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Unofficial Torturers and Helpless Victims: Applying the Convention Against Torture to Organized Criminal Groups

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Abstract

Since its inception, the United Nations Convention Against Torture (UNCAT) conceived torture as a state crime. The Convention established a so-called "state-nexus" that effectively excludes torture committed by non-state actors. The Committee Against Torture as well as the world's major anti-torture NGOs have almost exclusively focused on ill-treatment perpetrated by state entities. Yet, there have been efforts to extend the definition to private actors, including the "de facto authority" approach, and the due diligence doctrine. This article explores the effectiveness of these efforts to expand the scope of the UNCAT when applied to organized criminal organization such as gangs and cartels. By incorporating legal theory, human rights scholarship, and interviews with human rights practitioners, this work aims to highlight the limitations and opportunities of applying the UNCAT to acts of torture and ill-treatment perpetrated by organized criminal groups. The essay concludes that holding criminal groups accountable for committing torture requires both a broader understanding of what torture entails under the Convention that focuses on the victim, as well as addressing systemic issues in fragile states to prevent the types of environments that propitiate torture.

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I. Introduction

Rodrigo was casually driving on a highway when he was abducted by what he believed to be members a cartel in Mexico. He was held hostage for six days, during which he was brutally tortured. In his account for *El País,* he recalls:

> First, they get you wet. They beat you with a ten-inch plastic tube. It makes you dizzy, sometimes the pain impairs your ability to perceive reality, but you don't bleed, your skin is not perforated. They broke my left ribs. I fainted. One powerful kick let me out of breath. I was worried because the blow very was close to my heart. I thought it was the end; I could only see darkness (Santos Cid, 2022).

After his abductors discovered that Rodrigo did not belong to any cartel, he was released, but the drug lords warned him, "whatever you tell the police, we'll find out in real time" (Santos Cid, 2022). He sought government protection, nonetheless. To his demise, local authorities turned a blind eye. In the informed prepared by the local prosecutor's office, they denied Rodrigo's allegations by reporting that his health as "good," and local authorities asked Rodrigo forget about the incident and drop the case (Santos Cid, 2022). This occurred even though article 11 of Mexico's anti-torture law mandates public officials to report incidents of torture. The decree even contemplates punishment for both torturers and state officials who acquiesce on this crime (DOF, 2016). Yet, the law did not deter local officials from protecting Rodrigo's wrongdoers.

Once the prospect of national protection had been exhausted, it would be intuitive to believe that international law would offer a viable last-resort option to seek justice. Torture is, after all, one the most widely condemned human rights violations, and it has a special place in almost every international human rights instrument (Kelly, 2019). This is reflected by Article 5

of the Universal Declaration of Human Rights unequivocally states that "no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Nevertheless, applying international human rights law to the abuse that victims like Rodrigo experienced at the hands of organized criminal groups is absurdly challenging. As baffling as it may seem, the cruelty and intensity of the pain that cartels inflicted on victims like Rodrigo does not fall within the United Nations Convention Against Torture (herein forth UNCAT), which defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person […] 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*. (UN General Assembly, 1988. Emphasis added)

Because Rodrigo's suffering was inflicted by members of drug cartels, who are neither state officials nor act on an official capacity, this case does not directly trigger the international protection laid out in the Convention.

The example above illustrates a core paradox of the international prohibition of torture. On the one hand, the UNCAT, like all other human rights instruments, seek to safeguard individual rights. When applied, these instruments grant the victim claims that he or she holds against the state whenever the latter fails to provide protection. On the other hand, however, the definition of torture enshrined in the UNCAT centers the perpetrator (e.i., a state official or someone acting in an official capacity) as the determining factor when it comes to decide whether a victim deserves international protection or not. In other words, the UNCAT defines torture only when the crime has been committed by or with the involvement of the state, thereby defining the "right not to be tortured" in relation to the identity of the perpetrator. As a result, the

international prohibition of torture provides a strikingly definition of torture that excludes similar acts by non-state actors even when these are clearly an affront to the human dignity of the victims. Such restrictive definition creates accountability gaps for victims who cannot access justice at the national level, as Rodrigo's example illustrates well.

In order to expand the scope of the UNCAT, human rights practitioners have developed legal rationales to argue that, under certain circumstances, the Convention can extend to non-state actors. For example, it has been argued that non-state actors may be bound by the UNCAT when they act as a *de facto* legal authority and exercise power over certain population or territory. Another rationale for expanding the breath of the UNCAT has been the due diligence principle, which asserts that states have an obligation under article 3 of the Convention to investigate and punish incidents of torture perpetrated by non-state actors. This essay aims to explore the opportunities and limitations of these approaches when applied to the torturous crimes of members of Transnational Organized Crime (TOC) by exploring the following interrogations. How could the current UN anti-torture framework be used to persecute torture committed by members of TOC? And what are the limits of the existing legal rationales whenever states are unwilling or unable to investigate torture by organized criminal organizations?

In the first section of this work, I lay out the key moments in the historiography of the UNCAT, which helps explain why the definition of torture is state-centric, and how this constrained the of extending the Convention to non-state actors. The second section is devoted to the legal void created by the UNCAT, and how human rights scholars and practitioners have attempted to circumvent the state-nexus through the "de facto authority" and the due diligence approaches. I also inquire on the limitations of applying these rationales to criminal

organizations. The third segment of this essay suggests some alternatives to the traditional legal rationales, arguing that a victim-centered approach is the most suitable to deal with torture perpetrated by criminal organizations. This section also advocates for a preventive approach that goes beyond the legal system and addresses structural issues that propagate crime and torture.

II. Research Methodology

This qualitative work draws from a wide variety of sources. I relied primarily on peer-reviewed articles from human rights academic journals. These secondary sources include legal scholarship that incorporates landmark cases that illustrate how national courts have interpreted the UNCAT as it pertains to non-state actors. As for primary sources, I have incorporated information from the jurisdiction portal of the Committee Against Torture, whose resolutions are publicly available. Likewise, and in order to supplement human rights theory with practice, I have included information collected through eight interviews with a total of eight experts from various corners of the anti-torture field, including scholars, lawyers, NGO officers, and UN Representatives. These include three experts from the World Organization Against Torture (OMCT) offices in Brussels and Geneva, a Regional Officer for Latin America at the Association for the Prevention Torture (APT), a Legal Adviser from International Bridges to Justice, a Former Researcher from the Geneva Academy of International Humanitarian Law and Human Rights, an International Law Professor and Researcher from the Geneva Graduate Institute, and the current Chairperson of the United Nations Committee Against Torture. Lastly, this essay contains recommendations obtained from reports and resolutions elaborated by two of the former UN Special Rapporteurs on Torture. The interviewees were recruited on the basis of their area of expertise and respective availability.

III. Ethical Considerations

In order to preserve ethical integrity, most of the interviews were pre-arranged consensually, and the participants of the two informal interviews agreed to participate beforehand. The interviewees were explained the goals of this research and did not receive any form of compensation. To protect the privacy of the interviewees, none of the interviews was recorded or taped. No identifying information will be provided other than the demographic data, which all participants consented to provide. It is also worth noting the views and opinions expressed during the interviews may not necessarily represent the views of the organizations they work for. Likewise, the conclusions and arguments laid out in this essay represent the views of the author and the author only, and do not represent, by any means, those expressed by the interviewees.

IV. Literature Review

Unlike the case of International Humanitarian Law (IHL) and International Criminal Law (ICL), there is not a consensus on whether International Human Rights Law (IHRL) binds non-state actors (Bellal & Heffes, 2018). In IHL, the Geneva Conventions bind state and non-state actors in the exact same way, insofar as non-state fulfills a set of characteristics such as territorial control, sufficient level of organization, ability to exert significant violence, etc. This is referred to as the "principle of equality of belligerents" (Bellal & Heffes, 2018; Max, 2022). Similarly, International Criminal Law operates through individual culpability (Jochnick, 1999). This precedent, which establishes that individuals, not states, should be held criminally responsible for mass atrocities, was set out during the Nuremberg Trials, and has shaped subsequent ICL instruments. The 1948 Genocide Convention, for example, establishes that perpetrators of the

crime of genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individual" (as cited in Jochnick, 1999).

However, the applicability of human rights law to non-state actors is far less clear. Comprehensive studies in this issue by authors like Farrior & Clagett (1998) and Andrew Clapham (2017) indicate that the idea that human rights treaties impose obligations on private actors is very much contested. Some of the main arguments against extending human rights law to non-state actors include: i) the widely held conception, even among human rights lawyers, that non-state actors are simply not a party to a treaty, and therefore, cannot be expected to abide by these norms (Farrior & Clagett, 1998; A. Bellal. Personal communication. April 25, 2022), ii) the notion that extending human rights law to non-state actors would dilute the "legal specificity" of these treaties and would de-center state accountability (Farrior & Clagett, 1998; Clapham & Gaeta 2018; Le Moli, 2021), iii) there is concern about the possibility of legitimizing non-state actors at the international stage by making them stakeholders in human rights norms (Clapham, 2017), iv) some scholars such as Kelly, Jensen & Andersen (2014) argue the notion of expanding human rights obligations to businesses would leave them vulnerable to "lawsuits beyond the control of their home states" (as cited in Clapham, 2017).

Yet, the proposition of the other side of the debate, which argues that non-state actors are part of the human rights framework is gaining traction albeit slowly. For example, some and NGOs and scholars have long argued that IHL is insufficient to account for specific violations perpetrated by armed non-state actors, and they have therefore advocated for the expansion in the scope of human rights law to non-state actors (Clapham, 2017) As a result, the responsibilities of non-state actors have been acknowledged in some areas, including human trafficking, children's rights, domestic violence, and modern slavery (Farrior & Clagett, 1998; Bellal & Heffes, 2018).

Hence, and as Andrew Clapham (2017) has repeatedly contended, non-state actors may already bear some human rights obligations. He has claimed that

> A reading of international law that would deny that ISIS has perpetrated any violations of international human rights law seems unsustainable today. The human rights movement is now increasingly forced to focus on the gruesome violent oppression meted out by a surprising array of brutal non-state actors. This is where we are now.

Furthermore, supporters of this view have argued that the universal philosophy of human rights norms binds all actors, regardless of their consent. Jochnick (1999), for example, claims that since human rights norms derive "from the inherent dignity of the human person" and not a social contract, "[human rights] law is not based on content: at least it does not honor or accept dissent, and it binds particular states regardless of their obligation" (as cited in Jochnick, 1999). This principle has been codified by the International Law Commission's Draft Articles on State Responsibility, and it is known as the "due diligence standard." Due diligence consists on the notion that "human dignity makes certain claims on all actors, state and non-state, regardless of custom or consent" (as cited in Farrior & Clagett, 1998). In practice, this norm entails that even though private actors may not be directly obligated to respect human rights law, states have an obligation to protect their citizens from violations perpetrated by non-state actors.

Still, as Clapham (2017) noted, this view of legal theory has not caught up with human rights practice. In his view, although there is a growing recognition that non-state actors should be held accountable for their abuses, the practical means to do so "are still wanting." This is particularly notorious in the case of torture. As this essay will attempt to illustrate, most experts in the field of anti-torture advocacy disagree on how exactly the UN Convention Against Torture applies to

non-state actors. As a result, the position of anti-torture NGOs and the Committee Against Torture in regard to non-state actors remains vastly incoherent (Menéndez, 2015).

The applicability of the UNCAT to non-state actors remains understudied. The few scholars who have devoted time to explore this issue, such as Andrew Clapham (2018) have typically referred to human rights obligations derived from the UNCAT to armed non-state actors during conflict. Others, such as McGregor (2014), have highlighted the relevance of the UNCAT in cases of human trafficking. Among civil society organizations, I found that NGOs like the World Organization Against Torture (OMCT) have begun to encourage the use of the UNCAT in the fight against domestic and gender-based violence (N. Buerli. Personal communication, April 22, 2022) Little attention has been paid to how the UNCAT could be used to hold criminal organizations, for whom the cruelty of torture is a *modus operandi*.

This work aims to contribute to this embryonic literature by providing insight into how the current anti-torture framework could be expanded to prosecute atrocities under the UNCAT. In doing so, I will hint at some of the limitations of applying the Convention through traditional doctrines in fragile states. I will also inquiry on alternative models to approach the UNCAT that can provide victims of organized crime more consecrate pathways to access justice. This line of analysis is relevant not only to better understand the ways in which the institutional fragility caused by organized crime perpetuates torture, but it can also provide important insights on how to improve human rights practice. As this essay concludes, the limitations of applying the Convention Against Torture to acts committed by members of organized criminal organizations should help us rethink alternative models of torture prevention that go beyond the current prohibitive approach.

V. Torture as a State Crime: The Convention Against Torture and the Emergence of the 'State-nexus'

For most of human history, the practice of torture was a tool of state-building. The purposeful infliction of pain by political leaders unto citizens constituted a widespread and was thus as an instrument of state policy. As Einolf (2007) contends in his long-term analysis of the historiography available:

> torture has been most frequently employed against people who are not full members or citizens of a society, such as slaves, foreigners, prisoners of war, and members of racial, ethnic, and religious outsider groups. Torture has been used only rarely against full members of a society or citizens. In these cases, torture is used only after other evidence indicates probable guilt, and in the cases of extremely serious crimes, such as heresy and treason.

Torture was not only widespread across societies, but it was also perceived as legitimate; up until the nineteenth century, the world's tolerance to torture remained high (Einolf, 2007).

Nevertheless, with the advent of the Enlightenment, the practice of torture was questioned by Anglo-Saxon philosophers like John Locke (Halttunen, 1995). A new "culture of sensibility," embodied by romanticism and the novel spread throughout Europe. The result was that humanitarian compassion that extended to groups of individuals that had previously been excluded. Increasingly, sensibility and compassion for "the stranger" began to be associated with civilization, and torture was believed to be a feature of "barbaric" societies (Halttunen, 1995; Kelly et al, 2014).

European intellectuals' gradual distaste for violence led to efforts to outlaw torture as a state practice. According to Kelly et al (2014), since torture was perceived as a byproduct of the

legal system, efforts to combat it focused on the legal realm, instead of economic or political. Therefore, efforts to eradicate torture targeted the way in which testimonies were gathered in trials, "and the regulation of interrogation in particular" (Kelly et al, 2014). Torture was, again, perceived as a practice exclusively carried out by the state. In fact, these efforts to abolish state-perpetrated torture accounts the significant decline of torture and violence in the West in the nineteenth century (Halttunen, 1995). According to Einolf (2007), torture not only became illegal in most of Europe during this time, but it also became "rare in practice."

The reemergence of torture as a widespread practice in the 20th century may also be attributed to state dynamics. Einolf (2007), has shown that the increase in quantity and severity of wars, as well as changing perceptions of national sovereignty in the first half of the twentieth century reversed the trend of decreasing torture that had endured in the nineteenth century. Although some of this violence subsided right after World War II, the 1960s and 1970s saw another spike in torture. This increase in torture can be explained by the emergence of brutal dictatorships in Latin American countries such as Brazil, Chile, and Argentina, as well as the repression by the Portuguese and the French in their former colonies, and the civil war in Greece (Rodley & Huckerby, 2009; Manfred, 2021). Torture became anonymous with military rule and was as common of a practice as it had once been.

It was in this context of the "revival of torture" that NGOs undertook efforts to curve this practice globally. Amnesty International was primarily responsible for creating the current anti-torture movement. (Kelly, 2009; Rodley & Huckerby, 2009; Manfred, 2021). The organization set out to "transform torture into an act as legally and morally unacceptable and 'as unthinkable as slavery" (Rodley & Huckerby, 2009). In 1977, Amnesty international released the world's first ever 'Report on Torture,' which documented this practice in more than sixty countries

(Kelly, 2009; Manfred, 2021). The report caught the attention of activists and governments alike, and led to the International Symposium of Torture (Rodley & Huckerby, 2009). The event paved the way for the drafting and eventual adoption of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT) in 1984.

Originally, Amnesty International's efforts to outlaw torture through an international convention extended beyond detention. After heated discussions within the secretariat of the organization, Amnesty officially determined that it "would address all uses of torture and not just torture in situations of political imprisonment" (Rodley & Huckerby, 2009). This was, according to Rodley and Huckerby (2009), a radical shift in Amnesty International's trajectory. Since its creation in 1961, Amnesty was committed to a restrictive mandate of neutrality and focused primarily on prisoners and places of detention. Except, when the organization undertook its campaign against all types of torture, it "faced a transition from being a case-driven lobbying group to becoming a norm-oriented human rights organization that looked beyond situations of political imprisonment" (Rodley & Huckerby, 2009). This transformation shaped how the organization approached the drafting of the Convention Against Torture. During the negotiations, Amnesty International advocated for a definition of torture that also accounted for the crimes occurred outside of detention.

Nevertheless, Amnesty's hopes for a flexible definition of torture that would encompass a wide variety of ill-treatment were quelled by a coalition official delegations NGOs, mostly from Latin America. They fiercely contended that the goal of the Convention Against Torture was to fight impunity of military governments and how they treated their citizens (Manfred, 2021). In addition, because many of these NGOs and advocacy groups were sympathetic to leftist guerrillas, they oppose to extending the definition of torture to non-state actors. As Manfred

(2021) recalls, “they were not willing to open the definition to, for example, in the 1970s, the Sendero Luminoso in Pero or the Montoneros in Argentina. The Latin Americans’ wish was quite firm: torture was an exclusive state crime.” For these delegations, a draft of the Convention that expanded the definition of torture beyond the state was simply unacceptable (Gaeta, 2017, as cited in Andrew, 2017).

This view gained traction and ended up obfuscating Amnesty International’s vision for a universal punishment of torture regardless of who the perpetrator was. Thus, torture was defined in the Convention as a crime that could only be committed by a state official or someone acting in an official capacity. Henceforth, treating torture as a crime under international human rights law required a “state-nexus.”

The state-centric definition of the UNCAT severely constrained the global fight against torture. By defining torture as an exclusive state crime, the drafters of the UNCAT stripped the international prohibition of torture of the holistic nature it possessed in the Universal Declaration of Human Rights (UDHR). In fact, article 5 of the UDHR was drafted in a flexible and open-ended fashion so that it could apply to a wide set of practices, including the medical experiments of the Holocaust (Rodley & Huckerby, 2009). The strict codification of article 5 into the Convention Against Torture led civil society organizations, governments, and even victims to overly focus their efforts to eradicate tortures in methods of police investigation, jails, and courts. As the network of anti-torture NGOs expanded, most of them have devoted their resources to investigate state-perpetrated torture.

Even today, most of the discussions at the Committee Against Torture and among anti-torture activists has remained centered on detention, which has left little room to extend these advocacy efforts to the crimes of non-state actors. As Kelly et al (2014) brilliantly observed, “it

took a long period of campaigning for parts of the international human rights community to recognize the other places, such as immigration detention and hospitals, where torture might take place." The restrictive codification of the definition of torture created serious implementation challenges to hold non-state actors accountable. These limitations are even more prominent when one attempts to apply the UNCAT to criminal organizations, as discussed in the next section.

VI. Applying the Convention Against Torture to Organized Criminal Groups: Three Models

The UNCAT has been irregularly applied to non-state actors, which also informs on the limits of extending this instrument to organized criminal organizations. In general, most scholars (see, Le Moli, 2021) have identified four legal rationales for how the Convention can become appliable to private entities from the most conservative approaches to more liberal ones. These include i) a strict state-nexus, 2) de-facto or quasi-state authority, 3) due diligence (acquiescence).

a. State-nexus

The establishment of a state-nexus in the torture definition contained in article 2 of UNCAT has allowed states to implement approach torture very restrictively in their domestic legislations. By requiring the participation of the state, countries like Norway, Spain, Turkey, and previously Mexico have excluded private actors from accountability (Le Moli, 2021). In doing so, they are codifying a definition of torture that is significantly narrower than the torture prohibitions of in International Humanitarian Law and International Criminal Law (Manfred, 2021). As Emilie Max explained during our interview, in IHL, the prohibition of torture included in article 3 of the Geneva Conventions encompasses acts of torture committed by states as well as non-state actors. Likewise, the International Criminal Court has held that torture perpetrated by private entities

can constitute a crime against humanity if it systematically targets civilian populations (Le Moli, 2021). The Committee Against Torture has cemented this restrictive approach in a series of decisions (Gaer, 2020; Le Moli, 2021). Gaer (2020) has shown, for example, that the Committee generally encourages states to implement the state-centric definition contained in the UNCAT. When I asked Mr. Claude Heller (2022), who currently serves as the chairperson of the CAT, he responded that the Committee does indeed recommend that states implement the exact same definition contained in article 2 of the UNCAT, which requires a state-nexus.

This state-centric approach is followed to some degree by the NGOs and human rights practitioners I interviewed. For example, Elizabeth Disser, who recently joined International Bridges to Justice (IBJ) mentioned that at IBJ "we work with the police, judges and the different levels of the justice system." The organization's vision for preventing torture includes providing legal aid to victims, and advocate for state recognition of the crime. When I asked if the organization had dealt with any cases of victims who had been tortured by non-state actors, she responded, "not really. We work within the legal system, not outside" (Personal communication, April 13, 2022)

Another even more notorious example is the World Organization Against Torture (OMCT), which is arguably the world's largest anti-torture network. Nicole Buerli, who is a Senior Human Rights Adviser at OMCT Geneva told me that although some smaller NGOs advocate for a broader understanding of the UNCAT, her organization abides by the strict definition of the Convention which "only obliges states" (Personal communication, April 22, 2022). This stance is reflected in the work of the organization. The OMCT is mandated by the Committee Against Torture, which is the body created to monitor the UNCAT, to coordinate civil society organizations and present "shadow reports" (N. Buerli, Personal communication,

April 22, 2022) In these reports, the OMCT attempts to contest the often-self-serving reports that states are obligated to submit to the Committee Against Torture. Cecilia de Armas, who is Human Rights Adviser for the OMCT office in Brussels mentioned that shadow reports focused on states by issuing recommendations on how to reform the legal system. She acknowledged that "it is typically smaller NGOs that tend to engage more closely with non-state actors" (Personal communication, March 6, 2022). Another of the OMCT told me that even though the organization expresses concern about torture perpetrated by not state actors, the OMCT "ultimately engages with states, not private actors" (H. Solà Martín. Personal Communication. April, 25, 2022).

Nonetheless, the state-nexus approach has been amply criticized. Since states that require the state-nexus in their anti-torture laws are parties to IHL and ICL, they have created significant loopholes. Nowak Manfred (2021), former Special Rapporteur on Torture has called the state-nexus requirement "wrong and too narrow" (Manfred, 2021). Experts such as Clapham, Gaeta, and Powles have deemed this narrow interpretation of the UNCAT as outdated (as cited in Le Moli, 2021). During my interview with Emilie Max, she mentioned that the purpose of prohibiting torture under international human rights law should be that of increasing the protection gaps created by of the torture prohibitions in IHL and ICL. "In the Geneva Conventions, torture is briefly mentioned. The UNCAT, on the contrary, is its own separate treaty" (Personal communication, April 20, 2022). Hence, it results counter-intuitive that the supposed protection provided by the UNCAT is in fact much more limited that the one contained in IHL. The state-nexus approach effectively leaves out acts of torture committed by criminal organizations outside of the jurisdiction of the Convention. To address this problem, critics of the state-nexus have proposed the "de-facto authority" approach, to which I turn next.

b. De-facto Authority or Quasi-state Capability

Some scholars and courts have insisted that the "official capacity" language contained in Convention implies that torture committed non-state actors who exercise certain state-like functions would fall under the jurisdiction of the UNCAT. In the landmark case of R v. Reeves Taylor, for example, a British court charged Ms. Taylor, the defendant, with torture under the UNCAT because it considered that the defendant and her rebel group exercised quasi-state authority (Manfred, 2021; Le Moli, 2021). Ever since, the phrase "a person acting in an official capacity" has been expanded to encompass armed non-state groups that figure as a de facto governmental authority. This rationale is similar to the one in IHL: as long as an armed non-state has sufficient control over a certain portion of the territory or the population, such as terrorist organizations, they are unequivocally bound by UNCAT, as Emilie Max and Annyssa Bellal (Personal communication, April 25, 2022) explained to me.

The de facto authority rationale has been accepted by the CAT, NGOs and the UN Special Procedures. During our interview, CAT member Claude Heller alluded to the example of Iraq, where, he said, "it was clear that not only the armed forces had committed crimes. Many non-state actors engaged in torture. In Afghanistan, for some the crimes committed by non-state actors committed by terrorists were torture. In both cases, these groups exercised some sort of official capacity. We [at the Committee] do not refer to these groups as legitimate authorities, of course, but what they have done definitely falls under the jurisdiction of the Committee." Likewise, in the non-profit sector, Helena Solà from the OMCT commented, "we engage with non-state actors when they are the *de facto* authority" Martín (Personal Communication, April 25, 2022). Her colleague at the OMCT, also remarked that "what we have seem is that sometimes the lines between individual or private actors and governments is blurred" (N. Buerli,

Personal communication, April 22, 2022). Annyssa Bellal, from the Geneva Institute told me that UN Special Rapporteurs, for example, have jointly declared that non-state actors have human rights responsibilities when they exercise a certain amount of control over the populations in the territories that they operate (A. Bellal, personal communication, April 25, 2022). Therefore, the "de facto authority" model has expanded the UNCAT to armed non-state actors, particularly during armed conflict.

Non-profit organizations often rely on this rationale. During our interview, Sara Vera López, who works for the Association for the Prevention of Torture, told me that her organization had advocated for countries like Mexico to adopt a definition of torture that included the term "public official *or other person in the exercise of public functions,*" which is in line with what the Inter-American Court of Human Rights typically advises (Rodríguez-Pinzón. 2020). She further explained that the term 'acting in official capacity' "clearly goes beyond state agents and includes de facto authorities, including, for example, rebel, guerrilla or insurgent groups who "exercise certain prerogatives comparable to those normally exercised by legitimate governments" (Personal communication, April 21, 2022).

Although the "de facto authority" approach is less restrictive than the state-nexus, it has significant limitations if applied to organized criminal groups. First, implementing the UNCAT through the quasi-state authority rationale significantly overlaps with the prohibition of torture already contained in IHL. Dr. Bellal emphasized that some criminal organizations in Mexico such as the Sinaloa and Jalisco Nueva Generación are already believed to be bound by IHL. "It would not be too difficult to argue that they have a clear obligation not to torture given how much control they already exert. In this sense, determining whether they have human rights obligations may not be as important" (Personal communication, April 25, 2022). Therefore,

applying the UNCAT through the lenses of quasi-authority may deem the Convention irrelevant. This is because IHL already provides a far comprehensive route for imposing legal obligations unto armed non-state actors. Yet, relying solely on IHL would exclude torture committed by non-state actors outside of armed conflict (e.i., peacetime). Thus, establishing that non-state actors must exercise some level of authority for the UNCAT to apply to them leads to a circular argument. Namely, because IHL is insufficient to encompass torture committed beyond conflict, there is loophole that could be addressed through human rights law, but by applying the UNCAT exclusively to non-state actors with some level of authority, human rights law would establish norms that are already demarcated by IHL and so on.

Another noteworthy constrain of the de facto authority approach is that the quasi-state threshold may be too difficult to reach. This is because this logic requires to prove that the private actor who has committed torture has certain level of territorial power and performs certain state functions (Miraglia & Briscoe, 2012), thereby effectively excluding many criminal organizations that lack quasi-state authority but still perpetuate torture and degrading treatment. This position has been adopted by the CAT in several decisions (Manfred, 2021). As Emilie Max contended during our interview, “not all private actors fall in the definition of an armed non-state group. In the case of cartels, there is a lot of granularities and many of the perpetrators of torture may not necessarily exert control over the population” (personal communication, April 20, 2022) . Dr. Annyssa Bellal shares this view. She agrees that it may be too difficult to prove that a non-state actor may be bound by international law outside of armed conflict, or when the criminal group does not have the level of organization that the Sinaloa cartel has achieved (Personal communication, April 25, 2022).

Moreover, defining what constitutes "state authority" and how drug cartels or gangs may exercise it is an arduous task. As Kelly et al (2014) asserted that "a vast amount of social science has shown that the structure and meanings of public authority are historically and contextually specific. Public authority is not a yes/no binary distinction, but a spectrum." The direct result is, thus, that the "de facto" approach to torture creates a loophole because it leaves out crimes perpetrated by private actors that have little interest or potential in clearly exercising quasi-state authority (Clapham & Gaeta, 2018). This entails that torture perpetrated as most cartels and gangs, as well as anyone acting in at an individual capacity and not part of an organization, such as smugglers and rapists, would escape the scope of the Convention Against Torture.

c. Due diligence

In order to avoid the complications of the quasi-state authority requirement, human rights practitioners have invoked the principle of "due diligence." This concept rests on the assertation that states are directly responsible for protecting the human dignity of the citizens under its jurisdiction. In principle, this concept allows one to circumvent the complications of the "quasi-state authority" requisites given that it bestows victims with claims against states for all sorts of abuses, even those that were not necessarily committed by the government or quasi-state authority. In practice, due diligence "encompasses an obligation to marshal the full apparatus of the state to prevent, investigate, punish and compensate" (Farrior & Clagett, 1998) victims of human rights violations regardless of the identity of the perpetrator.

In the United Nations Convention Against Torture, the due diligence principle emanates from article 2: "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Human rights practitioners have stretched the definition by arguing that this clause implies that the "acts of

torture" that governments are mandated to prevent include those perpetrated by non-state actors (Manfred, 2021).

All the experts I interviewed agreed with this interpretation. For example, representatives from the OMCT acknowledged that "the due diligence concept was developed so that one can hold governments accountable if there are no remedies." (N. Buerli, Personal communication. April 22, 2022). They also highlighted that "when non-state actors are the facto authority, we place the responsibility to prevent torture on them. But when they are not, we place the responsibility on the state. States are ultimately mandated to take action to prevent torture by non-state entities" (H. Solà Martín. Personal Communication. 25 April, 2022). Likewise, Sara Vera López, from the APT told me that her organization attempts to "highlight the importance of recognizing that there is an international responsibility of the state when non-state actors commit torture." (Personal communication. April 21, 2022). In light of their views, it is clear that NGOs invoke due diligence to expand the Convention Against Torture to crimes non-state actors by highlighting states' obligations to prevent all acts of torture. However, it is also worth noting that both the OMCT and the APT do not perceive due diligence and the quasi-state authority rationales as mutually exclusive but, instead, as complementary.

The CAT has also supported the due diligence interpretation through the "acquiescence" test. Since the definition in the UNCAT stipulates that acts may amount to torture if the infliction of pain is committed "with the consent or acquiescence of a public official" (UN General Assembly, 1984), one may argue that it can apply to non-state actors if the government knows torture is taking place but does nothing to prevent it. In this regard, the CAT has explicitly clarified that whenever state officials are aware that private actors may commit acts that amount to torture but fail to take action, then governments are in violation of the UNCAT for failing to

exercise due diligence (Manfred, 2021). In fact, the CAT has even established that states' failure to investigate torture allegations by non-state actors is a *de fac*to encouragement of impunity (Le Moli, 2022). When I questioned him about due diligence practice in the CAT, Claude Heller told me that article 19 of the UNCAT obliges states to report to the CAT on the measures they have undertaken to prevent torture, which includes exercising due diligence towards private actors when they are *aware* that torture is taking place. The CAT also has the jurisdiction to receive individual complaints in cases in which the state has failed to investigate allegations of torture (C. Heller. Personal communication. April 22, 2022). The acquiescence approach is in line with the recommendations expressed by Manfred (2021), the former Special Rapporteur on Torture.

The case of due diligence and its relation to the international prohibition of torture is a strong one. The prohibition of torture in international law has achieved the *just cogens* or preemptory norm status, which makes this a customary law that cannot be derogated by any state under any circumstance (de Wet, E., 2004). Because of the universal repudiation of torture and the level of legitimacy that this norm has even among armed non-state actors, the responsibility of states to exercise due diligence is greater than it is for other human rights norms (Max, E. Personal Communication. April 20, 2022).

Although the due diligence approach may seem to present a feasible alternative to hold criminal organizations accountable, this principle has significant drawbacks. The CAT has clarified that "non-government entities without consent or acquiescence of government' generally fall outside the definition of torture" (as cited in Kelly et al, 2014). From the legal point of view, the "acquiescence" requirement poses serious implementation challenges. This standard rests on the assumption that the UNCAT only applies to incidents of torture that have already moved through the legal system.

Nevertheless, as Kelly et al has alerted (2014), victims of torture in fragile states may simply lack confidence in legal means or they may refrain from resorting to legal options because they experience coercion from criminal organizations. For example, in her study, which included interviews with seventeen ex members of cartels, García (2019) found that cartels have ideated gruesome methods to effectively silence victims, including publicly displaying tongues and fingers to terrorize the population and discourage them from alerting the authorities. Members of the OMCT alluded to this problem during our interviews. Helena Solà Martín, for example, told me that she has witnessed this phenomenon in Mexico, where she has worked for many years. "90% of the crimes are not reported to the police because there is a widespread lack of trust. In the end, non-state actors are not being punished. You can have a lot of mechanisms to prevent torture, but if there is no punishment, torture will happen again" she concluded (Personal communication. April 26, 2022). Likewise Cecilia de Armas, from OMCT Brussels called this "a de facto legal void" (Personal communication. March 06, 2022).

Thus, the "acquiescence" requirement in the due diligence practice is based on the erroneous idea that victims of torture will always report the abuses to the competent authorities. In countries where organized criminal groups are prominent, expecting that victims will always alert states is beyond unrealistic. Even though the due diligence approach to the UNCAT is much more comprehensive and flexible than the state-nexus or the de-facto authority models, it is still ill-equipped to respond to torture perpetrated by criminal organized groups.

VII. Alternative Approaches to the UNCAT and Criminal Groups

Regardless of which of the three aforementioned approaches is implemented when interpreting the UNCAT, they all produce protection gaps when applied to torture and ill-treatment perpetrated by criminal organizations. Insofar as the UNCAT is restricted to these

conditional frameworks the crimes by organized criminal organizations, for whom torture and cruelty are inherent part of their "business" (García, 2019), impunity will remain the norm. In attaching such specific conditions to the applicability of the Convention, "we might overlook major groups of victims and their needs," as Kelly et al (2014) summarized it.

Instead, the UN Convention Against Torture and the framework around it could effectively exercise normative power over criminal groups if it is interpreted from a victim-centered approach. This view, which has been supported by scholars like Clapham (2017) and Cheah W.L. (as cited in Le Moli, 2021) suggests that individuals interpreting human rights instruments like the UNCAT should go beyond the legal constraints and, instead, should focus on how the philosophy and purpose of human rights. In the context of the UNCAT, what should matter when considering whether an allegation constitutes torture of not is the power imbalance that the torturer exercises over the victim, and how this transgresses the victim's dignity. This view has resonated with Helena Solà Martín, who asserts that "the UNCAT is a living document, and the way it is interpreted can change" and "torture is by definition an act against someone who is powerless, regardless of if the perpetrator is a state actor or not" (Personal Communication. April 25, 2022). In fact, interpreting the UNCAT through this victim's dignity framework is perhaps the most faithful codification of article 5 of the Universal Declaration of Human Rights, which condemns torture because of its very abhorrent nature and does not attach conditions that revolve around the perpetrator.

Clearly, interpreting the UNCAT from the perspective of the victim does not necessarily solve all of the implementation problems described in this essay. However, as Kelly et al (2014) argued, this way of applying the UNCAT helps us acknowledge that "an overly technical approach that focuses on legal reform and training alone, or that focuses on particular actors –

such as the police, prosecutors and judges – needs also to take into account the wider social relations within which torture takes place." In the case of cartels and gangs, reframing how we conceive torture beyond the legal system can inform torture prevention strategies.

Torture prevention does not only require providing more opportunities for victims to seek justice, which a broader interpretation of the UNCAT can eventually deliver, but it must also address structural problems that lead to crime and, thus, to torture. The OCDC has suggested, for instance, that addressing economic inequality, marginalization and state abuse can make countries less susceptible to transnational organized crime and the violence it creates, including torture (Miraglia et al, 2012). Kelly et al (2014) has proposed similar findings. The experts I interviewed expressed similar views. Dr. Bellal expressed that she believes the solution to addressing torture by cartels in countries like Mexico will come from a synergy between the domestic and the international. At the domestic level, limiting the power of cartels is probably the best way to prevent atrocities. On the international scale, the CAT could support victims and demand reparations. The ICC may even charge some high-profile drug-dealers should they leave the country (Personal communication. April 25, 2022).

Likewise, Helena Solà Martín mentioned that although Mexico already recognizes that non-state actors can commit torture in its domestic law, she lamented that the government rarely investigate it because of corruption and collusion. "It all depends on the national context. In Mexico, the system is broken" (Personal Communication. April 25, 2022). Their comments reflect an acknowledgement that structural issues in countries susceptible to crime need to be address in tandem with a broader understanding of the UNCAT. Finding ways to address these systemic problems is beyond the scope of this work, but it is still worth highlighting how the structural issues that perpetuate torture are also responsible for propagating crime.

VIII. Conclusion

As we have seen, the inadequacy of the UNCAT to deal with torture committed by criminal organizations stem from defining the crime in relation to the perpetrator and not in relation to the victim or the nature of the crime itself. What the three approaches—the state-nexus, the de facto authority, and due diligence—fail to capture is the fact that torture and ill-treatment may take place in unconventional places and situations that reflect distinctive national contexts. In states tormented by weak rule of law and corruption, the purposeful infliction of pain occurs beyond prisons and courtrooms, and, instead, torture takes place in the margins of society, often with complicity of the state who lacks the willingness or the ability to punish it.

Like Rodrigo, thousands of victims endure untold cruel physical and psychological pain at the hands of reckless criminal groups who feel emboldened by the environment of impunity in which they operate. Without prospects for justice at the national level, victims of torture committed by organized criminal groups are in desperate need for the international community to offer them alternative means to hold perpetrators accountable. Yet, continuing to conceive torture as a crime that is inherently connected to the state interferes with this endeavor. Insofar as the Convention Against Torture denies these victims their absolute right to live free from torture as understood in the Universal Declaration of Human Rights, one may wonder what the purpose of a having a torture convention is.

A broader understanding of the Convention Against Torture and its relevance for criminal organizations is a crucial step towards a torture-free world. The fact that more and more acts of torture are being committed by a wider range of actors shows that torture is evolving in sometimes unpredictable ways. However, the fundamental nature of torture remains the same:

whether committed by a police officer or by a drug lord, both have abused their of power by exercising control over the victim. The implementation of the Convention should reflect this reality.

Finally, broadening how torture is conceived can provide alternative models to torture prevention that transcend the traditional prohibitive approach. As this essay has expounded, many of the structural problems that allow criminal groups to become so prominent in fragile states can also help us understand why violence and torture take place. Further research is therefore necessary to understand how to better address the causes of the types of systemic dysfunction that perpetuates the power of by drug cartels and gangs. These efforts must complement, and not compete against, the attempts to expand the scope of the UNCAT to victims of torture perpetrated by criminal organizations.

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