

**U.S. Court of Military Commission Review:
DuBay Hearing (Second), ISN 54 Ibrahim Ahmed Mahmoud Al Qosi**

Intents of 9APR2019 Hearing:

- Determine whether Ibrahim Ahmed Mahmoud al Qosi is an enemy belligerent.
- Determine whether Ibrahim Ahmed Mahmoud al Qosi can be made to respond to any judgments passed upon his appeal.

Al Qosi's first DuBay hearing¹ took place before Judge Col. James Pohl, who has heard and ruled on many cases involving GTMO detainees. The DuBay hearing was immediately complicated and halted by the question of representation for Al Qosi, who was in absentia. Per an appeal he directed to be filed prior to his release, Suzanne Lachelier had a counsel-client relationship with Al Qosi, and she had associated Mary McCormick. Lachelier had since left military service and claimed conflict-of-interest in associating any of the three defense counsels detailed to Al Qosi for the DuBay hearing. Judge Pohl ruled² himself unable to make a determination resolving the issue and returned the case to the USCMCR for further instruction.

The USCMCR solved the dilemma by negotiating Lachelier to permit associated McCormick to appear for a DuBay hearing and associate further counsel as necessary. The USCMCR scheduled a second DuBay hearing for 9 April 2019.

Events of 9APR2019:

Judge Capt. Michael J. Luken convened Al Qosi's second DuBay hearing³ in an open court, summarized the Appellate Exhibits (AEs) and motions scheduled for address in the session, and checked the certifications, qualifications, and swearings of both the government and the defense counsels. The defense counsel asked the judge if he considered his filing of papers for his retirement as impacting his ability to judge the case, and the judge responded that it did not, as he had no intent to work for any government agencies after departing the military.

Initial AEs and arguments concerned the state of discovery in the DuBay process. In a reluctant manner, the defense accused the government of denying discovery materials and stated that DuBay hearings are full due-process cases, and the government argued that DuBay hearings are post-trial events so its compliance with discovery is both voluntary and to date had not denied documents. The judge inquired after what the defense still wanted, and each item underwent individual discussion:

- **FBI lab results and facial recognition software:** Defense wanted the results of FBI tests of identity, including facial recognition software, that were used to verify the identity of Al Qosi in AQAP videos, and expert assistance in interpreting and understanding them. Government stated that the only report on same had been released, and that it was supplying the intelligence analyst who ran the software to the defense.

¹ Access to all documents for the first Al Qosi DuBay hearing is available at <https://www.mc.mil/CASES.aspx> through the hyperlink labeled "Ibrahim Ahmed Mahmoud al Qosi (DuBay)."

² Ruling available at [https://www.mc.mil/Portals/0/pdfs/alQosiDuBay/Al%20Qosi%20\(AE018\).pdf](https://www.mc.mil/Portals/0/pdfs/alQosiDuBay/Al%20Qosi%20(AE018).pdf).

³ Access to all documents for the second Al Qosi DuBay hearing is available at <https://www.mc.mil/CASES.aspx> through the hyperlink labeled "Ibrahim Ahmed Mahmoud al Qosi (2nd DuBay)."

- **Memoranda and communications regarding the investigation of Al Qosi, and any and all complaints and charges operative against him:** The judge explained to the government that the defense is concerned that attempts to contact Al Qosi or have him extradited to be part of his trial would trap him to face further charges. The government stated that there were no unsealed charges.
- **Diplomatic Notes sent between the State Department and Sudan during transfer operations:** Defense wanted these notes in order to know the exact agreement under which Al Qosi was transferred, whether noting the requirements of Al Qosi or the requirements of Sudan and the State Department. Government noted that since Al Qosi is not in custody, he would be unable to confirm or deny understanding of the requirements of him, and the defense responded that the concern was more about whether the U.S. can retrieve him.
- **Transportation and release information:** Defense held that a formal and acknowledged release of Al Qosi by the U.S. meant that he is not a “fugitive.” Government held that re-engaging is what rendered Al Qosi a fugitive and removed his right to sue for breach of agreement or unlawful imprisonment. Government noted that it has provided all documents, attempted to locate Al Qosi to serve notice, intended to provide a witness on the matter, and intended to show a video of the transfer.
- **Documents and video of Al Qosi’s activity since release:** Government contended that it had provided all 17 audio-visual files, and no outstanding classified information remained in process. Defense argued that further discussion of these document requests would require a closed court session.
- **Undefined (classified) documents:** Government noted that six of eight documents have been provided, but two were still in declassification proceedings. The judge requested a date on which the documents would be provided, but the government was unable to supply a deadline.

The AE 10 series requested that the judge write a judicial notice of a set of established or assumed facts. The government contended that the facts were not reasonable to dispute, but the defense argued that the government should have to prove each. The government stated that a witness named Hodgeson from the Terrorism and Criminal Investigation Unit would be able to testify on the subject on 7 May 2019. The potential facts were:

- Al Qaeda is a terrorist organization.
- Al Qaeda in the Arabian Peninsula is part of Al Qaeda.
- “Inspire” is a magazine published by Al Qaeda in the Arabian Peninsula.
- The Petitioner (Al Qosi) is an unprivileged belligerent.
- The Petitioner is a non-resident of the U.S.
- The Petitioner has not participated in his own defense.

After argument over whether the slate of witnesses scheduled for the day was permissible for calling, since the defense contended that it did not have sufficient time to prepare with documents provided only recently, the government called one witness. Lt. Col. Shane W. Corcoran is the defense attaché for the charges d’affaire of the embassy in Sudan. He explained that there was no ambassador to

Sudan because of the country's status as a state sponsor of terrorism, and described his own career history, then presented testimony on efforts to serve Al Qosi notice. Under examination from both the government and the defense, Lt. Col. Corcoran stated:

- Sudanese protests against Bashir were intensifying, rendering departure from the embassy hazardous, even with receipt of Sudanese government permission for embassy personnel to travel, which had to be requested at least seven days in advance.
- The best way the embassy determined to contact Al Qosi was through a regional security officer grapevine that tapped into local contacts who might be able to pass a message.
- A foray to Al Qosi's home town and last known location of Atbara was both unfeasible due to time constraints and unadvisable due to security concerns.
- No attempt to post notice to social media, publish it in local newspapers, or broadcast it over local radio was made, as it was assessed likely to draw anger or retribution from the Sudanese government as a mild violation of its sovereignty.
- The Sudanese postal service is not functional, and formal addresses for delivery are uncommon, so the embassy was unable to mail notice to Al Qosi or Atbara. The customary way of locating people in Sudan is through Google ping, but without knowledge of smart phone number for Al Qosi, no option to ping was available.
- Prior to attempting to locate one of its citizens, Sudan requires a Missing Persons report to be filed.

Observations:

Judge Luken displays a sense of humor toward his court staff, but he appears to maintain sober control when a hearing is in session and focuses on facilitating communication and cooperation between the government and the defense. While he affirmed that his preparations for retirement have not put him in any position to need to recuse himself from the DuBay process, his imminent retirement may also give him freedom to pass rulings that Judge Pohl did not have in the first DuBay hearing. Judge Luken neither has the prospect of continuing to deal with superior officers in the future if he makes an unpopular ruling, nor must he be concerned with continuing involvement in other GTMO detainee court cases that might be impacted by any rulings he makes.

Witness Lt. Col. Corcoran indicated that the major obstacle to Sudan negotiating itself off the "state sponsor of terrorism" list was the dictator Bashir himself. Two days after the hearing, Bashir was deposed. The removal of Bashir could pave the way for better potential diplomatic relations between Sudan and the U.S. and ease difficulties with finding Al Qosi to render notice. As a result, the defense team is likely to move for continuance of the DuBay hearing or recess until another attempt to render notice has been completed.

The removal of Bashir will also potentially impact the legal determination of whether Al Qosi can be made to respond to any judgments passed on his appeal. The agreement the U.S. made with Sudan to repatriate Al Qosi on the initial suspended sentence was made with a different Sudanese government

than the one now in power; holding a new government to the commitments of an old government has historically been problematic and of inconsistent legality.