**ORR Survivors of Torture Program**

**Nationality Capacity Building Project**

**Eligibility Determination Form - NCB TEMPLATE**

ORR requires that all program conduct and document eligibility determinations for all clients based on the Survivors of Torture Program Eligibility Determination Guidelines. To simplify this process SOT Program recipients may use this template or refer to it when creating an eligibility determination form for their organization. Eligibility determinations are not a legal exercise rather they are meant to establish a reasonable, common-sense basis to believe that the applicant’s experience satisfies the elements of the U.S. definition of torture:

*[A]n act committed [outside the United States] 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.[[1]](#footnote-1)*

The 2023 Services for Survivors of Torture Program Eligibility Determination Guidelines (“2023 Guidelines”) are designed to help you answer that question each step of the way. As you conduct the assessment below, please provide information about the primary survivor in Section A through H. If the applicant is a secondary survivor, please complete Section I as well. Please keep in mind that you should resolve any uncertainties and make decisions consistent with the United States’ unequivocal commitment to the prohibition of torture, including the President’s call to the nation to “stand in solidarity with survivors of torture.”

1. **What did the applicant endure that may constitute torture?**

***Note: This can include not only acts but also omissions. For example, withholding medical care which results in severe pain or suffering can constitute torture.***

*Please explain your answer and provide details:*

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1. **Did the alleged torture occur outside the United States?**

This question is entirely about location—where did the alleged torture happen? The nationality of the alleged perpetrator, or of the applicant, is irrelevant.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If yes, go to next question.

If no, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Was the alleged torture committed “under the color of law”?**

The “color of law” element is most clearly satisfied when the perpetrator is a government official acting in their official capacity, but that is not the only circumstance in which it is satisfied. Non-state or private actors – including, for example, gangs, rebel groups, and terrorist groups – also act under “color of law” when the government officially tolerates their torture, or when government officials, as a general matter, are unwilling or unable to prevent or punish it.

With respect to female genital mutilation (FGM), the U.N. Special Rapporteur on Torture has stated as follows:

It is clear that even if a law authorizes the practice, any act of FGM would amount to torture and the existence of the law by itself would constitute consent or acquiescence by the State. The “medicalization” of FGM, whereby girls are cut by trained personnel rather than by traditional practitioners is on the rise in some African countries. The Special Rapporteur stresses that from a human rights perspective, medicalization does not in any way make the practice more acceptable. Even in contexts where FGM has been recognized as a criminal offence, but where public hospitals offer this “service”, it constitutes torture or ill-treatment. Also, in cases where FGM is performed in private clinics and physicians carrying out the procedure are not being prosecuted, the State de facto consents to the practice and is therefore accountable.

With respect to domestic violence, the U.N. Special Rapporteur on Torture has stated that “[d]omestic violence amounts to ill-treatment or torture whenever States acquiesce in the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere.” For example, the “color of law” element is satisfied if “by indifference, inaction or prosecutorial or judicial passivity” government officials do not “exercise due diligence to protect against such violence or when they legitimize domestic violence by, for instance, allowing husbands to ‘chastize’ their wives or failing to criminalize marital rape, acts that could constitute torture.”

An applicant’s credible recounting of events can be sufficient to demonstrate that government officials in the country at issue are generally unwilling or unable to prevent or punish the type of act(s) or omission(s) that caused the harm they suffered. These additional resources may also be helpful toward that end:

* The U.S. State Department’s [Country Reports on Human Rights Practices](https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/)
* Human Rights Watch’s [country specific resources](https://www.hrw.org/countries), including their annual [World Reports](https://www.hrw.org/publications)
* Concluding observations of the Committee against Torture on countries’ own reports about their compliance with the Convention against Torture. (Go to the [Committee’s homepage](https://www.ohchr.org/en/treaty-bodies/cat); scroll half way down the page to the section titled “States parties reporting,” which allows you to select any country and a “Document Type;” select the relevant country from the former and “Concluding observations” from the latter, which will generate a list of documents; open the most recent document in the list that is titled “concluding observations.”)

For additional guidance see Criteria for Determining Eligibility Section c. Torture Committed under the Color of Law of the 2023 Guidelines.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If yes, go to next question.

If no, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Did the perpetrator “specifically intend” to inflict the alleged torture?**

Unlike other widely used definitions of torture, the TVRA does not limit its scope based on *why* perpetrators inflicted torture. For SOT Program purposes, it is necessary only that the perpetrator had a conscious desire to inflict physical or mental pain or suffering, *or* that the perpetrator knew or should have known that their act(s) or omission(s) would cause such harm.

For additional guidance see Criteria for Determining Eligibility Section b. Specifically Intended to Cause Severe Physical or Mental Pain or Suffering of the 2023 Guidelines.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If yes, go to next question.

If no, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Did the survivor suffer severe physical or mental pain or suffering?**

Clinicians are best placed to determine whether the act(s) or omission(s) to which the applicant was subjected resulted in severe physical *or* mental pain *or* suffering. Generally speaking, the more intense and lasting the physical *or* mental pain *or* suffering, the more likely it is that the individual was subjected to torture.

In assessing whether the applicant suffered severe physical *or* mental pain *or* suffering, programs should consider the vulnerability of the victim (age, gender, sexual orientation, status, etc.), as well as the environment and the cumulative effect of the circumstances.

For additional guidance see Criteria for Determining Eligibility Section a. Severe Physical or Mental Pain or Suffering of the 2023 Guidelines.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If yes, go to next question.

If no, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Was the severe pain or suffering “incidental to lawful sanctions”?**

A “lawful sanction” can be understood as a legitimate punishment that is consistent with international human rights standards and norms. So, for example, somebody who commits murder, is found guilty through a fair trial, and is then incarcerated (in humane conditions of confinement) for a term of years may suffer psychological pain or suffering as a result of their incarceration, but that harm would be considered “incidental to lawful sanctions.” However, the person cannot be subjected to additional, illegitimate, harms while serving their sentence – such as beatings, or withholding medical care, or solitary confinement to “manage” mental health conditions – that result in severe pain or suffering, notwithstanding the fact that their underlying arrest and conviction were lawful. In those cases, *that* severe pain or suffering is not “incidental to lawful sanctions.”

Also, if the act(s) or omission(s) that caused the applicant severe pain or suffering was authorized by a law that is inconsistent with international human rights standards and norms, neither the act(s) / omission(s) nor the harm is “incidental to lawful sanctions.” For example, if an LGBTQ person is arrested for same-sex relations or other forms of gender expression in a country criminalizes LGBTQ people, severe pain or suffering that results is not “incidental to lawful sanctions.”

For additional guidance see Criteria for Determining Eligibility Section d. Pain and Suffering Not Incidental to Lawful Sanctions of the 2023 Guidelines.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If no, go to next question.

If yes, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Was the survivor within the perpetrators “custody or lawful control” when the alleged acts of tortured were committed?**

The “custody or lawful control” element is met when a person is physically detained, irrespective of where (e.g., a jail, police station, military base, building occupied by a gang, residence, roadside checkpoint, healthcare facility, village compound, etc.). A person can also be in another’s custody or control *without* physical confinement. Such situations include, but are not limited to, beating of protesters under the guise of “crowd control”; escalated psychological methods, including intense stalking; car chases; consistent harassment at home, work, or elsewhere (even when escape may be possible); and house arrest (whether it is imposed by law, or is the case in practice).

For additional guidance see Criteria for Determining Eligibility Section e. Committed While Within Another Person’s Custody or Physical Control of the 2023 Guidelines.

*Please explain your answer and provide details:* \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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If yes, go to next section.

If no, the applicant is not eligible for SOT program services. If indicated, the applicant should be referred to other appropriate programs for assistance.

1. **Circumstances that do not constitute torture.**

Pain and suffering from accidental or random causes, such as the crash of a government vehicle, does not constitute torture for SOT program purposes. Also, an applicant must experience individual harm in some fashion—in other words, eligibility cannot be based on collective human suffering and trauma experienced by large groups of persons due, for example, to mass persecutions, detention, war violence, or ethnic cleansing. However, if an applicant in any such groups is individually subjected to severe pain or suffering – e.g., as part of mass violence or persecution they themselves are detained, or raped, or otherwise abused – they will be eligible if they meet the criteria above.

Torture committed by private individuals acting on their own does not meet the definition applied to the SOT Program, *unless* the government officially tolerates, or, as a general matter, otherwise acquiesces in such torture by failing to prevent or punish it. (See Section C. above).

**I. Is the person a secondary survivor of torture?**

ORR defines a secondary survivor as a relative or other individual closely associated with a primary survivor, who is impacted by the torture and/or subsequent trauma in a way that threatens their health or mental health and their ability to function or normal development. ORR authorizes a secondary survivor’s eligibility for the same SOT services as a primary survivor of torture, regardless of whether the primary survivor is enrolled in an SOT program.

*Please explain and provide details on how the individual is closely associated with a primary survivor and how they have been impacted by the torture and/or subsequent trauma.*

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I (*staff name*),\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ certify that (*client name*)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ qualifies as a Primary Survivor of Torture who meets the criteria defined in 18 U.S.C. Sec. 2340(1), as interpreted by the 2023 Eligibility Guidelines.

-OR-

I (*staff name*),\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ certify that (*client name*)\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ qualifies as a Secondary Survivor of Torture who meets the criteria defined in 18 U.S.C. Sec. 2340(1), as interpreted by the 2023 Eligibility Guidelines.

1. 18 U.S.C. § 2340. [↑](#footnote-ref-1)