**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

TAHA YASSIN RAMADAN,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

Civil Action No. 07-0297 (PLF)

**RESPONDENTS' OPPOSITION TO
PETITION FOR A WRIT OF HABEAS CORPUS**

PETER D. KEISLER
Assistant Attorney General

JEFFERY A. TAYLOR
United States Attorney

JOSEPH H. HUNT (D.C. Bar No. 431134)
Branch Director

VINCENT M. GARVEY (D.C. Bar No. 127191)
Deputy Branch Director

MICHAEL P. ABATE (IL Bar No. 6285597)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
Mailing Address
P.O. Box 883
Washington, D.C. 20044
Delivery Address
20 Massachusetts Ave., N.W., Room 7302
Washington, D.C. 20001
Telephone: (202) 616-8209
Facsimile: (202) 616-8470

Attorneys for Respondents

Dockets.Justia.com

TABLE OF CONTENTS

PAGE(S)

INTRODUCTION 1

BACKGROUND 4

I. The Multi National Force – Iraq 4

II. The Iraqi High Tribunal 6

A. The Structure of the Iraqi High Tribunal 6

B. Petitioner's Conviction and Sentence by the Iraqi High Tribunal 7

ARGUMENT 10

I. Federal Courts Lack Jurisdiction to Consider Habeas Petitions from Non-Citizens, Detained Overseas by a Multinational Force During Ongoing Hostilities, Convicted by a Foreign Court for Violations of Foreign Law 10

II. Neither the Constitution Nor Federal Law Permits a Collateral Attack on a Foreign Conviction in a Federal Court 19

III. Exercising Jurisdiction Over the Petition Would Contravene the Separation of Powers 23

IV. Article III Prohibits the Relief Petitioner Requests 25

CONCLUSION 27

TABLE OF AUTHORITIES

32 County Sovereignty Comm'n v. Dep't of State,
292 F.3d 797 (D.C. Cir. 2002) 21

Ahmad v. Wigen, 910 F.2d 1063 (2d Cir. 1990) 22, 25

* Al-Bandar v. Bush, et al.,
No. 06-2209 (D.D.C. Dec. 28, 2006) . . . . passim

Al-Bandar v. Bush, No. 06-5425 (D.C. Cir. Jan. 3, 2007) 2

Al-Bandar v. Bush, 127 S. Ct. 854 (Jan. 5, 2007) 2

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) 24

Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006) 24

Bishop v. Reno, 210 F.3d 1295 (11th Cir. 2000) 20

* Boumediene, et al. v Bush, et al.,
No. 05-5062 (D.C. Cir. Feb. 20, 2007) 19, 21, 22

Dep't of the Navy v. Egan, 414 U.S. 518 (1988) 23

Fiallo v. Bell, 430 U.S. 787 (1977) 27

* Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) . . . . passim

Garza v. Lappin, 253 F.3d 918 (7th Cir. 2001) 22

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 23

* Hirota v. General of the Army MacArthur,
338 U.S. 197 (1948) . . . . passim

* Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972) 20, 21

* In re Hussein, __ F. Supp. 2d __,
2006 WL 3832818 (D.D.C. 2006) . . . . passim

Johnson v. Eisentrager, 339 U.S. 763 (1950) 19, 22

Lopez-Smith v. Hood, 121 F.3d 1322 (9th Cir. 1997) 25

Mead Corp. v. United States, 490 F. Supp. 405 (D.D.C. 1980) 19

* Mohammed v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006) 15, 16

Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999) 26

Neely v. Henkel, 180 U.S. 109 (1901) 20, 21, 22

* Omar v. Harvey, No. 06-5126 (D.C. Cir. Feb. 9, 2007) . . . . passim

Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960) 21

People's Mojahedin Org. Of Iran v. U.S. Dep't of State,
182 F.3d 17 (D.C. Cir. 1999) 21

Preiser v. Rodriguez, 411 U.S. 475 19

Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) 27

Rasul v. Bush, 542 U.S. 466 (2004) 16, 17

Matter of Requested Extradition of Smyth,
61 F.3d 711 (9th Cir. 1995) 25

Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005),
cert. denied, 126 S. Ct. 1768 (2006) 24

* Sea Containers Ltd. v. Stena AB, 890 F.2d 1205 (D.C. Cir. 1989) 23

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 22

Spencer v. Kemna, 523 U.S. 1 (1998) 27

United States v. Kin-Hong, 110 F.3d 103 (1st Cir. 1997) 24

United States v. Verdugo-Urquidez, 494 U.S.259 (199) 20

W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.,
493 U.S. 400 (1990) 23

Wilkinson v. Dotson, 544 U.S. 74 (2005) 19, 26

Wilson v. Girard, 354 U.S. 524 (1957) 22

Zadvydas v. Davis, 533 U.S. 678 (2001) 20

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. II, § 2 24

U.S. Const. Art. III 24

8 U.S.C. §1252(a)(4) 22

28 U.S.C. § 1331 19

28 U.S.C. §§ 2201 19

Foreign Affairs Reform and Restructuring Act
of 1998 Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681 22

Military Commissions Act of 2006, § 5(a), Pub. L. No. 109-366,
120 Stat. 2600 22

OTHER AUTHORITIES

U.N. Security Council Res. 1511 (Oct. 16, 2003) 4, 14

U.N. Security Council Res. 1546 (June 8, 2004) 4, 5, 14

U.N. Security Council Res. 1637 (Nov. 11, 2005) 5, 14

U.N. Security Council Res. 1732 (Nov. 28, 2006) 5, 14

Iraqi National Assembly Law No. 10 of 2005 (“IHT Statute”) . . . . passim

Iraqi Criminal Procedure Code of 1971 (“1971 Code”) 7, 9

INTRODUCTION

Petitioner Taha Yassin Ramadan ("petitioner"), the former Vice President of Iraq, was convicted by the Iraqi High Tribunal ("IHT") for committing crimes against humanity, including willful killing, torture, deportation or forcible transfer of the population, and imprisonment in violation of the norms of international law. At the request of the Government of Iraq, members of the Multi National Force–Iraq ("MNF-I") – an international military force with a United Nations Security Council mandate – are detaining petitioner in Iraq during the pendency of his ongoing IHT proceedings.

Petitioner seeks a writ of habeas corpus to prevent his release or transfer from MNF-I custody to the Government of Iraq. Because petitioner is a citizen of Iraq, being detained in that country by multinational forces pursuant to a conviction by an Iraqi court, Supreme Court and D.C. Circuit precedent require this Court to dismiss the petition for lack of jurisdiction. *See Hirota v. General of the Army MacArthur*, 338 U.S. 197 (1948); *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949). This case presents a very straight-forward application of *Hirota* and *Flick*. To see why, this Court need look no further than the D.C. Circuit's recent opinion in *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Feb. 9, 2007).[1] In that opinion, the D.C. Circuit identified four key "circumstances" present in *Hirota*: (1) "detention overseas"; (2) "the existence of a multinational force"; (3) "foreign citizenship"; and (4) a "criminal conviction." *See Omar*, slip.

[1] The *Omar* decision is binding on this Court and dictates the outcome of this case. The Government nevertheless believes that *Omar* was wrongly decided, and the Solicitor General has already decided to seek rehearing *en banc*. However, such reconsideration, even if granted, would not affect the outcome here. It remains clear that *Hirota* and *Flick* do apply to cases like Ramadan's, involving a petitioner who is not a citizen of the United States and who has been convicted by a foreign tribunal.

op. at 11 (D.C. Cir. Feb. 9, 2007). This case is indisputably on all fours with *Hirota* because it contains the same four "circumstances": petitioner (1) is detained in Iraq; (2) by an international force (the MNF-I); (3) is a citizen of Iraq, and not the United States; and (4) was convicted by an Iraqi court for crimes against humanity. According to the *Omar* court, this last circumstance – the conviction by the Iraqi High Tribunal – makes inescapable the conclusion that *Hirota* governs this case. *See id.* at 12 ("[*Hirota*'s] language demonstrates the Court's primary concern was that the petitions represented a collateral attack on the final judgment of an international tribunal.").

There can be no doubt that this petition presents the kind of collateral attack upon a foreign judgment that is proscribed by *Hirota* and *Flick.* Two other courts of this district, in considering *identical habeas petitions* brought by co-defendants at petitioner Ramadan's trial, recognized just that. *See Al-Bandar v. Bush, et al.*, No. 06-2209, slip op. at 1 (D.D.C. Dec. 28, 2006) (amended order) (citing *Hirota* and *Flick* and dismissing petition for lack of jurisdiction);[2] *In re Hussein*, __ F. Supp. 2d __, 2006 WL 3832818, at *3 (D.D.C. 2006) (same).

Even if this Court were not compelled by controlling Supreme Court and D.C. Circuit precedent to dismiss the case for lack of jurisdiction, it nevertheless should refuse to issue the writ because principles of international comity prevent United States courts from adjudicating collateral attacks upon the decisions of foreign courts, like the Iraqi High Tribunal. Moreover, exercising jurisdiction over the petition would threaten the separation of powers. This Court's consideration of petitioner's plea would intrude into the President's control over military and

---

[2] Following this Court's dismissal of the petition for lack of jurisdiction, Al-Bandar sought an emergency injunction pending appeal from the D.C. Circuit and the Supreme Court. Both courts rejected that request. *See Al-Bandar v. Bush*, No. 06-5425, 2006 WL 3986241 (D.C. Cir. Jan. 3, 2007); *Al-Bandar v. Bush*, 127 S. Ct. 854 (Jan. 5, 2007).

foreign policy matters because it is the President, as Commander in Chief, who decided that U.S. forces should participate in the MNF-I. Entertaining this petition would also violate the principles underlying the longstanding rule of "non-inquiry" developed in the extradition context. That rule provides that if a determination is to be made about the fairness of a foreign judicial system or how it will treat a petitioner, that determination is to be made by the Executive Branch – in particular the Secretary of State – and not by federal courts.

Finally, the relief sought by petitioner – that MNF-I forces be enjoined from releasing him or transferring him to Iraqi custody – would violate Article III of the United States Constitution. That injunction would by its own terms prohibit the court from affording petitioner all the relief that he may obtain in a habeas proceeding – outright release or a shortening of his sentence – and would thereby artificially prolong his judicial proceedings without a justiciable case or controversy.

Petitioner's request essentially asks this Court to stand in judgment of a foreign tribunal's conviction of one of its citizens, and to prevent the nation of Iraq from carrying out the sentence pronounced by the Iraqi High Tribunal set up to prosecute the crimes committed in Iraq by the regime of Saddam Hussein. That request is inappropriate; it simply is not the role of the courts of the United States to adjudicate collateral attacks on the convictions of foreign citizens tried abroad in the courts of their own country for violations of foreign and/or international law. This Court should dismiss the petition.

BACKGROUND

I. THE MULTI NATIONAL FORCE – IRAQ

The Multi National Force–Iraq is an internationally organized entity consisting of forces from over twenty-five nations, including the United States.[3] The MNF–I operates in Iraq at the request of the Government of Iraq and under a U.N. Security Council mandate authorizing MNF-I "to take all necessary measures to contribute to the maintenance of security and stability in Iraq." U.N. Security Council Res. 1511, at 3 ¶ 13 (Oct. 16, 2003) (establishing MNF-I) (attached as Exh. 1). In resolution 1546, passed in 2004, the U.N. Security Council "[n]ote[d] that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq, and therefore reaffirm[ed] the authorization of the multinational force under unified command established under resolution 1511 (2003)." U.N. Security Council Res. 1546, at 4 ¶ 9 (June 8, 2004) (attached as Exh. 2).

Resolution 1546 also referenced letters sent by the Prime Minister of Iraq, Dr. Ayad Allawi, and the then U.S. Secretary of State, Colin Powell, to the President of the U.N. Security Council. *See id.* at 4 ¶ 10. Those letters (annexed to the resolution) state that MNF-I's goal is to

---

[3] In addition to forces from the United States, military forces from the following countries participate in the MNF-I: Albania, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, El Salvador, Estonia, Georgia, Italy, Japan, Kazakhstan, South Korea, Latvia, Lithuania, Macedonia, Mongolia, Netherlands, Norway, Poland, Romania, Slovakia, United Kingdom, and Ukraine. Although the United States is a leading participant in the MNF–I, and the multinational force operates under the "unified command" of high-ranking U.S. military officers, the multinational force is legally distinct from the United States and includes high-ranking officers from other nations (for example, the second in command, Lt. Gen. G.C.M. Lamb, is a British officer, *see* http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=22&Itemid=16 (last visited Feb. 19, 2007)).

"help the Iraqi people to complete the political transition" and "permit the United Nations and the international community to work to facilitate Iraq's reconstruction." *Id.* at 10. The letters also state that the MNF-I is prepared to "continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq." *Ibid.* MNF-I stood ready to "undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection," and to provide "civil affairs support, and relief and reconstruction assistance," as requested by the Government of Iraq. *Id. at 11.*

In addition, resolution 1546 created a mechanism that allows the Government of Iraq to seek a review of the MNF-I mandate at any time. The resolution provided that the "mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution." *Id.* at 4 ¶ 12. The Security Council also declared in that resolution that it "will terminate [MNF-I's] mandate earlier if requested by the Government of Iraq." *Ibid.* Since resolution 1546, the U.N. Security Council has twice extended MNF-I's mandate in Iraq for an additional twelve months, each time concluding (based on communications from Iraqi officials) that the Government of Iraq desired MNF-I's continued presence. *See* U.N. Security Council Res. 1637, at 3 ¶1 (Nov. 11, 2005); U.N. Security Council Res. 1723, at 3 ¶ 1 (Nov. 28, 2006).

Consistent with the U.N. Security Council mandate and at the request of the Government of Iraq, which convicted and sentenced petitioner for crimes against humanity, petitioner is currently in MNF-I custody. *See* Declaration of Lt. Col. Quentin K. Crank ¶ 3 ("Crank Decl.") (attached as Exh. 3). Petitioner will remain in MNF-I custody for the duration of his current legal proceedings before the Iraqi High Tribunal. *Id.* ¶ 4.

II. The Iraqi High Tribunal

A. The Structure of the Iraqi High Tribunal

The Government of Iraq established the Iraqi High Tribunal – sometimes called the Iraqi High Criminal Court ("IHCC") – in Law No. 10 of 2005. *See* The Statute of the Iraqi High Tribunal ("IHT Statute"), art. 1 § First (Oct. 18, 2005) (attached as Ex. 4). That law gave the IHT jurisdiction "over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused" of specific, enumerated crimes, including genocide, crimes against humanity, war crimes, or violations of certain other Iraqi laws, committed between June 17, 1968 and May 1, 2003. *Id.* art. 1 § Second.

The court operates under a continental or inquisitorial model, rather than under the Anglo-American adversarial model. Thus, the Iraqi High Tribunal is divided into three bodies: the Investigative Judges, the Trial Chamber, and the Appellate Chamber (sometimes called the Court of Cassation). *Id*. art. 3. IHT proceedings begin with an investigative hearing in which the Investigative Judges determine whether there is sufficient evidence to warrant a criminal trial. *Id*. art. 18. Investigative judges have the "power to question suspects, victims or their relatives, and witnesses, to collect evidence and to conduct on-site investigations." *Ibid*. If the Investigative Judge determines that there is sufficient evidence to proceed, he prepares an indictment and refers the case to the Trial Chamber. *Ibid.*

At trial, the accused is presumed innocent until proven guilty. *Id*. art. 19. In addition, every defendant is guaranteed certain rights, including the right to be informed promptly of the charges against him; the right to appointed counsel or counsel of choice; the right to a trial without undue delay; the right to present evidence and witnesses and to examine witnesses

against him; and the right not to testify against himself. *Ibid*. The IHT statute also incorporated into IHT proceedings the Iraqi Criminal Procedure Law of 1971 ("1971 Code") and a special set of IHT Rules of Procedure and Evidence enacted by the National Assembly. *Id.* art 16.

If the defendant is convicted, the Trial Chamber is required to impose a sentence in accordance with Iraqi law. *Id*. art. 24. The Appeals Chamber hears the appeals of defendants convicted by the Trial Chamber. *Id*. art. 25. The Appeals Chamber can affirm, reverse, or revise the decision of the Trial Chamber. *Ibid*.

B. Petitioner's Conviction and Sentence by the Iraqi High Tribunal

Petitioner and his co-defendants were tried before the IHT. Their trial, known as the "Dujail Trial," investigated events occurring after an alleged assassination attempt on Saddam Hussein in Dujail on July 8, 1982. *See generally Dujail Judgment*.[4] The IHT determined that, after 10 to 12 gunshots were fired from behind a garden wall in Dujail as Hussein's presidential procession passed by, the Hussein regime embarked on a massive and coordinated retaliation campaign that included: (1) the arrest, interrogation, torture, and detention of nearly 400 persons, many of whom died while in detention; (2) the widespread destruction of homes, autos, and water pumps and canals used to irrigate land with water from the Tigris River; (3) the destruction of the town's gardens and orchards, and seizure of arable land; and (4) a staged trial in which 148 men were wrongly convicted and executed. *Id.* Pt. 1, at 9; 18-22. In total, the IHT concluded, some 543 people were imprisoned, killed, or displaced. *Id.* Pt. 1, at 17.

---

[4] There is no official English translation of the IHT Trial Chamber judgment. An unofficial English translation of the Dujail Judgment (in six separate parts due to the opinion's length) may be obtained on a website hosted by the Case Western Reserve University School of Law, at http://law.case.edu/saddamtrial/Dujail/opinion.asp (last visited Feb. 19, 2007).

On May 15, 2006, the IHT Trial Chamber charged Petitioner – the former Vice President of Saddam Hussein's cabinet, commander of the Public Army, and high ranking Baath party official, *see id.* Pt. 1, at 10 – with crimes against humanity, including, *inter alia*: (1) willful killing; (2) deporting people or transferring them by force; (3) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (4) torture; (5) enforced disappearance of persons; (6) and other inhumane acts of similar character causing great suffering, or serious injury to the body or the mental or physical health. *See id.*, Pt. 5, at 30.

Both prior to and after these formal charges issued, the IHT allowed petitioner to present his case. *See, e.g.*, *Dujail Judgment*, Pt.5, at 25-27 (summarizing petitioner's own statements to the court on May 14, 2006 – the day before he was charged – and the evidence offered through petitioner's attorney in the months following the issuance of the formal charges). Moreover, throughout the proceedings, the accused were permitted to meet with their attorneys when their attorneys were in Baghdad, and at the end of every judicial session. *Id.* Pt. 1, at 24.

At the close of the defense case, the Trial Chamber convicted petitioner on all counts except the charge of enforced disappearance (of which all co-defendants were acquitted). *See id.* Pt. 5, at 30-49; *id.* Pt. 6, at 1-6. On November 5, 2006, the Trial Chamber announced petitioner's conviction and sentence: life in prison pursuant to Art. 24 of the IHT Statute and Art. 406 of the Iraqi Penal Code, No. 111 of 1969. *See Dujail Judgment*, Pt. 6, at 6. The Trial Chamber issued its written Judgment on November 22, 2006.

Petitioner appealed to the Appellate Chamber, advancing many of the same arguments he presses in this petition.[5] As permitted in the civil law system, the prosecutor and complaining victims also appealed, arguing that petitioner's sentence was too lenient. *See id.* at 4. The Appellate Chamber rejected petitioner's challenges to the IHT's legality and procedures, and affirmed his conviction, but returned the case file to the Trial Chamber with a recommendation that the sentence against petitioner be increased. *See id.* at 8-9, 14, 19-20.

On February 12, 2007, the Trial Chamber reconsidered the case and announced that petitioner was to be sentenced to death by hanging. Pursuant to the IHT Statute and the 1971 Code, the Appellate Chamber will automatically review petitioner's death sentence. The Trial Chamber must forward the case file to the Appellate Chamber, and petitioner has 30 days (starting the day after the decision was announced) to file papers in the Appellate Chamber contesting the new sentence. *See* IHT Statute art. 25 (noting that appeals are governed by the 1971 Code); 1971 Code ¶ 224(D) ("If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.").[6]

---

[5] *See Dujail Appellate Judgment* at 5-6 (noting petitioner's arguments that the court was illegally constituted, that the trial contained procedural errors, was not sufficiently transparent, and was influenced by American personnel, and that, as Vice President, he was entitled to immunity). As with the Trial Chamber judgment, there is no official English translation of the Appellate Chamber judgment. An unofficial translation may be obtained at http://law.case.edu/saddamtrial/content.asp?id=88 (last visited Feb. 19, 2007).

[6] An unofficial English translation of the 1971 Code can be found at http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (last visited Feb. 19, 2007).

ARGUMENT

Petitioner attempts to use this Court as a forum to collaterally attack his conviction and sentence before the Iraqi High Tribunal. This he cannot do. As precedents from the Supreme Court, D.C. Circuit, and courts in this jurisdiction make clear, federal courts in the United States lack jurisdiction to entertain habeas petitions from non-citizens held on foreign soil by multinational forces pursuant to convictions by foreign tribunals for violations of international and/or foreign law. Indeed, judges of this district have applied these precedents to dismiss for lack of jurisdiction two identical habeas challenges filed by co-defendants at petitioner's trial: Saddam Hussein and Awad Hamad Al-Bandar. The result in this case should be no different.

Even if this Court were to find, contrary to the legal principles underlying these precedents, that it had jurisdiction over the petition, it nevertheless should refuse to grant petitioner habeas relief because principles of international comity prevent this Court from entertaining an alien's collateral attack upon his conviction *by his own government*. Moreover, granting the writ would threaten the separation of powers and violate Article III.

I. FEDERAL COURTS LACK JURISDICTION TO CONSIDER HABEAS PETITIONS FROM NON-CITIZENS, DETAINED OVERSEAS BY A MULTINATIONAL FORCE DURING ONGOING HOSTILITIES, CONVICTED BY A FOREIGN COURT FOR VIOLATIONS OF FOREIGN LAW

Controlling authority confirms that the court lacks jurisdiction over petitioner's habeas plea. Under the Supreme Court's decision in *Hirota v. General of the Army MacArthur*, the D.C. Circuit's decision in *Flick v. Johnson*, and the decisions in *In re Hussein* and *Al-Bandar v. Bush*, habeas jurisdiction turns on whether the custodian holds the prisoner under the authority of the United States or, instead, pursuant to international authority.

In *Hirota v. General of the Army MacArthur*, 338 U.S. 197 (1948), the Supreme Court

considered a motion for leave to file a habeas petition on behalf of several Japanese citizens in the custody of U.S. military personnel in Japan, acting as part of the Allied Powers. *See Hirota*, 338 U.S. at 199 (Douglas, J., concurring). The prisoners had been convicted of war crimes and were in custody pending imposition of their sentences. They had been convicted by the International Military Tribunal for the Far East, a tribunal established by General MacArthur, acting "as an agent of the Allied powers." *Id.* at 198.

The Supreme Court held that "the courts of the United States have no power" to consider the prisoners' habeas petition. *Id.* at 198. Noting that the prisoners "are being held in custody pursuant to the judgments of a military tribunal in Japan," the Supreme Court explained that it had no authority to "review, to affirm, to set aside or annul the judgments and sentences imposed" because "the tribunal sentencing these petitioners is not a tribunal of the United States." *Ibid.* Thus, because the prisoners were not held pursuant to the laws of the United States, the Supreme Court held that the prisoners could not seek habeas relief in any U.S. court, even though the tribunal was established by General MacArthur, who was indisputably an officer in the U.S. Army subject to the direction of the President, and even though the petitioners were being detained by the U.S. Army. *Ibid.*

Shortly after *Hirota*, the D.C. Circuit reaffirmed that "no court of this country" has authority to exercise habeas jurisdiction over the claims of a petitioner held abroad under international authority, even if the petitioner is held by U.S. military personnel. *See Flick v. Johnson*, 174 F.2d 983, 984 (1949). In *Flick*, the D.C. Circuit affirmed a district court's dismissal, for lack of jurisdiction, of a German citizen's habeas petition. Flick was a German citizen, convicted of war crimes in Germany. *See id.* at 985. He was "serving a sentence of

imprisonment imposed by [a military tribunal] sitting in" the "American Zone of Occupation" in post-war Germany. *Id.* at 983. "American Army forces" were his jailers. *Ibid.* Because Flick was being held pursuant to a sentence imposed by the military tribunal, the D.C. Circuit explained, the determinative question was whether "the court which tried and sentenced Flick [was] a tribunal of the United States." *Id.* at 984 (citing *Hirota*). Accordingly, the Court "inquire[d] into the origin of the Flick tribunal and the source of its power and jurisdiction to determine whether it was a court of the United States." *Ibid.*

Even though that tribunal had been established by the American "Zone Commander," who appointed its members, and who was himself a General in the U.S. Army, the D.C. Circuit determined that the tribunal "was, in all essential respects, an international court"; the tribunal's "power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers," and not U.S. law. *Id.* at 985. The Allied Powers established a "Control Council," which enacted a law "for the prosecution of war crimes." *Ibid.* That law "vested in the Commander for the American Zone the authority to determine and designate, for his zone, the tribunal by which accused persons should be tried." *Ibid.* Because the court that convicted Flick "was not a tribunal of the United States, its actions cannot be reviewed by any court of this country." *Ibid.* It made no difference that Flick was detained by members of the U.S. Army. The court of appeals explained that, because the tribunal had been established under international authority, "that ends the matter." *Ibid.* *See also Omar*, slip op. at 12 ("*Flick* thus holds that the critical factor in *Hirota* was the petitioners' convictions by an international tribunal, and for good reason . . . . [T]he Court's primary concern was that the petitions represented a collateral attack on the final judgment of an international tribunal." (internal citation omitted)).

As recognized by other judges in this district in dismissing two petitions brought by Ramadan's co-defendants in the Dujail trial, *Hirota* and *Flick* require dismissal of this petition for lack of jurisdiction. Addressing the petition filed by Ramadan's co-defendant Awad Al-Bandar, the former chief judge of the revolutionary court that sentenced 148 people to death in the wake of the Dujail incident, Judge Walton concluded that "[t]his court lacks *habeas corpus* jurisdiction over an Iraqi citizen, convicted by an Iraqi court for violations of Iraqi law, who is held pursuant to that conviction by members of the Multi-National Force–Iraq." *Al-Bandar v. Bush, et al.*, No. 06-2209, slip op. at 1 (D.D.C. Dec. 28, 2006) (amended order) (citing *Hirota* and *Flick*) . Similarly, in finding that the court had no jurisdiction over the habeas petition of Ramadan's co-defendant Saddam Hussein, Judge Kollar-Kotelly cited *Hiorta* and *Flick* for the proposition that "A United States Court has no 'power or authority to review, affirm, set aside, or annul the judgment and sentence imposed' by the court of a sovereign nation pursuant to their laws." *In re Hussein*, __ F. Supp. 2d __, 2006 WL 3832818, at *3 (D.D.C. 2006); *see also id.* (quoting Judge Walton's analysis in *Al-Bandar*).

These opinions are undoubtedly correct. As in *Hirota* and *Flick*, Hussein and Al-Bandar (like Ramadan) were in the custody of an international force (*i.e.*, MNF-I) stationed overseas. And, as in *Hirota* and *Flick*, Al-Bandar and Hussein (like Ramadan) were convicted in foreign (or international) courts. Finally, as in *Hirota* and *Flick*, Hussein and Al-Bandar (like Ramadan), were citizens of the foreign country in which they are detained by that multinational force pursuant to that foreign conviction. Therefore, those cases – like petitioner's – are on all fours with *Hirota* and *Flick*. In all of these cases it is clear that the petitioners were being held not under U.S. law, but under international and Iraqi authority. "[T]hat ends the matter." *Flick*, 179

F.2d at 985.

Despite the fact that judges of this Court have twice applied *Hirota* and *Flick* to dismiss habeas petitions brought by Ramadan's co-defendants, petitioner nevertheless urges that *Hirota* is distinguishable because in *Hirota* the United States had no authority over the Allied Powers, whereas here, the MNF-I is "subordinate in law and in fact to the United States." Pet. ¶ 20 (citing comments by Gen. Casey); *see also* Pet. ¶¶ 2-4, 16-17, 23, 36, 64, 68 (arguing that petitioner is in actual and physical custody of the United States). This argument is flawed. As noted above, the MNF-I is an international military force. The MNF-I derives authority from United Nations Security Council resolutions. *See* U.N. Security Council Res. 1511 (2003), 1546 (2004), 1637 (2005), 1723 (2006). The MNF-I is present in Iraq at the request of the Government of Iraq, which could at any time seek a review of its mandate by the U.N. Security Council. *See* U.N. Security Council Res. 1546, at 4 ¶ 12.

Indeed, three courts in this jurisdiction have explicitly considered the question and concluded that the MNF-I is a multinational, not American, force. In *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), Judge Lamberth considered and rejected a claim that a petitioner in the custody of the MNF-I was within the custody of the United States military. He noted that the petitioner was "in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations *acting jointly, not from the United States acting alone*." *Id.* at 122 (emphasis added). Judge Lamberth went on to note:

> Petitioner is thus under the actual, physical custody of MNF-I, a multinational entity separate and distinct from the United States or its army. He is in the constructive custody of the Republic of Iraq, which is seized of jurisdiction in the

> criminal case against him, and which controls his ultimate disposition. Petitioner thus has two custodians, one actual and the other constructive: MNF-I and the government of Iraq. Petitioner has not shown that either custodian is the equivalent of the United States for the purposes of habeas corpus jurisdiction.

Ibid. (emphasis added); *see also id.* at 123 ("It does not change the outcome to point out that Munaf is in the physical custody of U.S. troops in their capacity as participants in MNF-I. Where a U.S. citizen is detained under the authority of a multinational military entity, he is not in custody 'under or by color of the authority of the United States,' even if American military personnel play a role in his detention as part of their participation in that multinational force.").

In finding that he had no jurisdiction over the habeas petition brought by Ramadan's co-defendant, Al-Bandar, Judge Walton agreed with Judge Lamberth's analysis: "The Court does not suggest that Respondents have custody of Petitioner. Rather, the Court agrees with Judge Lamberth's analysis in *Mohammed v. Harvey* that Petitioner is either in the actual physical custody of the Multi-National Force–Iraq or in the constructive custody of the Iraqi government." *Al-Bandar v. Bush, et al.*, No. 06-2209, slip op. at 2 n.1 (D.D.C. Dec. 28, 2006) (amended order) (citation omitted). Finally, in *In re Hussein*, __ F. Supp. 2d __, 2006 WL 3832818, at *3 (D.D.C. 2007), Judge Kollar-Kotelly also cited Judge Lamberth's analysis in concluding that Saddam Hussein, because he was "held by members of the United States Military . . . pursuant to their authority as members of the MNF-I," was "not in the custody of the United States."[7]

But, in any event, even if MNF-I were a United States military force, this Court would still lack jurisdiction over the petition. As *Flick* makes clear – a case in which the petitioner was unambiguously held by "American Army forces," *see* 174 F.2d at 983 – the fact that the

---

[7] *Omar* did not hold to the contrary. It stated that one of the "circumstances" that was "clearly the same" as in *Hirota* was the "existence of a multinational force." *Omar*, slip op. at 11.

petitioner is detained pursuant to a foreign conviction is sufficient, by itself, to deprive a United States court of jurisdiction over a habeas petition. "If the court was not a tribunal of the United States, its actions cannot be reviewed by any court of this country. If it was an international tribunal, that ends the matter." *Id.* at 985 (citations omitted); *see also Omar*, slip. op. at 13 ("The fact that Omar has never been convicted of criminal activity thus distinguishes this case from both *Hirota* and *Flick*.").

Petitioner also attempts to argue that *Rasul v. Bush*, 542 U.S. 466 (2004), and not *Hirota*, provides the proper framework to consider whether this Court has habeas jurisdiction. He alleges that under *Rasul*, a petitioner need only establish that the court has personal jurisdiction over the custodian and then allege that his detention violates the laws of the United States. *See* Pet. ¶ 16. Petitioner then implies that jurisdiction over his custodians exists so long as the respondents are within the territorial jurisdiction of the court. *See* Pet. ¶ 17 (arguing that "officials of the U.S. . . . are within the jurisdiction of this Court"). This argument puts the cart before the horse. *Hirota* and its progeny teach that jurisdiction over a custodian turns on whether the petitioner is being held pursuant to United States or international authority. Hence, the source of the authority for the detention is an *antecedent question* that must be answered before a court can conclude that it has jurisdiction over a custodian. *Rasul* did nothing to change that analytical framework. In *Rasul* there was simply no reason to address the antecedent question because those respondents are being held solely by U.S. forces under an assertion of U.S. authority. Here, by contrast, the petitioner is held by a multinational force, pursuant to authority granted to the MNF-I by United Nations Security Council resolutions, and at the request of the Government of Iraq after the Iraqi High Tribunal convicted petitioner of crimes against humanity. None of those factors were

present in *Rasul*, and, therefore, that opinion cannot be read to displace the analysis required by *Hirota* and *Flick*.[8]

Finally, in another attempt to make an end-run around *Hirota* and *Flick*, petitioner intimates that the Iraqi High Tribunal is not really a court of Iraq. *See, e.g.*, Pet. ¶¶ 7, 42-44. This contention is baseless. *Flick* makes clear that it is the source of the authority creating a court that determines whether that tribunal is a court of the United States or an international court. In *Flick*, even though the members of the court were selected by Gen. Clay, the American Military Governor and Zone Commander of the United States Zone of Occupation, the fact that he exercised that power at the directive of the Control Council of Allied Powers was sufficient to render the tribunal an international court whose sentences could not be reviewed in the courts of the United States. *See Flick*, 174 F.2d at 985-86.

Here, the court can only conclude that the IHT was established under the powers of a foreign sovereign – Iraq. As noted, the Iraqi National Assembly created the Iraqi High Tribunal in Law No. 10 of 2005.[9] The IHT has jurisdiction over, *inter alia*, crimes of genocide, crimes

---

[8] *Omar* does not support petitioner's argument that *Rasul* gives the Court jurisdiction over this case. The *Omar* court did not discuss the application of *Rasul* until after it concluded that the lack of a foreign conviction distinguished that case from *Hirota* and *Flick*. *See Omar*, slip op. at 14 ("With *Hirota* and the other cases the government cites thus distinguished . . . ."). Moreover, in *Omar* the D.C. Circuit explicitly recognized that *Rasul* did not overrule *Hirota*. *See id.* at 9 (noting that only the Supreme Court can overrule its prior opinions, and that *Rasul* did not purport to overturn *Hirota*).

[9] The Iraqi Special Tribunal, the predecessor to the Iraqi High Tribunal, was established in 2003 by the Governing Council of Iraq ("GCI"), which was part of the Coalition Provisional Authority ("CPA"). *See* CPA Order No. 48 ("IST Statute") (Dec. 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (last visited Feb. 19, 2007). Contrary to petitioner's suggestion, this fact does not mean that the IHT or the IST was "created by the United States." Pet. ¶ 7. The United Nations recognized the CPA (and the GCI) as the official governing body in Iraq pending the establishment of a permanent

against humanity, war crimes, and certain violations of Iraqi law. *See* IHT Statute art. 1. The court is governed by laws of procedure specially promulgated by the Iraqi General Assembly, as well as by the Iraqis' 1971 Code. *See id.* art. 16. The Iraqi Interim Government, the Iraqi Transitional Government, and the Government of Iraq all funded the court. *See Dujail Appellate Judgment* at 8-9. These facts amply demonstrate that the IHT is a court of a foreign sovereign – *as other judges of this Court have recognized*. *See In re Hussein*, 2006 WL 3832818, at *3 (referring to Hussein's sentence by the IHT as "the judgment of an Iraqi court"); *Al-Bandar*, slip. op. at 1 (noting that petitioner was "convicted by an Iraqi court for violations of Iraqi law").

This case is no different than *Hirota*, *Flick*, *In re Hussein*, or *Al-Bandar*. Because petitioner is an Iraqi citizen convicted by the Iraqi High Tribunal for crimes against humanity and Iraqi law committed in Iraq, and because he is in the custody of a multinational force in Iraq, this Court has no authority to consider the habeas petition. The court should dismiss petitioner's plea for lack of jurisdiction.[10]

---

government. *See* U.N. Security Council Res. 1511, at 2 ¶¶ 1, 4. In any event, even if it were true that the IST was created by the United States, the 2005 IHT Statute (passed by the Iraqi National Assembly) unequivocally abolished the IST. *See* IHT Statute art. 37. And the people of Iraq further ratified the court by providing in their Constitution (approved by 78% of Iraqis) that the IHT should continue its work in investigating crimes committed by the Hussein regime. *See* Const. of Iraq, art. 130, *available at* http://www.globalpolicy.org/security/issues/iraq/document/2005/1015text.htm (last visited Feb. 19, 2007).

[10] In addition to statutes authorizing actions for writs of habeas corpus, petitioner claims that this Court has jurisdiction over his petition under 28 U.S.C. § 1331 (the federal question jurisdiction statute) and 28 U.S.C. §§ 2201 *et seq.* (the Declaratory Judgment Act). *See* Pet. ¶ 15. This is not so. These statutes can form no basis of relief separate from his habeas claim, because they do not create any causes of action. *See, e.g.*, *Mead Corp. v. United States*, 490 F. Supp. 405 (D.D.C. 1980). Moreover, because petitioner is seeking to collaterally attack his conviction and sentence, that challenge *can only be brought* in a habeas proceeding. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 500 (holding that habeas is sole remedy where prisoner "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate

II. Neither the Constitution Nor Federal Law Permits a Collateral Attack on a Foreign Conviction in a Federal Court

This habeas petition is nothing less than a collateral attack upon petitioner's conviction and sentence by the Iraqi High Tribunal. *See* Pet. ¶¶ 6, 8, 44, 46-63, 68-89 (arguing that IHT proceedings violated, *inter alia*, the Fifth, Sixth, and Eighth Amendments because it was a "show trial" and denied petitioner "fundamental and basic rights of due process or fair trial"); Pet. ¶¶ 7, 42, 46, 63, 69 (arguing that the IHT was illegally constituted in violation of international law). The Constitution provides no basis for such an attack, and it would be wholly unprecedented for a U.S. court to sit in judgment of the decisions of a foreign, sovereign tribunal, especially where that decision concerns a citizen of that foreign sovereign. Therefore, even if this Court concluded that it had jurisdiction despite *Hirota Flick*, *Al-Bandar*, and *In re Hussein*, it should conclude that principles of comity prevent it from issuing the writ.

As noted, the central claim of Ramadan's habeas petition is that the IHT proceedings violated his rights under the United States Constitution, including the right to due process and a fair trial. But the Supreme Court long ago held that the guarantees of the United States Constitution "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Neely v. Henkel*, 180 U.S. 109, 122 (1901). For that reason, courts of the United States will not permit an individual to collaterally attack in a U.S.

---

release or a speedier release from that imprisonment"); *see also Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (suits attacking the fact or duration of confinement lie at "the core of habeas corpus").

Finally, petitioner alleges that he may bring this habeas action directly under the Constitution (as opposed to under the federal habeas statute). *See* Pet. ¶ 15 (citing suspension clause). This is incorrect. The Constitution provides no habeas rights to aliens detained outside the United States. *See Boumediene, et al. v Bush, et al.*, No. 05-5062, slip op. at 13-18 (D.C. Cir. Feb. 20, 2007); *In re Hussein*, 2006 WL 3832818, at *3 n.2 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

court his criminal conviction in a foreign court based on allegations that the foreign proceedings lacked the protections required by the United States Constitution, even when the petitioner is a U.S. citizen. *See Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972) (refusing to enjoin U.S. Army from transferring U.S. citizens to Germany to serve sentence for criminal conviction in Germany despite claim that German trial was unfair and violated their rights under the United States Constitution); *Neely*, 180 U.S. at 123 ("When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people . . . ."); *see also Bishop v. Reno*, 210 F.3d 1295 (11th Cir. 2000) (finding court lacked jurisdiction to consider habeas petition of U.S. citizen serving sentence for conviction by a foreign court, even though he was serving his sentence in a United States prison).

In *Neely* and *Holmes* the courts rejected United States citizens' constitutionally based challenges to foreign criminal proceedings. It is even clearer that the Constitution provides no protections for aliens, such as Ramadan, who are wholly outside the territory of the United States. In *United States v. Verdugo-Urquidez*, the Supreme Court explained that it had "emphatic[ally]" rejected the idea that "aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). *See also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." (citing *Verdugo-Urquidez*, 494 U.S. at 269)). Analyzing these Supreme Court precedents and its own cases, the D.C. Circuit recently reaffirmed that "the Constitution does not confer rights on aliens

without property or presence within the United States." *Boumediene, et al. v. Bush, et al.*, No. 05-5062, slip op. at 18 (D.C. Cir. Feb. 20, 2007). *See also 32 County Sovereignty Comm'n v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) ("[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise" (quoting *People's Mojahedin Org. Of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) ("[N]on-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States.").[11]

---

[11] Petitioner's citations to the numerous conventions on civil and political rights, *see* Pet. ¶ 15, are equally unavailing because those treaties do not create individually enforceable rights in the courts of the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("[T]he United States ratified the [International Convention on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in federal courts."); *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001) (noting that the American Declaration on Human Rights and the American Declaration on the Rights and Duties of Man have not been ratified by the United States, and therefore do not create binding rights enforceable in habeas proceedings). Ramadan also relies on the International Covenant Against Torture, but that convention provides no rights cognizable in this habeas proceeding. In giving its advice and consent to ratification, the Senate declared that the Convention would not, itself, be privately enforceable. *See* 136 Cong. Rec. S 36,198 (Oct. 27, 1990). Congress then enacted implementing legislation expressly limited to the immigration context. *See* Foreign Affairs Reform and Restructuring Act of 1998 Pub. L. No. 105-277, § 2242(d), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note). More recently, Congress eliminated habeas jurisdiction over claims asserted under the Convention. *See* 8 U.S.C. §1252(a)(4).

Finally, Ramadan claims (without any explanation) that the Geneva Conventions give this Court jurisdiction over his petition. This is not so. First, the Geneva Conventions do not give rise to individually enforceable rights. *See Boumediene*, slip op. at 13 (recognizing that Military Commissions Act of 2006, § 5(a), Pub. L. No. 109-366, 120 Stat. 2600, makes "unavoidable" the conclusion that no person may invoke the Geneva Conventions as a source of rights in any habeas corpus or other civil action to which U.S. or officer is a party); *see also Head Money Cases*, 112 U.S. 580, 597 (1884) (treaties are presumptively not judicially enforceable); *cf. Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (holding that the 1929 Geneva Convention is not judicially enforceable by the captured party). Moreover, even if those Conventions did create rights enforceable in United States courts, they still would not provide a basis for attacking petitioner's trial. The Geneva Conventions apply to treatment of prisoners of a foreign sovereign during conflicts between two or more of the Conventions' signatories; they have no application to a signatory's prosecution *of its own citizen* in a domestic court. And even if they did apply to petitioner's trial, those rights would

An injunction here would interfere with Iraq's criminal proceedings against one of its own nationals, convicted of committing a crime within Iraqi territory. "A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson v. Girard*, 354 U.S. 524, 529 (1957). Here, an Iraqi court has convicted Ramadan of crimes against humanity. That foreign judicial determination is entitled to respect. *See Neely*, 180 U.S. at 123. Consequently, an exercise of habeas jurisdiction in this case would be inconsistent with "international comity [and the] respect for the sovereignty of foreign nations on their own territory." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 404 (1990); *see also Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced.").

Any relief that interferes with MNF–I's continued detention of Ramadan, or that would require U.S. troops to interfere with Iraq's ability to obtain physical custody of an Iraqi national, found by the Iraqi High Tribunal to have committed crimes in Iraq, and who is still physically in Iraq, would be unprecedented and an unjustified violation of international comity. Petitioner attempts to elide this fact by arguing that the relief he requests would run only against the United States, and not against the Iraqi court. *See* Pet. ¶ 10-11. But, "[t]he fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity because such an order *effectively*

---

not properly be invoked against *respondents*; it was the Iraqi High Tribunal, and not any American authority, that tried and convicted petitioner.

restricts the jurisdiction of the court of a foreign sovereign." *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213 (D.C. Cir. 1989) (emphasis added and citations omitted). Indeed, as another judge of this Court has already concluded, preventing the transfer of petitioner's co-defendant Saddam Hussein from MNF-I custody to the government of Iraq would have been nothing less than a nullification of the Iraqi High Tribunal verdict. "[P]revent[ing] the transfer of Petitioner Hussein to the custody of the Iraqi government . . . would effectively alter the judgment of an Iraqi court." *In re Hussein*, 2006 WL 3832818, at *3.

III. Exercising Jurisdiction Over the Petition Would Contravene the Separation of Powers

Even if this Court found that it had jurisdiction to consider the petition, and that doing so would not violate principles of international comity, it nevertheless should deny the writ out of respect for the separation of powers. Article II of the Constitution "provides allocation of foreign relations and national security powers to the President, the unitary chief executive." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1768 (2006). And the Supreme Court has repeatedly emphasized that, under our Constitution, the Executive Branch exercises the "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). Moreover, because the President is the "Commander in Chief of the Army and Navy of the United States," U.S. Const. Art. II, § 2, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 414 U.S. 518, 530 (1988); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) ("Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those

who are best positioned and most politically accountable for making them.").

These considerations are particularly strong when they involve the Executive Branch's discretionary military and foreign policy decisions concerning persons and events wholly outside the United States, "on the far side of the world." *Bancoult v. McNamara*, 445 F.3d 427, 429 (D.C. Cir. 2006); *see id.* at 436. The Executive Branch determined that the U.S. military should participate in MNF–I "under unified command" by providing, among other things, "civil affairs support, and relief and reconstruction assistance," as requested by the Government of Iraq. U.N. Security Council Res. 1546, at 11. The Executive Branch's determination to permit U.S. military personnel to participate in the MNF–I and detain individuals such as Ramadan, at the request of the Government of Iraq, is a discretionary decision concerning how best to pursue the nation's military and foreign policy objectives. Similarly, whether, in the midst of daily violent attacks on the Iraqi people and their new democratic institutions, our Government should honor the Iraqi judiciary's judgment, and whether our Government should recognize Iraq's sovereign right to punish its own citizens for their criminal wrongs, are inherently foreign policy matters, entrusted solely to the Executive.

Moreover, in the context of extradition cases, respect for the separation of powers has led courts to apply a rule of "non-inquiry" that prevents courts from making their own judgments about the fairness of foreign judicial proceedings or the punishment to which a defendant is subject.[12] Where such judgments are to be made, they are the province of the Executive Branch –

[12] Because courts in extradition cases must ensure that "judicial inquiry does not unnecessarily impinge upon executive prerogative and expertise," they have repeatedly applied a "rule of non-inquiry." *United States v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997). Under that doctrine, "courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated

and in particular the Secretary of State – and not federal courts. Even though this is not an extradition case, because the MNF–I (and not the United States) is holding Ramadan, and is doing so in Iraq, the principles underlying these "non-inquiry" cases are nonetheless relevant to whether this Court should exercise its discretion to grant a writ (even if it had the power to do so). These cases counsel that any decision on whether transferring petitioner to the Government of Iraq to answer for crimes he committed in that country, and for which he was convicted in its courts, might result in cruel and unusual punishment, *see, e.g.*, Pet. ¶¶ 5, 24, 45, 66, 68, should be left to the Executive, and not the Judicial, Branch. *Cf. Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999) ("[I]t is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.").

IV. ARTICLE III PROHIBITS THE RELIEF PETITIONER REQUESTS

Finally, the relief petitioner requests is barred by Article III of the U.S. Constitution. Ramadan seeks to *prevent* his release from MNF–I custody. *See* Pet. at 26 ¶ 2 (asking court to "[o]rder Respondents to prohibit the surrender, *or release* of Petitioner or to allow him to be turned over to the Government of Iraq, or any of its Ministries, agents, the IST or designees or

---

humanely." *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997). Thus, for example, courts will not consider evidence regarding the requesting country's "law enforcement procedures and its treatment of prisoners"; such evidence is irrelevant and improper in a challenge to extradition in a U.S. court. *Ahmad v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990); *see also Matter of Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995) ("[C]ourts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems.").

any other entity, or person without the prior approval of this Court" (emphasis added)).[13] But the "core" relief afforded by the writ of habeas corpus is "immediate release or a shorter period of confinement." *Wilkinson v. Dotson*, 544 U.S. at 79, 80 (quotation marks omitted); *id.* at 86 (Scalia, J., concurring) ("It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a quantum change in the level of custody, such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." (quotation marks and citation omitted)).

As release is the only relief that petitioner could obtain in this habeas action, even if he had a right to any relief under the writ, his request that respondents be enjoined from releasing him must be rejected. *See Omar*, slip op. at 19 ("Omar did not seek an injunction barring his outright release, *nor could he have*." (emphasis added)). Because such an injunction would prevent respondents from affording him all the relief he could receive in habeas, it would offend Article III by artificially prolonging judicial proceedings in the absence of a legally cognizable case or controversy. *Cf. Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998) (habeas challenge to parole violation moot once prisoner released).[14]

---

[13] Although it is unclear, petitioner appears to be seeking to bar *both* his outright release from MNF-I custody *and* his transfer to the Government of Iraq.

[14] Petitioner is not entitled to be brought before this Court, as he requests. *See* Pet. at 26 ¶ 5. As Judge Robertson recognized when considering a similar request by non-resident alien habeas petitioners detained at Guantanamo Bay, such relief is inappropriate – even in a habeas proceeding – because "the conditions of entry for every alien . . . have been recognized as matters . . . wholly outside the power of [courts] to control." *See Qassim v. Bush*, 407 F. Supp. 2d 198, 202-03 (D.D.C. 2005) (quoting *Fiallo v. Bell*, 430 U.S. 787, 796 (1977)).

CONCLUSION

For all the foregoing reasons, this Court should dismiss the petition for a writ of habeas corpus.

Dated: February 23, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JEFFERY A. TAYLOR
United States Attorney

JOSEPH H. HUNT (D.C. Bar No. 431134)
Branch Director

VINCENT M. GARVEY (D.C. Bar No. 127191)
Deputy Branch Director

/s/ Michael P. Abate
MICHAEL P. ABATE (IL Bar No. 6285597)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
Mailing Address
P.O. Box 883
Washington, D.C. 20044
Delivery Address
20 Massachusetts Ave., N.W., Room 7302
Washington, D.C. 20001
Telephone: (202) 616-8209
Facsimile: (202) 616-8470

Attorneys for Respondents