

**Services for Survivors of Torture Program
Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services**

**TORTURE SURVIVORS PROGRAM (TSP)
ELIGIBILITY DETERMINATION GUIDANCE**

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1. Purpose of TSP Guidance

The non-regulatory guidance below establishes a uniform, consistent, national standard for determinations of eligibility of applicants for services under the Torture Survivors Program (TSP) funded through the Office of Refugee Resettlement (ORR) of the Administration for Children and Families, U.S. Department of Health and Human Services (HHS). This guidance is intended for organizations funded through TSP for use in developing, implementing, and documenting client eligibility for services. A finding of eligibility for TSP does not apply to any other program nor does it indicate that the applicant has met the definition of torture for any purpose other than the TSP. In particular, this eligibility determination for purposes of benefits is distinct from a legal or administrative determination that torture has occurred.

2. Definition of Torture for the TSP

What is “Torture” for TSP Purposes?

Torture has been variously defined in different national laws and international instruments. However, determinations of eligibility for the TSP must be made according to the definition of torture given in 18 U.S.C. 2340(1) and cited in the Torture Victims Relief Act of 1998 (TVRA) authorizing legislation:

“torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or lawful control;

18 U.S.C. 2340(1)

This TSP guidance is based in part on the United States Department of Justice’s (DOJ) most recent official opinion of the statute, issued in December 2004, which goes into great depth with regard to most of the terms used in this definition. This opinion, written by the Office of Legal Counsel, may be found at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

The current guidance is consistent with the legal analysis contained in that opinion. TSP policy direction is, however, intended for the different purpose of providing practical non-legal guidance to those who may encounter survivors of torture and who also may encounter other persons who have undergone traumatic experiences that do not constitute torture and are therefore ineligible for the special additional services and benefits reserved by law for victims of the *most* abhorrent practices of foreign governments, as referenced in the DOJ opinion.

To be a victim of torture, the client must have experienced, at the hands of someone acting under “color of law,” an act specifically intended to inflict one or more of three different types of harm: “severe physical pain,” “severe physical suffering,” or “severe mental pain and suffering.” In all cases, the harm inflicted on the client must have been intentional.

The federal statutory definition is in some respects broader than some other widely-used definitions of torture in that it does not limit its scope based on *why* the harms were inflicted (i.e. to extract a confession or prevent political dissent). Under 18 U.S.C. 2340 and thus for TSP purposes, it is enough that severe harm was done intentionally to a specific person by those having the support of the “color of law.” The reason or motive behind this abhorrent conduct is not relevant to eligibility determination. Generally, assuring statutory compliance proceeds in two steps, by first assessing the nature and severity of the trauma which has occurred, and second, identifying whether the source and circumstances of this trauma qualifies it as torture. The necessary inquiries are somewhat different depending on whether the client asserts that they have experienced severe *physical* or *mental* pain and suffering.

3. Severe Physical Pain or Suffering

Is the Client Claiming to Have Experienced Severe Physical Pain or Suffering?

Physical pain is not defined in the statute, but is relatively straightforwardly understood. The question will then turn to whether the pain was sufficiently “severe” so as to constitute torture. There are no precise, objective, scientific criteria for measuring pain. The critical issue is the

degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to have been torture.

Although pain and suffering will often be experienced together, physical “suffering” is a distinct route to eligibility, as it is possible that an individual may have experienced physical distress of sufficient intensity and duration to constitute torture, without having at any particular moment during this time experienced pain or anguish that is “severe.” Such suffering must be “physical,” flowing from the persistent effect of intentional harms on the body, including but not limited to maiming and mutilation; it cannot be transitory or mild. The issue is whether the intensity and duration of the individual’s suffering, considered together, was sufficiently “severe” so as to constitute torture.

The Torture Victims Relief Act legislation makes specific provision for including rape and other forms of sexual violence within the harms that can be encompassed by torture.¹

4. Severe Mental Pain or Suffering

Is the Client Claiming to Have Experienced Severe Mental Pain or Suffering?

Both of these “mental harms” are limited as a basis for eligibility within the statute and are further defined.

“severe mental pain or suffering” means the prolonged mental harm caused by or resulting from –the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. 2340(2)

Generally, mental harm as a basis for eligibility is “prolonged” in nature *and* caused by one or more of the specified acts inflicted on the client. Mental harm could consist of nightmares, flashbacks, anxiety, depression, difficulty sleeping, interpersonal difficulties, or many other conditions and experiences. The individual’s total amount of mental harm traceable to the acts inflicted by someone operating under color of law, and the length of time this mental harm has persisted should be assessed. There is no separate measure of severity in this part of the statute:

¹ 22 U.S.C. 2152 note.

the general requirement that the harm be severe is satisfied if (A) the mental harm extends over a long period of time and (B) has its source in:

- (1) the infliction of severe physical pain or suffering (in which case the individual may be eligible on that basis);
- (2) the threatened infliction of severe physical pain or suffering;
- (3) the forced administration or application of psychoactive drugs or other psychological procedures designed to disrupt profoundly the senses or the personality;
- (4) death threats made against the person, where death is made to appear imminent; and
- (5) threats made against others of imminent death, severe physical pain or suffering, or forced administration or application of psychoactive drugs or psychologically disruptive procedures.

The mental harm resulting from witnessing conduct that proceeds beyond threats to the actual infliction of torture against another is also considered as a potential basis for eligibility.

For “severe mental pain or suffering,” one of the above acts must produce a lasting mental harm (damage or injury) to the victim, though this need not necessarily be permanent or lifelong. Frequently, when threats are employed to inflict mental harm, they are repeated and occur over an extended period of time; the statute does not require this, however. The duration of time to be assessed is that of the trauma to the victim, rather than the period of time over which the acts occurred; if the acts do continue over a long period of time, of course, this would often indicate that the contemporaneous harm was also prolonged. It also could include certain techniques whose physical effects do not normally rise to the level of torture, but which are “calculated to disrupt profoundly the senses or the personality”; for instance, severe and extended sleep deprivation, *if* such a technique has disrupted profoundly the senses or personality of the individual concerned and has resulted in long-lasting mental injury.

5. Source and Circumstances

How Did the Client’s Severe Pain or Suffering Come About?

Under the statutory guidelines, it is not sufficient that the client has experienced severe pain or suffering as above-discussed. In addition, these harms to the client must have come about in a certain way, namely by the deliberate action of another person. The perpetrator’s acts should have the following characteristics: they occur under “the color of law” to individuals in the person’s custody or lawful control, yet are not incident to the application of lawful sanctions, and they are specifically intended to create severe physical or mental pain or suffering. Therefore it is as important to determine “who did this to you?” and “what were the circumstances?” as it is to determine “what did they do to you?”

Torture is committed under color of law, which means there must be at a minimum some connection between the act and the official authority in the location where the act occurred, which is presumed to be some place outside the control of the United States.² Purely private conduct is insufficient to trigger the label of “torture” even if these particular acts have not been criminally punished in a specific instance. Instead, the torturer may be an agent of a government whose acts arise out of his “official” duties (including de facto governments, military authorities, militias and like entities where there is no formal recognized government) or may simply purport to be such an agent. Commonly, this may be a member of the police, secret police, security or similar official, but it may also involve medical personnel or even private persons, if these purport to operate according to some form of state sanction.

The requirement that the color of law aspect be present to qualify an act as torture includes situations where a public official, although not directly inflicting the act, consents or acquiesces to the infliction by others of severe pain or suffering. Acquiescence requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.³

In addition, if a government or related entity is unwilling or unable to punish the acts that have caused harm, and this appears to be *generally* true (not just in the particular instance of the client) as to these type of acts, then such acts (and the pain and suffering they entail) may be considered as “officially” tolerated, and is covered under most interpretations of the term “color of law,” as the products of “deliberate indifference” on the part of the governing authority.

The individual inflicting the harm must also have “specifically intended” the harm. Most simply, the client’s pain or suffering cannot arise from accidental or random causes. For instance, even if the person suffered severely from the effects of an accident with a government vehicle, or from “collateral damage” that occurred during military operations, they would not be considered to have been “tortured.” It is not possible to fully reconstruct the state of mind of the individual inflicting the harm. However, for torture to have been present, it should be apparent that the perpetrator must have either wanted the pain or suffering to occur, or would had to have known, given the acts involved, that severe pain or suffering was the likely consequence of these acts.

Torture is also purposeful, and directed at a specific person, to hurt that specific person. The collective human suffering and trauma experienced by groups of persons or even entire populations as a result of mass persecutions, detentions, war violence, or ethnic cleansing does not, standing alone, constitute torture. Within these large groups, however, specific persons may have been singled out and individually subjected to severe physical or mental pain or suffering, as in cases of rape, maiming, or mutilation. This deliberate targeting and control of an individual is consistent with the purposeful nature of torture.

² The authorizing legislation, as well as the referenced federal torture statute, apply only to conduct occurring “outside the United States,” 18 U.S.C. § 2340A(a), which is currently defined in the statute to mean outside “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” *Id.* § 2340(3).

³ 8 C.F.R. § 208.18(a)(7).

Finally, the harm must have occurred while the victim was in the perpetrator's "custody or physical control," but *not* come about from the imposition of lawful sanctions, as incident to the apprehension and detention of a criminal or criminal suspect. This requirement assures that the alleged torturer committed his acts while "holding" the victim by means (at least tacitly) of state power, but not as part of a legitimate exercise of such power. For instance, the mere long-term detention of a person may result in significant stress or mental suffering, but this would not constitute torture. However, actions that go beyond (and are therefore not merely incident to) detention, such as deliberate starvation, extended and intentional poor prison conditions, and refusal to provide customary medical treatment, could well constitute physical suffering sufficient to qualify for torture. Likewise, the exertion by authorities of the physical force necessary to restrain and arrest a person resisting would not constitute torture, but severe brutality as "punishment" for resistance would qualify. The requirement of custody or lawful control will ordinarily be met if perpetrators are acting under "color of law" and under such pretext, seize the individual for the time necessary for him to suffer, against his will, the various heinous and adverse acts constituting the torture.

Within the context of legal sanctions, certain activities authorized by the law in a particular country might, if sufficiently severe or extreme, be considered torture were it not for their legal basis, such as forced abortion or psychiatric treatment. These activities, regardless of their designation as lawful sanctions by a particular government or authority, will not be considered lawful and qualify as acts of torture for the TSP, if the requisite level of severity is attained.

6. Primary and Secondary Survivors of Torture

Primary torture survivors are individuals who were directly tortured under the definitions set forth in this Guidance. People who were forced to witness the torture of another are also considered primary survivors.

Secondary survivors of torture are eligible for services under the TSP. Secondary torture survivors are family members or close intimates of the primary survivor.

Both primary and secondary eligible survivors are those who have a presenting complaint or condition that has a demonstrative cause and effect relationship with the torture experience. Primary and secondary survivors of torture are eligible for the same services under the TSP.

7. TSP Staff Training

Service providers under the TSP are strongly encouraged to establish and implement threshold professional standards for personnel who collect information from clients and make eligibility determinations. Areas that may be included in basic staff orientation and training are:

- Fundamentals of the practice and art of interviewing severely-traumatized individuals.
- Differentiating torture from other types of trauma and other elements of the practice and art of eligibility determination.

Programs are encouraged to establish a process for peer review and discussion. Many programs hold regular staff meetings to discuss potential cases and applicants' eligibility for services. The discussions help achieve sound eligibility determinations, advance staff understanding and application of the definition of torture, and ensure uniformity of eligibility determinations across staff.

8. TSP Case Documentation

It is important that documentation be included in each client's case file regarding eligibility for program services under the definition of torture found in 18 U.S.C. 2340(1). This information includes the nature and severity of pain or suffering experienced, the source of the acts, and the circumstances under which these acts were perpetrated.

In cases where it is determined that the applicant is not eligible for services under the TSP, it is also important that the case file include a description of the facts and circumstances of the case and an explanation of why the testimony, evidence, and facts submitted do not qualify as torture under the TSP.