

**WHO IS A SURVIVOR OF  
“TORTURE”?  
UNDERSTANDING THE  
ELEMENTS OF THE US  
AND UN DEFINITIONS  
OF TORTURE**

**Presented by:  
Annie Sovcik  
&  
Marie Soueid**

**The Center for  
Victims of  
Torture**

# WEBINAR OBJECTIVES

- Understand the basic elements, as well as differences, between the U.S. and UN definitions of torture and the refugee definition.
- Increase analytical skills in applying the legal definitions of torture to factual case scenarios.
- Conduct elemental analyses on the legal basis for determining eligibility under ORR and UN funding.
- Understand the following elements in the two definitions of torture: *color of law*, *acquiescence*, *custody and control*, and *purposes for torture*.

# ELIGIBILITY FOR SERVICES AUTHORIZED BY THE TVRA

- The TVRA authorizes the executive branch to provide grants to U.S. and foreign treatment centers and programs providing direct services, whether rehabilitative, social, or legal, to victims of torture or providing research and training for such services.
- This act provided that torture is defined in accordance with the criminal definition in the Torture Act.
- Under guidance issued in 2008 by ORR, service providers receiving ORR funding under the TVRA must assess whether prospective clients fit the legal definition of survivors of torture.

# WHAT IS “TORTURE”?

- *Jus cogens* norm: fundamental principle from which no nation may derogate or waiver under any circumstances. All countries are bound by this prohibition.
- Never justified.
- The definition of torture varies across countries, even as most have ratified the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

# CONVENTION AGAINST TORTURE

- CAT was adopted by the UN General Assembly in 1984 and currently has 158 State Parties.
- The United States ratified the CAT in 1994 upon passing legislation criminalizing torture abroad and submitting instruments of ratification.
- Even as the United States is a party to CAT, the specific legal statutes and regulations that define torture under US law have significant differences from CAT.

# HOW DOES CAT DEFINE “TORTURE”?

- “any **act**
- by which **severe pain or suffering**, whether physical or mental,
- is **intentionally inflicted** on a person
- for such **purposes** as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,
- 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**.
- It does **not** include pain or suffering arising only from, **inherent or incidental to lawful sanctions.**”

# U.S. TORTURE CONVENTION IMPLEMENTATION ACT OF 1994

- Although passed to fulfill its obligations under the CAT and ratify the treaty, the Torture Act – and thus the controlling definition of “torture” in U.S. law – modified important elements of the CAT and UN definition.
- The Torture Act defines torture as:
  - “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 physical control.**”

# KEY DIFFERENCES BETWEEN CAT AND THE TORTURE ACT

- The U.S. requires **specific intent** to bring about the severe pain or suffering inflicted, **not merely the general intent** to commit the act, seemingly required in the CAT.
- The U.S. definition includes the **additional element of “custody or physical control”** of the actor over the victim, a requirement absent from the UN definition.
- The U.S. definition seemingly heightened the standard for government involvement, requiring the act to be committed “under the **color of law;**” **rather than merely requiring official “acquiescence.”**
- The U.S. definition **removed the requirement** that torture be carried out for one of the **various enumerated purposes.**



# FACT PATTERN 1

Carlos, a school teacher, lived in Santo Domingo, Colombia where the government was planning to build an oil pipeline. Occidental, a private U.S.-based security company, was providing security for the construction of the pipeline. It had a contract with the Colombian armed forces that allowed Occidental to carry out “all means necessary” to protect the pipeline. Occidental was paid directly by the Colombian government for its services. There was no coordination on operations between the Colombian government and Occidental. The local government maintained a police station and local governor for day-to-day city operations.

As the construction was beginning, Carlos organized a protest against the presence of the oil pipeline. During the protest scuffles broke out between Occidental troops and demonstrators. Occidental opened up fire to disperse demonstrators. As Carlos ran away, Occidental troops caught up with him and started beating him severely in a small alley. They told him to never try to demonstrate against the pipeline again or he would be thrown in jail. This lasted a few minutes, but eventually he was able to escape. Carlos never told the Colombian police that he was beaten by Occidental’s troops and never filed a complaint. Colombia did not terminate or change its relationship with Occidental. Colombia has not prosecuted anyone for the assault on protesters.

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# COMPARISON: SPECIFIC V. GENERAL INTENT

- The Torture Act requires specific intent to bring about the severe pain or suffering.
- CAT does not clarify as to specific or general intent, which experts have interpreted to mean general (intent to commit the act).
- ORR guidance on the Torture Act: **Do not need to reconstruct the perpetrators' state of mind**--cannot be accidental or random but must be apparent he either wanted or would have known the pain or suffering would occur.
- Courts: Can **take into account all of the surrounding circumstances** to determine the perpetrator's intent.
- Practically, this difference is very important in a criminal context—whether the defendant had the requisite mental state to be convicted of the crime of torture.

# COMPARISON: “CUSTODY OR PHYSICAL CONTROL”

- Under the Torture Act, custody or physical control is a central element of torture; however it is excluded from the UN definition.
- Certain acts of torture arise mainly in detention centers or when the victim is under the exclusive control of the custodian. However, custody and physical control are broader than contexts of imprisonment.
- Department of Justice guidance on which ORR relies does not interpret this element because it guides U.S. interrogators, in which case custody is presumed.
- ORR’s guidance indicates that if the perpetrator **seizes “the individual for the time necessary for him to suffer [severely] against his will”** then the element of custody and control is met.
- Difficult unanswered cases: persistent stalking, home invasions, temporary custody or control (like blocking an alley).

# COMPARISON: “COLOR OF LAW” V. “ACQUIESCENCE”

- The **U.S. Torture Act** requires that to constitute torture, the act must have been committed under “the **color of law.**”
- **CAT** is more permissive providing that “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.**”
  - Cannot be entirely a private person acting in a personal capacity.
- The legislative history for the Torture Act indicates that **Congress intended “color of law” to be synonymous with** the requirement for government involvement in the CAT, namely, awareness of—or, **acquiescence** in—such activity.
  - U.S. courts have not interpreted “color of law” as defined in the Torture Act.
  - Despite its seeming origins in the term “acquiescence,” in other areas of US law “color of law” has led to a **strict requirement that the acts be perpetrated by or at the instigation of government officials (even through the active participation of just one individual).**
- ORR guidance seemingly adopts the definition of “acquiescence” that most circuit courts have elaborated on in interpreting the CAT for non-refoulement purposes, which requires “willful blindness” by government officials.

# CAT: ACQUIESCENCE

- The UN Committee Against Torture: “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 their due diligence to prevent, investigate, prosecute and punish** such non-State officials or private actors consistently with the Convention, the **State bears responsibility**[.]”
- A state’s **failure to “exercise due diligence to intervene to stop, sanction and provide remedies** to victims of torture facilities and enables non-State actors to commit” such acts. Therefore, “the State’s indifference or inaction provides a form of **encouragement and/or de facto permission.**”

# CAT: ACQUIESCENCE

- The Committee Against Torture has found **acquiescence in domestic violence cases** where states fail to prevent, investigate, or prosecute acts of torture by a non-state actor who knew or could have known of the severe ill-treatment.
- The UN Special Rapporteur on Torture, Juan Méndez has noted in the context of sexual and gender-based violence that “if a country knows or ought to have known that violence was occurring and fails to comply with their due diligence obligations to prevent, investigate, prosecute and punish, then there is state responsibility. In other words, if the country is **negligent in letting a private actor perpetuate torture** or cruel, inhuman and degrading treatment – for our purposes that person is a state agent.”
- Radika Coomaraswamy, UN Special Rapporteur of Violence Against Women argues that domestic violence mirrors the elements of torture including state action, whether active or passive.

## FACT PATTERN 2

Marisol and her two children lived in San Salvador, El Salvador. They have been subjected to severe beating and abuse by her husband. Her husband is a member of the MS-13 gang. She was too afraid to leave him because the gang controls such large swaths of the city that she knew he could find her anywhere. After years of consistent abuse, she sought the help of a NGO that operates underground to assist victims of domestic abuse, hoping they could help her and her kids escape El Salvador. They connected her with a police officer that was keen to stop gang violence in San Salvador and she filed a complaint. She knew that normally, the police are either too afraid or too loyal to the gangs to investigate abuses by gang members. They told her there was nothing they could do.

The government claims to be combatting the gang, it is almost powerless over the members and their actions. The gang even threatens or bribes the local police and authorities. And there is a well-known collaboration between the police and the gang. The local government has never prosecuted a domestic violence case against a gang member, even though the problem is widespread throughout the city. Marisol escaped to the United States.



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Despite his desire to help, **the police officer, after meeting with superiors, told her there was nothing he could do**. The government says **it is trying to combat the gang, it is almost powerless over the members and their actions**. The gang even threatens or bribes the local police and authorities. And there is a well-known collaboration **between the police and the gang**. The local government has never **prosecuted a domestic violence case against a gang member, even though the problem is widespread throughout the city**. Marisol escaped to the United States.

# COMPARISON: ENUMERATED PURPOSES

- CAT provides that to constitute torture an act must be carried out for one of the enumerated purposes: extracting a confession, obtaining information from the victim or a third person, punishment, intimidation or coercion, or discrimination.
- This list is not exhaustive and the enumerated purposes are so broad, it is rarely an obstacle in determining whether torture occurred.
- The U.S. Torture Act does not limit the scope of torture based on why the harms were inflicted—the motives of the torturer are irrelevant.
- Do not confuse the enumerated purposes of the CAT definition of torture with the definition of refugee.

# REFUGEE DEF'N: 5 GROUNDS

- Eligibility for asylum or refugee status depends on an applicant meeting the definition of “refugee.” Under the Refugee Convention, a person is a refugee if they have crossed an international border and:
  - “owing to a well-founded fear of being persecuted
  - for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality
  - and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”
- One of the five grounds (race, religion, nationality, membership in a particular social group, or political opinion) must be the motivation. The U.S. torture definition does not have this requirement. And the UN CAT’s purposes requirement are different than the refugee protected grounds.
- Although some refugees are torture survivors, many are not and vice versa.

# REFUGEE DEFINITION: UNWILLING OR UNABLE

- A refugee is defined as someone who is unwilling or unable to return to their country of origin.
- Refugee status is generally only granted when the state of origin cannot grant protection to an individual based on a well-founded fear of persecution.
- The state may not have to be the persecutor, but must fail to grant protection from the persecutor.
- This is a much less stringent state action than the requirement under either torture definitions, which require some deliberate or willful conduct by the state to either carry out the torturous act or to knowingly and purposefully ignore it and allow it to continue.

# REQUIREMENTS FOR NON-REFOULEMENT PROTECTIONS UNDER CAT & U.S. LAW

- U.S. law incorporated CAT's definition word-for-word and element-by-element in determining eligibility for non-refoulement protection.
- Article 3 of the CAT prohibits States Parties from the expulsion, return (*refoulement*), or extradition of someone to "another State where there are substantial grounds for believing the person would be in danger of being subjected to torture."
- In determining whether an applicant is entitled to withholding or deferral of removal from the United States under CAT Article 3, U.S. immigration courts and federal courts apply the UN CAT definition of torture subject to several regulations.
- This is by far the most common context in which the definition of torture is argued and analyzed in U.S. courts and tends to be used as a last resort for applicants seeking protection.
- This is distinctly different than the definition of a "refugee."

# RECAP: US DEFINITION

- The Torture Act defines torture as:
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# RECAP: UNCAT DEFINITION

- “any **act**
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# FACT PATTERN 3

In a coup, the military overthrew the civilian government in Haiti and took over the reins of power, sending much of the country into chaos. The military itself was primarily concentrated in the capital Port au Prince and paid much attention to holding the city. For years, an opposition group (AOG) had quietly been amassing weapons and carrying out vandalism and local attacks in the north of the country, but had not challenged the central or local governments. Its new leadership had political and territorial ambitions. With the military's concentration on the capital, AOG was able to take over northern parts of the country, drive out the few military troops, and control a large part of the northern territory.

AOG began to deliver basic services to those in its territory, took over the local ports and erected checkpoints along the main roadways. It sent out a decree with a strict moral code. It spread terror among civilians and carried out public executions to strictly enforce its code. Michel, a former local government employee did not leave the north when the military was driven out. AOG discovered that Michel worked for the Haitian government. It captured and held him in a makeshift prison for several months. Guards beat him and called him a traitor. He escaped by faking death and being thrown out of the prison with other bodies. He left Haiti for the United States. Since his arrival here, the Haitian military regained control of the north after several months of fighting.



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# CHALLENGE OF ELIGIBILITY FRAMEWORK

- A rarely utilized penal statute and its legal interpretations guide a clinical determination to provide services.
- Torture treatment centers, in addition to assessing eligibility on symptoms and clinical needs, must grapple with making legal determinations regarding whether an act was (a) sufficiently severe, (b) inflicted under the color of law, (c) motivated by the perpetrator's specific intent to cause the severe pain or suffering, and (d) committed under the offender's custody or physical control.
- Courts and other legal actors struggle with the above guidelines in immigration and liability contexts.
- Practitioners that are not legally trained are left to make complicated legal determinations. 2/3 of medical and psychological research on torture fails to define what is meant by the term "torture."

# WHAT HAS BEEN THE IMPACT OF DIFFERENT DEFINITIONS?

- To provide rehabilitative services to refugees and other survivors of torture, treatment centers are directed to apply the more restrictive criminal definition provided for in the U.S. Code, despite the absence of any penological goals in the TVRA.
- There is little indication that an application of the less restrictive CAT definition will result in more clarity or flexibility for torture treatment centers, as U.S. regulations and jurisprudence interpreting CAT would still apply in a strictly legal context.
- For purposes of providing protection to (potential) torture victims, immigration and federal courts have long applied the UN definition as provided for in statute and federal regulations but have narrowed the definition over the years to be interpreted closer to the Torture Act definition.

# TORTURE TREATMENT CENTERS ELIGIBILITY DETERMINATIONS

- Each torture treatment center and service provider has its own methods for making eligibility determinations.
- For the Center for Victims of Torture, it is a multilayered process:
  - When clients seek services, a CVT staff person conducts an initial interview and fills out a form that includes a description of the events that led to their seeking CVT's services.
  - After an initial intake with the client, a team of clinicians assembles to determine whether each client is eligible for services.
- The follow-up consultation will demonstrate the different processes in more detail

# ELIGIBILITY DETERMINATIONS

- Clinicians make eligibility determinations on two levels.
  - whether the client's symptoms make them eligible for services. A clinical determination.
  - whether the client was in fact tortured and meets the legal definition provided in the Torture Victim Relief Act. A legal determination.
- CVT uses the TSCL-R (Torture Screening Checklist - Revised), which was created by the Bellevue/NYU Program for Survivors of Torture, with permission.
- The checklist asks whether the potential client was specifically targeted, the level of state action involved, where the acts took place, and whether the act was intentional. It also uses a checklist for "fit" determination.
- Depending on the answers, a team of clinicians determines whether the acts fit within either the UN or the U.S. definitions.
- No lawyers or persons specifically trained in the law in this area are present for the eligibility determinations.

# ELIGIBILITY DETERMINATIONS: CHALLENGES

- Examples of scenarios that service providers struggle with:
  - Whether tribal leaders, families, or other “official” entities are acting under color of law, in particular in situations where the central or local governments have little or no power over the region. In these circumstances national governments are usually irrelevant and one cannot go to national or local police to stop intimidation, harassment or abuse by tribal leaders.
  - In regions where a government can barely operate because it has been overrun by non-state militias, do actions by those militias constitute either acquiescence or color of law? What if the armed groups have overrun an area and are seeking to assert control as a governmental entity as in Boko Haram in Northern Cameroon?
  - What level of harassment without physical confinement to a particular space is sufficient to show custody and control? For example, would a situation where a survivor is being stalked and constantly watched constitute custody? Would pillaging one’s home constitute custody? Would attempting to assassinate someone by trying to run them over repeatedly constitute custody or control?

# ELIGIBILITY DETERMINATIONS: CHALLENGES

- For torture treatment centers, determining whether an individual is eligible for services is not the only difficulty that accompanies having to make a complex legal determination upon initial intake.
- The added requirements during the intake process may force treatment centers to ask too many details of the client too early in the recovery process, usually at a time when the necessary trust has not been established between client and provider.
- This can be a hindrance to recovery and is not in the best interest of the client as it may invalidate the client's own suffering. It puts the clinician into the unnatural role of an investigator.
- Having to make a legal determination only adds to the difficulty of establishing a trusting relationship. Client's difficulty giving information early in the relationship with no guarantee of services.
- Finding alternatives for ineligible people.