2. Justifying Defensive Torture

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In this paper I will argue that there is something like self-defensive torture (which can include the defence of others), and that such torture is morally justified if certain general requirements for the justifiability of self-defensive violence/force are met. These requirements come under the headings of imminence, necessity and proportionality. In the first part of the paper I will briefly discuss the English, US and in particular German legal regulations regarding self-defence. I will argue that the same moral reasoning that underlies these laws is also applicable to torture cases, and that the necessity and the imminence requirements can be met in some torture cases. In the second part of the paper I will turn to the proportionality requirement and in that context discuss arguments that attempt to show that torture is worse than killing. I will argue that these arguments cannot hold water. Many forms of torture are definitely not worse than killing. In fact, I will show that there are cases where self-defensive torture is the morally preferable and more humane alternative to self-defensive killing. I conclude that if self-defensive killing is justified in some cases – and it is – then self-defensive torture is also justified in some cases. Finally, I will deal with the charge that justifying torture in some perhaps legitimate cases nevertheless somehow contributes to the spread of the illegitimate use of torture, and that therefore publishing justificatory articles like the present one is itself immoral. I will argue that such rather cheap charges have no rational basis whatsoever.

A. What is torture?

For the purposes of this article I shall define torture as follows:

> *Torture is the intentional (as opposed to merely foreseen or accepted) and continuous or repeated infliction of extreme physical suffering on a non-consenting victim.*

Some claim that torture has to involve the intent to break the will of the victim.[1] This might be true for interrogative torture, where the torturer seeks to get some in-

1 S. Miller, 'Is Torture Ever Morally Justified?' *International Journal of Applied Philosophy* 19 (2005): 179, p. 191, n. 2. Miller accepts, though, 'that, notionally at least, there might be some cases in which extreme physical suffering is inflicted but in which the torturer does not have as a purpose the breaking of the victim's will. However, I do not regard these as the central cases when it comes to torturing human beings, as opposed to other sentient beings that lack a will in anything other than an attenuated sense.' As I say in the main text, punitive torture was widespread in the Middle Ages and is still practiced today. There is no reason to ex-

formation out of the tortured person. I say 'might' because it is not entirely clear what 'breaking the will' actually means, nor is it clear that the interrogative torturer must intend more than that the victim give the desired information. If the victim decides with an intact will: 'I do not want to be tortured anyany more, therefore I will give the information', this, it seems, should be fine with the torturer. Be that as it may, interrogative torture is not the only kind of torture; there is also punitive torture, which was widely practiced in the Middle Ages (and is, incidentally, still practiced today). Punitive torture, however, does not normally involve the intention to break the will of the victim. Whether his or her will is broken is completely incidental to the aims of this form of torture. The aim is simply to punish the victim by inflicting extreme physical suffering.

Some also claim that the victim has to be defenceless.[2] I agree that in most cases (perhaps even in all real cases) he or she will be defenceless, but this in itself is no reason to make this a definitional requirement. Consider this case: theThe robber breaks into the house of the jeweller, who has a safe with a lot of money in his house. The robber points a gun at the jeweller and says: 'Give me the combination, or I'll kill you.' The jeweller says: 'Well, if you kill me you won't get the combination.' 'Right', thinks the robber and draws something else, namely his pain-inflicting device, which when activated causes extreme pain (almost like drilling on the unprotected nerve of a tooth) to any person in the radius of ten metres, excepting the person holding the device. He activates it. The jeweller writhes with pain on the ground, the robber says: 'Give me the combination', but the jeweller manages to reach for her own revolver. For all the pain she cannot take real aim and can hardly hold the gun; yet she manages to shoot in the general direction of the robber, who dives behind a couch. 'Let go of the gun!' the robber shouts, but the jeweller, still in extreme pain since the device is still activated, shoots in the direction of the couch, which offers no real protection, and the bullets go right through. The jeweller is obviously not defenceless. However, it seems that she was tortured nevertheless. Someone was intentionally inflicting pain on her nearly as intense as the pain inflicted by drilling the unprotected nerve of a tooth, and doing so in order to get some information or in order to have the person do something (let go of the gun) – how could this not be torture? The mere fact that the victim still has means of defence seems not to satisfactorily answer this question.

At this point someone might object that this is a silly constructed example, nothing that could happen in the real world. Well, first, of course it could. Second, one might well see a taser as an equivalent of such a pain-infliction device. Thus there may already have been equivalent cases. Third, even if there has never been a real such case and never will be, that is not a counterargument against the definitional point. There is not, nor will there ever be, a tyrannosaurus rex walking through the

clude it from a definition of torture, which as a definition, after all, should include the 'notional' cases – the more so if those cases are also very real.

2 Ibid., p. 179; M. Davis, 'The Moral Justification of Torture and other Cruel, Inhuman, or Degrading Treatment,' *International Journal of Applied Philosophy* 19 (2005): 161, p. 164.

Black Forest in the years 2008-10. However, that does not mean that by definition a tyrannosaurus rex cannot do so. Whether one of them does is an empirical question, not a definitional one. A definition that simply stipulated that they cannot walk through the Black Forest in these years would be a *wrong* definition even if the tyrannosaurus rex actually is extinct once and for all. Thus, if we would say about the case of the jeweller that it is (or would be) a case of torture, the alleged fact that such cases are not real is no counterargument to the claim that it indeed is (or would be) a case of torture.

The international conventions concerning torture seem to consider torture, for the purposes of those conventions, as something that can only be done by state agents. However, the legal usage of certain terms does not always coincide with the ordinary one. In any ordinary use of the term, torture can be practiced by private agents (for example the Mafia or a sadist).

A note on the expression 'continuous or repeated': this is only meant to exclude isolated and single 'shocks' of intense pain. I find it hard to consider such 'shocks' as torture (which is not the same as saying that they are quite all right).

Finally, what is 'extreme'? That is contentious, but one kind of physical suffering that clearly is extreme is the above-mentioned pain produced by drilling on an unprotected nerve of a tooth. I will use this as a reference point throughout the paper. This in no way implies that I think that lesser pains or certain other forms of pain and suffering are not also extreme.

B. What is self-defence?

People have a right to defend themselves or others against wrongful aggression, in particular if the aggression is life-threatening. Let us take a look at how German law (which I know best) treats self-defence. In the course of doing so I will also make some comparisons with British law and US statutes before coming to a moral assessment.

§ 32 of the German Penal Code states (my translation):

> (1) Whosoever commits an act that is required (*geboten*) in self-defence does not act against the law.
>
> (2) Self-defence is the defence necessary to avert a present (*gegenwärtig*) unlawful attack on oneself or others.

A few comments are in order. First, while the *necessity* requirement is supposed to *prevent excessive violence* (i.e. violence that clearly goes beyond the amount of violence of equally promising alternative means that have not yet been tried), it is not intended to *guarantee minimal force.* In other words, its actual judicial interpretation prefers to err on the safe side – that is, it favours the defender, not the attacker. While the general idea is that the defender should select *among the equally effective means* the one that harms the attacker the least, German courts have made it abundantly clear that the defender is not obliged to use less dangerous means of defence if the effectiveness of those means is doubtful. In addition, a person defending with

milder means may escalate his or her defence if these milder means have proven unsuccessful. And, of course, if no effective means are available, the defender is allowed to take his or her chances. A rape victim is not required to abstain from slapping the rapist merely because it is highly unlikely that this will have any effect. And although air rifles will hardly stop an aggressor (although it might slightly hurt him), I am completely within my rights to use them. Indeed, police would not prosecute a person according to the following logic: 'Well, Herr Fritze, blasting the aggressor away with your shotgun was of course an effective means of self-defence, but you should not have first used the air rifle. There was practically no probability of success. So you are off the hook for the shotgun, but we are afraid that for using the air rifle we have to prosecute you for battery.'

It is also important for the interpretation of the 'necessity' requirement that German law does not require one to retreat from the aggressor if one could safely do so. A basic German principle of law is *Das Recht muß dem Unrecht nicht weichen* (roughly: *law/justice does not have to give way to the unlawful/unjust*).[3] This principle does not exist in US law. However, it seems that there is no duty in US law to retreat from an aggressor threatening deadly force before defending with deadly force. As regards the UK, common law once contained a duty to retreat. This, however, is not the case any more.[4]

Thus, the 'necessity' requirement is in fact very lenient, in the USA and the UK as well. And rightly so. Although the self-defence paragraph gives *some* protection (namely against *excessive* violence) to the aggressor, its main task is to protect the defender. There is no moral symmetry between innocent defenders and culpable aggressors.

German law takes this asymmetry very far (which is a direct consequence of the principle that law/justice does not have to give way to the unlawful/unjust). *There is no proportionality requirement in the German self-defence law. The NECESSITY requirement is NOT the same as a PROPORTIONALITY requirement!* I put this statement in italics and use capitalization because necessity and proportionality are regularly confused by many people. This confusion is facilitated by the fact that we can say in *some* sense that the necessity requirement *is* a proportionality requirement. However, it is important to be clear in which sense it is and in which it is not. The 'necessity' requirement prohibits excessive violence or force when using defensive measures against unlawful actions. It does *not*, however, weigh the value of the defended good against the harm inflicted upon the aggressor. In other words, it says that you are not supposed to kill a thief if you can also stop him by knocking him out. It does not, however, say that you shouldn't use lethal force at all in defending

3 Kindhäuser provides a succinct overview of German self-defence law. U. Kindhäuser, 'Skript zur Vorlesung Strafrecht AT, § 16: Notwehr', <http://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Strafrecht3/Strafrecht_AT/s-at-16. pdf> (visited 25 March 2008).

4 E. Baskind, 'The Law Relating to Self Defence', <http://www.bsdgb.co.uk/index.php? Information:The_Law_Relating_to_Self_Defence> (visited 25 March 2008).

yourself against theft. It does *not* argue that human life is more valuable than property, and that therefore defending property with lethal force is disproportionate. This latter argument would be a proportionality argument, which exists, for example, in English law. In Great Britain you are not allowed to use deadly force if this is the only way you can keep a thief from stealing your car. In Germany, you *are* allowed to do so. Some *extreme* disproportionalities are now forbidden under German law (you are not supposed to shoot a thief in order to prevent him from escaping with an apple), but the fact remains that a principle that rules out *extreme dis*proportionalities is not yet one that demands proportionality.[5]

An attack is *present* according to German law if it is imminent, has started or is ongoing.

An *attack*, in German law, is every threat of a violation or actual violation of an interest that is protected by law insofar as this threat stems from human action. Thus, the German law makes use of the term 'attack' here in a way that does not necessarily follow ordinary usage, which associates 'attack' with fists and knives and guns – with 'action'. If someone has been kidnapped and is now alone in a room, we might, therefore, want to say that he is not *currently* under attack any more, but only was so when the gangster grabbed him and threw him into the car. For German law, however, the kidnapped person, stripped of his freedom, is still under attack.

In light of this brief exposition of German self-defence law, let us look at what I call a Dirty Harry Case (there are real-life examples of Dirty Harry cases, the most recent one being the famous German Daschner case):[6] A criminal kidnaps a child and puts her in a place where she will suffocate if not rescued in time. There is not much time left, according to the very claims of the kidnapper, who has been captured by the police. They ask him again and again where the child is. He refuses to tell. The police decide to torture the kidnapper in order to get the information they need to save the child. (In the Daschner case the kidnapper was only *threatened* with torture. Facing this threat, he gave up the location of the child. Tragically, the child was already dead.)

This case falls under the German self-defence law. The kidnapped child is still under 'attack', in the sense in which German law uses this expression. And the necessity requirement – whether in the German, British or American interpretation – in itself does not rule out the use of torture. The police had already tried normal interrogation, without success. In other words, the milder means did not work. So they were entitled to use harsher means.

At this point the usual objection will probably be heard, repeated like a mantra by many torture opponents: 'Torture does not work to gain information.' Actually, it sometimes does. In the real life Daschner case the threat of torture sufficed to make the kidnapper spill the required information. The child was already dead, but that

5 To be sure, from a moral standpoint it is actually not evident that defending an innocent person's property against a culpable aggressor by using deadly force if necessary really *is* disproportionate. But this is not a question we have to go into here.

6 See Introduction, pp. 1-2 above (eds.).

was not some kind of metaphysical necessity. If he had still been alive, he would have been saved thanks to the use of torture. Incidentally another case surfaced in the judicial proceedings of the Daschner case: In 1988 police had beaten up a kidnapper, who then gave up the information as to where he had hidden the child. The police were able to rescue the child alive from a wooden box.[7] I suppose that there are many more cases like these, but for obvious reasons police officers have an interest in denying that they used torture.

Moreover, even if torture were highly unreliable, this does not even matter. As already explained above, the so-called 'necessity' requirement, which actually is a No Excessive Force Requirement, allows you to use even 'improbable' means to defend yourself if your (or another innocent person's) life is threatened by a culpable aggressor. And that is exactly how it should be. Even if it were an empirically well-proven and commonly well-known fact that stopping a serial murderer and rapist by ramming a sharp pencil deep into his ear only works one out of 10,000 times, a victim of a rapist would still be well within her rights to ram a sharp pencil deep into the rapist's ear if that is the only option remaining that at least could have success.

But, so it is often said by torture opponents, couldn't the police have talked to the kidnapper longer? Maybe then he would have finally given up the information. Yes, maybe, but as already stated, if milder means – like talking – do not work in a self-defence situation, the defender is allowed to try harsher means. Besides, there are in fact cases where a rapist has been verbally persuaded by his victim to stop. However, hardly anyone would say to a rape victim: 'Why did you ram the pencil into his ear after only 30 minutes of rape? Why didn't you endure some more rape, maybe half an hour more? Maybe your begging would finally have worked.' Similarly, it should not be forgotten that the situation faced by the police is not one where the child is happily playing in a garden and would then, if the kidnapper does not give the required information, suddenly and peacefully die. While the kidnapper is not being tortured by the police, the child *is* being tortured, namely by the kidnapper. It is suffocating in a box the kidnapper put it in.

Thus, in Dirty Harry cases torture is not excluded by the 'necessity' requirement, that is, the requirement that among equally promising methods of defence that have not yet been tried in that particular case the one that inflicts the smallest harm upon the aggressor has to be used. (Whoever wants to object at this point that torture is somehow 'intrinsically excessive' only confuses necessity and proportionality again. I will come to proportionality shortly.)

From the perspective of German law the child is clearly in a situation that could justify self-defence. Is this also the case from the perspective of British and American law? The self-defence laws in these jurisdictions allow self-defence against the unlawful use of force only if the *imminence requirement* is fulfilled, that is, if the unlawful use of force is ongoing or imminent. Clearly, this requirement is fulfilled in the Dirty Harry case (as it is in ticking bomb cases, incidentally). *The child is al-*

7 V.. Erb, 'Folterverbot und Notwehrrecht', in W. Lenzen (ed.), *Ist Folter erlaubt? Juristische und philosophische Aspekte* (Paderborn, Mentis, 2006), p. 19.

ready victim of unlawful force, and not only at the moment when it dies. It is also already victim of *deadly* force. Deadly force is not only force that has already killed you, but force that is typically capable of doing so. Someone who has been poisoned with something that will kill her in a month has suffered deadly force already at the moment she was poisoned, and not first at the end of the month. Thus, under British law and US statutes as well, the Dirty Harry case is one where the child is in a situation that can justify self-defence.

However, for the sake of argument, let us take a look anyway at whether it does morally make a difference – as it is sometimes claimed – that in ticking bomb cases or Dirty Harry cases *death* is not always imminent (the deadly *force* is, of course). Some think it does. The underlying idea seems to be that if the expected harm (here in the form of death) is not imminent, there remains enough time to try all kinds of milder means to avert the danger. However, that is simply not always true. The fact that the ultimate harm might befall me much later, does not mean that I have much time to react. The incubation time of rabies can be up to 10 years, but after having been bitten one only has a couple of hours to get a vaccination. After that everything is too late. Now consider this situation. Jeanette is in a jungle camp with Bob. A black mamba bites her. The poison will kill her in few minutes if she does not immediately get the antidote from the refrigerator. Bob wants Jeanette dead and blocks the refrigerator. She draws her gun and threatens to shoot him if he does not go out of the way. He does not, and so she shoots him in the leg. If for some reason it were necessary to kill him in order to get him out of the way, she would even be allowed to do that. It is a clear case of self-defence. Now imagine that she has not been bitten by a black mamba but by a dog with superrabies. It will kill her in five years, but she needs the antidote as quickly as she needed the one against the mamba poison. Again Bob blocks the way to the refrigerator. Is she now not allowed to shoot him in the leg or to kill him if necessary to reach the antidote? Of course she is. The difference in the time frame of the ultimate *harm* is normatively irrelevant. What is decisive is the time frame wherein *defensive action* to avert the danger is still possible. This is, incidentally, reflected by a large part of US case law, by the Model Penal Code and by the statutes of some US states.[8]

Thus it seems that torturing an aggressor in order to save an innocent life from the aggressor's claws can be justified with the law of self-defence. To be sure, one might object that torture is still prohibited by international anti-torture conventions, which are also binding for the national jurisdictions of the UK, the USA and Germany. However, it seems that the anti-torture conventions define torture as something undertaken by *state* agents. Thus, they might not be applicable to private defensive torture (for example, a Dirty Harry case where not a police officer but the father of the kidnapped child tortures the kidnapper). Second, for the German case, Volker Erb argues that a law or an international convention that protects the kidnapper from being tortured even where torture would be the last available means to save

8 See V. F. Nourse, 'Self-Defense and Subjectivity', *University of Chicago Law Review* 68 (2001): 1235-1308.

the innocent child violates the human dignity of the child.[9] The highest article of the German constitution, however, states that human dignity must not be violated. International conventions that violate that article would therefore be null and void under the German constitution.

Be that as it may, here I can set aside the question as to whether torture is *actually* legal in the three jurisdictions. I am dealing with the *moral* question. Why am I then discussing self-defence *laws* in the first place? Because the self-defence law and its application in case law reflects intuitions many people have about self-defence. It also reflects the moral reasoning behind it. My moral argument is that if injuring or killing a person can be morally justified in self-defence as long as the defence abides by the so-called necessity, imminence and proportionality or no-gross-disproportionality requirements, the same is true for torture. To be sure, a legislator or an international convention could simply stipulate: 'Never mind the self-defence law. We just want to rule out torture, even if it occurs in self-defence.' (Or: 'Never mind the self-defence law. We just want to rule out stabbing, even if it occurs in self-defence.') However, such a stipulation would not follow the previous legal reasoning nor in particular the moral reasoning supporting the self-defence laws. It would be something externally imposed on the self-defence law and the moral reasoning behind it, something *contradicting* it. And since self-defence law is extremely plausible and the moral reasoning behind it very convincing, the contradiction would not show that self-defence law and the moral reasoning behind it are mistaken if they allow torture. Rather, it would show that the absolute prohibition of torture is wrong.

The only way out for the absolutist opponent of torture or the opponent of self-defensive torture would be to show that there is a normatively relevant difference between killing a person in self-defence and torturing him in self-defence that rules out the permissibility of the latter act. As I have already argued, appeals to the necessity and to the imminence requirements do not work. Yet, apart from the proportionality requirement (or the no-extreme disproportionality requirement, respectively), *there are no other requirement*s.

This fact is often ignored. For example, sometimes it is considered to be a good argument against torture that you can never know *for certain* that the person tortured in the Dirty Harry case (or a ticking bomb case) really is guilty. However, there is no certainty requirement in self-defence cases. In fact, in German law there is not even the requirement that the defender reasonably believes him- or herself to be under attack. If the defender *is* under attack, then necessary and not grossly disproportionate counter-measures are justified, whether the belief of the defender to be under attack is itself reasonable or not. As regards American and British self-defence law, there is certainly no requirement that there be no reasonable doubt for the defender that he or she is under attack. Thus, the fact is that there are many cases of legally and morally

9 Erb, 'Folterverbot', pp. 28-33. In an earlier article, I mistakenly took the legal prohibition of torture for granted. U. Steinhoff, 'Torture – The Case for Dirty Harry and against Alan Dershowitz', *Journal of Applied Philosophy* 23 (2007): 337-353, p. 346.

justified killings in self-defence where the certainty that an actual attack was imminent was much lower than the certainty the policemen in the Daschner case had that they were dealing with a child kidnapper. The circumstance that the no-certainty argument gets repeated and repeated and repeated does not make it any better. If self-defensive killing without certainty is justified, self-defensive torture without certainty is justified, too.

Another rather bad argument I came upon is this: A Kantian maxim allowing torture in certain cases would be too complicated. I offer two replies. 1. complicated ≠ wrong. 2. A Kantian maxim allowing self-defensive torture is not more complicated then a Kantian maxim allowing self-defensive killing. As far as I know, Kant did allow self-defensive killing and injuring. So where is the problem?

A further strange argument one sometimes encounters is that torture is 'inherently limitless'. What is that supposed to mean? Carl von Clausewitz said that war is inherently limitless, that the logic of war is escalation. However, he admitted that in reality war can be restrained and often has been restrained successfully. The same holds true for torture (whether justified or not). In the Middle Ages punitive torture was often used in a restricted way – that is, the amount of torture previously prescribed as punishment was administered, not limitless amounts of torture. Interrogative torture also has been limited in many cases by certain regulations (for example in Israel). But must interrogative torturers, if they want to be successful, not be ready to use any means – so that as long as the tortured person does not give up the information, they will use harsher and harsher means? Well, *if* the painful interrogator is ready to use any means, she will use any available means unless somebody stops her. So she might become a very painful interrogator. But the same logic applies to *any* course of action which aims by any means at making another person do something. Thus, it not only applies to painful interrogation, but to *any* interrogation. *Any* interrogator who is ready to use any means will transform into a painful interrogator, if need be, and a very painful interrogator, if need be, etc. Thus, the argument 'proves' more than it can take. Besides, there actually *is* an inherent limit to interrogative torture: Killing the painfully interrogated person is not an available means to get the information. Dead people do not speak. Thus, killing is not a possible means for interrogative torture. Other forms of self-defence, however, do not acknowledge this limit. Killing *is* a means by which one can keep an aggressor from attacking with a knife. Thus, it seems that self-defensive interrogation is actually more limited than self-defensive non-interrogative beating, stabbing or shooting. Besides, why should the fact that a certain course of action *could* escalate into something excessive make the course of action wrong even if it does not so escalate? After all, *any* self-defensive course of action, for example in the form of hitting an opponent or stabbing him, *could* escalate – that, however, obviously does not make all self-defensive action wrong. In short, the argument that torture is 'inherently limitless' and therefore unjustified is confused.

Thus, the fact remains that the last hope for someone who does not deny the permissibility of self-defensive killing or harming but nevertheless wants to show that defensive torture in Dirty Harry cases is impermissible can only lie in the proportionality requirement or the no-extreme-disproportionality requirement. Here, how-

ever, the proponent of defensive torture has a certain advantage. For the torture opponent it would not be sufficient to show that torturing is somehow worse than killing in order to rule out its permissibility. That one means of defence is harsher than another means of defence does not yet in itself show that the harsher means is unjustified. After all, killing someone in self-defence is harsher than merely knocking him out; still, self-defensive killing is justified in certain circumstances. Thus, even if torture were harsher than killing, torture could still be justified in certain circumstances. On the other hand, if the proponent of torture in certain cases can show that *killing* is worse than many forms of torture, than the fact that killing is sometimes morally justified demonstrates that torture can sometimes be morally justified too. With this in mind, let us turn to the question as to how bad torture really is in comparison to killing.

C. Proportionality or: Many forms of torture aren't as bad as killing

Now, why should torture always be wrong? Of course, on the face of it,

(a) the intentional and continuous or repeated infliction of extreme physical suffering on a non-consenting victim

sounds like a pretty gruesome practice. But how gruesome? After all,

(b) the intentional blowing out of someone's brain with a .44 Colt,

or

(c) the intentional chopping off of someone's head

also sound like pretty gruesome practices. In fact, practices (b) and (c) sound *much more gruesome* than practice (a). Yet, according to the principle of self-defence, most accounts of just war theory, and the overwhelming majority opinion of people around the world, these practices are permissible in some circumstances (for example in circumstances where they are the only promising defence of an innocent person against a culpable and life-threatening aggressor). Why, then, should torture not also be permissible in some circumstances (for example where it is the only promising means to save an innocent person from a culpable aggressor)? If *you* could choose to be the victim of practice (a), (b) or (c) – which would you choose? It depends, of course. There are *some* forms of practice (a) that might be worse than any form of practices (b) and (c), but, for example, being subjected to a pain nearly as excruciating as that of an unprotected nerve maltreated by a drill for 15 minutes is not one of them. If this were the choice, most people would, no doubt, prefer being a victim of this form of practice (a) to being a victim of any form of the other two

practices. The fact of the matter is that most people prefer extreme physical suffering to death. Death is *worse* than (most forms of) extreme physical suffering.

Once this is granted (and there is no *rational* way around granting it) the person who thinks that torture is never permissible is in a tight spot. So is the person who thinks that torture can only be allowed in certain extreme threshold cases, for example in ticking bomb cases where the live of hundreds, thousands or even millions of innocents are at stake. After all, killing is permissible in a good many less spectacular cases; and if being tortured is not worse than death, the obvious question arises as to why torturing should be worse than killing.

It should be noted, of course, that the mere fact that death is worse than many ways of being tortured does not logically imply that killing is worse than torturing. Losing most of your property in a poker game nobody compelled you to take part in is worse than many forms of being stolen from; this, however, does not show that winning most of another person's property in a poker game nobody forced the other person to take part in is worse than stealing a rather limited amount of money from him. Nevertheless, the mere fact that a particular answer to the obvious question posed regarding the comparative moral status of killing on the one hand and torture on the other is not logically impossible does not make the question go away. It still has to be answered. In the case of stealing and winning it is not too difficult to point out essential differences between the two cases and then to demonstrate that they are normatively relevant (such explanations, for example, would involve reference to the presence and absence, respectively, of consent to the poker game and to being stolen from).

In the case of torture, however, such explanations are much more difficult to provide. One of the most prominent attempts has been offered by Henry Shue. For him torture necessarily involves inflicting suffering on *defenceless* people (while killing does not); and he thinks, appealing to just war theory, that there is a moral constraint against assaults on the defenceless.[10] However, as I have argued elsewhere,[11] there simply is no such constraint in just war theory. While attacking defenceless people might conflict with some warrior's code of honour (I am sceptical about how strong that code actually is), it is not regarded as immoral in just war theory – nor in the laws of armed conflict, for that matter; nor should it be. I do not want to go into this debate again here, so let me illustrate my point with another example, which stems not from just war theory but from self-defence theory instead. In this theory talk about the fat innocent man falling from a cliff is ubiquitous. Let us say Jeanette is beneath the cliff, and for whatever reasons she is unable to move out of the way of the falling man. When he lands on her, she will be crushed (but he will survive due to the cushioning effect). She has a ray gun, though, with which she can vaporize the man (who himself is unarmed). This man, thus, is completely defenceless; in vaporising him Jeanette would attack a defenceless person. Yet, on the accounts of most

10 H. Shue, 'Torture', in S. Levinson (ed.) *Torture: A Collection* (Oxford, Oxford University Press, 2004): 49-60, pp. 48-51.

11 Steinhoff, 'Torture', pp. 337-338.

moral philosophers (Shue included, as far as I can see), vaporising the man would be justified.

One could attempt to amend Shue's position by saying that in this case the principle that you ought not to attack defenceless people is overridden by a principle that allows the attack on threats (even if they come in the form of innocent and defenceless persons). This move, however, does not help much. It only converts the previous obvious question ('Why should torturing be worse than killing?') it is supposed to answer into this obvious question: 'Why should torturing a *culpable aggressor* be worse than killing an *innocent threat*?' And this question cannot be answered in favour of the more or less absolutist opponent of torture any more easily than the previous one.

To see this more clearly, consider this amended example:

> *The fat man has been pushed off the cliff by an evil aggressor, who was simply in the mood to kill a person (he does not care much whether it is Jeanette or the fat man). Jeanette has not only a vaporizing gun, but also a pain-infliction gun (that inflicts pain nearly as extreme as the pain from drilling on the unprotected nerve of a tooth). The fat man does not fall directly; some strange rock formation is involved that works like a long and intertwined slide so that it will take some time until the fat man crushes her (however, he himself is completely unable to stop his fall or slide). The evil man above, on his part, accidentally stepped into one of his own devious traps so that he cannot move any more and can easily be shot at by Jeanette. He is unarmed. Jeanette is trapped in one of the evil man's traps (that is the reason why she cannot move). The man knows the combination of the locks, and Jeanette knows that he knows (he is, however, unable to free himself of the trap he is caught in, due to a malfunction of this trap). She also knows that unlocking her trap would simultaneously activate a mechanism that would save the falling man. Jeanette sees two options to save her life: Vaporize the falling innocent man (who, let's say, has a gun himself and would try to shoot Jeanette if she tries to vaporize him – thus, he is not defenceless) or torturing the evil aggressor with the pain-infliction gun until he gives her the combination of the lock so that she can save the lives of the only two innocent people involved in this situation. What should she do? It seems completely obvious that she should use her pain-infliction gun and try to get the combination. In fact, I consider this example to be an absolutely compelling refutation of the claim that torture could never be justified and of the claim that it could only be justified in ticking bomb cases involving high numbers of innocents instead of just one or two. What rational and moral way could there possibly be to get around this conclusion?*

Thus, I think Shue's argument as well as the modified argument (that being a threat trumps being defenceless) does not work.

The above example shows that it is better to torture a culpable aggressor than to kill an innocent threat. However, most forms of torture are preferable not only in situations where the choice is between torturing an aggressor and killing an innocent

person, but also in situations where the choice is between torturing or killing one and the same aggressor. Consider this longer example.

The case of the humane torturer and the bloodthirsty anti-torture fanatic:

Bill works for a company that has a lot of trolleys on its enormous property to transport different goods. He is in charge of the maintenance of the trolleys. There is some kind of animal in the region that often enters the trolleys from below and bites through the wires. Therefore, Bill planted several foot traps, which, however, can also trap humans. The traps have combination locks, and Bill knows the combination. In order to set in motion certain trolleys, one has to hold on to a lever well above one's head. Since Bill is very small, he has to jump to reach the lever. One day, Jeanette and Paolo, two completely innocent persons, cross the tracks and both accidentally step into a foot trap. Jeanette shouts to Bill: 'Help us!' 'You wish', he shouts back. 'I prefer to kill you.' And he jumps up to a lever and sets in motion a trolley, which is slowly but fatally moving in Jeanette's and Paolo's direction. If not stopped, it will crush them. Jeanette has with her both her explosive projectile gun (these projectiles can blow people into small pieces but do not much affect trolleys) and her pain-infliction ray gun. Bill, for whatever reasons, would rather die than let the two escape. Fearing that they might shoot at him with normal guns so that he lets go of the lever, which would stop the trolley, he handcuffs himself to the lever and throws away the keys, and shouts sneeringly: 'I know the combination of your traps – but I won't tell you. I will watch you die.' Even if they shoot him dead, that would not stop the trolley since Bill would still be hanging on to the lever by the handcuffs. Jeanette draws her pain-inflictor and shows it to Bill: 'If you do not tell me the combination of the traps, I will torture you! This gun inflicts pain like a dentist drilling on an unprotected nerve.' Bill remains silent. Jeanette sadly aims the pain inflictor gun at him. 'What are you doing', screams Paolo now. 'What am I doing? I am trying to save our lives!' 'No, no, but you can't torture him. Torture is brutal, it's – the horror, the horror!' 'So what am I supposed to do?' 'Well, non-torturing self-defence is permissible. Draw your projectile thrower and blow him into small pieces!' 'Are you crazy? That is not minimal force! Besides, maybe the guy is just having a psychotic break, or somebody's drugged him, and maybe he has family. If I get the combination by a few minutes of torture, maybe we can all still become friends. Why should I kill him?' 'You like to torture, you like to torture', Paolo shouts, his face red in righteous indignation.[12] *Two police officers ap-*

12 One comic at the Hull torture conference shouted in his talk: 'Dr. Steinhoff likes to torture, Dr. Steinhoff likes to torture.' What I do is to defend torture in certain extreme circumstances. To do that I do not have to like torture more than one has to like killing in order to argue for the right of self-defence. I am aware, though, that the subtle art of differentiation is well beyond the intellectual capabilities of some people.

proach from behind. They too step into traps and cannot interfere. They have overheard the loud argument. As Jeanette aims with the pain-inflictor, one police officer shouts: 'Don't do it! Torture is really bad. Blowing people into small pieces is much better.' Jeanette is for a moment paralysed by the sheer amount of idiocy and moral insanity she is confronted with. Paolo uses the opportunity and knocks her out, takes her explosive projectile gun, aims at Bill and blows him into small pieces. The trolley stops. 'Thanks', say the police officers. 'You did the right thing. So good that we prevented torture.' 'My pleasure', says Paolo, while he is picking bloody pieces of Bill's flesh and bones from his jacket. 'I'm always happy to uphold human rights and human dignity.'

This elaborate example shows quite clearly that the whole idea that torture necessarily violates human dignity while at the same time self-defensive killing does not is untenable. Don't get me wrong: Of course nearly all instances of torture in our actual world violate human rights and human dignity. But so do nearly all instances of killing (I use the term 'killing' exclusively for homicide in this paper). *Self-defensive* torture and *self-defensive* killing, however, as long as the general moral requirements of self-defence are met, do *not* violate human dignity or human rights. Therefore, the habit of some (by no means all) absolutist torture opponents of brandishing the concepts of human rights and human dignity as if they had a monopoly on them is quite inappropriate. The argument I am propounding here is a *rights-based* argument. It is not utilitarian or consequentialist at all. It is based on the *right* to self-defence.

While in my view the above examples already show conclusively in themselves the unfeasibility of any attempt to demonstrate that torture is more difficult to justify than killing, all else being equal, let us nevertheless have a look at another failed but instructive attempt. Heiner Bielefeldt argues as follows:

> The point of torture is not merely, as it is for example in coercive detention or in many other coercive measures of the state, to impose upon a person unpleasant consequences of his actions (or non-actions) that are supposed to *influence* his voluntary decisions [*Willensentscheidungen*] without directly [*unmittelbar*] breaking the will. Nor is the point to limit his external freedom of action … through such police measures as for example tying him up, or to completely eliminate it in the extreme case – through a death shot. Rather, the intent of torture is precisely to strategically use the physical and psychological vulnerability of a person for *directly breaking his inner freedom of the will*. For this reason torture is the direct negation of the subject status of the human being and hence of his dignity.[13]

13 H. Bielefeldt, 'Menschenwürde und Folterverbot: Eine Auseinandersetzung mit den jüngsten Vorstößen zur Aufweichung des Folterverbotes', Deutsches Institut für Menschenrechte, Berlin 2007, <http://files.institut-fuer-menschenrechte.de/437/IUS028_E_Folter_ RZ_WWW _ES.pdf>, p. 13 (my translation). David Sussman argues similarly: 'What's Wrong with Torture?', *Philosophy and Public Affairs* 33 (2005): 1-33. For a critique of Sussman, see Steinhoff, 'Torture', pp. 338-340.

Really? I doubt it. First, I already noted at the beginning that I am quite sceptical about the notion of 'breaking the will'. What precisely does that mean? I took the liberty to google the expressions 'Wille gebrochen', 'gebrochener Wille', 'broken will', 'will was broken' in connection with different sports. Judging from this, it seems that in football, boxing and other sports the wills of persons are broken quite often. Is the person's status as human being negated in such cases? Do sports violate human dignity? One might indignantly object that in these contexts the expression 'his will was broken' is only used metaphorically. Indeed, it is. However, my contention is precisely that there is no non-metaphorical use of the expression. All one typically means by saying that someone's will is broken is that after having for a while determinedly endured in some undertaking he has finally given up in the light of obstacles or some kind of attrition or because all hope was gone or because he was finally too exhausted to go on. What 'breaking the inner freedom of the will' means, in contrast, is entirely unclear.

Besides, in criticising Rainer Trapp, Bielefeldt complains:

> Well-nigh cynical is the claim that the person [namely the kidnapper of a child who has put it in some hole to let it suffocate and is asked by the police for the location] subjected to the painful interrogation procedure would merely suffer the 'disadvantage of being confronted with the choice between the voluntary and the coerced exercise of his duties.' For the alleged freedom of choice in this situation can be nothing else but the freedom to collapse; and the collapse will sooner or later occur nearly inevitably either because of unbearable pain or because of the fear of unbearable pain.[14]

One might wonder, of course, whether Bielefeldt's suggestion that in the case of threats with death shots we still *are* dealing with freedom of choice is not also well-nigh cynical. Be that as it may, although I agree with Bielefeldt that Trapp's use of language is unduly euphemistic, I definitely do not agree that the kidnapper's only option is collapse. For example, in the face of the threat of torture (Trapp is in particular referring to the famous German Daschner case) the kidnapper could say: 'Hey boys, slow down, take it easy … I had no idea that you guys take the life of that child so seriously. I certainly don't. So, what the heck: Here's the address.' Where is the collapse here?

More important, however, is that Bielefeldt says that even just the *fear* of unbearable pain can break a person's will. This undermines his position. Since, as argued above, nearly all people fear death more than some forms of torture,[15] it follows that fear of death can break the will of nearly all persons *more easily* than fear of some forms of torture. Then, however, the police shouting to a criminal who fears death more then some forms of torture (which is true of practically all criminals and of practically all other people) 'Don't move, or we'll shoot!' or 'Put down the gun, or we'll shoot!' would 'negate' the criminal's 'inner freedom of will' and his human

14 Bielefeldt, 'Menschenwürde' pp. 12 f. (my translation).

15 To be sure, if Bielefeldt understood 'unbearable' in such a way that pain would only be unbearable if people preferred death to this pain, my argument of this paragraph would not work. His argument against torture as such, however, would not work either, for not all torture is unbearable in this sense.

dignity. In fact, however, such warnings and threats are completely legitimate, and it seems that Bielefeldt does not want to deny this. But then 'breaking' someone's will is not always illegitimate, and hence torture not always wrong.

One could try to avoid this conclusion by taking back the claim that even just the threat of torture is capable of 'breaking' a person's will and instead claim that only real torture can achieve this. Yet, there still remains the problem of what 'breaking the will' is supposed to mean. Why is the case of someone who after fifteen minutes of torture says 'Please stop it, please stop it, I'll tell you what you want to know' a case of broken will, while the case of someone who after fifteen months of coercive detention says 'Please let me out, please let me out, I'll tell you what you want to know' is not? Without providing some phenomenological account of what breaking the will means and empirical evidence that it is caused by all forms of torture but not by coercive detention or death threats, the whole talk that torture breaks the will while those other forms of coercion do not is nothing but empty rhetoric.

Besides, it should be noted that some people *hold out under torture*. They do not give up the information. Furthermore, as already said, punitive torture does not even *aim* at the will of the victim, hence it does not aim at breaking his will, either. Bielefeldt claims that Jörg Splett has proffered the 'most succinct' definition of torture by designating it as the 'abolition (by physical or psychological means) of the freedom of the will while maintaining consciousness'.[16] For the reasons already adduced, this definition is not so much succinct as confused, as is any critique of torture that relies on it.

Last, but not least: Even if there were anything to this whole talk about 'breaking the will', it by no means answers the question at all as to *why* torture is worse than killing. Bielefeldt has quite correctly identified a difference between killing and torture – the first one, if successful, necessarily eradicates the consciousness of the target person, whereas the latter does not. But *why* does that make killing worse? *Why* is torture 'the direct negation of the subject status of the human being and hence of his dignity', while killing is not? Could Paolo in our above example say: 'Well, true, I blew Bill against his consent into small pieces – but at least I did not negate his subject status as a human being'? Isn't this statement downright idiotic? And if it is not – could not Jeanette make the claim of being much more respectful of Bill's subject status, a status she, after all, does not want to destroy once and for all by killing him? The answer can only be yes. Thus, Bielefeldt has certainly not provided any *argument* that would demonstrate that torture is worse than killing. He has only made a dogmatic claim.

This dogmatism, for the record, can also be found in the statements of one of the most outspoken opponents of torture at the torture conference in Hull, Massimo La Torre. He claims:

> Torture defeats any attempt at bringing it under a principle of universal material application: No one who accepts infliction of torture on others will accept it on oneself; this is not a stan-

16 H. Bielefeldt, 'Menschenwürde', p. 13 (my translation). Bielefeld quotes Splett from an unpublished manuscript.

> dard that anyone would advocate and at the same time choose to *live by*. And it stands to reason that no one should do so, because torture is experienced by those on the receiving end of it as an act of extreme, *intolerable* violence, as an abuse and an excess—and it *must* be so experienced if it is to qualify as torture, as an *unbearable* torment, as a method for effectively obliterating another's will. Torture could never pass the test of universal acceptability that acts more or less as a final criterion of morality, for it is defined as an excess and an abuse even by those who use and apply it.[17]

First, torture is *not* defined as an excess and an abuse even by those who use and apply it. If La Torre thinks it is, his knowledge of the history of torture is very limited indeed. Nor is there any reason, as should be clear from my above remarks on the definitional issues, to define it in such a way. There is, after all, also no reason to define self-defensive killing as an abuse even though most people would rather be tortured for a few minutes than killed for good. Second, as already said, not all torture is unbearable. Some people do bear it and do not break. Unsuccessful interrogative torture is still torture (why is that so difficult to understand?). Third, interrogative torture is indeed to some extent *aimed* at being 'unbearable', but so is coercive detention. 'Unbearable' coercive detention, however, can still be justified. So can 'unbearable' torture. Besides, for both interrogative torture and coercive detention limits can be accepted by those who use these methods. Fourth, the criterion of universal acceptability is not a final criterion of morality; rather, it is itself unacceptable – and perhaps universally so. The norms 'Do not abuse children for your sexual pleasure', 'Do not suppress free speech only to keep yourself in power', 'Do not torture for fun' are not universally acceptable, for they are not acceptable to dedicated rapists, child abusers and sadistic dictators. However, that obviously says nothing against their validity. Fifth, will anyone who accepts that others are killed in self-defence also accept that she be killed in self-defence? Perhaps not, in the act, but what does that say against the permissibility of self-defence? Nothing. Moreover, one might still (and most people do) accept a maxim that allows self-defensive killing, in the full knowledge that this maxim might lead to oneself being killed in self-defence. And again there is no difference here to the case of self-defensive torture. Many people, myself included, *do*, after all, support a moral maxim allowing self-defensive torture.

It does not help matters here, by the way, to claim that at least in principle one might accept *even in the act* being killed in self-defence (thinking, with the bullet entering the heart: 'I had it coming, I accept it'). I suppose that is indeed *possible*, but it is of course also possible in the case of torture. To be sure, my definition of torture rules out that a person is tortured with her consent, but one can still *accept* things one did not *consent* to. Since most people would prefer being tortured for a few minutes to being killed, the case in which someone accepts being tortured is, all else being equal, more likely than the case in which someone accepts being killed. Besides, I can define a special kind of self-defensive killing, namely 'unaccepted self-defensive killing', which by definition only takes place when the person killed

17 La Torre, p. 34 above.

in self-defence does not accept being killed in self-defence. Then obviously the same would be true of this form of self-defensive killing that La Torre thinks is true of torture: No one who accepts that others be killed in unaccepted self-defensive killing would accept being killed by unaccepted self-defensive killing herself (if she did, it would obviously not be unaccepted self-defensive killing any more). However, unaccepted self-defensive killing (practically all actual self-defensive killing is of this kind) is certainly justified in certain circumstances. So is unaccepted self-defensive torture.

To summarize: There just is no argument that could show that torturing is always worse than killing. Thus, if killing in self-defence or defence of others or in a justifying emergency is justified, torture in self-defence and defence of others is justified too.

D. Is justifying torture bad even if torture is sometimes justified?

Some people claim that our talk about torture should be accompanied by a certain 'shyness'. What that means is that rational argumentation should only be allowed to go so far. Bielefeldt, for example, claims:

> The uncircumventability [*Unhintergehbarkeit*] of human dignity has also an emotional side. It manifests itself, for instance, in a kind of *intuitive shyness* to argumentatively engage with fictional scenarios that are aimed at undermining the unconditional respect of human dignity.[18]

He experiences this shyness with regard to one of my examples, in which a dictator confronts a prisoner with the choice to either kill one of ten prisoners or to torture one of them for two hours (all these prisoners are innocent and have no special relation to the first prisoner). If the prisoner refuses to choose and to act on his choice, all ten prisoners will be killed. He is not permitted to ask them (if he did, all ten prisoners would be killed). Of course, I argue that the prisoner is justified under these conditions in torturing one of the other prisoners.[19] Bielefeldt declares:

> The intuitive shyness to argumentatively engage such a constructed scenario has nothing to do with ingenuousness or intellectual incompetence. One might even admit that the macabre situation constructed by Steinhoff could become reality. However, to positively develop in light of such a mere eventuality a normative criteriology that is supposed to make it possible to weigh violations of dignity against one another is a monstrous undertaking; it leads us legally and ethically astray.[20]

First of all, this scenario is not one of self-defensive torture. Most of my examples, however, are, and they are precisely supposed to show that torture does *not* always violate human dignity (after all, self-defensive killing does not violate human dignity either). To not even rationally consider such examples and to simply

18 Ibid, p. 22 (my translation).
19 Steinhoff, 'Torture', p. 339.
20 Bielefeldt, 'Menschenwürde', p. 22, (my translation). .

stipulate instead that all torture violates human dignity might not attest to shyness so much as arrogance.

Secondly, this talk about the 'normative criteriology' that 'leads us legally and ethically astray' is sheer phrase-mongering. As already said, the case of the ten prisoners is not a case of self-defence. It is a case of what the German law calls justifying emergency (*rechtfertigender Notstand*) and what other jurisdictions call *necessity*. The laws of necessity *were precisely made to cover extreme situations like this one.* In fact, since the international torture conventions are arguably not applicable to private torture, torturing a prisoner in my scenario probably *is* legal under German, British and American law. But whether legal or not: necessity clauses *require and allow* the weighing of health against health, injuries against injuries, lives against lives,[21] life against health, injuries against lives, pain against lives etc. – why should the weighing become more difficult or even 'monstrous' when torture is involved? I assume Bielefeldt is too 'shy' to ask this question, let alone to answer it.

Besides, examples like the Daschner case, my Jeanette/Paolo/Bill case and the case of the prisoners not only show that torture is justified in such circumstances, they *also* show that the shyness Bielefeldt and others recommend is quite inappropriate. If the police officers in the Daschner case said 'Oh, no, no, we are too shy to even consider the possibility of torture, when in doubt it's just better if the child suffocates'; if the prisoner who could save the life of one other prisoner said 'Oh, no, no, I am too shy to even consider the possibility of torture, when in doubt it's just better if one of you dies, whether you agree with me or not'; when Paolo says 'Oh, no, no, I am too shy to even consider the possibility of torture, when in doubt it's better if we just blow up somebody', then this is not only irrational but also *immoral*. I think the ten prisoners, Bill and the suffocating child would agree. They would have little sympathy for Bielefeldt's 'shyness'.

Sometimes some absolutist opponents of torture cannot resist the temptation of morally blaming a proponent of a limited permission of torture for somehow contributing to the spread of illegitimate torture. Of course, they think that all torture is illegitimate. I don't. If I somehow contribute to the spread of self-defensive torture that helps to save innocent children from culpable kidnappers, then that would be a good thing. If absolutist torture opponents with their arguments or pseudo-arguments contribute to more children suffocating in the hands of kidnappers, then that would be a bad thing.

However, I completely agree that *nearly all* torture currently being undertaken on our planet is *immoral*. There are very few cases of defensive torture or torture justified in light of a justifying emergency. (There are also very few cases of killing

21 Weighing of life against life is, according to majority opinion, not allowed under the German justifying emergency paragraph. It is allowed under the necessity statutes of some US states. See P. D. W. Heberling, 'Justification: The Impact of the Model Penal Code on Statutory Reform' *Columbia Law Review* 75 (1975): 914-962, n. 33.

that are justified by self-defence or in light of a justifying emergency.) Thus, one criticism I have heard (and several times) is this: 'Even if you were right about self-defensive torture, by publicly justifying torture in some cases you contribute to a slippery slope, you contribute to there being more cases of illegitimate torture too.' Can that criticism stick?

First of all, let us remember that absolutist torture opponents argue against torture by appealing to the notion of rights. When, for example, they argue against a nuclear ticking bomb case, they say: 'Even if millions of lives are at stake, the terrorist has a *right* not to be tortured. This right cannot be overridden by utilitarian considerations.' Well, perhaps my right to speak my opinion can also not be overridden by utilitarian considerations. In other words, even if by speaking my opinion I contributed somehow to the spread of torture, I would still have the right to do so. To be sure, one might object that liberty of speech is not absolute (the right not to be tortured isn't, either). So it could perhaps be overridden. But, of course, if it were to be overridden, this would have to happen on grounds of *credible and substantial evidence* that my speaking my opinion indeed does cause harm on a scale large enough to override my right to free expression.

Maybe, however, the criticism does not so much want to suggest that one does not have the *right* to present arguments that justify torture under certain circumstances, but that nevertheless one *ought not* to present such arguments. After all, one can have a right to do immoral things. Having a right only means that others are not at liberty to forcibly keep you from doing what you have a right to. For example, people have a right to claim that the Holocaust never happened; however, making such a claim is still immoral. Thus, if the claim is only that I ought not to justify some forms of torture, the opponents would perhaps bear weaker burdens of proof.

They do still bear a burden of proof, though. However, in fact there is not a shred of evidence for the claim that by justifying self-defensive torture one also contributes to the spread of torture that is not self-defensive. Indeed, the claim is rather silly. *How* is this contribution supposed to work? Is some spokesperson of the US State Department supposed to quote me in support of torturing in Guantanamo? That would be counterproductive, for anti-torture groups could immediately point out that I have argued that the torture in Guantanamo is not self-defensive nor an instance of a justifying emergency, and therefore not justified; and that I have argued that the *institutionalization* of torture is wrong.[22] They could thus blame the spokesperson for manipulating and distorting things. That would hardly help his case.

I suspect that behind the charge that by justifying torture in some circumstances you also contribute to the spread of illegitimate torture is nothing more than the vague suspicion that one contributes to some kind of 'general atmosphere' in which

22 Steinhoff, 'Torture', pp. 346-351.

torture can 'thrive'.[23] This charge is more or less as intelligent and substantiated, though, as the claim – and such claims *have* been made – that by arguing for the right to sexual self-determination one contributes to a general atmosphere of sexual permissiveness in which rape will thrive. The claim is also comparable to the one – interestingly, hardly ever made – that by arguing for the right to self-defensive killing one contributes to an atmosphere in which murder thrives. There is no way of either proving or disproving such claims. Making them anyway simply amounts to the manipulative and defamatory attempt to shut people up whose arguments one doesn't like and probably cannot refute.

Finally – there *is* some evidence that morality and moral behaviour profit more from rational discussion than from censorship, prejudice and thought-restraint.

E. Conclusions and some clarifications on the scope of my argument

I have argued here that self-defensive torture is morally justified. Thus, I have argued that torture is justified in very rare and extreme circumstances, for the cases in which self-defensive torture could be applied are extremely rare. Torturing so-called terrorists to find out more about their networks is not a case of self-defensive torture. The Daschner case, on the other hand, is a case in which self-defensive torture could have been applied.

I also think – although I have not further argued here for it – that it is not in itself contradictory to legally prohibit torture while admitting that it can in certain circumstances be morally justified.[24] Yet, I do not think that all torture should be legally prohibited (and perhaps it isn't either).[25] However, there is as little need to introduce a special paragraph allowing self-defensive torture into the penal codes as there is a need to introduce a special paragraph allowing self-defensive throat-cutting. Both forms of self-defence can be easily covered by the normal self-defence regulations.

23 In this context, one observation: If thought experiments like, for example, the ticking bomb case are so dangerous and might be 'abused', then one probably should not give them a platform. However, in most pamphlets and articles of torture opponents these and other examples are always described (if not always discussed) and presented to people who probably have never heard of them before. Those torture opponents who really think that these thought experiments are dangerous can then hardly exclude the possibility that they themselves are contributing to the spread of torture by acquainting their audience with these arguments. In other words: Why, then, don't *they* shut up?

24 For a contrary opinion see R. Trapp, *Folter oder selbstverschuldete Rettungsbefragung?* (Paderborn, Mentis, 2006), Ch. IV

25 I had not quite made up my mind on this question in Steinhoff, 'Torture': see p. 346.

Finally, I am adamantly against the institutionalization of torture – and thus against training torturers or introducing the infamous torture warrants. Doing so, as I have argued elsewhere,[26] would have disastrous consequences. As history has shown, the state is not to be trusted to use torture only in self-defence cases once it becomes institutionalized. This, however, in no way undermines the argument that self-defensive torture is morally permissible.[27]

26 Ibid., *pp*. 346-351.

27 Wolfendale thinks otherwise, if I interpret her correctly: J. Wolfendale, 'Training Torturers: A Critique of the 'Ticking Bomb' Argument' *Social Theory and Practice* 32 (2006): 269-277. While I mostly subscribe to her arguments as to why the institutionalization of torture would be bad, I do not see how from that finding one could possibly derive the moral impermissibility of torture in concrete cases. A basic assumption of her argument seems to be that in the ticking bomb case a torturer can only be justified in torturing the 'terrorist' if the torturer is some kind of super-torturer – that is, highly trained and extremely capable of getting results. Apart from the fact that even if one granted this assumption, it would not provide the conclusion Wolfendale is looking for, the assumption is also wrong. After all, no one is required to be a super-shooter or super-stabber or, more generally, a super-defender in order to be justified in defending herself against an aggressor by, for example, using a knife or a gun. As I have already argued, even in cases where the defender has not much of a chance to stop an attacker by using a certain form of violence, he is still permitted to try if there are no other means left that would promise more success. Thus, self-defensive torture, too, is justified in certain cases – and not only in hypothetical, but also in real ones.