

October 25, 2018

Via E-Mail

Periodic Review Board
c/o Periodic Review Secretariat
[REDACTED]
Arlington, VA 22202

Re: Guled Hassan Duran (ISN 10023)

To the Periodic Review Board:

We are private counsel for Mr. Guled Hassan Duran, ISN 10023, who is detained at the U.S. Naval Station at Guantánamo Bay, Cuba. We respectfully submit this letter on behalf of Mr. Duran in support of his Periodic Review Board hearing on November 20, 2018. The Board should approve Mr. Duran for transfer because he does not pose a significant threat to the security of the United States. Indeed, he has never posed such a threat and is not lawfully detained at Guantánamo.

1. Background

Mr. Duran is a citizen of Somalia with prior residence in Germany and Sweden. He was captured in Djibouti in March 2004, rendered to secret CIA detention where he was tortured and abused, and transferred to Guantánamo in September 2006. In 2009, he was designated for continuing indefinite detention – not prosecution like nearly all other former CIA detainees – by the Guantánamo Review Task Force. He appeared before the Board, without counsel or adequate translation services, for an initial hearing beset by other logistical problems, and was denied approval for transfer in September 2016. Since then, he has had only one file review in March 2017, which did not result in a new Board hearing. Mr. Duran also filed a habeas case in November 2016, challenging the legality of his initial capture and detention. That case is active and ongoing, and will likely proceed to a decision on the merits in mid-2019. *See Duran v. Trump*, No. 16-cv-2358 (D.D.C.) (Walton, J.).

2. Mr. Duran Is Not Lawfully Detained

In his habeas case, Mr. Duran contends that he is not lawfully detained at Guantánamo for several factual and legal reasons. His detention is not authorized under the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (AUMF), because he was captured outside the geographic and temporal scope of any armed conflict involving the United States. Among other factors, the United States has never been involved in armed conflict in Djibouti where Mr. Duran was apprehended, and was not involved in armed conflict in Somalia until at the earliest January 2007, when the first military operation was conducted there ostensibly under the AUMF.¹ There were also

¹ See Xan Rice, “Many Dead” in *US Air Strikes on Somalia*, *Guardian*, Jan. 9, 2007 (“Though the US has been mounting covert operations in Somalia in recent years, the attacks amount to its first direct involvement since the disastrous ‘Black Hawk Down’ operation during the early 1990s.”). We also

no Al Qaeda-associated forces in Somalia until December 2016, when President Obama designated Al Shabaab, a group that did not exist until years after Mr. Duran's capture and about which he has never been interrogated.² In addition, Mr. Duran's detention violates the AUMF and Due Process Clause of the Constitution because he has been held without charge for too long, based on too little evidence.

There is also no credible evidence to support his purported membership in Al Qaeda, the Taliban or any associated force. Unlike most detainees, the core evidence that the government presents in support of his detention consists of intelligence reports from the CIA that appear largely to include statements made by Mr. Duran after his initial capture in Djibouti and rendition to secret detention in March 2004. These statements were made while he was subject to torture and other unlawful abuse by the CIA in secret detention. Indeed, Mr. Duran's case is the first and only detainee habeas case litigated since *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the government has relied in its case-in-chief on evidence obtained from a detainee while that individual was subjected to the CIA torture program. We believe the federal courts will reject the government's attempt to use torture evidence to hold Mr. Duran without foreseeable end, and order his release.³

3. On Advice of Counsel, Mr. Duran's Participation in the Periodic Review Process Is Limited

Given the lack of credible evidence to justify Mr. Duran's detention, on the advice of counsel he will not answer any questions from the Board, including questions concerning the summary of unclassified allegations against him or any other matter related to his detention.

We are mindful, of course, that the Board hearing presents a rare opportunity for Mr. Duran to "make his case" for why he should be approved for transfer, and that refusing to answer the Board's questions could negatively impact that chance. But please allow us to be honest and direct: We are equally clear that this process offers Mr. Duran no meaningful opportunity to be transferred. The Board has never approved a high-value detainee for transfer. Since the end of the last administration, the periodic review process has not finally approved any detainee for transfer regardless of the allegations against him. Equally problematic, the current administration has made no efforts to transfer the five remaining detainees approved for transfer. In addition, we are aware of other detainees such as ISN 1017 and ISN 28, who have received no decision whatsoever regarding their status. This suggests that the Board has either failed to reach consensus or approved them for transfer but encountered agency objections – but also that whichever of these two contingencies is the case, no Principals

note U.S. military involvement in Somalia in the early 1990s was part of United Nations-sanctioned humanitarian relief operations, not armed conflict.

² See Charlie Savage et al., *Obama Expands War With Al Qaeda to Include Shabab in Somalia*, N.Y. Times, Nov. 27, 2016 (Al Shabaab, which arose in 2007, designated as associated force but Somalia remains outside zone of active hostilities); Factual Suppl. to Habeas Pet. ¶ 20, *Duran v. Trump*, No. 16-cv-2358 (D.D.C. Dec. 12, 2016) (dkt. no. 11-1) (redacted and approved for public filing).

³ See Suppl. to Jt. Status Report at 1-2 & n.1, *Duran v. Trump*, No. 16-cv-2358 (D.D.C. Aug. 2, 2017) (dkt. no. 37-1) (redacted and approved for public filing).

Committee has been convened to resolve those disputes. If that observation is correct, the failure to render periodic review decisions would violate not only the executive order establishing these reviews but also arguably the periodic review requirements of the Fourth Geneva Convention and customary international law.

We believe these points are well-known and widely acknowledged. This situation unfortunately leaves detainees like Mr. Duran with little choice but to focus their hopes for release elsewhere, including their habeas cases, and limit their participation in the Board hearings in order to avoid any risk of undermining those cases.

4. The Allegations in the Unclassified Summary Provide No Basis for Mr. Duran's Continuing Detention

The allegations against Mr. Duran in the unclassified Board summary are in any event easily disposed of as follows. First, although Mr. Duran admits nothing, the allegation that he traveled from Sweden to Afghanistan in 1995 to attend a "probable" Al Qaeda-related training camp, and returned to Somalia in 1996, is entirely irrelevant to his detention at Guantánamo. Putting aside the obvious fact that this allegedly occurred during the course of (at most) one year more than twenty years ago, the government by its own admission was not engaged in armed conflict with Al Qaeda until 1998.⁴ Second, equally irrelevant is the allegation that Mr. Duran joined and trained with Al-Ittihad al-Islami (AIAI), and fought against Ethiopia. AIAI was defeated by Ethiopia militarily in 1996 and disbanded in 1997.⁵ Even when it existed, and despite the uncontroversial fact it was considered an "Islamist" group, AIAI was not part of Al Qaeda or an Al Qaeda-associated force. Again, there were no Al Qaeda-associated groups in Somalia until the Obama administration's designation of Al Shabaab in December 2016.⁶ Moreover, neither AIAI nor the conflict between Ethiopia and Somalia had anything to do with the United States. Rather, that conflict was regional and involved a long-running dispute over ethnic Somali territory fought between the two countries – a dispute that a citizen of either country would have had a lawful right to engage in just as an American soldier would be authorized to fight in a war between the United States and another country over disputed territory. Finally, there is simply no group or entity known as "Al Qaeda in East Africa (AQEA)." Nor does the alleged existence of Al Qaeda in the region of East Africa – specifically Kenya and Tanzania – mean that Al Qaeda is equally established in Somalia or elsewhere in the Horn of Africa region. Indeed, the U.S. government has reached the opposite conclusion based on declassified intelligence-related materials gathered from a variety of sources, including Al Qaeda itself.⁷

⁴ See, e.g., Br. of United States at 33, *In re: Nashiri*, Nos. 15-1023, 15-5050 (D.C. Cir. Dec. 28, 2015).

⁵ See Harun Maruf & Dan Joseph, *Inside Al-Shabaab* 22-23 (Ind. Univ. Press 2018).

⁶ See Charlie Savage et al., *Obama Expands War With Al Qaeda to Include Shabab in Somalia*, N.Y. Times, Nov. 27, 2016.

⁷ See *Al Qaida's (Mis)Adventures in the Horn of Africa* at 1, Harmony Project, Combating Terrorism Center at West Point (2010) ("[W]e find that in this region al-Qa'ida has been moderately successful when operating in weak states like Kenya but has largely failed to establish itself in failed states like

We further note that these allegations are entirely backward looking – 20 years or more backward looking – which is plainly not relevant or material to the Board’s purpose in determining whether Mr. Duran presents a future threat to the United States. But even if such allegations were proven as to Mr. Duran and somehow helpful to the Board’s decision making – which they have not been and he does not concede – it would be important to note that nearly all of the individuals who were allegedly involved in leading groups like AIAI and Al Qaeda in East Africa or the Horn of Africa at any time possibly relevant to Mr. Duran are now gone. Indeed, a brief Google search shows that individuals such as Fazul Abdullah Mohammed, Saleh Ali Saleh Nabhan, Abu Talha Al Sudani, Ibrahim Al-Afghani, Hassan Abdullah Hersi Al-Turki, Aden Hashi Ayro, and Ahmed Abdi Godane are deceased. Others such as Mukthar Robow and Hassan Dahir Aweys have surrendered or been taken into custody. There is simply nothing left to these groups.

5. Other Factors Plainly Favor Mr. Duran’s Approval for Transfer

Far more important for the Board’s purposes should be the fact that Mr. Duran has a large, close-knit family across the United States, Canada, Kenya, and the quasi-independent State of Puntland. They remain willing and able to support him financially, emotionally and in any other way necessary to facilitate his reintegration and adjustment to life after Guantánamo. They are willing to do so for as long as needed, and regardless of whether Mr. Duran is repatriated to Somalia (as he will be promptly in the event that he wins his habeas case) or resettled in a third country. For his part, we can confirm that Mr. Duran is willing to be transferred to any country the U.S. government deems appropriate as long as he is safe and able to be reunited with his wife and children, who have been without him since his apprehension in March 2004.

We further note that three Somali detainees transferred from Guantánamo in 2008 and 2009 were sent to the quasi-independent Republic of Somaliland with the assistance of the International Committee of the Red Cross (ICRC). It is our understanding from discussions with the ICRC that it would be willing to provide similar assistance to Mr. Duran if the U.S. government were to request it in order to send him to Somaliland. We also know there have been no humane treatment concerns or ostensible “recidivism” concerns related to the other Somali detainees released from Guantánamo. We know this because we have been in contact with them via telephone, email and social media, particularly our former client Mohammed Sulaymon Barre, ISN 567, who among other things has pursued a graduate degree in pharmacology at a prestigious university outside Somalia.

Moreover, as the Board is already likely aware from our many years of representing dozens of Guantánamo detainees – in habeas cases, military commissions, and before this Board – the Center for Constitutional Rights maintains close contact with its formerly detained clients long after their transfer, as well as with the U.S. Department of State and other agencies, and has continued to serve as a point of contact and resource for each to ensure that all transfers from Guantánamo are successful. Mr. Duran is no exception; we expect to remain engaged with him – and the U.S. government – long after he is transferred to avoid or address promptly any issues that may arise, however unlikely.

Somalia.”), available at <https://ctc.usma.edu/app/uploads/2010/06/Al-Qaidas-MisAdventures-in-the-Horn-of-Africa.pdf>.

6. Conclusion

In sum, we respectfully submit that there is more than an adequate factual and legal basis for the Board to approve Mr. Duran for transfer from Guantánamo, and for the government to release him. But we are also aware of the presumption – whether acknowledged or not – that because Mr. Duran was held in the CIA torture program he is very unlikely to be approved for transfer regardless of the circumstances of his particular case.⁸ We hope the Board is willing to look beyond the assumptions and unproven claims against a so-called “high-value detainee” like Mr. Duran, and genuinely consider the merits of whether he poses a threat and should continue to be held at Guantánamo indefinitely without charge.⁹ That is what is required by the executive order governing periodic reviews as well as international law.

We submit that Mr. Duran has been held for too long, without legal basis or good cause, and should be returned to his family.

Please let us know if you have any questions.

Very truly yours,

Shayana D. Kadidal
J. Wells Dixon
Omar Farah

Counsel for Guled Hassan Duran

⁸ See, e.g., Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* at 4 (Declassified Revisions Dec, 3, 2014) (“The CIA led several detainees to believe they would never be allowed to leave CIA custody alive, suggesting to one detainee that he would only leave in a coffin-shaped box.”); *id.* at 35 (“[A]ll major players are in concurrence that [detainee] should remain incommunicado for the remainder of his life.”).

⁹ Certainly, the Board could not credibly determine that Mr. Duran presents a “threat” to the United States merely because he was exposed to – indeed, a victim of – the CIA torture program. The Board’s purpose is decidedly not to help the CIA conceal torture and other war crimes.