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The Moral Justification and Necessity of Torture in the Context of Suspected Terrorists

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Abstract

This essay examines the moral permissibility and necessity of using torture on suspected terrorists, particularly in the context of the "ticking bomb" scenario. The paper is divided into two parts. Part I critiques the deontological arguments against torture, highlighting the weaknesses in the absolutist stance that prohibits torture under any circumstances. It argues that in specific situations, the rights of victims justify a self-defence response, which can be executed by authorities on their behalf. Part II explores the common law doctrine of necessity, demonstrating that under certain conditions, torture is both necessary and reasonable. The essay concludes with a proposal for "torture warrants" to legalize and regulate the use of torture in specific, extreme cases, ensuring accountability and minimizing misuse.

Keywords

Torture, Moral justification, "Ticking bomb" scenario, Necessity doctrine

1. Introduction

Torture is defined under the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ("UN 1984") as an act which inflicts severe physical or mental suffering or pain on an individual for the purpose of obtaining information or confession (Note 1).

In 2017, the Trump administration openly endorsed the use of torture and confirmed the efficiency in intelligence collection (Note 2). His intention to soften the US's stance on torture has again put the ongoing academic debate over the moral and ethical legitimacy and efficiency of the practice of torture under the spotlight. On one hand, scholars like Clara Assumpção aver torture of suspected terrorists is either morally permissible or necessary (Note 3). Their position is bolstered by deontological ethics and the principle of universality of human rights. Yet, as the statement in the question rightly observes,

arguments advanced by ethical absolutists suffer from a fundamental weakness–pragmaticism. This essay takes an even further stance than the prompt maintains and argues that *under specific circumstances*, the practice of torture is not only morally justifiable but also necessary.

To illustrate this proposition, Part I will tackle the moral permissibility of the use of torture. It will unpack and scrutinise philosophical and moral arguments against the torture of suspected terrorists and identify their weaknesses. Part II will turn to the necessity of torture and will illustrate that torture of suspected terrorists can be effective under specific circumstances with reference to the common law doctrine of necessity. To narrow the scope of discussion, this essay will frame arguments in the context of the classic "ticking bomb" scenario.

2. The Ticking Bomb Dilemma: Ethical and Practical Justifications for Torture

When Courtenay and Conrad surveyed pedestrians in New York regarding the practice of torture, most individual's first reaction was an affirmative refusal to undertake in such a "gruesome act" (Note 4). However, when the very same group was presented with the iconic "ticking bomb" scenario, which is often the starting point of moral and ethical debate over the use of torture, many hesitated (Note 5).

Imagine the following context (Note 6):

> A terrorist stages an attack in your hometown. He hides a bomb carrying deadly chemical agents somewhere in the city. The police track him down and identify him as the suspected perpetrator, whereupon he confirms that the device has been set to go off. There is a very real danger that your city and all its suburbs could be destroyed by the bomb exploding in five hours. All will endure a horrifying demise. The terrorist declines to provide information on the position of the device despite being urged and pressured to do so. Instead, the terrorist requests the immediate and unconditional release of all prisoners on death row, the amount of ten million pounds, and a plane for his flight. What do you plan on doing?

In the view of moral absolutists, the prohibition of torture is absolute even in the above ticking bomb context. As Ariel Dorfman once famously puts it, "I can only pray that humanity will have the courage to say no to torture, no to torture under any circumstance whatsoever, no to torture, no matter who the enemy… no to torture no matter what kind of threat is posed to our safety" (Note 7). This stern attitude against the use of torture could be explained through deontological ethics. Kant maintains that an individual is either good or bad based on the motivation/reasons behind their behaviours, not on the goodness of the consequences of such behaviours (Note 8). Someone will have moral value if they are inspired by moral principles. In this reading, if someone acts on their impulses and wishes, the action is not morally correct, since it was not motivated by moral or ethical principles. More importantly, Kantian philosophers are unconcerned with the ramifications of decisions, but rather with their motivation. Kant asserts that if two individuals behave for the same purposes, they are still morally deserving, particularly if one of their acts results in negative outcomes (Note 9). According to Kant, an individual is only good if they perform their duties out of obligation. It is acceptable if they enjoy

themselves, however, they must want to do so even if they do not. This level of unshakable allegiance towards moral principles and ethical values is best summarised by the maxim that "one should only act which will become a universal law" (Note 10). Under this paradigm, since torture itself is an *intrinsically* wrong/evil action, no amount of good could possibly justify it. Thus, torture would never be admissible, not even in a "ticking-bomb" scenario.

A practical application of Kantian deontologism is *Gafgen v Germany* (Note 11). In this case, the European Court of Human Right ("ECtHR") upheld a breach of Article 3 (Note 12) of the European Convention of Human Rights ("ECHR") when German police officers subjected the kidnapper of an 11-year-old boy to threats of torture in an attempt to locate and rescue the victim. In reaching their decision, the Grand Chamber emphasised that Article 3 is an absolute right. There was no ground for defending any violations, which implies that they cannot be justified against the worthiness of other ends, such as the life of an 11-year-old boy (Note 13). On a point of which might appear to be pedantry, it should be noted that Grand Chamber did not adjudicate that Gafgen was tortured. Rather, they concluded he was subject to inhuman treatment.

Kantian absolutism's stance on the ticking bomb scenario suffers from fatal flaws. One major weakness is its impotence in reconciling two conflicting and competing interests. The Kantian maxim mandates persons not to commit any harm (because it is morally impermissible), but it does not give any guidance when others inflict harm first. For instance, in *Gafgen*, when the applicant kidnapped 11-year-old Jakob, Jakob's conventional rights were equally at stake and he was incapable of undertaking any defence to protect his rights. Echoing Professor Steven Greer's criticism, it is disappointing to see that Grand Chamber did not take the conventional rights and interests of the victim into proper consideration while rendering the judgment (Note 14).

One may challenge my view by suggesting that my argument only grants the victim, Jakob, a morally permissible right to self-defend and it does not justify the imposition of inhuman treatment of German police on the kidnapper. There is some truth to this critique. To counter this, *Osman v United Kingdom* (Note 15) needs to be closely examined. In this case, ECtHR confirmed that national authorities have a "positive obligation under Article 2 of the ECHR" to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual" (Note 16). Neil Graffin argues that this positive obligation is subject to two conditions (Note 17). The first is it cannot impose a disproportionate burden on authorities, and the second is that such obligation must exercise in respect of the suspects' rights under Article 5 and 8 of ECHR (Note 18). I agree with these two conditions. Indeed, it is precisely these two limitations that equally prevent the national authorities from abusing the practice of torture, which many Kantian absolutists are concerned about. This will be discussed in further detail in Part II. Unlike *Osman*, in which the murder could not have been predicted with sufficient certainty, in the case of *Gafgen*, the risk was much more imminent. Accordingly, it is puzzling why such a positive obligation is not engaged in the judgment to protect the rights of Jakob.

In addition to the conflicting convention rights, the inequality of each side enduring suffering as a

consequence of their rights having been abused is often not addressed under Kantian justification against torture. As Mavronicola puts it, Gafgen infringed on Jakob's interests even more seriously than the police did to Gafgen. Jakob would have faced a horrific nightmare spanning days if he had not been killed nearly immediately after being kidnapped. His ordeal would have been made much worse by the reality that he was an 11-year-old boy estranged from his parents. Gafgen's ordeal, on the other hand, lasted just ten minutes of "considerable anxiety, agony, and emotional pain", according to the Grand Chamber (Note 19). If the aim of Article 3 is to prevent human suffering caused by anyone for which the state may be held liable, given that if this was the only viable means of rescuing Jakob, it is argued that the positive obligation on the police to use force to extract information from Gafgen is morally permissible and necessary, since Gafgen is subject to a far less serious violation of his Article 3 rights than Jakob.

Another major moral claim against the practice of torture is the slippery slope argument. Green-Sanders argues that granting some level of justification to inhuman treatment or torture to suspected terrorists, including in life-or-death scenarios like the "ticking-bomb" scenario, starts a risky chain of events that might lead to torture being a normality (Note 20). In addition, in the real world, Green-Sanders maintains that there is no way to be certain that the suspect or detainee is the correct penetrator, that they possess all the knowledge, or that they will supply the details under the threat of torture (Note 21). This danger is unacceptable since causing discomfort or distress on others for the sake of obtaining information is not morally justified, particularly in established democracies. In *Gafgen*, the Grand Chamber also expressed the same concern and admitted part of the rationale behind the judgment is to prevent any potential "ill-treatment in future difficult situations" (Note 22). Yet, Bagaric and Clarke make a powerful point that a legal standard for torture would not slip if the practice of torture were rigidly legalised (Note 23). One piece of evidence in support of this is capital punishment. Donohue's model which analysed all existing death penalty cases confirmed that the legal standard for capital punishment does not seem to have slipped after capital punishment was formally legalised (Note 24).

In one version of the slippery slope argument, Jeremy Waldron interestingly characterises the blanket ban on torture as a "legal archetype" (Note 25), which can be understood as a baseline or bottom line in a legal system. In Waldron's words, torture "sums up or makes vivid to us the point, purpose, principle or policy of a whole area of law" (Note 26). Waldron demonstrates that landmark judicial decisions against less severe and harmful examples of police brutality were rendered, using torture as a baseline. The analogy of torture was used to justify the rejection of other forms of brutality. For example, in *Rochin v California* (Note 27), the Supreme Court made a comparison between "forcing a piece of information out of a suspect's body" and "forcing a substance from his body". It follows that if the former is strictly prohibited, the latter should have the same treatment in law. In this sense, the judgment would not be possible if torture were to become legalised and validated, since a punishment's resemblance to a normal legal practice could hardly be used to justify another. Waldron maintains that

"the premise is that our trust in what occurs at the bottom of the slope which is the practice of torture informs and encourages our confidence in the lesser evils that lay beyond torture as well". As a result, dismantling the archetype of torture prohibition contradicts the prohibition of lesser types of violence. The whole series of anti-brutality injunctions would fall apart, and the justice system's character would be tainted.

Moreover, Waldron contends that what makes such a brutalization of the justice framework particularly terrifying is that it often involves the brutalization of the enforcer—who, in contemporary democracies, is essentially the state. It is one thing to give a person the legal justification to torture another individual in a particular circumstance. However, allowing the state to constitutionally institutionalise torture in some cases is something entirely new. The more the practise of punishment spreads, the further it undermines the prohibition's archetypical character. The more this occurs, the more the practise spreads. It is not only a slippery slope but also one that becomes increasingly steeper as it descends.

Waldron's craft of argument is intriguing. However, by focusing solely on the relationship between incidents of police brutality and the practice of torture, Waldron exaggerates the role torture played in such cases and overlooks the intention behind police violence, which has most proven to be motivated by racial bias/discrimination (Note 28). The nature of the use of torture among suspected terrorists is very different. Two ethical approaches explain the nature of such practice. Firstly, according to the realist approach, which follows from Hobbesian thought, the ticking bomb scenario is the defence of the nation's interest (e.g., protection of community). It permits a person to do anything for the good of his country, the national interest is subject to the nation. Thus, torture would be morally justified if it was used to promote the state's well-being. The realist perspective, with its emphasis on national interest and patriotism, would enthusiastically embrace the use of torture not only in "ticking bomb" scenario but also in self-defence situations. On the other hand, the consequentialist approach maintains that actions are judged by their consequences and that the overarching goal should be to generate a "global good". Thus, if the use of torture is justified on the basis of the benefits derived from it, torture is also equally ethically justifiable.

The final criticism of the claim against torture falls upon the idea of practicality. Steinhoff gives an extreme example of the human race versus aliens. He invites us to consider—if one has the choice between killing a maniac (Let us say Idi Amin) or the minority group (namely us) for an hour, he/she would want to bless the creation of such a situation that character inhumanely harmfulness on the minority group (He has postulated, so far, an alien or one) and whether they'd even consider going against it if one hour were granted to do that when you think about it. Alternatively, what if it is decided that humanity as a whole must be tortured in order to obtain information or only one particular group of people are punished in order to protect one person? Fruits and vegetables count, too, if the consequences of their neglect could be considered catastrophic. The rules cannot be simply avoided by serving no function for the sake of the "absolute good", especially if there are no justifications for doing so. Legality exists in justice, as well as in ease; the letter of the law as well as in wealth.

Part I scrutinises the deontological claim that torture is categorically wrong under any circumstances because of its intrinsic affront to human decency and dignity. As demonstrated above, the deontological prohibition of torture presents a few ethical flaws. The first is its failure to reconcile and balance all parties' competing interests and Convention rights and the second is the slippery slope argument itself is displaced and unconvincing in the "ticking bomb" scenario.

3. The Doctrine of Necessity: Utilitarian Perspectives on Torture in Extreme Scenarios

There is a common fear shared by advocates of human rights that once the right of the individual not to be subjected to torture is derogated, even just slightly, the practice will be abused and exploited. Part II will focus on this very specific concern and make reference to the common law doctrine of necessity as a standard to assess the necessity of practice of torture in the "ticking bomb" scenario.

The doctrine of necessity is deeply embedded with the principle of utilitarianism, which inevitably involves weighing "choices of evil". The doctrine holds that certain conduct or in our context use of torture is permissible and acceptable because it prevents a greater evil and thereby results in a net social advantage or profit to society (Note 29). In comparison to inflexibilities presented in deontological claims, Andrew Ashworth suggests, the necessity doctrine is a compromise of human vulnerability in the face of immense pressure, in which the accused violates the law rather than resulting in greater harm if he did not violate the law (Note 30). The defence of necessity has long been recognised as a common-law doctrine and subject of controversy in both English and American courts.

3.1 An Assessment

A comprehensive five-prong test devised by John Cohan is applied here to analyse the "ticking bomb" scenario (Note 31). It is said that the practice can be justified by the doctrine of necessity and becomes necessary if the defendant can prove that:

(1)He had to choose between two evils and selected the lesser of the two.

(2)He took measures to prevent imminent harm.

(3)He had a reasonable expectation of a causal link between his actions and the damage to be prevented.

(4)There were no other alternatives but to break the rule.

(5)In the first place, the defendant's actions are not irresponsible and negligent.

Limb one is comprehensively covered in Part I. The following will focus on the rest of the elements.

On (2), imminence denotes the danger's immediacy, but how real must the threat be in order for it to be "imminent" enough to warrant torture? What if the ticking bomb goes off in a month, rather than a day or two? Or how about a week? The criterion of imminence usually ensures that the threatened damage is temporally quite close to the present moment. Torture "ought not to be utilised but in cases which admit of little delay; in cases in which if the thing done were not done instantly there is a likelihood, at least a great possibility, that the doing it will not answer the purpose", Bentham says (Note 32). If the danger is not immediate, there is always scope to use conventional law enforcement techniques and all

legitimate ways to find the relevant information. The matter of imminence, on the other hand, must be interpreted in terms of the gravity of the harm to be avoided. The danger could be days away if the gravity of the threat is immense, such as a ticking nuclear bomb that might destroy tens of thousands of civilians, but the gravity of the hazard may warrant drastic action now. On this topic, a study by an Israeli national commission known as the Landau Commission Report concluded that using torture to reveal the position of a device, if it is due to blow in five minutes or five days, could be justified (Note 33).

On (3), the intervention taken must be fairly determined to be causally successful in averting the greater evil under this factor. Bentham put the causal nexus aspect this way: "Torture is not to be used except on circumstances when pause is not possible, but only in situations where the value provided by doing the thing required is such as to justify the use of such a drastic remedy" (Note 34). Torture's usefulness under the need theory cannot be maintained where there is a remote chance of accomplishment and less invasive; permissible forensic tactics are usable.

This aspect takes into account whether the suspect has the ability to supply the requested details. To some point, this overlaps with the lesser-of-two-evils factor, as this essay argues that when deciding if torture is the lesser evil, officials should weigh the degree of confidence that the suspect has the requisite evidence. If the perpetrator admits to planting the bomb but declines to reveal its position, there seems to be a strong degree of confidence that the suspect has the ability to reveal the necessary facts. However, if authorities have just a theory and no evidence to back that up, we're in a whole different position. In this regard, Bentham argues that there seem to be two cases in which torture may be used appropriately (Note 35). The first is where the thing that a man is asked to do is something that the society is interested in his performing or something that he has a guarantee in being able to do (Note 36). Therefore, he is certain not to be innocent as long as he continues to struggle for not doing. The second is when a man is required to do anything that is perhaps, though not certainly, beyond his power to do; and through which he may suffer, even though he is innocent; but which the public has such a strong interest in him doing that the danger of what might result from his failure to do so is greater than the danger of an innocent person suffering the greatest degree of pain (Note 37). Bentham went on to state that torture cannot be used until there is good evidence that the inmate has the will to perform what is asked of him.

A related point to make regarding the causal nexus factor is the effectiveness of torture. According to Sanford Levinson, torture would never be required because "we have no idea how effective torture is as a method of extracting intelligence" (Note 38). Although it is true that there are fundamental difficulties in evaluating the efficacy of coercive interrogation, we cannot say that we have "no idea" how reliable it is. According to the Washington Post, Philippine officials tortured a jihadist into sharing intelligence that may have prevented attempts to kill the Pope, smash eleven passenger aeroplanes into the Pacific Ocean, and fly a private Cessna loaded with explosives into the CIA headquarters in 1995 (Note 39). Intelligence officers pounded the suspect "with a chair and a long piece of wood (breaking

much of his ribs), pushed water into his mouth, and mashed lighted cigarettes into his private parts" for sixty-seven days. They handed him over to American authorities after effectively completing this operation, along with the life-saving knowledge they had extracted from him. Following Osama bin Laden's death, CIA officials said that vital intelligence obtained by waterboarding aided in the capture of the world's most wanted jihadist (Note 40). It is hard to escape the daunting philosophical problem of deciding between evils while ignoring the scientific fact that torture operates sometimes, if not always. No crime-prevention strategy is guaranteed to be successful.

On (4), a demonstration that there is no fair legal solution to averting the greater evil is needed. If time allows, some fair solutions to torture will need to be used in order for torture to pass muster under the necessity theory. The legal way-out component is linked to the imminence factor, which means that if the emergency situation is actually urgent, there will be little opportunity to consider legal options. If the threat is not immediate, Bentham recommends that "a form of compulsion that seems less serious, and therefore, less unpopular can be used in preference". Obviously, if the threat to be averted is so immediate that there is little time to consider less invasive tactics, interrogators can decide if torture is the only rational way of averting the greater evil under the circumstances (Note 41).

Other options, such as bribery, other bonuses, or psychological tactics, may be discussed. The less traumatic option of injecting the prisoner with "truth serum" may be seen by interrogators (Note 42). The usage of truth serum or other mind-altering drugs may be legal in the United States unless the drug causes "prolonged psychiatric damage" (Note 43). In either case, "a large percentage of participants maintain the capacity to dissemble when under the control of truth serum", and certain drugs cannot guarantee the quality of the data collected (Note 44). Others contend that while medications make criminals chatty, there is more proof that they are merely "chirruping on" rather than speaking the facts, and that there is a shortage of scientific evidence of the authenticity of admissions elicited under so-called truth serum (Note 45). Truth serum, on the other hand, is less painful and, according to the United States' view of the United Nations Convention, is a legal procedure. "When the stakes are sufficiently large, and all techniques have failed, even a reasonably small risk of finding valuable intelligence might very well be considered as adequate to warrant the usage of such interrogation methods," such as truth serum, says Mary Lowth's study (Note 46).

The Fifth Amendment right against self-incrimination, according to Dershowitz, does not preclude the usage of truth serum or even coercion if a defendant is granted protection from indictment (Note 47). As a result, if using truth serum to interrogate a prisoner would not breach substantive fair process protections, it may be a legitimate solution to abuse. In comparison to simple, physical torture, the testimony cannot be used in prosecution, however; the suspect's human rights may not be deemed abused. It may be because truth serum injections are minimally painful, have virtually no discomfort or negative side effects, and simply reduce a person's inhibitions. If this rational legal option fails to yield the desired details, the interrogation may have no choice but to resort to torture.

On the (5), many attackers believe they have "clean hands", that is, that they are not to blame for the situation that has prompted them to target us (Note 48). They feel they are completely innocent of any crime and that the bad to be avoided is entirely external to them, such as fascism, colonialism, and the introduction of Western ideals. Terrorists may believe that they are facing a severe type of discrimination or persecution by a strong political adversary, that an act of terrorism is the only way to avoid the damage, and that the act is, on average, the lesser evil (Note 49). Furthermore, there is no such thing as an "innocent victim" in the hostile community for a criminal, but people and all "innocent" objectives are fair game for the offending country (Note 50). The targets are not completely innocent in the eyes of the terrorists, but collectively guilty of their government's policies. Terrorists may conclude that they were not the original aggressors, but that the enemy government's imperialism is illegal brutality and aggression toward their fundamental rights, and that terrorist action is the only logical way to combat the infringing government and end dictatorship.

Terrorists, according to R.M. Hare, "function on behalf of an impoverished segment of the society that has no other way of achieving redress of its just grievances" (Note 51). Such people would say that in a similar situation, they will be willing to make someone do the same to them. However, as Hare points out, the issue is what constitutes, "just complaints" (Note 52). It would be appropriate to demonstrate that there were no other viable options for resolving complaints. Terrorists, on the other side, entirely comply with the clean hands requirement—they have clean hands, and therefore, are not the root of the bad they aim to kill.

Even where serious situations arise, the different features of the need for protection render it exceedingly impossible for officials to explain or excuse the usage of torture. It isn't to say that in a ticking time bomb case, officials would not use torture. Nonetheless, the universal agreement that torture is unethical seems to have been conventional international law. As a result, it will extend to all state entities, with "necessity" serving as neither a rationale nor an excuse for violating it. In the end, states will pursue whatever measure they find appropriate in the face of exigent situations that will otherwise go unnoticed.

3.2 Application of the Doctrine of Necessity-Torture Warrants

A more concrete application of the doctrine of necessity is torture warrants. According to Dershowitz, "torture warrants" may be introduced, a process that will involve prosecutors to submit an application and, if sufficient cause is shown, a judge to sanction the procedure (Note 53). In a similar way, Floyd Abrams and Harvey Silverglate have also said that they would support the usage of nonlethal punishment if it could save thousands of lives, but they do not want torture to be accepted by our legal system (Note 54). The strategy taken by Abrams clashes with the third critical democratic value: transparent governance and transparency. Off-the-books, under-the-radar activities are incompatible with democratic philosophy and practise. Citizens cannot support or disapprove of government activities they do not know about. Off-the-books behaviour has been seen to have disastrous effects in the past (Note 55). Totalitarian and totalitarian governments do not face this conflict because they do

not adhere to civil libertarian or democratic ideals that are at odds with the importance of stability. We jeopardise our people's protection and welfare if we should not torture them. We sacrifice public transparency standards if we allow torture but leave it off the record and under the radar. We abandon our principled resistance to torture under all situations if we establish a legislative framework for restricting and monitoring torture. We, therefore, create a highly volatile and expandable scenario.

The request for a torture warrant aims to restrict the usage of torture to the lowest level and degree possible while still establishing collective responsibility for its occasional occurrences (Note 56). It is not a concession for civil liberty; rather, it is an attempt to maximise civil liberties in the face of the real possibility that torture occurs and may continue to occur outside of the reach of accountability (Note 57). And if judges seldom refuse requests, requiring the action to be accepted by a judicial officer would result in fewer cases of torture.

4. Conclusion: Torture—Moral and Can Be Necessary

Part I established that torture is not necessarily morally impermissible in the ticking-bomb scenario. To advance this proposition, this essay first identifies weaknesses of arguments driven by Kantian deontologism and concludes that since torture infringes victims' rights and interests in the first place, victims shall be granted a self-defence right to defend their interests being damaged. Additionally, the authority could exercise this self-defence on behalf of the victim if victims are incapable of protecting themselves from the infringement. Part II illustrates that that the long-recognised common law doctrine of necessity is used to demonstrate that if all certain conditions are met, torture in the ticking-bomb scenario is necessary and reasonable. The essay ends with a torture warrant as a reform recommendation to legalise and formalise the use of torture in specific circumstances.

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Notes

Note 1. Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

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Note 8. Peter Brian Barry, The Kantian Case Against Torture (2015) 90 Philosophy, 595.

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Note 12. Art. 3 European Convention on Human Rights provides as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

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