

### 3. Was John Walker Lindh a Victim of Torture?

By: William J. Aceves\*

#### I. Introduction

On July 15, 2002, John Walker Lindh, the “American Taliban,” made a brief appearance in federal district court for the Eastern District of Virginia. At the hearing, Lindh pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony. He was subsequently sentenced to 20 years in prison.

As part of his plea agreement, Lindh accepted several conditions. He agreed to cooperate with the United States in any subsequent investigations. He accepted future designation as an unlawful enemy combatant if he violated certain provisions of federal law. He assigned to the United States any future profits that he may receive in connection with the publication of information relating to his activities in Afghanistan. Lindh also acknowledged that he was not intentionally mistreated by the U.S. military during his detention. According to the terms of the plea agreement, “[t]he defendant agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn.” Plea Agreement, *United States v. Lindh*, Criminal No. 02-37A, (July 15, 2002).

This statement, however, contradicts allegations made by Lindh in earlier court documents. In several submissions, Lindh had alleged that he was subject to coercion by U.S. military personnel in Afghanistan. These

coercive techniques included: “incommunicado detention; food, sleep, and sensory deprivation; denial of a timely presentment before a magistrate; denial of clothing and proper medical care; humiliation; and failure to inform Mr. Lindh of his rights, to name just a few.” Defendant’s Memorandum of Points and Authorities in Support of Motion to Suppress Involuntary Statements, *United States v. Lindh*, Crim. No. 02-37-A, (Jun 17, 2002), at 1. Indeed, these assertions formed the basis for one of Lindh’s principal defenses: any statements acquired from him through coercion must be suppressed.

Was John Walker Lindh a victim of torture or cruel, inhuman or degrading treatment? The conclusory statements in his plea agreement denying mistreatment are in conflict with the detailed nature of his earlier assertions. If the factual allegations set forth in Lindh’s earlier submissions are true, a compelling case can be made that Lindh was subject to cruel, inhuman or degrading treatment. Indeed, a plausible argument can be made that Lindh was subjected to torture.

#### II. The Case of John Walker Lindh

In June 2001, John Walker Lindh entered Afghanistan to assist the Taliban government in suppressing the Northern Alliance.<sup>1</sup> After receiving military training, Lindh was sent to the front lines of the conflict in northeastern Afghanistan. He was serving the Taliban regime in this capacity when the attacks of September 11, 2001 occurred. After September 11th, Lindh continued to fight on behalf of the Taliban against the Northern Alliance.

On approximately November 24, 2001, Lindh surrendered to Northern Alliance troops under the command of General Abdul Rashid Dostum. At the time of his surrender, Lindh was ill and weak from shock, exhaustion, dehydration, and hunger. He was detained at Qala-i Janghi, a military complex near Mazar-e

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\* William J. Aceves is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. He is a Board member of the ACLU of San Diego and Imperial Counties.

Sharif. On or about November 25, 2001, Lindh was seated on the ground level of the fort when a large explosion occurred nearby. As Lindh attempted to flee, he was shot in the leg and collapsed. Lindh remained on the ground for several hours as gunfire and explosions continued in the fort. By nightfall, the fighting had subsided. With the assistance of several prisoners, Lindh was moved to the basement of the fort, where he would remain for approximately seven days.

During his stay in the basement, Lindh and the other prisoners were subject to repeated attacks. His captors threw hand grenades through the ventilation ducts in the basement, killing several prisoners. They also fired rocket-propelled grenades into the basement. Lindh suffered several shrapnel wounds as a result of these attacks. On approximately the fourth day of Lindh's captivity, fuel oil was poured into the basement and ignited, burning many prisoners. On approximately the fifth day, the basement was flooded with water, drowning several prisoners. Countless prisoners were killed indiscriminately throughout this seven-day period.

On December 1, 2001, Lindh emerged from the basement, where he was immediately detained by Northern Alliance soldiers. He was then transported with other prisoners to Sheberghan, where there was a hospital and prison. U.S. military personnel were located at this facility. Eventually, Lindh was identified as a U.S. national and given medical assistance by U.S. military personnel. According to a U.S. medic that treated him, Lindh had "sustained an apparent gunshot wound in the left leg, was malnourished and in extremely poor overall condition." A U.S. Special Forces officer noted that "Lindh appeared to be suffering from hypothermia, and exposure, and acted delirious." Although Lindh received medical treatment, the bullet was not removed from his leg so that it could be later used as evidence in any criminal proceedings. While he was receiving medical treatment, U.S. military

personnel interrogated Lindh. Afterward, he was transported to a nearby compound, where he was again interrogated.

On the following day, Lindh was bound, hooded, and taken to the Turkish School House at Mazar-e Sharif, where he was kept bound and blindfolded. During this detention, Lindh remained malnourished and dehydrated. He was provided with minimal food and medical assistance. His requests for additional food and medical attention were denied. On several occasions, he was subjected to derogatory remarks by U.S. military personnel. During this detention, U.S. government agents interrogated Lindh. They never informed him of his right to legal counsel. Indeed, his requests for counsel were denied. Despite his injuries, Lindh cooperated with his interrogators. After these interrogations were concluded, Lindh was provided more food.

On December 7, 2001, U.S. military personnel entered Lindh's room and took photographs of him while he was bound and blindfolded. They also made derogatory and threatening statements. Lindh was then transported by aircraft to Camp Rhino, a U.S. Marine installation located 70 miles from Kandahar, Afghanistan. During the transport, he remained blindfolded and handcuffed. The plastic straps used to bind his hands cut into his skin and cut off circulation to his hands. As a result, his wrists remained scarred and numb for several months.

Upon arrival at Camp Rhino, Lindh was stripped naked and bound to a stretcher "with heavy duct tape wrapped tightly around his chest, upper arms, ankles and the stretcher itself." He remained blindfolded. He was then placed in a metal storage container with no windows, minimal ventilation, and no heat source. He was provided with minimal food and little medical attention. Guards shouted epithets at him through the ventilation holes in the container. Throughout his detention, "Mr. Lindh's hands and feet remained cuffed such that his forearms were forced together and fully

extended, pointing straight down toward his feet.” Eventually, a blanket was placed over his body, which had remained naked and fully exposed until then. When Lindh needed to urinate, his stretcher was propped up into a vertical position. During this detention, Lindh experienced pain from his untreated injuries. Due to his injuries, hunger, and exposure, Lindh was unable to sleep. He remained under these conditions for two days.

On December 9, 2001, Lindh was dressed in a hospital gown and taken from the storage container while blindfolded and handcuffed. He was taken to a tent, placed on a cot, and his blindfold was removed. A person who identified himself as an FBI agent began interrogating him. Despite his request, Lindh was not provided a lawyer. Furthermore, he was not informed that his family had already contacted a lawyer to represent him. The interrogation continued despite Lindh’s physical injuries and mental trauma. After this interrogation, Lindh’s treatment improved. His restraints were loosened, and the duct tape was removed from his body. He was provided with more food and an additional blanket.

On approximately December 14, 2001, Lindh was transferred to the U.S.S. Peleliu, which was located in the Indian Ocean. “Government disclosures indicate that Mr. Lindh was suffering from dehydration, mild hypothermia and frostbite and could not walk when he arrived on board . . . .” While onboard, he was provided with medical assistance and received surgery for his wounds. On January 6, 2002, Lindh was allowed to receive written communications from his parents and the lawyers retained to represent him. Lindh remained on the Peleliu until he was transferred to the United States on January 23, 2002.

### **III. Torture and Cruel, Inhuman or Degrading Treatment Are Violations of International Law**

The prohibitions against torture and other cruel, inhuman or degrading treatment have long been recognized in international law. *See, e.g.*, Universal Declaration of Human Rights (Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). According to the authoritative *Restatement (Third) of the Foreign Relations Law of the United States* (“*Restatement (Third)*”) § 702(d), “[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment . . . .”

#### **A. Torture is a Violation of International Law**

The prohibition against torture is recognized in all major international human rights instruments. *See, e.g.*, International Covenant on Civil and Political Rights (“ICCPR”) (Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). The most extensive definition of torture appears in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”). Article 1 defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

acquiescence of a public official or other person acting in an official capacity.”

The U.N. Human Rights Committee, which was established to monitor compliance with the ICCPR, has clarified the nature of the prohibition against torture in several statements. In General Comment No. 20, the Committee indicated that the prohibition against torture is designed to “protect both the dignity and the physical and mental integrity of the individual.” Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 2. The determination of whether torture has occurred requires an assessment of all the circumstances of the case, “such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.” *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 249, 256 (1989). Thus, subjective factors can aggravate the effect of certain treatment. The Human Rights Committee has identified numerous acts that constitute torture.<sup>2</sup> *See, e.g., Cariboni v. Uruguay*, Communication No. 159/1983 (abducting petitioner, keeping him hooded, bound, and seated for extended periods of time, providing him with minimal food, and subjecting him to hallucinogenic substances and psychological abuse constitutes torture); *Herrera Rubio v. Colombia*, Communication No. 161/1983 (beating and near drowning, hanging the detainee by his arms, and threatening his family members constitutes torture); *Muteba v. Zaire*, Communication No. 124/1982 (beatings, mock executions, electric shocks, deprivation of food, and incommunicado detention constitutes torture); *Estrella v. Uruguay*, Communication No. 74/1980 (abducting petitioner from his home, blindfolding him, and threatening him with amputation of his hands constitutes torture).

The U.N. Special Rapporteur on Torture, established by the U.N. Commission on Human Rights, has issued many statements on torture. For example, the Special Rapporteur

has indicated that the prohibition against torture “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, such as intimidation and other forms of threats.” Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/56/156 (2001), at para. 3. Accordingly, threats to the physical integrity of the victim “can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials.” *Id.*, para. 8. In his most recent report to the U.N. General Assembly, the Special Rapporteur expressed deep concern about the use of torture in response to terrorism, and he reiterated that international law prohibits any derogation from the prohibition against torture, even in time of war. Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173 (2002), at para. 24.

Regional agreements also prohibit torture. For example, the American Convention on Human Rights (“American Convention”) provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” The Inter-American Court of Human Rights, which reviews state compliance with the American Convention, has noted that Article 5 prohibits torture “and that all persons deprived of their liberty should be treated with respect for the inherent dignity of the human person.”<sup>3</sup> The Inter-American Commission on Human Rights, which also monitors compliance with the American Convention, has made similar findings. *See, e.g., Case 10.574 (El Salvador)* (applying electrical shocks to detainee, burning him with cigarettes, beating him, and putting a hood over his head constitutes torture).

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) provides that “[n]o one shall be

subjected to torture or to inhuman or degrading treatment or punishment.” The European Court of Human Rights, which reviews compliance with the European Convention, has indicated that the prohibition against torture is one of the most fundamental values of a democratic society and is, therefore, non-derogable. As the European Court noted in *Selmouni v. France*, “[e]ven in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” *Selmouni v. France*, 29 E.H.R.R. 403, 440 (1999). In *Selmouni v. France*, the European Court held that severe and repeated police beatings that left marks on the body of a detainee constitute torture. *Id.* at 442-443. See also *Aydin v. Turkey* (1997) (blindfolding, beating, and raping a detainee constitutes torture); *Aksoy v. Turkey* (1997) (stripping detainee with arms tied behind his back and suspending him by the arms constitutes torture).

Finally, the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” The African Commission on Human and Peoples’ Rights, which was established to monitor compliance with the African Charter, has found various actions to constitute torture. See, e.g., *Amnesty International et al. v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (2000) (placing detainees in small cells, soaking them with cold water, and subjecting them to mock executions constitutes torture).

### **B. Cruel, Inhuman or Degrading Treatment is a Violation of International Law**

The prohibition against cruel, inhuman or degrading treatment is also recognized in all

major international human rights instruments. See, e.g., International Covenant on Civil and Political Rights (Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”). The Convention Against Torture prohibits cruel, inhuman or degrading treatment although its definition is limited in scope. Article 16(1) provides that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The U.N. Human Rights Committee has affirmed the prohibition against cruel, inhuman or degrading treatment on numerous occasions. See, e.g., *Tshishimbi v. Zaire*, Communication No. 542/1993 (abducting petitioner and placing him in incommunicado detention constitutes cruel and inhuman treatment); *Mukong v. Cameroon*, Communication No. 458/1991 (placing petitioner in incommunicado detention, depriving him of food, and threatening him with torture and death constitutes cruel, inhuman and degrading treatment).

The prohibition against cruel, inhuman or degrading treatment is also recognized in all the regional instruments. For example, Article 5 of the American Convention on Human Rights provides that “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” The Inter-American Commission on Human Rights has found several acts to constitute cruel, inhuman or degrading treatment. See, e.g., *McKenzie v. Jamaica*, Case No. 12.023 (2000) (keeping prisoners in overcrowded conditions for 23 hours a day with inadequate sanitation, poor lighting and ventilation constitutes cruel, inhuman and degrading treatment); *Valladares v. Ecuador*, Case No. 11.778 (1998) (holding petitioner incommunicado for more than 22 days

constitutes cruel, inhuman or degrading treatment); *Congo v. Ecuador*, Case No. 11.427 (1998) (holding detainee in a small isolated cell constitutes inhuman and degrading treatment).

The European Convention for the Protection of Human Rights and Fundamental Freedoms also prohibits inhuman or degrading treatment. Article 3 provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>4</sup> The European Court of Human Rights has recognized that determinations of whether torture or other inhuman or degrading treatment have occurred depend on the unique circumstances of the case and the status of the individual victim. *See, e.g.*, *Tyrer Case*, 2 E.H.R.R. 1 (1978). According to the Court, the distinction between torture and inhuman or degrading treatment derives principally from differences in the intensity of the suffering inflicted. *Ireland v. United Kingdom*, 2 E.H.R.R. 25, 80 (1979). Thus, torture constitutes deliberate treatment that causes suffering of particular cruelty and intensity.<sup>5</sup> The European Court has found various acts to constitute inhuman or degrading treatment. *See, e.g.*, *Tekin v. Turkey* (2001) (blindfolding a prisoner, threatening him with death, providing no bed or blankets, denying food and liquids, stripping him naked and hosing him with cold water, and beating him with a truncheon constitutes inhuman and degrading treatment); *Ribitsch v. Austria* (1996) (beatings and abuse administered by police constitutes inhuman and degrading treatment); *Ireland v. United Kingdom* (1979) (use of five interrogation techniques consisting of wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and water constitutes inhuman and degrading treatment).

Finally, Article 5 of the African Charter on Human and Peoples’ Rights provides that “[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and

treatment shall be prohibited.” The African Commission on Human and Peoples’ Rights has found various actions to constitute cruel, inhuman or degrading treatment. *See, e.g.*, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98 (2000) (chaining detainee to the floor while in solitary confinement constitutes cruel, inhuman or degrading treatment); *Huri-Laws v. Nigeria*, Comm. No. 225/98 (2000) (detaining petitioner in a dirty cell without charge and without access to medical attention constitutes cruel, inhuman or degrading treatment).

In sum, international law prohibits both torture and cruel, inhuman or degrading treatment. A review of international practice affirms the universal, definable, and obligatory nature of these fundamental norms. Indeed, the prohibitions against torture and cruel, inhuman or degrading treatment are so embedded in the pantheon of international law that they have been found to be *jus cogens* norms – non-derogable obligations that bind all states.<sup>6</sup> It is not surprising, therefore, that the United States has accepted the prohibitions against torture and other cruel, inhuman or degrading treatment through its ratification of the International Covenant on Civil and Political Rights and the Convention against Torture as well as through its signature of the American Convention on Human Rights. The United States has also recognized these prohibitions in countless executive, legislative, and judicial pronouncements.<sup>7</sup>

#### **IV. Was John Walker Lindh a Victim of Torture and Cruel, Inhuman or Degrading Treatment?**

Torture and cruel, inhuman or degrading treatment are closely related. The difference between these two violations of international law can be measured by the severity of the act and the degree of suffering. “Degrading treatment” is an act that tends to humiliate the victim; “inhuman treatment” is the deliberate infliction of severe mental or

physical suffering.<sup>8</sup> Torture constitutes the most aggravated form of severe mental or physical suffering. “So, for torture to occur, a scale of criteria has to be climbed. First, the behavior must be degrading treatment; second, it must be inhuman treatment; and third, it must be an aggravated form of inhuman treatment, inflicted for certain purposes.”<sup>9</sup> Thus, torture requires purpose – it is inflicted to threaten, coerce, or punish; cruel, inhuman or degrading treatment has no comparable *mens rea* requirement. In sum, determinations of whether torture or cruel, inhuman or degrading treatment have occurred require an assessment of all the circumstances in the case, including the form and duration of mistreatment, the level of suffering, the physical and mental status of the victim, and the objective of the perpetrator.

As a preliminary matter, Lindh’s physical and mental condition prior to capture provides an indispensable context for considering his treatment after capture. During his detention by the Northern Alliance, Lindh was subjected to numerous attempts on his life and witnessed the death of many other prisoners. He was shot and wounded. Shrapnel and a bullet were embedded in his body. In addition, Lindh suffered from severe battlefield trauma, hypothermia, and malnutrition.

Once Lindh was detained by U.S. military personnel, his treatment caused further deterioration to his physical and mental condition. He was stripped naked, blindfolded, and taped to a stretcher. He was held in a storage container with minimal ventilation and no heat source. Despite his wounds, Lindh received limited medical attention. The bullet was left in his body – not for medical reasons – but so that it could be used as evidence in criminal proceedings. On several occasions, Lindh was subjected to death threats and intimidation. Lindh’s treatment apparently improved *after* he was interrogated. Throughout his detention in Afghanistan, Lindh was not provided legal assistance or contact with judicial authorities.

Treatment of this nature has been found to constitute cruel, inhuman or degrading treatment. In *Ireland v. United Kingdom*, for example, the European Court of Human Rights was asked to consider whether the use of five interrogation techniques constituted torture and inhuman or degrading treatment. The five techniques consisted of the following: (a) wall-standing; (b) hooding; (c) subjection to noise; (d) sleep deprivation; and (e) deprivation of food and water. According to the Court, “[t]he five techniques were applied in combination, with premeditation for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.” *Ireland v. United Kingdom*, 2 E.H.R.R. at 79-80. Based on these findings, the European Court concluded that these interrogation techniques constituted inhuman treatment. They were also “degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” *Id.* at 80.

While the European Court did not find the requisite intensity and cruelty in the techniques to give rise to a torture claim in *Ireland v. United Kingdom*, the Lindh case is quite different. For example, Lindh’s physical and mental condition was already severely weakened when he was captured by U.S. military personnel.<sup>10</sup> He was wounded and malnourished. He was then immobilized and subjected to sensory deprivation. Lindh was also subjected to death threats during his detention. Apart from these factual distinctions, the European Court’s 1978 opinion in *Ireland v. United Kingdom* must be read in historical context. As noted by the European Court in *Selmouni v. France*, 29 E.H.R.R. at 442., the definitions of torture and inhuman or degrading treatment set forth in its case law must be interpreted in light of present-day conditions.

[T]he Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in [the] future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

For these reasons, a compelling case can be made that Lindh was subject to cruel, inhuman or degrading treatment.<sup>11</sup> The case law strongly supports this finding. And yet, a plausible finding of torture can also be made. On this claim, several factors require further investigation. Was Lindh’s physical treatment affected by his cooperation during the interrogations? Was Lindh’s medical treatment guided by non-medical considerations? What was the nature and scope of the harassment and threats made toward Lindh? What was Lindh’s mental condition throughout his detention?

While there is a distinction between torture and cruel, inhuman or degrading treatment, no justification exists for either act. They are both firmly prohibited by international law.

## V. Conclusion

Despite the plea agreement denying mistreatment, the United States Government has an obligation to investigate the allegations made by John Walker Lindh. Indeed, the Convention against Torture obligates the United States to examine Lindh’s allegations.<sup>12</sup>

If Lindh’s allegations of mistreatment are verified, those who participated should be held accountable for their acts. Appropriate relief should be provided to Lindh, including rehabilitation and compensation. This may also compel reconsideration of Lindh’s plea agreement.<sup>13</sup>

In a constitutional democracy, state action must conform to the rule of law. Neither military necessity nor public emergency can justify derogation from the most fundamental right protected by our democracy – the right to human dignity.<sup>14</sup> “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”<sup>15</sup>

## Endnotes

<sup>1</sup> This section is based on the Proffer of Facts in Support of Defendant’s Suppression Motions submitted by Lindh to the federal district court for the Eastern District of Virginia. *See* Proffer of Facts in Support of Defendant’s Suppression Motion, United States v. Lindh (Crim. No. 02-37-A).

<sup>2</sup> The Human Rights Committee has noted, however, that it is not necessary “to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.” Human Rights Committee, General Comment No. 20, U.N. Doc. HRI/GEN/1/Rev.5 (2001), at para. 4.

<sup>3</sup> *Neira Alegria et al. v. Peru*, 3 INTERNATIONAL HUMAN RIGHTS REPORTS 362, 382 (1996). *See also* *Bamaca Velasquez v. Guatemala*, 9 INTERNATIONAL HUMAN RIGHTS REPORTS 80, 137 (2002).

<sup>4</sup> The European Convention differs from other international and regional instruments by not using the term “cruel” in its definition of inhuman or degrading treatment. This omission has little, if any, significance.

<sup>5</sup> According to the European Commission on Human Rights, degrading treatment is defined as action that interferes with the dignity of the individual. *East African Asians v. United Kingdom*, 3 E.H.R.R. 76 (1973). “It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as ‘degrading treatment’ in the sense of Article 3, where it reaches a certain level of severity.” *Id.* at 80.

<sup>6</sup> RESTATEMENT (THIRD) \* 702 cmt. n. *A jus cogens* norm is a peremptory norm that binds all states. No state may assume release from these obligations. *Id.* at \* 102, cmt. k.

<sup>7</sup> In October 1999, the United States Government issued its Initial Report to the Committee Against Torture describing its compliance with the Convention against Torture. In the Initial Report, the United States Government reiterated that torture and cruel, inhuman or degrading treatment are categorically denounced as a matter of policy and as a tool of state authority.

United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances . . . or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.

Committee Against Torture, “Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America” (Oct. 15, 1999), U.N. Doc. CAT/C/28/Add.5 (2000), at 5.

<sup>8</sup> *See generally* The Greek Case, 12 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 1969 at 186 (1972).

<sup>9</sup> *See generally* NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 77-78 (2d ed. 1999).

<sup>10</sup> In his concurring opinion, Judge Zekia indicated that the health of the detainee is a relevant factor to be considered in determining whether torture has occurred. *Ireland v. United Kingdom*, 2 E.H.R.R. 25, 109 (1979).

<sup>11</sup> The fact that these acts were committed in Afghanistan does not obviate U.S. obligations under international law. As noted by the Human Rights Committee, “it would be unconscionable to . . . permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.” *Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (1984), at para. 12(3).

<sup>12</sup> In this respect, the Lindh case is unique. Unlike most cases of torture, corroborating evidence exists in this case. Photographs and video footage confirm several of Lindh’s allegations. Government transcripts provide additional support.

<sup>13</sup> Article 15 of the Convention against Torture provides that “[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

<sup>14</sup> *See generally* Malcolm D. Evans, *Getting to Grips With Torture*, 51 INT’L & COMP. L.Q. 365 (2002). *But see* Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661 (2002).

<sup>15</sup> *United States v. Robel*, 389 U.S. 258, 264 (1967).