

## The case for pre-emption: Alan M Dershowitz reviewed

By Neal Ascherson,  
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The other night, I had the luck to see Arthur Miller's *The Crucible*, in an unforgettable London production by the Royal Shakespeare Company. Like all great plays, it gleams in different places as the years pass, and last week I was gripped by a strand in the dialogue which had not greatly touched me before. Again and again, the Calvinist inquisitors scold the people of Salem for not realising that they are living in new times, in an era of quite different moral imperatives which make all the old rules and restraints obsolete. The devil is among us and stalking his victims, they said, and in this terrible emergency there is no place for traditional values of innocence, compunction or mercy.

Next day I went to hear Professor Eric Hobsbawm launch the [Birkbeck lecture series \[1\]](#) on the theme of violence. Speaking on "Public Order in an Age of Violence", he methodically dismantled precisely that inquisitors' case that "new times" had dawned – this time, since September 2001, whose terror made irrelevant the legal and ethical norms of liberal democracy.

History, [Hobsbawm said \[2\]](#), showed that there was nothing essentially new about the contemporary threat from terrorism. The threat itself, he went on, was serious but certainly not apocalyptic or terminal in its present form. But it suited certain states and political forces to pretend that the world had suddenly changed out of recognition, and they were using this false scenario of doom to cover the introduction of new rules of domestic and international practice which suited their own purposes. Hobsbawm concluded, as many others have done before him, that the measures taken to win the "war on terror" are more dangerous to liberty and democracy than terrorism itself.

**Neal Ascherson is discussing the book by Alan M Dershowitz, *Preemption: A Knife That Cuts Both Ways* ([WW Norton, 2006 \[3\]](#))**

### The road to chaos

And a few days later, I began to read Alan M Dershowitz's new book, *Preemption: A Knife That Cuts Both Ways [4]*. This one is about doctrines of pre-emptive and preventive war – and of pre-emptive and preventive "targeted killing" (selective assassination). Four years ago, he appalled much of the world with a book (*Why Terrorism Works [5]*) and a number of articles in which he suggested – in tune with cruder pronouncements from the Bush administration – that a legal framework could be devised to regulate the use of torture in "war on terror" situations.

He has now applied many of the same arguments to establishing what he calls "a jurisprudence" to regulate the resort to pre-emptive and preventive war and murder. And, like the ministers of [Salem \[6\]](#), he is in no doubt that we have entered new and Satanic times which render the old rules antique and obstructive:

"The democratic world is experiencing a fundamental shift in its approach to controlling harmful conduct. We are moving away from our traditional reliance on deterrent and reactive approaches and toward more preventive and proactive approaches. This shift has enormous implications for civil liberties, human rights, criminal justice, national security, foreign policy and international law – implications that are not being sufficiently considered."

The United States, Dershowitz continues, now uses tactics which include "...profiling, preventive detention, the gathering of preventive intelligence through rough interrogation and more expansive surveillance, targeting of potential terrorists for assassination, preemptive attacks on terrorist bases, and full-scale preventive war." But where, Dershowitz asks, is their "firm basis in law, jurisprudence or morality"?

Once it was supposed that human activities should recognise the law and adapt themselves to it. Dershowitz thinks that the law should adapt itself to human activities. Putting his approach coarsely, torture and pre-emptive or preventive war or murder will clearly go on happening, so the law had better take its head out of the sand and go there [6]. Once it has established a presence in these ugly areas, the law can then work out codes of rules and conditions for the proper use of the murder-missile, the electric-prod or the invasion of another state which might one day prove a danger.

Dershowitz offers many such possible conditions in this book, and they are often quite restrictive and hard to fulfil. But Michael Ignatieff [7] put his finger on the weak joint in the whole approach when he wrote of Dershowitz's previous book: "Judicialisation of torture, in my view, would lead to its 'banalisation', to torture becoming routine rather than an emergency exception" (see Kenneth Roth and Minky Worden eds., Torture: A Human Rights Perspective [8], Human Rights Watch, 2006). Much the same applies to "judicialising" the practice of pre-emptive or preventive attack. The knowledge that such attacks were in principle lawful, as long as certain conditions were met, would leave the exceptions helpless at the mercy of the rule. It would open the door to chaos and carnage.

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**The case for Israel**

Alan M Dershowitz [13] does polemic in glittering style: clever, agile and sometimes persuasive. He has no difficulty in showing that rulers in the past have often got their retaliation in first, to frustrate a genuinely imminent attack or merely to obliterate an adversary who might in future present a military threat.

The cumulative and presumably intended effect of the book is to justify the actions of Israel and the United States. But Dershowitz does admit to mistakes. Israel was right to bomb and destroy the Iraqi nuclear reactor in 1981 ("the paradigmatic example of a pure preventive ... attack short of full-scale war"), and justified in its pre-emptive attack on massing Arab forces in 1967 ("a lawful instance of anticipatory self-defence"), but much less so with the invasion of Lebanon in 1982 ("its scope and duration exceeded by far any reasonable response to ... threats").

He also disapproves of America's preventive war against Iraq, but on the pragmatic grounds that both its self-defence and humanitarian excuses turned out false. ("...No WMDs were found, and the invasion almost certainly caused more deaths among Iraqi civilians than Saddam Hussein was likely to have caused had he remained in power.")

On Iran, he is more hawkish. Israel, he thinks, has the right to take pre-emptive action against Iranian nuclear facilities, and is entitled to expect support from the United States and the international community. The strike cannot be left to Israel [13] alone. The dispersal of the nuclear centres into populated areas means that there would be huge civilian casualties and that the "nascent" Iranian opposition [13] would be crushed. But "demanding that Israel and the United States put the human rights of Iranians ahead of the lives of their own citizens and soldiers is both naïve and selfish...".

Dershowitz is less self-assured about the case for preventive wars. Here he constantly relies on a really bad example: "...if Hitler's Germany had been destroyed or disarmed by preventive military action, the world would never have experienced the horrors of Nazi aggression". But this particular "if" went threadbare and blew away years ago. The failure of France and Britain was not military – invading the Rhineland in 1935 would have made Iraq in 2003-6 look like a playground scuffle – but diplomatic: the failure to build a heavily-armed European security system around Germany.

But Dershowitz is not much interested in deterrence or collective security. His hatred of the United Nations security council for its distrust of Israel is too intense. The security council's "anachronistic mid-20th century view of international law precludes a democracy threatened with nuclear annihilation ... from taking proportional, preventive military action to dissipate the threat to its civilians..." Instead, a nation is supposed to wait until it is attacked by terrorists before it responds. "This unrealistic perversion of international law must be changed to take into account situations in which deterrence simply cannot be counted on to work..."

Waiting for UN action has been a prescription for disaster, according to Dershowitz. Sometimes, he says, unilateral action by a world power is the only way. On a very few occasions, and seen in retrospect, that has been true. But Dershowitz's lack of interest in international arrangements, or indeed in any nations apart from Israel and the United States arrayed against a vague, swarming mob of enemies and surrender-monkeys, is extraordinary. And yet it is other nations whose reaction to American and Israeli policies will decide – for instance – whether the 21st century's first nuclear conflict takes place in the middle east.

To be fair, Dershowitz does at least glimpse the significance of the rest of the world when he quotes a warning by Gareth Evans [14], former Australian foreign minister, against acts of unilateral preventive self-defence: "...What is sauce for the goose is sauce for the gander, legitimising the prospect of preventive strikes in any number of volatile regions ... To undermine so comprehensively the norm of non-intervention on which any system of global order must be painstakingly built is to invite a slide into anarchy". Evans is arguing that such decisions should be left to the security council rather than legitimised in general. Dershowitz merely retorts that no single jurisprudence can cover all situations, and repeats his contempt for the council.

He examines various lists of conditions which an anticipatory attack or "targeted assassination" might have to fulfil to be legitimate. But Dershowitz is vague about where his jurisprudence would exist, who would adjudicate or enforce it, and whether anyone would take any notice of it. Indeed, at one point he asks disarmingly "whether any jurisprudence ... can really be expected to influence the actions of nations that believe themselves to be under the gun".

As he dismisses any known supranational body, including the International Court of Justice [15], as a possible mechanism for applying his jurisprudence, he has to fall back on individual governments: "A widely accepted international jurisprudence will impose domestic constraints on the unilateral actions of democracies...". Unless, presumably, that country is "under the gun", or imagines it is. And as Dershowitz appears to think that only democracies are entitled to use preventive or pre-emptive force, who decides which state is a democracy?

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**A murky resemblance**

This is a curiously uneven book. It ranges from personal anecdotes – Dershowitz has actually watched guided missiles being radar-targeted on the cars of doomed Palestinians – to bursts of

pet mathematical theory. He is proud that in his youth he worked out a matrix for estimating ethical risk (true and false positives and negatives), and he includes as an appendix a lawyerish paper he wrote thirty years ago which applies the matrix to "preventive disbarment".

Dershowitz also suggests, as a useful exercise, the quantifying by number of factors in pre-emptive/preventive decisions. "Can a number be assigned to the likelihood that uninvolved persons may be killed or injured if targeted killing is attempted?" On the "uninvolved" scale, a baby would score ten and an activist one, and a "maximum total score would preclude action except in extraordinary situations, such as nuclear terrorism".

That "except" shows the fatal unreality of this sort of game, and indeed of the whole Dershowitz approach [16]. The reason that no juristic code has emerged to cover pre-emptive attacks and murders, although they have been going on for thousands of years, is that they have always been regarded as disgraceful acts which no prince can be proud of. Justification for such attacks and murders has to be provided afterwards, case by case, and it has to be pretty good to be convincing.

This is anything but neat, in an increasingly lawless age. George W Bush and Tony Blair would obviously prefer to be judged by the sincerity of their original perceptions of imminent threat from Saddam's Iraq, rather than by the bleeding wreckage of a situation which they made worse rather than better [17]. But they are being judged both on sincerity and results, rather than on compliance with some jurisprudential tick-box, and it is better so. Humanity's [18] traditional detestation of preventive violence is as good a restraint as we are likely to get.

If you disapprove of something, don't make laws for it. As Dietrich Bonhoeffer [19] said: "It's no good boarding the wrong train, and then running wildly down the corridor in the opposite direction". But perhaps Dershowitz doesn't really disapprove. Perhaps – in the most cynical interpretation of this book – he thinks that Israel and the United States are generally entitled to use anticipatory lethal violence, and he is calling for a "jurisprudence" simply to give those two states a cloak of international legitimacy whenever they follow their own unilateral – if not bilateral – interests.

There are murky resemblances here to older doctrines of state. When Reinhard Heydrich called senior civil servants together at the Wannsee conference [20], in January 1942, he did not ask their advice on whether or not to carry through the holocaust. Instead, he wanted them to devise a legal and organisational framework within which the inconceivable – his programme for the murder of 11 million Jews – could be conceptualised as just another special government project, embedded in its own defined rules and exceptions.

And Dershowitz's rhetoric about new times in which we must move from reactive to proactive behaviour – that too brings sinister echoes. All dictators, and some demagogues, like to maintain a climate of emergency in which they can reduce liberties and suppress critics in the name of "hard measures for hard times". Hitler used the medical metaphor to proclaim that in times of terror and crisis, society must shift from passive to active mode. As he told the Nazi doctors, "you are biological soldiers" who are now – after millennia of restraint – allowed to launch pre-emptive attacks on genetic causes instead of merely treating symptoms. And in that proactive, life-and-death struggle against racial pollution, the old Hippocratic oath could be thrown away at last.

These voices were also heard in Salem. Now they are heard in the debates over Iranian weaponry and Palestinian suicide-bombers. Those who preach new proactive moralities should only be approached with a clove of garlic, and that includes Professor Alan M Dershowitz.

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