

**THE LACK OF U.S. ACCOUNTABILITY
FOR TORTURE:
THE CASE OF ABDUL RAHIM ABDUL RAZAK AL JANKO**

Response to April 1, 2015 One-Year Follow-Up Response of the United States of America on
Recommendations of the Human Rights Committee (HRC) for Implementation of the
International Covenant on Civil and Political Rights

Committee Recommendation Paragraph 5:
Accountability for Past Human Rights Violations

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May 1, 2015

I. INTRODUCTION

In its One-Year Follow-up Response on the progress it has made in the past year on accountability for past human rights violations, the United States mentions investigations of unnamed officials¹ as well as the government's commitment to end torture, and that it "supports transparency and has taken steps to ensure that it never resorts to the use of those techniques again."²

The Follow-up report does not address steps that the U.S. government took over the past year to undermine accountability – namely to deny those who suffered torture any remedy and even their day in court.

The most recent example is the case of Abdul Rahim Abdul Razak al Janko ("Mr. Janko"), who lost eight years of his life after he was wrongfully detained and tortured by the U.S. government. The U.S. government refuses to provide any remedy for these abuses, and since 2010, has argued that Mr. Janko did not even have a right to bring a claim. A ruling in the U.S. Court of Appeals for the District of Columbia held that a 2006 law, the Military Commissions Act ("MCA"),³ deprived Mr. Janko of the right to sue. After years of appeals, on March 9, 2015, the Supreme Court denied review, and let stand the ruling which denied Mr. Janko the right to bring constitutional and human rights claims in U.S. courts.

II. THE ORDEAL OF ABDUL RAHIM ABDUL RAZAK AL JANKO⁴

In 1999, Mr. Janko, a 21-year-old Syrian Kurd, left his home in the United Arab Emirates with the intention of living in Europe or the United States. His plans went terribly wrong and he was captured by the Taliban which held and tortured him between 2000 and 2001. Starting in January 2002, after being denounced as a terrorist by former U.S. Attorney General John Ashcroft, Mr. Janko endured a nightmare of nearly eight years of detention, torture, and other cruel, inhuman or degrading treatment or punishment ("CIDTP") at U.S. military bases in Afghanistan and Guantanamo Bay ("Guantanamo"). During this mistreatment he attempted suicide seventeen times. Although a U.S. judge proclaimed that he had never been an enemy terrorist and it "defied common sense" to conclude otherwise, the U.S. government has opposed his human rights case in U.S. federal court for the past five years. With the Supreme Court's refusal to hear his claims in March 2015, he is left with no remedy in the U.S. judicial system.

¹ PERMANENT MISSION U.S., ONE-YEAR FOLLOW-UP RESPONSE OF THE UNITED STATES OF AMERICA, (Apr. 1, 2015), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fFCO%2fUSA%2f19957&Lang=en, paragraph 8.

² *Id.* at paragraph 14.

³ 28 U.S.C. § 2241(e) (2006).

⁴ The allegations that follow are taken from: Amended Complaint, *Al Janko v. Gates*, 831 F. Supp.2d 272 (D.D.C. 2011), and Petition for Certiorari, *Janko v. Gates*, 135 S.Ct. 1530 (2015), *available at* <http://www.losangelesemploymentlawyer.com/Supreme-Court-of-the-United-States.pdf>.

A. Mr. Janko's Arrival in Afghanistan: Detention and Torture by the Taliban

Mr. Janko arrived in Afghanistan in January of 2000. Soon after arriving, he was detained by Taliban forces who threatened to torture him if he did not fight for their terrorist organization. When Mr. Janko refused to fight, he was subjected to horrific and inhuman treatment. Mr. Janko was tortured until he was driven to provide a false confession that he was an American and Israeli spy. The Taliban videotaped this confession, which was later broadcast on United Arab Emirates national television, where his family and friends first learned that he was in prison.

Based on this forced confession, the Taliban sentenced Mr. Janko to 25 years in prison. Mr. Janko was then imprisoned at the notorious Sarpusa Prison in Kandahar where he was tortured and subjected to inhuman treatment for eighteen months. When the Taliban fled Kandahar to escape the fighting in December 2001, Mr. Janko hoped he might escape, but lacked the resources necessary to leave the country and was forced to take shelter at the prison.

B. Mr. Janko was Wrongfully Detained when He Attempted to Aid the United States in Identifying His Taliban Torturers

In January 2002, Mr. Janko met with U.S. officials at Sarpusa Prison. Mr. Janko wanted to see his torturers brought to justice, so he offered to act as a material witness providing information of Taliban atrocities. The officials brought him to Kandahar Air Force Base.

Then, just as Mr. Janko offered his help to act as a material witness and cooperated fully with his U.S. liberators, former Attorney General John Ashcroft and FBI Director Robert Mueller held a press conference in which they condemned Mr. Janko as an "international terrorist." This claim was based on the videotape of Mr. Janko's Taliban-coerced confession, in which he appeared pale, terrified, and underweight, "admitting" under duress to acting as a U.S. and Israeli spy. The videotape had not been properly analyzed or interpreted. This false accusation was broadcast throughout the world.

At this time, despite the abundant evidence that he had been detained and tortured by the Taliban, the U.S. military detained Mr. Janko. Once detained, he was subjected to abusive interrogation techniques including the striking of his forehead, sleep deprivation, exposure to frigid temperatures, exercise to exhaustion, hours-long stress positions, various forms of humiliation, and force-feeding.

In May of 2002, U.S. forces transferred Mr. Janko to the military detention facility at Guantanamo. The United States incarcerated him at Guantanamo without charge or trial for nearly eight years, during which he was regularly subjected to torture and inhuman treatment. This treatment included denial of adequate medical and psychological treatment; force-feeding; being restrained to a bed or chair and denied access to a restroom; prolonged periods of solitary confinement; severe beatings; exposure to frigid temperatures; being urinated upon; sleep deprivation; and many other abuses. Because of this treatment, Mr. Janko attempted suicide at least seventeen times.

During Mr. Janko's time at Guantanamo, two Combatant Status Review Tribunals ("CSRTs"), along with an Administrative Review Board ("ARB"), were convened to review his

status as an enemy combatant. The first CSRT hearing took place in October of 2004. There, Mr. Janko was represented by a nurse, not a lawyer. He was neither presented with nor permitted to review any evidence against him prior to the hearing. The CSRT - relying on coerced confessions made during his torture at the hands of the Taliban and the United States - determined that Mr. Janko was an enemy combatant. An ARB upheld that determination based on the same false evidence.

C. After Nearly Eight Years of Detention Mr. Janko Was Released When a United States Court Held that His Detention was Unlawful and “Defied Common Sense”

The U.S. Supreme Court extended statutory habeas corpus jurisdiction to Guantanamo detainees in June of 2005. Mr. Janko filed a petition for a writ of habeas corpus (“habeas petition”) on June 30, 2005. While his habeas petition was still pending, a second CSRT was convened to determine Mr. Janko’s status. Relying upon the same flawed reasoning and false evidence as the first CSRT, the second CSRT also concluded that Mr. Janko was an “enemy combatant.”

In June of 2008, the U.S. Supreme Court, in *Boumediene v. Bush*,⁵ found that detainees were constitutionally entitled to the writ of habeas corpus. As a result of that case, the U.S. District Court for the District of Columbia granted Mr. Janko’s petition on June 22, 2009, nearly four years after he originally filed his request for habeas relief. The District Court found that Mr. Janko was never “lawfully detainable as an enemy combatant,” and that his designation as such “defie[d] common sense.” To the District Court, it was “inescapable” that Mr. Janko belonged to neither al-Qaeda nor the Taliban. Because he was not lawfully detainable at the time U.S. forces took him into custody, the District Court ordered his release.

Even after this determination, U.S. forces continued to detain and mistreat Mr. Janko for several months. On October 7, 2009, he was finally released from U.S. custody.

In 2010, Mr. Janko filed for administrative remedies with the U.S. government. These remedies were denied. He then filed a claim in the U.S. District Court for the District of Columbia for violations of his constitutional and human rights. The U.S. Department of Justice (“DoJ”) argued that these claims were barred by the 2006 Military Commissions Act, that the alleged acts of torture were within the scope of employment of U.S. officials which resulted in immunity even for acts of torture, and that Mr. Janko had no right to bring claims on “extraterritoriality” grounds because, it ruled, the U.S. military bases were not U.S. territory. The District Court granted the DoJ motions to dismiss the claims and this dismissal was upheld by the U.S. Court of Appeals for the D.C. Circuit. Mr. Janko subsequently appealed to the Supreme Court which denied certiorari on March 9, 2015.

⁵ *Boumediene v. Bush*, 553 U.S. 724 (2008).

III. THE UNITED STATES DEPRIVES THOSE WRONGFULLY DETAINED AT GUANTANAMO OF ALL LEGAL REMEDIES

Pursuant to actions by all three branches of the U.S. government, former and present detainees held at Guantanamo will remain unable to obtain any remedy in the courts of the United States for the foreseeable future.

The Military Commissions Act, enacted into law by the legislative and executive branches, deprives any “court, justice, or judge” of “jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.”⁶

Accepting the arguments made by the U.S. Department of Justice, in January of 2014, the D.C. Circuit Court of Appeals struck down Mr. Janko’s challenge to this language, holding that “United States” refers exclusively to the Combatant Status Review Tribunal holdings—despite the lack of due process involved in that proceeding—and further, that depriving civilian courts of all jurisdiction over such cases, though “rough justice,” remained within the scope of Congress’s constitutional power.⁷ As a result, Mr. Janko was deprived of a judicial remedy for torture and other human rights violations.

Mr. Janko subsequently appealed the D.C. Circuit’s ruling to the Supreme Court. In his petition, he presented a two-fold argument: (1) that “United States” encompasses all branches of the United States, and not just the Executive Branch, and (2) that if “United States” in fact does refer exclusively to the Executive Branch, the resulting law unconstitutionally strips federal courts of their Article III power to resolve constitutional claims.⁸ The first argument’s central premise was that Mr. Janko’s release from Guantanamo, following a court’s finding that the government’s ground for such detention “defie[d] common sense” from the beginning,⁹ signaled that Mr. Janko was never “properly detained as an enemy combatant”;¹⁰ as such, the MCA’s jurisdiction-stripping provision did not apply to Mr. Janko. The second argument was that federal courts, under Article III of the Constitution, have inherent authority to provide judicial remedies for constitutional violations;¹¹ therefore, the MCA’s jurisdiction-stripping provision encroached unconstitutionally upon the power of the Judiciary.

The Supreme Court, however, declined to grant Mr. Janko’s petition.

⁶ 28 U.S.C. § 2241(e) (2006).

⁷ *Janko v. Gates*, 741 F.3d 136, 147 (D.C. Cir. 2014).

⁸ See generally *Petition for Writ of Certiorari, Janko v. Gates*, 2014 WL 6789941 (No. 14-650).

⁹ *Al Gingo v. Obama*, 626 F.Supp.2d 123, 128 (D.C. Cir. 2009).

¹⁰ See § 2241(e).

¹¹ See, e.g. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

As a result of this disposition, the D.C. Circuit’s ruling that Congress has stripped (and, generally speaking, *may strip*) all courts of jurisdiction over constitutional claims will remain good law. This ruling’s significance with regards to current and former Guantanamo detainees, is that they will be unable to obtain redress for unconstitutional violations of their rights. But the precedent also “makes it possible for Congress to strip the court[s] of jurisdiction over the constitutional claims of different classes of individuals in varying situations,” potentially including “voting rights, desegregation, and obscenity,” among other contentious issues.¹² Furthermore, the precedent solidifies other harmful doctrine in the D.C. Circuit, which remains the only circuit that may hear appeals from Guantanamo detainees. Because no other circuits may hear such cases, and the Supreme Court refuses to resolve the doctrine in favor of providing an adequate remedy to detainees, individuals like Mr. Janko are effectively deprived of important human rights.

IV. THE UNITED STATES SYSTEMATICALLY DENIES A REMEDY FOR VICTIMS OF TORTURE, CIDTP AND WRONGFUL DETENTION

Mr. Janko has not been the only detainee denied his right to remedy by the U.S. government. There are no known cases in which a torture victim of the U.S. military has been financially compensated by the United States.

Under the ICCPR, states have an obligation to provide a remedy. Yet, the United States has proclaimed its opposition to compensation. For example, during their appearance before the U.N. Committee Against Torture in November 2014, U.S. representatives declared that providing compensation to detainees would be “anomalous under the law of war.”¹³

In that same appearance, U.S. representatives did acknowledge a range of remedies available to private individuals, but did not acknowledge the reality that no such remedies have been awarded. Associate Deputy Attorney General Robin Jacobinson said that the range of options available include “injunctions, compensatory damages, punitive damages, and declaratory relief. In addition, the U.S. Congress has authorized the federal government to bring civil actions to enjoin acts or patterns of conduct that violate constitutional rights, including those that would amount to torture. At the federal level, the principal avenues of individual redress are administrative tort claims and civil litigation.”¹⁴

In contrast to its November 2014 statements, in the 2005 U.S. State Report to the Committee Against Torture, the government stated that “the United States continues to hold the view that in addition to monetary compensation, States should take steps to make available other forms of remedial benefits to victims of torture, including medical and psychiatric treatment as well as social and legal services.”¹⁵ Such programs included compensation funds for crime victims

¹² Petition for Writ of Certiorari, *Janko*, 2014 WL 6789941 (No. 14-650).

¹³ Jessica Schulberg, *It’s Time the U.S. Paid Reparations to the Prisoners It Tortured*, The New Republic (Dec. 4, 2014), <http://www.newrepublic.com/article/120485/law-requires-us-compensate-guantanamo-torture-victims>.

¹⁴ *Id.*

¹⁵ U.S. Periodic Report to the U.N.C.A.T. (CAT/C/USA/2), May 6, 2005.

in the United States and, in a stark contrast with the relief denied to Mr. Janko, funding for services for torture victims abroad.

In its most recent reports, the United States made no mention of the expansive social services or compensation offered in 2005. In actuality, none of these remedies are feasible for victims of U.S. torture and previous attempts to employ them have been blocked by federal courts, including Mr. Janko's own appeal to the Supreme Court. Among the detainees who have claimed that they have been tortured, a number of them, like Mr. Janko, have previously turned to U.S. federal courts, and have been similarly rebuffed.

The United States lags behind other nations in its willingness to take responsibility for international law violations during the "war on terror." For example, in 2010, the United Kingdom paid "millions" in compensation to British citizens or residents who had been detained and allegedly tortured in Guantanamo.¹⁶ The European Court of Human Rights found that Poland violated the rights of a Saudi Arabian national and a stateless Palestinian when that government enabled the United States to secretly detain and torture these two men on Polish soil. Other cases concerning other Council of Europe member states' role in allowing or facilitating secret detention and rendition of "war on terror" detainees are pending.¹⁷

Other countries are moving in the direction of holding U.S. officials accountable. On April 2, 2015, in a case on behalf of two French citizens who were detained at Guantanamo, a French court ordered former Guantanamo Commander Maj. Gen. Geoffrey D. Miller to explain his role in the torture and other serious mistreatment alleged by the plaintiffs.¹⁸ Maj. Gen. Miller was also a defendant in the case brought by Mr. Janko.

Canadian citizen Maher Arar was detained by the United States without charge for two weeks and then deported to Syria, where he was tortured. Mr. Arar brought suit under the Torture Victim Protection Act, which the U.S. invoked as one of the forms for "remedial benefits to victims of torture" in front of the Committee Against Torture in 2005.¹⁹ Mr. Arar was unable to recover under U.S. law.²⁰ It is telling that Mr. Arar found relief in a non-U.S. court, when Canada agreed to a \$10.5 million dollar settlement for Mr. Arar's ordeal.²¹

¹⁶ British Broadcasting Corporation, *Government To Compensate Ex-Guantanamo Bay Detainees*, (Nov. 16, 2010), <http://www.bbc.com/news/uk-11762636>.

¹⁷ International Justice Resource Center, *European Court of Human Rights: Poland Responsible for Secret Detention, Torture, and Rendition of Two Gauntánamo Detainees* (July 30, 2014), <http://www.ijrcenter.org/2014/07/30/european-court-of-human-rights-poland-responsible-for-secret-detention-torture-and-rendition-of-two-guantanamo-detainees/>

¹⁸ Center for Constitutional Rights, *French Court Investigation U.S. Torture: Summon Former Gitmo Commander* (Apr. 2, 2015), <http://www.ccrjustice.org/newsroom/press-releases/french-court-investigating-u.s.-torture%3A-summons-former-gitmo-commander>.

¹⁹ *Supra*, note 15.

²⁰ *See Arar v. Ashcroft*, 532 F.3d 157, 167 (2d Cir. 2008).

²¹ *See CBCNEWS, Ottawa Reaches \$10M Settlement with Arar* (Jan. 25, 2007), <http://www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875>.

V. SUGGESTED ASSESSMENT GRADE FOR THE FOLLOW-UP REPORT

As detailed above, over the past year, the United States (in particular the Executive and Judicial Branches) has taken measures contrary to the Committee's recommendations for accountability for past violations. The resulting grade should be an E.

We urge the United States to take action to provide a remedy to Mr. Janko for his torture and detention which violated his human rights.