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STOP NON-STATE TORTURE: ENFORCING HUMAN RIGHTS FOR EVERYONE



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This publication was produced by the Working Group on Gender-Based Violence as Torture Inflicted by Non-State Actors of the Alliance of NGOs on Crime Prevention and Criminal Justice (NST Working Group). The aim of this Working Group is to document research towards a model strategy to promote global awareness to end non-State torture crimes, especially against women and girls. Feedback and comments to this paper are welcome, please send them to nst@crimealliance.org.

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Stop Non-State Torture: Enforcing Human Rights for Everyone

Executive Summary:

This working paper explores the critical issue of non-State torture, with a focus on women and girls. The paper analyses international, regional, and national legal frameworks, emphasizing a paradigm shift to address the complexities of torture definitions. The comparative overview of anti-torture laws reveals diverse approaches, advocating for a victim-centric, inclusive definition. The conclusion calls for broader legal frameworks and international collaboration, presenting recommendations to reshape our approach to combatting non-State torture. This paper serves as an advocacy tool, urging stakeholders to contribute actively to the eradication of non-State torture and the protection of human dignity.

1. Introduction

The Working Group, established in 2021, aims to systematically document research for a model strategy that advances global awareness to end non-State torture crimes, particularly those targeting women and girls. Since its inception, the Working Group has garnered support from independent human rights experts, signalling the need for a paradigm shift in addressing the prevailing reality of non-State torture, often thriving within a climate of impunity.

This working paper extends the Working Group's research efforts, delving into the analysis of international, regional, and national legal frameworks pertaining to torture and gender-based violence. Its objective is to provide a comprehensive overview of current definitions and interpretations of the crime of torture, exploring their manifestations across diverse legal regimes.

The initial part of the paper comprises three sub-sections. The first explores the scope, objectives, and nature of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT' or 'Convention') as well as its foundational principles. It scrutinizes the evolving interpretation of the legal definition of torture, primarily within the framework of International Human Rights Law ('IHRL'). The second sub-section focuses on the legal aspects and implications of prohibiting torture within the domain of International Criminal Law ('ICL'). A third sub-section presents insights from the UN special procedures, relevant committees, esteemed scholars, and human rights experts, all united in their commitment to illuminating global efforts to eradicate torture and uphold human dignity.

The subsequent part of the document outlines the findings from the legal research and analysis conducted by the Working Group. The paper utilizes comparative legal analysis to scrutinize the domestic laws of selected countries in Latin America and the Caribbean, Europe, Africa, Australia and North America, specifically the United States, regarding the definition and criminalization of

torture. Acknowledging its evolving nature, the paper serves as a work in progress, encouraging additional contributions and opinions. Crafted to be an educational resource, the document aims to enhance comprehension and garner support for a forthcoming declaration on the eradication of non-State torture.

2. Methodology

The study ensures a comprehensive perspective by incorporating countries with diverse legal traditions, providing a nuanced exploration of different approaches to UNCAT implementation. It centers on variations in the definition of torture within national legal frameworks, emphasizing aspects related to torture by non-State actors, the elimination of the ‘special aim’ requirement, and the inclusion of non-discrimination clauses. The comparative analysis involves an examination of domestic legislations, extending to incorporate international instruments such as UNCAT and regional conventions to assess alignment with overarching human rights frameworks. Furthermore, the research identifies emerging trends, including the evolving recognition of gender-based violence as a form of torture and legislative developments addressing these issues, scrutinizing anti-torture acts and laws focused on prevention, alongside the shift from a State-centric to a victim-centric approach.

To maintain a diverse representation of legal traditions, recommendations from the Working Group and experts guide the inclusion of provisions from various regions. This inclusive approach reflects the iterative nature of legal analysis, encouraging ongoing contributions and insights. The Working Group actively engages with legal and human rights experts, fostering collaboration to expand the research scope. The methodology also includes a critical examination of femicide provisions in Latin America and the Caribbean, recognizing the intersectionality of gender-based violence and torture within the legal landscape.

3. International Legal Framework: UNCAT and its Interpretations

3.1 UNCAT: A Human Rights Instrument with a Hybrid Nature

In 1948, recognizing torture as a serious human rights violation, the Universal Declaration of Human Rights (‘UDHR’) unequivocally prohibited torture and other cruel, inhuman or degrading treatment or punishment. The pivotal 1984 UNCAT solidifies the global commitment against torture. This primary IHL treaty on torture mandates a universal prohibition of torture, obligating its States parties to prevent and prohibit any act of torture and implement preventive measures.

The UNCAT, as a human rights instrument, manifests in its Preamble, emphasizing the imperative to consider Article 5 UDHR and Article 7 of the International Covenant on Civil and Political Rights (‘ICCPR’). Both articles assert the prohibition of subjecting anyone to torture or cruel, inhuman or

degrading treatment or punishment. In turn, States that ratify the UNCAT are obliged to fulfil their responsibility to protect the fundamental human right to a life free from torture and enact necessary domestic provisions.

The Convention is widely regarded as a treaty with a “hybrid nature”, functioning both as an instrument of human rights law and criminal law. This dual nature underscores its role in not only the defining torture as a crime but also emphasizing the responsibility of States.

However, the definition of torture in the UNCAT has its limitations. As outlined in Article 1 UNCAT, the infliction of severe pain or suffering that characterizes the crime of torture is penalized “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.” This wording has led to an interpretation that excludes out certain victims of violence and human rights violations that manifest as torture perpetrated by non-State actors, including those subjected to gender-based violence and trafficking in persons.

Scholarly discourse in IHRL extensively explores the challenges associated with the UNCAT’s legal definition of torture. In this exploration, scholars discuss a broader understanding of torture, agreeing that the “State Orbit” is implicated¹ across different regimes when State officials are involved in acts of torture or fail to protect citizens from such acts. However, it is essential to consider how strictly the official element relates to the notion of torture.²

While some scholars agree that broadening the scope of actors defined in Article 1 UNCAT is improbable, it would not be unreasonable to assert that the Convention’s formulation explicitly aimed to strictly confine the punishment of torture to the official status of the perpetrator. This perspective is reinforced upon further scrutiny of the language articulated in Paragraph 2 of Article 1 UNCAT, maintaining that “[t]his article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”³

Although the UNCAT provision permits States to adopt a broader definition and criminalize all instances of torture, the practical result of constraining the definition, as mandated for State parties, creates a significant due diligence and accountability gap. This becomes evident when examining cases of torture by non-State actors, which are treated as acts of violence without recognising their systematic nature. The scholarly discourse extensively explores this gap, especially when comparing the UNCAT’s definition of torture with the rationales present in other international legal instruments

¹ G. Le Moli, ‘Torture by Non-state Actors: Four Inquiries’ [2021], 19(2) J. Int. Crim. Just. 389. <https://doi.org/10.1093/jicj/mqab029>

² P. Gaeta, ‘When is the Involvement of State Officials a Requirement for the Crime of Torture?’, 6(2) J. Int. Crim. Just 183. <https://doi.org/10.1093/jicj/mqn026>

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Art.1.

across different regimes. For instance, while the UNCAT includes the official capacity of the actor in the legal definition of torture, such inclusion is absent in international humanitarian law ('IHL') and international criminal law ('ICL') regimes.⁴

Understanding the evolving definitions of torture across various international legal regimes requires a thorough examination of progressively broadening rationales. This involves delving into:

- i) **The State Nexus:** Scrutinizing the extent of State involvement in acts of torture.
- ii) **The Nexus with *De-facto* Governmental Authority:** Investigating situations wherein non-State actors possess governmental-like power.
- iii) **Effective Power Over a Victim:** Exploring the concept of authority and control, allowing for a broader interpretation of torture.⁵

A common and key denominator among these rationales is the element of authority or control, enabling a broader interpretation of torture as a crime. This perspective finds reflection in various domestic provisions, as later discussed in this document. For instance, the Inter-American Convention to Prevent and Punish Torture offers a more detailed understanding than the UNCAT, defining torture as:

*[A]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.*⁶

This broader perspective is more aligned with the definition of torture under IHL and ICL, as also argued in the Melbourne Journal of International Law.⁷ The debate on torture's definition underscores the need for a nuanced approach, acknowledging variations across legal frameworks. This analysis sets the stage for further exploration of domestic legislations' diverse approaches to criminalize torture.

⁴ ESIL Interest Group on International Criminal Justice, 'Torture by Non-State Actors: Rationale(s), Legal Frameworks and Implications' (Online Conference, 30 March 2021)

⁵ Le Moli, above n.1

⁶ Inter-American Convention to Prevent and Punish Torture (1985) Art. 2

⁷ R. Lord, 'The liability of non-state actors for torture in violation of International Humanitarian Law: an assessment of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia' [2003] 4 Melb. J. Int. Law 112. <https://search.informit.org/doi/10.3316/agispt.20040205>

3.2 Torture in the Context of International Criminal Law

Building upon the discussion in the preceding section, the intersection of ICL with the UNCAT is crucial for a comprehensive understanding of the international legal framework surrounding torture.

The position described in the previous sub-section finds affirmation in the practical application of ICL, exemplified by the International Criminal Tribunal for the former Yugoslavia, as seen in the 2002 case of *Kunarac et al.* On this occasion, the Appeals Chamber concurred with the Trial Chamber that 'the public official' requirement was not obligatory under customary international law concerning individual criminal responsibility for torture beyond the confines of the UNCAT.⁸

Former UN Special Rapporteur on torture, Juan Mendez, furthers support this stance, citing developments in ICL that acknowledge torture's occurrence even without State's involvement. The characteristic trait of the offence is found in the nature of the act committed rather than the status of the person committing it, emphasizing that the absence of State failure to exercise due diligence does not absolve individuals of criminal responsibility.⁹

This important judgment underscores a shared approach in both ICL and IHL practice. The legal frameworks of these domains maintain that the status of the perpetrator should not be a required element for the crime of torture.

Crucially, this approach is codified in the Rome Statute of the International Criminal Court ('ICC'), specifically in its Article 7(2)(e). The ICC Statute defines torture as a crime against humanity involving "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused." Recent findings by the ICC Trial Chamber in the *Ongwen* case further reaffirm this interpretation. The wording emphasizes the element of control experienced by victims without specifying the nature and extent of such freedom restriction, thereby addressing challenges faced by persons subjected to trafficking, rape, forced or early marriage, or domestic violence.¹⁰ This interconnected legal framework between UNCAT and ICL reinforces a unified stance against torture across international jurisdictions.

⁸ Ibid.

⁹ Center for Human Rights and Humanitarian Law – Anti-torture Initiative, 'Gender perspectives on torture, law and practice' (2015) Washington College of Law, citing Mendez, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' A/HRC/31/57 (2016), citing Prosecutor v. Kunarac et al. (Judgment, International Criminal Tribunal for the former Yugoslavia, 22 February 2001) para. 495 and Prosecutor v. Semanza (Judgment, International Criminal Tribunal for Rwanda, 15 May 2003).

¹⁰ *Ongwen* case, Trial Chamber, Trial Judgment (4 February 2021), para. 2700: The crime of torture, whether as a crime against humanity or war crime, is committed either by act or omission and has a common material element that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

3.3 Insights from UN Special Procedures on Torture

This sub-section delves into valuable insights provided by UN special procedures, shedding light on the multifaceted nature of torture within the framework of IHRL. These insights not only complement but also extend the discussion on torture in the contexts of both IHRL and ICL.

The Institute of International Law, in a 1999 resolution, found that certain aspects of internal disturbances and tensions not covered by IHL, fall under the protection of fundamental human rights. This echoes the principle that persons are safeguarded by international law, compelling all parties to respect fundamental human rights under the international scrutiny.¹¹

Aligned with this perspective, the Human Rights Committee, in paragraph 2 of its General Comment No. 20 A/44/40, underscores a State's duty to protect against acts prohibited by Article 7 ICCPR.¹² This duty extends to acts committed by individuals in their official, non-official, or private capacity, aligning with the UDHR's rights-for-all approach.¹³

Former UN Special Rapporteur on torture Nils Melzer's 2017 report emphasizes the need for international attention to torture occurring in forced migration, extra-custodial settings, and at the hands of non-State actors.¹⁴ The Rapporteur's position reaffirmed in the 2018 interim report¹⁵ and reiterated in 2021, underscores that States are legally obligated to take reasonable measures to protect persons or groups within their jurisdiction from violence and abuse, including gender-based, ethnic, or discriminatory acts. Melzer emphasized the urgent need to address the widespread impunity for torture and ill-treatment globally. Melzer highlighted the persistent global prevalence of

¹¹ Geneva Academy, 'Human Rights Obligations of Armed non-State Actors: an Exploration of the Practice of the UN Human Rights Council' (December 2016), annex, pp 21-22, citing Institut de Droit International, 'The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties,' Berlin session, 1999, Article X.

No definition of what constitutes 'fundamental human rights' has been agreed, nor has it been settled which human rights norms are part of jus cogens. In its commentary on the Draft articles on State Responsibility, the International Law Commission has identified as peremptory norms of international law the 'prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination' (Commentary on Article 26, in Yearbook of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Vol. 2, Part Two, p 85). However, this list is exemplary rather than definitive. The UN Human Rights Committee has identified the following acts that violate jus cogens norms: arbitrary deprivation of life, torture and inhuman or degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivation of liberty, and deviating from fundamental principles of fair trial, including the presumption of innocence. See Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

¹² UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992)

¹³ E.g., the right to life, not be held in slavery or be subjected to torture or to cruel inhuman or degrading treatment or punishment.

¹⁴ UN Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2017) A/HRC/34/54 para. 54.

¹⁵ UN Human Rights Council, 'Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2018) A/73/207 para. 59.

torture and ill-treatment, practiced with near impunity, with victims rarely obtaining the redress and rehabilitation they are entitled to under international law. This reaffirms the urgent need for expanded efforts to address and prevent such human rights violations worldwide.¹⁶¹⁷

The Committee Against Torture reinforces the obligation of States to protect human rights in all instances, invoking the principle of due diligence. This principle holds that the State's indifference or inaction provides *de facto* permission for non-State actors to commit impermissible acts.¹⁸ The Committee Against Torture further clarifies under its General Comment on Article 2 UNCAT that:

Where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.¹⁹

These principles are essential in interpreting Article 1 UNCAT. Scholars like Nowak, Monina, and Birk²⁰ advocate for the general obligation of States to protect persons from torture by both State and non-State actors through due diligence. Consequently, States should incorporate this principle when establishing domestic provisions to prevent and protect victims from gender-based violence amounting to torture.

Various domestic provisions recognize and criminalize forms of violence as torture according to the legal mapping produced by the Alliance. This acknowledgment extends to situations where women and girls face systematic violence in private settings, emphasizing that States' obligation to protect their fundamental human rights is not dependent on the direct involvement or official capacity of perpetrators. The Committee Against Torture asserts that States should be held accountable for a failure to act diligently in preventing and responding to such acts. Therefore, a comprehensive understanding of torture, extending beyond legislation, becomes crucial. Addressing contemporary forms of torture requires enhanced recognition, proactive measures, and collaboration between

¹⁶ N. Melzer, 'Interim Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment' (2021) A/76/168 para. 1, citing A/73/207 para. 58.

¹⁷ UN Human Rights Council, 'Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,' 20 July 2018, A/73/207, para. 59.

¹⁸ CAT, General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 18.

¹⁹ *Ibid.*

²⁰ Evans, M. D. (2022). M Nowak, M Birk and G Monina (eds), 'The United Nations Convention against Torture and its Optional Protocol: A Commentary' 71(1) ICLQ 266.

public and private stakeholders to adjust the protective scope provided by existing national and international instruments.

The Committee on the Elimination of Discrimination Against Women, in its General Recommendations 19 and 35 on the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW') asserts a due diligence principle as well. Furthermore, following the adoption of the Declaration on the Elimination of Violence Against Women, ratifying State parties are obligated to protect persons from gender-based violence, requiring criminalisation of such acts and the investigation, prosecution, and punishment of perpetrators.

In Recommendation No. 19, paragraph 9, the Committee on the Elimination of Discrimination Against Women emphasizes that "discrimination under the Convention is not restricted to action by or on behalf of Governments."²¹ Article 2(e) CEDAW calls on State parties to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. Furthermore, in the same paragraph, the Committee asserts that under general international law and specific human rights covenants, States can be held responsible for private acts if they fail to exercise due diligence in preventing rights violations, investigating and punishing acts of violence, and providing compensation.²² This theme of liability for non-State actors is revisited in Recommendation No. 35, paragraph 25, where the Committee declares that both IHL and IHRL recognize the direct obligations of non-State actors in specific circumstances, not only as parties in armed conflict but also in situations where they hold *de-facto* control. These obligations include the prohibition of torture, a component of customary international law that has attained the status of a peremptory norm (*jus cogens*).²³

In conclusion, these insights from special procedures emphasize a holistic approach to combat torture, extending the responsibility to protect human rights beyond the realm of State actors. This multifaceted perspective contributes to a more nuanced understanding of torture in contemporary contexts, highlighting the imperative for collaborative efforts between public and private stakeholders to enhance the scope of protection under national and international instruments.

4. Domestic Implementation of Anti-Torture Laws: Comparative Overview

The UNCAT provision in Article 1 has inspired many legislations worldwide, prompting Member States to redefine the crime of torture within their domestic laws. Some Member States have even surpassed the conventional concept of torture, typically associated with State-related torture, by formulating legislation with language designed to provide additional safeguards for persons facing a

²¹ See articles 2(e), 2(f) and 5) of the Convention.

²² CEDAW, General Recommendation No. 19: Violence against Women (1992).

²³ CEDAW, General Recommendation No. 35: Violence against Women (2017).

heightened risk of victimization and torture. Drawing examples from selected countries across Latin America and the Caribbean,²⁴ Europe, Africa, Australia and North America, specifically the United States, this comparative analysis unveils diverse approaches aimed at expanding the UNCAT's Article 1 definition.

4.1 Recognition of Non-State Actors as Potential Torturers

Albeit many Latin American domestic laws adhere to UNCAT's State involvement requirement, some nations recognize non-State actors as potential torturers. Guatemala's Penal Code (Article 201 *bis*) illustrates this expansion, allowing prosecution for torture committed by organized groups and its members involved in terrorism, insurgency, subversion, or other criminal activities. Senegal, while lacking a specific torture provision, acknowledges the link between trafficking and the infliction of torture on victims, significantly increasing punishment in such cases. France has a specific torture provision with a link to human trafficking.²⁵

Countries like Argentina avoid explicit mention of criminal groups but instead associate torture with non-State actors by applying identical penalties to persons engaging in acts defined as torture by the legislation (Article 114, b, 1, Criminal Code). Some jurisdictions introduce a mitigation factor when torture is committed by a private actor. For instance, Honduras reduces penalties by one-third when torture is committed by private individuals (Article 209-A, Criminal Code). Notably, Brazil's Torture Law, along with Costa Rica's legislation, opts for an increased penalty when the crime is committed by a public agent, suggesting that situations without this aggravating factor may involve private actors. In contrast, Nicaragua's Criminal Code establishes the same term of imprisonment for both types of actors but imposes an additional interdiction from office exclusively for State actors.

National provisions criminalizing torture by non-State actors typically employ the term 'any person', aligning with Article 2(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ('Convention of Belém do Pará'). This article broadens the definition of violence against women to encompass acts of physical, sexual, and psychological violence perpetrated by any person in the community.

²⁴ This summary is the outcome of a mapping exercise that the Crime Alliance is producing to assess best practices in domestic laws implementing the CAT in Latin America. A few experiences from Europe were also incorporated in the analysis. This is by no means a comprehensive exercise and is a working in progress.

²⁵ See [Section 225-4-4](#).

4.2 Abandoning the ‘Special Aim’ Requirement

Some domestic laws surpass the traditional UNCAT approach by discarding the special aim requirement in Article 1 UNCAT. Examples include legislation from Belgium, Algeria, and the State of Queensland (Australia).

Colombia, Dominican Republic, Mexico, Nicaragua, and Panama consistently extend their provisions to encompass ‘any other purpose’ related to the crime’s aim. This expansion draws inspiration from Article 2 of the Inter-American Convention to Prevent and Punish Torture, incorporating the need for acquiescence by the State or a public servant.

In the State of California, the provision identifies the perpetrator as ‘every person who’ and includes ‘any other sadistic purpose’, portraying the element of purpose in a way that conveys the cruelty of torture rather than the declared or supposed purpose. Both approaches eliminate the ‘aim’ of the crime of torture from its defining elements. Algeria, Belgium, and Queensland omit any mention of purpose, while the second set of examples, retains purpose as an element but broadens its scope to potentially include any instance of torture.

4.3 Non-Discrimination Provisions and Addressing Vulnerabilities

In Latin American and the Caribbean countries, certain domestic laws, mirroring Article 1 UNCAT, necessitate the ‘special aim’ criterion for torture. These laws consistently recognize discrimination motives, including racial and religious discrimination, as the elements of torture. Brazil, Venezuela, Cote d’Ivoire, Colombia, Togo, and Rwanda are among the countries adopting such a definition. Costa Rica, Chile, and Finland (which still require the official element for criminalisation) further broaden the non-discrimination clause by including discrimination based on specific ideologies, economic status, and gender-based reasons.

Another approach to criminalizing torture by non-State actors is evident in provisions shifting from a perpetrator-centred to a victim-centred approach. These provisions include the concepts of authority, custody, and/or care in criminalizing torture by non-State actors when the victim is in a position of vulnerability. This includes victims deprived of personal freedom, under authority, custody or *de facto* control, suffering from any impairment or condition, whether physical or mental, or are otherwise incapable of self-preservation. Countries like Italy, Argentina, the State of Michigan adopt this approach. Spain and France²⁶ expands this classification by explicitly addressing victims who cohabit with the perpetrator or share any other personal relationship, thereby recognizing the link between domestic and gender-based violence and torture. Although these elements are part of the

²⁶ See Section 222-1.

criminalization of inhuman and degrading treatment, the provision specifically addressing torture requires the State element. Spain's example is illustrative due to this crucial insight, with the term 'torture' appearing throughout the entire title of the Spanish Criminal Code.

Additionally, provisions in the Criminal Code of Djibouti and the Central African Republic underscore attention to victims in a state of vulnerability or having a particular relationship with the perpetrator. They also consider the presence of multiple perpetrators during the commission of torture as aggravating circumstances.

4.4 Expanding the Scope of Intentional Infliction of Pain

Concerning the element of intentional infliction of severe pain or suffering, whether physical or mental, as defined in Article 1 UNCAT, a large majority of countries uniformly regard this infliction as the primary element of the crime. However, certain States specify particular forms of suffering qualifying as torture. For instance, Venezuela mentions methods undermining the victim's personality or their capacity to move and think, while Spain and Ecuador criminalize the subjugation of the victim's moral integrity and/or capacity as a form of torture.

A noteworthy development in the protection of victims of sexual abuse, exploitation, and gender-based violence is the recognition of these acts as forms of torture. Notably, Honduras and Chile introduce the violation of sexual freedom and suffering related to sexual violence as the elements of torture, with Chile explicitly assessing sex, sexual orientation, and gender identity as forms of discrimination and an element of the crime. Ecuador and the State of Alabama have specific provisions on sexual offences committed as a form of torture.

4.5 Intersecting Torture and Femicide Provisions

Femicide provisions often encompass acts that inflict great pain or suffering, aligning with the characteristics of the crime of torture. The infliction of mutilations before death serves as an indicator of the gender-based crimes motive. While femicide can only be identified when the victim is a woman or a girl and is murdered, the repetition of the gender-based element in both torture and femicide reveals unequal power relations. This connection becomes evident when perpetrators of femicide could potentially be held accountable for torture.²⁷

Detailed analyses of acts criminalized by various legislations highlight this link. For instance, legal provisions in Chile, Panama, and Guatemala explicitly address situations where a woman is killed

²⁷ The Vienna Declaration on Femicide, prepared by the participants of the Vienna Symposium on Femicide of 2012, explicitly mentions torture, along with the misogynistic slaying of women, when describing the various forms that the crime of femicide can be enacted in.

as part of a group ritual or challenge. Panama includes the victim's inability to communicate as a circumstance of the crime. Similarly, Venezuela, Peru, and Bolivia identify femicide when a woman is killed in the context of human trafficking. The infliction of mutilations is recognised as an element of the crime in the legislations of El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Peru. Notably, Venezuela includes Organized Crime Groups as possible perpetrators of femicide.

Femicide provisions, while not explicitly mentioning acts amounting to torture, indicate, as a circumstance to the crime, a previous cycle of violence and abuse inherent in gender-based crimes, and a condition of subordination in which the victim finds herself. Addressing gender-based violence, States may realize that these cycles can reach levels of severity meeting the criteria recognised as torture under existing legislative frameworks.

4.6 Establishing Standards in National Legislation

Certain States in this analysis have enacted laws with a precise objective of addressing the crime of torture. The anti-torture acts of Mauritania and Nigeria, as well as those of Uganda, Mexico, and South Africa, define torture by adopting the UNCAT's Article 1 definition. Mexico, through its Prevention and Prohibition of Special Law Against Torture, takes a similar approach. However, these laws go beyond merely defining the elements of the crime, still including the official element per the Convention. They extend to delineate a range of actions aimed at substantially improving the ways in which victims of torture can have their needs met, including treatment, compensation, and legal assistance. This proactive approach, exemplified by the mentioned laws, extends beyond the scope of this analysis. The establishment of a prevention mechanism, operating on multiple levels is seen as a crucial means of implementing the UNCAT. An illustrative expansion of this approach, particularly in criminalizing non-State actors, is evident in Venezuela's most recent law on the prevention and combating torture, explicitly designating natural persons as subject to legal scrutiny. Noteworthy is the South Dakota's introduction of a law specifically addressing torture inflicted upon victims of trafficking.

5. Concluding Remarks

In the wake of the 1984 UNCAT, which marked a pivotal commitment to combat torture globally, the journey toward eradicating this heinous crime has encountered both progress and persistent challenges. While State parties have embraced their responsibility and started adopting domestic provisions criminalizing torture as a crime, for which the State must hold accountability. However, the human rights perspective propels us beyond merely holding State officials and representatives accountable. It compels us to envision a future where preventative measures are as robust as punitive ones, ensuring that every person can live free from the haunting spectre of torture with access to justice.

This paper illustrates the need for a paradigm shift. A shift from a narrow definition tethered to official capacities to a holistic, victim-centric approach that comprehensively addresses the multifaceted manifestations of torture. The analysis, as undertaken by the Alliance’s Working Group, reveals that the UNCAT’s definition of torture is by no means intended to place restrictions on States when adopting and shaping their domestic provisions on torture. Notably, some States have gone beyond this threshold extending the criminalization of torture to encompass non-State actors, thereby holding them accountable and safeguarding vulnerable people.

The evolution of the protection for victims of torture can take diverse forms within domestic laws. These legal frameworks serve as a crucial platform to address any gaps that may arise due to the UNCAT’s somewhat restrictive definition of torture. As human rights expert and former UN Special Rapporteur on torture, Manfred Nowak, aptly notes it is paramount to “recognize the states’ obligation to broaden the scope of the definition of torture in their domestic criminal codes.”²⁸ This recognition becomes the impetus for States to craft legal provisions that not only hold perpetrators accountable but, crucially, prevent the occurrence of torture altogether. As observed in specific national legislations, adopting more expansive provisions can provide models for transitioning from a State-centred to a victim-centred approach. Such a shift creates new avenues for prosecution, empowering courts with increased opportunities to address human rights violations proportionately to the gravity of the committed acts.

The diverse approaches adopted by the mentioned States in addressing multiple cases of torture can provide a practical basis for formulating a workable definition of non-State actors. Establishing such a definition represents an important step in developing a unified approach to non-State torture. A definition of non-State actors developed by the UN Security Council describes “any individual or entity not acting under the lawful authority of the State.”²⁹ This approach ensures the exchange of best practices and facilitates the provision of technical assistance to States that have yet to ratify the UNCAT and face challenges in offering support or identifying victims of torture.

The paper’s findings show a path where a plausible definition of non-State actors can be carefully delineated. This definition could include armed groups exercising authority over a territory, whether in conflict situations or not. It may also extend to include organized crime groups, paramilitary and terrorist organizations, human traffickers, pornographers, pimps, and other persons involved in

²⁸ M. Nowak, 'Can Private Actors Torture?' (2021) 19(2) J. Int. Crim. Just. 415. <https://doi.org/10.1093/jicj/mqab031>

²⁹ UN Security Council, Security Council resolution 1540 (2004) [concerning weapons of massive destruction], 28 April 2004, S/RES/1540 (2004)

sexual exploitation. Furthermore, the definition should encompass those responsible for torture in the context of family and gender-based violence, including guardians, parents, spouses, or other kin.

In conclusion, this analysis stands as a clarion call for action. It urges States, policymakers, civil society, human rights advocates, and international bodies to draw inspiration from the varied approaches presented within the text – a mosaic of legal frameworks that have evolved to confront the stark reality of non-State torture. It beckons them to amplify their efforts, recognizing the imperative to reshape their legal frameworks. This paper envisions a future where the protection of human dignity is not just reactive but anticipatory. A future where the elimination of non-State torture and torture altogether is not a distant aspiration but a tangible reality.

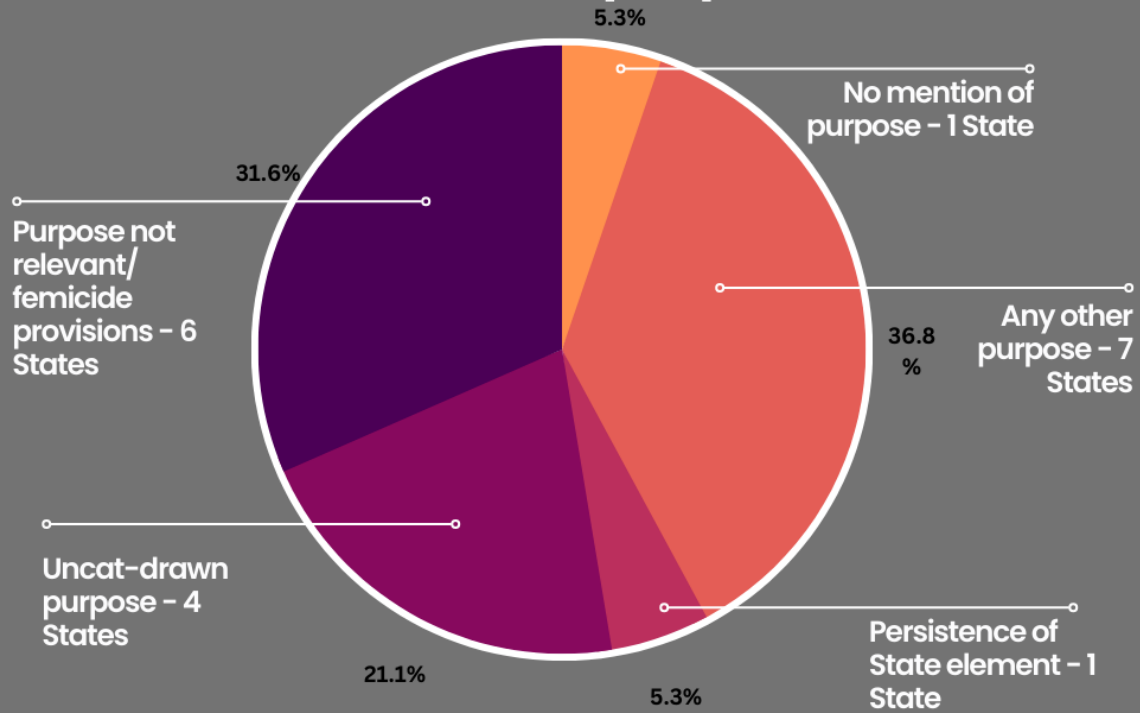
6. Annexes

EXPANDED ELEMENTS OF TORTURE PROVISIONS

	South America	Africa	Global
Consideration of victim vulnerabilities	7 states	2 states	3 states
Methods that disrupt the personality of the victim	4 states	0 states	2 states
Punishment of non-State actors as torturers in different crimes' provisions.	2 states	1 state	2 states
Sexual violence or violation of sexual freedom.	2 states	0 states	1 state
NUMBER OF STATES ANALYSED	18	8	9

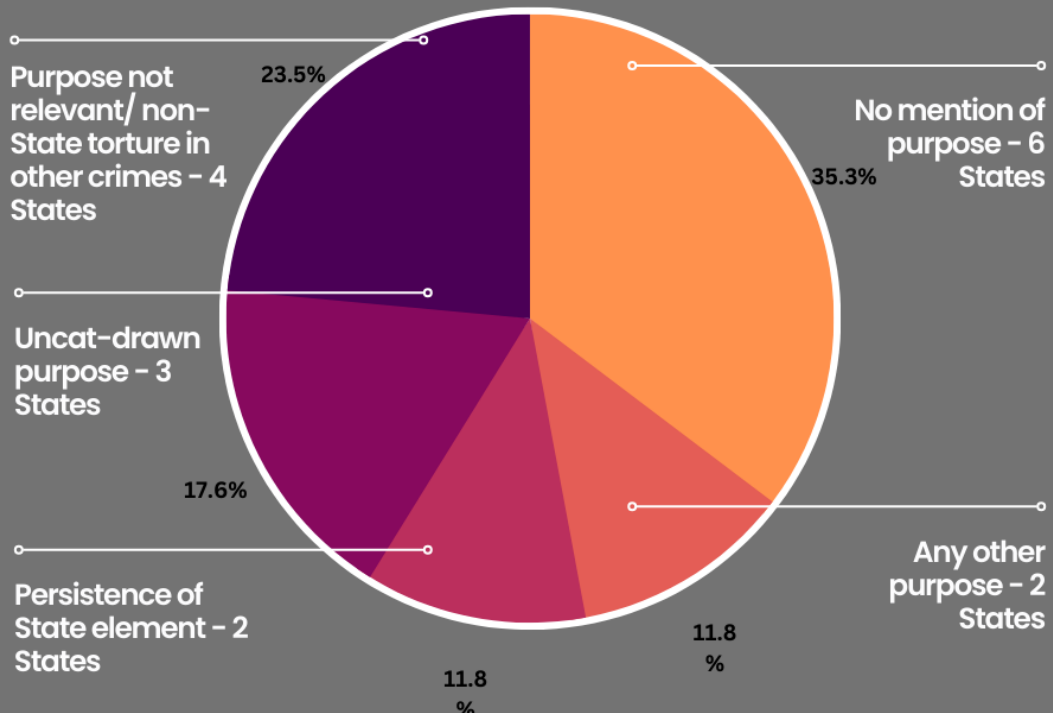
SOUTH AMERICA

Element of purpose



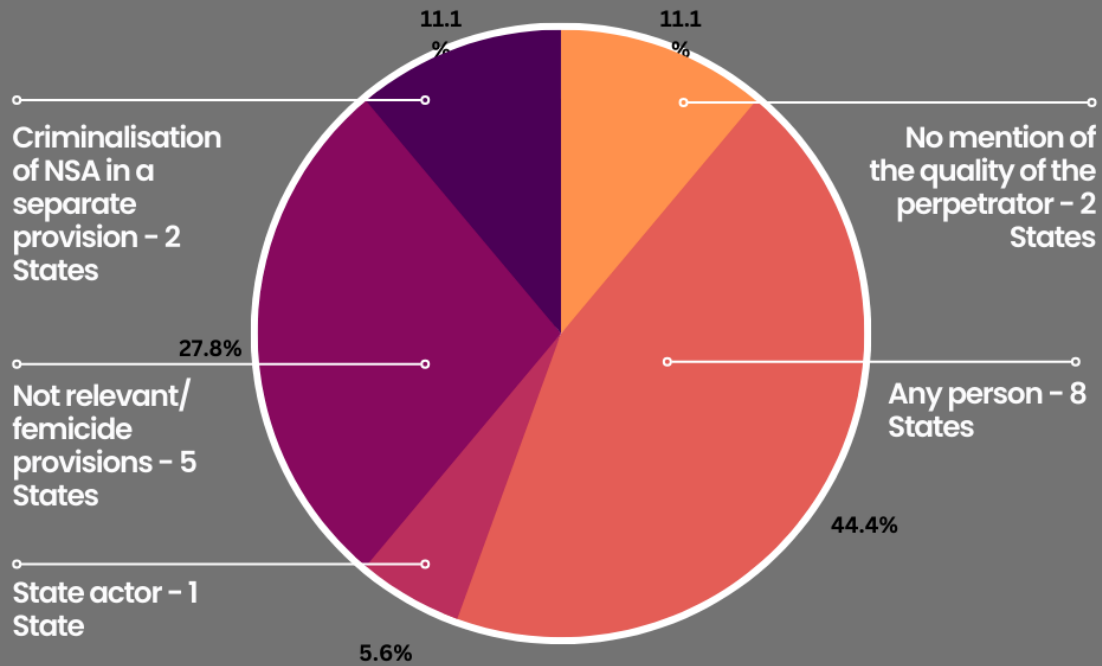
AFRICA AND GLOBAL

Element of purpose



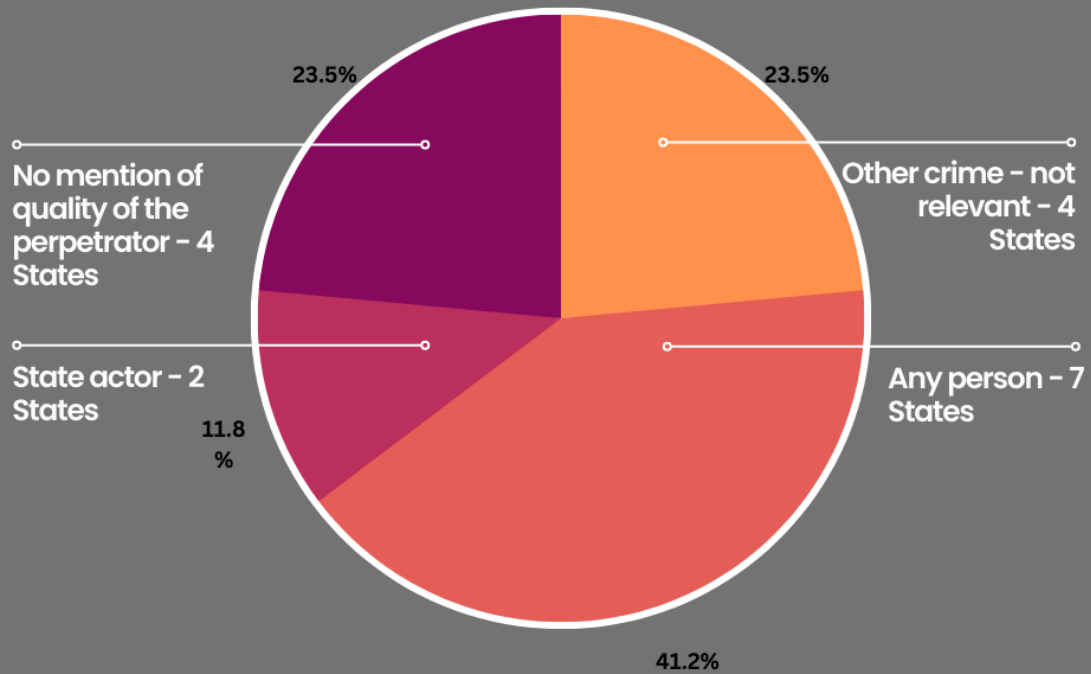
SOUTH AMERICA

Perpetrator



AFRICA AND GLOBAL

Perpetrator



“The analysis, as undertaken by the Alliance’s Working Group, reveals that the UNCAT’s definition of torture is by no means intended to place restrictions on States when adopting and shaping their domestic provisions on torture. Notably, some States have gone beyond this threshold extending the criminalization of torture to encompass non-State actors, thereby holding them accountable and safeguarding vulnerable people.”