

UNCAT at 2022

Observation #1: 2017, 2021 and 2022: Nils Melzer Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

While the prohibition against torture is one of the most universally accepted principles of international law,¹ the world is experiencing a global restructuring that poses a serious threat to international efforts to prevent and protect against torture.² For example by 2017, Nils Melzer, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, observed that **despite more than three decades of dedicated work** of the mandate and countless other international, governmental and non-governmental stakeholders, torture and other cruel, inhuman or degrading treatment or punishment were still rampant in most, if not all, parts of the world .³ In 2017, Mr. Melzer also observed with alarm that, since the turn of the century, the **rise of transnational terrorism, organized crime and other actual or perceived threats** had given way to an increasing tolerance for violent political narratives and popular beliefs that trivialized torture and other cruel, inhuman or degrading treatment or punishment.⁴

In 2021 and 2022, Mr. Melzer still focused on torture and ill-treatment as it continued “to be practiced with almost complete impunity throughout the world”, and victims of such abuse or their relatives “rarely obtained the redress, reparation and rehabilitation to which they were entitled under international law.”⁵ In 2022, Mr. Melzer described the **rise of powerful transnational non-State actors such as gangs, drug cartels, militias, and terrorist organizations**

¹ Ibid Citing DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES §7:1 (Thomson Reuters ed., 2020); see also Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, 74 Interpreter Releases 1773 (Fed. Publ’n Inc.), Nov. 21, 1997, at 1780 (“[T]he prohibition against torture is one of the handful of norms of international law that have attained the status of *jus cogens* (“compelling law”), and from which no derogation is permitted by any country, regardless of its domestic law . . . In fact, there is an emerging consensus that this principle has achieved the status of *jus cogens*, as well, so that international law creates a binding obligation with which every country must comply, regardless of its domestic law. This is particularly true when a country seeks to return a person to a nation with a record of egregious human rights violations.”); Nils Melzer (Special Rapporteur), U.N. Hum. Rts. Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 18–19, U.N. Doc. A/HRC/34/54 (Feb. 14, 2017) (explaining that the prohibition against torture “is a core principle of international law.”).

² Ibid Citing akin Ertürk (Special Rapporteur), U.N. Comm’n on Hum. Rts., *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women: Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

³ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 1 citing [A/73/207](#), para. 58.

⁴ **A/HRC/34/54** Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Note by the Secretariat 2017 Para 52

⁵ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 1 citing [A/73/207](#), para. 58.

as challenging States' authority to control and govern their territory.⁶ The result? Many of these non-State actors continued to commit torture with **alarming impunity**. This global power restructuring was also testing the ability of laws to protect those fleeing torture, especially in light of the fact that State actors (as opposed to private or non-State actors) were the primary subject of most of our international and domestic torture jurisprudence.⁷

What did Mr. Melzer view as being the obstacles here? To begin with, Melzer expressed his concern regarding the fact that the steps which had been taken by the UNCAT mandate to combat torture had focused **almost entirely** on States as potential perpetrators. Unfortunately, the **vast majority** of those responsible for perpetrating, instigating or consenting or acquiescing to torture or ill-treatment, such as non-State actors, were still not being held to account. For example, many national legal systems did not adequately guarantee or effectively implement accountability for torture and ill-treatment, and some even established legal and practical obstacles to accountability.⁸ In addition, in reality few of those who were being "held accountable" received sanctions commensurate with the gravity of their crimes.⁹ Unduly narrow approaches to redressing torture and ill-treatment also risked obscuring various facets of accountability and thereby restricted accountability's reparative, preventive and transformative potential.¹⁰

Mr. Melzer was also of the opinion that UNCAT should **provide for practical protection** against violations on the part of non-State actors because organized armed groups, private military and security contractors, mercenaries, foreign fighters and other non-State actors were increasingly engaged in conduct that adversely interfered with human rights, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Melzer believed that for the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment to retain its practical relevance it had to provide for practical protection against violations on the part of non-State actors.¹¹

Observation # 2 2016 : Professor Tania Tetlow

"International law defines torture as acts committed by, or with the complicity of, state

⁶ Ibid Citing *See Transnational Organized Crime: A Growing Threat to National and International*, NAT'L SEC. COUNCIL (July, 25, 2011), <https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat> ("Transnational organized crime (TOC) poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe.").

⁷ **Non-State Actors "Under Color of Law:" Closing a Gap in Protection under the Convention Against Torture 2021** Anna Welch and Sang Yeob Kim Forthcoming *Harvard Human Rights Journal*, Volume 35 pp 2

⁸ [A/73/207](#), para. 24.

⁹ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 26

¹⁰ **A/76/168** Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer July 16, 2021 Para 12

¹¹ **A/HRC/34/54** Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Note by the Secretariat 2017 Para 44

actors,¹² but the **technique of torture is far more ubiquitous**. Our streets are dotted with torture chambers— houses in which perpetrators use violence, threats, and psychological tricks to break the spirit of their victims. Because those victims are usually wives and children, however, the problem fails to capture much attention.¹³ Not only is this torture “private” because it is committed by nonstate actors, but it is doubly private because it occurs inside the home”.¹⁴

In Professor Tetlow’s article, she proposed that states should “criminalize private torture -the use of torture techniques by nonstate actors.”¹⁵ Professor Tetlow added that, although a prohibition on torture would not appear to be particularly controversial,¹⁶ to make it even less so, the crime should “apply broadly to any use of torture, not just to family violence”. By broadening its application, such a **crime would “equally capture the terror of a drug kingpin exacting information, a kidnapper with a basement of horrors, and a domestic violence batterer.”**¹⁷

#3 U.N. Deputy Secretary-General Amina Mohammed: 2017

In July 2017, U.N. Deputy Secretary-General Amina Mohammed stated that the **rise of transnational criminal and terrorist organizations are “growing threats” to global stability**.¹⁸ She explained that across the world **“[v]igilante justice has replaced State authority”** where criminal and terrorist organizations are now “competing to buy ungoverned spaces that are growing in size as governments retreat.”¹⁹ Whereas in the past these organizations operated regionally, modern criminal and terrorist organizations now operate transnationally,

¹² Tania Tetlow, *Criminalizing “Private” Torture*, 58 Wm. & Mary L. Rev. 183 (2016) pp 186 <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5> Ibid citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

¹³ Ibid citing Paul G. Chevigny, *From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 798 (2001) (suggesting that the concept of violence was socially constructed and traditionally focused on stranger violence); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2206- 07 (1996) (describing the law’s permission to physically chastise a wife and children, a right that remains as to children, and the ways that the law continues to devalue domestic violence).

¹⁴ Tania Tetlow, *Criminalizing “Private” Torture*, 58 Wm. & Mary L. Rev. 183 (2016) pp 26 citing Siegel *supra* note 3, at 2153 <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

¹⁵ Tania Tetlow, *Criminalizing “Private” Torture*, 58 Wm. & Mary L. Rev. 183 (2016) pp 186 <https://scholarship.law.wm.edu/wmlr/vol58/iss1/5>

¹⁶ E.g. California and Michigan have passed such codes in their jurisdiction. CAL. PENAL CODE § 206 (West 2016); MICH. COMP. LAWS § 750.85 (2016).

¹⁷ Tania Tetlow, *Criminalizing “Private” Torture*, 58 Wm. & Mary L. Rev. 183 (2016) pp 186

¹⁸ Ibid citing Press Release, U.N. Deputy Secretary-General, *Good Governance Key to Addressing Causes of Instability in Sahel, Deputy Secretary-General Tells Joint Meeting of Major Organs*, U.N. Press Release DSG/SM/1067-ECOSOC/6850-PBC/123 (June 28, 2017).

¹⁹ Ibid citing *Id.*; see also Etienne Rosas, *Fulfilling Clandestiny: Reframing the “Crime-Terror Nexus” by Exploring Conditions of Insurgent and Criminal Organizations’ Origins, Incentives, and Strategic Pivots*, at 15 (Rand Corporation 2020), https://www.rand.org/pubs/rgs_dissertations/RGSDA506-1.html (explaining that [violent non-

forming alliances and networks around the world as they exploit countries with weak or failing governance,²⁰ and, in many instances, forge relationships with corrupt government officials, further destabilizing fragile states.²¹ **These non-State actors form in “power vacuums,” resulting in their authority rivaling or even taking the place of State authority.**²² Indeed, many transnational criminal organizations take on a quasi-government role, assuming power and control traditionally held by State actors and providing, in many instances, State-like services including, e.g., schools, medical clinics, utilities, and security.²³ Once these non-State actors establish a foothold, it becomes that much more difficult for States to regain legitimacy and control.²⁴ To gain this foothold, a State need not necessarily be failing. Rather, “[i]t only takes the state to be dysfunctional in one area – or to underserve one vulnerable segment of the population.”²⁵

state actors] “tend to naturally converge, or indeed are born, in environments of weak or faulty governance and of high marginalization – slums, prisons, war zones – where influence is readily attainable through ideological mobilization or criminal ventures, both of which capitalize on failures of governance.”); *Strategy to Combat Transnational Organized Crime*, NAT’L SEC. COUNCIL (July, 25, 2011) [hereinafter *NSC Strategies for TOCs*], <https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat>; Ramon Bleuca & Douglas A. Ollivant, *A More Crowded Stage: America and the Emergence of Non-State Actors in the Middle East*, 17 HORIZONS: J. OF INT’L RELS. AND SUSTAINABLE DEV. (SPECIAL ELECTIONS ISSUE) 94, 100 (2020) (“Non-state actors are claiming the space left vacant in the political, security, and social arenas, creating parallel structures and organizations that can claim more effectiveness than the state.”).

²⁰ Ibid citing The UNHCR first recognized the concept of a “failed states” in 1997. See U.N. High Comm’r for Refugees, *State of the World’s Refugees: A Humanitarian Agenda*, ch. 1, U.N. Doc ST/HCR(058)/S7/1997-98 (1997) (describing the “failed state syndrome” wherein “[o]n the one hand, they are symptomatic of a state’s inability (or unwillingness) to protect its citizens . . . [and] [o]n the other hand, by exploiting these conditions, armed groups, warlords and corrupt government officials deprive the state of revenue and legitimacy, thereby reinforcing its disintegration.”).

²¹ Ibid citing *NSC Strategies for TOCs*, *supra* note 26. See Press Release, U.N. Deputy Secretary- General, *supra* note 25 (“Today, violent extremism and terrorism are global phenome that do not recognize borders.”).

²² Ibid Citing Etienne Rosas, *supra* note 26. See *NSC Strategies for TOCs*, *supra* note 26 (“[T]errorist and criminal groups use failed and fragile states as launching pads, since they can recruit more easily from suffering populations that lack supportive communities and reliable institutions.”)(internal citations omitted); Bleuca & Ollivant, *supra* note 26, at 26 (same).

²³ Ibid citing Bleuca & Ollivant, *supra* note 26, at 109; see also Lindsey Kennedy & Nathan Paul Southern, *The Pandemic is Putting Gangsters in Power*, FOREIGN POLICY (Feb. 15, 2021), <https://foreignpolicy.com/2021/02/15/the-pandemic-is-putting-gangsters-in-power/#>; Ivan Brisco & David Keseberg, *Only Connect: The Survival and Spread of Organized Crime in Latin America*, 8 PRISM (No. 1) 114, 116 (2019) (noting that “[a]side from the insecurity and violence they generate, armed criminal groups exert demonstrable political, social, and even electoral influence over certain circumscribed territories, both rural and urban.”).

²⁴ Ibid citing José Miguel Cruz & Brian Fonseca, *How Transnational Crime is Mutating in the Age of COVID-19 in Latin America*, Ams. Q. (Jan. 26, 2021), <https://americasquarterly.org/article/the-other-mutating-virus-the-pandemic-and-organized-crime/>; see also Brisco & Keseberg, *supra* note 30, at 119 (“[A] pronounced shift towards criminal rackets operating within clearly defined territorial limits, and the failure or inability of state authorities to provide basic services, have provided criminal groups with opportunities to shore up a social support base, and fertile ground to undermine, contest, and to a certain degree, erode state authority and legitimacy.”).

²⁵ Ibid citing Kennedy & Southern, *supra* note 30.

#4 This observation is drawn from UN General Assembly A/74/143 which focused on domestic violence as a form of torture. As you will see these arguments could apply to other crimes involving torture etc by non-state actors

Like war, torture is a veritable scourge of humanity, traumatizing countless individuals, in particular women and children, on a daily basis and brutalizing human society for generations to come. Unlike war, however, **many forms of torture such as** domestic violence, physical violence; sexual violence; psychological and emotional violence, including coercive control; economic violence; serious neglect; female genital mutilation; “honour” crimes; trafficking of family members; child, early and forced marriage; forced “conversion therapy”, reproductive coercion and sexual violence including rape **are still widely considered to be a “private matter”**. As such it has been **considered to be social taboo which should be dealt with at the discretion of the perpetrator, the family or the community in the perceived legal “black hole” of a home or a private location.** As long as a **substantial part of the world’s population** is oppressed, abused and even murdered by their own family members, other private parties or their own communities within their homes or private locations, the promises of the Universal Declaration of Human Rights and other international legal instruments aiming to give effect to the prohibition of torture and ill- treatment ²⁶ and the 2030 Agenda for Sustainable Development will remain a far cry from reality. Consequently, these forms of torture by non-state actors must be regarded as a human rights issue of inherently public concern which require States to take all measures reasonably available to them to fulfil their legal obligations in line with the principles of non-discrimination, due diligence and good faith. (domestic violence e.g.^{27 28})

However, the particular context in which these crimes of torture by non state actors occur and the wider environment in which patterns and enabling factors of these types of torture are embedded give rise to particular challenges in terms of prevention, investigation, accountability and redress, which must be considered. In particular, the domestic context of the family and the home is largely withdrawn from the purview of the State and protected, to a certain extent, by the right to privacy, resulting in considerable difficulties with regard to the effective detection, identification and protection of victims, perpetrators and situations of risk. ²⁹

²⁶ **Including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto, and the Convention on the Rights of Persons with Disabilities**

²⁷ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 63

²⁸ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 61

²⁹ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 64

These types of violence frequently occur, or are exacerbated or perpetuated, at the intersection of different types of discrimination by non state actors. Societal indifference to, or even support for, the subordinate status of certain persons, in particular of women and children, together with the existence of discriminatory and disempowering laws, combined with the sometimes systematic or systemic failure of States to prevent and redress abuse, create conditions under which victims are subjected to severe forms of torture with impunity and for prolonged periods of time.³⁰

The trivialization regarding the above examples of torture is often a consequence of a systemic and/or systematic failure of States to regard as a matter of public concern abuse that predominantly affects women, children, sexual and gender minorities, older persons, disabled persons and other marginalized groups. That trivialization often goes hand-in-hand with the stigmatization of the victims of such crimes, in particular those perceived to have transgressed dominant social norms, for example by breaching a so-called “honour” code, or by reporting a close relative to the authorities.³¹

In many contexts, non-state actors who perpetrate these forms of torture are still excused or even encouraged by dominant social or legal norms, including systemic tolerance of certain abuses and suspicion towards, or even legally enshrined or societally administered punishment of, complainants. The effect of such dynamics is often further compounded by legal, structural and socioeconomic conditions that may increase certain persons’ exposure to torture and ill treatment. Those conditions are in general the result of public governance failures and must be alleviated by States through systematic reform of relevant policies and practices.³² States should also ensure, as a matter of domestic law, that factors such as culture, custom, religion, tradition or so-called “honour” shall not be considered as justification or mitigating circumstance for the above examples of torture.³³

³⁰ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 65

³¹ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 67

³² UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 68

³³ UN General Assembly Resolution **A/74/143** Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence 2019 Para 76