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A Discussion of the Dilemmas Posed by Dershowitz as to Whether the ‘ticking bomb’ Terrorist Should be Tortured

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KATHERINE RYAN, MAY 27 2009

Torture is defined by the United Nations as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person’.[1] Torture is illegal, and both the Geneva Conventions and the UN stipulate that it is not to be engaged in under any circumstances. The war on terror has led to current debate on whether tortuous practices can ever be legitimately utilised. A belief in an absolute ban appears to have given way to a less rigid response when asking whether torture has a place in the intelligence-gathering process. The ticking bomb premise is frequently cited as a ‘what if?’ situation which appears to lend itself to the application of torture. The ticking bomb is a hypothetical situation. It supposes that if you knew a bomb was going to go off in the next few hours and you had someone in custody who you believed had information which would allow it to be stopped, would you permit the torture of the suspect in order to gain this vital intelligence. Dershowitz is the academic most commonly associated with having a supportive stance towards the torture of a ticking bomb terrorist and he has proposed legitimising the use of torture, if this event arose, through the use of torture warrants. This essay will discuss Dershowitz’s arguments as to why the ticking bomb terrorist should be tortured, and seek to counter them, concluding that it is too dangerous to legalise the use of torture, even in extreme circumstances.

The ticking bomb premise has extremely narrow parameters. To fulfil the criteria Bellamy cites four conditions that need to be met. These are that the right person is in custody, the suspect has information that will avert the threat, torture will secure the necessary information and reliable information will be gained.[2] If these conditions cannot be confidently fulfilled torture cannot legitimately be engaged in, as its use would have no impact in stopping a ticking bomb. There has never been a real-life ticking bomb scenario. Dershowitz cites an episode in 1995 where Philippine authorities tortured a terrorist, who revealed information relating to plans to crash eleven commercial aeroplanes into the Pacific and ‘fly a private Cessna filled with explosives into CIA headquarters’.[3] However, when the decision was made to torture the suspect, no-one knew about the planned attacks – the suspect was interrogated because ‘the police had received word of possible threats against the Pope’.[4] The information regarding the attacks was revealed during the torture which was undertaken in order to elicit information about the suspected plans to assassinate the Pope. Furthermore, it took sixty-seven days of tortuous interrogation to elicit this information. Thus for two strong reasons, this cannot be classified as a ticking bomb scenario. Firstly, no attack was imminent and secondly, if an attack had been imminent at the time of the arrest the information would have come too late. Dershowitz also refers to Zacarias Moussaoui, who was detained a few weeks before September 11 as he raised suspicions by paying for flight lessons in cash.[5] Dershowitz proposes that Moussaoui’s computer had been searched, and asks the reader to imagine that if it had and the government ‘discovered he was part of a plan to destroy large occupied buildings, but without any further details’, then eventually, his interrogation may have led to torture. [6] Dershowitz thus leaves the idea hanging that had this happened and it was decided to torture Moussaoui, the government may have received an early warning with regard to 9/11. This argument appears to have been designed to produce an emotional rather than a rational response to persuade the reader that torture can have a role to play. However, an emotional response to a ‘what if?’ situation is not appropriate when debating a possible policy on torture. Furthermore, this situation would not fulfil the ticking bomb criteria as again there was no prior intelligence

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warning that an attack was planned. Thus both of Dershowitz's examples do not strongly support the use of torture solely in ticking bomb circumstances, because in neither of these cases was the culmination of the planning imminent, nor suspected by the authorities.

Dershowitz views torture as equating to a cost-benefit analysis – the pain of one for the lives of many.[7] Act-utilitarianism is cited as the ‘most common defence of torture’, as it declares that an action is deemed right or wrong depending on the consequences. [8] Therefore, torture can be reasoned as right (and thus legitimate) if the consequence of its use is that lives are saved. Not everyone agrees with this view. General Carlo Della Chiesa of the Italian State Police, who in 1978 following the kidnapping of former Prime Minister Aldo Moro, rejected the proposal to torture a prisoner suspected of having information. The General stated, ‘Italy can survive the loss of Aldo Moro, but it cannot survive the introduction of torture’.[9] If the use of torture does not save lives – because the suspect refuses to divulge the information, proffers false information or simply has no information to give – and thus no lives are saved as a result, then act-utilitarianism cannot be employed as an argument in favour of the utilisation of torture.

Engaging in torture is futile if no useful information can be extracted from the suspect. Many people – academics, interrogators and those who themselves have been tortured – state that torture simply does not produce results, and thus as an interrogation technique is effectively worthless. Former Army interrogator, Tony Lagouranis, has said that in Iraq, he ‘never saw pain produce intelligence’,[10] and retired Major F Andy Messing states that ‘if you are so desperate that you need to torture somebody it means you’ve failed in your general mission’.[11] If a plan has progressed to the extent that a bomb is imminent yet completely unknown to the authorities, there has been a serious intelligence failure. Especially in a ticking bomb scenario, resorting to torture will indicate to a suspect that they need only hold out for a few hours as officials are nowhere near finding the bomb. Those who argue that torture elicits results tend to proffer the French experience in Algeria as evidence. However, General Massu, commander of the French forces in the battle of Algiers, stated in 1992 that torture offered no ‘necessary or useful purpose’ in fighting terrorists in Algeria.[12] The fact that the French used torture yet still lost the war could serve as an important lesson for the West with regard to fighting its current war on terror.

Those who have themselves been tortured say that they will confess to anything to stop the pain. Maher Arar, a Canadian citizen originally from Syria, was deported to Syria and then tortured. Arar says that he confessed to training in Afghanistan (a country he had never visited) in desperation to stop his torturers.[13] The problem with torture is that if a victim has no information, there is ‘no convincing way of demonstrating that he or she cannot comply’.[14] If suspects will say anything to stop the pain, then ‘the collating services are overwhelmed by a mountain of false information’,[15] which costs time, money and manpower to be checked. Moreover, false information ‘will inevitably lead to delays, confusion and even attacks against innocent parties’.[16] Especially in a ticking bomb situation, the investigation of false information can cause precious time-wasting. These dangers mean that torturing a suspect in a ticking bomb scenario can lead to no information or false information, which in turn results in time being lost when it could be utilised more successfully to investigate where a ticking bomb device might be located. Furthermore, those who are innocent yet have suffered at the hands of men who are convinced of their guilt, are ‘bound to [be] drive[n] into the enemy camp’, creating a larger enemy for an aggressor to fight. [17]

There are other flaws in the ticking bomb argument which demonstrate that even if the situation were to occur, it would be ineffective to engage in torture. Some terrorist networks are now sophisticated operations, and thus it is likely that members’ knowledge will be on a need-to-know basis. Therefore a high-level member of the terrorist network would have to be captured in order to possess the extent of information needed to stop the attack. However, the disappearance of such a person would be noticed and if this were to happen it is likely that the bomb would be moved and all evidence destroyed.[18] Furthermore, if the suspect being tortured did know that an explosion was imminent, they would do their best to withstand the torture in order to see the product of their hard work and planning. If we are indeed looking at a ticking bomb situation they may have only a matter of hours to endure tortuous circumstances and if they convincingly give false information it will lead the authorities nowhere. Furthermore, this creates the problem that if a terrorist is believed to have resisted torture in order to facilitate a bomb detonating it generates the image of a martyr – a man who has endured pain and suffering in order to protect the plans of his terrorist network. The image of a man enduring torture against the hands of an aggressor is not good propaganda for

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the latter.[19]

There is a fear that even if torture is legalised only in a ticking bomb situation, nonetheless the boundaries will be pushed and torture will be deemed necessary to employ in other circumstances. Israel has been the only country to legitimise the use of coercion in interrogations, but tellingly, the policy was revoked in 1999 after 12 years. The Landau Commission recommended the use of moderate physical pressure and psychological pressure in interrogations, but stated that these methods should never amount to physical torture.[20] However, the methods the General Security Service used in their interrogations were tortuous, and were not limited to suspected terrorists – people suspected of being pro-Islamic, and relatives of wanted people were also subjected to tortuous practices. [21] Thus the boundaries were pushed in two ways – by furthering the methods used to extract information and by extending the originally limited pool of suspects who were legally sanctioned to be put under physical and psychological pressure. To justify their behaviour, 'Israeli officials consistently continued to invoke the ticking bomb scenario'.[22] Israel's experience shows that legalising torture, even in exceptional circumstances, puts the concept onto a slippery slope, and that 'once torture is formally permitted, it becomes nearly impossible to draw the line or enforce any limitations'.[23] This is the danger with legitimising torture. Even if it is limited to ticking bomb scenarios, the boundaries get pushed and the justification that it *might* be a ticking bomb situation is used to excuse torture in circumstances that do not have the narrow limitations that the hypothesis demands.

Dershowitz also looks at the idea of being on a slippery slope, and asks 'What if it were necessary to torture the suspect's mother or children to get him to divulge the information?'[24] To torture a suspect's relative in order to elicit information 'seems to be a logical and moral corollary'.[25] If we look at torture as a simple cost-benefit analysis, then even if several people are tortured, as long as more lives are saved, it would still be deemed acceptable. However, in real-life terms the torture of a child would be rightly viewed by the general public as outrageous and would be damaging to the reputation of that country and its authorities. Dershowitz states that to avoid slipping down the slope limits must be put on the use of torture. However, as we have seen from Israel's experience as described above, what is prescribed and what takes place in practice can be very different. The fear of descending the slippery slope is a strong reason why torture should not be allowed under any circumstances. By outlawing it completely, it ensures that the precedent can never be extended.

Dershowitz advocates introducing a torture warrant which would give judicial approval and make the practice publicly accountable. Dershowitz believes that as well as better protecting a suspect's rights, torture warrants would lead to less violence as an official would need to sign the warrant and is likely to only do so under compelling circumstances.[26] Furthermore, torture would no longer take place in the shadows, but be an accountable process. However, others have disagreed with Dershowitz over the benefits of torture warrants. Žižek believes they grant 'legitimacy to torture [which] thus opens up the space for more illicit torture'.[27] Elstain fears that warrants will lead to the routinisation of torture,[28] and Ignatieff agrees, stating that 'judicialisation of torture... would lead to its "banalisation"'.[29] Thus once again the idea of the slippery slope can be applied. Dershowitz may believe torture warrants would reduce the amount of torture taking place and make it accountable, but the danger is that they would lead to torture being seen as a routine process, as once the idea becomes legally acceptable it becomes easier to apply. This possibility suggests that the boundaries may once again be pushed with regards to limiting torture solely to the ticking bomb terrorist. The risk of this happening means that legalising torture, even if solely in a ticking bomb situation, is too dangerous.

If a country does decide to employ torture in order to gain information, it puts them in a dangerous position amongst the international community. Employing torture would mean violating the UN Convention Against Torture and the Geneva Conventions. If a country is seen to allow torture, even in extreme circumstances, there will be ramifications. For instance, when the photographs detailing the abuses at Abu Ghraib were revealed by the media, the backlash was felt by the United States immediately. Nicholas Berg, an American citizen, was beheaded, with his killers 'expressly citing the prison abuses as their justification'.[30] John McCain, as a former prisoner of war in Vietnam, sees America's adherence to the Geneva Conventions as 'in part [determining] the willingness of other nations to do the same'.[31] When a country is seen to 'violate the principles it preaches to others, its moral authority diminishes'.[32] Therefore, how can a country appear to uphold human rights, and preach to others about the abhorrence of torture, when it is itself engaging in the very same act? Any short term gain is 'vastly outweighed by

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the global disgust' which would be faced by a country which permitted the use of torture. [33] Furthermore, particularly in the current climate where the West is fighting the war on terror, sanctioning torture will also lead to difficulties in trying to win the hearts and minds campaign. Trinquier states that 'modern warfare requires the unconditional support of the populace'. [34] This is unlikely to come about if an occupying country is seen to authorise the use of torture. Therefore, if a country values its reputation and global image (and as a consequence the power it exerts on the world stage) the long term effects of engaging in torture, even in extenuating circumstances, cannot be realistically believed to be beneficial.

If a member of the public was asked if they would condone the use of torture on a suspect who had planted a bomb which detonated, killing a member of said person's family or a friend, the answer would probably (and understandably) be 'Yes'. It is for this reason that the use of torture should be debated, and a policy agreed in case a ticking bomb situation should ever occur. The possibility of an attack in the form of a ticking bomb can bring about similar emotions as experienced in war, which in their turn can supply a 'plethora of excuses: fear, coercion, ignorance, even madness', [35] and so it is essential that decisions on whether to torture a suspect should be decided beforehand. Therefore, if such an event does arise, rather than be led by panic, a pre-formed policy can be followed. Many times in history we have looked back on an action which is now generally seen to be a huge mistake, viewed by historians to be a swift decision-making reaction taken by a panicked authority. For several strong reasons the torture of the ticking bomb terrorist should not even be entertained as an option. The legitimisation of such an idea would inevitably put that country onto a slippery slope and damage their international standing. Torture is not an exact science – it does not produce a certain amount or quality of intelligence – the outcomes cannot be predetermined. Thus as a method to gain intelligence, it cannot be relied upon to give good, strong information. Because of these flaws, it is important that the use of torture stays illegal – opt-out clauses cannot be introduced and the ticking bomb terrorist should not be treated as an exception to the rule.

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[2] Bellamy (2008), p.120

[3] Dershowitz (2002), p.137

[4] Luban (2005), p.1441

[5] Luban (2005), p.143-44

[6] Dershowitz, (2002), p.143

[7] Dershowitz, (2002), p.144

[8] Bellamy (2008) p.109

[9] Chiesa, quoted in Dershowitz (2002), p.134

[10] Lagouranis, quoted in Mayer (2007)

[11] Messing, quoted in Harbury (2005), p.166

[12] Massau, quoted in Bellamy (2008), p.117

[13] Harbury (2005), p.6

[14] Shue in Levinson ed. (2004), p.54

[15] Horne (2006), p.205

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[16] Horne (2006), p.162

[17] Horne (2006), p.205

[18] Harbury (2005), p.165

[19] Bellamy (2008), p.102

[20] Felner in Roth and Worden eds. (2005), p.31

[21] Felner in Roth and Worden eds. (2005), p.40

[22] Felner in Roth and Worden eds. (2005), p.28-43

[23] Harbury (2005), p.120

[24] Dershowitz (2002), p.146

[25] Felner in Roth and Worden eds. (2005), p.35

[26] Dershowitz (2002), p.158-159

[27] Žižek (2002), p.103

[28] Elshtain in Levinson ed. (2004), p.83-84

[29] Ignatieff in Roth and Worden eds. (2005), p.23

[30] Harbury (2005), p.169

[31] McCain in Roth and Worden eds. (2005), p.156

[32] Malinowski in Roth and Worden eds. (2005), p.141

[33] Roth in Head ed. (2005), p.13-14

[34] Trinquier (1964), p.19

[35] Walzer (1977), p.287

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