2007

The Post-Trial Re-Sentencing Of Ramadan: If The Iraqi High Tribunal Deviates From International Standards Regarding Fair Trials, What Are The Potential Legal Obstacles To The Transfer Of Convicted Iraqi High Tribunal Defendants From US Custody To Iraqi Custody?

Chelan Bliss

CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE
IRAQI HIGH TRIBUNAL

THE POST-TRIAL RE-SENTENCING OF RAMADAN: IF THE IRAQI HIGH TRIBUNAL DEVIATES FROM INTERNATIONAL STANDARDS REGARDING FAIR TRIALS, WHAT ARE THE POTENTIAL LEGAL OBSTACLES TO THE TRANSFER OF CONVICTED IRAQI HIGH TRIBUNAL DEFENDANTS FROM US CUSTODY TO IRAQI CUSTODY?

Prepared By Chelan Bliss
JD Candidate
Spring 2007

TABLE OF CONTENTS

INDEX OF AUTHORITIES

U. S. Cases

19. *Rasul v. Bush,* 542 U.S. 466, 474, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)

20. *Schneider v. Kissinger,* 366 U.S. App. D.C. 408, 412 F.3d 190, 193 (D.C. Cir. 2005)

21. *In Re Hussein,* 468 F. Supp. 2d 126; 2006 U.S. Dist. LEXIS 93586 (2006)

22. *US v. Tiede,* 86 F.R.D. 227 (1979)

Iraqi High Tribunal Cases

23. Dujail Trial Decision, Iraqi High Tribunal Appeals Chamber, Number 29/c/2006, December 12, 2006, available at: http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf

24. Appeal of the Sentencing Order issued by Trial Chamber One, Iraqi High Tribunal, Defense counsel Giovanni Di Stefano, Feb. 12, 2007

United Nations Human Rights Committee Decisions

25. Reid v. Jamaica, Communication No. 250/1987, adopted on July 20, 1990

Statutes and Laws

26. Code of Criminal Procedure of Iraq, Article 252

27. Constitution of Iraq, Article 73

28. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984, *23 I.L.M. 1027*

29. International Covenant on Civil and Political Rights, 1968, *6 I.L.M. 368* at Article 2.3(a), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)

30. Law of the Iraqi High Criminal Court (2005)

31. United States Code, 28 USCS § 2241, Title 28, Judiciary and Judicial Procedure, Part VI, Particular Proceedings, Chapter 153, Habeus Corpus § 2241, Power to grant writ, United States Code Service

Law Review Articles

32. Jonathan Bush, *Respondents: Lex Americana: Constitutional Due Process and the Nuremberg Defendants,* 45 ST. LOUIS L.J. 515 (2001)

33. Louis Klaveras, *The Surrender of Alleged War Criminals to International Tribunals: Examining the Constitutionality of Extradition via Congressional-Executive Agreement,* 8 UCLA J. INT'L L. & FOR. AFF. 77 (2003)

34. Robert Kushen and Kenneth J. Harris, *Current Development: Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda,* 90 A.J.I.L. 510 (1996)

35. Ved P. Nanda, *Essay: Bases for Refusing International Extradition Requests-Capital Punishment and Torture,* 23 FORDHAM INT'L L.J. 1369 (2000)

36. Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court,* 25 LOY. L.A. INT'L & COMP. L. REV. 605 (2003)

37. Michael Topiel, *The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?,* 9 CARDOZO J. INT'L & COMP. L. 389, (2001)

38. Patricia M. Wald, *Symposium: International Criminal Tribunals in the 21st Century: Iraq, Cambodia, and International Justice,* 21 AM. U. INT'L L. REV. 541

39. Joshua Pantesco, *Saddam Dujail Trial 'Fundamentally Unfair': HRW,* The Jurist, Nov. 20, 2006

40. Richard J. Wilson, *Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defenses: Toward the Enforcement of Universal Human Rights through Abrogation of the Rule of Non Inquiry in Extradition*, 3 ILSA J INT'L & COMP L 751 (1997)

Books

41. Geert-Jan Alexander Knoops, Surrendering to International Criminal Courts: Contemporary Practice and Procedures (2003)

News Articles

42. Melissa Bancroft, *Rights Group Urges Iraqi Court to Spare Saddam VP*, The Jurist, Feb. 11, 2007

43. Lisa Brunner, *US Court Rejects Habeus Petition of Saddam VP Facing Death Sentence*, The Jurist, Feb. 27, 2007

44. Bernard Hibbitts, *Ramadan Hanging Prompts Disavowal, Denunciation*, The Jurist, Mar. 20, 2007

45. Natalie Hrubos, *Second UN Rights Expert Calls on Iraq Not to Execute Saddam VP After Faulty Trial*, Feb. 13, 2007

46. Sabah Jerges, *Former Iraq VP Ramadan sentenced to death*, Agence France Presse, Feb. 12, 2007

47. Frank Jordans, *U.N. Rights Chief Argues for Saddam Aide*, Associated Press, Feb. 8, 2007

48. Jomana Karadsheh and Joe Sterling, *Ex-Hussein V.P.'s Sentence Switched from Life to Death*, CNN, Feb. 12, 2007

49. Katerina Ossenova, *Iraq Tribunal Sentences Saddam VP to Death*, The Jurist, Feb. 12, 2007

50. Cary O'Reilly, Jeff St. Onge, *Former Iraq Vice President Ramadan Loses Bid to Block Transfer*, Bloomberg, Feb. 27, 2007

51. Joshua Pantesco, *'Insufficient Evidence' to Support Ramadan Torture Allegations: US Army*, The Jurist, Feb. 22, 2007

52. Joshua Pantesco, *Iraqi Tribunal Delays Re-Sentencing Former Saddam VP*, The Jurist, Jan. 25, 2007

53. Joshua Pantesco, *Saddam VP Trial Unfair: UN Rights Expert*, The Jurist, Feb. 14, 2007

54. Sinan Salaheddin, *Iraqi Court Sentences Ex-Hussein Deputy to Hanging*, The Boston Globe, Feb. 13, 2007

55. Steve Scherer and Sheyam Ghieth, *Iraqi Official, Now Awaiting Execution, Says U.S. Tortured Him*, Bloomberg,, Feb. 19, 2007

56. Jeannie Shawl, *Former Saddam VP Seeks to Avoid Death Penalty*, The Jurist, Jan. 22, 2007

57. Jeannie Shawl, *Iraq Tribunal Upholds Death Penalty for Saddam VP as Lawyer Petitions US General*, The Jurist, Mar. 15, 2007.

58. Jeannie Shawl, *Saddam asks Iraq Tribunal to Lift Death Sentence*, The Jurist, Mar 14, 2007

59. Tina Susman, *Third Hussein Codefendant to be Hanged*, LA Times, Feb. 13, 2007

60. Alexis Unkovic, *Condemned Saddam ex- VP Claims Torture in US Custody*, The Jurist, Feb. 19, 2007

61. James Yoch, *Ex-Saddam VP Faces Iraq Execution,* The Jurist, Mar. 12, 2007

62. *UN Expert Says Saddam Deputy Should Not Hang,* Agence French Presse, Feb. 13, 2007

63. *Defence condemns Iraq Death Sentence,* Agence France Presse, Feb. 13, 2007

64. *Iraqi Court Raises Sentence Against Former Saddam Deputy to Death by Hanging,* USA Today, Feb. 12, 2007

Press Releases and Statements

65. Amnesty International, *Iraq: Amnesty International Concerned About Possible Death Sentence for Former Vice-President Taha Yassin Ramadan,* Feb. 9, 2007

66. Iraqi High Tribunal, *Sentence*, February 12, 2007

67. Iraqi High Tribunal, *Press Statement,* February 26, 2007

68. Giovanni Di Stefano, counsel for Taha Ramadan, *Ex-Iraqi VP Should be Freed or Retried,* The Jurist, February 25, 2007

69. Giovanni Di Stefano, counsel for Taha Ramadan, *US Must Not Hand Over Ramadan for Iraqi Execution*, The Jurist, February 12, 2007

Other Documents

70. Louise Arbour, Amicus Curiae Brief, *In the Matter of Sentencing Taha Yassin Ramadan,* United Nations High Commissioner of Human Rights, Feb. 12, 2007

71. Human Rights Watch, *Iraq: Judging Dujail- The First Trial Before the Iraqi High Tribunal,* Vol. 18 (No.9(E)). New York, November 2006.

I. ISSUES AND SUMMARY OF CONCLUSIONS

A. Issues*

Taha Yassin Ramadan ("Ramadan") was tried along with Saddam Hussein and other co-defendants in the Dujail Trial of the Iraqi High Tribunal ("IHT").[1] His life sentence was later changed to a death sentence, prompting controversy.[2] Assuming Ramadan to have been in the custody of the United States under a custodial memorandum of understanding, the Iraqi High Tribunal inquires as to the United States' options and responsibilities if Ramadan were to file a habeus petition in the United States. The IHT also inquires as to whether there is any legal obstacle to the transfer of custody of Ramadan from the United States to Iraq. Finally, the IHT is interested in whether *Hamdan v. Rumsfeld* bears upon Ramadan's case.

B. Summary of Conclusions

1. **The IHT's re-sentencing of Ramadan was condemned by many international organizations and legal experts as contrary to international standards of fair trial processes and in contravention to international law and Iraq's treaty obligations.**

---

* Taha Ramadan is in US custody at the request of the Iraqi government. For purposes of this question assume that he is being held by the US as a common criminal under a memo of understanding with Iraq and that this is a custodial arrangement only. If the IHT trial chamber increases the sentence to Taha Ramadan at the direction of the Appeals Chamber and the US concludes that the sentence is the result of a denial of fair trial rights of the accused and that the accused will suffer irreparable prejudice if the sentence is carried out, must the US release custody of Taha to the Iraq government? Must the US refuse to release custody? Would Ramadan have the right to file a habeus petition and would the US have jurisdiction over such petition? Does the Supreme Court decision in *Hamdan* bear on these issues?

[1] Dujail Trial Decision, Iraqi High Tribunal, December 12, 2006 [reproduced in accompanying notebook at Tab 23].

[2] Katerina Ossenova, *Iraq Tribunal Sentences Saddam VP to Death*, The Jurist, February 12, 2007, available at: http://jurist.law.pitt.edu/paperchase/2007/02/iraqi-tribunal-sentences-saddam-vp-to.php [reproduced in accompanying notebook at Tab 49].

Some human rights organizations, officials and legal experts have agreed with Ramadan that his trial was flawed and unfair, and that his re-sentencing was in violation of international law.[3] Ramadan's main arguments are as follows: the prosecution and defense were not evenly matched in resources and treatment, he did not have the chance to examine some witnesses, despite the testimony of these witnesses being read into the record, his guilt was expounded by officials before the trial came to a close, curtailing his right to a presumption of innocence, judge turnover and the murder of his defense counsel reduced his ability to put on an effective defense, and, most importantly, while there was stronger evidence against his co-defendants, there was not enough evidence to convict Ramadan.[4]

Beside the controversies over the Dujail Trial itself, more severe criticism has brewed over the resentencing of Ramadan. The resentencing occurred after the original life sentence was annulled and the case was remanded for a stronger sentence, despite that Ramadan did not appeal his original sentence. Many experts, human rights groups, and organizations, have denounced the resentencing of Ramadan.[5] Louise Arbour, the United Nations' High Commissioner for Human Rights, submitted an amicus curiae to the IHT on Feb. 8, 2007, arguing that the re-sentencing of Ramadan to capital

---

[3] Melissa Bancroft, *Rights Group Urges Iraqi Court to Spare Saddam VP*, The Jurist, Feb. 11, 2007. [reproduced in accompanying Notebook at Tab 42]

[4] Joshua Pantesco, *Saddam VP Trial Unfair: UN Rights Expert*, The Jurist, February 14, 2007, available at: http://jurist.law.pitt.edu/paperchase/2007/02/saddam-vp-trial-unfair-un-rights-expert.php . Hereinafter "*UN Rights Expert*". [reproduced in accompanying notebook at Tab 52]*;*
Joshua Pantesco, *Saddam Dujail Trial 'Fundamentally Unfair': HRW*, The Jurist, November 20, 2006, available at: http://jurist.law.pitt.edu/paperchase/2006/11/saddam-dujail-trial-fundamentally.php . Hereinafter "*HRW*". [reproduced in accompanying notebook at Tab 53]

[5] Bancroft, *supra* [reproduced in accompanying notebook at Tab 42]

punishment was in violation of the International Covenant on Civil and Political Rights ("ICCPR").[6] In particular, she believes the re-sentencing violates Article 6, Article 7 and Article 14.[7]

2. **Precedent suggests that US jurisdiction to review habeas petitions filed by convicted IHT defendants should be refused, under the doctrine of non-inquiry and the test that the Supreme Court established in *Hirota v. MacArthur* and *Flick v. Johnson.***

The Supreme Court of the United States has unambiguously held that the United States legal system shall not be used as an appellate chamber for foreign legal systems.[8] In order to achieve US jurisdiction, a convicted IHT defendant would need to show that his case differs from those contemplated in *Hirota v. MacArthur* and *Flick v. Johnson*, or that evolving human rights standards should cause US courts to reconsider this line of precedent.

The test established in *Hirota v. MacArthur*[9], and later described in *Flick v. Johnson*[10] and *Omar v. Harvey*[11] bars US courts from jurisdiction to consider writs of habeas corpus filed by those convicted in foreign or international courts, who are held abroad by international forces, even if the US is involved in their custody or was involved

[6] Louise Arbour, Amicus Curiae Brief, *In the Matter of Sentencing Taha Yassin Ramadan*, United Nations High Commissioner of Human Rights. [reproduced in accompanying notebook at Tab 70]

Id., referencing the International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1996), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). [Reproduced in accompanying notebook at Tab 29]

[8] *Hirota v. MacArthur, supra.* [reproduced in accompanying at Tab 10]

[9] *Id.*

[10] *Flick v. Johnson, supra.* [reproduced in accompanying notebook at Tab 5]

[11] *Omar v. Harvey*, *supra* [reproduced in accompanying notebook at Tab 16]

in creating the court that sentences them.[12] Ramadan's case seems to fit all of these criteria, so he would have to prove an exceptional circumstance not considered in this line of cases or convince US courts to narrow or alter this line of precedent in light of evolving human rights standards and laws.

The doctrine of non inquiry, which is part of the basis for the holding in *Hirota,* is a legal concept that suggests that courts should not review the validity or fairness of convictions handed down by foreign courts. The doctrine is generally supported by the arguments that review of foreign legal proceedings would be an attack on the sovereignty of the foreign state, and that such an attack would be an improper venture by the courts into political waters. Other arguments for non inquiry are that it may be impracticable to investigate claims of foreign judicial improprieties and that the US courts do not wish to be flooded with cases as though it were an appellate chamber for foreign legal systems.

3. The Supreme Court decision of Hamdan does not bear upon Ramadan's case.

The case of *Hamdan*[13] held that the military commissions used at Guantanamo Bay were not adequate tribunals and violated the laws of war because they did not meet the Geneva Conventions or the UCMJ standards. One of the main jurisdictional issues in Hamdan surrounds the Supreme Court's authority to review the legitimacy of tribunals created and run by the US military. Ramadan, and other convicted defendants of the IHT, are not tried by a US military commission, so cannot use the same basis for jurisdiction as could Hamdan. US military tribunals are entirely controlled by the US executive branch, so the arguments over jurisdiction center on executive and judicial

[12] *Id.*

[13] *Hamdan v. Rumsfeld, supra.* [reproduced in accompanying notebook at Tab 7]

spheres of power. Ramadan and his co-defendants are convicted by a foreign court, not in the total control of the US executive branch, and so the line of cases that follow *Hirota* are more relevant.

II. FACTUAL BACKGROUND

Taha Yassin Ramadan held various senior posts in Iraq's Baath regime for 35 years, ultimately becoming Saddam Hussein's Vice President. He continued to hold this position until Hussein's government capitulated to multinational forces in 2003.[14] Later in 2003, Ramadan was captured in Mosul and handed over to the multinational forces.[15] Ramadan was brought before the Iraqi High Tribunal, where he was tried in the Dujail Trial, for crimes against humanity that occurred in the village of Dujail in 1967.[16] He was joined by several co-defendants including Saddam Hussein. Ramadan was convicted on November 5, 2006, of murder, torture and forced deportation. Ramadan was sentenced to life in prison, while three of his co-defendants were sentenced to death, including Hussein.[17]

Hussein appealed his death sentence, but Ramadan did not appeal his life sentence. The Appeals Chamber affirmed Saddam's death sentence on December 26, 2006.[18] In

---

[14] Bernard Hibbitts, *Ramadan Hanging Prompts Disavowal, Denunciation*, The Jurist, March 20, 2007, available at: http://jurist.law.pitt.edu/paperchase/2007/03/ramadan-hanging-prompts-disavowal.php [reproduced in accompanying notebook at Tab 44]

[15] *Id.*

[16] *Id.*

[17] Jeannie Shawl, *Saddam VP asks Iraq Tribunal to Lift Death Sentence*, The Jurist, March 14, 2007, available at: http://jurist.law.pitt.edu/paperchase/2007/03/saddam-vp-asks-iraq-tribunal-to-lift.php [reproduced in accompanying notebook at Tab 58]

[18] Jeannie Shawl, *Iraq Tribunal Upholds Death Penalty for Saddam VP as Lawyer Petitions US General*, The Jurist, March 15, 2007 [reproduced in accompanying notebook at Tab 57]

that decision, even though Ramadan had not appealed, the Appeals Chamber considered Ramadan's sentence and declared that the life sentence was too lenient, remanding Ramadan's sentence "for the purpose of strengthening the penalty against him and raising it to the appropriate legal limit".[19]

United Nations officials, legal experts and human rights groups such as Amnesty International and Human Rights Watch released statements condemning the Appeals Chamber's decision, and pled with the Trial Chamber to refuse to obey it.[20] Ramadan submitted arguments to the Trial Chamber focusing on the lack of evidence tying him to the Dujail atrocities (beyond his possible involvement in the destruction of some orchards), and drawing attention to some perceived procedural flaws in the Dujail Trial and appellate processes.[21]

Since these questions were submitted to the War Crimes Lab, some important developments in Ramadan's case have transpired. On Feb. 12, 2007, the Trial Chamber acquiesced to the Appeals Chamber's demand, re-sentencing Ramadan to "hanging until death". The trial chamber announced that the new sentence would be appealed automatically to the same appellate chamber that had required the increased punishment.[22]

---

[19] Dujail Trial Decision, Iraqi High Tribunal Appeals Chamber, Number 29/c/2006, December 12, 2006 [reproduced in accompanying notebook at Tab 23]

[20] Amnesty International, *Iraq: Amnesty International Concerned About Possible Death Sentence for Former Vice-President Taha Yassin Ramadan,* Feb. 9, 2007 [reproduced in accompanying notebook at Tab 66]

[21] Jomana Karadsheh and Joe Sterling, *Ex-Hussein V.P.'s Sentence Switched from Life to Death,* CNN, Feb. 12, 2007 [reproduced in accompanying notebook at Tab 48]

[22] Sabah Jerges, *Former Iraq VP Ramadan sentenced to death,* Agence France Presse, Feb. 12, 2007 [reproduced in accompanying notebook at Tab 46]

Human rights organizations, UN officials and legal experts again expressed denunciation regarding the re-sentencing, and beseeched the Appeals Chamber to reconsider its position.[23] Ramadan submitted a lengthy appeal on Mar. 11, 2007.[24] Not persuaded by these efforts, the Appeals Chamber affirmed the sentence that it had itself demanded, on Mar. 15, 2007.[25]

Ramadan continued to seek to block his execution. He appealed to Iraqi President Jalal Talabani for commutation of his sentence, possibly because Talabani personally opposes the death penalty.[26]

Ramadan filed a petition for habeus corpus in the US, in an attempt to block transfer of his custody from the US to the Iraqi High Tribunal.[27] The US Court of Appeals for the District of Columbia found it does not have jurisdiction to hear Ramadan's case, and refused his petition.[28]

Ramadan also appealed directly to General David Petraeus, the US commander of forces in Iraq, asking him to apply "natural justice" standards under the Geneva Conventions and refuse orders to release Ramadan.[29] Ramadan argued that "natural

---

[24] *Appeal of the Sentencing Order Issued By Trial Chamber One,* Feb. 12, 2007 [reproduced in accompanying notebook at Tab 24]

[25] Jeannie Shawl, *Iraq Tribunal Upholds Death Penalty for Saddam VP as Lawyer Petitions US General,* The Jurist, March 15, 2007, Hereinafter "*Tribunal Upholds Death Penalty"*. [reproduced in accompanying notebook at Tab 58]

[26] *Id.*

[27] *Ramadan v Rumsfeld,* supra. [reproduced in accompanying notebook at Tab 18]

[28] *Id.*

[29] Shawl, "*Tribunal Upholds Death Penalty", supra.* [reproduced in accompanying notebook at Tab 57]

justice" standards would protect General Petraeus from prosecution for refusing to obey orders.[30]

The US released Ramadan to Iraqi authorities, and he was executed by hanging, before dawn on Mar. 20, 2007.[31]

III. LEGAL ANALYSIS

International outcry regarding the re-sentencing of Ramadan is widespread, and yet the US Courts are not capable of interfering in cases like Ramadan's because they do not have jurisdiction unless the Supreme Court narrows or overturns *Hirota* or the District of Columbia's District Court of Appeals narrows the cases that further defined the *Hirota* test. Considering recent case history, such a shift in judicial policy seems unlikely.

A. The Dujail Trial may have been flawed, and the later re-sentencing of Ramadan may have been contrary to Iraq's obligations under the ICCPR, however the doctrine of non inquiry and relevant case law forbid the United States from establishing jurisdiction to review habeus petitions filed by defendants in Ramadan's situation.

The Supreme Court case of *Hirota v. MacArthur,* and *Flick v. Johnson* and other cases that follow *Hirota* prevent the US court system from acting as an appellate chamber for foreign convictions. This is true even if the foreign trial was not conducted in accordance US or international standards of justice. In order for a petitioner in Ramadan's situation to prevail in establishing US jurisdiction for a writ of habeas, the US Supreme Court would have to overturn or narrow *Hirota* or the US Court of Appeals for

---

[31] Bernard Hibbitts, *Ramadan Hanging Prompts Disavowal, Denunciation*, The Jurist, and Mar. 20, 2007. [reproduced in accompanying notebook at Tab 44]

the District of Columbia would have to narrow *Flick.* Some scholars and human rights activists advocate for these changes, in the interest of giving US courts more flexibility to protect human rights, but such a drastic change is unlikely in the near future and multiple recent cases conform to *Hirota* and *Flick.*[32]

Human rights organizations, and some officials and legal experts have voiced serious criticisms regarding the fairness of the Dujail trial, and particularly the re-sentencing of Ramadan in its aftermath.

1. The UN High Commissioner of Human Rights, Louise Arbour, has argued that Ramadan's trial and re-sentencing are illegal under the ICCPR.

UN High Commissioner of Human Rights Louise Arbour filed an amicus brief with the Iraqi High Tribunal, arguing that a death sentence would be unfair to Ramadan and a breach of Iraq's obligations under the ICCPR.[33] Iraq entered into the ICCPR on Mar. 23rd, 1976, without establishing any reservations.[34]

Arbour identifies three covenants of the ICCPR that she believes would be violated by the execution. She suggests that Article Fourteen[35], which guarantees a fair trial process and appellate procedures, has been violated by many procedural and other shortcomings of the Dujail trial, including pre-conviction statements of Ramadan's guilt, lack of access to witnesses, frequent judge turn over, the murder of defense lawyers, and the post-trial increase of punishment imposed by the Appeals Chamber.[36]

---

[33] Louise Arbour, Amicus Curiae Brief, *In the Matter of Sentencing Taha Yassin Ramadan,* United Nations High Commissioner of Human Rights [reproduced in accompanying notebook at Tab 70]

[34] *Id.* at 5-6.

[35] Article Fourteen of the ICCPR, *supra.* [reproduced in accompanying notebook at Tab 29]

[36] Arbour, *Supra* at 4. [reproduced in accompanying notebook at Tab 70]

Arbour argues that Article Six[37] of the ICCPR, which forbids arbitrary deprivation of life and limits capital punishment, has been violated because the death penalty sentence was the product of a trial involving so many Article Fourteen violations, and because there was no possibility of pardon for Ramadan.[38]

Finally, Arbour contends that Article Seven[39], which prohibits torture or other cruel, inhuman or degrading treatment, has been violated because the death sentence, as a product of Article Fourteen violations, is illegitimate under Article Six, and causing the fear of impending execution in a person who is not legitimately sentenced to death is cruel or inhuman treatment.[40] Additionally, she writes that the cruelty of Ramadan's death sentence is increased because of defects in the executions of his co-defendants, including taunting and decapitation, and because Ramadan was not given sufficient assurance or evidence that similar defects would not characterize his own execution.[41]

2. UN Special Rapporteurs Philip Alston and Leandro Despouy each individually called for the abandonment of Ramadan's death sentence.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston ("Alston"), denounced Ramadan's trial and death sentence as illegitimate. Alston argued that official statements indicating Ramadan's guilt before the conclusion of the trial, in conjunction with the admission of witness testimony without the

---

[37] Article Six of the ICCPR, *supra.* [reproduced in accompanying notebook at Tab 29]

[38] Arbour, *Supra* at 4. [reproduced in accompanying notebook at Tab 70]

[39] Article Seven of the ICCPR, Section Four, *supra.* "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon, or commutation of the sentence of death may be granted in all cases". [reproduced in full in accompanying notebook at Tab 29]

[40] Arbour, *supra* at 5. [reproduced in full in accompanying notebook at Tab 70]

[41] *Id.*

opportunity for cross-examination and other procedural shortcomings, collectively amounted to an unfair trial and resulted in an illegitimate application of the death penalty.[42]

Alston was later joined in this criticism by the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy ("Despouy"). Despouy urged the Iraqi government not to execute Ramadan due to "grave shortcomings" in Ramadan's trial and his re-sentencing.[43]

3. Human rights organizations such as Human Rights Watch, the International Center for Transitional Justice, and Amnesty International have released statements condemning Ramadan's trial and sentence.

Human Rights Watch denounced the IHT Appeals Chamber's decision to remand Ramadan's case to the Trial Chamber for re-sentencing, and urged the Trial Chamber to spare Ramadan's life despite the Appeals Chamber's instructions.[44] Human Rights Watch and the International Center for Transitional Justice co-released a statement declaring that the evidence against Ramadan in the Dujail trial was inadequate to justify Ramadan's sentence at all and that increasing his sentence after the trial and without an appeal "reeks of vengeance".[45] After the Trial Chamber sentenced Ramadan to death, and after Ramadan appealed his death sentence, Human Rights Watch urged the Appellate Chamber to reconsider its position. Human Rights Watch maintained that its

[42] Natalie Hrubos, *Second UN Rights Expert Calls on Iraq Not to Execute Saddam VP After Faulty Trial*, The Jurist, March 17, 2007 [reproduced in accompanying notebook at Tab 45].

[43] *Id.*

[44] Bancroft, *supra*. [reproduced in accompanying notebook at Tab 42]

[45] *Iraqi Court Raises Sentence Against Former Saddam Deputy to Death by Hanging*, USA Today, Feb. 12, 2007. [reproduced in accompanying notebook at Tab 64]

primary concern was the lack of evidence concerning Ramadan, but it also had many concerns about the fairness of the Dujail Trial itself.[46]

Amnesty International issued a statement of concern declaring that the entire Dujail Trial was unfair, particularly because of the multiple murdered defense lawyers, and that the Appeals Chamber should not have increased Ramadan's sentence.[47]

4. Some governments expressed their censure or lack of support for the Appeals Chamber's decision to resentence Ramadan.

The Foreign Ministry of Russia released a statement on March 20, 2007, denouncing Ramadan's execution as an unjust act that could hurt stability in Iraq.[48] A spokesperson for the US Embassy in Iraq distanced the US from the execution by saying that the trial was "an Iraqi process and an Iraqi decision with respect to the sentence being carried out".[49]

B. Even if Ramadan's trial was unfair or illegal, relevant case law suggests that the United States does not have jurisdiction to review his habeus petition.

Ramadan filed a habeus petition in the United States, on Feb. 9, 2007.[50] The petition was brought before the US Court of Appeals for the District of Columbia, where it was recently rejected, on Feb. 27, 2007.[51] From the bench, the judge stated that US

---

[46] Human Rights Watch, *Iraq: Judging Dujail- The First Trial Before the Iraqi High Tribunal*, Vol. 18 (No.9(E)). New York, November 2006. [reproduced in accompanying notebook at Tab 66]

[47] Amnesty International, *Iraq: Amnesty International Concerned About Possible Death Sentence for Former Vice-President Taha Yassin Ramadan,* Feb. 9, 2007, [reproduced in accompanying notebook at Tab 65]

[48] Hibbitts, *supra.* [reproduced in accompanying notebook at Tab 44]

[49] Bloomberg, *supra.* [reproduced in accompanying notebook at Tab 63]

[50] *Ramadan v. Bush, supra.* [reproduced in accompanying notebook at Tab 18]

[51] *Id.*

courts will not act as appellate chambers for foreign decisions, because to do so would be a "collateral attack" on a foreign court.[52] In reaching this conclusion, the judge relied upon two World War II cases, *Hirota v. MacArthur*[53] and *Flick v Johnson*[54]. These two cases established a test that controls today and that precludes most petitions for writs of habeas corpus filed by people convicted in foreign or international courts and held overseas by multinational forces.

1. *Hirota* established the test for determining jurisdiction in habeas petition cases where the petitioner seeks to avoid custody transfer to a tribunal that has convicted him or her in a court procedure.

Hirota took place in post-World War II occupied Japan. Petitioners were Japanese citizens, convicted by a military tribunal in Japan, and held in custody in Japan, who filed petitions for writs of habeas in the U.S.

The Supreme Court had already considered similar cases in Germany that same year, and eight of the justices had established their positions on US jurisdiction for writs of habeas corpus filed by convicted foreigners in zones occupied by the US and its allies. Four justices believed US jurisdiction over these cases would be legitimate, four strongly disagreed. The ninth justice, Justice Jackson, had recused himself from voting on any of the German cases because he had "negotiated the charter under which the Nazi war

[52] *Id.* quoting *Omar v. Harvey, supra.* [reproduced in accompanying notebook at Tab 17]

[53] *Hirota v. MacArthur,* 338 U.S. 197, 69 S. Ct. 197, 93 L. Ed. 1902 (1948) [reproduced in accompanying notebook at Tab 10]

[54] *Flick v. Johnson,* 85 U.S. App. D.C. 70, 174 F.2d 983, 984 (1949) [reproduced in accompanying notebook at Tab 5]

criminals were tried". [55] The result was a consistent tie. Without a majority in favor of hearing the motions for writs of habeas petition, the default consequence was that none of these cases achieved jurisdiction.

When *Hirota* came before the Supreme Court, the justices were likely to maintain their previous positions regarding jurisdiction. Justice Jackson summarized their positions: "Of course, they could not consistently, with equal justice under law, apply a different jurisdictional rule to these cases than they have to those of the Germans". [56]

In order to break the stalemate, Justice Jackson decided to participate in *Hirota.* He explained that the Japanese war criminals were convicted under a different charter than the one he had directly negotiated in Germany, so it would not be improper for him to participate. Justice Jackson called for oral arguments to be heard regarding the jurisdictional issues. Justice Jackson described his choice as "between two evils". If he voted with those who rejected jurisdiction, he felt that the consequences would be "irrevocable" and the convicted Japanese people would be "executed and their partisans will forever point to the dissents of four members of the Court". He hoped that full oral arguments might persuade one or more other justices to switch positions, bolstering "a faint chance of avoiding dissents".

After oral arguments concluded, Justice Jackson did not take part in the final decision regarding Hirota's motions. Nevertheless, the tie was broken. Justice Rutledge delayed his own judgment, and then died without having announced his vote. Of the

[55] *Hirota, supra* at 199.

[56] *Id.* at 877.

seven remaining justices, five joined in the opinion. The controlling opinion in Hirota is only three paragraphs long.[57]

The International Military Tribunal for the Far East that convicted Hirota and the other defendants was created by General MacArthur, but in creating the tribunal, General MacArthur was deemed as not acting on the United States' authority alone, but rather as "an agent of the Allied Powers".[58] The court was therefore a multi-national tribunal and the defendants were not US citizens, and were detained in Japan.[59] *Hirota* holds that when the defendants are foreigners, and the convicting court is not American, US courts "have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners".[60]

2. Flick further described the test developed in Hirota, and determined that custody of petitioner by U.S. Armed Forces did not prevent petitioner from receiving habeas preclusion under Hirota.

---

[57] "The petitioners, all residents and citizens of Japan, are being held in custody pursuant to judgment of a military tribunal in Japan. Two of the petitioners have been sentenced to death, the others to terms of imprisonment. They filed motions in this court for leave to file petitions for habeas corpus. We set all the motions for the hearing on the questions of our power to grant relief prayed and that issue has now been fully presented and argued.

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside, or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of *habeas corpus* are denied" *Hirota v. MacArthur, supra* [reproduced in accompanying notebook at Tab 10]

[58] *Id.*

.

[59] *Id.*

[60] *Id.* at 198

Flick is also factually similar to *Ramadan* in many ways. Flick involves a German citizen convicted by a German court, in an American-occupied zone of post-war Germany.[61] Like Ramadan, Flick was a foreigner convicted abroad by a non-American court and held in custody by the United States Armed Forces. Also like Ramadan, Flick was tried for war crimes in a special tribunal developed at the conclusion of a war; Flick was tried by the military tribunals at Nuremberg.[62]

Flick held that the US did not have jurisdiction to review Flick's case because he was sentenced by a foreign court, even though he was held in American custody. The court was "German" but the German government was at the time led by a "control council" composed of four commanders, each from one of four occupying countries, one of which was the US. Although the court proceeding that convicted Flick derived its authority from the control council, and although the US held a portion of that control council power, the American ties were not sufficient to deem the court proceeding as American or under US control.

The foreign status of the court was central to the holding in *Flick*. The court asks, "was the court which tried and sentenced Flick a tribunal of the United States? If it was not, no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed on Flick".[63] The court cites *Hirota* in posing this question.[64] In short, *Flick* holds that the *Hirota* test controls US jurisdictional authority

[61] *Flick v. Johnson, supra.* [reproduced in accompanying notebook in Tab 5]

[62] *Id.* at 6-7.

[63] *Id.*

[64] *Id.*

over non-citizens convicted by foreign courts, whether or not those non-citizens were held in US custody.

3. In his petition for writ of habeus corpus, Ramadan relied on *Omar v. Harvey,* which held that the US had jurisdiction to entertain Omar's habeus petition, but *Omar* affirmed the *Hirota* test and the reasons Omar was granted jurisdiction do not apply to Ramadan's factual situation.

Very recently, a third case, *Omar v. Harvey*,[65] further explained and reinforced the test developed in *Hirota* and *Flick*. In *Omar,* a US citizen petitioned for a writ of habeus corpus after the US took him into custody in Iraq.[66] In his petition, Ramadan relied on *Omar* to establish jurisdiction for US consideration of his habeus petition.[67] However, there are two major distinctions between Omar and Ramadan's situations. Omar was a US citizen and he had not yet been convicted, nor was he even *charged* by a foreign court. Ramadan is *not* a US citizen, and *has* been convicted by a foreign court. *Omar* specifically states that it is because Omar wasn't convicted yet by a foreign court and wasn't a US citizen,[68] that Omar's petition is not barred by the test developed in *Hirota* and *Flick*.[69] *Omar* suggests that the heart of the *Hirota* court's concern was that "the petitions represented a collateral attack on the final judgment of an international

[65] *Id.*

[66] *Id.*

[67] *Ramadan v. Bush, supra.* [reproduced in accompanying notebook at Tab 18]

[68] In *Munaf,* the District Court of Columbia clarified that Omar's lack of foreign conviction was dispositive, and the Omar's US citizenship was a less important factor. *Supra* [reproduced in accompanying notebook at Tab 15]

[69] *Omar v. Harvey, supra.* [reproduced in accompanying notebook at Tab 16]

tribunal".[70] As Omar had incurred no final judgment by any foreign court, there was no final judgment to be attacked.

4. Ramadan's case meets the criteria set forth in *Hirota* and further defined in *Flick* and *Omar* for habeus jurisdiction preclusion.

Ramadan meets all four criteria of the *Hirota* test, as delineated in *Flick* and *Omar*; he has been *convicted* in a *foreign court*, and held in a *foreign country* by a *multinational force.*

a. Ramadan has been convicted.

One of the criteria is easily clearly met. Ramadan was convicted of crimes against humanity on Nov. 5, 2006.[71] The satisfaction of this criterion sets Ramadan's apart from *Omar.*[72]

b. Ramadan's case was held in a foreign country.

The criterion that the court must reside in a foreign country also appears to be met. The IHT is a court that is indeed located in a "foreign country" outside of the US, as it is in Iraq. It is possible that Ramadan or another defendant of the IHT could argue that Iraq is largely controlled by the US, and is therefore not "foreign". However, it does not seem likely that such an argument would prevail because the US and its allies had more direct control over occupied post-war Germany and Japan, and yet those countries were found to be "foreign" in *Hirota* and *Flick.*[73]

c. The IHT is a foreign tribunal.

[70] *Id.* at 6.

[71] Jerges, *supra.* [reproduced in accompanying notebook at Tab 46]

[72] *Omar, supra. [*reproduced in accompanying notebook at Tab 16]

Similarly, arguments that the IHT is not a court that is "foreign" to the US falter when compared to the tribunals that were found to be foreign under *Hirota* and *Flick.* While the US may have had influence in the creation of the IHT, and may even continue to have influence over the court, the threshold for "foreignness" of the court is quite low. In *Hirota,* it did not matter that General MacArthur, an American, had created the court in question.[74] In *Flick* it did not bear that the German court had derived its authority not from Germany as a sovereign nation, but from a four-seat control council, of which the US held a seat.[75]

d. Ramadan was held by a multinational force.

In *Munaf v. Geren*[76], *In Re Hussein*[77], and other recent cases, U.S. Courts have held that those defendants who are convicted by Iraqi courts and detained in Iraq, are held by multinational forces, and are not in U.S. custody.

In Re Hussein is an application for a temporary stay of execution, filed by Saddam Hussein in the U.S. on December 29, 2006.[78] His application cites his need to remain temporarily alive in order to defend himself in a civil suit[79] that was brought against his estate in a US court. Hussein alleged that he was in fact in US Custody in Iraq, and that therefore the U.S. District Court for the District of Columbia had the power to delay his execution. Hussein argued that the Court had this power not by exercising

[74] *Hirota v. MacArthur, supra.* [reproduced in accompanying notebook at Tab 9]

[75] *Flick v. Johnson, supra.* [reproduced in accompanying notebook at Tab 5]

[76] *Munaf v. Geren*, 2007 U.S. App. LEXIS 7974 (2007) [reproduced in accompanying notebook at Tab 15]

[77] *In Re Hussein*, 468 F. Supp. 2d 126; 2006 U.S. Dist. LEXIS 93586 (2006) [reproduced in accompanying notebook at Tab 21]

[78] *In Re Hussein, supra.* [reproduced in accompanying notebook at tab 21]

[79] Hussein refers to *Ali Rasheed v. Hussein*, Civ. A. No. 04-1862

any authority over Iraqi officials, but through an enjoinment against the United States Military and the United States Department of State, temporarily preventing them from handing Hussein over to Iraq. The opinion states that although not "styled as such, he sought this order under the legal framework of a petition for habeas corpus".[80]

Hussein attempted to prove that he was in US custody in part by showing that his access to his attorneys had been "at the discretion of the United States Military and Department of State".[81] The court cited 28 U.S.C. § 2241[82] which provides that jurisdiction over a writ of habeas corpus only exists if the petitioner is "in custody under or by color of the authority of the United States".[83] The court finds that Hussein was not under the custody or color of authority of the United States, concluding that "members of the United States Military maintain custody over Petitioner Hussein pursuant to their authority as members of Multi-National-Force-Iraq".[84]

In *Munaf*, an extremely recent case, an American citizen who was convicted in an Iraqi criminal court was found to be held not in US custody but "by United States personnel serving as part of the Multi-National Force-Iraq ("MNF-I")".[85] The case went on to define the MNF-I as "a multinational force, authorized by the United Nations Security Council that operates in Iraq in coordination with the Iraqi government".[86]

---

[80] *In Re Hussein, supra* at 1-2. [reproduced in accompanying notebook at tab 21]

[81] *Id.* at 5

[82] 28 U.S.C. § 2241 [reproduced in accompanying notebook at tab 31]

[83] *In Re Hussein, supra* at 9. [reproduced in accompanying notebook at tab 21]

[84] *Id.* at 9

[85] *Munaf*, supra [reproduced in accompanying notebook at Tab 15]

[86] *Id.* at 4

a. Ramadan's actual petition for habeas corpus was denied.

When Ramadan filed a petition for habeus corpus in the US, it was denied. The US District Court for the District of Columbia cites *Hirota*, *Flick,* and *Omar* in its decision.[87] The Court concludes that it "lacks jurisdiction to consider a petition for a writ of habeus corpus on behalf of this petitioner- a foreign citizen, detained overseas, with the existence of a multinational force, and criminally convicted by a foreign court—regardless of whether the United States can be deemed the custodian".[88]

C. The *Hirota* test is supported by the somewhat controversial doctrine of non inquiry.

The doctrine of non inquiry is a long-standing legal doctrine that forbids US courts from interfering in the extradition of non-citizens who have been convicted abroad, if the court's reason for interference is based on an evaluation of the trial standards of another country.[89] While the transfer of Ramadan's custody to Iraq may not qualify as extradition, the concepts upon which the doctrine of non-inquiry is based apply to Ramadan's case as clearly as they would to an extradition case. The doctrine of non inquiry demands that the courts not interject in what should be a political decision to create and continue extradition treaties, and that the courts ought not to challenge the rulings of other nations' legal systems.

---

[87] *Ramadan v. Bush, supra.* [reproduced in accompanying notebook at Tab 18]

[88] *Flick v. Johnson, supra.* [reproduced in accompanying notebook at Tab 5]

[89] Michael Topiel, *The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?*, 9 CARDOZO J. INT'L & COMP. L. 389, (2001) [reproduced in accompanying notebook at Tab 37]

Many reasons have been given for the implementation of the doctrine of non inquiry around the world, and for its continuation in the US judicial system.

One major concern is the foreign relations fall out that could occur if US courts entertain habeas petitions from those who have been convicted by foreign courts. If US courts hear such petitions, and then decide to refuse extradition, and if they base such a refusal on a case-by case appraisal on the legitimacy and fairness of the non-citizen's foreign conviction, the US courts would be essentially acting as an appellate chamber for foreign courts. To act in this way may be, at the very least, considered disrespectful toward the foreign country, or even perceived as a "collateral attack" upon that country's sovereignty.[90]

A related concern is that the courts would be solving political questions in determining which foreign trials have been legitimate, and so would be engaging unilaterally in foreign affairs, and violating the political question doctrine.[91] After all, extradition treaties are developed between states with the expectation that the executive or legislative branches of the states' respective governments have considered the worthiness of each others' legal systems and have found them to be adequate. Similarly, the executive branch of the United States, alone or as part of the multinational forces that it controls, has decided to hold some prisoners for the IHT, including those that are convicted and awaiting capital punishment. Therefore, if the judicial branch interferes

[90] *Omar v. Harvey, supra.* [reproduced in accompanying notebook at Tab 16]

[91] Richard J. Wilson, *Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defenses: Toward the Enforcement of Universal Human Rights through Abrogation of the Rule of Non Inquiry in Extradition,* 3 ILSA J INT'L & COMP L 751 (1997). [reproduced in accompanying notebook at Tab 39]

with the transfer of custody from the US to Iraq, it may be overruling a political decision made by the executive branch.

Courts around the world have also defended the doctrine of non-inquiry on practical grounds. They have claimed that it is not feasible for a court of one country to investigate the alleged human rights abuses of another country, nor is it practicable for courts to evaluate the protections inherent in the judicial procedures of other countries. Courts may not have the time or resources for such an enterprise.[92]

The doctrine of non inquiry is not without controversy. Some legal scholars have argued that the doctrine of non inquiry ought to be discarded or adjusted in light of human rights concerns. These scholars argue that courts ought to have more flexibility to promote human rights by refusing extradition of individuals who have suffered or will suffer gross injustices or inhuman treatment abroad.[93] They also argue that the doctrine of non inquiry may be at odds with some treaty obligations, such as those adopted under the Convention Against Torture.[94] However, the courts have far from abandoned the legal doctrine.

D. The Supreme Court decision of *Hamdan v. Rumsfeld* does not bear on Ramadan's case.

[92] Michael Topiel, *The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?,* 9 CARDOZO J. INT'L & COMP. L. 389, (2001). [reproduced in accompanying notebook at Tab 37].

[93] Richard J. Wilson, *Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defenses: Toward the Enforcement of Universal Human Rights through Abrogation of the Rule of Non Inquiry in Extradition,* 3 ILSA J INT'L & COMP L 751 (1997). [reproduced in accompanying notebook at Tab 39]

[94] Ved P. Nanda, *Essay: Bases for Refusing International Extradition Requests- Capital Punishment and Torture*, 23 FORDHAM INT'L L.J. 1369 (2000). [reproduced in accompanying notebook at Tab 35]

Hamdan v. Rumsfeld[95] does involve a foreign citizen plaintiff who was in US custody, but the facts of the two cases are otherwise quite divergent. Hamdan was captured by bounty hunters, at the US's behest, and he was then held in the Guantanamo Bay Naval Base.[96] Ramadan, by contrast, was only placed in US custody under a memorandum of understanding with Iraq, and at Iraq's request.[97] Hamdan was charged with a crime but not yet convicted[98], while Ramadan has been convicted, sentenced, and resentenced. Hamdan's case was before a military tribunal wholly controlled by the United States, while Ramadan's case came before an Iraqi court, the Iraqi High Tribunal. The difference in venue is highly important, as the *Hirota* test only applies to those convicted by foreign courts.[99]

Hamdan holds that the military commissions used at Guantanamo Bay were not adequate tribunals and violated the laws of war because they did not meet the Geneva Conventions or the UCMJ standards.[100] It also holds that the President does not have authority to set up such tribunals, and that the courts do have authority to review the validity of these tribunals.[101] The latter holding is the only true jurisdictional issue in *Hamdan.*

---

[95] *Hamdan v. Rumsfeld, supra.* [reproduced in accompanying notebook at Tab 7]

[96] *Id.*

[97] This is according to the assumptions of the Issues submitted by the IHT for this memorandum, reprinted in full at the beginning of this document.

[98] *Hamdan v. Rumsfeld, supra*. [reproduced in accompanying notebook at Tab 7]

[99] *Flick v. Johnson, supra.* [reproduced in accompanying notebook at Tab 5]

[100] *Hamdan v. Rumsfeld, supra.* [reproduced in accompanying notebook at Tab 7]

[101] *Id.*

Ramadan was not tried by a US military commission, so he could not use the same basis for jurisdiction as could Hamdan. Even if Ramadan has been in the custody of the US, he had a foreign trial. *Hamdan* appears to have no bearing on Ramadan's case, because nothing in *Hamdan* would grant jurisdiction to someone convicted in a court that is part of another country's legal system. Indeed, *Hamdan* was not mentioned in the court's rejection of Ramadan's petition for writ of habeas corpus.[102]

IV. CONCLUSION

All defendants of the IHT who file writs of habeas in the US *after conviction* are likely to be denied, even if the convicted defendant is in US custody, or even if the convicted person is a US citizen, as long as the *Hirota* precedent is not overturned or narrowed by the US Supreme Court.

While some elements of the Hirota test have waned in importance, two factors, when in conjunction, remain absolutely dispositive for habeas claim preclusion under US law; if a defendant has received a conviction, and if that conviction comes from any court other than one under total US control, the defendant's habeas petition will be refused.

It is possible that the US Courts will change course and overturn or narrow *Hirota* and its successors. Indeed, many human rights advocates argue for such change. And while *Hamdan* may not be directly relevant to convicted IHT defendants, it may still stand as an example that US courts are adjusting their jurisdiction.

However, in light of the many recent cases that refuse habeas to those convicted by the IHT or other foreign courts, and considering the unambiguous support for *Hirota* and

[102] *Ramadan v. Bush, supra.* [reproduced in accompanying notebook at Tab 18]

its successors that these cases describe, any major change in US policy toward petitioners filed in foreign courts seems unlikely in the near future.