

Proposed Revision to the Definition of Torture under Article 2 (2)(e) of the Draft Articles on the Prevent and Punishment of Crimes Against Humanity

Art 2 Definition of crimes against humanity

...

(2) For the purpose of paragraph 1:

...

(e) “torture” means 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~~, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.¹

Explanatory Notes

This proposal is intended to bring the language presently included in Draft Article 2(2)(e) in line with customary international law.² Specifically, under the Draft Treaty, a victim of torture as a crime against humanity must have been “in the custody or control of the accused.”³ This requirement is inconsistent with customary international law, which has never included a custody or control element.

Additionally, while the current Draft’s definition aligns with Article 7(2)(e) of the Rome Statute of the International Criminal Court (“ICC”),⁴ the custody or control element could

¹ U.N. General Assembly, International Law Commission (ILC), Draft Articles on Prevention and Punishment of Crimes Against Humanity, International Law Commission, U.N. Doc. A/74/10, art. 2(2)(e) (2019), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf [hereinafter Draft Articles].

² See, e.g., Canada, *Statement on the Draft Articles on Prevention and Punishment of Crimes against Humanity*, U.N. GAOR, 77th Sess., Sixth Comm., 40th mtg, p. 3 (June 12, 2023), https://www.un.org/en/ga/sixth/77/pdfs/statements/cah/40mtg_canada_2.pdf?utm (noting that some acts “are defined differently in customary international law, such as the definition of torture, which does not require custody or control”).

³ Draft Articles, art. 2(2)(e).

⁴ Rome Statute of the International Criminal Court, art. 7(2)(e), July 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf> [hereinafter Rome Statute].

preclude recognition of certain forms of torture now recognized as such— including situations where the traditional context of custody or control is absent, or difficult to prove, such as where power is exerted through coercion or domination.

Torture has been recognized as a crime against humanity since at least the post-World War II era.⁵ In the absence of a crimes against humanity treaty, the definition of the crime against humanity of torture has developed under customary international law, to require three elements: (1) the infliction of severe pain or suffering, whether physical or mental, (2) by an intentional act or omission, (3) which was perpetrated for specific purposes.⁶ During this long history, however, there has never been a requirement under customary international law that the victim had to be within the custody or control of the perpetrator.

None of the statutes of the post-World War II tribunals or subsequent *ad hoc* and hybrid criminal tribunals required custody or control.⁷ Moreover, none of these tribunals – which, with minor exceptions not applicable here, applied customary international law

⁵ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(1)(c) (Dec. 20, 1945), *reprinted in* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG [sic] MILITARY TRIBUNALS XVIII (1947) [hereinafter Control Council Law No. 10]. Indeed, an argument can be made that recognition of this crime dates back to 1919. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (Mar. 29, 1919), *reprinted in* 14 AM. J. INT'L L. 95, 113-14 (1920) (listing torture as an offense that violates both “the laws and customs of war and . . . the laws of humanity”) (emphasis added); OTTO

TRIFFTERER, *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 205 (2008).

⁶ *E.g.*, Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Judgement, ¶ 513 (ICTY Trial Chamber II, Sept. 27, 2007); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 343 (ICTR Trial Chamber III, May 15, 2003) [hereinafter Semanza Trial Judgment]. The jurisprudence sometimes has included a fourth element – that the torture was inflicted by or at the instigation of a public official – drawn from the Convention against Torture. *E.g.*, Prosecutor v. Kaing, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, ¶¶ 195-205 (ECCC Supreme Court Chamber, Feb. 3, 2012) [hereinafter Kaing Supreme Court Judgment]. The *ad hoc* tribunals, however, ultimately rejected this requirement. *E.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement ¶¶ 145-48 (ICTY Appeals Chamber, June 12, 2002) [hereinafter Kunarac Appeals Judgment]; Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgement, ¶ 248 (ICTR Appeals Chamber, May 20, 2005) [hereinafter Semanza Appeals Judgment].

⁷ See Control Council Law No. 10, art. II(1)(c); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5(f) (May 25, 1993, *as updated* Sept. 2009) [hereinafter Updated Statute of the ICTY]; Updated Statute of the International Criminal Tribunal for Rwanda, art. 3(f) (Nov. 8, 1994, *as updated* Dec. 2009) [hereinafter Updated Statute of the ICTR]; Statute of the Special Court for Sierra Leone, art. 2(f) (Jan. 16, 2002); Statute of the Extraordinary African Chambers within the courts of Senegal, art. 6(g) (Aug. 22, 2012); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 5 (2001, *as amended* Oct. 27, 2004).

with respect to crimes against humanity⁸ – required custody or control as an element of the crime against humanity of torture when prosecuting individuals⁹ for this crime.¹⁰

The Rome Statute broke from such customary international law by adding a custodial or control requirement to torture as a crime against humanity.¹¹ Unfortunately, neither the drafting history of,¹² nor commentaries on,¹³ the Rome Statute clearly explain why this element was added. Nor is it clear why this element was added to the crime against

⁸ U.N. Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶¶ 34-35, U.N. Doc. S/25704 (May 3, 1993) (observing that the ICTY would apply customary international law); Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 618-23 (ICTY Trial Chamber, May 7, 1998) [hereinafter Tadić Trial Judgment]; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶¶ 465-66 (ICTR Appeals Chamber, June 1, 2001); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgement, ¶¶ 56-59 (SCSL Trial Chamber I, Mar. 2, 2009) [hereinafter Sesay Trial Judgment]; Co-Prosecutors v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgement, ¶¶ 284-96 (ECCC Trial Chamber, July 26, 2010) [hereinafter Kaing Trial Judgment].

⁹ Semanza Trial Judgment, ¶ 343; Kaing Supreme Court Judgment, ¶¶ 195-205.

¹⁰ Custody or control is not a requirement of torture in other contexts. For example, the U.N. Convention against Torture does not require custody or control. Convention against torture and other cruel, inhuman or degrading treatment or punishment, art. 1(1), 1465 U.N.T.S. 85, 113 (Dec. 10, 1984) [hereinafter Convention against Torture]. In interpreting the Convention, the Committee against Torture has recognized that States have an obligation to prohibit, prevent and redress torture in contexts under their custody or control. U.N. Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶¶ 15-16 (Jan. 24, 2008). However, the Committee also has recognized that this obligation extends to contexts beyond the State's custody or control, including situations in which torture is committed by non-State actors or in some situations in which torture is committed after the State transferred the person to the custody or control of another individual or institution. *Id.* ¶¶ 17-19.

¹¹ Rome Statute, art. 7(2)(e).

¹² The publicly available drafting history indicates little more than that the United States supported the custody or control requirement, and that the parties were undecided about whether to include it in the definition of torture. *See, e.g.*, U.S. Delegation, Redraft of ILC Art. 20 on ICC Jurisdiction with Proposed Elements (Mar. 22, 1996), <https://www.legal-tools.org/doc/efc778/pdf/>; Preparatory Committee on the Establishment of an International Criminal Court, Draft Composite Text Submitted by the Chairman, ¶ 2(b), Doc. A/AC.249/1997/WG. 1/CRP.3 (Feb. 18, 1997) (bracketing the custody or control requirement and proposing alternative language), <https://www.legal-tools.org/doc/548a58/pdf/>; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court 21, Doc. A/CONF.183/2 (June 15-July 17, 1998) (providing alternative definitions of torture), <https://www.legal-tools.org/doc/732f58/pdf/>.

¹³ *See, e.g.*, YOUNG SOK KIM, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY OF THE ROME STATUTE 88 (2003); TRIFFTERER, p. 205; WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 166-69 (2010). One commentary suggests that the custody or control requirement was drawn from the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Torture and the Convention against Torture, TRIFFTERER, p. 253, but neither the Declaration nor the Convention include this requirement, and the source upon which the commentary relies does not provide any evidence for its assertion. *See* Convention against Torture, art. 1(1); U.N. General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1) (Dec. 9, 1975); J. HERMAN BURGERS AND HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 120 (1988).

humanity of torture, but not the war crime of torture.¹⁴ Thus, removing the custody or control language from the Draft Treaty would ensure consistency with customary international law.

Moreover, while the ICC has thus far interpreted the “custody or control” requirement broadly—extending it to situations where the victim is not under the perpetrator’s direct physical control¹⁵—the lack of a universally accepted definition of the phrase remains problematic. This ambiguity opens the door to divergent interpretations by judges in States that may join the treaty, potentially leading to the failure to recognize conduct that would otherwise qualify as torture. Indeed, although the requirement is easily satisfied in more traditional contexts, such as torture that occurs in detention centers or prison camps,¹⁶ torture can occur in a variety of settings that may not meet this standard. Removing the custody or control requirement is therefore critical to ensure that all forms of torture, including those committed outside the traditional detainee context, are properly recognized and prosecuted.

Significantly, international criminal tribunals have consistently recognized that abuse occurring outside traditional custody or control settings can constitute torture. For example, in *Semanza*, Laurent Semanza asked refugees sheltering in a church to identify Rusanganwa, “a Tutsi teacher and ‘an important personality’” in the town.¹⁷ Rusanganwa

¹⁴ Compare Rome Statute, arts. 7(1)(f), 7(2)(e) (custody required for the crime against humanity of torture), with *id.*, arts. 8(2)(a)(ii), 8(2)(c)(i) (no custody or control requirement for the war crimes of torture). The ICC’s Elements of Crimes states, in a footnote to the war crime of torture, that “[a]s element 3 requires that all victims must be ‘protected persons’ under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7(1)(e).” International Criminal Court, Elements of Crimes, art. 8(2)(a)(ii)-1 n.35. A protected person is not, however, synonymous with a person under the custody or control of another. Rather, protected persons include “those who, at a given moment and *in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), art. 4, 75 U.N.T.S. 287 (Aug. 12, 1949). As such, protected persons include, for instance, civilians and hospital staff who live in occupied territories, but who are not under arrest, in detention, or imprisoned, or otherwise within the physical custody or control of the occupying power. *See generally* Geneva Convention IV, Part III. There is no reason why torture as a crime against humanity should encompass a narrower set of circumstances than torture as a war crime.

¹⁵ *See, e.g.*, Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18, Judgment, ¶ 1129, n. 3821 (ICC Trial Chamber, Jun. 26, 2024) (clarifying that “the use of the terms ‘custody’ and ‘under control of the perpetrator’ ... should not be equated with ‘imprisonment or other severe deprivation of liberty’; rather it should be interpreted broadly in the sense that a person need not be in actual custody and some form of control is sufficient to establish this element”) (citing to C. Stahn, *Article 7: Crimes against humanity, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 238 (K. Ambos, ed., 2022)). In that case, the Chamber concluded that public flogging constituted torture. *Id.*, ¶ 1310. *See also* Prosecutor v. Al Rahman, Case No. ICC-02/05-01/20, Judgment, ¶ 749 (ICC Trial Chamber, Oct. 6, 2025).

¹⁶ *See, e.g.*, Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶¶ 146-47, 158, 163-72 (ICTY Appeals Chamber, Sept. 17, 2003) (holding that a prison warden was responsible as a superior for the crime against humanity of torture committed on male detainees at KP Dom); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶¶ 40, 61, 108 (ICTY Trial Chamber II, Mar. 15, 2002) (detainees at KP Dom were *male*).

¹⁷ *Semanza* Trial Judgment, ¶ 169.

came out of hiding, and Semanza asked him when the rebels would arrive.¹⁸ When Rusanganwa answered that he did not know, Semanza took a machete and cut his arm and leg while another man cut his other limbs, resulting in his death.¹⁹ The court found Semanza guilty of the crime against humanity of torture,²⁰ although there was no evidence that Semanza had exerted custody or control over Rusanganwa, such as by arresting or detaining him. Other cases likewise have found individuals guilty of the crime against humanity of torture for beatings committed outside traditional arrest and detention contexts, such as during house-to-house searches²¹ or during city takeovers.²²

On the other hand, a custody or control requirement could impede the recognition and prosecution of torture in cases in which the accused instigated or encouraged crimes that rise to the level of torture, but where the accused never saw – much less had custody or control of – the victim. In the *Semanza case*, for instance, Laurent Semanza “encouraged a crowd to rape Tutsi women before killing them,” immediately after which one of the men in the crowd raped a Tutsi woman who had been hiding in a nearby home.²³ There was no evidence, however, that either Semanza or the direct perpetrator of the rape had custody or control over the victim.²⁴ To the contrary, Semanza left after inciting the men,²⁵ and the direct perpetrator did not arrest, detain, or otherwise exert custody or control over the victim.²⁶ If custody or control had been an element of the crime against humanity of torture at the time of the events in the *Semanza case*, it is not evident that Semanza could have been convicted of this offense, nor is it clear that perpetrators in similar situations could be held accountable.²⁷

A custody or control requirement likewise could prevent the recognition and prosecution of torture where there is evidence of coercion that may not rise to the level of custody or control. In the *Kunarac case*, for example, Dragoljub Kunarac brought several women to a house in Trnovace, where they lived for several months.²⁸ During that time, one woman estimated that she was raped at least 20 times by Kunarac.²⁹ It is questionable, however, whether a custody or control element could have been satisfied if it had existed at the time – the women acknowledged that they were given keys to the

¹⁸ *Id.*, ¶¶ 169, 170, 486.

¹⁹ *Id.*, ¶¶ 170, 213, 486.

²⁰ *Id.*, ¶¶ 487-88.

²¹ Akayesu Trial Judgment, ¶¶ 390-92, 400, 409, 412, 682-84.

²² Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgement, ¶ 496 (ICTY Trial Chamber, Sept. 1, 2004) (describing beating and death of Sead Husagić) [hereinafter Brđanin Trial Judgment]; Prosecutor v. Brđanin, Case No. IT-99-36-T, Transcript p. 16259 (ICTY Trial Chamber, May 26, 2003) (same).

²³ Semanza Trial Judgment, ¶¶ 12, 476, 481, 485; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Transcript of the Deposition of Witness VV 8:21-9:7, 10:8-11:13, 12:10-12 (Mar. 29, 2001) [hereinafter Semanza Trial Transcript].

²⁴ Semanza Trial Judgment, ¶¶ 253-54, 257, 261; Semanza Trial Transcript, at 8:21-9:11, 10:18-11:13.

²⁵ Semanza Trial Transcript, at 8:21-9:8.

²⁶ *Id.* at 10:18-11:13; Semanza Trial Judgment, ¶ 254.

²⁷ Semanza also was convicted of rape for this act. Semanza Trial Judgment, ¶ 586.

²⁸ Kunarac Trial Judgment, ¶¶ 255-57, 262, 717-18, 724, 728, 733.

²⁹ *Id.* ¶ 268; *see also id.* ¶¶ 718, 724, 734.

house where they were taken.³⁰ Similarly, Radomir Kovac, another defendant in the *Kunarac* case, and other soldiers raped several women who lived in Kovac's apartment.³¹ There was testimony, however, that the women had keys to the apartment and were able to leave the apartment and move freely around town, often going out to eat at various cafes, to shop at a market place, and to visit people in their homes.³² Although *Kunarac* and Kovac were convicted of rape and enslavement for these particular crimes, their conduct would likely also have amounted to torture as a crime against humanity.³³ Yet if a custody or control requirement is maintained in the Draft Treaty, it could prevent a charge of torture in similar contexts.³⁴

In addition, international criminal jurisprudence has recognized that a wide variety of other harms – such as witnessing the mistreatment or rape of a friend or loved one³⁵ or family separations³⁶ – may constitute torture. Although the specific instances of torture in those cases concerned detainees who were in the custody or control of the defendants, individuals undoubtedly would experience the same severe pain and suffering even if not in custody.

Further, both regional human rights mechanisms and UN fact-finding bodies have similarly recognized that torture encompasses abuse occurring outside traditional custody or control settings.

³⁰ *Id.* ¶ 265. The court found that the women were “not free to go where they wanted to,” *id.* ¶ 740 – a finding at odds with the women’s admission that they had keys to the house. This determination appears to have been based, in part, on the court’s finding that the women “had nowhere to go, and had no place to hide” from the defendant. *Id.* Although it is possible the ICTY might have found custody and control were met in this circumstance if the requirement had existed at the time, the term “custody or control” is not defined in international law (*Id.* at ¶¶ 718, 724), and there is no guarantee that State Parties to a treaty on crimes against humanity would interpret the term broadly enough to encompass these circumstances.

³¹ *Id.* ¶¶ 748-49, 754, 758-59.

³² *Id.* ¶¶ 145, 147-50, 154-56. Kovac’s victims denied that they had had keys to the apartment or that they could move freely around town. *Id.* ¶ 74.

³³ These factual circumstances plainly sufficed for a charge of torture. See *Kunarac Appeals Judgment*, ¶ 150 (“Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture”); *id.*, ¶ 181 (“rape may constitute torture”); *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgement, ¶ 145 (ICTY Trial Chamber, Nov. 2, 2001) [hereinafter *Kvočka Trial Judgment*]. However, prosecutors have substantial discretion to determine which crimes to charge, and although torture could have been charged for these crimes, the prosecutor likely chose to focus on rape and enslavement charges here, as they enabled the first prosecution recognizing that sexual enslavement could constitute enslavement as a crime against humanity.

³⁴ Although there is no accepted definition of custody or control in international law, some of the ICTY’s findings suggest that it might have found these facts sufficient to meet that requirement if it had existed at the time. *Kunarac Trial Judgment*, ¶ 265.

³⁵ *Kvočka Trial Judgment*, ¶ 149; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶¶ 267-69 (ICTY Trial Chamber, Dec. 10, 1998) (being forced to witness rape of a friend constituted torture as a war crime) [hereinafter *Furundžija Trial Judgment*].

³⁶ See *Brđanin Trial Judgment*, ¶¶ 495, 524 (holding that the treatment of detainees, including family separations, constituted torture).

For instance, in the *Mapiripán Massacre* Case, the Inter-American Court of Human Rights (IACtHR)³⁷ concluded that townspeople had been tortured by the paramilitary group *Autodefensas Unidas de Colombia* (AUC).³⁸ In July 1997, 100 AUC personnel entered the village of Mapiripán.³⁹ During a period of one week, they tortured and murdered approximately 49 individuals perceived to be affiliated with guerrillas⁴⁰ Here, the AUC took control over the village not through a traditional form of deprivation of liberty, but by intimidating and terrorizing the residents.⁴¹

The IACtHR also found that the sexual abuse perpetrated by Guatemalan military forces against women in the outskirts of villages where massacres took place also constituted torture.⁴² When the military personnel arrived in El Mozote in December 1981, they ordered all residents to remain in their homes, threatening to shoot those who so much as “poke[d] their nose out.”⁴³ The next day, women were grouped together in one home, before being taken to different locations to be raped, tortured, and murdered.⁴⁴ As in the *Mapiripán Case*, the military exercised control not through the traditional restrictions on liberty, but by intimidation and threats.⁴⁵

The jurisprudence from the European Court of Human Right (ECtHR) reflects a similar understanding that torture should be recognized in non-traditional contexts. For instance, in *Ukraine & the Netherlands v. Russia*, the Court concluded that torture was widespread in Russian-occupied Ukraine and that rape as a weapon of war was “an act of extreme atrocity that amounts to torture.”⁴⁶ In its discussion, the Court considered not only the treatment of prisoners of war but also the abuse of civilians that took place throughout the occupied territories.⁴⁷ As the Court observed, “[b]odies of many of the victims discovered in mass graves, pits, inside houses and basements and in other places after the liberation bore signs of serious ill-treatment and had been disfigured and mutilated.”⁴⁸ In discussing the torture, the Court made no distinction between the abuse

³⁷ Notably, the Inter-American Convention to Prevent and Punish Torture does not include any reference to custody or control. OAS, Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67 (Feb. 28, 1987). The Convention also defines torture to include “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.” *Id.*, art. 2.

³⁸ *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, (ser. C) No. 134, ¶ 96.39 (Inter-Am. Ct. H.R., Sept. 15, 2005), https://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf.

³⁹ *Id.*, ¶¶ 96.34 -35.

⁴⁰ *Id.*, 96.39.

⁴¹ *Id.*, ¶¶ 96.35, 96.41. See also p. 25 (where one resident described the “terror” felt by the townspeople).

⁴² *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, (ser. C) No. 280, ¶¶ 165, 245, (Inter-Am. Ct. H.R., Oct. 25, 2012), https://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf

⁴³ *Id.*, ¶ 89.

⁴⁴ *Id.*, ¶ 90,

⁴⁵ *Id.*, ¶ 89, 158.

⁴⁶ *Ukraine & the Netherlands v. Russia*, App Nos. 8019/16, 43800/14, 28525/20 (ECtHR, July 9, 2025), ¶ 1078, <https://hudoc.echr.coe.int/eng?i=001-244292>

⁴⁷ *Id.*, ¶ 1079.

⁴⁸ *Id.*, ¶ 1053.

which occurred in detention facilities and that which took place in the victims' homes.⁴⁹

UN fact-finding bodies have also adopted an expansive definition of torture to include abuse occurring in non-traditional custody or control contexts. For instance, the UN Independent International Fact-finding Mission on Myanmar determined that torture had occurred when security forces attacked and sexually abused both male and female Rohingya during operations in villages.⁵⁰ Specifically, the report documents attacks on civilian-populated residential areas where security forces used torture and other forms of ill-treatment against men, women, and children "to obtain information or confessions regarding the activities of ethnic armed organizations or as punishment for perceived sympathy for the opponents."⁵¹ In other cases, torture arose in the context of forced labor after detention, or in prison.⁵² In identifying torture, however, the report made no distinction between abuse that occurred while a person was in the custody of military forces and abuse that happened as part of the attacks on civilian areas.⁵³

Likewise, the UN Independent International Fact-finding Mission for the Sudan reported that both the Sudanese military forces and militias engaged in widespread torture, including instances where victims were tortured in their homes or at checkpoints.⁵⁴ For instance, the report details the case of a woman who was pulled to the side of the road and whipped by a militia member for attempting to defend herself from a rape at a checkpoint.⁵⁵ Other victims were tortured while detained, such as with lashings and beatings.⁵⁶ Yet, again, the report made no distinction between cases where a custody or control requirement would have been met, and those where it would not.⁵⁷

In sum, by narrowing the accepted customary law definition on the crime against humanity of torture to situations in which custody or control is present, Article (2)(2)(e) as currently drafted would depart from established customary law and risk excluding forms of torture now recognized as such—particularly those committed outside traditional custody or control settings.

⁴⁹ *Id.*, ¶ 1071.

⁵⁰ UNHRC *Report of the Independent International Fact-Finding Mission on Myanmar*, ¶¶ 60-62, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

⁵¹ *Id.*, ¶¶ 58-61.

⁵² *Id.*, ¶¶ 26, 61.

⁵³ *Id.*, ¶ 61.

⁵⁴ UNHRC, *Findings of the Independent International Fact-Finding Mission for the Sudan*, ¶¶ 257-58, U.N. Doc. A/HRC/57/CRP.6 (Oct. 23, 2024), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session57/A-HRC-57-CRP-6-en.pdf?utm_source.

⁵⁵ *Id.*, ¶ 257.

⁵⁶ *Id.*, ¶ 261.

⁵⁷ *Id.*, ¶ 265.