systems and the institutions comprising them and ensure the right of everyone to a fair trial without undue delay by a competent, independent and impartial tribunal established by law, to equal access to justice with due process safeguards, to exercise due diligence to prevent and counter acts of violence; and to take effective legislative, administrative and judicial measures to prevent, prosecute and punish all forms of torture and other cruel, inhuman or degrading treatment or punishment and eliminate impunity (§ 5 of the Doha Declaration on Integrating Crime Prevention and Criminal Justice¹⁶). Finally, the 2021 Declaration, which aims to improve criminal investigation processes, encourages the use and sharing of good practices on legally grounded, evidence-based interviewing methods designed to obtain only voluntary statements, thereby reducing the risk of unlawful, abusive, and coercive measures (§ 47 of the Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law¹⁷).

¹³ Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, General Assembly Resolution 55/59, Annex, adopted on 4 December 2000, <https://digitallibrary.un.org/record/428853?v=pdf> (accessed: 25.06.2024).

¹⁴ Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, General Assembly Resolution 60/177, Annex, adopted on 16 December 2005.

¹⁵ Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World, General Assembly Resolution 65/230, Annex, adopted on 21 December 2010.

¹⁶ Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation, General Assembly Resolution 70/174, Annex, adopted on 17 December 2015.

¹⁷ Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development, General Assembly Resolution 76/181, Annex adopted by the General Assembly on 16 December 2021.

Following the streamline highlighted by the UN General Assembly, the Principles on Effective Interviewing for Investigations and Information Gathering¹⁸ were developed under the auspices of the United Nations and adopted in May 2021 (hereinafter referred to as the Méndez Principles or just the Principles). The Principles provide a systematic overview of the commonly agreed international standards, norms, and rules for the protection of the rights of individuals involved in criminal proceedings. The Principles aim to ensure that interviews and interrogations related to criminal investigation are conducted under the internationally recognised human rights protection principles and legal guarantees, particularly related to the prevention of torture and other forms of ill-treatment. The document emphasises the importance of thoroughness, impartiality, and professionalism in information gathering while respecting the dignity and rights of all involved parties.

The Méndez Principles contain a set of recommendations, standards, and procedures that are structured into six key principles: Principle 1 – On Foundations, Principle 2 – On Practice, Principle 3 – On Vulnerabilities, Principle 4 – On Training, Principle 5 – On Accountability, and Principle 6 – On Implementation. All the Principles are interconnected and interdependent, which is emphasised in the Introduction section of the document and mentioned in the part devoted to Principle 6 (On Implementation). The interconnectivity means that countries cannot selectively implement some of the recommendations and safeguards provided while omitting or not fully implementing others.

International instruments specify a set of safeguards that must be implemented in criminal proceedings in each state that signed a particular convention to ensure that interviews and interrogations related to criminal investigations are conducted following internationally recognised human rights protection principles and legal guarantees. One of those safeguards is the right to submit a complaint regarding the person's mistreatment in a pretrial investigation proceeding. During the examination of the complaint, the responsible independent authority checks whether the actions indicated in the complaint comply with international standards and the requirements established in national legal acts. This safeguard, with the assistance of other guarantees, allows timely remedy for a person whose rights in criminal proceedings have been infringed. The Méndez Principles support such an approach.

The analysis of international conventions shows that Art. 8 of the Universal Declaration of Human Rights foresees everyone's right to an effective remedy by the competent national tribunals. International Covenant on Civil and Political Rights specifies in Art. 2(3) that such effective remedy must be available notwithstanding that the violation has been committed by persons acting in an official capacity. Similarly, Art. 13 of the European Convention

¹⁸ Principles on Effective Interviewing for Investigations and Information Gathering, May 2021, <https://interviewingprinciples.com> (accessed: 7.05.2024).

on Human Rights indicates that everyone whose rights are violated must have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

Following the international agreements, the effective remedy is the possibility of filing a complaint regarding such actions. Universal Declaration of Human Rights, in Art. 10, provide general guidance that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations. Art. 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment more specifically indicates that each state must ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed. Whereas Art. 13 of the Convention specifies that any person subjected to torture and other cruel, inhuman or degrading treatment has the right to complain to competent authorities. The complainant and witnesses should be protected against all ill-treatment or intimidation due to his/her complaint or any evidence given.

In addition, each mentioned conventions prohibit discrimination on any ground in accepting and examining the complaint. In some conventions, the prohibition of discrimination in the acceptance of a complaint and its consideration can be seen from the general prohibition of discrimination, which limits access to the rights protected by the particular convention. In particular, the International Covenant on Civil and Political Rights, in Art. 2(1), indicates that states must respect and ensure the rights recognised in the Covenant to all individuals within their territory and subject to their jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Similarly, discrimination is prohibited in Art. 2 of the Convention on the Rights of the Child, Art. 12 of the Convention on the Rights of Persons with Disabilities, Art. 14 of the European Convention on Human Rights, and Art. 1 of Protocol No. 12. Art. 2 of the Convention on the Rights of the Child indicates that non-discrimination should be ensured for children, and Art. 12 of the Convention on the Rights of Persons with Disabilities specifies that non-discrimination should be guaranteed to persons with disability as well. At the EU level, the Charter of Fundamental Rights of the European Union, in addition to the grounds indicated in international conventions, prohibits discrimination based on genetic features, belief, membership of a national minority, and age or sexual orientation (Art. 21 of the Charter of Fundamental Rights of the European Union).

In other international conventions requirement for non-discrimination relates to laws protecting the indicated rights. In particular, the Universal Declaration of Human Rights, in Art. 7, indicates that everyone must be equal

before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination and any incitement to such discrimination. The convention addressing equality between men and women issue – Convention on the Elimination of All Forms of Discrimination against Women emphasises prohibition of discrimination based on sex. Art. 15(1) of the convention states that women must be treated equally with men before the law. At the EU level, the Charter of Fundamental Rights of the European Union in Art. 20 specifies, in a similar way, that everyone is equal before the law.

Finally, it should be emphasised that the Convention on the Rights of the Child requires that the best interest of the child be ensured in all actions involving children or the protection of their rights. Art. 3(1) specifies that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

While speaking about procedural safeguards foreseen in the European Union law, it should be indicated that the Treaty on European Union¹⁹ and Treaty on the Functioning of the European Union (TFEU)²⁰ just provide a framework for the functioning of the Justice area in the European Union. In Art. 2, the Treaty on European Union specifies that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. The TFEU in Art. 67 indicates that the European Union constitutes an area of freedom, security, and justice where fundamental rights are respected. The Charter of Fundamental Rights of the European Union, specifies some core safeguards, such as the right to an effective remedy, fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law, the right to be advised, defended, and represented, the right to legal aid for those who lack sufficient resources, the right to the presumption of innocence and the right not to be tried or punished twice. In addition, the TFEU, in Art. 82(2), clarifies that additional minimum rules concerning the rights of individuals in criminal procedure and the rights of victims of crime are established by the directives of the European Parliament and the Council. However, it should be noted that established minimum rules do not prevent EU member states from maintaining or introducing a higher level of protection for individuals than those defined in the directives.

Directives define suspected or accused persons’ rights in criminal proceedings, such as the right to interpretation and translation²¹, the right to in-

¹⁹ Treaty on European Union (consolidated version of 2016, OJ C 202, 7.6.2016).

²⁰ Treaty on the Functioning of the European Union (consolidated version of 2016, OJ C 202, 7.6.2016, p. 1).

²¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, pp. 1–7).

formation²², the right of access to a lawyer, the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty²³, the right to legal aid²⁴, the right to presumption of innocence and of the right to be present at the trial in criminal proceedings²⁵. In addition, Directive (EU) 2016/800 provide a list of safeguards dedicated to ensuring the protection of children who are suspects or accused persons in criminal proceedings²⁶. However, EU institutions did not issue any directives regarding access to effective complaint proceedings.

Summarising the analysis above, the standards set by international and European law aim to ensure fairness, dignity, and respect for the rights of all the individuals involved in legal proceedings, regardless of their procedural status. They influence the development of domestic legislation and judicial practices by emphasising the importance of effective procedural safeguards, due process, and accountability within the national justice system. They foster transparency and trust in the legal process and, overall, bolster public confidence in the fairness and integrity of legal proceedings.

Conditions for effective complaint proceeding

The right to file a complaint against abuse of power, denial of rights and safeguards or other mistreatment during a pre-trial investigation constitutes an important premise of a fair trial and might serve as an effective remedy against human rights violations. This is one of the most significant safeguards ensuring protection against coercive mistreatment in investigative and interviewing tactics.

²² Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, pp. 1–10).

²³ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, pp. 1–12).

²⁴ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, pp. 1–8).

²⁵ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, pp. 1–11).

²⁶ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21.5.2016, pp. 1–20).

However, the existence of such a right is not enough to ensure a fair and efficient inquiry into allegations of mistreatment and abuse of power. Several conditions should be fulfilled for the interviewed or interrogated person's right to complain regarding mistreatment in criminal proceedings to be effective. Following the International and EU law requirements as well as Méndez principles, the following conditions could be indicated:

1. All complaints about mistreatment should be processed by an impartial investigative body.
2. Clear guidance should be established on a complaint process, appeals mechanisms and possible outcomes available to all interviewees.
3. Inquiries into possible mistreatment should ensure an appropriate level of confidentiality for all interested parties.
4. Access to a lawyer, including through legal aid, should be ensured to the complainant in the complaint proceeding.
5. Access to translation and interpretation should be ensured in the complaint proceeding.
6. Authorities dealing with a complaint must have access to comprehensive and objective evidential material (to ensure the effectiveness of fact-finding and fact-checking).
7. Audio or video recordings of all interviews and interrogations should be provided and later made accessible as evidence sources during an official inquiry.
8. Protection of the complainant from any repercussions and reprisals following the complaint should be ensured.
9. The filing of a complaint should stop the criminal proceeding until the complaint is resolved.
10. An external independent agency should periodically evaluate complaints addressing policies and existing practices.

Impartial investigative body

The authorities charged with investigating and resolving such complaints should be independent of the investigative officials whose actions are being questioned. Only then can the inquiry be guaranteed to be carried out objectively and fairly.

According to the Méndez Principles, all interviewees must have “the right to complain of any mistreatment, including denial of rights or safeguards. Such complaints must be promptly, thoroughly and impartially examined through competent assigned channels” (Section 194). The document analysis indicates that there are two types of complaints – more serious and less serious.

More serious complaints are those which refer to the use of torture or other aggravated forms of mistreatment and abuses of power. In such cases, the Principles emphasise the need for appropriate actions, including holding the offenders criminally responsible.

Domestic investigation agencies are expected to create internal complaint investigation units for less serious complaints. These units should provide “clear internal chains of command, impartial reporting, protection from reprisals, and specific procedures to correct, discipline or refer for criminal investigation any abuse or violation committed” (Section 179). Besides resolving complaints filed by interviewees, an inter-institutional response can be triggered by internal “whistleblowers”, lawyers, prosecutors, judges or medical personnel possessing information on the cases of possible mistreatment.

Following the Principles, both types of complaints should be investigated by independent authorities. The investigative bodies should be formed reflecting the diversity of the communities that they serve. Two conditions to be met to ensure the independence of the investigating body:

The investigative body should be operationally and financially independent from both the law enforcement and prosecution services or agencies responsible for holding persons deprived of liberty.

The investigative body must have adequate investigatory powers, political support, human and financial resources, and competence to issue recommendations and manage follow-up (Sections 198, 199).

It should be noted that the investigative body dealing with the complaints that alleged the use of torture, while analysing or investigating the situation, should follow internationally recognised guidelines such as the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment published by the Office of the United Nations High Commissioner for Human Rights²⁷. According to Section 190 of the Manual, the purpose of such an investigation is to “establish the facts relating to alleged incidents of torture or ill-treatment, with a view to identifying those responsible for the incidents and facilitating their prosecution, or for use in the context of other procedures designed to obtain redress or protection for victims”. To fulfil this purpose, the investigators should take the following steps:

- obtain statements from the victims of alleged torture,
- recover and preserve evidence, including medical evidence, related to the alleged torture or ill-treatment,

²⁷ Office of the United Nations High Commissioner for Human Rights. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The edition of 2022, https://www.ohchr.org/sites/default/files/documents/publications/2022-06-29/Istanbul-Protocol_Rev2_EN.pdf (accessed: 25.06.2024).

- identify possible witnesses and perpetrators and obtain statements from them concerning the alleged torture or ill-treatment,
- determine how, when and where the alleged incidents of torture or ill-treatment occurred as well as any pattern or practice within which it took place, including identifying particular locations and perpetrators, methods used and the role of corruption, and other contextual factors, such as gender, sexual orientation, gender identity, disability, race, ethnicity, nationality, age and socioeconomic status of the victim.

Investigations need to be commenced without any delay, taking place within hours or, at the most, a few days after the suspicion of torture or ill-treatment has arisen, and to be conducted expeditiously throughout (Section 193 of the Manual).

Established guidelines on complaint-addressing procedures

Under the Principles, “complainants should receive clear guidance on complaint processes, appeals mechanisms and outcomes” (Section 195). This requirement ensures that potential complainants know how to initiate a complaint, what steps are involved, and what to expect at each stage of the resulting inquiry. The existence of clear complaint procedures potentially encourages individuals to rely on this safeguard, making it accessible, regardless of the complainant’s familiarity with the legal process and its components. Detailed guidance and transparent processes make it easier to hold the officials handling complaints accountable. Ideally, the instructions regarding the right to file a complaint and following the complaint process should be formulated in a way that makes it easy to understand regardless of the complainant’s education level or professional background. Informing the interviewee about the procedure and explaining how to file the complaint and what happens with the complaint should be the responsibility of the interviewer. It should be a part of the duty to provide information about the person’s rights and available safeguards.

The Principles do not provide specific details on how to inform the interviewees about complaint-handling procedures. So, such information might be given out in the form of printed leaflets and later clarified, if needed, by the interviewer and/or the interviewee’s lawyer. In cases where there is a written protocol for the interview (interrogation), the standard form of the protocol might include detailed information about the details of the complaint filing and complaint handling procedures.

Confidentiality of the inquiry

The procedure for dealing with such complaints should be transparent, easy to understand, known to the individuals involved in criminal proceedings and confidential. According to the Méndez Principles, “access to complaints mechanisms must be easy, direct, free of charge, and confidential” (Section 195).

The requirement of confidentiality is particularly required in situations when information about possible mistreatment was received from sources not known to the interviewer. For example, such information might come from an internal “whistleblower”. Under the Principles, whistleblowers “should be provided adequate protection from any form of reprisals or negative treatment” (Section 184). Studies found that fear of retaliation, the uncertainty surrounding the reporting mechanism itself, as well as the perception of disciplinary leniency, are among discouraging factors for internal “whistleblowers”²⁸. Besides the protection of the complainants or “whistleblowers”, confidentiality serves other important functions. Maintaining confidentiality during the investigation helps preserve the integrity of the process. It prevents the manipulation of evidence, witness tampering, and the potential spread of misinformation, which is crucial for a fair and unbiased investigation into the allegations stated in the complaint or the facts reported by a “whistleblower”. Confidentiality should be ensured to both the complainant and the accused party. Accusations of mistreatment and abuse of power can severely damage the accused person’s reputation and future career, even when the allegations are not substantiated. Protecting the privacy of all involved parties until a final decision is reached is crucial for ensuring fairness of the procedure.

Right of access to a lawyer, including through legal aid

The guidance in the Méndez principles specifies that access to a lawyer is inextricably linked to the protection of rights and prevention of torture and other ill-treatment (Section 81). The interviewee must have a lawyer of their own choosing or have one provided for them free of charge where the interests of justice require it (Section 82).

Although the recommendations in the Méndez Principles address the importance of access to a lawyer during questioning in a criminal case, the presence of a lawyer during the preparation and examination of the complaint is also very important to ensure the effectiveness of the complaint proceeding.

²⁸ See: O.E.V. Taylor, R. Philpot, O. Fitton, Z. Walkington, M. Levine, *Police whistleblowing. A systematic review of the likelihood (and the barriers and facilitators) of the willingness of police officers to report the misconduct of fellow officers*, „Journal of Criminal Justice” 2024, Vol. 91.

Often, a person does not know what redress measures are available, how to write a complaint, what information to provide in it, to whom to file a complaint, how to represent one's interests during the investigation of a complaint, and others. The availability of a lawyer's consultations, assistance in filing a complaint and representing the individual's rights during the hearing of the complaint help to solve these problems. Therefore, access to the lawyer should be ensured at the complaint proceeding. The support for this statement can be seen in Section 44 (c) of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems²⁹. Under the Guidelines, legal representation should be ensured at all pretrial proceedings and hearings.

Ensuring the right to a lawyer, including through legal aid, is not enough for the proper protection of the interviewee's rights. For the right to access a lawyer to be effective, the interviewee should be informed about this right, the way how to get the lawyer, and the requirements for that. Such information should be provided in a manner that corresponds to the needs of illiterate persons, minorities, persons with disabilities and children; and such information should be in a language that those persons understand (Section 42).

Access to translation and interpretation

Although the Méndez principles do not discuss the availability of translation and interpretation during the submission and consideration of a complaint, the right to submit a complaint would not be properly ensured without ensuring this right. If a person does not know the language of the process, this can be an obstacle to filing a complaint.

Therefore, a person must be able to submit a complaint in a language he understands, prepare it with the help of an interpreter, or get a translation of the complaint. Ensuring this right is particularly relevant for those who lack sufficient financial resources.

Section 44 (f) of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems supports this view³⁰. The guidelines recommend that states introduce measures to provide the services of an independent interpreter whenever necessary and the translation of documents where appropriate.

²⁹ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly Resolution 67/187, Annex, adopted on 28 March 2013.

³⁰ *Ibidem*.

Recording of interviews and access to comprehensive and objective evidential material

One of the most significant safeguards is an audio or video recording of the interview (interrogation) in question³¹. The record shows the way the interview (interrogation) was conducted, the interviewer's actions, and the interviewee's behaviour and statements.

The establishment of obligatory recording of all interviews and interrogations is one of the key recommendations provided by the Méndez Principles. However, implementation of those recommendations is challenging. Audio or video recording requires some reflection not only on technical aspects of the process itself. In particular, not only the form of recording (audio or video) and the type of recording device should be selected, but also organisational and tactical aspects should be discussed. For example, there is a need to decide should the recording device or its interface be visible or hidden³², what should be the standard for the recording to ensure the clearness and usability of the recordings, and what procedures should be followed for creating and sharing copies of the recordings. While the audio recording is less intrusive and it is easier to implement, video recording provides a more comprehensive account of the interaction and allows capturing non-verbal cues and the demeanour of both the interviewer and the interviewee.

The UN's Manual on Investigative Interviewing for Criminal Investigation, which was officially launched in February 2024, highlights several advantages that video or audio recordings of criminal interviews and interrogations provide compared to traditional written reports:

- a) Recording allows the interviewer to focus on the interview rather than on typing all the information manually or taking notes (reduces cognitive load).
- b) Recording enables the interviewer to actively listen and improves communication with the interviewee since the interviewee can provide their account without constant interruptions.
- c) Recordings preserve the oral evidence in its original form.
- d) Recordings produce a full and valid representation of the information provided and how the interview was conducted, securing evidence and minimising miscarriage of justice.

³¹ The audio and video recording of interviews and interrogations is recommended to prevent possible mistreatment and provide the possibility of verification in cases of criminal confessions – E. Gruza, *Anatomia pomyłek sądowych*, „Prokuratura i Prawo” 2023, No. 7–8, pp. 184–185.

³² The presence of the recording device might affect the comfort level and willingness of interviewees to speak openly. So, hidden recording devices might be optimal in specific cases to prevent altering the natural flow of conversation. Nevertheless, all the participants should be informed about the recording before the interview commences, since interviewees have a right to know about the recording to be able to familiarise themselves with the final recordings, correct their testimonies, add explanations, as well as file complaints.

e) Recordings can protect interviewers against false accusations of abuse, coercion, manipulation, or failure to follow procedural rules and make it difficult for the interviewee to recant or deny their testimony.

f) Recordings can help in organising and thereby analysing the information provided.

g) Recordings are great tools for evaluating and providing feedback on interviews, training, and research, leading to a more professional police service.

Undoubtedly, the audio or video recordings can be comprehensive and objective evidential material for the inquiries into the allegations stated in the complaint concerning mistreatment. As a comprehensive and unbiased source of information regarding the events of the interview (interrogation) in question, including the interviewer's and the interviewee's behaviour and any other persons present during the interview, the recording serves as a factual foundation for assessing the complaint. The record analysis allows the investigators to make informed decisions on what has happened during the interview or interrogation.

The mandatory recording of all interviews and interrogations has one predictable drawback: reviewing video records in a real time is more time-consuming than studying written transcripts or protocols of the interviews. This is particularly true for lengthy interviews (interrogations), where every minute of the footage must be reviewed to capture the full context. Unlike written protocols for interviews and interrogations, which can be quickly scanned or searched for specific keywords or phrases, audio and video recordings require more effort to locate specific pieces of information. This can slow down the investigation process, particularly when dealing with multiple recordings. This issue can be partially resolved by preserving traditional written records alongside audio or video recordings to facilitate navigation. In this case, written protocols can be shortened to include only key events and important moments of the interview or interrogation. Using transcription software and other technological aids might also help in creating detailed summary protocols. Advanced AI-powered software can generate rough transcripts and highlight important parts of the conversation based on keywords or even the emotional tone of the speakers, which can then be refined by human reviewers. This technology, however, is still in the development stage, particularly concerning the challenges posed by dealing with regional languages, dialects, double-meaning expressions or slang.

Protection from adverse repercussions and reprisals

According to the Principles, "all complainants should be protected from any adverse repercussions and reprisals as a consequence of having made a complaint" (Section 200). Protecting complainants from adverse repercussions

and reprisals is essential for fair and effective complaint-handling practices. It encourages reporting and prevents further harm to complainants. Confidentiality measures, anti-retaliation policies, support systems, and effective monitoring and enforcement strategies are crucial to ensure this protection.

Suspension of the criminal proceeding

The filing of a complaint by an interviewee should stop the particular criminal proceeding until the complaint is resolved. Although the Principles do not directly indicate such condition, however, such requirement can be seen from the obligation of states not to allow evidence obtained through coercion in court, enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Art. 15 of the Convention states that each state must ensure that any statement which is established to have been made as a result of torture cannot be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

This allows us to say that any evidence obtained through torture or cruel, inhuman or degrading treatment that will be confirmed during the complaint hearing should not be allowed in the further investigation of the criminal case. To ensure that criminal proceedings should be delayed until a final decision is made regarding the complaint.

In addition, the criminal proceedings should be delayed because of the need to replace the pretrial investigation officers who applied the interviewing methodology involving torture or cruel, inhuman or degrading treatment. If this is confirmed during the investigation of the complaint, there is no doubt that these officers should be replaced.

Nor should officials against whom a complaint is filed be allowed to continue performing pre-trial investigation actions during the hearing of the complaint. First, their actions may turn out to be illegal; second, they may be biased against the person who filed the complaint; and third, conditions may be created for even more severe mistreatment of the person who filed the complaint.

Periodical evaluation of the existing practices and the improvement of relevant policies

The Méndez Principles emphasise the importance of collecting and analysing information on complaints regarding the alleged mistreatment during criminal interviews and interrogations and the noticed violations. According to Section 168 of the document, periodic assessments of interviewing and in-

terrogation practices are necessary in terms of monitoring and constant improvement of the existing national procedures. There is not much information on the nature and organisation of such oversight though. The principles emphasise the value of transparency and the participation of independent researchers, skilled practitioners and organisations (Sections 169–171). It is clear from this part of the document that such reviews should be periodical and involve people from outside the justice system.

To summarise, the above requirements must be followed to ensure an impartial, objective, and efficient investigation into alleged violations. Otherwise, the complaint handling would become inconsistent with the model promoted by the Principles, potentially weakening the protection of individual rights guaranteed by international and European law.

Discussion

Investigating complaints of potential mistreatment can be a difficult and complex task, but it is crucial for implementing the Méndez Principles in a specific country. It's important to note that the recommendations, safeguards, and principles form a comprehensive system with interconnected and interdependent elements. Just like other guarantees provided by the Méndez Principles, the elements of the complaint-handling procedures should not be selectively or partially applied. To ensure that the complaint-related inquiries align with the goals of the Principles, all the recommendations should be followed and put into practice.

As mentioned in the paper's discussion section, it is important to consider that the Méndez Principles' recommendations and safeguards are quite general and serve as guidelines rather than ready-to-use procedures and solutions. It is possible to anticipate many situations where the Principles do not offer clear answers. However, they still provide some general guidance in such cases.

These are some of the issues that arise when dealing with complaints: What if the person making the complaint is misusing their right to file it? For example, what if they're doing so to delay the process, create formal obstacles, or lay the groundwork for further motions or complaints, such as asking to exclude evidence obtained during an interview, requesting a new investigator, or seeking information about the evidence collected so far?

Another issue to consider is whether there should be time limits or specific conditions for filing complaints to prevent possible misuse of the right. Given that responding promptly to matters is important for maintaining confidence in the complaints system, should there be a time limit? And if so, how can we justify such limitations while also considering the importance of seeking the truth and providing appropriate redress?

Finally, we need to address the consequences when (interview) recordings are unavailable or of poor quality, limiting their usefulness as evidence.

Such situations can lead to long legal discussions that may take the proceedings off track. As often happens, small details can often make a significant difference. To address practical matters like the ones mentioned above, competent authorities should establish comprehensive policies and procedures. It is wise to study the experience of other countries that have implemented such mechanisms in their practice³³.

Conclusions

1. Ensuring the right to complain regarding any form of mistreatment during a pre-trial investigation requires a multifaceted approach that incorporates impartiality, clear guidance, confidentiality, evidence-based decision-making, protection from reprisals, and regular evaluation of the existing policies and practices.

2. The recommendations of the Méndez principles regarding complaint handling establish a complex, interdependent system of requirements. As with many other recommendations provided by the Méndez Principles, implementation of the safeguard on complaint handling is intertwined with other safeguards foreseen in International and EU law.

3. Following the relevant guidance, safeguards, and guarantees provided in the form of a checklist, it is possible to assess whether the implementation of the complaint-handling mechanism in a particular country complies with the Méndez principles.

4. Notably, the guidance and principles provided by the Méndez Principles lack specific details, leaving space for legal discussions. This requires competent domestic authorities to implement comprehensive guidelines and policies.

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³³ For example, in England and Wales, an Independent Office for Police Conduct issued Statutory guidance on the police complaint system, which covers all the stages of the inquiry (Independent Office for Police Conduct. Statutory guidance on the police complaint system, https://www.policeconduct.gov.uk/sites/default/files/documents/2020_statutory_guidance_english.pdf (accessed: 25.06.2024).

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Summary

Right to complain about mistreatment in criminal interviews and in-terrogations following international and EU law and the Méndez Principles

Keywords: human rights in criminal proceedings, Méndez Principles, criminal interviews and interrogations, mistreatment, institutional accountability, complaint in criminal proceeding.

The paper aims to determine the requirements that must be met in the complaint mechanism to prevent torture or cruel, inhuman, or degrading treatment in the pretrial proceeding. This paper analyses the International, regional, and EU laws and policy documents of international organisations and how the recommendations and complaint mechanisms provided by the Méndez Principles contribute to the implementation of International and EU law requirements. It includes a list of conditions to ensure an effective complaint mechanism and analyses them. The paper also discusses problematic issues to be solved while establishing an effective complaint mechanism. The authors concluded that the right to complain during a pre-trial investigation requires a multifaceted approach that incorporates impartiality, clear guidance, confidentiality, evidence-based decision-making, protection from reprisals, and regular evaluation of the existing policies and practices. The guidance and

principles provided by the Méndez Principles lack specific details, leaving space for legal discussions. This requires competent domestic authorities to implement comprehensive guidelines and policies.

Streszczenie

Prawo do składania skarg na złe traktowanie podczas przesłuchań w postępowaniu karnym w świetle prawa międzynarodowego i unijnego oraz zasad efektywnego przesłuchania Juana Méndeza

Słowa kluczowe: prawa człowieka w postępowaniu karnym, zasady Méndeza, przesłuchania w postępowaniu karnym, złe traktowanie, odpowiedzialność instytucjonalna, skarga w postępowaniu karnym.

Artykuł ma na celu określenie wymagań, jakie musi spełniać mechanizm rozpatrzenia skarg związanych z okrutnym, nieludzkim lub poniżającym traktowaniem osób przesłuchiwanym w postępowaniu karnym przygotowawczym. Autorzy analizują przepisy prawa międzynarodowego i unijnego, *soft law*, w tym rekomendacje i wytyczne dotyczące danego zagadnienia zawarte w zasadach efektywnego przesłuchania, zwanych również zasadami Méndeza. Autorzy proponują listę warunków koniecznych do zapewnienia skuteczności instytucji skarg w postępowaniu karnym przygotowawczym. We wnioskach zwracają uwagę na to, że prawo do składania skarg wymaga wieloaspektowego podejścia, na które składają się wymóg bezstronności, jasności procedur, poufności, podejmowania decyzji w oparciu o dowody, ochrony przed ewentualnymi konsekwencjami negatywnymi dla osoby skarżącej oraz regularnej ewaluacji istniejących procedur i praktyki. Wytyczne i rekomendacje zawarte w zasadach Méndeza mają charakter ogólny, co wymaga od kompetentnych władz krajowych wdrożenia procedur kompatybilnych ze wspomnianymi zasadami.