

NETPRALAT

Module 6: psychosocial approach



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Introduction

Module aims & topics covered:

- Being able to assess and identify detainees' needs and personal situation
- Learning some basic psychosocial tools to deal with these situations.
- Detecting possible abuse or ill-treatment during detention.
- Learning about the legal and psychological definitions of 'vulnerability'
- Learning to use the 'exploratory guide' of vulnerabilities in the criminal process
- Determining which action to take when a possible 'vulnerability' is detected



**Part 1:
General Psychosocial
tools**

**Part 2:
Identification of
abuse, ill-treatment**

**Part 3:
Vulnerable suspects**

PART 1: GENERAL PSYCHOSOCIAL TOOLS



In this Section, we will discuss several topics related to conducting your job from a psychosocial perspective. After the module about communication skills including the first contact with police officers and clients, unconscious bias, active listening, empathy, and other behaviors that facilitate rapport, however it is essential to move one step forward. This means not only being able to build mutual trust and better communicate but also, being able to assess and identify our client's needs and personal situation as well as having some basic tools to deal with these situations.

PART 1: GENERAL PSYCHOSOCIAL TOOLS

In this part of the module we include the following information:

1.1 Introductory definitions

1.2 Basic psychosocial approach during the interview

1.3 Memory and facts

1.1 Introductory definitions



If we ask what psychosocial approach is, first we must define the meaning of two basic terms:

Psychosocial:

It refers to the relationship between each person and his/her social environment

Psychosocial impact:

Psychosocial impact is defined as the effect caused by environmental and/or biological factors on individual social and/or psychological aspects.

1.1 Introductory definitions

Difference between psychosocial approach and psychological therapy:

The objective of a psychosocial approach is to accompany the detained person, activating and recognizing his/her own resources and capabilities. It involves processes of accompaniment, understanding, listening and empathy as well as identification of vulnerabilities. It can have therapeutic effects.

On the other hand, the objective of psychological therapy is to use Psychology to improve the psychological state of the person (in accordance with their specific needs). It involves evaluation and intervention processes and it is a therapeutic process.

You are not a psychologist
but a lawyer working with a psychosocial approach

1.1 Introductory definitions

As a consequence of an impact, it is possible that a psychosocial harm or trauma arises.

Psychosocial
harm or trauma

Experience that constitutes a threat to the physical or psychological integrity of the person, associated to emotions or experiences of chaos, confusion, absurdity, horror, among others. The experience breaks one or more of the basic assumptions that constitute the references of security of the human being and the beliefs of invulnerability and control over one's own life, trust in others, goodness, empathy

1.2 Basic psychosocial approach during the interview

Psychosocial approach is to be applied for conducting an interview or conversation with any person that has been or still is in a difficult situation, crisis, or stressful situation. However, when conducting a first interview in a detention center, added to a possible personal difficult situation of your client you also deal with a difficult environment.

Here is a comparative table of regular psychosocial elements in a normal interview and how different it can be from the reality of an interview in detention center:



1.2 Basic psychosocial approach during the interview

Key psychosocial approach outside detention situations	Reality of interview during detention
Prepare the person	Interview may be the first time you meet or see each other
Management of time: not make him/her wait for us	The suspect can be waiting for a long time until the lawyer arrives
Comfortable surroundings	Not comfortable surrounding, not able to choose or adapt it to the person
Avoid ending the session when the person is still explaining	Limited time for the interview or pressure to end quickly
Let the person speak and explain in his/her own way	Pressure to get the key and relevant information to defend the suspect properly

Therefore, it is very important to take all these stressful factors into consideration when assessing our clients' situation and identifying various emotions or possible vulnerabilities.

1.2 Basic psychosocial approach during the interview

In spite of the previously mentioned exceptional circumstances of detention's context, there are basic psychosocial tools that you can have in mind and will help you guarantee that the interview is the least re-victimizing as possible, taking into account the context:

Preparation

Vocabulary
adaptation

Contextualization

Realistic message

Ask: how
are you?



1.2 Basic psychosocial approach during the interview

Preparation

Prepare the interview in advance, at least with the time and information available. Learn the detainee's personal data, contact the family members if possible. Let the person see your preparation, it shows interests and professionalism and lets the person know you are there for him/her. Your interview is the only contact with "the outside" this person had.

Contextualization

Introduce yourself and contextualize the way the interview works, explain what it consists of, objectives, time, confidentiality, etc. The anticipation of things helps to reduce nervousness

Vocabulary adaptation

Give the information and the explanations that the person asks for or you think is essential. Legal terms are complicated and difficult to understand if the person is not accustomed. Adapt the vocabulary used.

1.2 Basic psychosocial approach during the interview

Realistic message

Give realistic messages, neither hopeful nor very catastrophic

Ask: how are you?

Although some times you believe you only have time to gather the relevant facts for his/her defence, it is essential to ask the person how is he/she feeling. Not only it will bring comfort and trust but will save you from surprises or will allow you to identify possible vulnerabilities, difficult personal situations or abuse (we will go back to that last part later).

When asking 'how are you?', you must be able to react properly to verbalisation of different kinds of emotional distress

1.2 Basic psychosocial approach during the interview

Psychosocial approach responding to verbalisation of emotional distress:

1

Not to minimize nor invalidate pain

2

Reflecting message

3

Paraphrasing

4

Clarifying

5

Direct and indirect questioning



1.2 Basic psychosocial approach during the interview

1

Not to minimize nor invalidate pain

Example of minimizing pain:

Detainee:

- *I feel as if I am losing it, as if I lost control and there was nothing I can do*

You:

- *Come on, don't see it this way... Besides, you still have your family and friends, that is positive!*

Example of invalidating pain:

Detainee:

- *Everything is so confusing, I feel like abandoning*

You:

- *Well, maybe at some point you are overreacting...Is everything that negative? Don't you think there is something positive?*

1.2 Basic psychosocial approach during the interview

2

Reflecting message

Return to the person his/her message emphasizing the affective part. It helps the person put the emotions in words

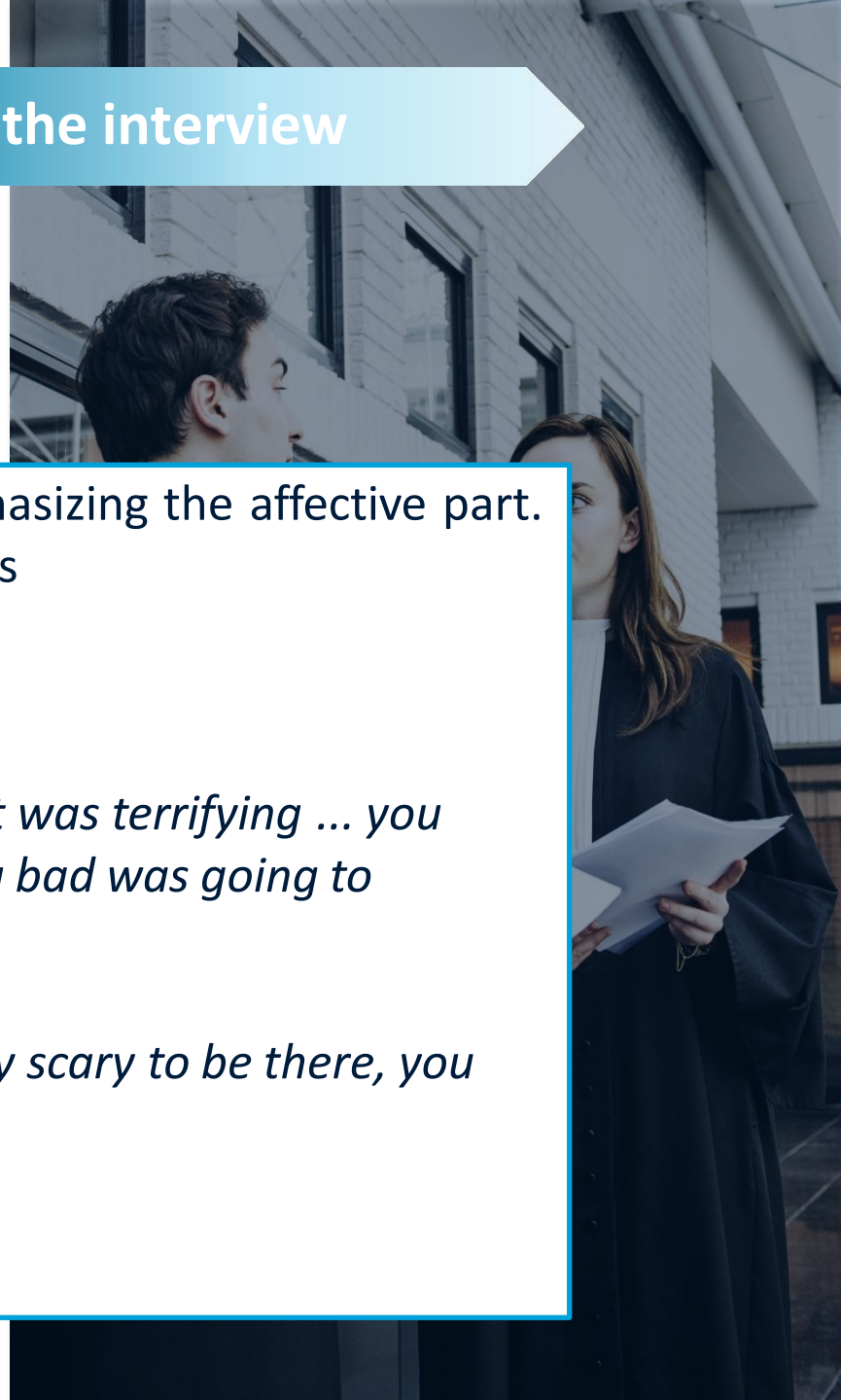
Example of reflecting:

Detainee:

- *I started to tremble, I wanted to get out, it was terrifying ... you should have seen ... It was as if something bad was going to happen...*

You:

- *It seems to me that it must have been very scary to be there, you must have felt helpless.*



1.2 Basic psychosocial approach during the interview

3

Paraphrasing

To say with the your own words what the other person has just said. This system helps the other person to define more clearly what he/she meant to say.

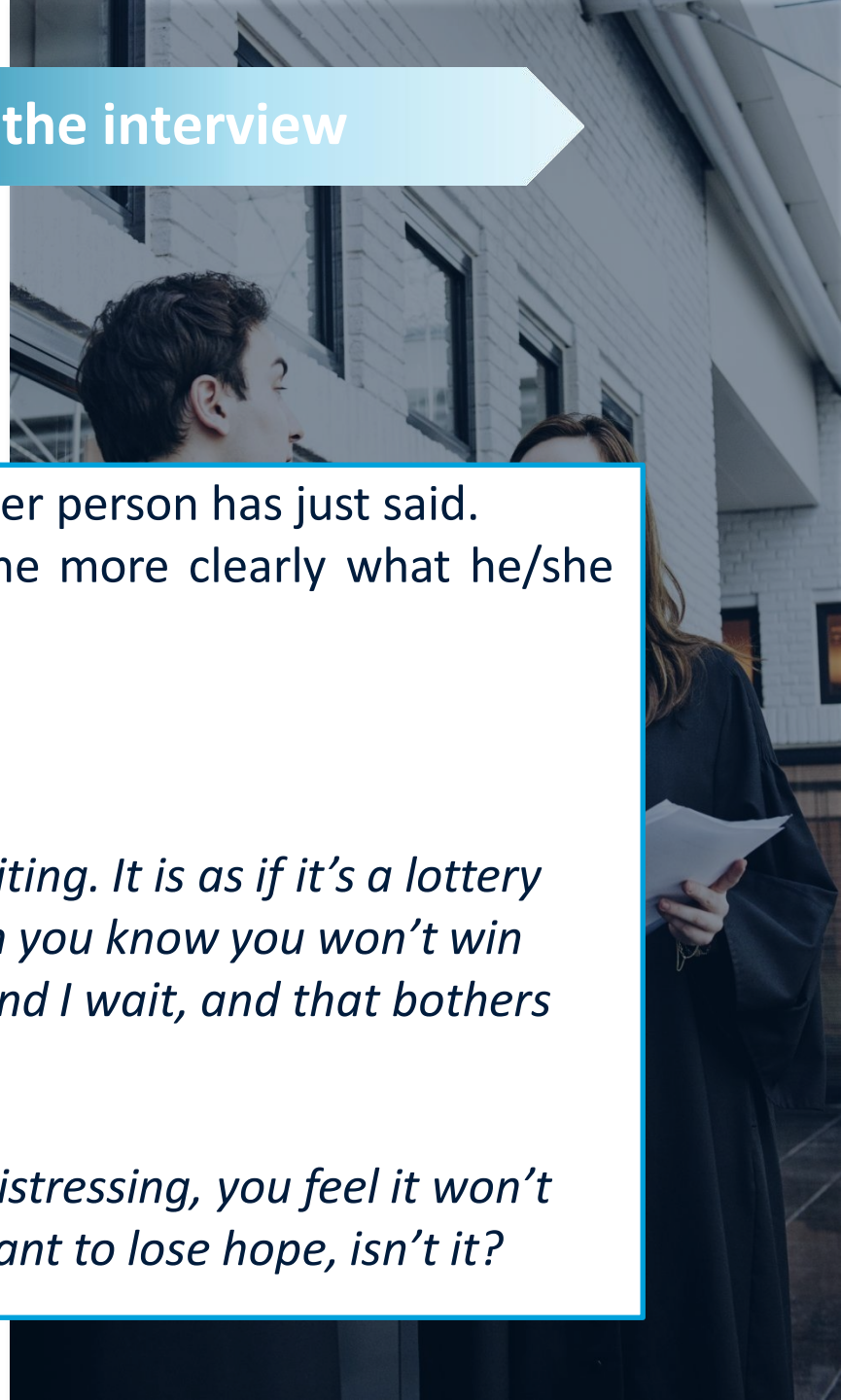
Example of paraphrasing:

Detainee:

- *What makes me anxious is the fact of waiting. It is as if it's a lottery and you have expectations but deep down you know you won't win and you continue to have a bit of hope...and I wait, and that bothers me.*

You:

- *To be always waiting for that call is very distressing, you feel it won't happen but at the same time you don't want to lose hope, isn't it?*



1.2 Basic psychosocial approach during the interview

4

Clarifying

Ask a question to obtain a clarification. It helps the person understand what he/she means.

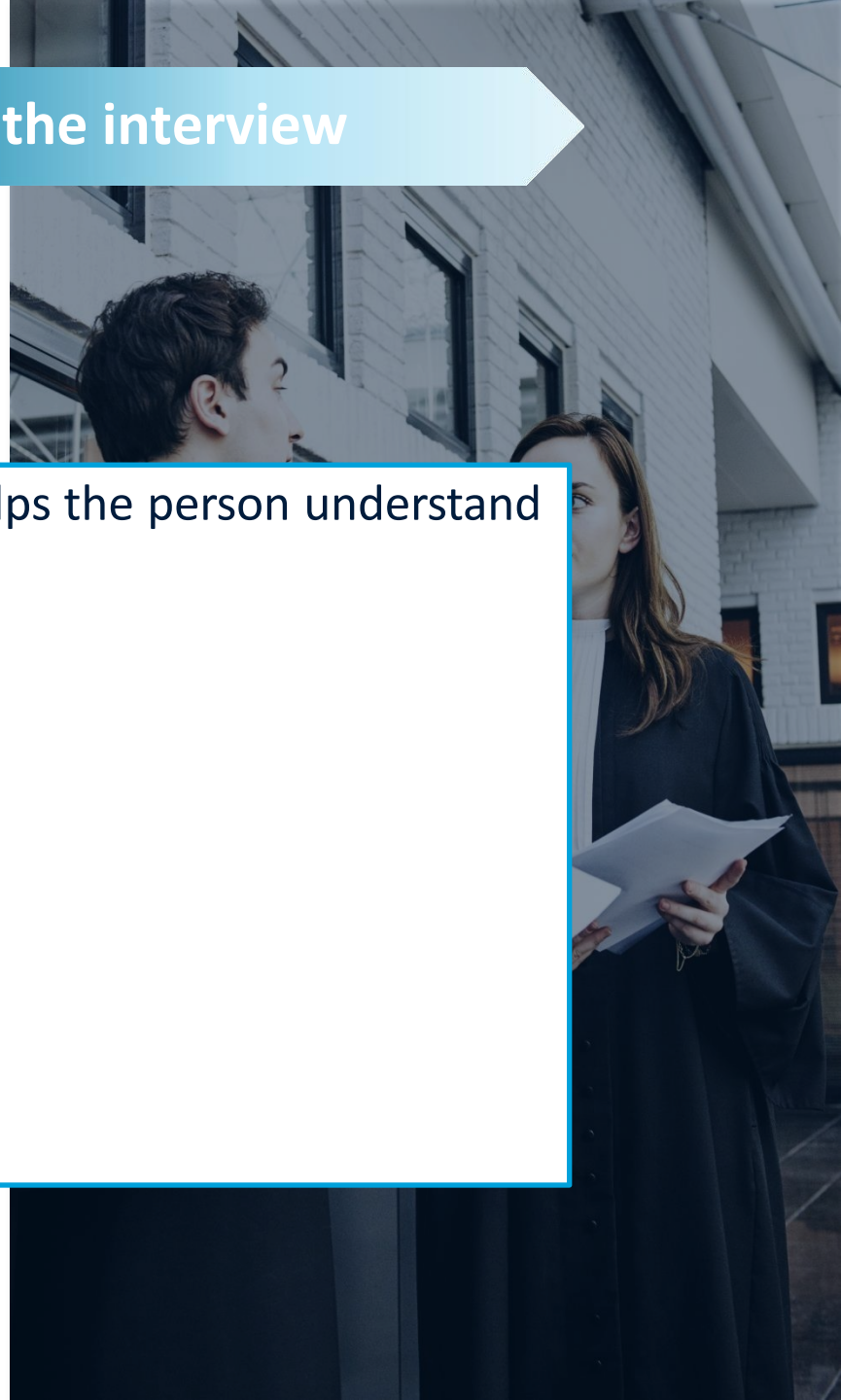
Example of paraphrasing:

Detainee:

- *It's all very confusing, I want to give up...*

You:

- *What do you mean by giving up?*



1.3 Memory and facts

As introduced in the communication module, one of the most relevant aspects of the interview is to gather as much information as possible.

However, occasionally the personal situation of the suspect makes their memory fail, incur in contradictions, repeat some facts, etc.

It is essential to understand that this behavior not always means lying or hiding information. It is important to understand how memory and facts explanation works in order to help the detainee.



1.3 Memory and facts

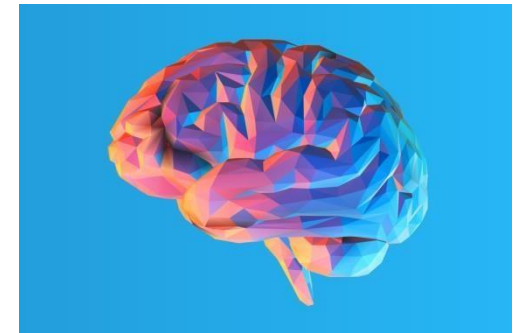


During situations with great emotional content, adrenal hormones such as adrenaline, noradrenaline and glucocorticoids are released, and these hormones selectively modulate learning and memory (McGaugh & Roozendaal, 2002; Roozendaal, 2000).

Alert situations can increase or deteriorate memory, depending on the situation, the moment in which it occurs and the characteristics of the participants. At a brain level, this modulation occurs mainly in the basolateral region of the amygdala, which is the brain area responsible for emotional regulation

1.3 Memory and facts

In addition, we must bear in mind that if the person has experienced a situation with high traumatic content, it is probable that they develop Acute Stress Disorder during the first 3 months or a post-traumatic stress disorder. One of the affections of the Acute Stress Disorder according to the DSM-V Manual is **negative alterations in the cognitions and emotions associated with the traumatic event or incapacity to remember an important aspect of the trauma.**



As lawyers, story-telling of facts occurred is very relevant. It is clear that stress and situations with emotional or traumatic content have a negative effect on memory. That is why it is important to create a space of comfort, confidence and comprehension, as this directly affects our capacity to conduct a proper defence.



PART 2: IDENTIFICATION OF ABUSE, ILL-TREATMENT

Although you are not psychologists and you will be in a situation where you need to act quickly and you have to obtain a lot of information in short time, it is important to take into account human beings' reactions in situations of anxiety or even in situations of human rights violations.

This information can be useful as to know how to act during the interview (look at 'basic psychosocial approach during the interview' section) and in the face of the judicial procedure itself, since we can detect or acknowledge possible abuse or irregularities during detention.

PART 2: IDENTIFICATION OF ABUSE, ILL-TREATMENT

Although it is not subject to this module to deep into the matter, we will talk about legal definition of torture based on case law of the European Court of Human Rights. This part has been included in the module for one main reason, when trying to prevent or prosecute torture, timing is essential, and the key moment to be able to act is during our first assistance as lawyers during detention. Given its importance in the mater, you will also learn from the Istanbul protocol:

**2.1 Legal definition
and case law**

**2.2 Timing is
essential**

2.3 Istanbul protocol

2.1 Legal definition and case law

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.

"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.



Case law ECtHR

Procedural violation of art. 3

**Beristain
Ukar v. Spain**

In its analysis of the violation of Article 3, the European Court of Human Rights indicates that pursuant to art. 1 of the Convention, when there is alleged ill-treatment by the State Security Forces, it is necessary to investigate.

The investigation must be thorough and effective, in addition to respecting the principle of contradiction and having as main goal the identification and punishment of those responsible. On this aspect, based on case law, failure to comply with this obligation may entail the violation of art. 3.

Case law ECtHR

Procedural violation of art. 3

**Martinez Sala
v. Spain**

To conclude whether a violation has been effective, the Court establishes two principles:

- The investigation must be able to conclude if use of force has been justified.
- All means must be used to ensure a detailed and objective analysis of the incident

San Argimiro Isasa v. Spain

During an investigation into the existence of torture, not allowing the plaintiff to provide evidence that can clarify who are the alleged perpetrators of the aggression or what the facts were, would imply that a thorough and effective investigation is not being conducted and, as a consequence, the violation of art. 3 in its procedural aspect.



Elements within the legal definition

Substantial violation of art. 3

a) SUPERIOR VALUE

Focusing now on the substantial violation of Article 3, the Tribunal begins its study recognizing the prohibition of torture as a SUPERIOR VALUE in democratic societies. This means that the prohibition will not suffer exceptions "even in the most difficult circumstances" and "whatever the behaviours attributed to the victim" *Judgment of the European Court of Human Rights, Matter of Martínez Sala and others v. Spain, of November 2 of 2004, p.120.*), even if terrorism cases.



Elements within the legal definition

Substantial violation of art. 3

b) LEVEL OF SEVERITY

Another requirement that must be met is that the ill-treatment must have a minimum level of SEVERITY.

c) VERACITY

On the other hand, in order to consider VERACITY of the alleged facts, criterion of certainty "beyond any reasonable doubt" needs to apply, although indications and presumptions can also be observed if they are sufficiently consistent.



Elements within the legal definition

Substantial violation of art. 3

d) BOORDEN OF PROOF

In short, in situations in which the authorities are guarantors of the physical and mental integrity of those in custody, such as preventive detentions, the Court notes that the BURDEN OF PROOF, in case of any event, falls on The authorities.

2.2 Timing is essential

Detention is one of the moments in which torture is more likely to occur

"Yes, prevention of torture works", main conclusions of a global study on 30 years of prevention of torture. Ass. for the Prevention of Torture, France, 2016

The study showed that the practical application of safeguards during detention is the measure with greatest impact on the reduction of torture. Of all the measures, applying safeguards in the first hours and days of detention are the most important means of preventing torture. In particular, notification to family or friends and access to legal aid have the greatest effect on the reduction of torture, followed closely by access to an independent medical examination.

The study concluded that the most important measure to prevent torture is to ensure effective access for all detainees to all due process during the first hours and days of detention.

Other safeguards identified by the study are access to a lawyer and an independent medical examination.

2.2 Timing is essential

Detention is one of the moments in which torture is more likely to occur

The Court of Justice of the European Union has foreseen in several rulings that the rules contained in the Community Directives, which have not been transposed into the legal system of each member state enjoy the direct vertical effect, they are imperative. As such, they can be invoked in an express and direct way to the public authorities.

It is not acceptable, therefore, to systematically deny lawyer's access to the detainee custody book to know the exact time of the arrest or, what is much more serious, the refusal to submit a copy of the police statement before the deposition or the interview with the detainee. This practice clearly contradicts Directive 2012/13/EU.

2.3 Istanbul Protocol

In addition to the identification in proper time, right during detention, of any situation of ill-treatment or torture, in some circumstances, the existence of an accurate medical report is also essential to the effectiveness of the investigation.

However, Amnesty International has received reports of cases of alleged ill-treatment in which the medical examination of the victim was carried out in the presence of police officers. Such a situation is contrary to the international regulations, since the presence of the agents most likely intimidates the victim and the victim does not dare to speak about the ill-treatment and the causes of his/her injuries. Due to situations like this one, medical reports may not accurately reflect the physical and mental state of the person detained at the time of the examination, because it does not indicate all injuries.



PROFESSIONAL TRAINING SERIES No. 8/Rev.1

Istanbul Protocol

*Manual on the Effective Investigation and
Documentation of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment*



UNITED NATIONS
New York and Geneva, 2004

2.3 Istanbul Protocol

The Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, in popular terms, the **Istanbul Protocol**, contains the first set of internationally recognized standards for the examination, investigation and reporting of allegations of torture and ill-treatment. It was prepared in a collective effort of more than 75 experts in law, health and human rights defenders that represented more than 40 different organizations including the IRCT.

Since its inception in 1999, the Istanbul Protocol has been supported and promoted by the UN and other key human rights bodies. It exists in Arabic, Chinese, Spanish, French, English, and Russian.

Although we cannot extend more on that topic, it is essential for lawyers to know about it and you will find a hand book for lawyers regarding Istanbul Protocol.



PROFESSIONAL TRAINING SERIES No. 8/Rev.1

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*Manual on the Effective Investigation and
Documentation of Torture and Other Cruel,
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UNITED NATIONS
New York and Geneva, 2004

PART 3: VULNERABLE SUSPECTS



When attending police stations, you regularly come across clients who may be described as vulnerable. Children, people with mental or intellectual disabilities, or physical disabilities are some of the obvious examples of vulnerable suspects. The prevalence of vulnerable suspects in police custody is unknown, however, what is known from research is that vulnerabilities are severely under detected at the early stages of criminal proceedings.

PART 3: VULNERABLE SUSPECTS



There is also no common inter-disciplinary definition of a “vulnerable suspect”. It is important for lawyers to know both the legal and the psychological definitions of vulnerability. The legal definition only provides the general framework for determining whether someone is vulnerable in the criminal process. However, the “essence” of this concept lies in the understanding of the possible risk factors, mechanisms and implications of vulnerability.

PART 3: VULNERABLE SUSPECTS



It is not the aim of this Module to teach how to assess whether someone is psychologically vulnerable, because this requires specialist knowledge. Our goal is to raise your awareness about the possible psychological risk factors and mechanisms causing vulnerability. We hope that you can use this knowledge, firstly, to identify clients that may be vulnerable and might require a special medical assessment, and, secondly, to bring the need to take special measures to compensate for the possible vulnerability to the attention of the investigative authorities, as well as to be able to argue why such measures may be needed.

PART 3: VULNERABLE SUSPECTS

In this part of the module we include the following information:

3.1 Legal definition

**3.2 Definition from
(legal) psychology**

**3.3 The 'exploratory'
guide**

**3.4 Risk
factors**

**3.5 Taking
action**

3.1: Legal definition

In this Section, we will look at the legal definition of a vulnerable suspect in criminal proceedings.

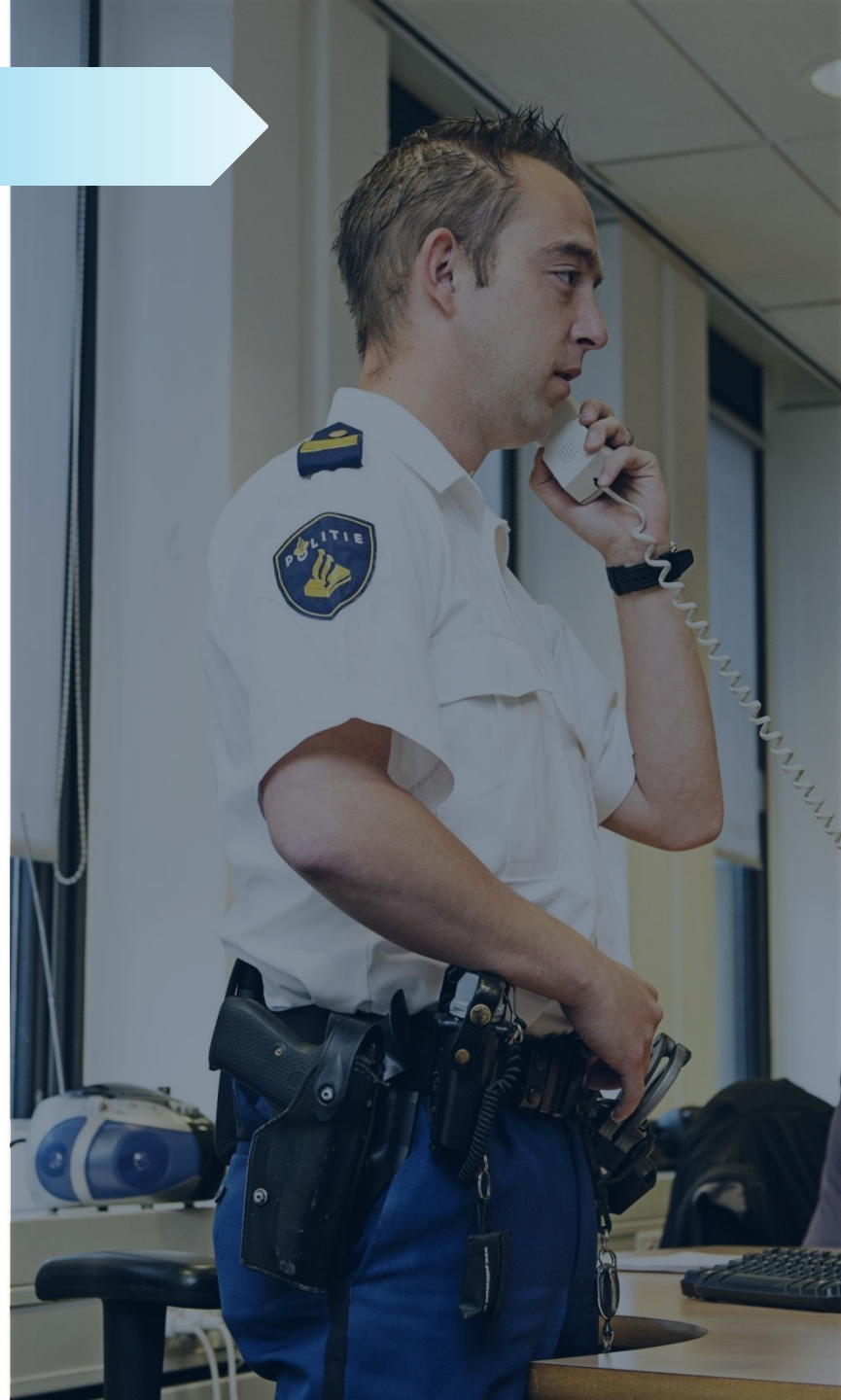
We will use the definition derived from the case law of the European Court of Human Rights, and reflected in the European Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

Recommendation definition

Effective participation

Examples from ECHR case law

Legal exercises



The Recommendation definition

Let's first look at the definition of a vulnerable suspect given in the Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. The EU Recommendation does not have binding power on the Member States. However, it is relevant because:

(a) it summarises the requirements of the EU case law; and

(b) it may be cited as legal authority by national and European courts when interpreting European regulations on the topic.

The Recommendation defines “vulnerable suspects” as “all suspects or accused persons who are not able to understand, and effectively participate in, criminal proceedings due to their age, their mental or physical conditions or disabilities”.

It may not always be apparent, particularly when it comes to psychological vulnerabilities, whether the person affected by these vulnerabilities is unable to effectively participate in the proceedings. Therefore, the Commission recommends that there should be an opportunity for a medical expert to identify vulnerable persons, and to determine the degree of their vulnerability and to assess their special needs.

The Commission also recommends that states should foresee a presumption of vulnerability particularly for people with serious psychological, intellectual, physical or sensory impairments, mental illness or cognitive disorders, hindering them to understand and to effectively participate in the proceedings.

Effective participation

The European Court of Human Rights said that in order to effectively participate in the proceedings, suspects must at least have “a broad understanding of the nature of the...process, and of what is at stake for him or her, including the significance of any penalty which may be imposed.” (SC v. UK case).

However, simply understanding what is being said in the interrogation or in the courtroom or of the nature of the process is not enough for “effective participation”. Effective participation also encompasses the ability to actively defend oneself against the accusation. This includes the capacity to exercise procedural rights, make important procedural decisions, as well as to participate in one’s own defence from the factual perspective: for example, the ability to comment on the facts and evidence presented by the prosecution, or to advance one’s own version of the events. This also encompasses the ability to instruct, and to cooperate with, the lawyer.

Effective participation

It is therefore presumed that, “average” or “non-vulnerable” suspects, provided that they are given adequate information - for example, about the consequences of making certain procedural decisions - would be able to exercise the above-mentioned functions to a reasonable minimum standard without any compensatory measures being taken. Vulnerable suspects, in turn, need additional compensatory measures to ensure their participation even to a minimum acceptable level.

The difficulty is of course that there is no explicit definition of what is the “minimum acceptable standard” of participation in the criminal process. However, it might be possible for you as practicing lawyers to argue what is NOT effective participation based on the concrete circumstances of the case. In the next Section, we will review some examples from the ECtHR case law related to “effective participation”, and subsequently look at a couple of hypothetical situations, which will allow you to practice the application of the legal definition of a “vulnerable suspect” to ensure their participation even to a minimum acceptable level.

ECtHR case law examples

Let us look at some cases, where suspects' ability to "effectively participate" in the criminal proceedings was examined by the European Court of Human Rights. These situations are meant to provide you with some examples - they are not exhaustive.

A) Bortnik v.
Ukraine

B) Todorov v.
Ukraine

C) Baytar v.
Turkey

D) Liebreich
v. Germany

ECtHR case law examples

A) Bortnik t. Oekraïne

In **Bortnik v Ukraine**, the Court found that the suspect was “particularly vulnerable” based on a combination of factors: firstly, he had a **“physical disability, suffered from chronic alcoholism, and belonged to a socially disadvantaged group”**.

Secondly, his vulnerability, in the Court’s view, was apparent **from his behaviour in the proceedings**. Namely, he said that “he would defend his rights himself”, but was clearly unable to do so. He had confessed to murder and waived his right to legal assistance in the presence of the investigators, but had immediately pleaded not guilty and requested a lawyer when outside of their authority.

This led the Court to conclude that the suspect was **“particularly vulnerable, legally ignorant and susceptible to external influence.”**

ECtHR case law examples

B) Todorov t. Oekraïne

In **Todorov v Ukraine**, the Court found that the suspect was **not capable of effectively participating** in the police interview, and more specifically to competently waive his procedural rights. This was both because of the suspect's **physical disability**, namely, he was almost fully blind, and due to the **manner in which the proceedings were conducted**. He was only informed about his rights in a written manner, and was requested to sign the record of questioning and the waiver of rights, without any explanation of what he was signing.

ECtHR case law examples

C) Baytar t. Turkije

In **Baytar v. Turkey**, the Court found that the suspect was unable to *“effectively participate”* in the proceedings, **because he did not sufficiently speak the language of the proceedings**, and did not enjoy access to an interpreter when informed about the charges against him. As a result, he could not understand what was at stake for him in the proceedings, and thus could not take an informed decision about the exercise of his procedural rights, namely the right to remain silent and the right to legal assistance.

ECtHR case law examples

D) Lieblich t.
Duitsland

Legal exercise

The following exercise is provided to act as a simulation of possible real life situation that criminal lawyers attending police interviews may find themselves.

The goal in carrying out this exercise is to apply the concepts we have discussed and encourage participants to engage in a reflexive mindset in their approach to this training. Providing exercises which simulate real life situations will, hopefully, encourage you to retrospectively apply these concepts to your own personal, professional experiences.

You were asked to attend Mr. S., arrested on suspicion of destruction of public property. Mr. S. suffers from a mild form of schizophrenia. During the lawyer-client consultation, it becomes clear that Mr. S. is alert and aware of the circumstances of the impugned events, and understands that he is at the police station answering a criminal charge. He tells you that he committed the offence because he was ordered to do so by someone. He seems to understand your advice to respond to police questions. Once in the interrogation room, Mr. S. decides to remain silent. He tells the officer that you, his lawyer, had given him different advice, but he was certain that this was because you were secretly plotting against him, and wanted to send him to prison.

QUESTION

Was Mr S. a “vulnerable suspect” according to the legal definition?

Legal exercise

ANSWER

Was Mr. S a “vulnerable suspect” according to the legal definition?

Mr. S **should be considered vulnerable** from the legal standpoint. The legal criteria for a vulnerable suspect is the ability to understand proceedings, as well as to actively participate in the process, including the capacity to exercise one’s procedural rights, make rational procedural decisions, and to cooperate with the lawyer. Although Mr. S seems to understand the nature of the process, and is able to exercise his rights (his right to silence) , his capacity to make rational decisions and to cooperate with the lawyer is severely compromised by his paranoid delusions. It is evident that he remains to be silent based on irrational considerations. He is unable to cooperate with his lawyer effectively, as he does not trust the motives of his lawyer’s advice.

3.2: Psychological definition

Vulnerable persons are at risk of being disadvantaged in social interactions. This disadvantage may manifest itself in various forms, such as, the limited capacity to understand spoken or written language or behavior, the limited capacity to respond to behavior or to act according to social expectations, or the increased risk of being excluded from meaningful social interactions.

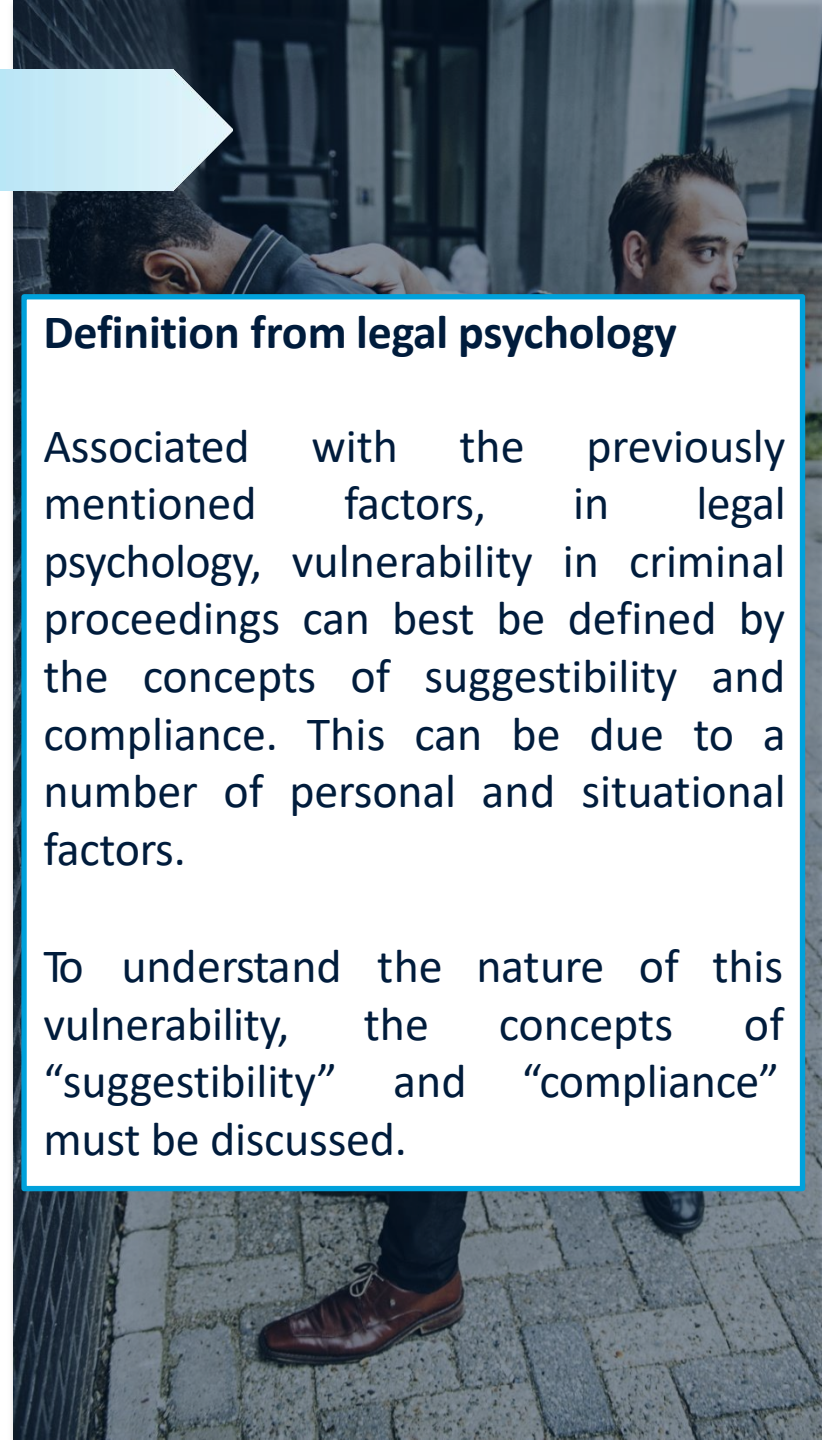
This may happen due to various factors, for instance, due to age, disability, mental illness, race or ethnicity, language, social status and others.

Suggestibility and Compliance

Definition from legal psychology

Associated with the previously mentioned factors, in legal psychology, vulnerability in criminal proceedings can best be defined by the concepts of suggestibility and compliance. This can be due to a number of personal and situational factors.

To understand the nature of this vulnerability, the concepts of “suggestibility” and “compliance” must be discussed.



3.2: Psychological definition

The concepts of “**suggestibility**” and “**compliance**” in police interviews are associated with the works of an Icelandic forensic psychologist; Gisli Gudjohnsson.

“Suggestibility” in the context of an interrogative interview is the propensity of persons to accept messages or suggestions given to them by the interviewer, and change their behavior as a result.

“Compliance” is defined as the tendency to accept or go along with propositions, suggestions or instructions in exchange for a perceived instrumental gain.



3.2: Psychological definition

Thus, the difference between “suggestibility” and “compliance” lies in the personal acceptance: highly suggestible suspects internalize the propositions made by an interrogator, believing them to be true. Highly compliant individuals, in turn, realize that they are being influenced, but they accept it, for example, because they wish to please the interviewer, or fear the consequences of non-compliance. Suggestibility is linked with uncertainty and distrust of one’s own memory. Compliance is related to the desire for social acceptance, or the need to escape a certain situation.

Both suggestibility and compliance are influenced by adolescence, intelligence, IQ, self-esteem, the degree of sleep deprivation, the level of anxiety and many other factors. For instance, the lower someone’s IQ level is, the higher is his or her suggestibility and compliance level. It must be remembered though that any reliable assessment suggestibility and compliance must be done by a specialist, and it takes considerable time. Therefore, it may often not be feasible to assess this in the first police interrogation.

3.2: Psychological definition

It is important to note that higher levels of suggestibility and compliance do not necessarily always result in false confessions. Having said this, it is still useful for lawyers to take note of any potential risk factors or manifestations of suggestibility or compliance in their clients, and share these observations with the interrogating officers, particularly because the effects of psychological vulnerability of suspects during an interview may be amplified by other factors, such as the manner and style of questioning.



3.3: An exploratory guide

This is an explorative guide, which you as practicing lawyers may use for the initial assessment of the relevant issues surrounding your client's vulnerability in the criminal process, especially at the early stages of criminal proceedings. This tool is not meant to substitute an assessment being done, for instance, by a forensic psychologist. However, it will hopefully help you to ask the right kinds of questions to decide what you, as a lawyer, should do, when facing a client who is potentially vulnerable.

1 Are there any factors present which make my client vulnerable during the "ordinary flow" of the criminal process?

2 What risks is my client facing because of these vulnerabilities? What are the (psychological) implications?

3 How can I substantiate the argument concerning these risks?

4 What are the potential legal implications of my client's vulnerabilities?

5 What action should I take to address/compensate for the potential risks?

3.4: Risk factors

Some **risk factors** that may lead to **vulnerability**, are:

Age (too young or too old)

Mental illness

Intellectual disability

Physical health condition

Language

Gender

Ethnicity/race

Other factors (this list is not exhaustive)

Factors such as ethnicity/race or gender are less commonly accepted as leading to a potential vulnerability. Yet, research suggests, that persons belonging to certain ethnic groups, or women in certain cultures, may be less confident in invoking their rights in police custody for reasons related to culture and intercultural communication. Thus, suspects originating from some ethnic groups, particularly women belonging to these groups, may have difficulty with employing direct and categorical language, often necessary to invoke certain rights. Furthermore, persons from certain ethnic background may be subject to discrimination while in police custody.

3.4: Risk factors

Regarding risk factors in this part of the module you will find information about:

A) Types of risks

The question that you may ask yourself is:

what sort of a risk does my client face, or what type(s) of vulnerability(ies) is he or she facing?

B) Legal implications

The next question to be asked is:

What are the legal implications of your client's possible vulnerability?

C) Underlying mechanisms

Finally:

What measures, as a lawyer, could you take to compensate for your client's vulnerabilities, and to support you in arguing in favor of special safeguards?

A) Types of Risks

The next question that you may ask yourself is: what sort of a risk does my client face, or what type(s) of vulnerability(ies) is he or she facing?

The **kinds of risks** are numerous, and at the stage of police detention they may include:

?

An increased risk of providing an unreliable or inaccurate account, or a false confession. This risk is linked to increased suggestibility or compliance, and vulnerability to pressure during an interview.

?

Limited ability to provide an account or evidence at the interview, due to such things as a limited ability to pay attention to questions, or communication difficulties.

?

Increased risk of self-incrimination, due to susceptibility to interrogative pressure. This risk may also manifest itself due to the limited ability to understand the implications of giving answers at interrogation on the issues of evidence and proof.

?

A reduced ability to cooperate with the lawyer.

A) Types of Risks

The **kinds of risks** are numerous, and at the stage of police detention they may include:

?

Increased susceptibility to waiving rights and diminished capacity to ensure rights are upheld.

?

Diminished ability to understand the nature of the criminal proceedings, the nature of questioning, and/or the roles in the criminal process.

?

Reduced capacity to make rational decisions, e.g. about whether or not to respond to questioning.

?

Health risk associated with being in police detention.

B) Legal implications

A photograph of a woman with long brown hair and a man in a black legal robe with a white collar, both looking at each other in conversation. They are in an office setting with window blinds in the background. A large white arrow points to the right, partially overlapping the top of the image.

The next question to be asked is: What are the legal implications of your client's possible vulnerability?

Knowing the legal implications might help you decide which action should be taken as a result of identifying a potential vulnerability risk. The legal implications will depend on the national legal system, but as far as the police detentions stage of the criminal proceedings is concerned, they would typically include:

B) Legal implications

The next question to be asked is: What are the legal implications of your client's possible vulnerability?

1

The consequences for criminal liability of your client, namely whether or not he is in the state to understand his actions and to carry responsibility for them.

2

One legal implication may be the capacity of your client to be interrogated, namely whether or not your client's physical state allows him or her to be subjected to an interrogation, and whether or not he is mentally fit for interrogation, meaning whether, firstly, the questioning is likely to cause his or her health condition to deteriorate, secondly, whether he or she is capable of understanding the interrogation and giving rational responses, and thirdly, whether there is a high risk that the account given by the client will be unreliable.

B) Legal implications

A woman with long brown hair is looking towards a man in a dark suit and white clerical collar. They are in an office with blinds in the background. A large white arrow points to the right, partially overlapping the man's head.

The next question to be asked is: What are the legal implications of your client's possible vulnerability?

3

In some jurisdictions, people with serious vulnerability may be unable to waive certain rights, for example, the right to legal assistance during the interview.

4

In most countries, vulnerability calls for specific procedural safeguards such as the presence of a support person, or audiovisual recording of the interrogation.

C) Underlying mechanisms

When trying to explain the potential risks to the police, you may need a further understanding of the vulnerability in order to substantiate your explanation. Why might people like your client face a certain risk in the criminal process? And which cognitive, mental or developmental characteristics make certain suspects more vulnerable than others?

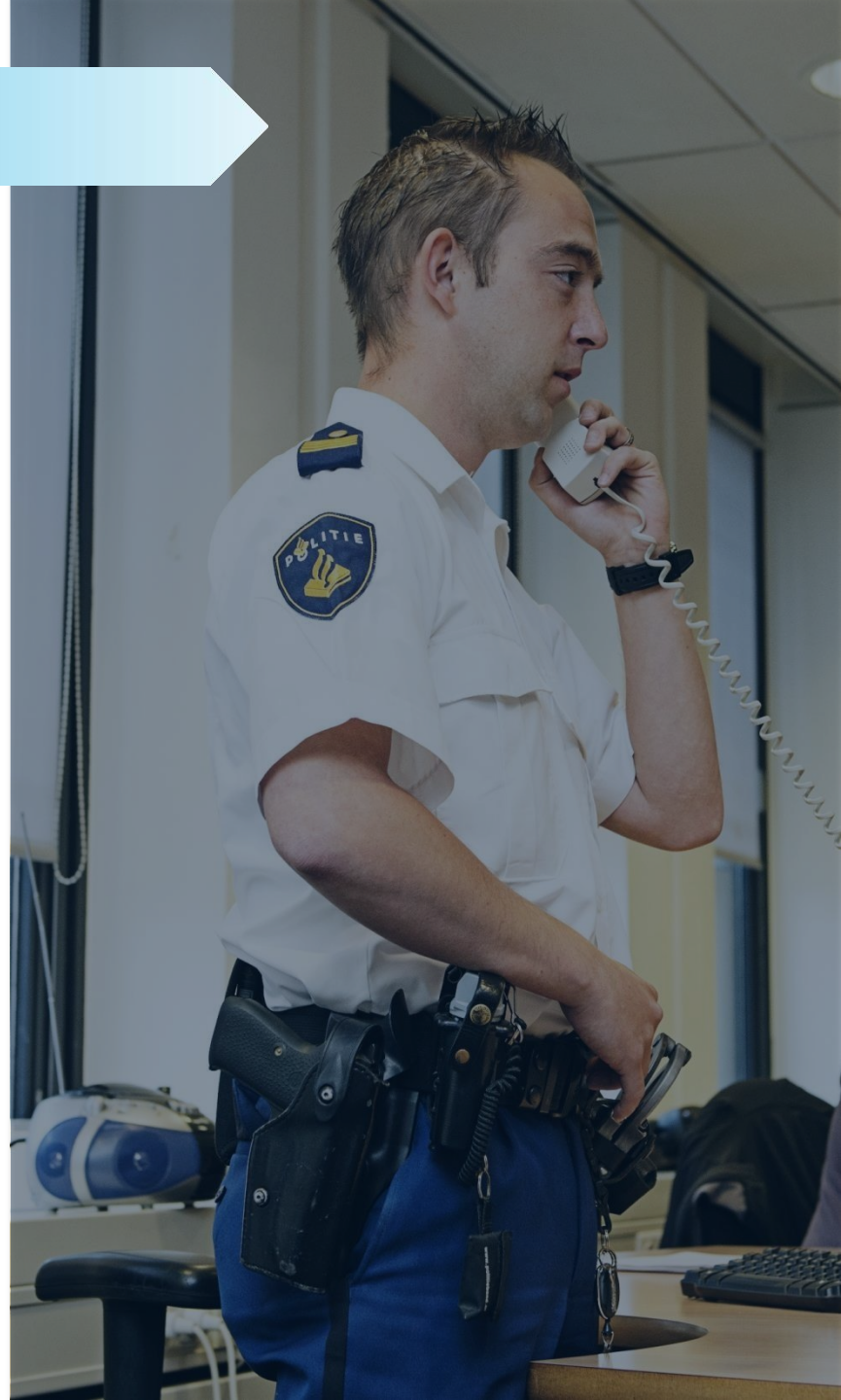
This information may be helpful both to decide what measures you as a lawyer could take to compensate for your client's vulnerabilities, and to support you in arguing in favor of special safeguards for your client.

Usually, an expert psychological assessment of your client would be needed to determine whether, and to what extent, he or she exhibits certain typical characteristics leading to vulnerability, but it might be helpful to learn about the basic mechanisms underlying vulnerability in certain groups, for example, children or persons with intellectual disabilities.

3.5: Taking action

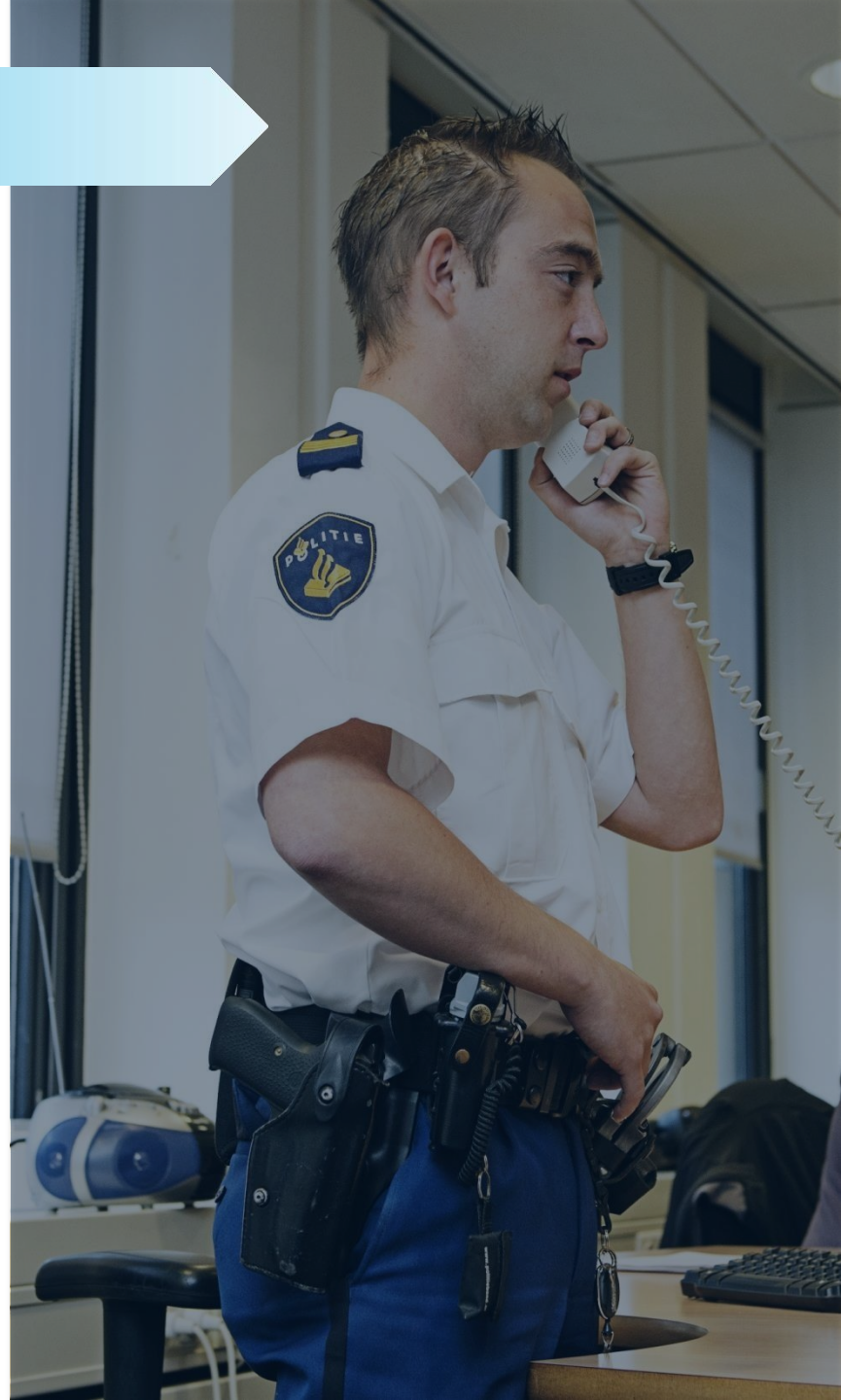
The final question in our explorative guide is what action you as a lawyer need to take when you have detected that your client is potentially vulnerable.

These actions would of course depend on the type of the potential vulnerability risk. For example, if the client does not sufficiently speak the language of the proceedings, it might be sufficient to use the services of an interpreter for your communications with the client, as well as ensuring that the client benefits from access to an interpreter during the interrogation. (more information in Module 6 about the right to interpreter)



3.5: Taking action

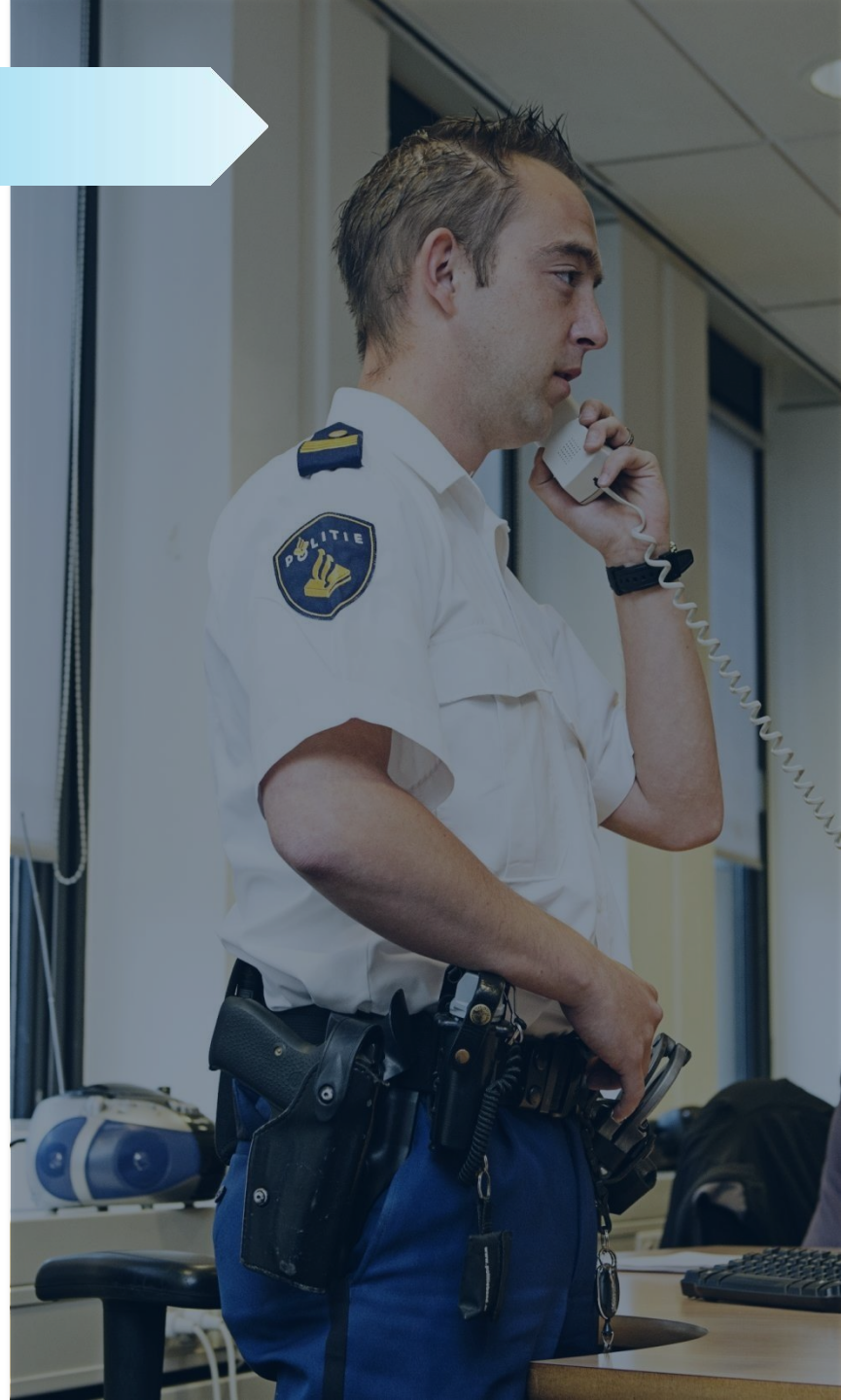
Other, more complex, vulnerabilities may require a more complex analysis of the appropriate action. We suggest that in any case, lawyers should inform the investigative authorities about the potential client's vulnerability, and, if possible, suggest which legal, and other, measures should be taken to compensate for the potential vulnerability, such as avoiding the use of complex language and leading questions in the interrogation or recording the interrogation on video, amongst others.



3.5: Taking action

Lawyers should also consider the implications of the client's potential vulnerability on the advice they have given during consultation and police interview.

For example if a lawyer notices his client is excessively compliant, and he or she is not considered unfit for an interview, this may be a reason for advising client to remain silent during the interview. Likewise, the lawyer might need to assist the client in responding to questions, or in presenting evidence favourable for his or her vulnerable client, if the client seems unable to do so independently.



3.5: Taking Action

In this Section, you are presented with a short case scenario. The goal is to illustrate the application of the five-question explorative guide.

Please first read the **case scenario**.

Then please take a pen and paper and respond to the following questions:

1. What factors make A. potentially vulnerable?
2. What are the risks that A. is facing at the given stage of the criminal proceedings because of his potential vulnerability?
3. How can I substantiate the argument concerning A.'s vulnerability?
4. What are the legal implications of A.'s potential vulnerability?
5. What action should I take as a lawyer to address/compensate for the risks associated with A.'s potential vulnerability?

Scenario

3.5: Taking action

Case scenario:

A. is suspected of causing bodily harm to a passer-by on the street. He is attended by you, the lawyer at the police station.

The custody officer tells you that A. is a “known felon” to the police, who obviously has “mental issues”, but they (police) have no record of any particular mental illness.

During the lawyer-client consultation it becomes clear that A. has a communication impairment. He talks incessantly with no pauses, jumps from one topic to another, his speech is at times unintelligible.

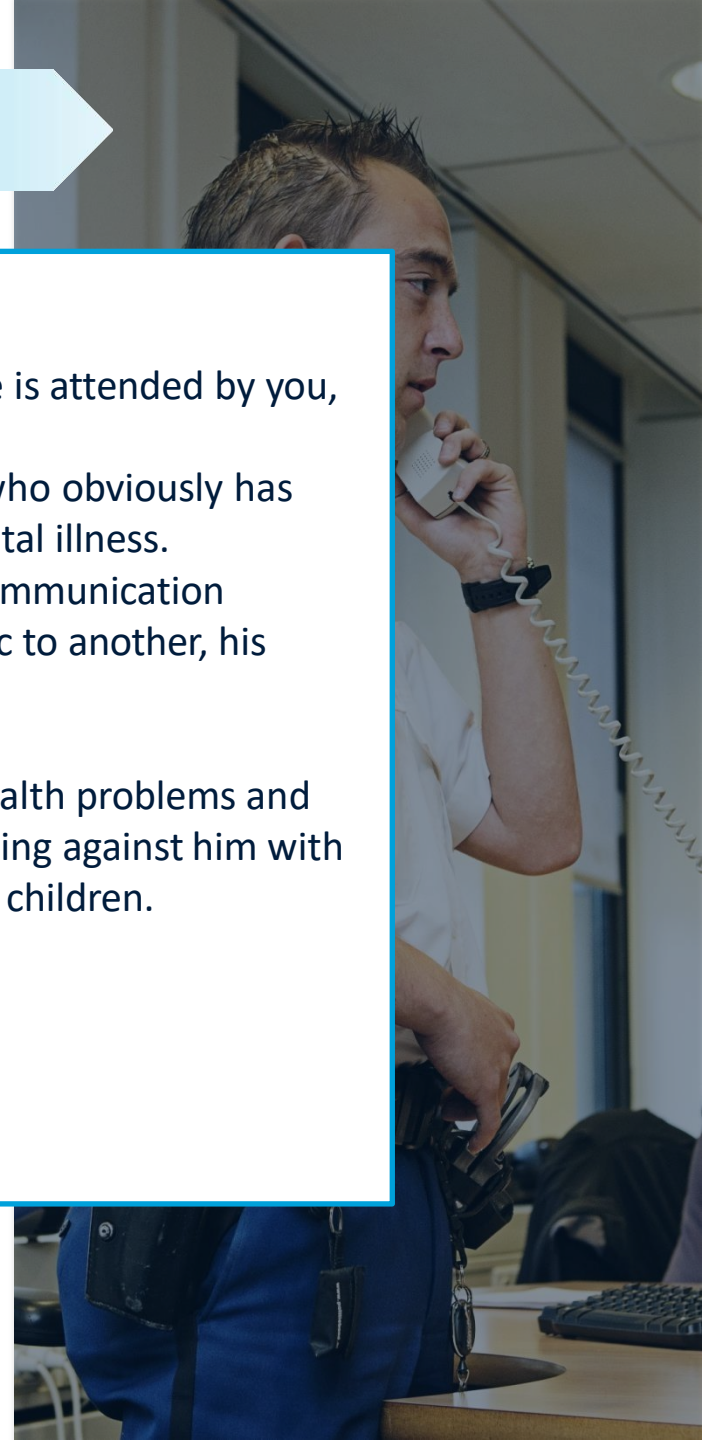
You have difficulty catching A.’s attention.

For the rest of the consultation, A. complains you about his various health problems and inability to find work. He also states that the police are lying, and plotting against him with his ex-partner, because they do not want him to have custody over his children.

What would you do next as A.’s lawyer?

(Please go through the steps described in the explorative guide.)

*When you are ready, you can compare your answer with the **model answers in next page:***



1) Factors present to suggest that A. may be vulnerable?

A. seems to be suffering from (an) unidentified mental disorder(s), he has communication impairment, and exhibits an attention deficit and possible (unconfirmed) paranoid symptoms.

2) What risks is A. facing?

- A. is probably unable to comprehend his procedural rights

- There is some chance that A. is unable to take rational decisions about exercising his procedural rights and about his procedural behaviour at interview

- A. probably has diminished ability to understand the questioning/provide an effective account during an interview

- A. is probably unable to effectively cooperate with his lawyer, i.e. to give instructions to the lawyer and/or to understand lawyer's advice

3) How can the risks be substantiated?

- Possible lack of ability to comprehend rights/understand the questioning/understand legal advice: A. seems to suffer from an attention deficit, which appears to impair him in understanding lawyer's advice and his procedural rights, and might also have an impact on his understanding the questioning.

- Possible inability to take rational decisions about the exercise of the right to silence/procedural behaviour at interview: A.'s account to his lawyer may exhibit signs of paranoia (alleged conspiracy between the police and A.'s ex-partner), which if confirmed. might be indicative e.g. of a paranoid schizophrenic disorder, and may interfere with A.'s ability to take rational decisions in the criminal process.

- Possible inability to provide an effective account: A. has an obvious communication impairment (as well as a possible paranoid disorder) which is likely to prevent him from responding to police questioning in a logical and reasonable way.

- Inability to give instructions to the lawyer: For the same reasons as above, A. appears unable to provide logical and clear instructions to his lawyer.

4) Legal implications

-It is very likely that A. is unfit to be interrogated. However, an expert assessment is needed, looking into whether A. is sufficiently able to understand the questioning and provide rational responses. (Most probably, A. should be considered unfit, as he seems unable to provide a rational account to his lawyer).

- If A. is considered fit for interrogation, he should be interrogated in the presence of the lawyer AND an appropriate adult/trusted person.

5) What action?

-The lawyer should request a medical assessment of A.'s fitness to be detained/need for special supervision or treatment while in detention, bearing in mind the possible implications of his (undiagnosed) mental disorder on his ability to cope with the detention and his (mental) health status.

- The lawyer should furthermore ask for an expert assessment of A.'s fitness for interview, arguing that A. is possibly unfit to be interviewed.

-Implications for the interview (if conducted): Given the compromised A.'s ability to provide a rational account, the lawyer should consider advising A. to remain silent (if A. is able to comply with this advice). If during the interview it turns out that A. is unable to understand the questioning, and/or starts responding to it, the lawyer should consider stopping the interview.

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