

# The Justification of Torture

## Some Remarks on Alan M. Dershowitz – Why Terrorism Works – Understanding the Threat, Responding to the Challenge<sup>1</sup>

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The current debate over how best to fight international terrorism reflects different points of view and approaches throughout the world. One of the most controversial contributions to this debate is Harvard Law School Professor Alan M. Dershowitz's book entitled "How Terrorism Works". Dershowitz wrote this in the aftermath of the tragic events of September 11, 2001, in New York and Washington, D.C. Debate over how to handle "ticking bomb" scenarios, however, extends beyond the United States of America,<sup>2</sup> as is evidenced by controversy surrounding the threat of torture employed by the deputy police chief of Frankfurt/Main, Germany, in February 2003.<sup>3</sup> Dershowitz's specific proposal for such scenarios, though not apparent from his book's title, is application of torturous methods, and it warrants careful scrutiny.<sup>4</sup>

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<sup>1</sup> Alan M. Dershowitz – Why Terrorism Works – Understanding the Threat, Responding to the Challenge, Yale University Press, New Haven and London, 2002, 271 p.

<sup>2</sup> Economist, 11 January 2003, 11 and 20 et seq.; Dana Priest and Barton Gellman, U.S. Denies Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, The Washington Post, 26 December 2002, A 01; Alan Cooperman, CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture, The Washington Post, 28 December 2002, A09.

<sup>3</sup> The deputy police chief, Daschner, threatened torture in order to save the life of an 11-year old who had earlier on been abducted by the accused and whose whereabouts and health status at that point were unknown. Police later on found the victim dead. At the time Daschner threatened to "inflict pain, under medical supervision and subject to prior warning" to be applied by a martial arts trainer without however causing lasting injury. However, at that point, the child had already died. Immediately afterwards, Daschner filed a report outlining his action with the prosecutorial office. See Koch, Daschners Verhalten "menschlich sehr verständlich" – Politische Diskussion über die Legitimität der Folter bei Polizeiverhören / Der Fall Magnus G., Frankfurter Allgemeine Zeitung, 24.02.2003, 4; Folterdrohung mit Folgen, Süddeutsche Zeitung, 28 February 2003, 6; Die Folter-Debatte – Politiker kommentieren die Äußerungen von Richter Geert Mackenroth, Die Welt, 22 February 2003, 3; Peter Finn, Police Torture Threat Sparks Painful Debate in Germany, The Washington Post, 8 March 2003, A19; John Hooper, Germans Wrestle with Rights and Wrongs of Torture, The Guardian, 27 February 2003, 18. See also Interview with Otto Schily, Federal Minister of the Interior, Druck ja, Folter nein, Die Zeit, 13 March 2003, 10; Winfried Brugger, Das andere Auge, Frankfurter Allgemeine Zeitung, 10 March 2003, 8.

<sup>4</sup> A similar stance is already promulgated by Alan Dershowitz, Commentary: Is There a Torturous Road to Justice? Los Angeles Times, 8 November 2001, B19.

Before analyzing the arguments put forth by Dershowitz, however, it is worthwhile to review the book's basic structure and Dershowitz's underlying assumptions. After introductory remarks,<sup>5</sup> he goes to considerable lengths in Chapters 1 and 2 to show how the actions of European governments and the United Nations made the September 11 attacks inevitable. Chapter 3 addresses how a society with no moral, ethical, or legal constraints – one under the leadership of a “dictator” or a “czar” – would be capable of fighting terrorism.<sup>6</sup> Next comes the book's centerpiece, in which Dershowitz describes the choices and trade-offs between liberty and security that must be made and examines how torture can be justified while maintaining a “free society”. His basic tenets can be summed up as follows. First, the greatest danger facing the world today comes from religiously inspired terrorist groups – often state sponsored – that are seeking to develop weapons of mass destruction for use against civilian targets.<sup>7</sup> Second, terrorism – “poor man's warfare” – has been “successful as terrorists have consistently benefited from their terrorist acts”.<sup>8</sup> Third, root causes should not be taken into consideration when fighting terrorism because this would encourage others to apply the same methods in their struggle.<sup>9</sup> Dershowitz considers the struggle against terrorism a fight without a definitive end; he states that “we will never again be able to lower our guard,”<sup>10</sup> and the “emergency steps we take today to combat terrorism ... are likely to become part of the permanent fabric of our legal and political culture”.<sup>11</sup> Accordingly, he considers sunset provisions to be “less effective in the context of terrorism than in other contexts, because the sun will never set on terrorism and the fears it provokes”.<sup>12</sup> Finally, because European countries and the United Nations “made it all but inevitable” for the attacks of September 11, 2001, to occur, and because nations other than the US and Israel are incapable of fighting terrorism,<sup>13</sup> the US “must assume the role, if not of policeman of the world, then at least of police commissioner in regard to terrorism”.<sup>14</sup> This conclusion lays the foundation for Dershowitz's actual thesis or at least one possible interpretation thereof: that torture can be justified in the fight against terrorism and that we should apply torturous methods vigorously if they can prevent such acts from oc-

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<sup>5</sup> Dershowitz does not attempt to define terrorism in the text of the book, but gives guidelines for such a definition on 230.

<sup>6</sup> These methods include gaining control of the media, monitoring of communications, criminalizing advocacy, restricting movement, carrying out collective punishment, targeted assassinations, preemptive attacks, massive retaliations, secret military trials and torturing suspects.

<sup>7</sup> Dershowitz, 2; a similar remark is made on 12, where Dershowitz states that “international terrorism is becoming the defining issue of our age”.

<sup>8</sup> Dershowitz, 2.

<sup>9</sup> Dershowitz, 2. The assumption that trying to understand the root causes of terrorism is the wrong approach is further elaborated on 24 et seq. For an early analysis of international terrorism, see Alex P. Schmid, *Political Terrorism*, 1983, 160 et seq. and the subsequent edition of 1988, 5.

<sup>10</sup> Dershowitz, 6 and 10.

<sup>11</sup> Dershowitz, 11.

<sup>12</sup> Dershowitz, 11.

<sup>13</sup> Dershowitz, e.g. 2 and 185.

<sup>14</sup> Dershowitz, 168.

curing. In this regard Dershowitz submits that he is “willing to think the unthinkable and move beyond the kind of conventional wisdom that has failed us up to now in our losing battle against terrorism”.<sup>15</sup>

When analyzing Dershowitz’s book, it seems appropriate to focus on two main issues: the author’s methodology and his treatment of whether torture can be justified. There are of course arguments (albeit not convincing ones) that attempt to justify torture.<sup>16</sup> These arguments have not been prominent in the past, and literature regarding whether torture can be justified is scarce.<sup>17</sup> This *status quo* seemed ripe for a challenge in the aftermath of the September 11 terrorist attacks, but so far little has been published. One would anticipate that a contribution by as prominent a scholar as Dershowitz would have been able to fill this gap and provide deep insight regarding the legal issues surrounding the use of torture. However, Dershowitz’s book fails to live up to that expectation.

From the start, Dershowitz seems not even to attempt to find a balanced view regarding who is to blame for the rise of terrorism. To the contrary, he has been described as “having no time for the standard line which rationalizes terrorism ...”.<sup>18</sup> Moreover, an emotional appeal permeates the book and is most obvious in the examples Dershowitz offers and in parallels to well-known movies such as *Marathon Man*, starring Dustin Hoffman<sup>19</sup> or his allusion to the killing of “our children and our grandchildren”.<sup>20</sup> This narrow focus and emotionality ultimately lead him to distinguish between good and evil nations (the former category containing only two states).<sup>21</sup> These characteristics also do not seem to permit him to use a comparative approach with respect to methods such as the use of identity cards, which he indicates is one method to counter terrorism<sup>22</sup> and which have been widely used in Europe without the citizens losing their sense of privacy. The proposal to require “foolproof ID cards for anyone visiting the United States”<sup>23</sup> and a “system under which visitors to [the US] are required to check in telephoni-

<sup>15</sup> Dershowitz, 13.

<sup>16</sup> Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, *American Journal of Comparative Law* 48 (2000), 661 et seq. For a more detailed account see Winfried Brugger, *Darf der Staat ausnahmsweise foltern?*, *Der Staat* 1996, 67 (79). Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (1987), excerpted in *Israel Law Review* 23 (1989), 146 (164 et seq.).

<sup>17</sup> Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System’s Failure to Prevent Torture in the Occupied Territories*, *Indiana International and Comparative Law Review* 12 (2001), 75 et seq.; Emanuel Gross, *Democracy in the War Against Terrorism – The Israeli Experience*, *Loyola of Los Angeles Law Review* 35 (2002), 1161 (1170 et seq.); Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, *Iowa Law Review* 86 (2000), 205 et seq.; John T. Parry/Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option*, *University of Pittsburgh Law Review* 63 (2002), 743 et seq.

<sup>18</sup> Efraim Karsh, *Terrorism, the Growth Industry*, *The Sunday Telegraph*, 3 November 2002, 12.

<sup>19</sup> Dershowitz, 144.

<sup>20</sup> Dershowitz, 11.

<sup>21</sup> Dershowitz, 166 et seq.

<sup>22</sup> Dershowitz, 199 et seq.

<sup>23</sup> Dershowitz, 204.

cally ... on a regular basis, say every ten or fifteen days”<sup>24</sup> seems far-fetched. One can only imagine the outcry that would follow a European country’s institution of such a system. Furthermore, an almost excessive bias is evident when Dershowitz states that “the most extreme example of [...] a hypocritical approach to torture comes – not surprisingly – from the French experience in Algeria” for the lack of punishment there of actual crimes committed.<sup>25</sup> In this instance, it is important to note that a general amnesty was granted for those crimes committed in the Algerian war.<sup>26</sup> The book’s omission of such vital information for understanding these events leaves a bitter taste when one tries to reach one’s own conclusions, and Dershowitz’s remarks therefore seem misleading.

Dershowitz’s book suffers moreover from a surprising selectiveness. This is evidenced above all by the fact that large portions of his work focus on the conflict between Israel and the Palestinian people,<sup>27</sup> while only rudimentary mention is made of other groups that have carried out terrorist attacks. One notable exception is al Qaida, although the book does not deal with the threat posed by that group in as much detail as one would expect. This selective focus renders the title of the book somewhat of a misnomer. Selectiveness also has found entry into the book in a variety of other forms. Perhaps the most obvious example is that, while the book contains a considerable number of citations, many points are left without a reference. Moreover, a large majority of the sources Dershowitz cites can be characterized as insufficiently scholarly; the book contains newspaper reports even in cases where other sources would be desirable and available. For instance, his book ignores important works on terrorism<sup>28</sup> and torture.<sup>29</sup> In addition, a considerable

<sup>24</sup> Dershowitz, 206.

<sup>25</sup> Dershowitz, 152.

<sup>26</sup> For a report on the trial of Aussaresses, see Keith B. Richburg, General Is Convicted for Trying to Justify War Crimes, *Washington Post*, 26 January 2002, A24; Jon Henley, French General Fined for Army Torture Book, *The Guardian*, 26 January 2002, 15. For the war between Algeria and France in general, see Rita Maran, *Torture – The Role of Ideology in the French-Algerian War, 1989*.

<sup>27</sup> It should be noted that the acts taking place by radical Palestinians are to be condemned in the strongest sense and that terrorism is not a method that should lead to any results at any point in time.

<sup>28</sup> E.g. Antonio Cassese, *Terrorism, Politics and the Law*, 1988; Louis Rene Beres, The Legal Meaning of Terrorism for the Military Commander, *Connecticut Journal of International Law*, 11 (1995), 3; W. Michael Reisman, International Legal Responses to Terrorism, *Houston Journal of International Law*, 22 (1999), 9 et seq.

<sup>29</sup> E.g. Malcolm D. Evans/Rod Morgan, *Preventing Torture – a Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1998; Edward Peters, *Torture*, 1996; Antonio Cassese (ed.), *The International Fight Against Torture – La lutte internationale contre la torture*, 1991; Eyal Benvenisti, The Role of National Courts in Preventing Torture of Suspected Terrorists, *European Journal of International Law* 8 (1997), 596 et seq.; Pnina Baruh Sharvit, The Definition of Torture in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *Israel Yearbook on Human Rights* 23 (1993), 147 et seq. Even more surprisingly, Dershowitz does not mention the ruling of the European Court of Human Rights in the case between Ireland and the United Kingdom, 25 *European Court of Human Rights (ser. A)*, 59 (1978).

number of scholarly articles have addressed the inmates at Guantanamo Bay and their status under international humanitarian law.<sup>30</sup> Yet all that Dershowitz has to say about the legal aspects of this problem – and these should be legal issues – is either that terrorists do not deserve any protection (and here he makes no specific mention of any provision in the Geneva Conventions) or that they are combatants. This leaves Dershowitz's view of the status that they should thus receive unclear.<sup>31</sup> Moreover, here Dershowitz cites articles only from the *New York Times*. A closer scrutiny of the legalities of the Geneva Conventions would also seem to be appropriate. Dershowitz's selectiveness is also apparent in his interpretation of John Langbein's study on "Torture and the Law of Proof".<sup>32</sup> While Dershowitz portrays the English system of torture as having been "used for discovery, and not for evidence," thereby quoting Langbein,<sup>33</sup> Langbein himself states two sentences later that "nothing kept the information thus extracted from being used in trial if it were needed ...".<sup>34</sup>

Throughout the book, moreover, Dershowitz describes certain events on a rather one-sided basis. This is apparent, for example, from a comparison of his description of the actions taken by the special forces of Israel and Germany at the airports of Entebbe and Mogadishu respectively. While the Israeli rescue mission is presented as "Israeli commandos [rescuing] all but three passengers,"<sup>35</sup> the other operation receives no such credit. Furthermore, Dershowitz claims that the "United States has prevented many acts of terrorism".<sup>36</sup> However, he fails to cite even one such case. Dershowitz mentions one Philippine case in which information was obtained from a suspect after torturous methods were applied. This is his example for "numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians".<sup>37</sup> Moreover,

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<sup>30</sup> Daryl A. Mundis, *The Use of Military Commission to Prosecute Individuals Accused of Terrorist Acts*, *American Journal of International Law* 96 (2002), 320 et seq.; Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, *American Journal of International Law* 96 (2002), 475 et seq.; Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, *Harvard Journal of Law and Public Policy* 25 (2002), 591 et seq.; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, *Michigan Journal of International Law* 23 (2002), 677 et seq.; Neal K. Katyal/Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, *Yale Law Journal* 111 (2002), 1159; Yoram Dinstein, *Humanitarian Law on the Conflict in Afghanistan*, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law* 96 (2002), 23 et seq.

<sup>31</sup> Dershowitz, 221. Similarly, the term war is used indiscriminately on several occasions, e.g. 10 and 217. While this might be acceptable in a general debate, it seems inappropriate in a book produced by academic and claiming to write an academic book.

<sup>32</sup> John H. Langbein, *Torture and the Law of Proof*, 1977.

<sup>33</sup> *Ibid.*, 90. Langbein himself relies on Bacon.

<sup>34</sup> *Ibid.*, 90. Langbein continues by stating that the reason for the relative scarcity of evidentiary use was that "a jury could convict on scant evidence, and in treason cases the pressure to convict was intense".

<sup>35</sup> Dershowitz, 50.

<sup>36</sup> Dershowitz, 102.

<sup>37</sup> Dershowitz, 137.

Dershowitz does not draw legal conclusions from United States action in which it “renders’ terrorist suspects to nations like Egypt and Jordan ... where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States”.<sup>38</sup> One of the book’s most provocative statements – and another example of one-sidedness – is the blame placed on European governments and the United Nations, an understanding that runs like a fine thread throughout the book. A revealing example is the allegation that “several European countries ... formed their diabolical pact with Palestinian terrorists: if you do not direct your terrorism toward us, we will not hinder your terrorism toward Israel and the United States”.<sup>39</sup> In a seemingly ultimate analysis, Dershowitz claims that the actions of European governments and the United Nations “made September 11 unavoidable”.<sup>40</sup> However, Dershowitz ignores governmental action with respect to domestic and international terrorism in the 1960s and 1970s in a variety of countries such as Canada,<sup>41</sup> France, Germany, Spain and the United Kingdom.<sup>42</sup> In light of this, it should come as no surprise that the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>43</sup> does not feature prominently in Dershowitz’s book. Indeed, this treaty is first mentioned more than halfway through the book.<sup>44</sup> Article 1(1) of this treaty<sup>45</sup> undoubtedly has acquired the status of *ius cogens*,<sup>46</sup> that is, a preemptory norm of international law according to Article 53 of the Vienna Convention on the Law of Treaties.<sup>47</sup>

<sup>38</sup> Dershowitz, 138.

<sup>39</sup> Dershowitz, 185.

<sup>40</sup> Dershowitz, 85.

<sup>41</sup> James Stewart, A Special Report by the Montreal Star, The FLQ: Seven Years of Terrorism, 1970.

<sup>42</sup> Christian Walter/Silja Vöneky/Volker Röben/Frank Schorkopf (eds.), *Terrorism as a Challenge for National and International Law – Security versus Liberty?*, 2003 (forthcoming).

<sup>43</sup> 1465 U.N.T.S. 85, 10 December 1984. The treaty entered into force on 26 June 1987 and has been ratified by 132 countries as of March 2003.

<sup>44</sup> Dershowitz, 135-136 and 138.

<sup>45</sup> Article 1 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads:

“For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

<sup>46</sup> Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2<sup>nd</sup> ed., 1999, 74; Edward Peters, *Torture*, 1996, 62; Rosalyn Higgins, *Derogations Under Human Rights Treaties*, *British Yearbook of International Law* 48 (1976-77), 281 (282), referring to the norm under customary international law; Jordan J. Paust et al., *International Criminal Law – Cases and Materials*, 2<sup>nd</sup> ed., 2000, 13; Restatement (Third) of Foreign Relations Law of the United States, § 702 comment n; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (941); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (714).

<sup>47</sup> 1155 U.N.T.S. 331, 23 May 1969. The treaty entered into force on 27 January 1980.

In one of his few legal analyses of international materials, Dershowitz argues that Article 12 of the International Convention Against the Taking of Hostages<sup>48</sup> was “expressly intended to permit hostage taking by Palestinians”.<sup>49</sup> He merely cites portions of this provision, however, and does not provide a single additional source to back up his argument. Additionally, he claims that the “U.N. General Assembly even went so far as to encourage Palestinian terrorism” by approving “an exception to the international convention against the taking of hostages”.<sup>50</sup> The Convention on Hostage Taking – as is the case with most other universally applicable international treaties – was indeed approved by the General Assembly, but to become binding upon states it still requires ratification by them.<sup>51</sup> In addition, while Dershowitz claims that Article 12 constitutes an amendment, this provision was included in the drafting of the Convention at an early stage. More importantly, however, his argument is unconvincing for a variety of other reasons. First, the provision is concerned with the extradition of offenders and the obligation of State Parties either to prosecute offenders or extradite them to another country. The provision thus achieves the goal of ensuring that a state will be obligated either to prosecute or extradite hostage-takers under this Convention unless it is equally bound to do so under the 1949 Geneva Conventions and Additional Protocols.<sup>52</sup> Second, the context in which such wording appeared during and after the period of decolonialization has to be taken into consideration.<sup>53</sup> Finally, the historical emergence of this treaty clearly indicates that even nations who traditionally have a favorable attitude toward the Palestinian cause admitted that “all acts of hostage-taking, even if they were a reaction to the illegal activity of colonial or occupying Powers, would be covered by the proposed Convention and would thus be not clearly exempt to the acts of liberation movements ...”.<sup>54</sup>

<sup>48</sup> 131 U.N.T.S. 206, 17 December 1979. The treaty entered into force on 3 June 1983 and currently has 118 State Parties. The text of its Article 12 reads in its entirety:

“In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

<sup>49</sup> Dershowitz, 54. Emphasis in the original text.

<sup>50</sup> Dershowitz, 54.

<sup>51</sup> See Article 18 (1) of the International Convention Against the Taking of Hostages.

<sup>52</sup> Robert Rosenstock, International Convention Against the Taking of Hostages: Another International Community Step Against Terrorism, *Denver Journal of International Law and Policy* 9 (1980), 169 (184); Malvina Halberstam, Challenges to International Law: Terrorism, *George Mason University Law Review* 9 (1986), 12 (18).

<sup>53</sup> Alastair C. MacWilson, *Hostage-Taking Terrorism*, 1992, 189 et seq.

<sup>54</sup> 34 UN GAOR C.6 (14<sup>th</sup> mtg.) 16, UN Doc. A/C.6/34/SR.14 (1979).

One of the most problematic areas Dershowitz touches upon is the use of torture, in particular its institutionalization by means of a torture warrant. Dershowitz makes what initially seems to be a compelling argument by describing a case in which one could “forgo any use of torture and simply allow the preventable act of terrorism to occur”.<sup>55</sup> But this is exactly the crux of the matter: One can never be certain as to the suspect’s actual knowledge.<sup>56</sup> Only with such knowledge would application of torture be the *ultima ratio*, the weapon of last resort. Leaving aside the moral implications of this, which Dershowitz points out, a more fundamental issue seems to be whether, once torture is legitimized, any and all other forms of governmental action can be justified because no other such action carries with it the same level of intrusion into the rights of an individual.<sup>57</sup> Dershowitz pleads for a procedural mechanism here and defends this approach as better than keeping the issue under the cloak of governmental secretiveness and outside of public scrutiny and accountability.<sup>58</sup> He proposes a torture warrant but fails to mention the exact requirements for obtaining it. What cases would be covered by such proposals? Dershowitz mentions not only a ticking bomb scenario in which a large number of people would be killed, but also the scenario of an individual left in a box with two hours of oxygen,<sup>59</sup> and this would certainly extend the range of cases in which torture would be permissible. Who would decide on such a warrant – a law enforcement agent, a single judge, or a panel of three judges? What level of proof would be required – a high level (alluded to elsewhere in his book<sup>60</sup>) or certainty beyond a reasonable doubt?<sup>61</sup> Would this warrant be subject to judicial

<sup>55</sup> Dershowitz, 150.

<sup>56</sup> See e.g. Emanuel Gross, *Democracy in the War Against Terrorism – The Israeli Experience*, Loyola of Los Angeles Law Review 35 (2002), 1161 (1170 et seq.). Bernhard Schlink, “Darf der Staat foltern?” – Eine Podiumsdiskussion, 28 June 2001, <[www.humboldt-forum-recht.de/4-2002/index.html](http://www.humboldt-forum-recht.de/4-2002/index.html)> (20 March 2003). A similar argument is advanced by Kremnitzer and Segev, who deal in detail with the questions surrounding the ticking bomb scenario. Mordechai Kremnitzer/Re’em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, Israel Law Review, 34 (2000), 509 et seq. The authors point to the unrealistic nature of the ticking bomb scenario and examine the issue in great detail (549 et seq.). Moreover, they make a convincing argument that the reality is not as clear cut as authors like Dershowitz would like us to believe (550), but that the actual interrogator would face a very different – and far more complex – situation. They conclude that the “practical difficulties [...] lead to the conclusion that we should not permit an investigating authority to depart from the prohibition on the use of torture or physical interrogation methods” (552). Regarding the position of the interrogator, see Günter Jerouschek/Ralf Köbel, *Folter von Staats wegen*, Juristenzeitung 2003, 613 (618).

<sup>57</sup> See interview with Schily (note 3), 10. Dershowitz, 193 et seq., further claims that the restrictions on civil liberties after September 11, 2001 are mild compared to those imposed upon certain parts of the population in US history. This argument – intentionally – leaves aside the issue of the death penalty.

<sup>58</sup> Dershowitz, 149 et seq. Dershowitz himself seemed to have the same concerns in an earlier publication which dealt with the Landau Commission Report and the defense of necessity. Alan Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists – And to Lie About It?*, Israel Law Review 23 (1989), 192 (195).

<sup>59</sup> Alan Dershowitz, *Commentary: Is There a Torturous Road to Justice?* (note 4), B19.

<sup>60</sup> Dershowitz, 184.

<sup>61</sup> See Kremnitzer/Segev (note 56), 548.



review? Given the emergency situations described by Dershowitz, this seems an unlikely prospect. Would there be any compensation if it turns out that the person tortured did not have any knowledge? Dershowitz intends for such a warrant to “reduce the use of torture to the smallest amount and degree possible, create public accountability for its rare use,”<sup>62</sup> and protect the rights of the suspect.<sup>63</sup> This argument reveals a strange confidence in the propriety of governmental agencies, although he considers himself to be averse to such thinking in a later portion of the book.<sup>64</sup> Furthermore, his proposed requirement for such action to be legitimate – disclosure of such action, with a potential time lapse – is also not convincing. If the argument, as Dershowitz himself points out, goes to accountability, a time lapse would certainly not be necessary.<sup>65</sup>

Sunset provisions are certainly not the major thrust of Dershowitz’s arguments but are nevertheless worth noting briefly. The purpose of such provisions should be kept in mind. According to Black’s Law Dictionary, a “sunset law” is a “statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other governmental function. The legislature must take positive steps to allow the law, agency or functions to continue in existence by a certain date or such will cease to exist.”<sup>66</sup> Thus, unless the legislature chooses to renew the law or the governmental function after its prescribed termination, the law or function would cease to exist.<sup>67</sup> The sun would thus set on the act. Similar arguments to those put forth by Dershowitz were advanced in the Canadian debate after September 11, when government officials claimed that that terrorism will not vanish any time soon and that the inclusion of a sunset clause would lead to a legislative vacuum.<sup>68</sup> However, close oversight and review are essential for these measures not to be used inappropriately.<sup>69</sup> In addition, sunset clauses serve as reminders to the legislature to re-evaluate the contents of a particularly intrusive piece of legislation and to determine whether the measures previously taken are still necessary and justified. Sunset clauses do not prevent the legislature from adopting the measures in the same form

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<sup>62</sup> Dershowitz, 141.

<sup>63</sup> Dershowitz, 159.

<sup>64</sup> Dershowitz, 216.

<sup>65</sup> The lack of such clear criteria makes his arguments even less convincing. These points had been thoroughly discussed by Henry Shue, *Torture, Philosophy and Public Affairs* 7 (1978), 124 (137 et seq.).

<sup>66</sup> Henry Black, *Black’s Law Dictionary*, 6<sup>th</sup> ed., 1990, 1436.

<sup>67</sup> Sarah Armstrong, *Special Notes on Bill C-36: Does Bill C-36 Need a Sunset Clause?*, *University of Toronto Faculty of Law Review* 60 (2002), 73 et seq. (74).

<sup>68</sup> Anne McLellan, *Antiterrorism Act – Re your editorial The Antiterrorism Law Needs a Sunset Clause*, *Globe and Mail*, 25 October 2001, A18. Janice Tibbetts, *No Sunset Clause on Antiterror Law*, *Chretien* says: “PM puts an end to debate over possible legislated review of new police powers”, *Vancouver Sun*, 22 October 2001, A7.

<sup>69</sup> Special Senate Committee on the Subject Matter of Bill C-36, *First Report*, 1 November 2001, <[www.parl.gc.ca/37/1/parlbus/chambus/senate/JOUR-E/066ap\\_2001-11-01-e.htm](http://www.parl.gc.ca/37/1/parlbus/chambus/senate/JOUR-E/066ap_2001-11-01-e.htm)> (20 March 2003).

that they were initially approved, but they require the legislature to reflect on the necessity of the measures concerned.

Dershowitz also deals, in a rather sweeping manner, with the relative merits of trials by jury as opposed to trials by professional judges as well as international tribunals. The latter might, according to Dershowitz, function as forums in which international terrorists would be tried. While his book was not the place to deal with these issues extensively, his outright rejection of international tribunals because they do not conduct trials by jury seems misguided and inappropriate. Dershowitz argues that judges are more susceptible than jurors to political interference because they have “future judicial and political aspirations” and “all judges want to be well regarded among their patriotic peers”.<sup>70</sup> But there is no evidence that the current or previous benches in either the ICTY or ICTR were susceptible to political bidding, and Dershowitz certainly does not provide any such evidence. Moreover, it should be remembered that these individuals are under heightened public scrutiny and would lose their reputations should they give in to such demands.

Dershowitz admits that finding a solution to the problems presented by terrorist activity is “not easy” – and one could not agree more with such a statement.<sup>71</sup> His presentation seems not well thought out, however, as some have asserted.<sup>72</sup> To the contrary, the very oversimplification that he criticizes is enshrined first in his analysis and second in his vision of how to fight terrorism. His conclusions rest on a small foundation because his analysis focuses almost exclusively on the conflict between Israel and Palestine, while ignoring the wave of terrorist acts that has swept other parts of the world.<sup>73</sup> His proposals regarding how to fight terrorism are also highly problematic. While seemingly adopting the view that no one should be held imprisoned without just cause, and that it is better to let ten guilty people free rather than setting one innocent man in chains, he considers the calculus to have changed when it comes to terrorists.<sup>74</sup> His book is clearly intended to polarize, something at which he is quite successful. However, with respect to source selection and presentation, one cannot but feel that often information is omitted that would have given the reader a more balanced view without compromising the aim of conveying the author’s opinions. For the most part, Dershowitz cannot be accused of not being stringent in his argumentation. Nevertheless, this stringency

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<sup>70</sup> Dershowitz, 218.

<sup>71</sup> Dershowitz, 226. Indeed, on 207 Dershowitz makes allusions to various degrees of proportionality depending on the circumstances of the case and the level of intrusion.

<sup>72</sup> David Abel, Dershowitz Makes Case for Antiterror Measures, *The Boston Globe*, 6 November 2002, C8.

<sup>73</sup> This also makes one of his underlying premises, leaving root causes out of any consideration whatsoever, less justifiable. Although it is undoubtedly possible to disregard the root causes, it seems more tenable to at least be cognizant of them. See e.g. Schmid, see note 9 and Walter Laqueur, *Reflections on Terrorism*, *Foreign Affairs* 65 (1986), 86 (91 et seq.).

<sup>74</sup> Dershowitz, 188.

is achieved at the expense of scholarly detachment, academic clarity, and ultimately persuasiveness.

Chief Justice Barak of the Israeli Supreme Court stated, in a recent decision regarding torture by the Israeli secret service GSS, that it is necessary for a democracy “to fight with one hand tied behind its back” because “only then will our society truly show that we maintain the upper hand in the fight against terrorism”.<sup>75</sup> While these words can be considered “sanguine”,<sup>76</sup> they are nevertheless a display of a consensus regarding values that permeates the large majority of societies in the world. The methods to be used in the fight against terrorism indeed constitute a choice among evils. No matter what the decision is, however, it will always be one which leaves a bitter taste once the decision has been made and the effects of that decision become known.

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<sup>75</sup> HCJ 5100/94, *Public Committee Against Torture in Israel v. Government of Israel*, P.D. 53(4), 817 (835), International Legal Material 28 (1999), 1471 et seq. The decision is also available at <[www.derechos.org/human-rights/mena/doc/torture.html](http://www.derechos.org/human-rights/mena/doc/torture.html)> (20 March 2003). For a case note, see Ardi Imseis, *Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods*, International Journal of Human Rights 5 (3/2001), 71 et seq.

<sup>76</sup> Dershowitz, 3.

