

Deconstructing Dershowitz and his Torture Warrants

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JOCELYN LEUNG, FEB 1 2010

Civil Libertarian Alan Dershowitz Believes that the Law should allow Torture in certain cases. He argues that States Currently use Torture but it is Illegal and therefore Unregulated. According to Dershowitz, it would be Preferable to have the law allowed Defined means of Torture in Defined Circumstances. Should Torture be Legalized?

Torture is defined by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) as an illegal act that causes “severe pain or suffering, whether physical or mental” and is intended to either obtain a confession, gather information, punish the subject, pressure the subject or someone else into behaving in certain ways, or “for any reason based on discrimination of any kind.”[1] One component of torture is that it can only occur when a state intentionally commits or at least tacitly acquiesces to it.[2]

Despite this qualification, international law has been incredibly firm in universally condemning torture, which the international community views as undermining the “integrity and dignity of the individual”.[3] As a consequence, this belief permeates through codified international law and customary law. The aforementioned Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR) specifically prohibits torture under all circumstances including the most desperate of situations, e.g. “state of war or threat of war, internal political instability or any other public emergency,” that threaten the very existence of the state.[4] While in customary law, the taboo for torture has reached *jus cogens* status and has become a truly peremptory norm.[5] Dershowitz does not challenge the general illegality of torture, which he describes as “[a] horrible practice that we all want to see ended...”[6] Dershowitz argues, however, that all states (whether they be authoritarian or democratic) practice torture extralegally; he considers it to be a lesser of evils to legalise torture and control it rather than allow it to go unchecked and under the radar.

This paper intends to invalidate Dershowitz’s argument on the need for “torture warrants” especially in democracies and elucidate why torture should remain unconditionally illegal.

Dershowitz’s Argument:

Dershowitz bases his proposal on the hypothetical ‘ticking bomb’ scenario, a scene that would be familiar to anyone who has watched *24*. A bomb is about to go off in a civilian population somewhere and hundreds of lives are at stake unless a captured accomplice divulges the location just in time to stop it. Said individual is proving to be hard to crack, and state agents now face the moral dilemma of sanctioning torture or allowing innocent people to die. Dershowitz at this point contends that the agents should be able to apply for a “torture warrant” from a judge, if they are able to prove with probable cause that the suspect knows where the bomb is but is reluctant to disclose it, and that there is a life-threatening public danger. He/she would then be subjected to nonfatal but painful torture, e.g. inserting needles under fingernails, which fits under the Convention’s definition for torture, since the state intentionally inflicts pain to gain information.

Dershowitz points out that in today’s world, most law officers would be prepared to take the law into their own hands and commit torture, while the majority of the public would support them under these circumstances.[7] The stated benefit of his proposal, however, is that instead of leaving the decision of torture to “single-minded” police or anti-

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terrorist agents operating furtively, neutral and “highly visible” judges would make the decisions.[8] They are after all equipped by their profession to “balance the needs of security against the imperatives of liberty” and can be held publicly accountable.[9] Therefore, by legalising and specifying torture to extreme circumstances, one is effectively limiting the “severity” and “frequency” of its usage.[10]

Deconstructing Dershowitz:

Dershowitz’s argument is weak on multiple grounds. First of all, it is established on an extremely hypothetical scenario where a perpetrator is rightly suspected of being guilty and withholding essential information that the government **knows** (or only within “probable cause” which is a very low standard of review that is comparable to what is needed for a search warrant) will kill hundreds of people. Not only do these assumptions run contrary to democratic values, e.g. ‘presumption of innocence,’[11] but also it is more likely for a state to be holding the wrong person in custody than to be in this position. After all, intelligence gathering is notoriously difficult due to the breadth of information available, the lack of reliable sources, and the numerous opportunities for human errors that are amplified by unpredictability and competition. There is a reason why Clausewitz dubbed intelligence to be the “fog” of war, and why the US Joint Congressional Inquiry concluded that the sheer volume of information and lack of cooperation between intelligence agencies contributed to 9/11.[12] Of course, legalising torture means that faulty intelligence may lead to a perfectly innocent person being tortured, or open the door to future governmental abuse done under the vague, but fear-inspiring, name of ‘anti-terror.’

Furthermore, even Dershowitz admits that the US has never had a “ticking bomb case,” but he seems fairly certain that it will happen in the foreseeable future.[13] Perhaps that attitude should be revamped to, “We should never let the situation get so far.” Even if a suspect is guilty, torturing him/her for information hours before a bombing occurs should send a red flag that something is wrong with the intelligence or preventative systems and not that torture supposedly saves lives. Resorting to torture deals with the symptom and not the cause of government inadequacies and mistakes. Furthermore, the veracity of statements given under duress remains highly suspect, since oftentimes people will make up anything to stop the pain, or the torturers would lead their victims to disclose the outcome they desire or expect. As the “ticking bomb” scenario implies, every setback in faulty intelligence wastes precious time before emergencies, and therefore following the wrong leads from faulty evidence gained through torture is a lose-lose situation.

Dershowitz attempts to counter the dreadful possibilities of torturing the wrong person or for the wrong reasons by placing faith on the comforting appearance of judges, who already issue search warrants in the US.[14] Nevertheless, it is hard to compare the consequences of a misguided search warrant to a mistaken torture warrant. Wrongful invasion of privacy is reprehensible, but wrongful torture—or the physical infliction of “excruciating pain”[15]—can be ethically irredeemable. Judges are not gods, after all, and are subjected to human flaws, including making mistakes, holding biases, or being burdened by moral dilemmas like the responsibility of permitting torture on a regular basis. Moreover, people are vulnerable to being swayed when they are lead to believe that lives are at stake and have only limited time to make important decisions. Additionally, judges are not as high profile or publicly accountable as Dershowitz leads his readers to believe. Every American can name the President, who is incidentally the head of the intelligence services and police, but there are very few who can name all the Supreme Court Justices. Furthermore, many justices sitting on nationwide courts cannot be easily recalled and, unlike the president, certainly not by popular elections.

Finally, Dershowitz underestimates the inherent self-correcting mechanisms found in democracies with a multi-party system and an obligation to more or less protect free speech. Certainly, developed democracies have committed torture but not at the level of authoritarian countries. Although some people would like to attribute this restraint to ‘democratic values,’ a lot of it actually comes from institutionalising competing self-interests. Minority parties looking to win seats are motivated to point out the shortcomings of the majority party; the media is interested in selling stories and therefore monitors government actions. From time to time, these and other groups, e.g. NGOs, dig up illegal acts like torture and stir up public discontent which when translated into elections helps remove those in power. Of course, oftentimes apathetic public opinion does not reach the level of outrage appropriate to heinous governmental transgressions, but the mechanism for recognising breaches and bringing change remains there. Unfortunately,

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public reaction, which serves as the ultimate check on government, to torture is diminished if a judge, or someone sitting on an authoritative, respected position, rubberstamps it.

Torture is universally recognised to be an extreme act. It should therefore remain illegal, and those who conduct it should be judged in court, which is after all truly open to the general public. This means that there will still be an opening for a sympathetic jury or judge to lessen the punishment for a person accused of conducting or approving torture if the “ticking bomb” emergency was ever to occur. But this should be naturally made a difficult process conducted on an individual basis, and the right for the public to question torture should not be impeded by a hastily granted judicial veto. Undoubtedly, some agents will covertly use torture extralegally whether the torture warrant system is established or not, and therefore the emphasis should be on extra vigilance rather than relaxing the process.

General Concerns on Legalising Torture:

Dershowitz’s recognised that the main flaw of his argument was the “[reasonable]” possibility that a torture warrant would “[establish] such a precedent [that] would legitimize torture and make it easier to extend its permissible use beyond the ticking bomb case.”[16] Legalising torture on the whole is a slippery slope, since once torture is no longer regarded as unconditionally evil, there will be room for people to twist the laws into allowing torture for more instances and eventually “[having] been regularized, the practice will become regular.”[17] Even if torture is used under the best discretion, making mistakes is part of the human condition, so there will always be innocent people mistakenly tortured.

On the international arena, legalising torture also weakens a democracy’s legitimacy and the overall effectiveness of international law. The US has already been targeted for being hypocritical by espousing itself to be a leader in human rights and allowing capital punishment. Legalising torture will further diminish its and other democracies’, credibility and ability to put international pressure on other states for their human rights violations. Furthermore, because international law cannot be enforced by a global police, its strength stems from states making it a *norm* to obey the laws especially when they conflict with short-term state-interest. The prohibition of torture is one of the few principles that have been universally regarded to be important and potentially superseding over other laws. If this principle is compromised than there is possibility that the entire legal framework of international law will be undermined too.

Conclusion:

The emotional power in Dershowitz’s argument lies in its ability to tap into people’s fear of security. Nevertheless, this argument has been carefully crafted to inspire panic and thus becomes shaky in logic and dangerous in practice. There is a reason why the world has so many treaties condemning torture even in the most extreme of circumstances, and these cannot all be traced back to regarding torture as a horrible and morally degrading practice. Instead the decision to start and continue torture is too often clouded by the irrationality that is inherent in fear, and this creates an area for abuse even when there are no selfish interests involved. People who have witnessed the herd mentality of McCarthyism know this side of human nature all too well. Thus, it is perhaps fitting to end with a quote from Adlai Stevenson in 1952: “The tragedy of our day is the climate of fear in which we live and fear breeds repression. Too often, sinister threats to the Bill of Rights [and fundamental human rights including freedom from torture...] are concealed under the patriotic cloak of anti-Communism [and other vague appeals such as national security].”¹⁸

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[2] Ibid.

[3] David Weissbrodt and Joan Fitzpatrick, *International Human Rights Law: Law, Policy and Process*, 2nd ed. (Cincinnati, Ohio: Anderson Publishing Co: 2001), 175.

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[8] Ibid.

[9] Dershowitz, "Tortured," 249.

[10] Ibid, 250.

[11] *Universal Declaration of Human Rights 11 (1)*, <http://www.un.org/Overview/rights.html>.

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[13] Dershowitz, *Warrant*.

[14] Ibid.

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[15] Ibid.

[16] Dershowitz, *Warrant*.

[17] qtd. by Posner in Dershowitz, "Tortured," 249.

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