

**In the United States Military Commission at
Guantanamo Bay Naval Base, Cuba**

UNITED STATES OF AMERICA)

v.)

IBRAHIM AHMED MAHMOUD AL QOSI)

MOTION TO ABATE
MILITARY COMMISSION
PROCEEDINGS OR
DISMISS CHARGE

1. **Timing:** This motion is filed in a timely manner, as the Defense gave written notice of its intent to file the same on 15 September 2004.

2. **Relief Sought:** COMES NOW THE ACCUSED, by and through his detailed defense counsel, and requests the Military Commission to abate the proceedings against him until adequate measures can be implemented for the employment of qualified simultaneous court interpreters, verification interpreters, and the installation of proper interpreting equipment, to include interpreting booths and recording devices that not only record what is being said in open court, but also the English to Arabic being translated by the court interpreters to Mr. al Qosi. If such adequate measures cannot be implemented with the opportunity for defense counsel to voir dire prospective court interpreters, the Defense requests the Military Commission to dismiss the charge against Mr. al Qosi because the measures currently in place will not provide him with a “full and fair” trial as mandated by the President’s Military Order of 13 November 2001.

Injustice is doubtless being done from time to time in communities thronged with [linguistic minorities], through failure of the judges to insist on a supply of competent interpreters. The subject is one upon which the profession are in general too callous, for no situation is more full of anguish than that of an innocent accused who cannot understand what is being testified against him...

*Judges frequently must rely on individuals who have received little or no training in the skills needed to be a qualified court interpreter. These individuals are neither trained in the proper role of a court interpreter nor do they have any knowledge of the Model Code of Professional Responsibility for Interpreters in the Judiciary or of the various state codes or rules of professional responsibility for court interpreters. "This extremely important and fundamental issue has been allowed to become a 'stepchild' of the justice system: understudied, under-funded, and in terms of its ultimate impact, little understood."*¹

3. Facts:

A. In the single charge of conspiracy at issue in this case, Mr. al Qosi is alleged to have conspired to commit a variety of war crimes as a member of al Qaeda in the context of and associated with armed conflict, from June 1989 to December 2001.

B. Mr. al Qosi was initially notified of the charge on or about 23 February 2004.

C. The charge was provided to defense counsel in English and to Mr. al Qosi in Arabic.

D. The Arabic translation of the charge sheet fell far below the minimum standard in both content accuracy and formal correctness and "was translated by someone whose knowledge of Arabic was far below native knowledge, let alone scholarly knowledge."²

E. In fact, at least 69 incorrect and inappropriate translations, misquotations, and omissions were found.³

¹ Charles M. Grabau and Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation* *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 New Eng. L. Rev 227, Winter, 1996, at 2. See also Molly McDonough, *Lost in Translation; Lack of Qualified Interpreters May Compromise Justice*, ABA JOURNAL, November 2003.

² See Attachment A, a summary provided by Mr. Fuad M. Yahya, contract linguist for the Office of the Chief Defense Counsel, assigned to the al Qosi defense team.

³ *Id.*

F. Concerning content accuracy errors, there were numerous expressions translated in a manner that clearly altered the original meaning of the document.

Examples include the following:

- a. "is based on" was rendered "belongs to."
- b. "charged conduct" was rendered "the charge against the conduct."
- c. "is triable" was rendered "may be triable."
- d. "worked closely with al Qaida" was rendered "worked alongside al Qaida."
- e. "attacks on US forces were proper to drive them out" was rendered "attacks on US forces could drive them out."
- f. "al Qaida should support" was rendered "al Qaida must support."
- g. "associated group" was rendered "supporting group."
- h. "should kill Americans" was rendered "must kill Americans."
- i. "to prepare as much force as possible" was rendered "to provide the force they have."
- j. "associates" was rendered "supporters."
- k. "bombing" was rendered "bombardment."
- l. "knowingly" was rendered "with full knowledge."
- m. "joined an enterprise of persons" was rendered "supported persons."
- n. "in furtherance" was rendered "in preparation."
- o. "overt acts" was rendered "flagrant acts."
- p. "shelter" was rendered "hideout."
- q. "military tactics" was rendered "military plans."
- r. "deputy chief financial officer" was rendered "assistant to the financial section chief."
- s. "couriered" was rendered "dispatched."
- t. "compound" was rendered "center."
- u. "traveled" was rendered "intended to travel."
- v. "occasionally driving Usama bin Laden himself" was rendered "was occasionally Usama bin Laden's private driver."
- w. "detachment" was rendered "caravan."
- x. "the attacks on the US" was rendered "the events."
- y. "mobilizing" was rendered "preparing."⁴

G. One of the more disturbing errors noted on the charge sheet concerned the description of the alleged crime of conspiracy itself.

H. Mr. Yahya noted, "The Arabic version attributes conspiracy to 'an enterprise of persons,' rather than to Mr. Al-Qosi. I recall how much this error confused Mr. Al-

⁴ *Id.*, at pages 1 – 2.

Qosi when he read his charge sheet. He wondered aloud how he could be held responsible for a conspiracy attributed to other people.”⁵

I. On 23 March 2004, the Defense received the first batch of discovery, Bates stamps 0001-118.

J. Upon examination of the discovery materials, it became readily apparent to Mr. Yahya that the material “was produced through a process that, in at least some of its steps, involved individuals whose knowledge of Arabic was so deficient as to compromise the integrity of the information.”⁶

K. On 27 August 2004, an initial hearing in Mr. al Qosi’s case was convened at Guantanamo Bay Naval Base, Cuba (GTMO).

L For this hearing, simultaneous interpretation was provided by three court interpreters, two of whom were supposedly certified.

M. The third interpreter was not certified and had no experience in simultaneous interpreting.

N. During the hearing, everyone in the courtroom was able to hear statements made by counsel, the Presiding Officer, and the other commission members.

O. Additionally, the Arabic spoken by Mr. al Qosi could be heard, as could the Arabic to English translation by the court interpreters.

P. Unfortunately, the English to Arabic interpretation provided by the court interpreters to Mr. al Qosi was not heard in open court and, based upon information and belief, was not recorded in any fashion.

⁵ *Id.*, at 7.

⁶ *Id.*, at page 8 of summary.

Q. In fact, the only people able to hear the English to Arabic interpretation were Mr. al Qosi and Mr. Yahya, both of whom were wearing headsets.

R. There were many representatives from the media who attended not only the al Qosi hearing, but also the three previous hearings conducted earlier in the week.⁷

S. In addition to media representatives, several representatives from Non-Governmental Organizations (NGOs) were also present.

T. In fact, after attending the August hearings, the Executive Director of Human Rights Watch drafted a letter to the Secretary of Defense declaring, "The August hearings made clear that defendants before military commissions will be unable to challenge fairly the evidence presented against them. The hearings were marred by frequent problems with the U.S. government translators, who proved incapable of satisfactorily interpreting between the Arabic and English, especially legal terminology...The military must address the problem of translation by employing more capable translators at future hearings. In addition, official audio recordings of the entire hearings (including all translations) should be maintained so that translations can be checked afterwards for accuracy."⁸

U. As evidenced from the observations of representatives from Human Rights Watch and the attached summary from Mr. Yahya, the August hearings suffered into a complete breakdown of communication and missed and lost translation.

V. According to Mr. Yahya, "It was only during the hearing of Mr. Al-Qosi that I had access to a headset, and therefore became fully aware of the magnitude of the problem with English-to-Arabic interpreting. As the hearing started, I followed the

⁷ Also of note is the fact that of the three other hearings, two required court interpreters.

⁸ Human Rights Watch, Letter to Donald H. Rumsfeld, Secretary of Defense, 16 September 2004.

English script while listening to the interpreted proceedings through the headset. I

observed the following:

a. No standard was being followed with respect to the choice of dialect.

The interpreter mostly used colloquial Egyptian, but switched to modern standard Arabic at will. Except in the case of addressing small children or unschooled individuals, I am not aware of any situation when a colloquial form of Arabic is used in providing formal court interpretation services.

b. The interpreting tempo was conspicuously inadequate for the simultaneous mode. This became obvious to all every time the Presiding Officer reminded speakers to slow down to help the interpreter catch up. What was not known to all, and what I could clearly observe, was that, to catch up, the interpreter had to **skip over sentences any time he fell behind** [emphasis added].

c. In the end, the service provided came to a nearly complete breakdown. In the beginning, I started taking notes about individual terms that were inadequately rendered. These were mostly legal terms, such as “review exhibit,” “protective order,” “findings,” “voir dire,” “brief,” etc. Some of the terms were specific to the Military Commission process. For instance “Appointing Authority” was rendered “Appointing Committee.” Other terms were military jargon, such as military ranks. I hastened to the conclusion that the quality of the interpretation was at the level known in the translation/interpreting industry as “Swiss cheese,” which means “full of holes.” However, as the hearing progressed, the interpretation deteriorated further. Individual errors and lacunae were beside the point at this stage, as the interpretation became almost totally incoherent. At the point when the Presiding Officer and you were discussing the issues of lack of resources and the conflict arising from your reassignment, the “Swiss cheese” analogy did not fit anymore. It was more like “shredded cheese,” I thought. I stopped taking notes, because it was pointless.⁹

W. One of the most disturbing points observed, notes Mr. Yahya, was the fact that there was a complete absence of any effort from anyone in the Appointing Authority’s office to create a multi-lingual glossary of commission and/or legal terms (a

⁹ *supra* note 3, at page 10.

point which is stressed by other linguists as a must in any court proceeding in which interpretation is required).¹⁰

X. In addition to the obvious problems noted in the previous paragraphs, it is also important to note that at no time was Mr. al Qosi given a copy of the “trial script” in Arabic, and he has yet to receive a copy of the commission orders, instructions, and presiding officer memoranda in Arabic.

Y. Finally, it is worth noting that upon information and belief, the court interpreters were given virtually no time to prepare for the proceedings, and in fact, with constant changes in the trial script, found themselves working late into the evening trying to devote some last minute preparation for the upcoming hearings.

4. Legal Analysis:¹¹

U.S. LAW:

The Court Interpreters Act of 1978 provides the following:

(a). The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States.

(b) (1). ...The Director shall certify interpreters based on the results of criterion-referenced performance examinations.

(2) Only in a case in which no certified interpreter is reasonably available as provided in subsection (d) of this section, including a case in which

¹⁰ *supra* note 3, at page 11.

¹¹ The Defense has prepared a “Memorandum of Points & Authorities on Humanitarian and Human Rights Law”, Attachment B, that in specific detail provides the legal reasoning why international treaties and agreements, and customary international law bind this Commission as it decides issues of law, and why the Commission need reference them in order to ensure a “full and fair” trial in this matter.

certification of interpreters is not provided under paragraph (1) in a particular language, may the services of otherwise qualified interpreters be used. The Director shall provide guidelines to the courts for the selection of otherwise qualified interpreters, in order to ensure that the highest standards of accuracy are maintained in all judicial proceedings subject to the provisions of this chapter.

(d) (2). Upon the motion of a party, the presiding judicial officer shall determine whether to require the electronic sound recording of a judicial proceeding in which an interpreter is used under this section. In making this determination, the presiding judicial officer shall consider, among other things, the qualifications of the interpreter and prior experience in interpretation of court proceedings; whether the language to be interpreted is not one of the languages for which the Director has certified interpreters, and the complexity or length of the proceeding.¹²

INTERNATIONAL TREATIES:

The international legal instrument most relevant to the United States that provides the general rule on interpreters is the International Covenant on Civil and Political Rights (ICCPR). Article 14(3) provides, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ... (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.”¹³

¹² 28 USCS 1827

¹³ Available at <http://www.ohchr.org/english/law/ccpr.htm>

The international community has also embodied this rule in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the International Criminal Court (ICC).

The statutes of the ICTY (Article 21 (4)(f)) and the ICTR (Article 20 (4) (f)) contain identical language and provide, “(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal.”¹⁴

The Human Rights Committee assumes the provisions to mean that the interpreter must be competent. “Subparagraph 3(f) [of the ICCPR] provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.”¹⁵

In fact, the ICC adopts the *competent* verbiage in Article 67 (1) by providing, “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are

¹⁴ Available at <http://www.ohchr.org/english/law/itfy.htm>

¹⁵ *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*(Art. 14), 13 April 1984, CCPR General Comment No. 13.

necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.”¹⁶

While judges in international fora have shied away from defining what exactly *competent* means with respect to the quality of an interpreter, two sources provide guidance. Article 105 of the Third Geneva Convention provides, “The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter.”¹⁷

Moreover, the International Committee of the Red Cross (ICRC) commentary to Article 105 provides further guidance. “The right of an accused prisoner of war to have the services of a competent interpreter ‘if he deems necessary’ automatically results from the rights of defence if the language currently used in the detaining country is unfamiliar or unknown to the prisoner of war. In this connection, it should be noted that it is for the prisoner himself to judge whether he needs an interpreter. The word ‘competent’ denotes an interpreter who not only knows the two necessary languages – that of the prisoner of war and that of the detaining country – but also is familiar with legal terminology and accustomed to acting as an interpreter during judicial proceedings.”¹⁸

¹⁶ Jordan J. Paust, Bassiouni, Scharf, Gurul'e, Sadat, Zagaris, & Williams, *INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT*, Carolina Academic Press, Durham, North Carolina (2000), at 238, 239.

¹⁷ The Geneva Conventions of 12 August 1949, III Geneva Convention Relative to the Treatment of Prisoners of War, Article 105.

¹⁸ *Id.*

The second source relevant to the competence of interpreters is The Code of Ethics for Interpreters and Translators Employed by the International Criminal Tribunal for the Former Yugoslavia. This Code of Ethics places the burden on the interpreter to determine whether he or she is competent, and to withdraw from cases where he or she cannot provide competent interpretation.¹⁹

INTERPRETATION IN OTHER TRIBUNALS:

In international tribunals convened around the world, court interpreters recognize the need for preparation and accuracy in interpretation. In the Court of Justice of the European Community, for example, “given the nature of judicial work, the conference interpreters who work at the institution are required to produce a high level of accuracy in their work, and must master the legal concepts and terminology used.”²⁰

In the International Tribunal for the Law of the Sea, “The interpreters not only require precise knowledge of legal and technical terminology. They also must keep abreast of new terms emerging from the discussions among the judges, which have a lasting impact on the jurisdiction of the Tribunal. To do this the interpreters have produced a terminology database which is being constantly updated.”²¹

During the trial of the two Libyans accused of the Lockerbie bombing, the first days of the trial proved quite stressful for the court interpreters. In fact, the demands placed on the interpreters were so great that on the 19th day of trial, the problems came to a head when the defense counsel officially lodged objections with the court noting,

¹⁹ Available at <http://www.un.org/icty/basic/codeinter/IT144.htm>

²⁰ *Interpreting at International Courts and Tribunals*, Conference in the Hague, Netherlands, 4 - 7 July 2001; available at <http://www.aiic.net/ViewPage.cfm/page1372.htm>

²¹ *Id.*

“...the interpretation services, which are provided in the court, are apparently just that; they are interpretative of the evidence rather than verbatim translation of the evidence which is given...That which has been complained about is not a deficient service of interpretation, but is a service of interpretation which is precisely that. It’s not a service of translation all...my client is entitled to a translation of the proceedings in which he is a participant.”²²

To fix the problems of the Lockerbie court interpretation, several mechanisms were put into place, to include external monitoring by an independent team of interpreters. Their job was to monitor the translation arrangements to ensure that they were adequate and accurate.²³

In the end, an interpreter noted, “The importance of accurate interpretation in this case in order to guarantee a fair trial is acknowledged and all parties need to make concerted efforts to take this into account. A basi[c] step in this direction is providing courtroom interpreters with copies of the documents intended to be read out or introduced during the proceedings. If the interpreters have the relevant documents, the[y] will be in a position to be well prepared (vocabulary, terminology, register of the language, etc.) and to perform their job at the highest professional level, to everyone’s satisfaction, thus playing their role in the administration of a fair trial.”²⁴

²² *Id.*

²³ Interestingly, in an e-mail attached to this motion, Attachment C, [REDACTED] of the [REDACTED] (the govt. contractor for interpreters provided for military commissions), also acknowledges the need for editing and proofreading by other translators beyond those who translated the original documents.

²⁴ *supra* note 17.

COMMISSION LAW:

Military Commission Order (MCO) number 1, paragraph 4 (D), dated 21 March 2002, provides that “Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.” Further, paragraph 5 (J) provides, “The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.”

Aside from the aforementioned commission order, the only attempt to clarify qualifications of translators and interpreters can be found in draft Presiding Officer Memorandum (POM) No. 11, which is scheduled to go out in final form on 18 October 2004.²⁵

While this draft POM provides a mechanism for counsel to raise objections for what is deemed “significant translation errors”, it is woefully inadequate for the following reasons: first, following the initial hearings in August, the Chief Prosecutor held a press conference with several members of the media. During his briefing and in response to concerns raised by the media on interpretation issues, he announced that he did not believe an audio recording was made of the English to Arabic interpretation (which only the accused and the defense translator had the benefit of hearing). In the draft POM, however, the Presiding Officer provides that an “audio file”

²⁵ Even this POM was not drafted until after the fiasco in interpretation that took place during the August hearings at GTMO.

for the session in question will be produced. To date, the Defense has not been made aware in writing that all of the interpretations taking place in the Military Commission are recorded. These assurances should be in writing; second, the relevant time to have a verification translator is during the actual proceeding so that he/she can monitor the performance of the other interpreters performing duties in the military commission, not after the fact; third, allowing counsel to obtain a copy of an interpreter's curriculum vitae hardly begins to tell anything about that particular interpreter's qualifications. Indeed, even in the initial hearings in August, one of the court interpreters had never even interpreted in court before and had absolutely no grasp whatsoever of legal language; fourth, there is nothing contained in the draft POM to explain how long and where (if there are any) the audio tapes of all interpretations conducted during the military commission shall be maintained; finally, unlike in other tribunals conducted around the world, the equipment utilized for simultaneous interpretation in the military commissions process is lacking (and the draft POM is silent). For example, during the August hearings, the interpreters were required to sit completely out in the open commission room rather than in interpretation booths, and were forced to work with a staff of only three, with no ability to prepare for the commissions process and no working vocabulary of commission legal terms.

Even during the trial of defendant Donitz in the International Military Tribunal in Nuremberg, the judges quickly recognized the need for accurate interpretation. At one point, the defense counsel objected because in many instances, the translations of several German witnesses did not correspond to their actual statements. After a colloquy between the President of the Tribunal and Mr. Justice Robert H. Jackson

(Chief of Counsel for the United States), Colonel Leon Dostert, Chief of Interpreters, provided, "Your Honors, the reports of the proceeding are taken down in all four languages and every word spoken in German is taken down in German by German court stenographers. The notes are then transcribed and can be made available to Defense Counsel. Moreover, there is a mechanical recording device which registers every single word spoken in any language in the courtroom, and in case of doubt about the authenticity of the reporter's notes, we have the further verification of the mechanical recording, so that Defense Counsel should have every opportunity to check the authenticity of the translation."²⁶

ARGUMENT

The [military commission] has the duty to supervise and conduct [commission] proceedings so as to afford all parties a fair and impartial trial to the end that justice may be served. Courts and scholarly commentators recognize that inadequate or improper court interpretation creates problems of constitutional dimensions. Moreover, the court interpreter is an impartial officer...directly under the control and supervision of the [commission]. Therefore, the [military commission] has an obligation to ensure that the interpreter performs his or her duties accurately, fairly, impartially, and ethically.²⁷

Without adequate measures in place for qualified simultaneous court interpretation, Mr. al Qosi's fundamental right to confront the witnesses against him is meaningless if he cannot understand their testimony. As evidenced by the voluminous

²⁶ International Military Tribunal –Nuremberg, Transcript Book, Volume III, pages 18 – 19.

²⁷ *supra* note 2.

errors in interpretation discussed previously, the ramifications to Mr. al Qosi's right to a "full and fair" trial are already of a constitutional dimension, as noted by the incorrect translations in the charge sheet and discovery documents provided to the defense.

Without a complete overhaul of the interpretation system currently in place, Mr. al Qosi will be denied his fundamental rights to confront the witnesses against him and to effectively participate in his own defense. Furthermore, without audio recordings of the English to Arabic interpretation, the government is essentially choking any meaningful appeal that might otherwise be available to Mr. al Qosi to dispute the reliability of the evidence presented against him at trial through the interpretation of less than qualified interpreters. Even appellate judges have "complain[ed] about the paucity of the trial court record and their inability to review the interpretation at trial. Indeed, absent adequate recording mechanisms in place to record all that is being interpreted, courts have commented on the near – impossibility of appellate challenge to the accuracy of an interpretation."²⁸

CONCLUSION

For the forgoing reasons, the Defense respectfully requests that the Military Commission abate the proceedings against Mr. al Qosi until adequate measures can be implemented for the employment of qualified simultaneous court interpreters, verification interpreters, and the installation of proper interpreting equipment, to include interpreting booths and recording devices that not only record what is being said in open court, but also the English to Arabic being translated by the court interpreters to Mr. al Qosi. If

²⁸ *supra* note 2, at 13, citing *United States v Anguloa*, 598 F.2d. 1182, 1185 n. 3 (9th Cir. 1979).

such adequate measures cannot be implemented with the opportunity for defense counsel to voir dire prospective court interpreters, the Defense requests the Military Commission to dismiss the charge against Mr. al Qosi because the measures currently in place will not provide him with a “full and fair” trial as mandated by the President’s Military Order of 13 November 2001.

5. Attachments:

Mr. Yahya’s summary of translation quality
Defense Counsel Memorandum of Points & Authorities
[REDACTED] e-mail

6. Oral Argument:

The Defense hereby requests oral argument during the November voir dire hearing before the Military Commission on this motion to abate proceedings. Oral argument is necessary under the President’s Military Order of 13 November 2001 to provide for a “full and fair” trial.

7. Legal Authority:

Charles M. Grabau and Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation* *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 New Eng. L. Rev 227, Winter, 1996, at 2. See also Molly McDonough, *Lost in Translation; Lack of Qualified Interpreters May Compromise Justice*, ABA JOURNAL, November 2003.

Summary provided by Mr. Fuad M. Yahya, contract linguist for the Office of the Chief Defense Counsel, assigned to the al Qosi defense team.

Human Rights Watch, Letter to Donald H. Rumsfeld, Secretary of Defense, 16 September 2004.

28 USCS 1827

<http://www.ohchr.org/english/law/ccpr.htm>

<http://www.ohchr.org/english/law/itfy.htm>

General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law(Art. 14), 13 April 1984, CCPR General Comment No. 13.

Jordan J. Paust, Bassiouni, Scharf, Gurul'e, Sadat, Zagaris, & Williams, INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT, Carolina Academic Press, Durham, North Carolina (2000), at 238, 239.

The Geneva Conventions of 12 August 1949, III Geneva Convention Relative to the Treatment of Prisoners of War, Article 105.

<http://www.un.org/icty/basic/codeinter/IT144.htm>

Interpreting at International Courts and Tribunals, Conference in the Hague, Netherlands, 4 - 7 July 2001; available at <http://www.aiic.net/ViewPage.cfm/page1372.htm>

International Military Tribunal –Nuremberg, Transcript Book, Volume III, pages 18 – 19.

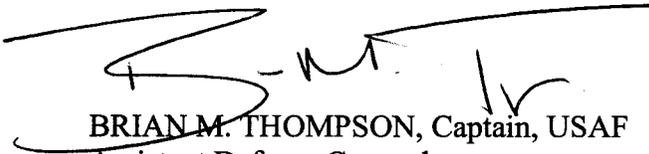
United States v Anguloa, 598 F.2d. 1182, 1185 n. 3 (9th Cir. 1979).

8. Witnesses:

- a. Mr. Fuad Yahya
- b. Mr. al Qosi for the limited purposes of the motion
- c. Any other witnesses that might be determined as necessary after the Defense receives and reviews the government's response.
- d. Any witness the commission desires to summon to testify on the matters herein.



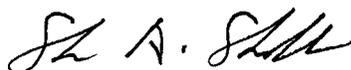
SHARON A. SHAFFER, Lt Colonel, USAF
Defense Counsel



BRIAN M. THOMPSON, Captain, USAF
Assistant Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on 19 OCT 2004, I e-mailed this Motion to Abate Proceedings to the Presiding Officer and legal assistant to the Presiding Officer. A copy was also e-mailed to the prosecutor.



SHARON A. SHAFFER, Lt Colonel, USAF
Defense Counsel

Lieutenant Colonel Sharon Shaffer
Deputy Chief Defense Counsel
Office of Defense Counsel
Office of Military Commission
Department of Defense
Washington, DC

October 11, 2004

Dear Lt. Col. Shaffer,

This will serve as a documentation of my observations regarding the quality of translation and interpreting services provided in support of the processes implemented to carry out the Military Commissions for the Guantanamo Bay detainees. The observations documented below apply only to the translated documents that I have read and the interpreted proceedings that I have attended in the course of rendering my duties as contract linguist for the Office of Defense Counsel, assigned to the defense team handling the case of Mr. Ibrahim Al-Qosi. I submit these observations to you at your request. You are free to use this information as documentation for any motion.

I. The Charge Sheet of Mr. Ibrahim al Qosi: The Arabic translation of the charge sheet falls far below the minimum standard in both content accuracy and formal correctness, showing both inadequate comprehension of the source English text and poor rendition in Arabic. The following list of deficiencies will also show that the translation was not subjected to any quality review process:

A. Content Accuracy Errors:

- 1. Incorrect Translations:** A number of expressions were translated in a manner that altered the original meaning. Examples:
 - a. "is based on" (paragraph 1) was rendered "belongs to."
 - b. "charged conduct" (paragraph 2) was rendered "the charge against the conduct."
 - c. "is triable" (paragraph 2) was rendered "may be triable."
 - d. "worked closely with al Qaida" (paragraph 6) was rendered "worked alongside al Qaida."
 - e. "attacks on US forces were proper to drive them out" (paragraph 9) was rendered "attacks on US forces could drive them out."
 - f. "al Qaida should support" (paragraph 11) was rendered "al Qaida must support."

ATCH A

- g. “associated group” (paragraph 11) was rendered “supporting group.”
- h. “should kill Americans” (paragraph 13) was rendered “must kill Americans.”
- i. “to prepare as much force as possible” (paragraph 14) was rendered “to provide the force they have.” See item 3.c below for additional comment on this error.
- j. “associates” (paragraphs 15, 16, 17, 18, and 19) was rendered “supporters.”
- k. “bombing” (paragraphs 15 and 16) was rendered “bombardment.”
- l. “knowingly” (paragraph 18) was rendered “with full knowledge.”
- m. “joined an enterprise of persons” (paragraph 18) was rendered “supported persons.”
- n. “in furtherance” (paragraph 19) was rendered “in preparation.”
- o. “overt acts” (paragraph 19) was rendered “flagrant acts.”
- p. “shelter” (paragraph 19.b) was rendered “hideout.”
- q. “military tactics” (paragraph 19.d) was rendered “military plans.”
- r. “deputy chief financial officer” (paragraph 19.e) was rendered “assistant to the financial section chief.”
- s. “couriered” was rendered “dispatched.”
- t. “compound” (paragraph 19.j) was rendered “center.”
- u. “traveled” (paragraph 19.k) was rendered “intended to travel.”
- v. “occasionally driving Usama bin Laden himself” (paragraph 19.k) was rendered “was occasionally Usama bin Laden’s private driver.”
- w. “detachment” (paragraph 19.k) was rendered “caravan.”
- x. “the attacks on the US” (paragraph 19.l) was rendered “the events.”
- y. “mobilizing” (paragraph 19.l) was rendered “preparing.”

2. Inappropriate Translations: A number of expressions were replaced by near synonyms that might have been appropriate in other contexts. This category includes transitive verbs that were used intransitively or vice versa. Examples:

- a. “a/k/a” (paragraphs 1 and 18)
- b. “officials” (paragraph 3)
- c. “forcing the United States to” (paragraph 5)
- d. “activities” (paragraphs 7 and 19.f)

- e. “began making statements indicating that” (paragraph 9)
- f. “whether al Qaida” (paragraph 11)
- g. “to assassinate” (paragraph 11)
- h. “members” (paragraph 15)
- i. “the following offenses” (paragraph 18)
- j. “said conduct being” (paragraph 18)
- k. “provide” (paragraphs 19.b and 19.k)
- l. “using” (paragraph 19.c)
- m. “individual weapons” (paragraph 19.d)
- n. “fighting” (paragraph 19.e)
- o. “assumed the position of” (paragraph 19.e)
- p. “background” (paragraph 19.e)
- q. “organizations” (paragraph 19.e)
- r. “to provide cover for” (paragraph 19.f)
- s. “procurement” (paragraph 19.f)
- t. “checks” (paragraph 19.f)
- u. “loading” (paragraph 19.g)
- v. “handpicked” (paragraph 19.h)
- w. “Star of Jihad” (paragraph 19.j)

3. Misquotation: The translation contained exact quotes that should have been copied verbatim from original sources rather than back-translated. Original sources are freely available on the Internet.

- a. “International Islamic Front for Fighting Jews and Crusaders” (paragraph 13)
- b. “The Nuclear Bomb of Islam” (paragraph 14)
- c. “It is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God.” The translator clearly did not realize that this was an allusion to the Qur’anic verse 8:60.

4. Omissions: Some words and phrases were omitted from the Arabic translation.
Examples:

- a. “formally” (paragraph 6)
- b. “also” (paragraph 6)
- c. “in part” (paragraph 6)
- d. “Somalia” (paragraph 8)
- e. “training and” (paragraph 8)
- f. “Sudan, Ethiopia” (paragraph 18)
- g. “destruction of property by an unprivileged belligerent” (paragraph 18)
- h. “operating” (paragraph 19.b)
- i. “directly” (paragraph 19.e)
- j. “other” (paragraph 19.f, line 6)
- k. “detachment” (paragraph 19.k)

5. **Prepositions:** In Arabic, as in English, prepositions can be interchangeable in some contexts, subject to the limits of acceptable practice. The translator, however, stretched the bounds of acceptable practice and used inappropriate prepositions in some expressions. Examples:

- a. “traible by a military commission” (paragraph 2)
- b. “directed by a *shura* (consultative) council” (paragraph 7)
- c. “of the bombing” (paragraphs 15 and 16)
- d. “of the attacks” (paragraph 17)

B. Formal Errors:

1. **Inflection:** Arabic is a heavily inflected language. Grammatical case is not determined by word order, but by differential suffixes. The translation of the charge sheet contains some incorrectly inflected words. Examples:

- a. In paragraph 8, the object phrase “training camps, guest houses, and business operations” requires the accusative case. It was given the nominative case.
- b. In paragraphs 15, 16, and 17, the expression “known and unknown” requires the nominative case. It was given the accusative case.
- c. In paragraph 19.d, the object phrase “physical training, military tactics, and weapon instruction and firing” requires the accusative case. It was given the nominative case.

2. **Tense:** In paragraph 18, the present tense was used for the verbal phrase “conspired and agreed.”
3. **Sentence Form:** In English, declarative sentences begin with the subject. In Arabic, a declarative sentence can begin with the subject or the verb, depending on various factors. The translator of the charge sheet chose inappropriate sentence forms in several places, most notably in the opening sentences of paragraphs 6, 7, 11, and 12.
4. **Word order:** When translating from English to Arabic, one must yield to the requirements of the target language with respect to word order. The translator failed to yield to such requirements, producing oddly constructed phrases. Examples:
 - a. The phrase “support of terrorist camps and operations” (paragraph 19.e)
 - b. The phrase “on or about” in paragraphs 11, 14, 15, 16, 17, 18, 19.c, and 19.e
 - c. The phrase “before, during, and after” in paragraph 19.1
5. **Conjunctions:** In Arabic, the conjunction “and” is used between all items in a series. The translator followed the standard scheme used in English by placing the conjunction “and” only before the last item in a given series, with commas separating other items, as in “personnel, weapons, explosives, and ammunition” (paragraph 19.8). It is also interesting that the translator used left-to-right commas, which are not appropriate for Arabic.
6. **Gender:** In Arabic, all nouns are either masculine or feminine. The translator used the wrong gender for a number of nouns. Examples:
 - a. In paragraph 6, “Egyptian Islamic Jihad,” which is the name of an organization, was incorrectly treated as masculine, while the Arabic word for “interpretation” (in the same paragraph) was incorrectly treated as feminine.
 - b. In paragraph 9, “attack” was incorrectly treated as feminine. See item 7.a below for additional comments on the translation of this word.
7. **Number:** In Arabic, a noun can be singular, double, or plural. The translator used incorrect numbers in several spots. Examples:
 - a. In paragraph 9, “attacks” was rendered “attack.”
 - b. In paragraph 13, the phrase “Usama bin Laden and Ayman al Zawahiri” was treated as plural instead of double.
8. **Determiners:** The translator incorrectly used definite and indefinite articles, in a number of phrases, as in the following:

- a. "A purpose or goal of al Qaida" (paragraph 5) was translated to "The goal of al Qaida."
 - b. "violent attacks" (paragraph 5) was rendered "the violent attacks."
 - c. The word "Conspiracy" in the title above paragraph 18 requires the definite article in Arabic, because it is an abstract noun. The definite article was not supplied. Additionally, the term itself was mistranslated (see III. 2, below),
 - d. The word "information" (paragraph 19.b) was changed to "the information."
 - e. The definite article was omitted from the phrase "the al Farouq camp" (paragraph 19.d). This omission is inexplicable because the English charge sheet supplied the definite article in Arabic (the prefix "al").
 - f. The word "Sheikh" in paragraph 19.e requires the definite article in Arabic because it is the title of an individual. The translator failed to supply the definite article.
 - g. "income" (paragraph 19.f) was rendered "the income."
 - h. "explosives" (paragraph 19.g) was rendered "the explosives."
 - i. "a failed assassination attempt" (paragraph 19.h) was rendered "the failed assassination attempt."
9. **Spelling:** The following words and names, which are very well known, were consistently misspelled:
- a. al Qosi (throughout the charge sheet). It is interesting to note that the English spelling "al Qosi" itself is incorrect. The medial vowel should be either "ū," "oo," or "ou," but not "o."
 - b. Usama (paragraph 3)
 - c. Zawahiri (paragraph 6)
 - d. shura (paragraph 7; correctly spelled in other instances)
 - e. Somalia (paragraph 9)
 - f. Ethiopia (paragraph 11)
 - g. al Gamaa al Islamiyya (paragraph 11)
 - h. Kenya (paragraph 15)
 - i. Tanzania (paragraph 15)
 - j. December (paragraphs 19.a and 19.k; correctly spelled in other instances)
 - k. Jalalabad (paragraph 19.j.)

- l. The word “some” in paragraph 19.k. This particular error is one more indication that Arabic was not an “A” language for the translator. The final consonant in this word is a unique Arabic sound that non-Arabs commonly confuse with the letter D, which is the letter used by the translator.

10. Orthography:

- a. All initial hamzas are missing.
- b. Incorrect forms of the medial hamza were used, as in the Arabic word for “allies” (paragraph 13).
- c. In the Arabic word for “advocated” (paragraph 6), the final vowel is the wrong kind of alif.

11. Typographical errors:

- a. “properties” (paragraph 10)
- b. “provide” (paragraph 19.f)

C. Errors of meaning stemming from errors of form: Two content accuracy errors merit some explanation because they are the result of grammatical errors, the first being syntactical, the other being morphological:

1. **Paragraph 18:** The Arabic version attributes conspiracy to “an enterprise of persons,” rather than to Mr. Al-Qosi. I recall how much this error confused Mr. Al-Qosi when he read his charge sheet. He wondered aloud how he could be held responsible for a conspiracy attributed to other people.

This incorrect attribution reflects the failure of the translator to comprehend the complex structure of the English text. This entire paragraph is a single complex sentence with an intricate structure and many long parenthetical phrases. In bare bones, the sentence reads:

“Ibrahim...al Qosi...joined an enterprise of persons who share a common criminal purpose and conspired and agreed with Usama bin Laden...and other members...to commit the following offenses.”

This sentence consists of two clauses, a main clause:

“Ibrahim...al Qosi...joined an enterprise or persons...and conspired and agreed with Usama bin Laden...and other members...to commit the following offenses.”

and a subordinate adjective clause:

“...who share a common criminal purpose...”

The subordinate adjective clause modifies the noun phrase “an enterprise of persons,” which is the object of the verb “joined” in the main clause.

The subject of the main clause is “Ibrahim Ahmed Mahmoud Al-Qosi,” while the subject of the subordinate adjective clause is the relative pronoun “who,” which refers to “an enterprise of persons.” The translation error reflects a failure to distinguish the two subjects of the two clauses because of the intermediate position of the subordinate adjective clause, sandwiched as it is between the verb “joined” in the first part of the main clause and the two verbs “conspired” and “agreed” in the second part. In the absence of an explicitly stated subject for the last two verbs, the translator attributed the two verbs to the nearest preceding subject rather than to the subject of the main clause. In other words, the translator merged the second part of the main clause with the subordinate adjective clause.

Students of writing are often cautioned to avoid placing an unrelated subject closer to a verb than its own subject in order to avoid confusing their readers. In legal and other technical writings, however, such structural pitfalls are very common. A competent legal translator is expected to be able to parse a complex sentence and to correctly identify its components and their relationships.

2. **The Arabic word used for “conspiracy.”** In Arabic, two different nouns may be derived from the verb “to conspire,” one used to express a conspiratorial enterprise, while the other is used to express “being involved in a conspiracy.” The latter is the correct term called for in the charge sheet as a name for the charge. The former, used by the translator, cannot be used as the name of an offense, because it denotes the enterprise itself, not anybody’s involvement, role, or conduct. Both terms mean “conspiracy,” but each has a different function based on its form. The translator does not seem to know the difference. In addition, the translator used another word for “conspire” in the text, which, in a non-legal context, may be acceptable as a near synonym, but in a formal charge sheet, such a term would not be acceptable. It is equivalent to the English term “collude.”

The evidence cited above shows that the charge sheet was translated by someone whose knowledge of Arabic was far below native knowledge, let alone scholarly knowledge. The translation is unacceptable by any recognized standard.

II. The discovery material: It is also clear that the discovery material was produced through a process that, in at least some of its steps, involved individuals whose knowledge of Arabic was so deficient as to compromise the integrity of the information. Examples:

A. In the interview of January 22, 2003, the following statement appears:

“On one occasion he gave 5,000 USD to a man named ADIS ABABA.”

- B. In the interview of February 24, 2003,** neither the interviewer nor the interpreter understood the meaning of the Arabic word for “guesthouse.” The English documentation of the interview does not attempt to translate the term, but renders it in English as “maldafa” and refers to this odd word as a mere “phonetic” rendition of the Arabic term. As written, it is incorrect even as a mere phonetic rendition.

III. The Pretrial Hearings: Simultaneous interpretation was provided by three court interpreters, two of whom were certified (according to their business cards). The third was not certified and had not had any experience in simultaneous interpreting. The third interpreter should not have been selected to provide court interpreting duties, although she has good bilingual skills and may be well qualified to provide other language-related services, including consecutive interpreting in a non-court setting.

The Arabic-to-English interpretation was transmitted via loudspeakers to be heard by everyone in the courtroom and in the satellite viewing rooms for media representatives. The English-to-Arabic interpretation of the proceedings was transmitted via cordless headphones to the accused and his defense team interpreter sitting next to him. No one else in the courtroom could hear the English-to-Arabic interpretation. I will address each of these two modes separately:

- A. Problems with Arabic-to-English** interpreting became public during the Bahlul hearing. The expressions “Islamic law” and “secular law,” as well as the statements “I know lawyers in Yemen” and “Admission is the master of all evidence” were misinterpreted, and the court interpreters themselves disputed each other publicly and on the record during the proceedings.

During the hearing of Mr. Al-Qosi, the Arabic-to-English interpreter tried to anticipate Mr. Al-Qosi’s answer to the question of whether he wanted to be represented by you and no one else. The interpreter hastened to interpret without hearing the full answer, giving a false rendition of the second half of the answer, but Mr. Al-Qosi insisted on completing his answer to the question, whereupon the interpreter corrected himself.

- B. Problems with English to Arabic** interpreting were known only to the interpreter of the defense team of each hearing, because he was the only person in the courtroom who knew both Arabic and English and had access to a headset. During the hearings of Mr. Hamdan and Mr. Bahlul, I had no access to a headset, so I cannot comment on the interpreters’ performance in these hearings. Nevertheless, performance deficiencies became known to all when Mr. Hamdan’s defense counsel stated to the court that his client could not understand the Arabic rendition. A different interpreter took over, the hearing continued, and the issue was not further raised.

It was only during the hearing of Mr. Al-Qosi that I had access to a headset, and therefore became fully aware of the magnitude of the problem with English-to-Arabic interpreting. As the hearing started, I followed the English script while listening to the interpreted proceedings through the headset. I observed the following:

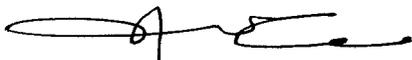
- 1. No standard was being followed with respect to the choice of dialect.** The interpreter mostly used colloquial Egyptian, but switched to modern standard Arabic at will. Except in the case of addressing small children or unschooled individuals, I am not aware of any situation when a colloquial form of Arabic is used in providing formal court interpretation services.
- 2. The interpreting tempo was conspicuously inadequate for the simultaneous mode.** This became obvious to all every time the Presiding Officer reminded speakers to slow down to help the interpreter catch up. What was not known to all, and what I could clearly observe, was that, to catch up, the interpreter had to skip over sentences any time he fell behind.
- 3. In the end, the service provided came to a nearly complete breakdown.** In the beginning, I started taking notes about individual terms that were inadequately rendered. These were mostly legal terms, such as “review exhibit,” “protective order,” “findings,” “voir dire,” “brief,” etc. Some of the terms were specific to the Military Commission process. For instance “Appointing Authority” was rendered “Appointing Committee.” Other terms were military jargon, such as military ranks. I hastened to the conclusion that the quality of the interpretation was at the level known in the translation/interpreting industry as “Swiss cheese,” which means “full of holes.” However, as the hearing progressed, the interpretation deteriorated further. Individual errors and lacunae were beside the point at this stage, as the interpretation became almost totally incoherent. At the point when the Presiding Officer and you were discussing the issues of lack of resources and the conflict arising from your reassignment, the “Swiss cheese” analogy did not fit anymore. It was more like “shredded cheese,” I thought. I stopped taking notes, because it was pointless.

Mr. Al-Qosi was asked at the beginning of the hearing if he understood the interpreter. He answered in the affirmative. As he explained to me later, his answer reflected the fact that he clearly understood the questions addressed to him. At first, he was not troubled by the procedural parts of the hearing being not very clear. He had not assumed that these parts would be clear to a lay person anyway. Later in the hearing, when the interpreting reached an almost complete breakdown, he mentioned it to me. I asked him if he wanted me to ask you to raise the issue with the court, he said that he wanted the issue to be raised in one of your motions, but he did not want the issue to bring the proceedings to a halt, because that might delay the resolution of the matter that was most vital for him, namely whether you would continue to be his defense counsel. Besides, he had already stated that he had understood the interpreters early in the hearing. He was not sure if he wanted to change his position at that late stage, but he was sure he wanted the issue to be addressed in one of the motions.

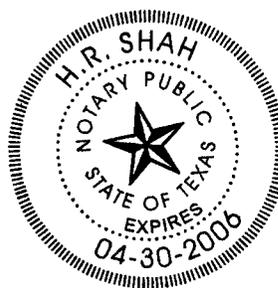
IV. General Observations: One of the most disturbing observations in the entire Military Commission process is the absence of any effort to create a multi-lingual glossary of terms that are specific to the process. Considering how the process itself involves many novel legal concepts, and knowing how large translation/interpreting projects are normally handled in the industry, I would have expected the Office of the Appointing Authority to address this issue from the beginning and to create a language unit to address this and other language-related issues.

Providing translation and interpreting services for processes of the magnitude and historic importance of the Military Commission requires a lot more than just hiring good professionals. It requires a great deal of methodical planning and language services management. The objective would be to establish standards and to eliminate not only poor performance, but also inconsistencies. Unless this issue is systematically addressed, the performance will always be marred by inconsistency regardless of the qualifications of the translators/interpreters hired for various duties.

In my judgment, the above-cited deficiencies can have a significant impact on the ability of the accused to participate in his own defense, and may therefore have an adverse impact on due process.



Fuad M. Yahya



H. R Shah

10-11-04

**In the United States Military Commission at
Guantanamo Bay Naval Base, Cuba**

UNITED STATES OF AMERICA)	
)	
v.)	DEFENSE MEMORANDUM
)	OF POINTS & AUTHORITIES
)	ON INTERNATIONAL
IBRAHIM AHMED MAHMOUD AL QOSI)	HUMANITARIAN AND HUMAN
)	RIGHTS LAW

In addressing the issues raised in this Motion, the Commission must apply international humanitarian and human rights law. Under the Supremacy Clause of the Constitution, “all Treaties” are part of the “supreme Law of the Land.” U.S. Const. Art. VI, §2.

Humanitarian and human rights treaties matter to this Commission’s assessment of the legal validity of its procedures for three main reasons. First, all United States treaties, regardless of whether they are self-executing, must be considered in the interpretation of United States statutes. The Presidential Order authorizing the establishment of this and other military commissions, and on which the subsequent military orders and instructions are based, purports to exercise authority conferred by a statute, namely 10 U.S.C. §836 (2004), which authorizes the President to prescribe procedures for military commissions. Like all statutes, this one must be interpreted, if possible, in a manner consistent with international law. As Chief Justice John Marshall declared in *Murray v. Schooner Charming Betsy*, “[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ...” 6 U.S. (2 Cranch) 64, 118 (1804). This principle has been consistently reaffirmed by the Supreme Court. *E.g., F.Hoffman-La Roche Ltd. v. Empagran S.A.*, ___ U.S. ___, 124 S.Ct. 2359, 2366

(2004); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros*, 370 U.S. 10, 20-21 (1963).

The *Charming Betsy* canon requires construction of Acts of Congress, wherever possible, in a manner consistent with United States treaty obligations. *Sale v. Haitian Centers Council*, 509 U.S. 155, 178 and n. 35 (1993).

Second, the *Charming Betsy* canon also requires that construction of U.S. statutes be consistent, if possible, with another prong of the “law of nations,” namely customary international law. *Hoffman-La Roche, supra*, 124 S.Ct. at 2366 (statutory construction reflecting “principles of customary international law--law that (we must assume) Congress ordinarily seeks to follow”). Customary international law consists of norms reflecting general practices of nations, accepted by them as binding norms.¹ Thus, even where the U.S. has not joined a treaty, it must be taken into account in construing U.S. statutes if it is widely recognized as a statement of customary international law.

Nothing in the statute here -- 10 U.S.C. §836 -- purports to authorize or require military commission procedures in conflict with international law. Thus the statute may -- and accordingly must -- be interpreted to authorize only procedures consistent with United States treaties and customary international law.

And third, certain treaty provisions -- such as the fair trial provisions of the Geneva Conventions -- are “self-executing.” *U.S. v. Noriega*, 808 F.Supp. 791, 799 (S.D.Fla. 1992); *U.S. v. Lindh*, 212 F.Supp. 2d 541, 553-54 and n. 20 (E.D.Va. 2002).² As the Supreme Law of the Land, they prevail over inconsistent executive procedures.

¹ Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1987).

² The Fourth Circuit concluded in *Hamdi v. Rumsfeld*, 316 F. 3d 450, 468-69 (4th Cir. 2003), *vacated*, 124 S.Ct. 2686 (2004) that the Geneva Conventions are not self-executing. Whatever the merit of that conclusion with respect to the provision addressed in that case -- the right to a POW status hearing -- the Fourth Circuit’s analysis, which relied heavily on diplomatic avenues of relief, has no application to the procedural safeguards for the benefit of individuals in criminal trials, at issue in this case.

APPLICABLE INTERNATIONAL NORMS

While international humanitarian law guarantees rights specifically in the context of armed conflict, international human rights law applies in both war and peace.³ Both require fair treatment of persons accused of crimes, and both apply to the procedures of this commission.

Applicable humanitarian law treaties to which the United States is a party include the 1949 Geneva Convention on prisoners of war (“GC III”).⁴ In addition, customary international humanitarian law is embodied in Common Article 3 of the 1949 Geneva Conventions and in the “fundamental guarantees” (art. 75) of the 1977 Geneva Protocol I (“Protocol I”).⁵ Applicable human rights treaties joined by the United States include the International Covenant on Civil and Political Rights (“ICCPR”)⁶ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).⁷

Under the 1949 Geneva Convention III (“GC III”), prisoners of war charged with crimes are guaranteed a series of fair trial rights.⁸ In addition, GC III guarantees POW’s the right to be tried only by the same courts, under the same procedures, as in cases against military personnel of the detaining power.⁹ POWs in the hands of the United States are thus entitled to trial by court-martial. These fair trial guarantees of GC III are so essential that “willfully depriving a

³ See *infra* at p. 11-13.

⁴ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, entered into force, Oct. 21, 1950, entered into force for the U.S., Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, entered into force, Dec. 7, 1978, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

⁶ G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force, Jan. 3, 1976 [hereinafter ICCPR].

⁷ G.A. Res. 39/46, annex, 39 U.N. GAOR Supp., (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987 [hereinafter Torture Convention].

⁸ GC III, *supra* note 4, arts. 99 and 103-07, guarantee the rights not to be tried or sentenced for acts not forbidden by law at the time; not to give coerced confessions; the right to defense and to assistance of a qualified advocate or counsel; speedy trial; limits on pretrial confinement; timely notice of charges; the right to call witnesses; the right to an interpreter if necessary; the right to private communications between the advocate or counsel and the accused; the right of appeal in the same manner as for members of the armed forces of the detaining power; and to announcement of judgment and sentence. GC III does not expressly provide for the rights to a fair and public hearing before an independent and impartial tribunal established by law, equality before the courts, or the presumption of innocence. These latter rights are, however, sought to be assured by GC III’s additional provision giving POW’s the right to trial before the same courts with the same procedures as would hear cases against military personnel of the detaining power. *Id.*, art. 102.

prisoner of war of the rights of a fair and regular trial prescribed in this Convention” is deemed a “grave breach,” which makes the persons responsible subject to criminal punishment.¹⁰

Mr. Al Qosi is entitled to be treated as a POW under GC III, because so long as there is “any doubt,” he is entitled to be treated as a POW “until such time as [his] status has been determined by a competent tribunal.”¹¹

Common Article 3 of the 1949 Geneva Conventions reflects customary international law. The International Court of Justice long ago ruled that there is “no doubt” that its norms “constitute a minimum yardstick” and “minimum rules” applicable in all armed conflicts.¹² These essential norms are recognized as a part of customary international law.¹³

Common Article 3’s minimum rules include a prohibition on passing sentences and carrying out executions “without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁴ In view of the subsequent inclusion of fundamental fair trial guarantees in widely ratified humanitarian and human rights law treaties, these “indispensable” judicial guarantees of Common Article 3 should now be understood to include the “fundamental guarantees” for fair trials of Protocol I and the fair trial safeguards of the ICCPR, both discussed below.¹⁵

The “fundamental guarantees” set out in Article 75 of Protocol I are even more protective of fair trials than the 1949 Geneva Conventions. These fundamental guarantees largely parallel

⁹ *Id.*, art. 102.

¹⁰ *Id.*, art. 130.

¹¹ *Id.* art. 5.

¹² *Military and Paramilitary Activities in and Against Nicaragua*, Merits, Judgment, I.C.J. REPORTS 1986, p. 14, para. 218, 219, 220. This principle is also reflected in U.S. domestic law, which makes violations of Common Article 3 subject to criminal prosecution. 18 U.S.C. § 2441 (c)(3) (2004).

¹³ George Aldrich, *Symposium: The Hague Peace Conferences: The Laws of War on Land*, 94 AM. J. INT’L L. 42, 60 (2000).

¹⁴ GC III, *supra* note 4, art. 3 (1)(d); GC IV, *supra* note 5, art. 3(1)(d).

¹⁵ The “fundamental guarantees” of Protocol I, *supra* note 6, art. 75, give “valuable indications to help explain the terms of [Common] Article 3 on guarantees.” CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 75.4, para. 3084 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987) [hereinafter ICRC Commentary to Protocol I].

the fair trial safeguards of ICCPR Article 14.¹⁶ They apply to all persons who are within the power of a state participant in an armed conflict and who do not benefit from more favorable treatment under the Geneva Conventions or Protocol I.¹⁷ This includes Mr. Al Qosi.

The fundamental guarantees of Article 75 of Protocol I reflect customary international law. More than 160 states are parties to Protocol I. Although the United States has not ratified Protocol I, it has signed the treaty, and its stated reasons for not ratifying did not include objections to the fair trial guarantees of Article 75.¹⁸ On the contrary, U.S. government legal experts and military manuals have identified Article 75 as among those provisions of Protocol I that reflect customary international law.¹⁹ Article 75 is consistent with the fair trial standards of widely ratified treaties on both human rights (*e.g.*, ICCPR Article 14) and humanitarian law (GC III and GC IV). Leading commentators as well as the American Bar Association agree that it reflects customary international law.²⁰

¹⁶ Whereas ICCPR Article 14, *supra* note 7, guarantees the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” Article 75.4 of Protocol I, *supra* note 6, assures the right to trial before an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .” It then lists essentially the same safeguards as in ICCPR Article 14.2 and 14.3. Right to counsel, though not expressly delineated, is deemed implicit in the “necessary rights and means of defence.” ICRC Commentary to Protocol I, *supra* note 23, art. 75.4(a), para. 3096.

¹⁷ Protocol I, *supra* note 6, art. 75.1.

¹⁸ See *Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 562, 564 (1987) (stating objections to Protocol I while “recogniz[ing] that certain provisions of Protocol I reflect customary international law”).

¹⁹ T. Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989), citing Panel, *Customary Law and Additional Protocol I to the Geneva Conventions for the Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify*, 81 ASIL PROC. 26, 37 (1987) (Lt. Col. B. Carnahan of the Joint Chiefs of Staff in personal capacity only); *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM.U.J. INT’L L. & POL’Y 415, 427 (1987) (M. Matheson, Deputy Legal Adviser, U.S. Dept. of State); D. Scheffer, *Remarks*, 96 ASIL PROC. 404, 406 (2002) (Ambassador Scheffer stated that “we need to understand fully that Article 75 of Protocol I is a very vibrant article that the United States government has actually said represents customary international law (even though we have not ratified Protocol I).” Additionally, the 1997 edition of the U.S. Army, Judge Advocate General’s School, International & Operational Law Department, OPERATIONAL LAW HANDBOOK (p. 18-2) stated expressly that the U.S. views article 75 of Protocol I as “customary international law.” (Accessible at, <http://www.cdmha.org/toolkit/cdmha-rttk/PUBLICATIONS/oplaw-ja97.pdf>, visited June 4, 2004.) Although more recent editions do not repeat this statement, neither do they qualify or retract it.

²⁰ *E.g.*, George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002); Christopher Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 DUKE J. COMP. & INT’L L. 185, 190 (1996); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 MILITARY L. REV. 40, 81-82 (2002); American Bar Association Recommendation 10-B, adopted by the ABA House of Delegates Aug. 9, 2004 (“customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions”).

The International Covenant on Civil and Political Rights (“ICCPR”) is a multilateral treaty to which 153²¹ countries are States Parties. The United States in 1992 became party to, and thus bound by, the ICCPR.²² Among the rights guaranteed by this treaty are the right to judicial review of the lawfulness of detentions (art. 9.4), to a catalogue of fair trial safeguards for “everyone” charged with a criminal offense (art. 14), to the treatment of prisoners with humanity and respect for their inherent dignity (art. 10.1), and to non-discrimination and equality before the law (arts. 2.1, 14.1, and 26).

Guidance in interpreting the ICCPR is provided by the Human Rights Committee (“HRC”), established under the ICCPR and “charged with implementing and interpreting the ICCPR” *United States v. Duarte-Acero*, 208 F.3d 1282, 1285 n.12 (11th Cir. 2000). HRC interpretations “are recognized as a major source for interpretation of the ICCPR.” *Maria v. McElroy*, 68 F.Supp. 2d 206, 232 (E.D.N.Y. 1999), *abrogated on other grounds*, *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004).

Although ICCPR Article 4 permits “derogations” from certain rights in times of national emergency, ICCPR fair trial norms are non-derogable. As the HRC has made clear, no derogation may be made which would violate “humanitarian law or peremptory norms of international law, for instance . . . by deviating from fundamental principles of fair trial,”²³ The United States has not attempted to invoke the derogation clause with respect to the proposed trials by military commission.

²¹ See Ratification Table, Office of the U.N. High Commissioner for Human Rights (visited Sept. 28, 2004) <http://www.ohchr.org/english/countries/ratification/index.htm>.

²² 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). See also S. Rep. No. 103-35, at 6-10 (1993).

²³ *General Comment No. 29 on Article 4 of the Covenant: States of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11. See also *id.* at para. 15-16.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) has 138²⁴ States Parties, including the United States. It requires States Parties to ensure “that any statement which is established to have been made as a result of torture shall not be invoked as evidence” against an accused.²⁵

* * *

Each of these sources of international law -- GC III, Common Article 3 of the 1949 Conventions and article 75 of Protocol I as customary international law, and the ICCPR and Torture Convention -- apply to these proceedings. Under the *Charming Betsy* canon, each must be applied to the interpretation of the statute, 10 U.S.C. 836, which authorizes the President to establish commission procedures. To the extent commission procedures conflict with these international norms, they exceed the President's statutory authority and are unlawful.

In applying these norms, three further principles come into play: complementarity, most favorable protection and territorial scope.

A. Complementarity

In wartime international humanitarian and human rights law are complementary, not mutually exclusive. As confirmed by the Human Rights Committee, the ICCPR continues to apply

“in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain [ICCPR] rights, more specific rules of international humanitarian law may be specially relevant for the purposes of interpretation of [ICCPR] rights, both spheres of law are complementary, not mutually exclusive.”²⁶

²⁴ See Ratification Table, *supra* n. 30.

²⁵ Although the United States attached reservations and understandings to its ratification of the Torture Convention, none sought to limit the applicability of this exclusionary rule. 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

²⁶ *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 (General Comments), para. 11 [hereinafter Gen. Cmt. 31].

The International Court of Justice likewise affirms that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [ICCPR].”²⁷ As noted above, the United States has not purported to derogate from its ICCPR obligations with respect to the military commissions, nor could it, since fair trial rights are non-derogable.²⁸ The Torture Convention also explicitly applies in war as in peace: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, . . . or any other public emergency, may be invoked as a justification of torture.”²⁹

In regard to fair trial rights of persons detained in connection with armed conflict, article 75 of Protocol I provides rules “additional to . . . other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”³⁰ The International Committee of the Red Cross (“ICRC”) Commentary to Protocol I specifies that these “other applicable rules” include ICCPR norms.³¹

B. Most Favorable Protection

Article 75.8 of Protocol I provides that Article 75 may not be construed to limit “any other more favorable provision granting greater protection, under any applicable rules of international law.” This includes greater protection resulting from “another Convention [e.g., the ICCPR and the Convention Against Torture] or from customary law.”³² This principle of the “most favourable protection” applies as well where there is doubt about whether a prisoner

²⁷ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. - - -, para. 106, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf. See also, *id.* at para. 105, (quoting I.C.J. Advisory Op. of 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 25).

²⁸ See *supra* at p. 5.

²⁹ Torture Convention, *supra* note 8, art. 2.2.

³⁰ Protocol I, *supra*, note 6, Art. 72, referring to arts. 72-79.

³¹ ICRC Commentary to Protocol I, *supra* note 23, art. 72, para. 2927-28.

³² Protocol I, *supra* note 6, para. 3146.

qualifies as a prisoner of war, and hence benefits from the fair trial guarantees for POWs. “In case of doubt, the defendant can always invoke the most favourable provision.”³³ As a consequence, whatever his status, Mr. Al Qosi is entitled to the most favourable protection afforded by applicable international humanitarian or human rights law, be it the GC III, Protocol I, the ICCPR or the Torture Convention.

C. Territorial Scope

International humanitarian and human rights law obligations reach beyond the borders of a state’s own territory, and hence govern U.S. military commission trial procedures in Guantanamo. As the HRC has reaffirmed, States Parties are bound to ensure ICCPR rights “to all persons subject to their jurisdiction” and “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”³⁴ This is consistent with the HRC’s longstanding jurisprudence,³⁵ and has recently been confirmed by the International Court of Justice.³⁶

The Geneva Conventions and customary international humanitarian law likewise apply to commission trials at Guantanamo, because they govern a state’s conduct beyond its own borders, wherever the state exercises jurisdiction or effective control.³⁷ This reflects the consistent case

³³ *Id.*, para. 3142.

³⁴ Gen. Cmt. 31, *supra* note 36, para. 10.

³⁵ *Lopez Burgos*, Communication No. R.12/52, Views of 29 July 1981, para. 12.1; *Celiberti*, Communication No. R.13/56, Views of 29 July 1981, para. 10.1.

³⁶ I.C.J. Advisory Op. of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. -- -, paras. 107-11, available at http://www.icj.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf.

³⁷ Extraterritorial application of the Geneva Conventions is reflected in State practice, including by the U.S. as a member of the Security Council. *E.g.*, Article 7 of the Statute of the International Criminal Tribunal for Rwanda, which has subject matter jurisdiction *inter alia* over violations of Common Article 3 of the Geneva Conventions, provides in relevant part that its “territorial jurisdiction . . . shall extend to the territory of Rwanda . . . as well as to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.” *Available at* <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Aug. 9, 2004).

law of other human rights bodies on the territorial application of international human rights instruments.³⁸

* * *

In sum, both international humanitarian and human rights law obligations govern the proper interpretation of the President's authority under 10 USC 836 to establish procedures for military commissions, and require that prisoners tried by military commission at Guantanamo, including Mr. Al Qosi, be given the benefit of the most favorable applicable norms.



SHARON A. SHAFFER, Lt Colonel, USAF
Defense Counsel



BRIAN M. THOMPSON, Captain, USAF
Assistant Defense Counsel

³⁸ *E.g., Bankovic et al. v. Belgium et al.*, Eur.Ct.H.Rts. App. No. 00052207/99, Decision of 12 Dec. 2001 (Grand Chamber), para. 71; *Loizidou v. Turkey*, App. No. 000015318/98, Judgment of 23 March 1995 (preliminary objections), para. 62 (State Party responsible under European Convention when it “exercises effective control of an area outside its national territory”); *Coard et al. v. U.S.*, Int.-Am.Comm.H.Rts., Case No. 10.951, Report No. 109/99, 29 Sept. 1999, para. 37.

Shaffer, Sharon, LTC, DoD OGC

From: Sundel, Philip, LCDR, DoD OGC
Sent: Wednesday, October 13, 2004 11:40
To: Shaffer, Sharon, LTC, DoD OGC
Subject: FW: Tests for Linguists/Translators
Importance: High

Ma'am,

Relevant language highlighted.

V/r
PLS

-----Original Message-----

From: Gunn, Will, Col, DoD OGC
Sent: Friday, May 14, 2004 14:10



Subject: Tests for Linguists/Translators
Importance: High

I spoke to [redacted] of [redacted]. She is very receptive to a test for the potential translators. She's done that for other customers. Yesterday, I believe Phil suggested that we allow them to translate one of the instructions and/or a charge sheet and have it graded by one of our recognized experts. If we were to follow that method, does that need to be done here? I don't think it would unless we were concerned about cheating. Also, what should we use for the test?

Col Will A. Gunn
Chief Defense Counsel
Office of Military Commissions
(703) 607-1521 ext. 184
DSN 327-1521 ext. 184
will.gunn@osd.pentagon.mil

-----Original Message-----

From: [redacted]
Sent: Friday, May 14, 2004 13:25
To: Will Gunn; [redacted]
Subject: Résumés of linguists
Importance: High

Col. Gunn,

This is in reference to your question about certification for the proposed Arabic translators/interpreters.

The answer to that question is this: Academic Degrees (education) in addition to experience can replace certifications by either the Department of State or the American Translators Association (ATA). ATA does not offer certification for translation from English into Arabic. The references for each have been checked as well as their capability to do their jobs. In many cases, and I know through my own personal experience, these professionals do not want to go through the certification process unless it becomes necessary to do so. The main reason is lack of time. It is already known in the language field that it is more important that a translator have acquired high education in any field that will be reflected in the writing style as well as in the formalities of the Court system. And experience is a must.

10/13/2004

ATCH C

I also would like to emphasize that when translating documents that are going to be published, and this applies to any language, the process involves not only translation, but also the editing and proofreading. That is a must. One person, the translator, cannot produce a document that is going to be published. If, in order to "save" funds, the project will be completed in that way, I believe that you will need to consider the consequences. Editing is an essential part of Quality Assurance in the language field. Any linguist will corroborate this statement.

I hope this information helps you in making a decision on how to select the right individuals for the job that needs to be done.

Thank you for your help in all aspects of this contract with the Department.

[REDACTED]
President
[REDACTED]

10/13/2004