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Even Immoral Governments Should Stop Torturing to Attract Investment

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Abstract

Condemning torture is a universal norm of international law, yet it is still routinely practiced by many States around the world. We must face the fact that moral arguments have failed to eradicate this harm, and turn to other methods. Knowing that States may be indifferent to the damage they inflict upon individual people, but they are usually committed to economic development, we can see financial arguments in favour of ending torture should be persuasive. Investors should recognize torturing States as corrupt, unstable and inefficient, and hence a poor choice of place to run a business. If governments want to attract foreign investors to their development project, they must end torture and implement the rule of law.

Introduction

Several national and international legal instruments absolutely prohibit torture, including the U.N. Convention against Torture. Although it is often called an 'offence to human dignity',[1] torture is still widely practised, as many people believe it has countervailing benefits. Even though the ethical argument has failed to convince the world to abandon this abhorrent act, immoral governments should still stop torturing so they can attract much-needed foreign direct investment. This claim is built on three pillars. First, investors want to build businesses in States that are economically and politically stable. Second, torturing states cannot meet this criteria. Third, States are capable of changing their policies to encourage investment.

Human rights and investment usually operate in separate spheres, with few attempts to make them work together[2] as they are controlled by different actors. There is considerable literature on whether foreign direct investment itself respects or violates human rights.[3] But whilst it would be pleasing to find investors can improve rights in employment and access to services, there is little they can do to prevent abuse perpetrated in areas outside their control, such as torture. Further, good-faith attempts to hold financial actors accountable for violations have proved extremely difficult as there are often complicated chains of money where obligations get lost.[4] It would be unwise to abandon the project of using the immense power of

[1] United Nations General Assembly, 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', General Assembly resolution 3452, 9th December 1975.
[2] Abdulla Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment and Trade 539, 539.
[3] See Matthis Sant'Ana, 'Foreign Direct Investment and Human Development: Two Approaches for Assessing Impacts on Human Rights' (2009) 3 Human Rights & International Legal Discourse 229.
[4] Mary Dowell-Jones, 'Financial Institutions and Human Rights' (2013) 13 Human Rights Law Review 423, 441.

investment to improve human rights conditions. The challenge is to find a better way to enlist investors in the fight against torture than asking them to end abuses directly.

The most successful strategies to bring the two fields together will only require governments and investors to work inside their domain of influence. As governments are the perpetrators of torture, only they can put a stop to it. At the same time, investors are not human rights experts, and should focus on what they are good at, which is identifying the business ventures they believe have the characteristics for success. Even if both the investor and the State are self-interested and indifferent to morality, their rational actions should lead to a reduction in torture.

I. Investors Want a Stable and Predictable State

A foreign investor will choose to start a business in a State where it believes it will make a return. There have been many studies examining which characteristics make investment more likely. One of the most important factors is the stability of a country's economy.[5] It should have a settled and strong consumer base, and have constant policies not affected that decision-makers cannot override with arbitrary preferences. Investors particularly look for States that have a strong monetary system, can control inflation, and have a legal regime that enables people to benefit from resources they own.[6]

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[5] J. Durham, 'Absorptive Capacity and the Effects of Foreign Direct Investment and Equity Foreign Portfolio Investment of Economic Growth' (2004) 48 European Economic Review 285.

[6] Manuchehr Irandoust, 'A Survey of Recent Developments in the Literature of FDI-Led Growth Hypothesis' (2010) 11 Journal of World Investment and Trade 275, 278.

The quality of the labour force is also significant.[7] Workers should be free to move to find job opportunities without fear of local authorities. The government must value its people enough to invest in their education.[8] They need access to information so they can learn necessary skills follow economic developments. Residents should also be healthy enough to undertake long-term work.

Another factor is the government's ability to carry out economic reforms.[9] The government must be capable of implementing its fiscal policies by controlling political and financial institutions. It should be able to monitor compliance by local officials and discipline those who disobey instructions.

II. States that Torture Are Poor Choices for Investment

A 'torturing' State is one where torture is practised with impunity. There is no country in the world which is completely free of torture, but there is a certainly a continuity of severity. The negative characteristics a State must adopt to torture, as outlined below, will increase in intensity where the practice is more widespread. There are also many kinds of torturing regimes, from those where instructions are issued at the highest level, to those where local police officers are out of control. The problems identified in this sections will apply to some situations better than others, but in all cases torture is evidence of a damaged government power to be avoided.

[7] D. Wheeler and A. Mody, 'International Investment Location Decisions: The Case of US Firms' (1992) 33 Journal of International Economics 57.
[8] Georg Caspary and Susanne Berghau, 'The Changing Nature of Foreign Direct Investment in Developing Countries: Evidence and Implications' (2004) 5 Journal of World Investment and Trade 683, 689.
[9] Pravakar Sahoo, 'Determinants of FDI in South Asia: Role of Infrastructure, Trade Openness and Reforms' (2012) 13 Journal of World Investment and Trade 256, 276.

A. *Inefficient and Failing Government*

Worrying about a government's poor administration is increasingly common in international economic decisions. In recent decades, the World Bank and International Monetary Fund have worried that programmes were failing because governments were too weak or inefficient to implement necessary structural changes. They consequently introduced "good governance" as an assessment criteria when deciding which projects to fund.[10] The World Bank believes this has both an economic and social aspect, as respect for the rule of law will mean a consistent and accountable government that ensures human rights.[11] There are many reasons for a potential investor to suspect that a government who tortures is corrupt and unstable.

First, there is a gap between the government's official statements and its real actions. Governments who routinely torture are turning to a practice which violates international and, almost certainly, domestic law. They are therefore experienced in using illegitimate ends to further their interests. This should worry investors, because even if the government promises them certain tax rules or resource licenses in legally-binding agreements, it may choose to override these whenever suitable to meet other policy objectives.

Worse still, the investor may not realize what is happening until it is too late for them to mitigate their losses, as a torturing government is adept at hiding its actions. Investigators into torture prevention believe the absolute prohibition of torture and proliferation of monitoring mechanisms in international law has encouraged governments to hide information. They are now more adept at denying outsiders access to information and far less transparent in their accounts

[10] S. de la Harpe, C. Rijken and R. Rood, 'Good Governance' (2008) 11(2) Potchefstroom Electronic Law Journal.
[11] World Bank, 'Governance and Development' (1992) available at http://documents.worldbank.org/curated/en/1992/04/440582/governance-development (last accessed 19th April 2015).

of the legal system.[12] This suggests that not only can they lie well when breaking promises, but they will also be able to mislead investors in advance by providing them with false information on their policies.

Second, officials often commit torture according to personal whims, not fundamental policy objectives, and so they are arbitrary decision-makers who are vulnerable to corruption. An official may torture someone to obtain information about a crime they believe has been or will be committed. Moral and efficacy questions aside, this is a 'rational' action focused on obtaining an important result for the public. However, a Stage agent may also torture someone they do not like to intimidate them, as a form of discrimination.[13] In this case, they have more discretion over their own actions and victims are substitutable. People will have more leverage to avoid torture by paying off officials. Any State that tortures in this way will be riddled with corruption, which is a problem for investors as they cannot rely on officials to provide them with promised resources and policies because someone else could buy them off.

Third, a State that regularly uses torture is unstable because it feels threatened. States use torture to control the population, and to impress their power upon enemies inside the country and abroad.[14] We know governments that public admit ill-treatment claim it is justified because they are targeting enemies of the state.[15] If there really are serious threats to national security, an investor should beware as their property may not be properly protected. In a worst case scenario,

[12] Malcolm Evans and Rod Morgan, 'Torture: Prevention versus Punishment?' in Craig Scott, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001).
[13] See Article 1, United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[14] Edward Peters, *Torture* (Basil Blackwell 1985).
[15] Wolfgang Heinz, 'The military, torture and human rights: Experience from Argentina, Brazil, Chile and Uruguay'. In: Ronald Crelinsten and Alex Schmid (eds), *The Politics of Pain: Torturers and their Masters* (University of Leiden 1993) 73-108.

the government may fall, and fulfilling obligations to foreign investors is unlikely to be a high priority for a country in transition. If the threats are imagined, or invented to instil fear in the population, an investor should be suspicious of any information the government provides, and doubt the sincerity of its motives.

Fourth, torture has a poor record in preventing crime, and shows the government has little interest in developing effective methods to reach its policy objectives. Torture takes place in secret and causes people to make statements whilst under severe mental and physical strain. It is impossible to monitor the interrogation techniques to see whether someone provided information of their own initiative, or was fed the answers the authorities wanted to hear. Anyone truly interested in finding perpetrators of a crime would not rely on statements made under torture.[16]

Torture will create more destabilizing problems in society by alienating victims and leaving real offenders at large. A state that uses torture as part of crime control does not bother to investigate the efficacy of its policies and is prepared to create harm so it can appear to be doing good. This is not the attitude an investor wants from the government of the country it is choosing to invest in, as it needs to know the most efficient way to use its resources in the national legal and regulatory framework. The investor also needs the agencies to be capable of achieving promised results at the lowest cost. Consequently, even researchers who dispute the negative correlation between corruption and investment (as it is possible for an investor to successfully negotiate their way through a corruption network) accept that a State with poor-quality institutions will discourage investment inflows.[17]

[16] Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10 Science and Engineering Ethics 543.
[17] Ali-Al-Sadif, 'The Effects of Corruption on FDI Inflows' 29 Cato J. (2009) 267.

Investors will not choose to work with governments that cannot be trusted, are expert liars, and privilege ineffective policies. They will worry about whether the State will fulfil its obligations in the investment agreement, and do not know whether their assets will be safe. As torturing governments are corrupt, unstable, and inefficient, investors should avoid them.

B. Poor Quality Human Capital

An investor needs good-quality local human capital, both to work directly in its business, and also for sub-contractors and suppliers. Local people may also be needed as consumers for internal sales. Torture severely damages human life, and destroys morale. It is also indicative of other human rights abuses, which can prevent people actively participating in business. Investors who know a State tortures should assume its human capital is damaged and send their investment elsewhere.

Torture is a form of abuse and threatens people's ability to work. Those who are tortured are physically injured after the incident, but they will also suffer long-term mental difficulties. These may include debilitating flashbacks of the terrible event, and cause mental illnesses, such as depression. These can either prevent people from working, or reduce the quality of their work. Further, the general population, regardless of whether they have been tortured, will have a poor relationship with employees. Torture causes people to mistrust figures of authority, and will make them more loyal, out of fear, to their own government that to their employer. This will make it difficult for an investor to encourage them to work at their most productive level, and makes the company vulnerable to threats by local officials.

Torturing states will also regularly violate other rights, which further diminishes the value of human capital. Investors prefer setting up businesses in countries where citizens enjoy civil and political rights.[18] Modern business works better when citizens are able to freely communicate ideas and learn new skills.[19] This means they should have freedom of expression and not be excluded from society, such as through arbitrary detention. Torture is one of the few human rights which has attained the level of *jus cogens*, which means there is now legally-recognized justification for violating the prohibition. If a State is prepared to abuse this right, it will certainly have no qualms in ignoring other ones. In fact, as it pursues torture as a form of population control, it will likely enlist other methods, such as censorship and imprisonment, to this end. When an investor sees a government tortures its people, it can be sure it is violating other essential rights, which means its potential employees will less skilled than those offered in other places.

C. Unfair Dispute Resolution

Whether a government tortures because it cannot stop local official's abusing their power, or because it has a systematic policy of population control, its national courts will offer little protection against authorities acting unlawfully. Every investor needs to know their disputes can be settled, either through negotiation or litigation. If they cannot trust local dispute resolution, they know they will have to resort to arbitration, which may be investor-friendly, but really only

[18] David Law, 'Globalization and the Future of Constitutional Rights' 102 Northwester University Law Review (2008) 1277, 1318.

[19] Philip Levy, 'Economic Integration and Incipient Democracy' American Enterprise Institute for Public Policy Research, Working Paper No. 142 (26th March 2008).

suitable when a relationship has completely broken down. Investors will avoid places where small disputes during the period of operation will not be considered fairly.

Torture may be a sign that the central authority in a State does not have effective control over local officials. Impunity for torture is often found even when a government wishes to end the practice because it lacks the resources or political will to force law enforcement to comply.[20] Disputes are more likely to arise because different layers of government do not work together with a unified strategy, and so an investor will receive conflicting instructions on how to proceed. It will be difficult to determine which version is binding, as no official is able to impose their will. An investor may then turn to the judiciary for answers and bring a case in a domestic court, or ask for an advisory opinion. Judges in torturing states are used to turning a blind eye to unlawful acts, so may be of little help in restraining government. It also beyond the competency of most judiciaries, even efficient ones, to impose policy decisions on government factions.

On the other hand, a torturing state may be highly disciplined if systematic abuse is ordered from the top. This is just as problematic for the investor as there will be no one in the State with the power to condemn wrongful government acts. Torture is often characterized as a "crime of obedience" which proliferates when policies are effectively imposed through a chain of command.[21] The legitimacy of a State depends on whether its actions are determinable and coherent.[22] When the central authority is strong and it can make local government act with one voice, it gives the impression of legitimacy and there will be little support for challenging it in a

[20] Peter Burns and Sean McBurney, 'Impunity and the U.N. Convention against Torture: A Shadow Play Without an Ending?' in Scott (n 12).
[21] Herbert C. Kelman, 'The policy context of torture: A social-psychological analysis' (2005) 87 International Review of the Red Cross 187.
[22] Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 49.

court or other form of inquiry. An investor abused by this kind of government will find itself up against an impenetrable web of government support, making it impossible to resolve disputes at the national level.

III. States Respond to Pressure from Investors

Having explained investors have good reason to stay away from torturing States, it is now necessary to show investors actually do compare legal systems and governments can change internal policies to attract investment. This is why we want to convince investors to voice their dislike of torture, in the hope that States will change their practices, even if they do not care about the moral arguments against torture.

Since World War II, economic prosperity has been touted as a means to improve human welfare. For example, the Consultative Board of the World Trade Organization directs its arguments for free trade at improving human life.[23] We need not confine our optimism in this area to the direct benefits from the movement of wealth. In an inter-connected world, outside pressure and the temptation of growth will encourage States to open themselves up to intervention, and could force to improve respect for the rule of law and human rights as they compete for economic attention.

Investors look into legal regimes when deciding where to spend their money. A 2008 study in the Suzhou Industrial Park in China found 88% of the 61 foreign respondents thought the legal

[23] Peter Sutherland et al., ‘The Future of the WTO: Addressing Institutional Challenges in the New Millennium’ (2004) 10, available at http://www.ipu.org/splz-e/wro-symp05/future_WTO.pdf (last accessed 20th April 2015).

framework was highly important when deciding whether they should invest.[24] Not only will they find the formal rules, such as a prohibition on torture, but they are also interested to see how the system operates. Over 60% of the Suzhou group had examined how written law was implemented,[25] which means they want assurances that there is no corruption and there is effective dispute resolution. When asked why they felt confident in China, 40% said it was because of the legal protection it offered, or political stability.[26] States which offer better protection and even greater stability, as evidence by low torture practice, would be an even greater draw for investors.

States want to attract investment to accelerate their economic development. The government can earn money by offering its resources to foreign businesses, and it can then use this revenue to run projects of its own and improve provision for local people. States can also delegate development projects to investors as it can rely on them to build roads, energy supplies and other infrastructure to supply their business, which then allow local start-ups to flourish.[27] The government may even require an investor to provide extra services for access to the country, including building schools and hospitals. It is not surprising that countries compete for these advantages, and we can therefore expect them to seek to improve their desirability as host States.[28]

[24] Wenhua Shan and Sheng Zhang, 'FDI in China and the Role of Law: An Empirical Approach' (2011) 22 Journal of World Investment and Trade 457, 461-462.
[25] *Ibid.* 463.
[26] *Ibid.* 467.
[27] Theodore Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Counties nd Economies in Transition* (Peterson Institute 1998) 1- 9.
[28] Sharon Jackson and Stefan Markowski, 'The Attractiveness of Countries to Foreign Direct Investment' (1995) 29 Journal of World Trade 159, 161.

China provides an excellent example of a State that was prepared to make significant changes to attract foreign direct investment. At the World Investment Forum in 2010, the Chinese Vice President explained that foreign companies brought over half the country's technology imports and a fifth of its tax revenues.[29] Investment has been very important in China's development and it has worked hard to accommodate it. For example, it realized foreign investors wanted better legal protection of their assets, so it introduced legal doctrines to meet outside expectations.[30] The private transfer and lease of land had not been part of its legal system since 1949 and property transfers had to be mediated through the State. In response to foreign investors seeking rights similar to those of ownership that they were familiar with from their home jurisdictions, China allowed foreign companies to buy rights of use to land.[31]

Some people suggest investors prefer to work with governments who do not have high human rights ambitions, but this does not mean they would prefer a torturing government. Investment agreements often include 'stabilization clauses' to prevent governments changing laws and regulations that will diminish an investment's value. It is arguable that these clauses could be used to prevent State's implementing human rights reforms that would reduce the amount a company could earn by exploiting workers.[32] The existence of such clauses is, however, compatible with torture avoidance. Investors do not want to be abused by volatile authorities,[33] and a torturing government is likely to be dishonest and aggressive so should be

[29] Cited in Shan and Zhang (n24), 458.
[30] John Zhengdong Huan, 'An Introduction to Foreign Investment Laws in the People's Republic of China' (1994-1995) 28 John Marshall Law Review 471, 472.
[31] *Ibid.*, 484.
[32] Titus Edjua and Anthony Crockett, 'Human Rights Not Negotiable' (2008-2010) 28 International Financial Law Review 50, 50.
[33] *Ibid.*

shunned. Further, even if investors dislike the changes caused by human rights improvements during the operating period of their business, they would like a system which respects the rule of law from the beginning and remains stable. This is will not be true of a place where torture is commonplace.

Conclusion

Torture is an abhorrent practice which is evidence of blatant disregard for the rule of law. Investors want to run businesses in stable, efficient States with high-quality human capital and effective means of resolving disputes. States who want to further their economic development by attracting foreign investors need to stop torturing so they can prove they are a suitable environment for commercial growth. Even if we pessimistically believe States and investors are immoral or indifferent to ethical arguments, we can still persuade governments to end torture.