

## MODULE 4

*Definitions.* Gender-based violence refers to harmful acts directed against individuals or groups on the basis of their gender. Sexual violence is a form of gender-based violence. It is defined by the ICC as “an act of a sexual nature against one or more persons or caus[ing] such [persons] to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such [persons] or another person, or by taking advantage of a coercive environment or such [persons’] incapacity to give genuine consent.”

*SGBV is gendered and inherently discriminatory.* The term ‘SGBV’ acknowledges the dual aspect of the violence as both sexual and a form of discrimination on the grounds of gender, sexual orientation, or identity. SGBV stems from gender norms and stereotypes, gender inequality, and unequal power relationships. Victims are targeted because of their gender and socially-constructed gender roles. The predominant targets are women, girls, LGBT persons, and gender non-conforming individuals. Men and boys can also be victims of SGBV, but women and girls are disproportionately affected.

*SGBV can take multiple forms.* UNCAT has stated that SGBV can take the form of sexual violence and many other forms of physical violence and mental torment. CEDAW identifies, *inter alia*, rape, domestic violence, forced sterilisation, forced abortion, forced pregnancy, criminalisation of abortion, and abuse and mistreatment of women and girls seeking sexual and reproductive health information as forms of SGBV that may amount, depending on the circumstances, to torture or cruel, inhuman or degrading treatment. The Istanbul Protocol describes instances of sexual torture and ill-treatment, including rape and threats of rape, being stripped naked, the application of electrical current to the genitals, buttocks, or breasts, and insults and humiliation of a sexual nature constructed under fear, duress, force, threat of force, psychological oppression, and/or abuse of power.

### SGBV as torture

*The importance of recognising SGBV as torture.* Recognition that some forms of SGBV may 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 SGBV as a form of torture is important firstly because it makes survivors visible, and secondly because it raises certain State obligations towards survivors, including the obligation to redress. The Special Rapporteur on Torture has stated that integrating a gender perspective on torture and ill-treatment “is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed and remedied.”

In order to constitute torture, an instance of SGBV must also fulfil the elements of the offence of torture as defined by UNCAT or criminal law (see *Module 2: UNCAT and the Definition of Torture*).

The main elements of the definition of torture include:

- Conduct inflicting **severe pain or suffering**, whether physical or mental.
- Element of **intent** (which means pure negligence does not amount to torture).
- Specific **purpose** (e.g., gaining information, punishment, intimidation, coercion, among others – the list given in Article 1 is not exhaustive).
- **Involvement** of a State official, at least by acquiescence.

The **intent and purpose** element of the definition is fulfilled if an act is gender-specific or perpetrated against persons on the basis of their sex, gender identity, real or perceived sexual orientation, or non-adherence to social norms around gender and sexuality.

- The discrimination inherent in SGBV makes it capable of constituting a form of torture.
- States must look at the totality of circumstances, to account for lived realities and compounded forms of oppression. In Linda Loaiza López Soto v. Venezuela, the IACtHR made an important finding that the intention of the perpetrator to assert a relationship of power and patriarchal domination over the victim demonstrated his discriminatory purpose.

The element involving a **public official** is met when the acts are perpetrated by State actors or when States fail to exercise due diligence to prevent and protect victims from gender-based violence. This obligation arises when State authorities (or others acting in an official capacity) know or should have known of a situation of real or imminent risk that such 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 SGBV as having the potential to constitute torture.

- The ECtHR has recognised, *inter alia*, rape (e.g. M.C. v. Bulgaria) and domestic violence (e.g. Opuz v. Turkey) as violations of Art. 3 ECHR (prohibition of torture).
- In his 2016 report, former Special Rapporteur Juan Mendez defined SGBV as a form of torture under UNCAT. In its General Comment 2, the CAT recognises SGBV as acts inflicting severe pain and suffering amounting to torture. To assess the level of pain and suffering, "States must examine the totality of the circumstances, including the victim's social status; existent discriminatory legal, normative and institutional frameworks that reinforce gender stereotypes and exacerbate harm; and the long-term impact on victims' physical and psychological well-being, enjoyment of other human rights and their ability to pursue life goals."

*State obligations.* Under both CEDAW and CAT, State parties must prohibit, prevent, investigate, prosecute, punish, and provide redress for SGBV as a form of torture and other cruel, inhuman or degrading treatment. The UN Special Rapporteur on Torture has interpreted this to include the duty to prevent, investigate and punish SGBV. When States fail to prosecute perpetrators of violence, they neglect victims, perpetuate impunity, and become complicit in the cycle of violence:

- For example, in Opuz v. Turkey a woman complained multiple times to the police about domestic abuse and her mother was eventually killed by her husband. The ECtHR found a violation of Art. 3 of the ECHR as the State had failed to meet its positive obligations to protect the victims and prevent the violence against them despite the many reports of the victims.

- In M.C. v. Bulgaria the victim had been raped by two men (not State officials). The ECtHR held that Bulgaria failed to put in place an effective criminal law system for the investigation and prosecution of all forms of rape and sexual abuse, a positive obligation under Art. 3 ECHR.
- In Linda Loaiza López Soto v. Venezuela, Ms López Soto was kidnapped by an individual (non-State actor) and subjected to physical, sexual, and psychological abuse for four months. Her sister reported her absence to the police, who did not accept the complaint in relation to her disappearance, on the basis that the assailant was ‘her partner’. The domestic judicial process lasted five years and did not convict the perpetrator for sexual violence, leaving Ms López Soto without remedies for an integral part of the violence that she was subjected to. In a landmark decision, the IACtHR found Venezuela responsible for sexual slavery and SGBV as torture committed by a non-State actor through its failure to prevent and investigate the events.
- In Maria Da Penha v. Brazil the IAComHR found that Brazil failed to exercise due diligence to prevent and respond to domestic violence, despite clear evidence against the accused and the seriousness of the charges. The Commission found the case was “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors” and it involved “not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.” This case led to the approval in Brazil of the first law against domestic violence, named after the victim.

### Situations where SGBV takes place

SGBV as a form of torture can take place in, *inter alia*, the following circumstances:

*SGBV against detainees by prison, security, or military officials.* The Special Rapporteur on Torture has recognised that women are at particular risk of torture and ill-treatment during pre-trial detention because sexual abuse and violence may be used as a means of coercion and to extract confessions. For example, in Aydin v. Turkey the ECtHR recognised for the first time that an act of rape by public officials or another person acting in an official capacity constitutes a form of torture. The ECtHR stated that the rape of a detainee by a State official was an “especially grave and abhorrent form of ill-treatment”, noting the ease with which the perpetrator may exploit the vulnerability of the victim, and the physical and emotional suffering and lasting psychological trauma.

*Where victims are detained, even where they are not formally prisoners.* Detention may take place in unofficial or secret centres, official buildings of security agencies, and other locations such as the victim’s home. In the Kunarac case, the sexual enslavement of Muslim women in various private locations was found to amount to torture. The International Criminal Tribunal for the former Yugoslavia found that the rapes were perpetrated with the intention to intimidate and discriminate against Muslims (see also Magdulein Abaida case).

*SGBV by (acting) law enforcement officials in other contexts.* In the Akayesu case, which concerned systematic sexual violence and rape of Tutsi women during the Rwandan genocide, the International Criminal Tribunal for Rwanda found Akayesu (a mayor) guilty of sexual violence. It stated that it understood sexual violence to constitute an inhumane act as a crime against humanity, an act of genocide, and a violation of common Article 3 of the Geneva Conventions.

*SGBV perpetrated by detainees against other detainees.* This includes SGBV against women or child detainees, perpetrated by male inmates because of the failure of public officials to separate males, females, and children. Similarly, it includes SGBV against male detainees, perpetrated by fellow male inmates with the complicity, consent, or acquiescence of detention officials.

In J.L. v. Latvia the applicant assisted the police in securing evidence against another individual in a criminal case. The applicant was later convicted of an unrelated crime and placed in a filtering cell with 11 other inmates, where he was assaulted and raped due to his having previously co-operated with the police. The applicant requested a transfer to another prison. The Court found that the police had violated the procedural aspect of Art. 3 ECHR and noted the “lack of sufficient coordination among the investigators, the prosecution and the detention institutions to prevent possible ill-treatment of detainees who, owing to cooperation in disclosure of criminal offences, have become particularly vulnerable and prone to violence in prison.”

*SGBV based on inherent discrimination on the basis of gender identity or sexual orientation.* In the Azul case, the IACtHR found Peru responsible for the rape and sexual violence as a form of torture committed by police officers against a LGBTI person in detention, motivated by discrimination based on the victim’s sexual orientation or gender identity.

*SGBV as torture, based on other forms of discrimination.* In the Mariam Ibraheem case before the AComHPR the victim, a Muslim woman who married a Christian man was convicted and sentenced by Sudanese courts to lashing and death because of adultery and apostasy. The AComHPR found the case admissible and has yet to rule on its merits. In the meantime, Mariam was released and Sudan’s apostasy laws were repealed.

### **Representing victims of SGBV as torture**

Characterising SGBV as a form of torture can have a significant impact in ensuring that the offence is given serious consideration by prosecuting authorities and courts.

#### Barriers to documenting SGBV as torture and accessing justice:

*Collecting contextual evidence.* Instances of SGBV are often not isolated, but form part of a wider pattern of violations. Identifying such patterns and collecting evidence about the wider context can help to establish that there is a systemic failure of the State to fulfil its duty to prevent and protect victims of SGBV. This can be key to a finding against a State before a national court, or in an international forum. It is therefore important to gather information on, for instance: the legal, political, and cultural context; wider patterns and occurrence of SGBV in the country; and the rate of investigation and punishment by the authorities of complaints.

*Evidence.* In criminal prosecutions, recognising rape as torture may require an additional layer of evidence to prove the elements of both crimes. Additionally, there may be difficulties in securing forensic evidence.

*Stigmatisation and discrimination.* Survivors of SGBV often face stigmatisation and discrimination within their own communities and families. This makes it contextually difficult to come forward and speak up and may even be a barrier to them seeking any form of help (whether medical, psychological, or legal).

*Underreporting.* The realities and experiences of survivors are often hidden because of a 'culture of silence'. This is particularly so when SGBV occurs far from the public eye (e.g. in places of deprivation of liberty) or during conflict, where SGBV is often accepted as 'collateral damage'. Factors contributing to under-reporting include: stigmatisation of survivors; personal safety and security concerns of survivors and their families, e.g. fear of retaliation and reprisals; cultural norms that condone SGBV; lack of services and reporting mechanisms; and lack of knowledge about legal rights, remedies, and services.

*Gaps in legal systems and frameworks.* In some cases, governments may not recognise a group of survivors as victims of torture. For instance, many States do not recognise male rape, or intimate partner violence and marital rape.

*Intersectional discrimination and holistic support.* It is important to understand the intersectional discrimination inherent in SGBV, in order to identify the full impact on victims' physical integrity, mental health, and human dignity. Also be aware of the fact that the impact of SGBV on survivors may vary depending on their gender, sexual orientation, and societal or cultural factors. Cultural norms and narratives around gender roles affect the survivor's experience of sexual and gender-based torture. 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.

*Holistic support.* Recognition of the need of this is, in turn, 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.

- *Medical care.* Confidential and non-discriminatory medical assessments should be carried out by skilled medical and forensic providers, using a trauma-informed approach that takes into account the patient's level of comfort and ability to tell their story.
- *Mental health and psycho-social support services.* Victims of SGBV are likely to develop mental health conditions, including anxiety, depression, PTSD, and personality disorders. Many survivors also struggle with a number of socio-economic challenges, such as childcare responsibilities and lack of financial independence. It is critical to take a holistic approach that provides multidisciplinary services to survivors.

It is therefore important to:

- *Seek to challenge social barriers and stigma.* This may include community-wide advocacy to counter stigma and advocating for changes in policy and legal frameworks that can act as obstacles to accessing support and services. Addressing and combating stigma and social exclusion is critical to addressing the major challenges to reporting SGBV, preventing victims from accessing services and other forms of support, and hindering the process of rehabilitation.

- *Build the capacity of survivors* to know their rights and create an enabling environment in which survivors feel able to disclose their experiences when they are ready. Practitioners and organisations need to employ different methods to reach out to survivors and ensure they receive appropriate support.
- *Ensure confidentiality* in order to avoid identification of victims and their re-victimisation in the family and community. In some countries and contexts, reporting SGBV can lead to further violence.

*Reparations and advocacy.* The gendered nature of SGBV means that reparations for harm should be comprehensive and include measures and reforms designed to combat gender-based discrimination. There is a need for transformative reparations.

- In its General Recommendation No. 33, CEDAW noted that States must “ensure that remedies are adequate, effective, promptly attributed, holistic, and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement), compensation (whether provided in the form of money, goods, or services), and rehabilitation (medical and psychological care and other social services)”.
- *Guarantees of non-repetition.* This form of reparation requires structural changes to prevent SGBV in the future. If lawyers can point to a systemic failure, they can advocate for legislative and institutional changes as a remedy for the victims they represent, and the broader group impacted. Such structural changes may include gender-sensitive training and capacity building for law enforcement institutions, protocols for the effective investigation of SGBV, and putting in place gender advisors in police stations to receive complaints from victims, among others.

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.

- *Rehabilitation.* 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.* Compensation is an important form of reparation for SGBV, 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 SGBV which - particularly in the case of psychological harm - can be undervalued. The obstacles faced by women in accessing and controlling money should be

considered when reparations are awarded. This form of redress must be combined with non-monetary reparation mechanisms, as money is not sufficient to repair the harm caused to survivors of SGBV.