

MODULE 16

Definition. LGBTIQ+ violence refers to violence perpetrated based on an individual's actual or perceived sexual orientation or gender identity. The acronym "LGBTIQ+" refers to Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and other gender and sexual identities, but these definitions may sometimes be limiting, and individuals may choose to identify with multiple or none of these terms.

LGBTIQ+ violence is inherently discriminatory. Violence against LGBTIQ+ persons very often takes place due to discrimination based on their actual or perceived sexual orientation and/or gender identity and expression. LGBTIQ+ violence stems from preconceptions and biases related to a person's sex, sexual orientation, gender, gender identity and/or gender expression. As such, LGBTIQ+ violence is inherently discriminatory.

LGBTIQ+ violence can take multiple forms. The [Inter-American Court of Human Rights](#) (IACtHR) recognised that violence against LGBTIQ+ persons can take the form of physical and sexual violence and arbitrary arrest. The [European Court of Human Rights](#) (ECtHR) also identified strip-searches, humiliations, and threats of disclosing an individual's sexual orientation or gender identity to the public, and hate speech as forms of violence against LGBTIQ+ persons.. The [UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#) (UN Independent Expert on SOGI) also notes conversion therapy practices as forms of violence against LGBTIQ+ persons, including so-called "corrective" rapes and psychological treatments.

Forms of LGBTIQ+ violence, hence, can include but are not limited to killings, rape and other forms of sexual abuse, beatings and other physical attacks, forced anal examinations, conversion therapy practices, arbitrary detention and other violations of due process and fair trial rights, threats and general discrimination and other forms of harassment. Depending on the circumstances, such discriminatory violence can amount to torture or cruel, inhuman or degrading treatment or punishment.

LGBTIQ+ violence as torture

Importance of recognising LGBTIQ+ violence as torture. The UN [Special Rapporteur on Torture](#) has said that, historically, the analysis of the anti-torture framework "largely failed to have a gendered and intersectional lens, or to account adequately for the impact of entrenched discrimination, patriarchal, heteronormative and discriminatory power structures and socialized gender stereotypes". In this context, the UN [Independent Expert on SOGI](#) has stressed that "gender theory, gender-based approaches and intersectionality provide a framework for addressing multiple asymmetries of power (deriving from how sex is constructed and operates in societies), including those that feed violence and discrimination against women; and that they are also a sharp lens for analysing the root causes of violence and discrimination based on sexual orientation and gender identity and expression".

Recognition that some forms of LGBTIQ+ violence can amount to torture is necessary to acknowledge the gravity of these acts, to bring to light the prevalence of the violations, and to ensure survivors' rights. Recognition of LGBTIQ+ violence as a form of torture is important firstly because it makes survivors visible, and secondly because it triggers certain State obligations towards survivors, including the obligation to redress.

In order to constitute torture, an instance of LGBTIQ+ violence must fulfil the elements of torture as defined by UNCAT or in criminal law (see *Module 2: UNCAT and the Definition of Torture*). The main elements of the UNCAT definition of torture include:

- severe **pain or suffering**, whether physical or mental;
- inflicted **intentionally**;
- for a specific **purpose** (such as obtaining information or a confession; to punish, intimidate, or coerce; or for any reason based on discrimination of any kind);
- by or at the instigation of, or with the consent or acquiescence of, a **public official** or other **person acting in an official capacity**.

The inclusion in the **purposive** element of "*discrimination of any kind*" is important:

- Violence against LGBTIQ+ persons is often perpetrated against someone on the basis of their sex, gender identity, actual or perceived sexual orientation or non-adherence to social norms around gender and sexuality.
- States have a duty to take all necessary steps to clarify if violence was motivated by prejudice and discrimination. In [Azul Rojas Marín v Peru](#), the IACtHR found that sexual violence that involves anal rape, especially when carried out with a tool of authority such as a police baton (which also represents masculinity), all while derogatory remarks were made, shows that the specific motive of the crime was to discriminate against the victim.

In relation to the element involving a **public official**, the UN has encouraged States to interpret it broadly. It can therefore capture situations where the State has failed to exercise due diligence to prevent, investigate and punish the relevant act of violence. This obligation arises when State authorities (or others acting in an official capacity) knew or should have known of a situation of real or imminent risk that acts of torture or ill-treatment were being committed and did not take reasonable measures to prevent or avoid such violations. The State's failure to fulfil their positive obligations through indifference or inaction represents a form of encouragement and/or *de facto* permission.

International jurisprudence recognises LGBTIQ+ violence as having the potential to constitute torture.

[Azul Rojas Marin](#) (IACtHR) was the first judgement on discriminatory torture on grounds of sexual orientation and gender identity by a human rights court worldwide. Azul, then living as a gay man, was arbitrarily arrested by police officers in 2008, then raped, beaten and verbally abused due to her sexual orientation. The State failed to adequately investigate and hold the perpetrators accountable. The IACtHR concluded that the incident amounted to torture (the various elements – including the purposive element – having been met); and labelled the treatment of Azul as a ‘hate crime’ given that it was the result of prejudice, and stated that the crime not only breached Azul’s rights but was also “*a message to all LGBTI people, as a threat to the freedom and dignity of this entire social group*”. The IACtHR also concluded that States have a duty to investigate violence motivated by discrimination against members of the LGBTI community, including a duty to investigate the discrimination element itself. It also noted that an inappropriate definition of torture was in place in Peru at the time of the facts, which did not contain discrimination as one of the potential purposes of torture, and therefore prevented the investigation into the ill-treatment of Azul from being broadened to include ‘torture’.

State obligations. Under UNCAT, States must prohibit, prevent, investigate, prosecute, punish and provide redress for LGBTIQ+ violence as a form of torture and other cruel, inhuman or degrading treatment. When States fail to prosecute perpetrators of violence, they neglect victims, perpetuate impunity and become complicit in the cycle of violence.

In addition to the Azul case above, State obligations have been specifically assessed in the following international jurisprudence:

- *Aghdgomelashvili and Japaridze v. Georgia, 8 October 2020, ECtHR*

This case concerns a police raid of an LGBTIQ+ organisation’s office in which complainants were subjected to insults, threats and humiliating strip-searches because of discrimination against their sexual orientation and gender identity. The ECtHR noted that the duty to investigate implies taking steps to secure the evidence, testimonial, forensic or other, and reacting in a prompt manner. The ECtHR stressed the State’s obligation to investigate the discriminatory motive, which means taking all reasonable measures to collect evidence and deliver impartial decisions “*without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.*” The ECtHR concluded that the investigation was ineffective, as the State failed to demonstrate that any investigative measure had been undertaken, and the protraction suggested the authorities’ “*inability – which can also be read as unwillingness – to examine the role played by homophobic and/or transphobic motives in the alleged police abuse*”.

- *Identoba and others v. Georgia, 12 May 2015, and MC and AC v. Romania, 12 April 2016, ECtHR*

These cases were brought to the ECtHR by victims of attacks on activists during (or after) LGBTIQ+ peaceful demonstrations. Building on States’ obligations to prevent

and investigate LGBTIQ+ violence, the ECtHR concluded that authorities had failed to adequately protect the victims, since, in light of the negative attitude towards LGBTIQ+ persons, the “*authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community, and were consequently under an obligation to provide heightened State protection*”. The ECtHR also ruled that authorities have a duty to undertake effective investigations into violent incidents against LGBTIQ+ persons, which includes acting promptly and taking all reasonable measures to “*unmask possible discriminatory motives*”.

Situations where LGBTIQ+ violence as torture takes place

As noted above, LGBTIQ+ violence can take the form of sexual violence, many other forms of physical violence and/or mental torment. It can be perpetrated by State actors or non-State actors tolerated and supported by the State. Depending on the circumstances, such violence can amount to torture or cruel, inhuman or degrading treatment. LGBTIQ+ violence as a form of torture can take place in many circumstances, including:

Physical violence by State actors. LGBTIQ+ persons are often victims of serious physical violence by State actors, including but not limited in the form of beatings, rapes and forced anal examinations, which commonly take place in the context of police custody or in detention facilities. Most of these cases constitute torture and/or cruel, inhuman or degrading treatment and amount to other grave human rights violations.

Psychological violence by State actors. One form of psychological violence frequently used by law enforcement officials is arbitrary detention. Especially, but not exclusively, in jurisdictions where same-sex relations are criminalised, police officers often detain individuals on the basis of perceived sexual orientation or gender identity and threaten them with charges of homosexuality, indecency or other ‘morality’ laws. Threats of public shaming or forced outing, which are used to extort individuals into paying police officers for their silence, are also common.

Violence against LGBTIQ+ persons in detention. There is an inherent vulnerability and power imbalance associated with such places and in particular LGBTIQ+ persons. Often there is a strict hierarchy in places of detention, and LGBTIQ+ persons are found at the bottom of such hierarchy. This means they are often among the groups most exposed to violence, and are disproportionately affected by discrimination and violence, in particular sexual violence.

Violence by non-State actors. LGBTIQ+ persons also face widespread violence from non-State actors, including family members, religious leaders and the community more broadly. In some cases, this violence, including mob violence, has resulted in the death of LGBTIQ+ individuals. Sometimes this violence takes place in the presence of or with the participation or acquiescence of State officials. In other cases, it illustrates the omissions and lack of protection of the State, and the lack of accountability for such violence.

Violence against LGBTIQ+ refugees and asylum seekers. LGBTIQ+ refugees and asylum seekers who must flee their countries due to discrimination based on sexual orientation or gender identity (or other reasons) are often met with hostility, further discrimination and violence in the receiving country.

General discrimination and harassment. Due to the prevalence of discrimination, violence and lack of effective protection, many LGBTIQ+ persons suffer other violations of fundamental rights and other forms of harassment.

Challenges faced in documenting, investigating, and addressing LGBTIQ+ violence

Structural discrimination. Accountability for LGBTIQ+ violence is in many States either absent, or extremely limited. The reasons for this can include inadequate legal frameworks, absence of political will and ongoing institutional discrimination, lack of independent complaints mechanisms and investigative bodies, lack of appropriate training of State officials – particularly law enforcement, prosecutors and members of the judiciary – and absence of gender sensitive protocols on the effective investigation of such violence.

The lack of criminalisation of torture, or omission of the discriminatory purpose in national definitions of torture, can also prevent forms of LGBTIQ+ violence from being prosecuted and dealt with as torture, which means these can be considered minor or other ordinary offences instead. Even in cases where LGBTIQ+ violence is addressed and perpetrators are convicted, the discriminatory purpose may not be taken into account, in which case the root causes of such discriminatory violence can remain hidden.

Inadequate legal frameworks for the protection of the LGBTIQ+ community, including the existence of discriminatory laws (such as criminalisation of same-sex relations), can also marginalise LGBTIQ+ persons. This legitimises a differentiated treatment based on discrimination that suggests LGBTIQ+ persons do not deserve the same level of protection afforded to the general population. Consequently, it can discourage State authorities from taking prompt and effective action to investigate and address violations committed against this marginalised group. For instance, criminalisation of same-sex conduct could be used to shift the focus of investigations onto the LGBTIQ+ victims that report crimes committed against them. This can be further aggravated by significant discrimination entrenched in State institutions that leads to a general unwillingness by State authorities to address such violence and ultimately creates a culture of impunity.

Additionally, a key role is played by the investigative bodies which are responsible for receiving complaints and investigating allegations of human rights violations. However, such bodies can face challenges in relation to their independence and limited resources, both of which may impact on their capacity to conduct effective investigations. Furthermore, the lack of sensitisation on LGBTIQ+ issues, linked to the lack of appropriate protocols and training, can further impede investigative mechanisms and law enforcement officials from adequately dealing with LGBTIQ+ violence.

Misinformation and entrenched discriminatory practices (which may not always be intentional) on the part of those undertaking investigations can also have the effect of:

- limiting lines of enquiry to assess whether violence was motivated by discrimination on the grounds of sexual orientation or gender identity, and
- the adoption of inappropriate and potentially discriminatory forms of gathering evidence (such as forced anal examinations), which are ineffective and compound the damage being suffered by the victims.

Invisibility and lack of training on LGBTIQ+ rights. A lack of data and information about the violence faced by the LGBTIQ+ community can exacerbate difficulties in understanding the nature and scale of the problem, and can therefore compound the challenges faced in responding to it.

Limitations on the operation of LGBTIQ+ organisations. Civil society organisations play an important role in addressing discriminatory violence and supporting victims, not least where States are inactive in doing so themselves. However, especially in hostile environments, LGBTIQ+ activists and civil society organisations working with the LGBTIQ+ community can face restrictions on their ability to organise, register themselves and otherwise function effectively. This can further hinder accountability for LGBTIQ+ violence, by limiting proper documentation of allegations of violence, impeding or reducing the representation or accompaniment of victims by NGOs (which is particularly crucial where victims are reluctant to report to the authorities without support), and can impact on the awareness of victims' rights.

Victims' fear of reprisals, distrust, and hesitancy in reporting violence. LGBTIQ+ individuals can also fear reporting crimes to relevant authorities, especially where the crime was motivated by discrimination on grounds of sexual orientation or gender identity, due to possible further harassment and discrimination they may face in such circumstances.

Representing victims of LGBTIQ+ violence as torture

Intersectional discrimination and holistic support. It is important to understand the intersectional discrimination inherent in LGBTIQ+ violence, in order to identify the full impact on victims' physical integrity, mental health and human dignity. One should be aware of the fact that the impact of LGBTIQ+ violence on survivors may vary depending on their gender, sexual orientation and societal or cultural factors. For instance, survivors may believe that rape is a form of punishment for transgressing certain norms, and feelings of shame and guilt may prevent them from seeking access to justice and medical and psychological support.

Recognition of the need for holistic support is essential for understanding the specific needs of torture survivors, who have experienced multiple and simultaneous forms of human rights abuses and discrimination, and to ensure effective and tailored support. It is important to ensure clients' access to holistic services, such as medical treatment and psycho-social support.

Reparations, advocacy and rehabilitation. The nature of LGBTIQ+ violence means that reparations for harm should be comprehensive and include measures and reforms designed to combat discrimination based on actual or perceived sexual orientation and/or gender identity and expression.

In the Azul case, the IACHR awarded measures to address structural discrimination. For instance, it instructed the State to provide training to members of the justice system and the police on LGBT+ rights and due diligence investigations, to implement a data collection system to officially register all cases of violence against members of the LGBT+ community, and to develop a protocol on the effective investigation of violence against the LGBT+ community.

A holistic approach to rehabilitation includes ensuring access to medical and psychosocial services, support to access the justice system and measures to provide opportunities for economic autonomy and stability. It is important to involve survivors in the design and delivery of rehabilitation programmes, and to be informed by the survivor's cultural context. Survivor-led peer support groups may be instrumental in this regard. It is vital that rehabilitation and psycho-social facilities are made available to all victims who need them, irrespective of whether they file a claim or whether the alleged perpetrator is prosecuted.

Compensation (see *Module 10: Compensation*). Compensation is an important form of reparation for LGBTIQ+ violence, and must be prompt, fair, adequate and sufficient to compensate for any economically assessable damage resulting from the crime. It is crucial that courts appreciate the severity of the harms caused by LGBTIQ+ violence which - particularly in the case of psychological harm - can be undervalued.

Reparation (see *Module 9: Reparation*). Compensation alone is not sufficient to repair the harm caused to survivors of LGBTIQ+ violence. Therefore, it is essential that other forms of reparation are also provided, for example, rehabilitation and guarantees of non-repetition.