COOLEY GODWARD LLP
WILLIAM E. GRAUER (84806)
KOJI F. FUKUMURA (189719)
MAZDA K. ANTIA (214963)
4401 Eastgate Mall
San Diego, CA 92121
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

WILLIAMS & CONNOLLY LLP
F. WHITTEN PETERS (*pro hac vice*)
ARI S. ZYMELMAN (*pro hac vice*)
F. GREG BOWMAN (*pro hac vice*)
FRANCIS Q. HOANG (*pro hac vice*)
725 12th Street NW
Washington, DC 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

Attorneys for Defendant TITAN CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SALEH, an individual; SAMI ABBAS AL RAWI, an individual; MWAFAQ SAMI ABBAS AL RAWI, an individual; AHMED, an individual; ISMAEL, an individual; NEISEF, an individual; ESTATE OF IBRAHIEM, the heirs and estate of an individual; RASHEED, an individual; JOHN DOE NO. 1; JANE DOE NO. 2; A CLASS OF PERSONS SIMILARLY SITUATED, KNOWN HEREINAFTER AS JOHN and JANE DOES NOS. 3-1050,

Plaintiffs.

v.

TITAN CORPORATION, a Delaware Corporation; ADEL NAHKLA, a Titan employee located in Abu Ghraib, Iraq; CACI INTERNATIONAL INC., a Delaware Corporation; CACI INCORPORATED-FEDERAL, a Delaware Corporation; CACI N.V., a Netherlands corporation; STEPHEN A. STEFANOWICZ, a CACI employee located in Abu Ghraib, Iraq; and JOHN B. ISRAEL, a Titan subcontractor located in Abu Ghraib, Iraq,

Defendants.

Case No. 04-CV-1143 R (NLS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TITAN'S MOTION TO DISMISS

Date: February 7, 2005
Time: 2:00 P.M.
Courtroom: 5
Judge: Hon. John S. Rhoades

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Plaintiffs—ten Iraqis detained in U.S. military detention facilities located in Iraq for varying lengths of time while the U.S. military was occupying Iraq—seek to recover against individual civilians and their corporate employers for alleged mistreatment during plaintiffs' confinement and interrogation by the military in this time of war.[1] No plaintiff states a claim against any specific employee of The Titan Corporation ("Titan"), and plaintiffs stated forthrightly in their opening press conference that they had no specific evidence linking Titan to the mistreatment alleged. While some of the alleged mistreatment would be shocking if true, the law is nonetheless clear that these plaintiffs have no claim against Titan. For a host of policy reasons, none of which have to do with the truth of plaintiffs' allegations, the controlling precedent holds that plaintiffs cannot sue Titan for the treatment they received in Abu Ghraib or other military facilities in Iraq and that their complaint must be dismissed.

Titan provided linguists (including defendants Nakhla and Israel) to the U.S. military to translate during the interrogation of detainees, while defendant CACI provided interrogators (including defendant Stefanowicz).[2] Plaintiffs ask this Court to review the conduct of these interrogations and the conditions (and duration) of plaintiffs' confinement, and award them damages on a variety of tort theories under state and federal common law, as well as various federal statutory schemes. The defendants are liable to the plaintiffs, according to plaintiffs, because the individual defendants (and "upon information and belief" other unnamed civilians that plaintiffs believe were employed by the corporate defendants), committed a variety of torts against them (alleged to include assault, battery, murder, and torture). These acts were undertaken, according to plaintiffs, at the behest of, and in conspiracy with, the United States

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[1] For the purposes of this motion only, Titan accepts all of the factual allegations of the Second Amended Complaint ("SAC") and plaintiffs' RICO Case Statement ("RCS"). *See Karam v. City of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003); L. Civ. R. 11.1(a). In addition, Titan relies upon and has attached as exhibits to this motion documents mentioned in, but not attached to, the SAC. Reference to such documents does not convert this motion into a motion for summary judgment. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

[2] Plaintiffs have sued CACI Incorporated and two of its subsidiaries: CACI Incorporated – Federal and CACI N.V. We use "CACI" to refer to them collectively.

military (the so-called "Torture Conspiracy") to secure more information from the plaintiffs for use in the United States' war in Iraq.

Titan rejects the allegations that its employees abused (or participated in abuse of) plaintiffs or anyone else, that it was engaged in any conspiracy with CACI or the government, that its conduct in providing linguists to the U.S. military was in any way wrongful, or that it is liable to plaintiffs for actions taken by others in Iraq. Even with the liberal use of "upon information and belief" allegations, the Second Amended Complaint hardly supports plaintiffs' claims against Titan. Although it asserts 24 claims for relief against Titan, and indiscriminately lumps Titan's employees as part of its accusations of torture and abuse by unidentified perpetrators, the SAC is notably thin on alleging what Titan and its identified employees specifically did to these plaintiffs. Defendants Israel and Nakhla (the only individuals alleged to have a connection with Titan, in the case of Israel as a subcontractor) are the only identified Titan employees, but they are not identified as having participated in any of the alleged acts. Only two allegations are made against unidentified Titan employees, and none of the named plaintiffs are alleged to have been the victim of these two acts. Beyond these two specific allegations, the SAC relies on vague and conclusory "upon information and belief" allegations, as opposed to allegations that specify the "how, where, what, and who" of plaintiffs' tort claims, which is the difference between factual allegations entitled to deference and unsupported accusations. At this stage of the litigation, factual allegations of the SAC must be accepted to determine whether plaintiffs can proceed with this lawsuit. But even with the benefit this procedural posture confers on them, plaintiffs have no claim against Titan.

The fundamental premise of this action is that federal law allows alien plaintiffs to bring a civil damages suit against military contractors for injuries suffered at a United States military detention facility in a war zone. This premise is fatally flawed and dooms plaintiffs' claims. The injuries defendants claim to have suffered are a result of actions by the military in support of combat operations in a foreign war zone. As plaintiffs freely admit, these acts were taken under the military's control, with the participation of the military, to achieve military goals. Nonetheless, perhaps recognizing that such claims could not be brought against the United States

Government, or its employees, plaintiffs have not sued them. Instead, plaintiffs have attempted to file the same claims against Titan.

That these claims could not be brought against the government, however, means that they can not be brought against Titan. Although plaintiffs seek an unprecedented expansion of this Court's reach by asking it to evaluate and supervise the military's conduct of interrogations of its detainees in a war zone, the bar to Titan's liability for its participation as a contractor in such military activities is well established in the precedent. Both the Supreme Court and this Circuit have made clear that plaintiffs cannot state claims against military contractors such as Titan, or their employees, for conduct (such as providing linguists to support combat operations) that does not give rise to a claim against the government. Titan can no more be held liable to plaintiffs than can the government. This general principle is venerable and fixed in the federal common law, and has been applied to bar exactly these sorts of claims by binding precedent in this Circuit. At times it has been referred to as the military contractor defense or immunity; however denominated, this principle squarely applies to plaintiffs' claims against Titan. Not surprisingly, this Circuit and the Supreme Court have also rejected the proposition that such claims can be pursued under state common law.

Nor can plaintiffs assign liability to Titan for these claims under the Alien Tort Statute ("ATS" or "ATCA"), 28 U.S.C. § 1350. Although the ATS is a federal statute, it does not give rise to a statutory cause of action. In its first ever decision on the scope and reach of the ATS, the Supreme Court explained at the end of last Term that the ATS is a grant of jurisdiction to consider a limited number of federal common law claims based on violations of international law norms. As such, plaintiffs' ATS claims fail for the same reasons that their other common law claims fail, and for additional reasons that the Supreme Court indicated should restrain the judicial creation of new causes of action under the ATS.

Beyond this general and fundamental principle, plaintiffs' tort claims suffer from a number of other infirmities, each of which requires dismissal. Aliens injured abroad have no claims under the Constitution. The Supreme Court has also made clear that claims under the Constitution can be asserted against only individuals, not corporations such as Titan. The same

analysis would also preclude claims against Titan under the ATS. And the willingness of the U.S. government to provide compensation to Iraqi nationals is the normal remedy for war reparation claims and must be exhausted.

Plaintiffs' attempts to bring their claims against Titan under various federal statutory schemes fare even worse. The Racketeer Influenced and Corrupt Organizations ("RICO") claims fail for at least three independent reasons in addition to the general principle outlined above. First, there cannot be a criminal enterprise where the U.S. government is an essential part of the enterprise, as plaintiffs have alleged here. Second, RICO does not apply to extraterritorial conduct with extraterritorial effects. Finally, these plaintiffs do not have standing under RICO because the injury proximately caused by the alleged acts in captivity did not injure them in their business or property.

Plaintiffs also make claims under the Geneva Conventions (a treaty) and several statutes and regulations that govern federal procurement. None of them creates a private right of action, and plaintiffs would not have standing to assert such rights even if they did exist.

In short, plaintiffs cannot sue Titan for their confinement and treatment in Iraq. To the extent that plaintiffs suffered injuries during their detention, their satisfaction must come from the remedies unilaterally provided by the U.S. government, what might be provided by negotiations between the governments of Iraq and the U.S., and the government's pursuit of criminal prosecutions. Plaintiffs' complaint must be dismissed.

FACTUAL BACKGROUND

On March 19, 2003, the President, acting with Congressional authorization, began military operations against Iraq. *See* David E. Sanger, *Bush Orders Start of War on Iraq*, N.Y. Times, March 20, 2003, at A1 (Ex. A); Authorization for Use of Military Force Against Iraq Act of 2002, Pub. L. No. 107-243 (Ex. B).[3] The President soon thereafter appeared on television,

[3] The Court may take judicial notice of public record facts in considering the sufficiency of the SAC. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *Koohi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992) (taking judicial notice of facts of Iran-Iraq war).

telling the American people that coalition forces were in the "early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger." Sauger (Ex. A). On March 20, 2003, coalition ground forces entered Iraq. See Ex. C, T. Michael Moseley, *U.S. Air Force, Operation Iraqi Freedom: By the Numbers* (2003) at 28.[4] The ensuing military operations involved over 460,000 ground troops, 41,000 aircraft sorties, and 750 cruise missile strikes. *Id.* at 16, 20, and 24. The Iraqi regime fell on April 9, 2003. *Id.* at 28. Coalition forces occupied Iraq afterwards, suffering over 800 deaths since May 1, 2003 (out of a total of over 1,000 for the entire operation). *See* Patrick J. McDonnel, *Sovereign Iraq Just as Deadly to U.S. Forces,* L.A. Times, Aug. 31, 2004, at A1 (Ex. D). During the occupation, insurgent forces spread throughout Iraq, launching over 4,000 attacks from May through November 2003. *See* Bryan Bender, *Guerrilla War in Iraq Spreading*, Boston Globe, Nov. 29, 2003, at A1 (Ex. E). This "surge of violence" from insurgent forces led the military to increase the number of troops in Iraq. *See* Abdul Hussein Yousef, *Tough Times in Iraq: As Insurgency Rages, U.S. Extends 20,000 GIs' Tours,* The Star-Ledger, Apr. 16, 2004, at 1 (Ex. F). Although sovereignty was returned to Iraq on June 28, 2004, the military continues to battle insurgents. *See* McDonnel, *Supra.* Much of Iraq remains hostile territory. *See id.* The United States military has suffered almost 7,000 wounded to date, including over 1,100 in the month of August alone. *See* Karl Vick, *U.S. Troops in Iraq See Highest Injury Toll Yet*, Wash. Post, Sep. 5, 2004, at A1 (Ex. G). A single snapshot provides an idea of the war in which U.S. forces are engaged:

> U.S. medical commanders say the sharp rise in battlefield injuries reflects more than three weeks of fighting by two Army and one Marine battalion in the southern city of Najaf. At the same time, U.S. units frequently faced combat in a sprawling Shiite Muslim slum in Baghdad and in the Sunni cities of Fallujah, Ramadi and Samarra, all of which remain under the control of insurgents two months after the transfer of political authority.

Id. Throughout these hostile operations in Iraq, Titan provided translators to assist the U.S. military. (RCS 11.)

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[4] Available at http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf. Site visited Sept. 9, 2004. (Ex. C.)

As part of its occupation, the U.S. military, under the Coalition Provisional Authority, established several facilities to house and interrogate detainees who had "potential intelligence value," including suspected insurgents and terrorists. *See* Ex. H, JIDC Briefing Slides at 56.[5] During its occupation of Iraq, the U.S. military established at least seven detainee facilities where interrogations were conducted. *See id.* at 45. The largest of these was at Abu Ghraib, the scene of most of plaintiffs' allegations, although smaller facilities existed near Baghdad, Bucca, and Tikrit. See *id.* Titan provided linguists at each facility pursuant to its government contracts. Abu Ghraib was the scene of constant combat:

> Abu Ghraib lies on the road to Fallujah, one of the most volatile spots in Iraq. Abu Ghraib withstood attack, including mortars, automatic-weapons fire and rocket-propelled grenades, several times a week. Mortar rounds fired into the compound on Aug. 16 [2003] killed six Iraqi prisoners and injured 49. Two rounds hit the camp on Sept. 20, killing two U.S. soldiers and injuring 14. Four days later, insurgents lobbed 12 mortar rounds into Abu Ghraib, injuring eight prisoners.

Donna Leinwand, *Chaotic Prison Always on the Brink,* USA Today, Aug. 26, 2004, at A4 (Ex. I).

A. The Parties

Titan provides "information and communications products, solutions, and services for National Security." (SAC Ex. A.) It is a publicly-traded company headquartered in San Diego, California. Titan has supplied linguists to the military since 1999 under a Department of Defense contract. *See* Statement of Work ("SOW") (Ex. J);[6] Titan Annual Report 2002, (Ex. K) at 129.[7]

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[5] The JIDC Briefing Slides are Annex 40 to the Taguba Report, which the plaintiffs attached to the SAC as Exhibit H. In addition, plaintiffs have attached an excerpt from the slides as Exhibit A to the RCS.

[6] Plaintiffs have referred to Titan's contracts with the government (SAC ¶ 51), thereby making the full contracts available for review by the Court in considering the adequacy of plaintiffs' allegations. *See, e.g., Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir. 2002) (Under the "incorporation by reference" rule of this Circuit, a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment."); *Barron v. Reich,* 13 F.3d 1370, 1377 (9th Cir. 1994). The SOW is a portion of the contract that sets forth the performance conditions.

[7] Available at http://www.titan.com/investor/annual-reports/titan-ar-2002.pdf. Site visited Sep. 10, 2004 (Ex. K).

CACI is a publicly-traded corporation headquartered in Arlington, Virginia. (SAC ¶ 88.) In Iraq, CACI provided interrogators in support of military operations under a contract with the Department of the Interior. (SAC ¶¶ 64, 88.) CACI and Titan once worked together to provide computer and related services to American military installations in Europe (the "Assistance and Advisory Services contract"). (SAC ¶ 54; SAC Ex. A.)

Plaintiffs allege that Steven Stefanowicz is an interrogator employed by CACI who resides in Pennsylvania. (SAC ¶ 23.) Adel Nakhla is alleged to be a Titan linguist. (SAC ¶ 18.) Plaintiffs do not allege where he resides. John Israel is alleged to be employed by a subcontractor to Titan. (SAC ¶ 24.) Plaintiffs also do not allege where he resides.

The plaintiffs are ten individuals alleged to have been detained by the U.S. military during its operations in Iraq after March 20, 2003. (SAC ¶¶ 2-11.) No plaintiff is alleged to be a U.S. citizen and all but one currently resides in Iraq. *See id.* The plaintiffs allege that they were detained by the U.S. military in various detention facilities in Iraq for periods ranging from five days to twelve months. *See id.* They also claim property losses ranging from $1,000 in gold and jewelry to destruction of a home. (SAC ¶¶ 101-153.)

B. The Claims

This action arises out of alleged mistreatment of detainees by soldiers and contractors in Iraq during the period August 2003 to January 2004. Titan (along with CACI and the individual defendants) allegedly "conspired with certain United States officials" to summarily execute and torture detainees. (SAC ¶ 25.) Plaintiffs allege that Titan did so to "artificially" inflate the demand for interpretation and translation services. *Id.* Furthermore, plaintiffs claim that Titan sought to "profit and gain a competitive advantage" from "additional government contracts." *Id.* According to plaintiffs, as a co-conspirator, Titan received "millions of dollars over and above" what it would have otherwise have received. (RCS at 15.)

Between August 2003 and January 2004, plaintiffs allege that they were held by the military at Abu Ghraib and other U.S. Army prisons in Iraq and mistreated. (SAC ¶¶ 2-11.) Plaintiffs allege two acts by a translator or Titan employee, *see* RCS at 10; SAC ¶ 98. First, Plaintiffs allege that "an unknown employee of Defendant Titan working in Iraq admitted to

stripping, handcuffing, and forcibly restraining" an unnamed detainee. (SAC ¶ 98.) Second, plaintiffs allege that a translator raped a teenage Iraqi boy. (RCS at 10.) Neither alleged incident involved a named individual plaintiff. More tellingly, neither allegation alleges that a named defendant was the perpetrator.

Notwithstanding the paucity of specifics, Titan's employees are alleged to have abused detainees as part of the "Torture Conspiracy." Plaintiffs vaguely allege that Titan senior management had "relationships" that "assisted" in the formulation and implementation of this "Torture Conspiracy." (SAC ¶ 83.) Plaintiffs do not even attempt to allege facts in support of these conclusory allegations. Plaintiffs allege that the "Torture Conspiracy," operating through "Tiger Teams" organized and controlled by the military, "tortured, killed, sexually assaulted, or robbed" detainees on at least 94 instances. The named plaintiffs allege similar treatment at the hands of the "Torture Conspirators" at Abu Ghraib and other locations, though none claim to know that this abuse took place at the hands of Titan employees. To the extent that Titan's employees actually acted, plaintiffs allege that they did so to further the goals of the U.S. military to "intimidate and coerce detainees into providing 'intelligence.'" (RCS at 12.)

C. The Military Controlled Titan's Involvement in Its Iraqi Operations

At all times during the actions giving rise to this complaint, Titan and its employees acted on behalf of the military, in the service of the United States. *See* Ex. H, JIDC Briefing Slides at 59; SOW §§ C-1.2, 1.3. Titan worked "hand-in-hand" with the military to provide translation services that were integral to military operations, including the "operat[ion of] an intensive interrogation, debriefing, and intelligence gathering program designed to screen and identify detainees who had valuable 'intelligence.'" (RCS at 11, 17-18.)

The military's control over Titan's employees started before they were hired, and became total once they arrived in Iraq. As set forth below in greater detail, Titan linguists worked under the day-to-day supervision of the U.S. military. *See* SOW § C-1.3.1, C-1.8.4.[8] The

[8] "Contractor personnel must adhere to the standards of conduct established by the operational or unit commander."

government exercised complete control over Titan linguist work assignments and deployments. (RCS at 11); SOW § C-1.2.[9]

To recruit qualified linguists, Titan posted job listings on its web site and in newspapers and other print media. (SAC ¶ 53.) These postings sought individuals to provide "operational contract linguist support to U.S. Army operations." (SAC Ex. B.) The government was closely involved in linguist recruitment: it dictated detailed linguist qualifications to Titan, *see* SOW §§ C-1.4.1.2, C-1.3.3 (Ex. J), and conducted an investigation and security screening of linguists before hiring. *See id.* at § C-1.6.1. The government had authority to veto Titan's decision to hire a linguist. *See id.* at § C-1.4.1.2. The government also had authority to remove a linguist. *See id.* at § C-1.5. Once hired, the government provided required training and briefings to the linguists. *See id.* at § C-3.3.5.

Once in Iraq, the military's control over what the linguists did became total. Titan linguists provided translation support for every type of military operation in Iraq, including interrogations. *See* SOW § C-1.2 ("Contract linguists...may be required to perform translation/interpreter services anywhere U.S. Forces/Agencies are deployed or employed."); SAC ¶¶ 38, 87. Linguists were assigned to specific military units that they supported. They lived and traveled with these units. *See* SOW § C.1.2. Titan linguists were wholly dependent on the military for necessary food, shelter, transportation, equipment, and medical care. *See id.* at § C-3.3. As a document included in the complaint succinctly summarized: "Linguists are under the operational control of U.S. Central Command." (SAC Ex. E.[10]) Titan's role was primarily to

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[9] "[Linguists] may be required to perform translator/interpreter services anywhere US Forces/Agencies are deployed or employed to support [military Persian Gulf operations]. The [military authority] shall determine work locations on a case-by-case basis in coordination with the [government's contracting officer], and shall inform the Contractor of locations as requirements are added to this effort."

[10] *See also* SOW § C-1.8.4 ("Contractor personnel must adhere to the standards of conduct established by the operational or unit commander."). Note that Exhibit E to the SAC is a document that actually applies to Operation Enduring Freedom in Afghanistan.

provide administrative support for the linguists working at the direction of the military, e.g., personnel issues such as pay, accountability, and schedules. *See* SAC ¶ 59; Ex. E.[11]

Plaintiffs identify 35 government officials, beginning with the Secretary of Defense, who "adopted and/or implemented policies and practices" that defined military operations in Iraq, and nearly 100 military personnel who they believe might have been involved in the daily supervision and deployment of Titan linguists. (RCS ¶ 3.) The Secretary of Defense developed regulations and standards of conduct concerning military operations in Iraq. (SAC ¶ 60.) U.S. Central Command, which oversaw military operations in Iraq, developed additional regulations concerning the conduct of interrogations. (SAC ¶ 72.) Combined Joint Task Force-7, in charge of all military prisons in Iraq, developed specific Interrogation Rules of Engagement ("IROE"), which were approved by Central Command. *See* Ex. H, JIDC Briefing Slides at 70-73. The IROE was "approved for use on civilian detainees/security detainees." The U.S. military developed pre-approved interrogation approaches, along with approaches which required approval of the Commanding General. *Id.* Among the approaches approved and used by the U.S. military were stress positions, sleep adjustment, and the presence of military working dogs. *Id.* It is conduct pursuant to this direction, and the direction received from every level of the military, that plaintiffs contend create a cause of action against Titan.

At Abu Ghraib, the military established the Joint Intelligence Debriefing Center ("JIDC") in order to "gather and report timely and actionable intelligence" from "individuals who are believed to be of intelligence value or are a threat to Coalition Forces." *See* Ex. H, JIDC Briefing Slides at 56. The JIDC, which is alleged to be responsible for many of the abuses at Abu Ghraib (RCS at 18), was completely controlled by the military. Its director, headquarters staff, operations staff, and interrogation supervisors were all members of the military. (SAC Ex. H at 34; RCS Ex. A.) The JIDC was directed by an Army Lieutenant Colonel. (SAC Ex. H, at 34.) The JIDC Director oversaw a staff of over a dozen military officers and soldiers. (RCS Ex. A.)

[11] "We are supporting the U.S. Government, but they do not exercise administrative control over the group." *See also* SOW § C-4.1.

An Army Sergeant First Class had responsibility for all interrogations. *Id.* Under this individual were four Army Staff Sergeants who each supervised up to six interrogation teams. *Id.* Each interrogation team at JIDC (also called a "Tiger Team") included an interrogator who was in charge and an analyst. *Id.*

During interrogations, a Titan linguist translated for the interrogator in charge. *Id.* The JIDC organizational chart shows 20 linguists assigned to the JIDC, but no Titan managers. *Id.* Army doctrine required military interrogators to exercise total control over what Titan linguists said and did during an interrogation. See *Army Field Manual* 34-5 (Ex. L).[12] Acting under the actual interrogators, Titan's linguists exercised no independent authority; they were the very bottom of the interrogation totem pole, instructed to be nothing more than a reflection of the interrogator:

> [S]tatements made by the interpreter and the source should be interpreted in the first person, using the same content, tone of voice, inflection, and intent. The interpreter must not inject any of his own personality, ideas, or questions into the interrogation.

Id. at 146-47.; *see also* Ex. H, JDIC Briefing Slides.

ARGUMENT

Plaintiffs allege 24 counts each of which asserts a different claim.[13] For all their numerousness, however, plaintiffs' claims can be easily divided into two broad categories: those that seek relief under common law theories of tort liability and those that seek to come within particular statutory schemes, e.g., RICO. These claims fail for a variety of reasons. In the case of the tort theories, plaintiffs cannot escape that they are asking this Court to assign liability to Titan for actions pursuant to a contract with the government in support of military operations during a time of war. Such actions do not give rise to private liability, especially not to these plaintiffs to whom Titan owed no duty of care. As to the statutory claims, the Court need not assess the

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[12] Available at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/chapter3.htm. Site visited on Sep. 9, 2004. (Ex. L.)

[13] The Counts are numbered I–XXIII and XXV (omitting Count XIV). Count XXVI is a request for injunctive and declaratory relief.

availability of the defenses, because plaintiffs do not come within the statutory schemes of the statutes that they seek to invoke. All of plaintiffs' claims against Titan must be dismissed.[14]

I. PLAINTIFFS' COUNTS III–XIII & XV–XXII, SOUNDING IN TORT, FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs assert that the SAC states claims against Titan under various theories sounding in tort: under state common law (Counts XV–XXII), under the U.S. Constitution (Counts X–XIV), and under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (Counts III–IX). However these theories are denominated, they are determined by federal common law under which they do not state a claim against Titan. Where plaintiffs invite courts to examine their claims against civilian contractors for actions the contractors have taken in support of combat operations, federal common law preempts state law and provides an absolute defense. Plaintiffs' direct claims under federal common law are of course subject to the same defense. In addition, plaintiffs have no claims under the U.S. Constitution as aliens. Even if they did, corporations are not subject to such suits. The analysis under the ATS is the same. Moreover, most of plaintiffs' ATS claims are deficient for other reasons.

A. Plaintiffs' State Law Tort Claims Are Preempted by the Federal Common Law Defense for Military Contractors Supporting Combat Operations

Plaintiffs have invoked California state law in framing their common law tort claims (SAC ¶ 66(d)), but these claims are both preempted by and not recognized by federal common law. Specifically, the Ninth Circuit has held that contractors who provide support to the military in a time of war owe no duty of care to enemy civilians injured as a result of military operations because federal law provides a defense to plaintiffs' state tort claims, as if those claims were being asserted directly against the military. *Koohi v. United States*, 976 F.2d 1328, 1335-37 (9th Cir. 1992). Federal common law looks to the most analogous statute to evaluate such claims,

[14] Defendant Titan moves to dismiss the SAC under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 19(b). Some of the bases on which the SAC should be dismissed have been variously treated under Rules 12(b)(1) and 12(b)(6). Since we accept as true the SAC's well-pleaded factual allegations for the purposes of this motion, the standard of review here is equivalent under either rule. In addition, Titan adopts and joins in CACI's Memorandum of Points and Authorities insofar as it argues that these claims are nonjusticiable and that the allegations are insufficient to state a claim upon which relief can be granted.

in this case, the Federal Tort Claims Act ("FTCA"). The FTCA unambiguously bars claims where they arise out of combatant activities, as do plaintiffs'. It also would bar their claims under other provisions. Accordingly, Titan cannot be liable for the actions of others taken at the direction of the military. To the extent that the SAC is read to allege that the individual defendants were not acting at the direction of the military, they would be acting outside the scope of their employment for which Titan is also not liable.

1. There Is No Claim Against Titan as a Military Contractor Acting in Support of Combat Operations

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court held that a tort suit brought against a contractor by the survivors of a soldier killed in a military helicopter crash in the course of training must be dismissed. The suit sought recovery against the helicopter's manufacturer for the allegedly defective design of the emergency escape system. The Court explained that "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by...'federal common law.'" *Boyle*, 487 U.S. at 504, (citation omitted). Looking to the statutory scheme of the FTCA to set the contours of federal common law, *Boyle* held that state law claims against military contractors acting pursuant to contract with the government, and under the detailed direction and supervision of federal authorities, are pre-empted and do not state a claim. As the Court had earlier set out, "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley v. Ross*, 309 U.S. 18, 20-21 (1940).

Boyle articulated multiple federal interests in civil suits against military contractors that required preemption and dismissal of that suit, settling on the exemption for actions committed to the discretionary function of the government. 487 U.S. at 506-07. All those interests are found here, but one clearly controls. The FTCA bars "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during a time of war." 28 U.S.C. §2680(j). The Ninth Circuit has held that this exception creates a military contractor

defense for actions in support of combatant activities that applies under all circumstances, whether the challenged actions were taken "carefully or negligently, properly or improperly." *Koohi*, 976 F.2d at 1335 (dismissing tort claims against military contractor for war-related deaths of civilians when the military fired missiles upon an Iranian civilian airliner). As explained by *Koohi*, federal interests that arise during a time of war conflict with at least three principles underlying tort law: deterrence, punishment, and providing a remedy to innocent victims. It dismissed claims against the government's contractor on the basis that, "[t]he imposition of such liability on the [contractors] would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* at 1337. Put more succinctly, "during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Id.*

In applying *Koohi* to dismiss claims against another military contractor for actions that took place in a time of war, a district court in this Circuit expounded on the rationale for the absolute immunity of military contractors for their actions in a war zone. *See Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (dismissing tort claims against the military contractor who manufactured missiles when American servicemen were killed by friendly fire in the first Persian Gulf War). *Bentzlin* explained that, "[t]he United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution." *Id.* at 1493. The Court can take judicial notice that exactly this course is being followed with regard to plaintiffs' allegations here: the government has already taken affirmative steps to correct the policies and punish those responsible for plaintiffs' claims. *See* Mark Mazzetti, *Reforms in Place at Abu Ghraib,* L.A. Times, Sep. 4, 2004 (Ex. M); Thomas Ricks, *Four SEALs Are Charged with Abuse of Prisoners,* Wash. Post, Sep. 4, 2004, at A4 (Ex. N); Renae Merle, *6 Employees From CACI International, Titan Referred for Prosecution,* Wash. Post, Aug. 26, 2004, at A18 (Ex. O).

Titan's activities fall squarely in the very core of the military contractor defense. The conduct at issue here clearly involved "combat activities" during a "time of war." *See Koohi*, 976 F.2d at 1334 ("We simply note that... that from a practical standpoint 'time of war' has come

to mean periods of significant armed conflict rather than times governed by formal declarations of war."); *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) ("combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities."). The crux of plaintiffs' allegations is that the improper conduct, whether it was torture, unlawful detainment, or theft was taken as part of a "scheme" to extract intelligence in support of U.S. military combat operations. Even Titan's alleged pecuniary interest was in pleasing its customer, the U.S. military, by giving it what was demanded in support of the military's interrogations in Iraq. As such, whatever Titan's employees did, they did under the supervision and direction of the U.S military in support of combat operations—even if one accepts plaintiffs' allegations that the supervision was deficient or the actions improper.

It would be inconsistent with principles of federal supremacy and the federal interest in authorizing and waging war to apply state tort law—or indeed any tort liability—to contractors who operate in a time of war under the direction and authority of the military.[15] Whatever failures of leadership or supervision might have occurred, once Titan's linguists were assigned to military units, they became part of those military units for the purpose of completing military operations and for the purposes of the FTCA. Plaintiffs have called for a judgment on the validity of those military operations, and the role that Titan personnel played in them. As the Ninth Circuit noted in *Koohi* there are no civil claims for such actions:

> War produces innumerable innocent victims of harmful conduct—on all sides. It would make little sense to single out for special compensation a few of these persons—usually enemy citizens—on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.

Koohi, 976 F.2d at 1335.[16]

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[15] These same federal interests, and in particular the delegation of sole authority to the Executive Branch to wage war and conduct foreign policy, would also require the court to dismiss plaintiffs' claims for raising a political question. *See generally* CACI's Memorandum of Points & Authorities in support of its Motion to Dismiss § II (B).

[16] Two other exceptions to the FTCA would also warrant dismissal of these claims if they were not so clearly barred by the "combat" exception. Under 28 U.S.C. § 2680(a) and § 2680(k), the FTCA bars claims when they are based upon discretionary acts, "whether or not the discretion involved be abused," as well as claims that arise "in a foreign country." *See Boyle,* 487 U.S. at

2. Titan Is Not Vicariously Liable for the Alleged Torts

Plaintiffs seek damages from Titan for the alleged intentional torts of unnamed individuals in Iraq. Even if the alleged conduct under these facts did not fall squarely within the military combat contractor defense, plaintiffs make no allegations that Titan management participated directly in these acts, or formulated or developed policy that allegedly encouraged or allowed abuses. Plaintiffs' vague allegation that Titan senior management had "relationships" with government officials that assisted in the formulation of policy (SAC ¶ 83), is simply insufficient to establish corporate liability for intentional torts committed by third parties.

In an attempt to make Titan liable for torts supposedly committed by military officials or the employees of other corporations, plaintiffs allege that all named defendants are joint venturers. (SAC ¶ 26.) Joint ventures require, *inter alia*, joint control over the venture. *Sutton v. Earles*, 26 F.3d 903, 913 (9th Cir. 1994). Plaintiffs must plead that Titan had the right to joint control over the venture, an equal voice with the military officials running operation. *DeSuza v. Andersack*, 63 Cal. App. 3d 694, 700 (Cal. Ct. App. 1976).[17] Plaintiffs' allegations establish the opposite: that military officials had exclusive operational control at all relevant times, foreclosing the possibility of joint venture liability on the part of Titan.

Accordingly, although not specifically alleged in the complaint, the only theory under which Titan can be held vicariously liable for the actions of its individual employees is *respondeat superior*. That theory is unavailable, however, because even if Titan's unnamed

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511 ("the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision."); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004) ("the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

[17] Under California law the joint venture doctrine also requires "an agreement between the parties under which they have a...joint interest, in a common business undertaking, [and] an understanding as to the sharing of profits and losses," *DeSuza v. Andersack*, 63 Cal. App. 3d 694, 700 (Cal. Ct. App. 1976) (quoting *Connor v. Great Western Sav. & Loan Ass'n.* 69 Cal. 2d 850, 863 (Cal. 1968)).

employees and defendants Israel and Nakhla are servants of Titan,[18] their alleged actions (and in the case of Nakhla and Israel, there are none) are not within the scope of employment. Employers are liable for intentional torts of their employees only when the tortious acts fall within the scope of employment. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 756 (1998).[19] The mere fact that the employment situation provided the opportunity for tortious activity does not make the employer liable. *See Bozarth v. Harper Creek Bd. of Educ.*, 94 Mich. App. 351, 355 (1979). The scope of employment of Titan translators was limited to providing translation services at the direction of the military, and the tortious acts alleged cannot reasonably be said to be in furtherance of that end.

B. Plaintiffs Have No Claims Under the U.S. Constitution

Plaintiffs seek damages from Titan for alleged violations of rights under color of federal law they contend are guaranteed them under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. *See* SAC Counts XI-XIII (the "Constitutional Claims"). Count XI alleges that in "conspiring with certain public officials, including certain military officials," defendants "imprisoned Plaintiffs" and "inflicted cruel and unusual punishment upon them" in violation of the Eighth Amendment to the U.S. Constitution. (SAC ¶¶ 255, 257.) Count XII alleges that in "conspiring with certain public officials, including certain military officials,"

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[18] As a threshold matter, the SAC does not establish the requisite servant-master relationship for the individual defendants. Plaintiffs allege that John Israel and Adel Nakhla are agents of Titan, but provide no facts or reasoning for this conclusory allegation. The court need not accept as true allegations that are "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988. (9th Cir. 2001). The extent of the employer's right to control the employee in the performance of his tasks is a determinative factor in deciding the existence of the requisite relationship. *Moorehead v. District of Columbia*, 747 A.2d 138, 143 (D.C. 2000). Here, only the U.S. military had the right to control defendants Israel and Nakhla in the performance of their assigned tasks.

[19] The standard for scope of employment under California law is whether "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Mary M. v. City of Los Angeles*, 54 Cal. 3d. 202, 214 (Cal. 1991). The Supreme Court of California considers three policy objectives relevant to making the scope of employment determination: 1) preventing recurrence, 2) ensuring victims of public employees are compensated, 3) spreading loss among beneficiaries of an enterprise. *See id.* at 214-18. Clearly none of these policy objectives will be furthered by holding Titan liable.

defendants "deprived Plaintiffs of life and liberty without due process of law" in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. (SAC ¶¶ 261, 263.) Count XIII alleges that in "conspiring with certain public officials, including certain military officials," defendants "violated the right to be free from unlawful seizures" in violation of the Fourth Amendment to the U.S. Constitution. (SAC ¶¶ 267, 269.)

The Constitutional Claims must be dismissed because aliens injured outside the United States cannot assert them. Even if plaintiffs had standing, their Constitutional Claims would fail: claims for damages do not lie for Constitutional violations by corporations and special factors are present here that preclude these claims against any defendant.

1. The U.S. Constitution Does Not Address the Treatment of Aliens Outside the United States

The Constitutional provisions under which plaintiffs seek redress do not govern the treatment of aliens outside the United States. The Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), clearly established that the Fifth Amendment in particular (and Constitutional provisions in general) do not extend to aliens outside the United States. The Court's categorical holding was animated in large measure by a prescient scenario:

> If the Fifth Amendment confers its rights on all the world [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and "werewolves" could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against "unreasonable" searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.

Id. at 784 (footnotes omitted).

The force of this holding of *Eisentrager* is not affected by *Rasul v. Bush*, 124 S. Ct. 2686 (2004), or *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *amended* 374 F.3d 727 (9th Cir. 2004). The *Rasul* Court held that jurisdiction over aliens' habeas petitions was mandated, not by the Constitution, but by a broader reading of the habeas statute. *See Rasul*, 124 S. Ct. at 2695. The *Rasul* Court's holding that the habeas statute—unaided by the Fifth Amendment—reached aliens abroad did not revisit or undermine *Eisentrager*'s constitutional dimensions. *See Rasul*, 124 S. Ct. at 2695. Although plaintiffs may, under *Rasul*, seek review of their detention

under 28 U.S.C. § 2241, *Rasul* fails to confer that which aliens have never enjoyed abroad—the protection of the Fifth Amendment Due Process Clause for injuries arising outside the United States.

The Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), expressly extended *Eisentrager*'s rejection of the extraterritorial application of the Fifth Amendment to an alien's contention that the Fourth Amendment applied extraterritorially. In addition to categorically precluding extraterritorial application of the Fourth Amendment, the Court reaffirmed *Eisentrager*'s principle holding: "our rejection of extraterritorial application of the Fifth Amendment [in *Eisentrager*] was emphatic." 494 U.S. at 269. As in *Eisentrager*, the potential adverse consequences to foreign operations from extending the Fourth Amendment to aliens abroad strongly influenced the Court's decision in *Verdugo-Urquidez*:

> Not only are history and case law against respondent, but as pointed out in *Johnson v. Eisentrager*, the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." The United States frequently employs armed forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. *Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.*

Verdugo-Urquidez, 494 U.S. at 273-74 (emphasis added; internal citations omitted). The Court was so concerned that such suits might disrupt military operations that even the case-by-case adjudication of "special factors," which would independently bar suit most suits in the military context, was considered too intrusive. The Court determined that only a categorical rule was consistent with the Executive's foreign affairs and military responsibilities:

> Perhaps a *Bivens* action might be unavailable in some or all of these situations due to "'special factors counseling hesitation,'" but the Government would still be faced with case-by-case adjudications concerning the availability of such an action. And even were *Bivens* deemed wholly inapplicable in cases of foreign activity, that would not obviate the problems attending the application of the Fourth Amendment abroad to aliens.

Id. at 274 (internal citations omitted).

Nor is there reason to believe that the Court would view claims under the Eighth Amendment differently. Indeed, as recently as three years ago, the Court reaffirmed its bedrock holdings in *Eisentrager* and *Verdugo* in stating: "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Ninth Circuit has implied as much with respect to the Eighth Amendment. *See In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1476 n.12 (9th Cir. 1994) ("While the Constitution itself does not apply to aliens whose claims arise outside the United States, we may employ [an] analogy [to the Eighth Amendment] for purposes of abatement."). Thus, none of the constitutional provisions provide causes of actions for actions committed against aliens abroad.[20]

The SAC names ten plaintiffs (including the estate of a deceased individual and two unidentified "Does"—John and Jane). Seven are alleged to be Iraqi citizens. (SAC ¶¶ 3, 5–11.) One is alleged to be a Swedish citizen residing in Sweden and the United States. (SAC ¶ 2.) The complaint fails to allege citizenship of the remaining two named Plaintiffs. (SAC ¶¶ 4, 8.) All plaintiffs allege that their injuries arose in Iraq, during the occupation of that country by a coalition of forces including the U.S. military, and that their injuries were sustained while being detained by the U.S. military or during the course of U.S. military operations. Because plaintiffs are not U.S. Citizens, and no injury is alleged to have arisen within the United States, *see* SAC ¶¶ 254-271, plaintiffs cannot avail themselves of the protection of the U.S. Constitution.

2. Corporations Are Not Liable for the Constitutional Claims

Even if Plaintiffs had pleaded U.S. citizenship or that their injuries arose here, Counts XI-XIII would not state a claim against Titan. The Supreme Court in *Correction Services*

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[20] Plaintiffs also purport to bring a claim under the Fourteenth Amendment. (SAC ¶¶ 260-265 (Count XII).) The Fourteenth Amendment, applies only to state action, not actions taken by, or under color or authority of, the federal government, as plaintiffs have exclusively alleged. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1998); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 858 (8th Cir. 1998) ("By its terms, the Fourteenth Amendment is applicable only to the states, and not to the federal government.").

Corporation v. Malesko, 534 U.S. 61 (2001), held there was no private right of action for damages against private entities, such as Titan, alleged to have engaged in constitutional deprivation under color of federal law. That recent decision by the Supreme Court is thoroughly dispositive of the Constitutional Claims asserted against Titan.

Malesko was a Fifth Amendment damages action brought by a federal prisoner against Correctional Services Corporation, a private entity, operating the institution in which plaintiff was incarcerated, under contract with the Bureau of Prisons. Plaintiff alleged that employees of Correctional Services Corporation ignored his medical condition and unconstitutionally denied him the right to use the facility elevator, causing him to suffer a heart attack. *Malesko*, 534 U.S. at 64. The Supreme Court held categorically that constitutional damages actions are unavailable against corporate entities. The rationale of *FDIC v. Meyer*, 510 U.S. 471 (1994), which barred such suits against agencies of the federal government, applied with equal force to private entities acting under color of federal law, which the Court reasoned stood on essentially the same footing as an agency of the government. *See Malesko*, 534 U.S. at 71; *see also Gantt v. Sec. USA, Inc.*, 356 F.3d 547 (4th Cir. 2004) (applying a categorical rule against corporate liability in constitutional tort actions under *Malesko*); *Root v. United States*, 67 Fed. Appx. 451 (9th Cir. 2003) (unpublished) (same); *Riggio v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 31 Fed. Appx. 505 (9th Cir. 2002) (unpublished) (same).

3. The Presence of Special Factors Independently Requires Dismissal of the Constitutional Claims

The Court's decisions in *Verdugo-Urquidez, Malesko* and *FDIC v. Meyer* not to expand the causes of action available under the Constitution recognized that "special factors" "counsel hesitation" in expanding such judicially-created (i.e., federal common law) causes of action. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971). These concerns contributed to *Malesko*'s categorical preclusion of constitutional tort claims against corporations and *Verdugo-Urquidez*'s categorical preclusion of claims under the Fourth Amendment. Two special factors applicable to this case, which support the military

contractor defense, provide an independent basis to reject plaintiffs' attempt to plead federal common law claims based on the U.S. Constitution.

First, constitutional tort actions must be dismissed where the danger of interference with military discipline is too great because the injuries are alleged to "'arise out of or are in the course of activity incident to service.'" *United States v. Stanley*, 483 U.S. 669, 684 (1987) (quoting *Feres v. United States*, 340 U.S. at 135, 146 (1950)) (allegations of unconstitutional human medical experimentation involving nonconsensual injection of LSD not cognizable due to military context even where defendants may include civilian personnel not within plaintiff's military chain of command). Second, the availability of an alternative remedial scheme—even where such remedies may be incomplete or otherwise unattractive—requires dismissal. *See Bush v. Lucas*, 462 U.S. 367 (1983); *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130-31 (9th Cir. 2003).

a. Plaintiffs' Claims Arise from Activity Incident to Service

Plaintiffs allege that Defendants conspired with the Secretary of Defense and other senior Department of Defense officials and high-ranking uniformed military officers to embark on a joint venture of torturing Iraqis captured and detained by the U.S. military in Iraq. Plaintiffs specifically point to the U.S. military's interrogation policies as the genesis of their injuries. Plaintiffs also invite this Court to pass judgment on the utility of the intelligence derived from its interrogation efforts. *See, e.g.*, SAC ¶ 81 (implying that unlawful interrogation techniques were employed to extract information of dubious intelligence value solely for the purpose of increasing revenues from interrogation services).

Adjudication of such allegations would unavoidably entangle this Court in the military's interrogation policies and techniques in the course of combating an armed insurgency in occupied territory many thousands of miles removed from this Court. Such decisions—determining interrogation methods, determination of the intelligence value of certain information and the procedures for resolving claims arising from military operations in a foreign combat zone—lie at the innermost of the Executive's core responsibility for foreign affairs:

> [W]e must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims. While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power.

See Deutsch v. Turner Corp., 324 F.3d 692, 711 (9th Cir. 2003); *see also El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1365 (Fed. Cir. 2004) ("We are of the opinion that the federal courts have no role in setting even minimal standards by which the President, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the Nation's friends and which belong to its enemies."). Judicial intervention into such military decision-making conjures the specter of entanglement about which the Supreme Court warned in *Eisentrager*: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779; *see also El-Shifa*, at 1367 ("The appellants' desire for judicial review of the President's decision to target the Plant would most surely give way to the specter of field commanders vetting before the civil court the intelligence on which they rely in selecting targets for destruction while simultaneously dealing with exigencies of waging war on the battlefield.").

A suit restraining the actions of military contractors assigned to a combat unit no less fetters the field commander than does a direct suit against that commander when he relies on those contractors to perform functions critical to the military mission—as is undisputed in this case.[21] *Cf. Boyle*, 487 U.S. at 512 ("It makes little sense to insulate the Government against

[21] The military leadership has recognized contractors' critical role in military operations, referring to them as an "indispensable part of our nations' warfighting and peacekeeping capability." *On the Roles and Missions of Contractors That Support the Dep't of Defense and the Military Services*. Before the House Subcomm. on Readiness, Comm. on Armed Services, 108th Congress (2004) (Statement of Ms. Tina Ballard, Deputy Assistant Secretary of the Army). Plaintiffs apparently would have this Court intercede in the contracting practices of the U.S. military in occupied territory to preclude such reliance. That is an area clearly reserved for the political branches. Indeed, Congress recently began its own consideration of such issues. *See* 150 Cong. Rec. S 6693, S6696 (daily ed. June 14, 2004) (statement of Sen. Reid introducing amendment concerning regulation of contractors during wartime).

financial liability…when the Government produces the equipment itself, but not when it contracts for the production.").

b. The Government Has Created Substantial Remedies for Plaintiffs

To entertain plaintiffs' claims would require the Court to ignore the Executive's chosen methods of resolving claims arising from its military operations in Iraq. At least two sources of alternative remedies exist to address injuries arising from U.S. military operations overseas: the Military Claims Act, 10 U.S.C. § 2733, and the Foreign Claims Act, 10 U.S.C. § 2734. *See also* 32 C.F.R. pt. 536. More generally, the issue of war time reparations is one squarely committed to the Executive. *See American Ins. Ass'n v. Garomend,* 539 U.S. 396, 413 (2003). The Court can take judicial notice that, in fact, the Government is offering remedies to Iraqi citizens: the Army has publicly announced that it "is accepting claims from Iraqis for damages incurred due to the actions of U.S. forces," U.S. Central Command News Release, Coalition Reorganizes Day-to-Day Issues, 03-08-47 (Aug. 22, 2003) (Ex. P),[22] and the Secretary of Defense recently pledged that "appropriate compensation" would be provided to Iraqis who were mistreated at Abu Ghraib. Bindley Graham, *Rumsfeld Takes Responsibility for Abuse*, Wash. Post at A1 (May 8, 2004) (Ex. Q). These remedies were conceived and fashioned to deal with the scenario at hand—injuries arising in the context of military operations in a foreign country.

C. Plaintiffs' ATS Claims Must Be Dismissed

Plaintiffs also seek damages from Titan under the ATS. (SAC Counts III-IX, ¶¶ 195–247.) On June 28, 2004, the Supreme Court issued its first comprehensive examination of

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[22] Available at www.centcom.mil/centcomnews/News_Release.asp?NewsRelease=20030841.txt (visited Sep. 9, 2004):

> The U.S. Army has appointed Foreign Claims Commissions throughout Iraq to accept and process the claims. These commissions provide claimants with the proper forms to start the process. The claims process takes an average of one month. To date, more than four thousand claims have been filed with more than half of them resulting in payment. Almost $400,000 in claims have been paid to Iraqi citizens.

Id.

the ATS and the nature of such claims. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). Contrary to the assumption on which many prior ATS decisions had been grounded, *Sosa* made clear that ATS claims are grounded in federal common law and are not based on a statutory cause of action. *Sosa*, 124 S. Ct. at 2761 ("[T]he ATS is a jurisdictional statute creating no new causes of action...."). After *Sosa*, the ATS joins Admiralty and *Bivens* suits as arising under and implementing rules of decision supplied by federal common law. *See Sosa*, 124 S. Ct. at 2771 (Scalia, J., concurring in part and in the judgment) (noting that, prior to *Sosa*, Admiralty and *Bivens* actions were among the few exceptions to the general rule that the vesting of jurisdiction in the federal courts does not, without more, give rise to authority to formulate federal common law). Plaintiffs' ATS claims, grounded in federal common law, must be dismissed because (a) they do not state a claim against military contractors providing services at the direction and under the control of the government in support of military operations in Iraq; and (b) the ATS does not create a cause of action against corporations. In addition, several of the Counts would not state a claim under the ATS even against other defendants.

1. The Military Contractor Defense Applies to the Alien Tort Statute

The Ninth Circuit has squarely held that there is no claim under the ATS against contractors performing under government control in support of combat operations in time of war. *See Koohi*, 976 F.2d at 1336-37. *Koohi*, binding precedent in this jurisdiction, established this principle as a matter of statutory interpretation of the interrelationship of the exemptions under the FTCA and claims under the ATS.

The Supreme Court's recent ruling in *Sosa* is fully consistent with *Koohi*. After *Sosa*, the issue is not one of statutory interpretation, but whether courts should create new causes of action under the federal common law for the challenged conduct (support of military operations) that otherwise does not give rise to a cause of action. The answer is clearly not. Thus, it should not be surprising that *Koohi's* holding that there is no claim under the ATS against military contractors for support of war time operations is consistent with the federal common law's recognition of the military contractor defense in cases arising under other jurisdictional grants. *See, e.g., McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983) (government

contractor defense precludes tort claims brought in Admiralty); *Malesko*, 534 U.S. 61, 74 n.6 (2001) (recognizing government contractor defense in context of a *Bivens* suit but finding its applicability unsupported in the record).

Even if one were to ignore the binding precedent in this area and take up anew the question of whether there should be liability under the ATS for military contractors acting at the direction of the government, one would reach the same result. Two of the five considerations identified by the *Sosa* Court as requiring judicial caution before recognizing private rights of action under ATS are based on the preeminent role of Congress in establishing federal causes of action. First, the *Sosa* Court observed that federal courts generally "look for legislative guidance before exercising innovative authority over substantive law." 124 S. Ct. at 2762-63. Second, the Court noted an absence of any mandate from Congress to recognize and define new causes of action under ATS. *Id.* at 2763. Both considerations would mandate against finding a cause of action under the ATS for plaintiffs' claims because of Congress' intent, manifested in the "combatant activities" exception to the FTCA, to preclude tort liability for activities taken in support of combat operations.

2. Corporations Are Not Subject to Claims Under the ATS

Under federal common law, it is not assumed that actions may be brought against corporations; in fact, in 2001, the Supreme Court made it clear that implied causes of action against corporate entities are disfavored. *See Malesko*, 534 U.S. 61 (holding that constitutional tort actions under federal common law—*Bivens* actions—are unavailable against corporate defendants notwithstanding that corporations may be sued under 42 U.S.C. § 1983).

Using the framework established in *Malesko*, there is no right to proceed against corporations under the ATS.[23] The circumstances of this case—arising as it does in the context of a U.S. military occupation embroiled in a violent insurgency—even more strongly mandate no cause of action against corporate defendants than under *Bivens*. While it is true that prior to *Sosa*,

[23] The factors that led the *Malesko* Court to endorse a categorical rule against the availability of *Bivens* actions against corporate defendants are discussed in more detail above. *See* § I.B.2.

courts, including the Ninth Circuit, had permitted ATS suits against corporations to go forward, those cases did so under the then-prevailing view that the ATS constituted an express statutory cause of action. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308-320 (S.D.N.Y. 2003) (holding that corporations are subject to liability under ATS and collecting U.S. cases that assumed the same). No Court of Appeals had addressed whether such actions are available against corporations if ATS was not a statutory action. Even without the sea change mandated by *Sosa*, it is well established that questions of jurisdiction cannot be settled unless directly presented and addressed. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984).[24]

3. Plaintiffs Have Not Established Jurisdiction Under the ATS

The ATS provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS is somewhat unique in that it incorporates substantive violations into its jurisdictional pleading requirements. *See Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) ("Because the [ATS] requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under' formula of section 1331 [federal question jurisdiction].") (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir.

[24] The *Sosa* Court's *dicta* in footnote 20 is not to the contrary. There, the Court stated: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 124 S. Ct. at 2766 n.20. But *Sosa* did not involve corporate defendants and, therefore, did not require the Court to consider the liability of corporations or the consequences of rejection of the prevailing theoretical framework for common law claims against corporate defendants. Not surprisingly, the Court did not analyze the impact of its recent decision in *Malesko* on corporate ATS suits, and, therefore, its dicta cannot be taken as suggesting a contrary resolution to this important jurisdictional question. *See Pennhurst*, 465 U.S. at 119 (stating that when "'questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us'") (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 533, n.5 (1974)); *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) (stating the Court is "bound by holdings, not language.").

1980)).[25] Plaintiffs must plead facts sufficient to establish that defendants have injured them through the commission of cognizable violations of the law of nations.

In *Sosa*, the Supreme Court further limited the available causes of action in light of its five articulated concerns, noting that "clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law." *Sosa*, 124 S. Ct. at 2766 n.21. The Court articulated five reasons for the lower courts to exercise "great caution" in recognizing causes of action under the ATS: (1) the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally-generated norms; (2) there has been an equally significant rethinking of the role of federal courts in making federal common law; (3) creation of private rights of action is better left to legislative judgment in the majority of cases; (4) the implications for foreign relations should make courts particularly wary of impinging Executive and Legislative discretion in managing foreign affairs; and (5) the courts have not been given a Congressional mandate to recognize new causes of action in this area. *Sosa*, 124 S. Ct. at 2762-63. The Court suggested that among other appropriate limiting principles was consideration of whether the international norm at issue extends to the alleged perpetrator being sued, *id.* at 2766 n.20, and whether an injured party is required to exhaust other domestic remedies prior to entertaining ATS claims, *id.* at 2766 n.21. In addition, the Court discussed the appropriateness of a case-specific deference to the political branches. *Id.* at n.21. This case involves issues that courts have previously recognized as constituting a particularly sensitive area of foreign relations: the

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[25] *See also Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2001) (requiring that, under the ATS, the plaintiff must plead a violation of the law of nations at the jurisdictional threshold); *Bagguley v. Bush*, 953 F.2d 660, 663 (D.C. Cir. 1991); *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003) ("The [ATS] requires that a more searching review of the merits to establish jurisdiction that [sic] is required under the more flexible 'arising under' formula of Section 1331…[T]o survive a 12(b)(1) motion to dismiss, the complaint must identify the specific international law that the defendant allegedly violated. This is a higher standard of pleading than traditionally required. The heightened pleading standard requires that the complaint identify facts showing Defendants violated a specific international law.") (internal citations omitted); *Sarei v. Rio Tinto Plc*, 221 F. Supp. 2d 1116, 1130 (C.D. Cal. 2002); *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1026 (C.D. Ill. 2001) ("[T]his court must thoroughly examine the merits of the plaintiff's complaint to determine whether it has [ATS] jurisdiction.").

resolution of claims arising from a period of armed conflict. *See Deutsch*, 324 F.3d at 712–16; *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing ATS suit implicating resolution of war claims on political question doctrine). For all these reasons, the Court should deny Plaintiffs' ATS claims here.

a. Cruel, Inhuman, or Degrading Treatment (Count V)

Even before *Sosa* limited the availability of ATS actions, the federal courts addressed claims for cruel, inhuman, or degrading treatment and found wanting the proffered bases for permitting such actions. *See Rio Tinto Plc*, 221 F. Supp. 2d at 1163; *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (allegations of cruel, inhuman and degrading behavior fail to state a cognizable claim under ATS). After *Sosa*, there can be no doubt that these claims do not "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 124 S. Ct. at 2761-62.

b. Enforced Disappearance (Count VI)

Plaintiffs' claims for enforced disappearance are also insufficient. Even if plaintiffs could show that enforced disappearance is a norm that satisfies *Sosa*'s demanding burden (which they cannot), their claims must be dismissed for insufficient factual basis. The allegations fail to allege that any of the named plaintiffs "disappeared." Rather, the allegations indicate that they were taken into custody by the U.S. military under the authority of the occupying powers. Additionally, no named plaintiff alleges that he (or she) is still in custody. As a result, plaintiffs cannot maintain an action for enforced disappearance, even if such a claim is cognizable under the ATS.

c. Arbitrary Detention (Count VII)

In *Sosa*, the Supreme Court evaluated a claim for arbitrary arrest and detention and required "a factual basis beyond relatively brief detention in excess of positive authority." *Sosa*, 124 S. Ct. at 2768-69. The Court's discussion implies two components to making out such a claim: duration and unlawful motive for the detention. This case involves the alleged detention of

ten named plaintiffs. None are alleged to have remained in detention when the complaint was filed. Although they generally deny any wrongdoing, they do not allege that the U.S. military had no basis for detaining them or that their detention exceeded the power inherent in the occupying force.

Plaintiffs Rasheed (the location of whose detention is not alleged) and Estate of Ibrahim (whose decedent was allegedly detained at Abu Ghraib) fail to recite a specific duration of detention. (SAC ¶¶ 8–9.) Two plaintiffs—Sami and Mwafaq—claim that they were detained for five days at Baghdad International Airport. (SAC ¶¶ 3-4.) Plaintiff Saleh alleges that he was detained for eight days at El-Najaf. (SAC ¶ 102.) Plaintiff Ismael claims to have been detained for "months" at Abu Ghraib and for an unspecified period at Buka. (SAC ¶ 6.) Plaintiff Jane Doe No. 1 claims that she was detained for a total of approximately four months at four different military detention facilities: Samarra Airport, Tikrit, Abu Ghraib, and Sahia. (SAC ¶¶ 137-38.) Plaintiff Ahmed alleges he was detained for five months at Abu Ghraib. (SAC ¶ 6.) Plaintiff Neisef alleges he was detained for seven months at Abu Ghraib and for five months at Buka. (SAC ¶ 7.) John Doe No. 1 claims he was detained at Abu Ghraib on August 24, 2003 until he was "recently" released. (SAC ¶ 10.)

Thus, with the exception of Plaintiff Neisef who has pled almost a year of detention, those plaintiffs that have actually pleaded the length of their detention have demonstrated that the longest detention was for approximately five months, and that was only for one plaintiff. After *Sosa*, these brief detentions in the face of an ongoing insurgency cannot violate the relevant customary international norm.

Moreover, plaintiffs have not pled facts sufficient to hold Titan liable for such detention. It is clear from the pleadings that the U.S. military was in complete control of the detainees. Plaintiffs have not even alleged that Titan had anything to do with detention operations. Thus, plaintiffs have plainly failed to satisfy their demanding jurisdictional burden on their claim under Count VII.

d. Crimes Against Humanity (Count IX)

Crimes against humanity have been defined in this jurisdiction as applying to the widespread persecution of entire classes of people:

> It appears that crimes against humanity target a particular group of people for political, racial, or religious reasons. *See Quinn v. Robinson,* 783 F.2d 776, 799 (9th Cir. 1986) ("While some of the same offenses that violate the laws and customs of war are also crimes against humanity, crimes of the latter sort most notably include 'murder, extermination, enslavement,...or persecutions on political, racial or religious grounds...' of entire racial, ethnic, national or religious groups," quoting The Nurnberg (Nuremberg) Trial, 6 F.R.D. 69, 130 (Int'l Military Tribunal 1946)); *Ofosu v. McElroy*, 933 F. Supp. 237, 245 (S.D.N.Y. 1995) (stating that the definition of "crimes against humanity" includes "persecutions on political, racial or religious grounds").

Sarei v. Rio Tinto Plc, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002); *See also Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at 28 (S.D.N.Y. Feb. 22, 2002) (noting that the Statute of the International Criminal Court defines crimes against humanity as "widespread or systematic attack directed against any civilian population"). Plaintiffs have failed to allege facts that even suggest that defendants engaged in widespread persecution of entire racial, ethnic, national, or religious groups. As a result, plaintiffs' claims for crimes against humanity must be dismissed.

II. PLAINTIFFS' STATUTORY CAUSES OF ACTION DO NOT PROVIDE CLAIMS AGAINST TITAN

A. Plaintiffs' RICO Claims Must Be Dismissed

The SAC contains two RICO counts, brought on behalf of three named plaintiffs: Ahmed, Sami, and Neisef (the "RICO Plaintiffs").[26] (SAC Counts I-II, ¶¶ 172–194.) Counts I and II differ only in that Count II asserts a conspiracy to violate RICO (in the same manner as set

[26] Plaintiffs also seek to assert their RICO counts on behalf of a class of individuals. Under RICO, plaintiffs must plead particularized facts for each purported plaintiff and, as a result, class certification is unlikely. *See Poulos v. Caesars World, Inc.*, 2004 U.S. App. LEXIS 16410 (9th Cir. Aug. 10, 2004) (holding class certification inappropriate in RICO context because particularized pleading requirements of RICO would not be excused and, therefore, individual issues would predominate). Accordingly, we address only the claims on behalf of the RICO Plaintiffs.

forth in Count I).[27] The RICO Plaintiffs' allegations fail to state a claim under RICO because: (a) the United States is alleged to be a part of the "enterprise"; (b) plaintiffs' allegations do not establish that Titan undertook an enterprise with CACI; (c) plaintiffs lack standing; (d) and RICO does not reach the extraterritorial conduct alleged.

1. The Legal Framework

To state a claim under RICO a plaintiff must allege the defendant has (1) conducted; (2) an enterprise; (3) through a pattern (i.e., two or more acts that are sufficiently related); (4) of racketeering activity. *See Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 498 (9th Cir. 1985) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)). A RICO enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).[28] "Racketeering activity" includes enumerated offenses that are either "chargeable" or "indictable" under state or federal law.[29] 18 U.S.C. § 1961(1).

Pleading facts sufficient to establish those elements—conduct, an enterprise, pattern, and racketeering activity—is necessary, but not sufficient. Plaintiffs must also identify a specific subsection of 18 U.S.C. § 1962,[30] and facts that establish defendants: (a) invested

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[27] Because plaintiffs have failed to state a claim under Sections 1962(a) and (c) by failing to plead the common elements of all RICO claims, we do not separately address their conspiracy claim under Section 1962(d). *See Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir. 2003) ("Since [plaintiff] has not satisfied the pleading requirements for [Sections 1962(a), (b), or (c)], he has also not alleged sufficient facts to state a claim [for conspiracy under Section 1962(d)]"), *cert. denied*, 124 S. Ct. 2176 (2004)

[28] A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(4).

[29] Enumerated state law offenses are murder, kidnapping, robbery, and dealing in obscene matter. Enumerated federal offenses are 18 U.S.C. § 1510 (obstruction of criminal investigations); § 1951 (interference with commerce), § 1952 (racketeering), § 1958 (use of interstate commerce facilities in the commission of murder for hire), and §§ 2314–15 (interstate transportation of stolen property).

[30] *See Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989) ("it is essential to plead precisely in a RICO case the enterprise alleged and the RICO section allegedly violated"); *United Transp. Union v. Springfield Terminal Co.*, 869 F. Supp. 42, 49 (D. Me. 1994). RICO claims that fail to plead specific types of RICO violations must be dismissed. *See Glenn v. First Nat'l Bank*, 868 F.2d 368 (10th Cir. 1989) (affirming 12(b)(6) dismissal for failure to assert RICO subsection violated and to support each claim with allegations of fact); *National Semiconductor*

income derived from a pattern of racketeering in an enterprise; (b) maintained any interest in or control of any enterprise through a pattern of racketeering activity; (c) conducted or participated in the enterprise's affairs through a pattern of racketeering activity;[31] or (d) conspired to violate any of the above provisions. *See* 18 U.S.C. § 1962(a)–(d). Standing to assert claims under RICO is limited to those who have suffered business or property losses directly and proximately caused by the underlying predicate acts. *See* 18 U.S.C. § 1964(c); *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258 (1992); *Reddy v. Litton Indus.*, 912 F.2d 291, 294 (9th Cir. 1990).

2. Plaintiffs' Enterprise Allegations Require Dismissal

a. There Is No RICO Claim Where the United States Government Is a Necessary Constituent of the Alleged Enterprise

The U.S. military is an indispensable part of plaintiffs' alleged RICO enterprise, with Titan playing a supporting role under its control in the alleged predicate acts. The RICO Plaintiffs allege that the corporate defendants, government officials, and individual defendants formed an association-in-fact that constituted an "ongoing Enterprise" for the purposes of RICO. (SAC ¶ 174.) They further allege that the enterprise engaged in both legal and illegal acts, including racketeering activity of "acts and threats of murder, assault and abuse, kidnapping, and obstruction of justice" (SAC ¶¶ 174–175),[32] and that the acts of the enterprise "have a major impact on interstate commerce." (SAC ¶ 178.) Military officials and officers acting in their official capacities to prosecute the war time activities in Iraq are also central to plaintiffs' alleged "Torture Conspiracy," which they equate with a "pattern of racketeering activity." *See, e.g.*, RCS at 14. At the core of plaintiffs' claims is the assertion that government officials, including the Secretary of Defense and other senior Department of Defense officials—both civilian and

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Corp. v. Sporck, 612 F. Supp. 1316, 1325 (N.D. Cal. 1985) ("As a preliminary matter, the complaint must identify under which subsections of 18 U.S.C. §1962 [plaintiff] is proceeding.").

[31] For 18 U.S.C. § 1962(c), one must "participate in the operation or management of the enterprise itself to be subject to liability." *Reves v. Ernst & Young*, 507 U.S. 170, 172 (1993).

[32] *See also* SAC ¶ 96 ("The predicate acts include, but are not limited to, kidnapping, murder, assault and battery, unlawful imprisonment, obstruction of justice, and other acts intended to be humiliating and mentally devastating to those who practice the faith of Islam.").

military—"adopted and/or implemented policies and practices that led to detainees being kidnapped, tortured, threatened with death and bodily harm, physically and mentally permanently disabled, and, in some cases, murdered." *Id.* at 4. Plaintiffs point to the "Rules of Engagement for Interrogations" promulgated by these government officials as "purporting to permit Interrogators to threaten detainees with death." *Id.* Without the participation of senior Department of Defense officials, as well as senior and junior military personnel, no "Torture Conspiracy" could exist.

This does not state a claim under RICO. The United States is not subject to suit under RICO. *See Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) ("it is clear that there can be no RICO claim against the federal government"); *Dees v. California State Univ.*, 33 F. Supp. 2d 1190 (N.D. Cal. 1998); *Harley v. United States DOJ*, 1994 U.S. Dist. LEXIS 21621 (D.D.C. Oct. 7, 1994). It is well established that municipal agencies are incapable of forming the criminal intent required to enter a conspiracy—neither a municipal corporation nor its employees in their official capacities are subject to civil RICO liability. *See Pedrina v. Han Kuk Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996). Even quasi-public entities are treated this way. *See North Star Contracting Corp. v. Long Island R.R. Co.*, 723 F. Supp. 902, 908 (E.D.N.Y. 1989). How could the United States form such an intent?

Although there is a dearth of cases where plaintiffs have had the temerity to allege that the United States or officials acting on its behalf could be part of a RICO enterprise, it is not surprising that in the few cases where the issue has come up, no claim has been found. *See Norris v. United States Dep't of Defense*, 1996 U.S. Dist. LEXIS 22753 (D.D.C. Oct. 28, 1996) (allegations that Secretary of Defense and other senior military officials conspired to reduce the number of active duty physicians to secure pay raises for those remaining not cognizable under RICO) *aff'd*, 1997 U.S. LEXIS 16130 (D.C. Cir. May 5, 1997); *see also Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) (federal government cannot be sued under RICO because it cannot be "prosecuted" for predicate acts). Because the indispensable principal actor in plaintiffs' alleged conspiracy cannot, as a matter of law, engage in racketeering activity, the enterprise fails and, along with it, plaintiffs' RICO claims.

Even if the concept of the United States as part of an association-in-fact enterprise was not unimaginable, it is clear that defendants would not state a claim under RICO against Titan because Titan's alleged activities were undertaken in its role as supplying military support to military operations in Iraq.[33] It must be presumed that because the legislature has not expressly subjected the U.S. military to suit under RICO, it intended that military decisions and operations be exempt from RICO's strictures in the same manner that the federal common law would not allow a cause of action against Titan by aliens allegedly injured by Titan employees under these circumstances. *See* § I, *supra*; *see also Chappell v. Robbins*, 73 F.3d 918, 923-25 (9th Cir. 1996) (extending common law doctrine of legislative immunity to RICO claims and stating that "[i]n passing RICO, Congress [did not intend] to displace common-law immunities...."). Indeed, at least one Court in a RICO action has afforded to private parties defenses normally only available to government officials where the common law had done so. *See Cullinan Ass'n, Inc. v. Abramson*, 128 F.3d 301, 309-12 (6th Cir. 1997) (extending common law doctrine of qualified immunity to city's outside counsel). Thus, even if plaintiffs' government-centric RICO claims were tenable, these claims are not tenable against Titan.

b. Plaintiffs' Allegations Are Insufficient To Establish the Existence of an Enterprise Between Titan and CACI

Putting to one side the inclusion of the United States in the alleged enterprise, the allegations of an association among CACI, Titan, and their alleged agents are also insufficient. An enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The enterprise is proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* "[F]or an association of individuals to constitute an 'enterprise' for purposes of RICO, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes."

[33] Waivers of sovereign immunity must be "unequivocally expressed" and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Even where Congress has unequivocally expressed its will, the Courts are to construe such waivers narrowly. *See id.*

Moll v. U.S. Life Title Ins. Co., 654 F. Supp. 1012, 1031 (S.D.N.Y. 1987). The RICO Plaintiffs must also "allege a structure for the making of decisions separate and apart from the alleged racketeering activities, because the existence of an enterprise at all times remains a separate element which must be proved." *Wagh*, 348 F.3d at 1112 (internal quotation omitted). To do so, the plaintiffs must describe "a system of making decisions in furtherance of their alleged criminal activities, independent from their respective regular business practices" and "an independent system of distributing the proceeds" of its activities. *Id.*

Plaintiffs allegations fall far short of establishing what is the *sine qua non* of RICO—an enterprise. They allege the RICO enterprise consists of an association-in-fact among the individual defendants, Titan, CACI and the co-conspiring government officials (SAC ¶ 185), but they do not allege facts that establish such an association-in-fact. Plaintiffs' association-in-fact allegations are contained within paragraphs 54 and 55 of the 326-paragraph SAC. Those two paragraphs conclusorily allege that Titan and CACI once worked together to provide computer and related services to American military installations in Europe. (SAC ¶ 54; SAC Exhibit A.) That exhibit accurately reflects that the undertaking to which it refers did not involve interrogation or translation services and was executed in Europe, not Iraq. It does not provide any factual support for the allegation, which is absolutely necessary to the maintenance of plaintiffs' RICO allegations, that Titan and CACI had any kind of formal or informal structure for the conduct of interrogations in Iraq based on preparatory activity in the United States.[34]

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[34] The Exhibit A attached to the original complaint, purportedly from Titan's website, would have provided far more support because it, along with plaintiffs' now-abandoned allegations flowing from it, implied that Titan and CACI had teamed together to provide services in Iraq. (Attached hereto as Ex. R.) Unfortunately, the document was fraudulent. As plaintiffs concede in the SAC, it consisted of stitched-together excerpts from a number of different documents concerning unrelated projects. Not surprisingly, the effect of the selective editing was to support to plaintiffs' theory that could not be found in the actual documents. Although plaintiffs trumpeted the exhibit at a press conference, they have now twice amended the original complaint to withdraw the offending exhibit and the allegations associated with it, replaced them with two new exhibits and watered-down allegations, and provided no explanation for the original distortion. Instead, plaintiffs offer an explanation that is at best disingenuous:

> In the Complaint, plaintiffs had attached as Exhibit A various relevant text excerpted from Defendant Titan's web site. (This information is now located in the printouts attached separately for clarity as Exhibit A and Exhibit B.) In the prior version of Exhibit A, there was a reference to a third party included on

In an apparent attempt to overcome this glaring and potentially fatal deficiency in their factual allegations, plaintiffs added a new allegation in the SAC not found in the initial complaint. They allege that an "employee of Defendant Titan," who remains unidentified, "has stated in an email communication," which is not attached as an exhibit despite its centrality to their attempt to establish a RICO enterprise, "that Defendant Titan intends to use the Assistance and Advisory Services contract to deploy people to Iraq in the near future." (SAC ¶ 55.) Plaintiffs also allege, upon information and belief that "Defendant Titan and/or the CACI Corporate Defendants used and/or continue to use the Assistance and Advisory Services contract as one of the contract vehicles related to Interrogation Services in Iraq." *Id.* These vague allegations, not even made with actual knowledge, do not cure the notable abandonment of their previous allegation that Titan and CACI operated in Iraq under an arrangement called "Team Titan." (Original Complaint ¶¶ 52–54.) The result is that the SAC does not allege facts demonstrating that Titan and CACI have created "a structure for the making of decisions separate and apart from the alleged racketeering activities [in Iraq]," and "a system of making decisions in furtherance of their alleged criminal activities [in Iraq], independent from their respective regular business practices" and "an independent system of distributing the proceeds" of its activities in Iraq." *Wagh*, 348 F.3d at 1111–12 (internal citations omitted).

3. Plaintiffs Lack Standing

Even if plaintiffs had identified a valid enterprise, they lack standing under RICO. The bulk of the alleged injuries suffered by plaintiffs are personal injuries. Personal injuries are not cognizable under RICO. *See Diaz v. Gates*, 2004 U.S. App. LEXIS 17871 (9th Cir. Aug. 23, 2004) (damages flowing from inability to pursue gainful employment while defending against

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> Defendant Titan's web site as part of "Team Titan." Defendant Titan had not obtained permission to use the name of this third party on its web site. Although this third party was not named or identified in any way in the Complaint, the plaintiffs want to make crystal clear that they have not and are not making any allegations against this third party. To further that goal, the name of the third party has been redacted from the revised Exhibit A.

(SAC at 12 n.2.)

unjust charges and while unjustly incarcerated not cognizable under RICO) (collecting cases); 18 U.S.C. § 1964(c). The rule against entertaining personal injuries applies regardless of the severity of the personal injury because RICO was intended to remedy commercial crimes. *See Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988) (cited approvingly in *Diaz*, 2004 U.S. App. LEXIS 17871). Thus, a plaintiff must allege that the RICO violation injured his business or property. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990).

The RICO Plaintiffs allege the following property losses: Plaintiff Ahmed alleges $3,200 in cash and $1,500 worth of gold and jewelry were seized when his house was destroyed (SAC ¶ 113); Plaintiff Neisef alleges that $6,000 in cash and $1,000 worth of gold and jewelry were seized when his house was damaged (SAC ¶ 126); and Plaintiff Sami alleges that $67,500 and 15.35 million dinars were seized at the time of his arrest (SAC ¶ 130).[35] They allege that their property was wrongfully confiscated by the "torture conspirators." Notably absent from the allegations are any details about who specifically took their property and how those confiscations relate to the overarching conspiracy to increase the demand for interrogation services. What is clear from the allegations is that the confiscations happened at the time of their arrests, or before, all of which preceded the alleged predicate acts of the RICO claim. Moreover, there are no allegations that Titan or its employees were in any way involved with the arrests that led to these plaintiffs' incarceration.

These allegations do not confer standing. "[T]he alleged violation of the law [must] be a 'proximate cause' of the injury suffered." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (citing *Holmes*, 503 U.S. at 268). A proximate cause is "a substantial factor in the sequence of responsible causation." *Oki Semiconductor Co., v. Wells Fargo Bank*, 298 F.3d 768, 773 (9th Cir. 2002) (quotations omitted). "A direct relationship between the injury and the alleged wrongdoing, although not the 'sole requirement' of RICO...proximate causation, 'has been one of its central elements.'" *Id.* (quoting *Holmes*, 503 U.S. at 269).

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[35] On July 20, 2004, 15.35 million dinars was worth approximately $10,500.

Plaintiffs' allegations plainly fail to establish how the alleged pattern of murder, kidnapping, and obstruction of justice proximately caused the RICO Plaintiffs' economic losses.[36] Under Section 1962(a), a plaintiff must also establish that funds derived from the racketeering activity that affected him were used in a manner that also had the effect of directly and proximately injuring him. *Wagh*, 348 F.3d at 1110-11. It is insufficient for the purposes of Section 1962(a) to show injury deriving from the investment of income gained from a *previous* act of racketeering activity. *Id.* at 1110.

Plaintiffs also lack standing under subsection 1961(c). First, no RICO Plaintiff alleges to have been subject to any of the predicate acts—murder, kidnapping, and obstruction of justice—alleged in the RICO counts. Second, the allegations are that the property was taken before plaintiffs were detained, or during the arrest leading to detention, not in the furtherance of the enterprise to extract information by unlawful means. With regard to Titan, the RICO Plaintiffs make no allegations that Titan translators captured, arrested, or physically secured individuals or buildings. Indeed, the RICO Plaintiffs could not credibly make such allegations because their own exhibits establish that the scope of the translators' duties was narrowly confined to translating. Moreover, the RICO Plaintiffs assert that Titan, CACI, and the U.S. military were in fact engaged in legitimate and lawful activity apart from the so-called torture conspiracy. (SAC ¶ 174.) It is difficult if not impossible to see how, but for the alleged pattern of murder, kidnapping, and obstruction of justice, plaintiffs' property would not have been seized by the U.S. military. It is equally unlikely that the seizure of property from plaintiffs would be a reasonably foreseeable consequence of those unlawful activities.

Nor do the various allegations that Titan engaged in the Torture Conspiracy to increase its earnings from government contracts confer standing on the RICO Plaintiffs. They have failed to allege that defendants' activities in this regard directly caused their property losses, and given the lack of logical connection between the economic motive the RICO Plaintiffs

[36] "Abuse and assault" does not qualify as a predicate act under 18 U.S.C. 1961(1), therefore, any property loss attributable to abuse and assault would not give plaintiffs standing.

attribute to the conspirators—increasing the demand for interrogation services—and the seizure of their property incident to their arrest, it is unlikely that they could credibly do so. This is demonstrated in part by the fact that no RICO Plaintiff alleges any business or property loss directly flowing from the allegedly unfair competitive advantage obtained by defendants, which is not surprising given that none of the RICO Plaintiffs are alleged to be competitors of Titan.

Even if plaintiffs could overcome the foregoing barriers to standing, the property losses they allege—property damaged or seized by the U.S. military in the course of military operations in occupied territory—are not cognizable under RICO or any other cause of action. Under settled principles governing civilized warfare, "an occupying power is entitled to seize any private property susceptible of direct military use, with compensation to be fixed at the conclusion of hostilities." *Gondrand v. United States*, 166 Ct. Cl. 473, 482 (1964) (citing *Cuban Truck & Equipment Co. v. United States*, 166 Ct. Cl. 381 (1964); II Oppenheim, International Law 404 (Lauerpacht 7th ed.)). Moreover, it is the occupying power—rather than its agents or those supporting its activities—that is required to provide compensation at the appropriate time:

> The nub of the case is that Britain was the occupying authority in Eritrea and that it insisted that all seizure of goods susceptible of military use be through its procedures and under its aegis. Americans may have physically removed the property from plaintiff's premises and Americans may have given receipts to plaintiff's representatives. The goods were selected for, and to be used in, the American military operations which were supporting the British in and near Eritrea. But these surface facts did not convert the transaction into a taking by the United States rather than Britain, or into a commercial bargain between the United States and plaintiff.

Id.; *see also Askir v. Brown & Root Servs. Corp.*, 1997 U.S. Dist. LEXIS 14494 (S.D.N.Y. Sept. 22, 1999) (government contractor supporting U.S. and United Nations military operations in Somalia not liable for property loss incident to its use of building seized by military forces). If the seizures were not illegal, they cannot be the basis for RICO standing.

4. RICO Does Not Reach the Extraterritorial Conduct Alleged

An independent basis for dismissing the RICO claims is that RICO does not apply extraterritorially, and the claims here are about conduct in Iraq affecting aliens. At the outset it should be noted that the plaintiffs have failed to establish that any of the alleged acts of racketeering activity that fall within 18 U.S.C. § 1961(1) (and for which they have alleged a

factual basis) apply to extraterritorial acts in Iraq. If such acts are not chargeable or indictable then the RICO claims fail. *See* 18 U.S.C. § 1961(1). Moreover, even if the RICO Plaintiffs identify a qualifying offense that is applicable to defendants' alleged foreign actions, they must still overcome RICO's nonapplicability to foreign conduct and effects.

It is presumed that "Congress intended ... legislation to apply only within the territorial boundaries of the United States absent statutory language or an express statement by Congress to the contrary." *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 n.4 (9th Cir. 1994); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). As RICO is silent on its extraterritorial application, there is no subject matter jurisdiction over a RICO claim for foreign conduct with foreign effects. *See Butte Mining PLC v. Smith*, 76 F.3d 287, 291-92 (9th Cir. 1996). Subject matter jurisdiction over RICO claims requires, at a minimum, allegations of domestic conduct or substantial domestic effect. *See id.* The conduct test establishes jurisdiction for domestic conduct that directly causes foreign loss or injury while the effects test establishes jurisdiction for foreign conduct that directly causes domestic loss or injury. Plaintiffs do not allege actionable domestic conduct or domestic injury.

a. The Alleged Domestic Conduct Does Not Support the Extraterritorial Application of RICO

In cases involving domestic conduct causing foreign injury, the Ninth Circuit has set forth the following factors to determine whether there is jurisdiction:

> whether defendant's conduct [that involved the use of instrumentalities of interstate commerce] in the United States was significant with respect to the alleged violation...and whether it furthered the fraudulent scheme....The conduct in the United States cannot be merely preparatory...and must be material, that is, directly cause the losses.

See Grunenthal GmbH v. Hotz, 712 F.2d 421, 424 (9th Cir. 1983) (securities fraud case) (internal citations omitted); *Poulos v. Caesars World, Inc.*, 2004 U.S. App. LEXIS 16410 (9th Cir. Aug. 10, 2004) (endorsing for RICO cases the test set adopted in *Grunenthal*).[37] Plaintiffs' allegations of domestic conduct fall well short of this mark.

[37] *See also Butte Mining PLC*, 76 F.3d at 291 (no RICO jurisdiction over fraud committed abroad despite use of U.S. mail and wire service in the United States).

Plaintiffs allege, upon information and belief, that Defendants "formed and fostered" relationships with Department of Defense officials "by meetings, telephonic discussions, in-person discussions, email discussions and other communications that occurred in, among other places, California, Virginia and the District of Columbia." (SAC ¶ 83.) In addition, plaintiffs allege that Titan recruited translators within the United States and "screen[ed] potential applicants to ascertain whether they would be willing to engage in illegal acts." (SAC ¶ 86; *see also* SAC ¶ 52.) Such conduct is far removed from the alleged illegal violations in interrogation rooms in military prisons in Iraq. They are "mere preparatory activities" and "conduct far removed from the completion of the wrongdoing," which fail to confer subject matter jurisdiction under the conduct test. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003). *See also Butte Mining PLC*, 76 F.3d at 291. Nor can one say that such legal, normal business meetings and preparatory activities "directly caused" the RICO Plaintiffs' alleged property losses, i.e., property seized by the U.S. military during arrest that led to detention that led to the challenged conduct.

b. The Alleged Domestic Injuries Are Insufficient

In cases of foreign conduct that allegedly caused domestic injuries, courts look to the "effects" test to determine whether the allegations establish jurisdiction. *See Poulos*, 2004 U.S. App. LEXIS 16410, at *16-*17; *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) (applying effects test). The effects test derives from that applied in evaluating subject matter jurisdiction in two other areas: securities law and antitrust law. *See North South Finance Corp.*, 100 F.3d at 1051-52 (tracing effects test to securities and antitrust law but noting that antitrust approach is "an equally or even more appropriate test especially since the civil action provision of RICO was patterned after the Clayton Act.") (quoting *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 150 (1987)).

Under the effects test, foreign conduct must cause "substantial" domestic effects that are a "direct and foreseeable result of the conduct outside of the United States." *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (quoting *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989)). An effect cannot be direct

where it depends on uncertain intervening factors. *See United States v. LSL Biotechnologies*, 379 F.3d 672, at 681 (9th Cir. 2004). Recently the Supreme Court clarified the effects test in the context of an antitrust suit, holding that foreign plaintiffs cannot establish jurisdiction unless the domestic effect injured the foreign plaintiffs and gives rise to a claim cognizable on their behalf. *See F. Hoffmann-La Roche LTD v. Empagran S.A.*, 124 S. Ct. 2359, 2369-2372 (2004). This represents a significant limiting of the effects test, as the Second and D.C. Circuits had not previously required such a direct nexus between the domestic injury alleged and the foreign plaintiffs. *See id.* at 2364. It also dooms plaintiffs' RICO claims.

The alleged domestic effects of the RICO enterprise are that Titan paid its translators above-market rates (SAC ¶ 56), and formed the Torture Conspiracy to "gain a competitive advantage" in the market, as well as to avoid losing money on recent acquisitions. (SAC ¶ 84.) Plaintiffs can not allege that they compete with defendants in the translation or interrogation services businesses—which would be necessary to maintain a claim against defendants for unfair competitive prices. Nor do their allegations establish that they would be entitled to recover based upon defendants' alleged payment of above-market salaries to its employees. This alone renders the pleadings insufficient with respect to the effects test. *See Empagran S.A.*, 124 S. Ct. at 2369–2372.

Moreover, the pleadings would be insufficient for vagueness and speculation even if it was not required that plaintiffs have an actionable claim under their alleged domestic effect. To establish jurisdiction, the alleged domestic effects must be both "substantial" and "a direct and foreseeable result" of the "Torture Conspiracy." "To show an injury to competition, the plaintiff ordinarily 'must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly.'" *Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (quoting *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)). Plaintiffs' allegations fail both prongs.

B. Plaintiffs' Geneva Convention Claim Must Be Dismissed

Plaintiffs assert that Titan violated the Third and Fourth Geneva Conventions ("the Conventions") and seek damages.[38] *See* SAC Count X, ¶¶ 248–253. Count X does not state a claim, however, because the Conventions do not create a private cause of action.

The Conventions govern legal relationships among the contracting nation-states rather than regulating relationships between private parties. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."). Article 1, common to every Convention, obliges the *signatory nation-states* to observe the terms of the Conventions: "High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Rather than directly regulating private conduct, the Conventions oblige the "High Contracting Parties" to enact domestic legislation to punish anyone who commits or orders a grave breach.[39] *See* Convention III, art. 129; Convention IV, art. 146. None of the parties to this case are "High Contracting Parties."

Moreover, courts have uniformly held that because the Conventions are not self-executing, they do not create a private right of action. "A treaty that is not self-executing confers no judicially enforceable rights upon a private party." *Cornejo-Barreto v. Siefert*, 2004 WL 1812250, at *9 (9th Cir. Aug. 16, 2004) (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (holding that if a treaty's stipulations are not self-executing they can be enforced only pursuant to legislation to carry them into effect)). Courts consider the following factors to determine whether a treaty is self-executing:

> [1] the purposes of the treaty and the objectives of its creators, [2] the existence of domestic procedures and institutions appropriate for direct

[38] The Geneva Conventions of 1949 are a series of four treaties concerning the law of armed conflict. The First Convention concerns the treatment of the wounded and sick in the armed forces on land, while the Second Convention covers the same issues for armed forces at sea. *See* 75 U.N.T.S. 31; 75 U.N.T.S. 85. The Third Convention addresses the treatment of prisoners of war. *See* 75 U.N.T.S. 135. The Fourth Convention addresses the treatment of civilians. *See* 75 U.N.T.S. 287.

[39] The United States has enacted such legislation. *See War Crimes Act*, 18 U.S.C. § 2441. While the Act criminalizes "grave breaches" of the Geneva Convention if they are committed by or against a U.S. national, it makes no provisions for civil remedies or for private lawsuits.

> implementation, [3] the availability and feasibility of alternative enforcement methods, and [4] the immediate and long-range social consequences of self- or non-self-execution.

Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985). Applying these factors to the Geneva Conventions clearly shows that they are not self-executing.

Article 129 of the Third Geneva Convention requires the parties to implement the Convention through domestic legislation. *See* Convention III, art. 129. "A treaty which provides that signatory states will take measures through their own laws to enforce its provisions evinces an intent that the treaty not be self-executing." *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (citing *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 311–14 (1829), *overruled on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)). In *Eisentrager*, the Supreme Court wrote of the limited enforcement mechanisms embodied in the Third Convention:

> It is however the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

339 U.S. at 789 n.14; *see also Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (the "corrective machinery specified in the [Third Geneva Convention] itself is nonjudicial"). Likewise, courts have held that the Fourth Geneva Convention is not self-executing and therefore creates no private cause of action. *See Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 769–70 (N.D. Cal. 1989).

Because the Geneva Conventions are enforced through the intervention of nation-states, not through lawsuits brought by private individuals, *see Hande,* 601 F. Supp. at 1424–25, Count X must be dismissed.

C. Plaintiffs' Contracting Law Claims Must Be Dismissed

Plaintiffs assert, without supporting factual allegations, that Titan violated federal contracting laws—the Federal Acquisition Regulations (the "FAR"), the United States Truth in Negotiations Act ("TINA"), and the United States Cost Accounting Standards ("CAS") (collectively the "Contracting Laws")—and seek disgorgement of defendants' allegedly "ill-

gotten" gains. They also seek to enjoin the United States from awarding any future contracts to Titan. (SAC Count XXV, ¶¶318–321.) Putting aside the dearth of supporting factual allegations, Count XXV must be dismissed because these laws do not create a private cause of action, plaintiffs lack standing even if they did, and the United States is an indispensable party.

1. There Is No Private Action for Damages Under the Contracting Laws

Even assuming plaintiffs' assertions of Titan's violations of the Contracting Laws are true, that does not mean plaintiffs have a cause of action.[40] The intent to create a private right of action must be discernable from the relevant statute:

> [P]rivate rights of action to enforce federal law must be created by Congress. The judicial task to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one.

Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001).

Neither the language of the Contracting Laws nor their structure nor their legislative history supports the proposition that there is a private right of action under them. This is fatal to plaintiffs' claim:

> [W]hen, as here, the language of the statute in question does not itself provide evidence favoring implication, a silent legislative history obviates the need to inquire further into congressional intent. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981); *California v. Sierra Club*, *supra*, 451 U.S. at 293, 101 S.Ct. at 1779; *Touche Ross & Co. v. Redington*, *supra*, 442 U.S. at 571, 99 S.Ct. at 2487. In such cases, "(t)he question whether Congress ... intended to create a private right of action, has been definitely answered in the negative."

Osborn v. American Ass'n of Retired Persons, 660 F.2d 740, 745 (9th Cir. 1981). Indeed, no

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[40] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person"); *AT&T v. United States*, 307 F.3d 1374, 1377-1379 (Fed. Cir. 2002) (reporting requirement under Defense Department appropriations bill "envisions enforcement, if any, through legislative procedures" and "does not create a cause of action inviting private parties to enforce the provisions in courts"); *Clark v. United States*, 609 F. Supp. 1249, 1251 (D. Md. 1985) ("Section 2304 [of the FAA] does not create standing for any taxpayer or any private party to sue for its enforcement...[and] was clearly enacted to effect the relationship between the Congress and the President over disbursing foreign aid funds in light of an official policy of concern for human rights.").

federal court has ever held that any of the regulations or statutes cited by plaintiffs creates a private cause of action.[41]

2. Plaintiffs Lack Standing

Even if there were a private right of action, plaintiffs lack standing. "Article III limits the jurisdiction of federal courts to cases and controversies. Federal courts are presumed to lack jurisdiction, unless the contrary appears affirmatively from the record. Standing is an essential, core component of the case or controversy requirement." *San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1126 (9th Cir. 1996) (internal quotes and citations omitted). Constitutional standing has three elements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'"—an injury both "concrete and particularized" and "actual or imminent." *Id.* (internal quotes and citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of." *Id.* "Third, it must be likely ... the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotes and citation omitted). Nowhere do plaintiffs allege an injury in fact that is causally connected to a violation of the Contracting Laws. "Absent injury, a violation of a statute gives rise merely to a generalized grievance but not to standing." *Waste Management of N. Am., Inc. v. Weinberger,* 862 F.2d 1393, 1398 (9th Cir. 1988) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 482–83 (1982)).

Plaintiffs did not participate in the procurement process that led to the Department of Defense's decision to award government contracts to defendants. Nor have any of them alleged that they could have qualified as a prospective bidder for the contracts at issue. "[W]here a party neither participated in the bidding process nor protested afterward and could not qualify as

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[41] Not only do the Contracting Laws lack any distinct provision allowing private causes of action, but they explicitly contemplate action only by *the government.* The FAR grants authority to remove a company from contracting consideration ("debarment") only to "(1) an *agency* head or (2) a designee authorized by the agency head to impose debarment." 48 C.F.R. § 9.403. TINA states that "[i]f the United States makes an overpayment to a contractor...due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the *United States*." 10 U.S.C. § 2306a(f) (emphasis added). The CAS regulations require a *government official*, the Administrative Contracting Officer, to make a determination of noncompliance before remedial action is taken. *See* 48 C.F.R. § 30.602-2.

an actual or 'prospective' bidder under 31 U.S.C. § 3551, a non-bidder lacks standing to sue." *San Francisco Drydock, Inc. v. Dalton,* 131 F.3d 776, 778 (9th Cir. 1997) (citing *Waste Management of North America, Inc. v. Weinberger*, 862 F.2d 1393, 1398 (9th Cir. 1988)).

Plaintiffs have also not alleged what harm was caused by defendants' alleged violation of the Contracting Laws. "[I]njury must be fairly traceable to the challenged action of the defendant. It cannot be the result of the independent action of some third party not before the court." *Prescott v. County of El Dorado,* 298 F.3d 844, 846 (9th Cir. 2002) (internal quotes and citations omitted). Plaintiffs have alleged mistreatment while detained in military prisons under control of the Army. Nowhere in their complaint do plaintiffs explain how alleged physical, mental, and economic injuries are "fairly traceable" to a violation of the Contracting Laws by Titan. In addition, the United States—which awarded the contracts in question—is not a party to this suit. Given that plaintiffs claim that harm resulted from the defendants' receipt of a government contract, the harm resulted from the United States' independent act of awarding the contract, making the United States a necessary party.[42] Accordingly, Count XXV must be dismissed.

D. RLUIPA Does Not Apply to Acts under Color of United States Law

Plaintiffs allege that Titan violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by substantially burdening the plaintiffs' exercise of their religious beliefs. *See* SAC ¶ 273–74 (Count XIV). Plaintiff's RLUIPA claim fails because "RLUIPA only covers *state action* aimed at land use decisions and persons in jails or mental facilities." *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1220 (C.D. Cal. 2002) (emphasis added). Plaintiffs allege that Titan violated Section 2000cc-1 of RLUIPA (SAC ¶ 263), but, Section 2000cc-1 only applies to an "institution." *See* 42 U.S.C. § 2000cc-1(a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an *institution, as defined in section 1997 of [Title 42]*...)

[42] Plaintiffs also seek to enjoin the United States as a remedy. This obviously would also make it a necessary party, even if plaintiffs had a claim to resolve. Fed. R. Civ. P. 19(b).

(emphasis added). Section 1997 of RLUIPA defines an "institution" to mean a facility or institution that is "owned, operated, or managed by, or provides services on behalf of *any State or political subdivision of a State*." 42 U.S.C. § 1997(1)(A) (emphasis added). RLUIPA goes on to define a "state" as "any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States." *Id.* § 1997(4). Neither the United States nor those acting under color of United States law is included in this definition. Plaintiffs have not, and cannot, allege that Titan was engaged in state action; in fact, they affirmatively plead that Titan was acting under the color of federal law. (SAC ¶ 274.) Therefore, plaintiffs RLUIPA claim must be dismissed with prejudice.

CONCLUSION

Plaintiffs assert that they and others were severely mistreated during their confinement by the U.S. military in Iraq. Even assuming these claims are true, and might give rise to claims against others, restitution from the military, and the public vindication of criminal prosecutions, plaintiffs have no claim against Titan. They can no more sue Titan for providing linguists to the military to act under the government's direction, than they can sue the United States for the acts of the military, notwithstanding that soldiers have already been convicted of the types of acts described by plaintiffs. For the same reasons plaintiffs did not attempt to sue the government or the individual soldiers that participated in their detention and interrogation, suits against Titan for its provision of linguists to the military cannot be entertained by the judicial branch. As clearly articulated in the controlling precedent, to allow a suit against Titan to proceed would fetter the military commanders to whom Titan's employees were assigned no less than would suits directly against the soldiers alongside whom they work. The common law does not recognize a cause of action against Titan on the facts alleged here, and Congress has not provided for such liability under any of the statutes upon which plaintiffs rely. To the extent that Congress has spoken on this issue, the FTCA clearly indicates that Titan should not be sued. Accordingly, plaintiffs must seek redress in administrative remedies offered by the political branches, and from the pursuit of wrongdoers through criminal processes, not through the courts.

For all the foregoing reasons, the complaint should be dismissed for failure to state a claim, lack of subject matter jurisdiction, and failure to join an indispensable party. Since the flaws in plaintiffs' claims can not be cured by amendment based on the facts already alleged, the dismissal should be with prejudice.

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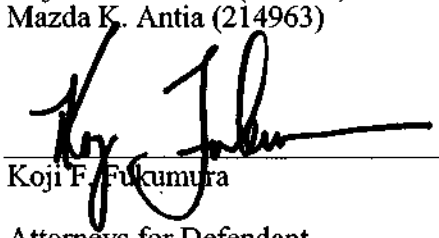
COOLEY GODWARD LLP
William E. Grauer (84806)
Koji F. Fukumura (189719)
Mazda K. Antia (214963)



Koji F. Fukumura

Attorneys for Defendant
The Titan Corporation