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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, and JOHN B. ISRAEL,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION OF DEFENDANTS CACI INTERNATIONAL INC, CACI INC. - FEDERAL, AND CACI N.V. TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

DATE: FEBRUARY 7, 2005
TIME: 2:00 P.M.
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I. INTRODUCTION

By filing this action, Plaintiffs seek to inject themselves and this Court into the process of establishing and overseeing the United States' foreign policy and the manner in which the federal government is waging the war in Iraq. As explained below, Plaintiffs' Second Amended Complaint ("Complaint" or "SAC") is legally meritless and should be dismissed with prejudice.

It is no accident that Plaintiffs have not sued the United States government or any United States officials in this action, even though Plaintiffs falsely allege that Defendants entered into a conspiracy with elements of the United States government to engage in the conduct alleged in the Complaint. Indeed, Plaintiffs' principal theory appears to be that they can hide behind the concept of "upon information and belief," a harbor into which Plaintiffs retreat no less than *37* times in their Complaint, in order to allege this conspiracy, and that they can then tag Defendants with every wrong supposedly committed by the United States government against detainees in Iraq. SAC ¶ 26. The single theme pervading Plaintiffs' Complaint is their willingness to make up facts, attaching the caveat that such allegations are "upon information and belief," every time Plaintiffs were confronted with the absence of a facts supporting their claims.

To be perfectly clear, Defendants CACI International Inc, CACI INC. – FEDERAL, and CACI N.V. (collectively, the "CACI Defendants") categorically deny that they or any other CACI company engaged in a conspiracy with *anyone* to mistreat detainees in Iraq.[1] The CACI Defendants do not condone the mistreatment of detainees at Abu Ghraib prison or elsewhere, and have consistently reaffirmed that position. The abject falsity of Plaintiffs' allegations aside, Plaintiffs' Complaint fails to state a claim upon which relief may be granted for several reasons.

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[1] Consistent with Plaintiffs' failure to conduct any reasonable prefiling inquiry as to the truth of their allegations, Plaintiffs have not even sued the CACI entity that actually provided interrogators to the United States armed forces in support of its mission in Iraq.

First, Plaintiffs' claims present a nonjusticiable political question in that they seek recompense for injuries allegedly inflicted upon them during the prosecution of a war. Such claims historically have been for the political branches to resolve, with the federal courts playing no role in that process. Indeed, the law for two centuries has been that wartime reparations claims belong to *nations* and not to individuals, and must be resolved on a nation-to-nation level.

Second, all of Plaintiffs' federal and state tort claims are preempted as being inconsistent with the "combatant activities" exception to the Federal Tort Claims Act. The Ninth Circuit squarely has held that Plaintiffs should not be permitted to skirt the combatant activities exception by asserting their wartime injury claims against defense contractors.

Third, Plaintiffs' RICO claims are legally infirm because they fail to allege a cognizable injury to Plaintiffs' business or property as a result of Defendants' supposed conduct. Moreover, Plaintiffs have failed sufficiently to allege predicate acts of racketeering, a pattern of racketeering activity, or the existence of a racketeering enterprise.

Fourth, Plaintiffs' claims under the Alien Tort Claims Act ("ATCA") lack merit because ATCA does not create a private right of action for injuries occurring during an external war, such as the war in Iraq. Moreover, Plaintiffs have neither exhausted their remedies nor defined their causes of action with the degree of particularity required under ATCA.

Fifth, Plaintiffs' "constitutional" claims fail because Plaintiffs, as noncitizens, are not entitled to the protections of the United States Constitution for alleged injuries occurring outside the United States.

Sixth, Plaintiffs' "Geneva Conventions" claim fails because no private right of action exists for alleged violations of the Geneva Conventions.

Seventh, Plaintiffs' claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, fails as a matter of law because that statute applies only to the actions of states regarding institutions under state control.

Eighth, Plaintiffs' claim of violations of United States contracting laws fails because Plaintiffs have not alleged any facts that, if true, would establish such a violation. Moreover, Plaintiffs lack standing to assert such a claim.

The Court should not permit Plaintiffs to use this suit and Defendants as pawns in their obvious effort to turn every decision and action of the United States in waging the war in Iraq into a litigable issue in the federal courts. Plaintiffs' fundamental quarrel is with the United States and its actions in prosecuting the war, and the Court should not allow Plaintiffs to drag Defendants through this lawsuit so that Plaintiffs can sidestep the clear prohibitions on vetting such claims in the federal court. Therefore, the Court should dismiss all of Plaintiffs' claims.

II. ANALYSIS

A. The Standard for CACI's Motion to Dismiss

CACI has moved to dismiss the Complaint for lack of subject-matter jurisdiction, failure to state a claim, and for failure to join an indispensable party. The law is somewhat unsettled whether a motion to dismiss a claim based on the political question doctrine is appropriately treated as a challenge to the Court's subject-matter jurisdiction under Rule 12(b)(1) or a 12(b)(6) motion that challenges the legal sufficiency of the complaint. *See* 13A Charles A. Wright, et al., *Federal Practice & Procedure* § 3534.3 (2d ed. 1984); *see also Sarei v. Rio Tinto plc*, 221 F. Supp. 2d 1116, 1193 n.273 (C.D. Cal. 2002).

The plaintiff bears the burden of demonstrating the existence of subject-matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Where, as here, the subject-matter jurisdiction challenge attacks the complaint on its face, the Court need not resolve

whether the motion is decided under Rule 12(b)(1) or Rule 12(b)(6) because the standard is identical under both rules: the Court accepts all well-pleaded allegations in the complaint as true for purposes of the motion. *Sarei*, 221 F. Supp. 2d at 1193 & n.273; *Valdez v. United States*, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), *aff'd*, 56 F.3d 1177 (9th Cir. 1995).

A motion pursuant to Rule 12(b)(6) should be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058 (9th Cir. 2004) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). While the Court must accept the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001); *see also Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

The CACI Defendants seek dismissal of Count XXV for failure to state a claim and for failure to join an indispensable party. A motion to dismiss for failure to join an indispensable party should be granted where a nonparty is indispensable to the resolution of the dispute between the parties and equity and good conscience require that the case be dismissed in the absence of the indispensable party. Fed. R. Civ. P. 19(b). Because Plaintiffs' claims are legally and factually insufficient, the Court should dismiss Plaintiffs' Complaint in its entirety.

B. Plaintiffs' Claims Present Nonjusticiable Political Questions

Plaintiffs' claims necessarily ask this Court to sit in judgment of the manner in which the United States has waged the war in Iraq. Plaintiffs challenge the decisions made by the United States armed forces in deciding which persons found in the combat theater would be detained, as well as the standards established by the United States government in deciding how to interrogate those that were detained. Damages claims based on the conduct of war are classic political

questions that are committed exclusively to Congress and the President for resolution. Indeed, the Supreme Court has observed on several occasions that decisions regarding the detention of persons found in a combat theater are an inseparable component of the prosecution of war. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (noting that arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942))). Therefore, the Court should dismiss all of Plaintiffs' claims.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth the controlling standards for determining whether a case raises a nonjusticiable political question. After reviewing the doctrine's history, the Court noted that cases raising political questions generally have one or more of the of the following characteristics:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards for resolving it;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning adherence to a political decision already made; or
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. If any "one of these formulations is inextricable from the case," the Court must dismiss the case as presenting a nonjusticiable political question. *Id.*; *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990).

While it is true that not every case having a foreign affairs connection presents a political question, the political question doctrine unquestionably has widespread application to "questions

touching foreign relations." *Baker*, 369 U.S. at 211; *see also United States v. Curtiss-Wright Corp.*, 299 U.S. 2304, 320 (1936) (noting that the political question doctrine distinguishes between cases involving foreign relations and those involving domestic issues); *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990) (observing that "the political question doctrine routinely precludes judicial scrutiny" of foreign affairs issues). Rather than automatically holding that any suit relating in any way to foreign relations presents a nonjusticiable political question, the Court instead must undertake a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12.

The present action fits squarely within the class of cases touching on foreign relations to which the political question doctrine applies. Plaintiffs seek reparations for injuries – real or imagined – that they allegedly suffered as a consequence of the United States' conduct of the war in Iraq. Determinations as to the propriety of such civil recompense has always been the exclusive province of the political branches of government. Moreover, Plaintiffs' claims necessarily ask this Court to sit in judgment of virtually every decision the Executive branch has made in prosecuting the war in Iraq, even the detailed decisions – which often will be based on classified information – as to which persons found in the combat zone would be apprehended and detained. For these reasons, the Court should dismiss all of Plaintiffs' claims.

1. Claims for Wartime Reparations Present Classic Political Questions

Reduced to their essentials, Plaintiffs' claims seek reparations for the injuries that Plaintiffs allegedly suffered to their persons and/or property as a consequence of the actions of the United States in invading and occupying Iraq. To the extent that Plaintiffs' allegations of

abuse, as set forth in their Complaint, are in fact accurate, the CACI Defendants repeatedly have condemned the detainee abuse detailed in the media, and trust that the United States government will take appropriate action against those responsible for such abuse. CACI expresses no view as to the propriety of reparations over and above the billions of dollars committed by Congress for the rebuilding of Iraq, but stresses that the advisability of wartime reparations presents a political question to be determined by the political branches of government, and it is inappropriate for the courts to consider requests for wartime reparations asserted against either the United States or private entities that have supported the United States' efforts in Iraq.

American courts have long recognized that they have no role in assessing the propriety of reparations for wartime injuries. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796), the plaintiffs, citizens of Great Britain, sued American citizens to recover debts that had been confiscated by the Commonwealth of Virginia during the American Revolution. Writing for the Supreme Court, Justice Chase observed that recovery for wartime losses was a matter committed to diplomacy among the affected governments and was not a matter for private litigation:

> [T]he restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice.

Id.

Similarly, in *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. 315 (1870), the plaintiffs, noncombatant citizens of France, sought to recover from the United States for damages they suffered to their property as a result of the United States Navy's intentional destruction of the entire town of Greytown, Nicaragua. After beginning with the assumption "that the bombardment and destruction of Greytown was illegal and not justified by the law of

nations," *id.* at 544, the court *still* held that plaintiffs were entitled to no recovery because compensation for wartime injuries presents a classic political question properly resolved only through negotiations among the affected nations:

> [I]t will be readily seen that the questions raised are such as can only be determined between the United States and the governments whose citizens it is alleged have been injured by the injurious acts of this government. *They are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide.* They grew out of and relate to peace and war, and to the relations and intercourse between this country and foreign nations. They are political in their nature and character, *and under our system of government belong to the political departments of the government to define, arrange, and decide.*

Id. (emphasis added). The Supreme Court summarily affirmed on the grounds that the plaintiffs' claim was not "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," thereby reaffirming that such compensation decisions belong to the political branches and not to the courts. *Perrin v. United States*, 79 U.S. 315, 315 (1870). These cases establish that, from the earliest days of the Republic, the federal courts have recognized that they have no role in compensating individuals, whether the defendant is the United States or a private party, for injuries suffered as a result of the manner in which the United States wages war, even if the United States violated the law of nations through its warfighting tactics. Rather, the advisability of such compensation appropriately is determined through the diplomatic efforts of the political branches of government.

More recent cases have echoed this principle. For example, in *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 666-67 (N.D. Cal. 2002), the court held that claims against a bank for financial losses suffered by the plaintiff during World War II were reparations claims constitutionally committed to the political branches: "As an issue affecting United States

relations within the international community, war reparations fall within the domain of the political branches and are not subject to judicial review." *Id.* at 666 (internal quotations and citations omitted).

The *Zivkovich* court also rejected plaintiff's argument that his claim was not for reparations because it was asserted against a private bank:

> Plaintiff attempts to distinguish the instant action from actions for war reparations, arguing that he is not asserting claims for reparations but for bank restitution. This distinction is one without a difference. Beginning with the Versailles Treaty concluding World War I, the term "reparations" has been deemed to refer to "all the loss and damage to which . . . Governments and their nationals have been subjected as a consequence of the war imposed on them." Because here Plaintiff's claims stem from the conversion and use of property plundered during World War II, Plaintiff seeks to remedy a "loss and damage" he was subjected to as a consequence of war.

Id. at 666-67 (citations omitted) (omission in original); *see also In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1055 (N.D. Ill. 2004) ("[T]here are numerous cases where the federal courts have dismissed claims by private plaintiffs against private defendants on the basis of the political question doctrine. The majority of these cases arise in the context of reparations claims arising out of World War II."); *Anderman v. Fed. Repub. of Austria*, 256 F. Supp. 2d 1098, 1117 (C.D. Cal. 2003) ("[C]ourts have not hesitated to apply the political question doctrine based on the executive branch's foreign affairs power to cases in which private entities are defendants."); *Sarei*, 221 F. Supp. 2d at 1195 ("[W]hether defendants are liable on several of plaintiffs' claims turns on whether [Papua New Guinea] and/or its military violated international law. That the named parties are private entities does not change this fact.").[2]

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[2] *See also Gross v. German Found. Indus. Initiative*, 320 F. Supp. 2d 235, 254 (D.N.J. 2004) (dismissing World War II-era reparations claims against German companies).

Taken together, the cases cited above stand for the proposition that claims for compensation for injuries suffered as a consequence of war – whether asserted against governments or against private companies – present nonjusticiable political questions. These cases present political questions even when the claims involve intentional infliction of injury, and even when the claims involve credible allegations of some of the most heinous conduct imaginable, such as forced labor, slavery, sexual assault, and wartime plunder. Federal courts have reached this conclusion because, as discussed below, wartime compensation claims implicate several of the factors set out in *Baker v. Carr* as characteristic of political questions.

2. The Propriety of Reparations for Injuries Incurred in the Prosecution of War Is An Issue Textually Committed to the Political Branches

Claims seeking compensation for injuries allegedly suffered as a consequence of the manner in which the United States has conducted the war in Iraq are textually committed to, and historically resolved by, the political branches as part of their war and foreign affairs powers. As the Supreme Court observed:

> Since claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations' between the countries involved, there is a 'longstanding practice' of the national executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries.

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942), and *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). In *Garamendi*, the Court even noted that resolution of wartime claims against private parties is a function historically undertaken by the political branches and not by the courts. *Id.* at 416 ("Historically, wartime claims against even nominally private entities have become issues in international diplomacy . . . . As shown by the history of insurance confiscation mentioned earlier, untangling

government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.").

The historical commitment to the political branches of wartime reparations claims, even reparations claims against private entities, flows directly from the Constitution's commitment of matters of war and foreign policy to Congress and the President. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the President has "unique responsibility" for the conduct of "foreign and military affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (noting that Article II of the Constitution bests the President with a "vast share of responsibility for the conduct of our foreign affairs"); *Oetgen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative . . . ."); *Deutsch v. Turner Corp.*, 324 F.3d 692, 708-09 (9th Cir. 2003) (listing constitutional provisions committing war and foreign policy matters to the political branches); *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999) ("'[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] . . . the propriety of the exercise of that power is not open to judicial review.'" (quoting *Pink*, 315 U.S. at 222-23)); *Sarnoff v. Connally*, 457 F.2d 809, 809 (9th Cir. 1972) ("The conduct of foreign affairs is within the exclusive province of Congress and the Executive."); *Zivkovich*, 242 F. Supp. 2d at 668 (dismissing reparations claim because "the Constitution relegates issues of foreign policy to the political departments of the government"); *Alperin v. Vatican Bank*, 242 F.

Supp. 2d 686, 689-90 (N.D. Cal. 2003) (dismissing reparations claim because issue is textually committed to the political branches).[3]

Indeed, because compensation for wartime injuries is indivisible from the power to conduct war and foreign policy, it has been recognized for more than two centuries that such compensation claims belong to governments, not individuals, and are to be resolved on a government-to-government level without the interference of private litigation. *Ware*, 3 U.S. (3 Dall.) at 230; *Perrin*, 4 Ct. Cl. at 544; *see also Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (dismissing World War II-era forced labor claims against German company because "[c]laims for war reparations arising out of World War II have always been managed on a governmental level"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) ("The executive branch has always addressed claims for reparations as claims between governments."); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273 (D.N.J. 1999) ("Under international law claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen."); *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 769 (Ct. Fed. Cl. 2003) ("Claims for injuries for violations of

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[3] The Ninth Circuit's decision in *Deutsch*, 324 F.3d at 713 n.11, is not to the contrary. While dismissing the plaintiffs' claims on other grounds, the *Deutsch* court noted in a footnote that it disagreed with the district court's conclusion that the plaintiffs' claims presented a political question. The court came to this conclusion because the plaintiffs' reparations claims merely involved "the proper application of a treaty," and did not require the court to make policy judgments as to the propriety of reparations. *Id.* The *Deutsch* court reaffirmed, however, that "it is impermissible for a court to make policy related to foreign affairs." *Id.* Here, because there has been no treaty or executive agreement regarding reparations for injuries occurring in the Iraq conflict, the Court would be very much establishing foreign relations policy if it ruled on the propriety of reparations. *Deutsch* merely stands for the proposition that no political question would exist if the political branches resolved the reparations issue through treaty or executive agreement and the Court was asked simply to apply that agreement to Plaintiffs' claims.

international law are political questions to be decided between governments."), *aff'd*, ___ F.3d ___, 2004 WL 1780921 (Fed. Cir. 2004).

For these reasons, the Constitution's commitment to the political branches of the power to conduct war renders and foreign policy precludes judicial involvement in determining the propriety of monetary claims asserted by Plaintiffs for injuries they allegedly received as a result of the manner in which the United States prosecuted the war in Iraq.[4]

3. There Are No Judicially Discoverable and Manageable Standards for Evaluating Plaintiffs' Claims

Much of the evidence bearing on Plaintiffs' claims, and establishing Defendants' utter blamelessness with respect to those claims, likely will be impossible for the Court and the parties to discover. Because there are no judicially manageable standards for evaluating Plaintiffs' claims, the political question doctrine renders Plaintiffs' claims nonjusticiable. Any entitlement Plaintiffs might claim to compensation should be directed to the political branches, which are in a far better position to assess the facts surrounding each Plaintiff's claims and to make a policy determination as to the appropriateness of reparations.

The named Plaintiffs claim that they were illegally detained by the United States military, and they also purport to speak on behalf of thousands of putative class members who were supposedly illegally detained by the United States military. SAC ¶ 25 (alleging "arbitrary arrest

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[4] Moreover, because the Constitution vests the power to wage war and conduct foreign affairs in the political branches, adjudicating Plaintiffs' reparations claims would implicate several of the other concerns that the *Baker* Court found indicative of a political question. The Court's encroachment on the political branches' war powers would require the Court to make discretionary judgments on the merits of the United States' war policy (implicating the third *Baker* consideration), would demonstrate a lack of respect for the proper constitutional role of coordinate branches of government (implicating the fourth *Baker* factor), and could result in inconsistent statements regarding the United States' policy in Iraq, implicating the fifth and sixth considerations announced in *Baker*. *See Zivkovich*, 242 F. Supp. 2d at 668.

and detention"). Moreover, the named Plaintiffs allege that they, and the innumerable putative class members they purport to represent, were injured during their detentions by what Plaintiffs call the "Torture Conspirators," a group defined to include Defendants, their employees, and "certain government officials" who supposedly conspired to flout domestic and international laws governing the conduct of interrogations. SAC ¶¶ 77, 80, 103, 110, 115, 120, 127, 129, 131, 133, 135, 139. Plaintiffs also allege that each Defendant is liable for all of the wrongful acts of any other member of this so-called Torture Conspiracy. SAC ¶ 26. Thus, Plaintiffs seek to hold CACI liable for the acts of the United States military (certain of whose officials are supposedly part of this imaginary "Torture Conspiracy") in arresting and detaining the named Plaintiffs and the thousands of other members of the putative class.

Federal courts regularly have held that they lack judicially manageable standards for evaluating claims for wartime injuries that would require an extensive review of classified materials, or materials that are unlikely to be discoverable because of the "fog of war." *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."); *El-Shifa Pharm. Indus. Co. v. United States*, ___ F.3d ___, 2004 WL 1780921, at *19 (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."); *Anderman*, 256 F. Supp. 2d at 1112-13 (dismissing reparations claim because "there is a very real possibility that the parties might not be able to compile all of the relevant data, thus making any adjudication of the case both difficult

and imprudent"); *Alperin*, 242 F. Supp. 2d at 695 ("[T]here is a distinct possibility that the parties might not be able to compile all of the relevant information, this making any attempt to justify a ruling on the merits of an issue that will affect the nation difficult and imprudent" (quoting *Iwanowa*, 67 F. Supp. 2d at 484)); *Zivkovich*, 242 F. Supp. 2d at 668 (dismissing reparations claims in part based on court's "concern with . . . the evidentiary difficulties already evident in light of the time, place and manner in which the alleged conversion occurred").[5]

As one court in this Circuit has observed, "[i]n wartime, it would be inappropriate to have soldiers assembling evidence, collected from the 'battlefield.'" *Bentzlin*, 833 F. Supp. at 1495; *see also Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) ("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."). Indeed, for each and every member of the class, the parties would need access to each and every piece of evidence associated with that claimant's arrest and detention – much of which likely is highly classified – in order to assess the veracity of the claimant's assertion that his or her detention by the United States was unjustified. *Bentzlin*, 833 F. Supp. at 1497 (dismissing "friendly fire" suit against defense contractor because "[n]o trier of fact can reach the issue of manufacturing defect without eliminating other variables which necessarily involve political questions"). Because most, if not

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[5] The Ninth Circuit's decision is *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), is not to the contrary. In *Koohi*, the court held that the political question doctrine did not apply to claims arising from a single event – the erroneous downing of a single commercial plane. *Id.* at 1331. Recent decisions by courts in this Circuit have found *Koohi*'s political question analysis inapplicable to suits litigating wartime claims involving injuries incurred over a months-long period of time. *See Alperin*, 242 F. Supp. 2d at 693 n.9 (N.D. Cal. 2003). Moreover, the *Koohi* court's political question analysis did not permit the case to go forward, as the court correctly affirmed the dismissal of the plaintiffs' claims on preemption grounds. *Koohi*, 976 F.2d at 1337.

all, of the evidence relating to each detainees arrest and detention is likely highly sensitive and in the possession of the United States government, it also is likely that the United States will assert a state secrets privilege to prevent discovery of these materials. *See id.* at 1495 (noting impact of state secrets privilege on reparations cases). This is precisely the type of wartime claim that defies resolution through the judicial process.

C. Plaintiffs' State and Federal Tort Claims (Counts III-IX and XV-XXIII) Are Preempted

Plaintiffs have not joined the United States government or any of its officials as defendants in this case because they know that the United States and its employees are immune from suit. Fundamentally, Plaintiffs are using the artifice of an "upon information and belief" conspiracy in an effort to obtain recovery through the backdoor for injuries supposedly caused by the United States government's prosecution of the war in Iraq. Not surprisingly, precedent from both the Supreme Court and the Ninth Circuit foreclose evasion of the federal government's immunity through suits against government contractors such as CACI. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) ("To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." (alterations in original) (quoting *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977)).

1. Preemption is Appropriate in Areas of "Unique Federal Interests" in Order to Avoid a "Significant Conflict" With an Identifiable Federal Policy

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Court held that federal law preempted state law tort claims against the supplier of a military helicopter. In so holding, the Court stated that state law tort claims may be preempted by federal law when "'uniquely federal interests' are . . . committed by the Constitution and laws of the United States to federal

control." *Id.* at 504 (citations omitted). When "uniquely federal interests" are implicated by a tort suit, preemption is required when "a 'significant conflict' exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotations and citations omitted) (alteration in original).

Moreover, the Ninth Circuit has held that federal tort actions against government contractors may be preempted by the Federal Tort Claims Act, 28 U.S.C. § 1346(b) ("FTCA"), when the claim would fall within one of the exceptions to the FTCA if the claim were asserted against the United States government. *Koohi*, 976 F.2d at 1336 ("We have also previously held that those exceptions [to the FTCA] may preempt federal statutory tort actions [against government contractors].") (citing *McKay*, 704 F.2d at 444). Because CACI's provision of services to the United States government in support of the wartime efforts in Iraq implicate uniquely federal interests that would be frustrated through imposition of tort liability upon defendants, Plaintiffs' federal and state tort claims (Counts III-IX and XV-XXIII) are preempted and must be dismissed.

2. CACI's Provision of Services in Iraq Under Federal Government Contracts Implicates "Uniquely Federal Interests"

In *Boyle*, 487 U.S. at 505, the Supreme Court held that federal law preempted state law tort claims against a government contractor that manufactured and repaired military helicopters for the armed forces. As part of that inquiry, the Court held that "the civil liabilities arising out of the performance of federal procurement contracts" implicate uniquely federal interests for purposes of preemption analysis. *Id.* at 505-06. As a result, the Court held that federal law would preempt the state tort claims if the application of state tort law would cause a "significant

conflict" with an identifiable federal interest or would "frustrate specific objectives" of federal legislation. *Id.* at 507.[6]

If anything, the unique federal interest is even more pronounced in the present action than it was in *Boyle*. While *Boyle* involved the peacetime manufacture and repair of a helicopter that crashed during a training exercise off the Virginia coast, *id.* at 502, the present action involves a government contractor's provision of interrogators in a war zone in direct support of the United States military's war effort in Iraq. *See Hamdi*, 124 S. Ct. at 2640 (noting that arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'") (citing *Quirin*, 317 U.S. at 28). The foreign relations of the United States, including the exercise of the war-making power, is uniquely a federal prerogative over which the states have no permissible role. *Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Sarnoff*, 457 F.2d at 809 ("The conduct of foreign affairs is within the exclusive province of Congress and the Executive."); The Federalist No. 74 (Hamilton), at 447 (Clinton Rossiter ed. 1961) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."). Because Plaintiffs' tort claims implicate uniquely federal interests, they are preempted if the application of tort law would either significantly conflict with a federal interest or frustrate the objective of federal legislation.

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[6] In holding that federal law preempted tort suits against the manufacturer of the Aegis weapons system, the Ninth Circuit necessarily came to the same conclusion that the civil liabilities of government contractors implicate a uniquely federal interest. *Koohi*, 976 F.2d at 1336-37.

3. Federal Law Preempts Plaintiffs' State and Federal Tort Claims Because Application of Tort Law Would Significantly Conflict With Federal Interests and Frustrate the Operation of the FTCA

The FTCA abrogates the United States' sovereign immunity for certain tort claims. *See* 28 U.S.C. § 1346(b). The FTCA, however, provides several express exceptions to this waiver of sovereign immunity. *See* 28 U.S.C. § 2680. The Supreme Court has held that state tort actions against government contractors create a significant conflict with federal interests when state law would permit a tort suit to proceed against a contractor when the same claim would fall within an FTCA exception if the claim were asserted against the United States. *Boyle*, 487 U.S. at 511.

In *Boyle*, the Court noted that the "discretionary function" exception to the FTCA would bar a tort suit against the United States relating to the design of military equipment. *Id.* at 511-12. Given Congress's decision to prohibit the second-guessing through tort litigation of the "technical, military, and even social considerations" involved in the procurement of military equipment, *id.* at 511, the Court held that tort plaintiffs should not be permitted to evade Congress's will by suing a government contractor instead of the United States:

> It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

Id. at 512. Indeed, the *Boyle* Court held that permitting state tort suits would frustrate the FTCA's objectives because it would: (1) involve the judiciary in balancing "the trade-off between greater safety and greater combat effectiveness"; and (2) would ultimately place the financial burden of tort judgments on the United States because contractors would increase their contract prices to cover or insure against liability that Congress sought to avoid imposing on the United States government through explicit exceptions to the FTCA. *Id.* at 511-12.

For its part, the Ninth Circuit preempted tort suits against a defense contractor as being inconsistent with the objectives of the FTCA. In *Koohi*, 976 F.2d at 1336-37, the court held that state tort claims and federal claims under the Alien Tort Claims Act, 28 U.S.C. § 1350, asserted against a weapons system manufacturer were preempted with respect to a suit filed by the survivors of an Iranian passenger aircraft accidentally shot down by the United States Navy. The *Koohi* court determined that permitting state and federal tort suits against the defense contractor undermined the policies underlying Congress's enactment of the "combatant activities" exception to the FTCA because allowing such claims "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* at 1337. Similarly, in *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), the court held that tort claims against a defense contractor relating to deaths in the first Gulf War were preempted because "[t]he federal interests that exist in wartime would be frustrated by allowing state tort suits against government contractors that arise from wartime deaths even when plead as manufacturing defect claims." *Id.* at 1492.

Preemption of Plaintiffs' state and federal tort claims is required because – as in *Koohi* – prosecution of these claims frustrates operation of the combatants activities exception to the FTCA. Plaintiffs cannot bring these claims directly against the United States because Congress has determined through enactment of the combatant activities exception to the FTCA that assertion of such tort claims is inappropriate. Indeed, perhaps the best proof that Plaintiffs' claims are barred as against the United States is Plaintiffs' failure to name the United States as a defendant even though virtually all of the factual allegations relate to the manner in which the United States has waged the war in Iraq. By asserting claims against the private contractors that have supported the United States' war effort in Iraq, Plaintiffs are seeking to evade the

congressional determination that allegations relating to the United States' combat activities should not be the subject of tort litigation.

The combatant activities exception proscribes any claim "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Plaintiffs' Complaint alleges supposed wrongdoing not only by Defendants, but by elements of the United States military itself, in apprehending, detaining, and interrogating persons identified by the United States for detention during its occupation of wartime Iraq. The Ninth Circuit has held that the term "combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).[7] The detention of personnel in a war zone clearly qualifies as an activity taken in direct connection with armed hostilities.

In addition, the activities alleged in Plaintiffs' Complaint are alleged to have occurred in a "time of war." The phrase "time of war," as used in the combatant activities exception, does not require a congressional declaration of war. *Koohi*, 976 F.2d at 1333-34. The *Koohi* court observed that the first Gulf War constituted a "time of war" for purposes of the FTCA,[8] and squarely held that the United States' actions in flagging Kuwaiti ships during the Iran-Iraq war constituted a "time of war" for the United States. *Id.* at 1334; *see also Minns v. United States*,

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[7] In *Koohi*, 976 F.2d at 1333 n.5, the court reaffirmed the *Johnson* court's construction of the term "combatant activities" and added that "the firing of a missile in perceived self-defense is a quintessential combatant activity," even though the missile actually was fired at a civilian passenger plane that posed no threat to the armed forces. Indeed, the *Koohi* court found that the combatant activities exception to the FTCA required preemption of federal and state tort actions against a contractor who manufactured a Navy vessel's weapons systems, *id.* at 1337, conduct far more removed from actual combat than CACI's provision of interrogation services in the Iraqi combat zone.

[8] *Koohi*, 976 F.2d at 1334 ("Yet no one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq.").

974 F. Supp. 500, 506 (D. Md. 1997) (holding that the first Gulf War constituted a "time of war" for purposes of the combatant activities exception), *aff'd*, 155 F.3d 445 (4th Cir. 1998); *Clark v. United States*, 974 F. Supp. 895, 898 (E.D. Tex. 1996) (same); *Rotko v. Abrams*, 338 F. Supp. 46, 47-48 (D. Conn. 1971) (holding that Vietnam conflict constituted a "time of war" under the combatant activities exception), *aff'd*, 455 F.2d 992 (2d Cir. 1972). Therefore, the United States' invasion of Iraq certainly qualifies as a time of war for purposes of the combatant activities exception to the FTCA.

Plaintiffs have asserted tort claims based on a supposed conspiracy between Defendants and "certain United States officials." Compl. ¶ 25. However, Congress has expressed its determination, through the combatant activities exception, that claims involving the United States' combatant activities should not be permitted. The Supreme Court and the Ninth Circuit have held that "preemption [is] appropriate when imposition of liability on defense contractors 'will produce [the] same effect sought to be avoided by the FTCA exception.'" *Koohi*, 976 F.2d at 1337 (quoting *Boyle*, 487 U.S. at 511); *see also Bentzlin*, 833 F. Supp. at 1493 ("Congress determined that the government should not be punished for mistakes made during war. This purpose of the [combatant activities] exception similarly applies to government contractors . . . .)."[9] Because allowing tort suits involving combatant activities to go forward against defense contractors would invite judicial second-guessing of the United States' war-making decisions

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[9] The *Bentzlin* court also noted that tort law was not necessary to punish and deter government contractors for wrongful conduct relating to combat activities because "[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." *Bentzlin*, 833 F. Supp. at 1493. The United States is performing this oversight as we speak, oversight that the CACI Defendants welcome, with several government investigations either in progress or completed with respect to allegations of detainee abuse in Iraqi prisons.

and ultimately would increase the United States' defense costs through higher contract prices to reflect contractors' exposure to tort liability, *see Boyle*, 487 U.S. at 511-12,[10] Plaintiffs' federal and state tort claims are preempted as inconsistent with the purpose of the combatant activities exception to the FTCA.[11]

D. Plaintiffs' RICO Claims Fail as a Matter of Law

In a reckless effort to shoehorn their claims within the narrow confines of the RICO statute, Plaintiffs repeatedly have made up facts or hidden behind the shroud of "on information and belief" when confronted with myriad obstacles to asserting a RICO claim. Even after employing such disingenuous tactics, Plaintiffs' RICO claims remain patently lacking as a matter of law. As described in greater detail below, Plaintiffs' RICO claims fail to allege the requisite

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[10] Or, perhaps even more likely, the United States would find private contractors unwilling to accept contracts that might place private contractors in a role supporting the United States military in a combat zone, as private contractors would be inviting targets for plaintiffs who will sue the contractors in an attempt to recover for the war-making decisions of the United States military, as in the present action. In an analogous context, one court in this Circuit has observed that "[e]xposing government contractors to tort liability . . . would place undue pressure on manufacturers to act too cautiously, even when the national interest would be better served by expedient production than defect-free weapons." *Bentzlin*, 833 F. Supp. at 1493. The same reasoning applies to the provision of interrogator services needed by the United States military in a combat environment.

[11] In addition to the combatant activities exception, the discretionary function exception to the FTCA would apply here as well. *See Boyle*, 487 U.S. at 511 ("We think that 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 [the discretionary function exception to the FTCA]."). Similarly, the Supreme Court recently clarified that the "foreign country" exception to the FTCA retains sovereign immunity for all tort claims involving injuries occurring outside the United States, regardless of whether conduct within the United States is a proximate cause of such injuries. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754 (2004). Under the Ninth Circuit's reasoning in *Koohi*, Plaintiffs' tort claims against Defendants are preempted because, in addition to the combatant activities exception, both the discretionary function and foreign country exceptions to FTCA liability bar tort claims by Plaintiffs' against the United States. *See Koohi*, 976 F.2d at 1337 ("[P]reemption [is] appropriate when imposition of liability on defense contractors 'will produce [the] same effect sought to be avoided by the FTCA exception.'").

economic injury, pattern of racketeering activity, and the existence of an enterprise. Therefore, the Court should dismiss Plaintiffs' RICO claims.

Plaintiffs assert civil RICO claims on behalf of three named RICO Class Plaintiffs and a putative RICO subclass. In support of their claims, Plaintiffs allege in their RICO Case Statement ("RCS")[12] that that, incident to arrest, Defendants confiscated cash, gold, and jewelry belonging to the RICO Class Plaintiffs and in addition caused damage to the personal residences of two of them. RCS ¶¶ 4, 15. However, there is no allegation that the CACI Defendants had *any* role in arresting any of the Plaintiffs, or in seizing or damaging their property. Rather, Plaintiffs allege that the CACI Defendants conducted interrogations upon detainees after they had already been arrested by the United States military. RCS ¶ 5(f).

RICO does not provide recovery for the Plaintiffs' alleged injuries to their business or property. *See Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785-86 (9th Cir. 1992). Courts have repeatedly rejected attempts to use civil RICO as a vehicle for personal injury or other tort claims, noting that "RICO was 'intended to combat organized crime, not to provide a federal cause of action for treble damages and attorneys fees to every tort plaintiff.'" *Rodriquez v. Topps Co., Inc.*, 104 F. Supp. 2d 1224, 1125 (S.D. Cal. 2000) (quoting *Oscar*, 965 F.2d at 786). For the reasons stated below, this Court should dismiss Plaintiffs' RICO claims for lack of standing and for failure to state a claim upon which relief may be granted.

1. Plaintiffs Lack Standing to Bring a Civil RICO Claim

RICO's statutory standing requirement for a civil plaintiff is unambiguous: a plaintiff must suffer an injury to his "business or property by reason of a violation of section 1962 of this

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[12] A RICO Case Statement operates to amend the pleadings with respect to the RICO claims. L. Civ. R. 11.1(a).

chapter." 18 U.S.C. § 1964(c) (2000). "The plaintiff only has standing if, and can recover to the extent that, he has been *injured in his business or property by the conduct constituting the [§ 1962] violation . . . .*" *Sedima, S.P.R.L. v. Imrex Co., Inc.* 473 U.S. 479, 496-497 (1985) (emphasis added). Furthermore, the injury must be directly and proximately caused by the defendant's § 1962 violation. *Holmes v. Securities Investor Protections Corp.*, 503 U.S. 258, 268 (1992). Here, Plaintiffs have suffered no injury to their business or property as a result of the conduct they claim that Defendants committed. Therefore, they lack standing to assert a RICO claim against Defendants.

Plaintiffs allege a violation of § 1962(a). *See* RCS ¶¶ 1, 11. Section 1962(a) provides in pertinent part as follows:

> It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . in which such person has participated as a principal . . . *to use or invest* . . . any part of such income, or the proceeds . . . in acquisition . . . or the establishment or operation of, any enterprise which is engaged in interstate or foreign commerce.

18 U.S.C. § 1962(a) (emphasis). In order to assert a claim under § 1962(a), a plaintiff must "'allege facts tending to show that he or she was injured *by the use or investment of the racketeering income*,'" rather than from the alleged predicate acts themselves. *Nugget Hydroelectric, L.P. v. Pacific Gas & Electric Co.*, 981 F.2d 429, 437 (9th Cir. 1992) (emphasis added); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083 (9th Cir. 2000). Plaintiffs allege no such facts, instead claiming that the supposed § 1962(a) injury flowed to "competitors" of Defendants and "others in commerce," and implicitly, the United States taxpayers. *See* RCS ¶ 10. Accordingly, Plaintiffs lack standing to bring a claim for violation of § 1962(a).

Plaintiffs also allege a violation of § 1962(c). *See* RCS ¶¶ 1, 13. That subsection provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, *to conduct* or participate, directly or indirectly, in the conduct of *such enterprise's affairs through a pattern of racketeering* or collection of an unlawful debt.

18 U.S.C. § 1962(c) (emphasis added). To "conduct" the affairs of a RICO enterprise, the defendant "must have some part in *directing* those affairs." *Reeves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (approving an "operation or management" test) (emphasis added).[13] Plaintiffs have no standing to assert a violation of § 1962(c) because they show no injury to their business or property flowing from the CACI Defendants' supposed conduct of the enterprise ("Enterprise") that Plaintiffs describe. *See* RCS ¶ 6.

Plaintiffs allege an Enterprise that obtains "'intelligence' from detainees by both lawful and unlawful means." *Id.* ¶ 6(b). Plaintiffs further allege murder, attempted murder, threats to murder, threats of death, kidnapping, various types of sexual assault, and the recording, transportation, or importation of obscene materials, as predicate acts supposedly attributable to members of the "Enterprise." *See* RCS ¶ 5(b). Not a single one of these alleged predicate acts is alleged to have caused any injury to RICO Plaintiffs' *property or business*. *See* RCS ¶ 4. The only alleged injury to the RICO Plaintiffs' property or business occurred incident to arrest, *not* during the interrogation process. *See id.* Thus, Plaintiffs have no standing to assert a claim against any of the CACI Defendants for a violation of § 1962(c).

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[13] Indeed, other than the vague and general assertion that "[t]he Enterprise is managed and operated by executives from the CACI Defendants, Defendant Titan, and by certain government officials, including military officials," *see* RCS ¶ 6(b), Plaintiffs do not even bother to allege "conduct" of the Enterprise's affairs. It is clear that Plaintiffs offer no facts to support the "conduct" allegation, and that such pleading fails to meet the minimum fact pleading requirements of Fed. R. Civ. P. 8.

A plaintiff cannot sue under RICO for injuries from a RICO conspiracy unless he or she can show an injury to business or property that resulted from an overt act of racketeering. *Beck v. Prupis*, 529 U.S. 494, 507 (2000). Because Plaintiffs show no injury to business or property flowing from the alleged violations of either § 1962(a) or § 1962(c), Plaintiffs cannot show any injury to business or property flowing from a RICO conspiracy and, therefore, Plaintiffs lack standing to claim a violation of § 1962(d). Because Plaintiffs fail to allege any injury to their business or property as a result of conduct constituting a § 1962 violation, Plaintiffs' RICO claims must be dismissed. *See Sedima,* 473 U.S. at 496.

2. Plaintiffs Fail to Plead The Elements of Any RICO Violation

In addition, even if Plaintiffs had the requisite standing, they still have failed to state a legally cognizable RICO claim. Pleading any violation of § 1962 requires Plaintiffs to allege facts showing (*i*) that Defendants engaged in (*ii*) multiple acts of "racketeering activity," (*iii*) that constitute a "pattern" (*iv*) that directly and proximately caused injury to Plaintiffs' business or property, and (*iv*) the existence of a "RICO enterprise" that is distinct from the Defendants and distinct from any criminal conspiracy. *See* 18 U.S.C. §§ 1961(1), (3), (4) & (5); 1964(c); *Sedima,* 473 U.S. at 496-97; *Holmes,* 503 U.S. at 268; *Brady v. Dairy Fresh Prods., Inc.* 974 F.2d 1149, 1152 (9th Cir. 1992). Here, Plaintiffs fail to establish *any* of the required elements to state a cognizable RICO claim.

a. Plaintiffs Fail to Plead Any Predicate Act of "Racketeering Activity"

To allege a RICO claim, Plaintiffs must plead multiple predicate acts of "racketeering activity." *See* 18 U.S.C. § 1962. In their attempt to plead predicate acts, Plaintiffs allege that Defendants violated several specific sections of the California Penal Code and several specific sections of Title 18 of the United States Code, as well as "Article 23 of the Transitional

Administrative Law, and Iraqi laws in force under the Coalitional Provisional Authority." RCS ¶ 5(a). Racketeering activity, however, is expressly defined and delimited by statute, and Plaintiffs fail to plead within the strictures of the statute. 18 U.S.C. § 1961(1). Plaintiffs' failure to plead even a single act of racketeering activity is fatal to all of their RICO claims.

Certain common law crimes, such as murder, kidnapping, robbery, and threats of the same, as well as violations of state statutes prohibiting dealing in obscene matter may qualify as RICO predicate acts, but only if they are "*chargeable under State law* and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A) (emphasis added); *see also* 18 U.S.C. § 1961(2) (defining "State"). Yet, while Plaintiffs cite the California Penal Code, they do not even attempt to establish that any of the supposed misconduct that occurred *in Iraq* is, in fact, chargeable under California law. Furthermore, Plaintiffs do not plead as much as a single element of any alleged California law violation; they make no attempt to correlate any specific set of facts with any specific California statute, and in most cases do not even identify an alleged perpetrator. In *no* instance do Plaintiffs provide any facts connecting any of the CACI Defendants with any of the acts that allegedly violate the California Penal Code and qualify as predicate acts under RICO. *See* RCS ¶ 5(b).[14]

Violations of 18 U.S.C. §§ 2251, 2252, 2260, and 2315 also may qualify as RICO predicate acts, if the alleged facts establish the elements of the offense. *See* RCS ¶ 5(a). Here, however, it is obvious from a mere reading of the statutes cited that Plaintiffs do not allege facts that establish the elements of any of these offenses. *See* RCS ¶ 5(b). Again, Plaintiffs do not

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[14] Indeed, it would raise serious due process concerns if the Court were to hold that the California Penal Code applies extraterritorially to conduct allegedly committed in a foreign country by non-California residents against non-California residents.

correlate any specific set of facts with any specific federal prohibition, nor plead a single fact connecting the CACI Defendants with any alleged predicate act. *See* RCS ¶ 5(b).

Other alleged violations of specific statutes are baseless because they cannot qualify as RICO predicate acts under any circumstances. For instance, the offenses prohibited by Cal. Penal Code §§ 261 - 269 and 422.1 are simply not encompassed by RICO as predicate acts, and the offense prohibited by Cal. Penal Code§ 422 has an authorized punishment that does not exceed one year, and therefore does not qualify as a RICO predicate act. *See* 18 U.S.C. § 1961(1)(A); Cal. Penal Code § 261 - 269, 422, 422.1 (West 2000 & Supp. 2004). In addition, Plaintiffs' allegations of violations of the penal laws of Iraq, and the laws in force in Iraq under the Coalition Provisional Authority are not cognizable as RICO predicate acts, because they do not qualify as "chargeable under State law." *See* 18 U.S.C. § 1961(2) (defining "State," which term does not encompass foreign sovereigns or multinational governing coalitions).

Plaintiffs' attempt to plead predicate acts falls far below the standards required by Rules 8 and 12(b)(6), Fed. R. Civ. P., and cannot survive this motion to dismiss. *See, e.g., Nugget Hydroelectric,* 981 F.2d at 437-38 (dismissing claim where plaintiff's RICO allegations were "general, conclusory and vague"); *In re MDC Holdings Securities Litig.*, Civ. No. 89-0090-E, 1991 WL 537515, at *7 (S.D. Cal. July 2, 1991) (dismissing RICO conspiracy claim for conclusory pleading of elements without supporting facts). In sum, Plaintiffs do not sufficiently plead *any* RICO violation and accordingly, all the RICO claims must be dismissed.

b. Plaintiffs Fail to Plead a Pattern of Racketeering Activity

RICO Plaintiffs must allege facts that establish a "pattern" of racketeering activity. *See* 18 U.S.C. §§ 1962; 1961(5). Given that Plaintiffs fail to plead even a single predicate act of

racketeering activity, they necessarily fail to plead a "pattern" of racketeering activity. In addition, Plaintiffs fail to plead a "pattern" in other important respects.

To plead a pattern, Plaintiffs must establish that multiple predicate acts (*i*) are related and (*ii*) that they constitute continuity of racketeering activity or its threat. *See* 18 U.S.C. § 1961(5); *Sedima*, 473 U.S. at 496 n. 14; *H.J. Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 236, 240-42 (1989); *Howard v. Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000). Isolated or sporadic wrongdoing is *not* cognizable under RICO. *Sedima*, 473 U.S. at 496 n.14 (quoting S. Rep. No. 91-617, at 158) (emphasis added). Plaintiffs offer no facts capable of supporting a reasonable inference that the alleged predicate acts – if they even qualified as predicate acts under RICO – were anything other than isolated or sporadic.

In assessing continuity, courts have recognized that a pattern may be either close-ended or open-ended. *See Howard*, 208 F.3d at 750 (quoting *H.J. Inc.*, 492 U.S. at 241, 242). A closed-ended pattern consists of related predicate acts over a substantial period of time. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *H.J. Inc.*, 492 U.S. at 242. Alternatively, an open-ended pattern requires the real and present threat of continuing racketeering activity. *Id.* at 241.

Plaintiffs try to cover all bets with the naked assertion that "[t]he predicate acts of murder, attempted murder and threats of murder" commenced "as early as January 2002," and continue to date, *i.e.*, July 30, 2004. *See* RCS ¶ 5(f). Plaintiffs' unprincipled attempt to plead to the requirements of the law is betrayed not only by their own pleading, but by the historical (and indisputable) facts alleged. According to the Plaintiffs' list of predicate acts, the first alleged predicate act occurred in May 2003, not January 2002. *See* RCS ¶ 5(b). Moreover, by

definition, it is impossible that any alleged predicate act of racketeering affecting the RICO Plaintiffs or the proposed RICO Class occurred prior to April 2003. Plaintiffs define the putative Class, including the RICO subclass, as being comprised of persons who were mistreated while being detained "subsequent to the fall of the Hussein regime." SAC ¶¶ 2, 12, 13, 36 (a), (b), (c). It is a widely known historical fact that the Hussein regime did not fall until early April 2003; Baghdad fell on April 9, marking the collapse of the Hussein government. *See War Against Iraq: Baghdad Collapses*, San Diego Union-Tribune, Apr. 10, 2003, at A7, 2003 WL 6577208 ("Saddam Hussein's rule in Baghdad ended yesterday."). Thus, by their own class definition, Plaintiffs' allegations of predicate acts are limited to events taking place in or after April 2003.

Plaintiffs offer no factual allegations in support of their assertion that the supposed racketeering activities continue to date. *See* RCS ¶ 5(f). Under the prevailing circumstances, with the intense scrutiny of multiple ongoing investigations by various governmental and non-governmental agencies, and pending criminal proceedings against specific individuals, in the absence of factual support, this assertion cannot be taken as anything other than conclusory, baseless, and irresponsible. It should be discounted accordingly.

The specific factual allegations point to the conclusion that the complained-of conduct is exactly what the Supreme Court said did *not* constitute a "pattern" for RICO purposes: "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do *not* satisfy this [pattern] requirement." *H.J. Inc.*, 492 U.S. at 242 (emphasis added). Thus, Plaintiffs fail to allege a pattern of racketeering activity as required to support any RICO claim.

c. Plaintiffs Fail to Show a § 1962 Violation Directly and Proximately Caused Injury to Plaintiffs' Business or Property

A RICO plaintiff must demonstrate some direct relation between the injury asserted and the injurious conduct alleged. *Holmes*, 503 U.S. at 268. Plaintiffs do not demonstrate any causal

link between a violation of § 1962 and any injury to the RICO Plaintiffs' property or business. Plaintiffs do not show that they have been directly and proximately injured in their business either (*i*) by the Defendants' investment of racketeering proceeds in an enterprise or the use of racketeering proceeds to acquire an interest in, manage, or operate, an enterprise, or (*ii*) by the Defendants' conduct of the Enterprise through a pattern of racketeering activity. In fact, Plaintiffs do not even demonstrate that any of the alleged predicate acts, *see* RCS ¶ 5(b), caused any injury at all to RICO Plaintiffs' property or business, *see* RCS ¶ 4. Thus, by a wide margin, Plaintiffs fail to establish that a violation of § 1962 (which entails demonstrating far more than the commission of a single qualifying predicate act) directly and proximately caused an injury to a RICO Plaintiffs' business or property. The absence of any element of causation is fatal to Plaintiffs' RICO claims.

d. Plaintiffs Fail to Plead an "Enterprise"

To plead a RICO violation, Plaintiffs must allege facts to show the existence of a RICO "enterprise." *See* 18 U.S.C. §§ 1962 & 1961(4). An association-in-fact that serves as the RICO defendant's tool may constitute a RICO enterprise. *See* 18 U.S.C. § 1961(4); *United States v. Turkette*, 452 U.S. 576, 581-82 (1981); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162, 164 (2001). Such a RICO enterprise must (*i*) be comprised of persons associating for a common purpose of engaging in a particular course of conduct, (*ii*) function as a continuing unit rather than on an *ad hoc* basis, and (*iii*) have an ascertainable structure for decision-making and for controlling and directing its affairs. *Turkette*, 452 U.S. at 538; *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996). Further, such an enterprise must be "an entity that is separate and apart from the pattern of [racketeering] activity in which it engages," *Turkette*, 452 U.S. at 583, and "a 'conspiracy is not an enterprise for the purposes of RICO,'" *Simon*, 208 F.3d at 1083 (quoting

Chang, 80 F.3d at 1300). Plaintiffs' allegations, largely devoid of specific facts, do not satisfy these requirements and therefore Plaintiffs' RICO claims fail.

While alleging that "Defendant Titan and the CACI Defendants are corporate entities that, together with certain government officials, comprise the Enterprise," Plaintiffs do not flesh out this skeleton pleading with facts. *See* RCS ¶ 6(c). Required to describe the purpose and function of the enterprise, Plaintiffs allege, implausibly, that the "central purpose of the Enterprise is to increase the United States' demand for the non-governmental professionals to assist the United States' intelligence gathering efforts." RCS ¶ 6(b); *see also* RCS ¶ 5(g). Directed to describe the structure of the enterprise, Plaintiffs completely miss the point, offering a description of the three-person interrogation teams, *see* RCS ¶ 6(b), and failing to provide any description whatsoever of the structure of the management and operation of the alleged Enterprise entity, the affairs of which Plaintiffs must show are conducted "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Plaintiffs' bald assertions notwithstanding, Plaintiffs do not in any way describe – with facts – the very existence of the alleged Enterprise or its structure, management or operation.

To establish that the alleged Enterprise is distinct from the criminal activity alleged, Plaintiffs repeatedly assert that the Enterprise conducts legitimate as well as illegal business. *See* RCS ¶¶ 6(b), 7. However, the only legitimate business Plaintiffs posit is exactly the same "business" as the "business" supposedly conducted illegally. Plaintiffs' own allegations demonstrate the circularity and hypothetical nature of their pleading:

> The Enterprise conducts legitimate business in Iraq, other foreign countries, and in the United States. For example, discovery will likely reveal that in some instances the Enterprise conducted certain interrogations in Iraq in a lawful manner.

RCS ¶ 6(b).

> The Enterprise operated both legally and illegally to obtain intelligence from detainees .... To the extent discovery reveals that an Enterprise [interrogation] "team" conducted an interrogation in a lawful manner ... the Enterprise's daily activities may have been lawful. However, to the extent an Enterprise "team" conducted an interrogation in an unlawful manner, the Enterprise is part of the Torture Conspiracy.

RCS ¶ 8. Extending this logic then, presumably, on the days a member of the team participated in lawful interrogations, he or she was part of the legitimate business of the Enterprise and on the other days, part of the Torture Conspiracy. Plaintiffs do not describe an Enterprise that is distinct from the criminal activity in which it engages; they merely allege that the persons acting for the alleged Enterprise sometimes act lawfully and sometimes act unlawfully in carrying out the Enterprise's business.

Based on the *facts* alleged, it is clear that the alleged Enterprise is no more than a hypothetical construct. Plaintiffs allege no facts to show that any Enterprise actually exists or ever did. The only *fact* reflected in the allegations attempting to establish the existence and operation of a RICO enterprise is the fact that the law requires such pleading and the Plaintiffs conjured up a hypothetical construct.

e. Plaintiffs Fail to Plead a Conspiracy Pursuant to 18 U.S.C. § 1962(d)

It is unlawful for "any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [§ 1962]." 18 U.S.C. § 1962(d). Plaintiff's failure to plead the requisite elements of a substantive violation of RICO necessarily means that Plaintiffs cannot successfully plead a conspiracy to violate RICO, and Plaintiffs' RICO conspiracy claim fails on that account. *See Simon,* 208 F.3d at 1084; *Wagh v. Metris Direct, Inc.*, 363 F.3d 821, 831 (9th Cir. 2003)

Even if Plaintiffs had sufficiently pleaded a substantive violation of RICO, the conspiracy claim fails for other reasons.

"To state a claim for conspiracy to violate RICO, 'the complaint must allege some *factual basis* for the finding of a *conscious agreement* among the defendants.'" *Sebastian Int'l, Inc. v. Russolillo,* 186 F. Supp. 2d 1055, 1068 (C.D. Cal. 2000) (quoting *Hecht v. Commerce Clearing House*, 897 F.2d 21, 26 n.4 (2d Cir. 1990) (emphasis added)). Plaintiffs must plead facts demonstrating that the partners in the criminal plan agreed to pursue the same objective by criminal means, which, if executed, would satisfy all of the elements of a substantive RICO violation. *Salinas v. United States*, 522 U.S. 52, 63, 65 (1997).

Plaintiffs fail completely to allege facts in support of their conspiracy claim. Plaintiffs assert that the Corporate Defendants recruited nationally, and that the job postings sought males willing to work in a harsh environment as part of a civil-military team in an unstructured environment" and "revealed" that applicants "must undergo a favorable U.S. Army Counterintelligence screening interview." *See* RCS ¶ 14. In particular, Plaintiffs allege that the CACI Defendants recruited persons for the position of Intelligent Analyst, whose duties were expected to include "[i]nterfac[ing] with . . . [other] intelligence organizations to fully prepare interrogation team [sic] for exploitation of detainees." *Id.* Plaintiffs further allege that civilian contractors did in fact work with military personnel to conduct interrogations, and that some of the interrogations supposedly involved violations of law. *See id.* These so-called facts are simply incapable of supporting an inference of a conspiracy attributable to the CACI Defendants.

For all of these reasons, the Court should not countenance Plaintiffs' obvious effort to contort their claims to fit within a RICO statute that is not intended to encompass Plaintiffs' claims. As such, the Court should dismiss Plaintiffs' RICO claims.

E. Plaintiffs' Alien Tort Claims (Counts III-IX) Must Be Dismissed

Plaintiffs' claims asserted under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, must be dismissed for several reasons.

First, because Plaintiffs seek reparations for injuries supposedly inflicted upon them as part of the United States' prosecution of the war in Iraq, Plaintiffs' claims present a nonjusticiable political question. *See* Section II.B, *supra*.

Second, Plaintiffs' state and federal tort claims, including their ATCA claims, are preempted as inconsistent with the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j). Indeed, in *Koohi*, the Ninth Circuit specifically dismissed tort claims brought against a defense contractor under ATCA as preempted where the same claims would be barred by the combatant activities exception to the FTCA if asserted directly against the United States. *Koohi*, 976 F.2d at 1336 ("We have also previously held that those exceptions [to FTCA liability] may preempt federal statutory tort actions.").

Third, even if claims asserted under ATCA were neither preempted nor presented nonjusticiable political questions, Plaintiffs' ATCA claims still fail as a matter of law because, for the reasons set forth below, Plaintiffs' fail to satisfy the strict standards for establishing a new private tort action under ATCA.

1. ATCA Permits Assertion of New Tort Claims Only in Narrowly Prescribed Circumstances

In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004), the Court held that ATCA "is a jurisdictional statute creating no new causes of action." Rather, ATCA "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* at 2754. Indeed, at the time Congress enacted ATCA, the common law recognized only three violations of the law of nations as being both definite and actionable by

private parties under ATCA: (1) offenses against ambassadors; (2) violations of safe conduct; and (3) individual actions arising out of piracy or prize captures. *Id.* at 2759 (noting that "some, but few, torts in violation of the law of nations were understood to be within the common law"); *see also id.* ("'[O]ffences against this law [of nations] are principally incident to whole states or nations' and not individuals seeking relief in court." (quoting 4 *Blackstone's Commentaries* 68)).

Thus, the Supreme Court counseled that courts should exercise "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by [ATCA]." *Id.* at 2762. The Court identified five factors that should cause federal courts to exercise restraint in considering whether to open federal courts for private rights of action based on the law of nations:

> (1) At the time of ATCA's enactment, the common law was perceived as the process of discovering preexisting law rather than making new law.
>
> (2) The federal courts' practice "to look for legislative guidance before exercising innovative authority over substantive law."
>
> (3) The fact that the Court "has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."
>
> (4) "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."
>
> (5) The absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial scrutiny."

Id. at 2762-63. Indeed, the *Sosa* Court emphasized that these five factors "argue for great caution in adapting the law of nations to private rights." *Id.* at 2764.

Claims arising out of the manner in which the United States wages an external war are particularly inappropriate candidates for the creation of private causes of action under ATCA. Claims arising out of war have always been resolved on a government-to-government basis, and allowing private causes of action would unreasonably infringe on the political branches' constitutional role to establish American foreign policy. Therefore, the Court should not open the doors of the federal courts for the resolution of wartime reparations claims through private litigation.

a. Congress Has Expressed an Intent Not To Have Wartime Claims Litigated in Federal Tort Actions

Two of the five considerations identified by the *Sosa* Court as requiring judicial caution before recognizing private rights of action under ATCA 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." *Id.* at 2762-63. Second, the Court noted an absence of any mandate from Congress to recognize and define new causes of action under ATCA. *Id.* at 2763. With respect to private tort claims arising out of the manner in which the United States has prosecuted a war, congressional intent could not be clearer that such claims should not be resolved through private causes of action.

As described in greater detail in Section II.C, *supra*, one of the very few exceptions to Congress's waiver of sovereign immunity under the FTCA is the "combatant activities" exception, which continues to prohibit private tort suits against the United States for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). The combatant activities exception evinces Congress's determination that claims for injuries suffered in wartime are not the appropriate subject of

private tort litigation. Indeed, the Ninth Circuit has explicitly recognized this principle in holding that claims asserted under ATCA against a defense contractor were preempted by the combatant activities exception to FTCA, as Congress's determination that such tort claims should not proceed would be undermined if claimants could instead file suit against defense contractors. *Koohi*, 976 F.2d at 1336-37. Consistent with the Ninth Circuit's decision in *Koohi*, the Court should respect Congress's determination that private rights of action should not be recognized for alleged injuries arising out of the manner in which the United States conducts war. *See also Sosa*, 124 S. Ct. at 2765 (noting that Congress can remove causes of action from ATCA jurisdiction "explicitly, or implicitly by treaties or statutes that occupy the field").

b. Recognizing Private Causes For Wartime Injuries Would Reverse Two Centuries of Law to the Contrary

Since the earliest days of the Republic, claims of injuries as a result of the conduct of war have belonged to the nation of which the injured party is a citizen, and could not be asserted through a private cause of action. *See Ware*, 3 U.S. (3 Dall.) at 230 ("[T]he restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; . . . they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice."); *Perrin*, 4 Ct. Cl. at 544; *Frumkin*, 129 F. Supp. 2d at 376 ("Claims for war reparations arising out of World War II have always been managed on a governmental level."); *Iwanowa*, 67 F. Supp. 2d at 485 ("The executive branch has always addressed claims for reparations as claims between governments."); *Burger-Fischer*, 65 F. Supp. 2d at 273 ("Under international law claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen."); Restatement (Third) of Foreign Relations Law of the United States § 713 cmt. a (1987) ("In principle, the responsibility of a state [for injuries to nationals of

other countries] is to the state of the alien's nationality and gives that state a claim against the offending state. The claim derives from injury to an individual, but once espoused it is the state's claim, and can be waived by the state.").

The discretion to resolve wartime reparations claims historically has been the unquestioned prerogative of the political branches, and has been accomplished on a government-to-government level. As a result, it would inappropriately impinge on the political branches' exclusive role in resolving wars and setting the United States' foreign policy for the judiciary to disrupt two centuries of foreign policy norms by allowing private litigants to circumvent this procedure by asserting claims under ATCA. *See Sosa*, 124 S. Ct. at 2762-63.

2. Plaintiffs Have Not Properly Exhausted Their Remedies

The *Sosa* Court commented favorably on an argument presented by the European Commission that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other for a such as international claims tribunals." *Sosa*, 124 S. Ct. at 2766 n.21. Thus, even if Plaintiffs' claims belonged to them and not to the Iraqi government, they would have to demonstrate an exhaustion of remedies before being permitted to proceed with their claims against Defendants. In the absence of evidence that they have exhausted the administrative remedies available to them, including resolution of any administrative claim against the United States, the Court should dismiss Plaintiffs' ATCA claims.[15]

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[15] The reason why Plaintiffs made no effort to pursue administrative claims is clear, as plaintiffs' counsel filed this suit not in a good-faith effort to obtain recovery, but rather for the sole purpose of obtaining discovery from the United States concerning its activities in Iraq, with Defendants being mere pawns in plaintiffs' counsel's political crusade.

3. Plaintiffs' ATCA Claims Lack the Required Definiteness

In *Sosa*, the Supreme Court made clear that the *only* violations of the law of nations that conceivably could qualify as a cognizable tort under ATCA are those that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to" the few torts understood as authorized under ATCA at the time of the statute's enactment. *Sosa*, 124 S. Ct. at 2761-62. Plaintiffs have not made any effort to define the scope of the seven new "law of nations" torts that they ask this Court to recognize as being not only actionable, but actionable in a wartime setting. This requirement of definiteness is a necessary component of any ATCA cause of action, and Plaintiffs' failure to offer a defined scope of their proffered tort claims requires their dismissal. *Id.*

Moreover, even if Plaintiffs bothered to offer a defined scope of their new ATCA claims (and even if wartime reparations claims were actionable under ATCA), Plaintiffs' claims cannot overcome the considerations announced by the Supreme Court in *Sosa* as requiring caution in recognizing new tort claims under ATCA. For example, with respect to Count III (alleging "Torture" as an ATCA claim), Congress already has weighed in on the extent to which claims of torture should be cognizable federal tort claims in enacting the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. In that statute, Congress created a private cause of action for certain victims of torture, but only for victims of torture under color of law "of any foreign nation." *Id.* § 2(a)(1). Thus, in likely recognition that Congress and the Executive were the proper entities to resolve any claims that torture occurred under color of United States law, Congress expressly excluded such claims from the private cause of action it created. Given the Supreme Court's admonition in *Sosa* that private causes of action generally should be created by

Congress, *Sosa*, 124 S. Ct. at 2762-63, the Court should respect Congress's judgment in establishing the scope of cognizable claims of torture.[16]

Plaintiffs' other ATCA causes of action are equally flawed. Plaintiffs' "Cruel, Inhuman, or Degrading Treatment" claim (Count V) has already been rejected by a court in this Circuit as failing to state a cognizable ATCA claim. *See Sarei*, 221 F. Supp. 2d at 1163. With respect to Count VI (Enforced Disappearance), this claims is not only vague and undefined, but not one of the Plaintiffs alleges facts relating in any way to this cause of action. The Supreme Court already has rejected "Arbitrary Detention" (Count VII) as a cognizable claim under ATCA. *See Sosa*, 124 S. Ct. at 2768-69. "Crimes Against Humanity" (Count IX) is a cause of action that involves the persecution of an entire nationality, religion or other definable population, *Sarei*, 221 F. Supp. 2d at 1149, and Plaintiffs have not alleged any facts supporting such a claim against Defendants. Plaintiffs' "War Crimes" cause of action (Count VIII) is vague and undefined in the extreme, and apparently purports to create a tort action for the violation of any treaty relating in any way to the conduct of war. SAC ¶¶ 237-38. Thus, even if ATCA could create tort actions out of war reparation claims, in derogation of two centuries of American law, the specific claims asserted here are insufficiently defined or otherwise inappropriate candidates for the creation of a private cause of action under ATCA.

F. Plaintiffs' "Constitutional" Causes of Action (Counts XI, XII, and XIII) Fail to State a Claim

Plaintiffs, as noncitizens, allege that Defendants – private parties all – somehow violated *their* constitutional rights under the Fourth, Fifth, Eighth, and (perhaps most implausibly)

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[16] Similarly, Count III asserts a claim based on "summary execution." Again, in enacting the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, Congress limited causes of action relating to "extrajudicial killing" to acts undertaken with the actual or apparent authority of "any foreign nation." *Id.* § 2(a)(2).

Fourteenth Amendments to the United States Constitution. Like the other claims in Plaintiffs' complaint, these so-called constitutional claims present nonjusticiable political questions and should be dismissed on that basis. *See* Section II.B, *supra*. Beyond their patent nonjusticiability, these claims fail as a matter of law for several reasons. First, aliens do not have rights under the United States Constitution for acts occurring outside of the United States. Second, Plaintiffs' assertion in Count XII of a claim under the *Fourteenth* Amendment betrays a fundamental misunderstanding of constitutional structure, as that amendment imposes obligations upon *state* governments and there is no allegation whatsoever that any state government has had any interaction with Plaintiffs in Iraq.

1. As Aliens With No Connection to the United States, Plaintiffs Have No Constitutional Rights to Invoke With Respect to Actions Taking Place in Iraq

The Bill of Rights is a compact between the United States government and its people, and establishes certain rights to be enjoyed by the American people vis-à-vis the United States government and, in certain cases, state and local governments. *See Ross v. McIntyre*, 140 U.S. 453, 464 (1891) ("By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits."). Yet, Plaintiffs, who have undertaken none of the obligations of United States citizenship or domicile, ask this Court to rule that the entire world is bestowed with the rights set forth in the United States Constitution as against private contractors working for the United States government. However, both the Supreme Court and the Ninth Circuit have held that the constitutional rights set forth in the Bill of Rights do not extend to aliens lacking a significant connection to the United States.

While observing that a noncitizen located in the United States possesses certain constitutional rights, the Supreme Court in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), made

clear that those rights are dependent on the alien's identification with the United States through his presence in this country:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. . . .
>
> But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.

Id. at 770-71.

Consistent with *Johnson*, the Ninth Circuit has flatly observed in connection with the Eighth Amendment that "the Constitution itself does not apply to aliens whose claims arise outside the United States." *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1476 n.12 (9th Cir. 1994); *see also Ross*, 140 U.S. at 464 ("The constitution can have no operation in another country.").[17] Similarly, the Supreme Court has held that aliens have no Fourth Amendment rights with respect to conduct occurring outside the United States' borders,

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[17] Indeed, this result is the natural outgrowth of the Supreme Court's rulings in the *Insular Cases* and other cases that not every provision in the Constitution applies even in insular possessions over which the United States exercises sovereign power. *See Verdugo-Urquidez*, 494 U.S. at 268; *Balzac v. People of Porto Rico*, 258 U.S. 298, 304-05 (1922) (holding that constitutional right to jury trial does not apply, even in favor of United States citizens, "to territory belonging to the United States which has not been incorporated into the Union"); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding Fifth Amendment grand jury right inapplicable in Philippines); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that constitutional right to jury trial does not apply in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903) (holding that rights to jury trial and grand jury indictment inapplicable in Hawaii). Given that United States citizens may not enjoy all of their constitutional rights when located in certain United States territories, it makes perfect sense that an alien would not enjoy such rights when on another country's soil.

United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990), and has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269 (citing *Johnson*, 339 U.S. at 763).

All of the actions that Plaintiffs assert violated "their" constitutional rights are alleged to have occurred within the sovereign nation of Iraq during the United States' temporary occupation of that country. Because Iraq is not part of the United States' sovereign territory, much less part of the United States itself, aliens present in Iraq are not entitled to claim the benefit of the constitutional rights that are bestowed upon Americans by virtue of the Bill of Rights.[18] Therefore, all of Plaintiffs' "constitutional" claims fail as a matter of law and must be dismissed.

2. Plaintiffs' Fourteenth Amendment Claim Fails for the Additional Reason that the Fourteenth Amendment Creates Rights Only Vis-à-Vis State Governments

In Count XII of the Complaint, Plaintiffs inexplicably allege that Defendants somehow violated Plaintiffs' *Fourteenth* Amendment rights. By its plain terms, the Fourteenth Amendment imposes obligations only on *state* governments. *See Dist. of Columbia v. Carter*,

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[18] The Supreme Court's recent holding in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), that certain alien detainees at Guantanamo Bay, Cuba can assert a statutory habeas corpus petition does not affect the result here. First, that decision rests on a construction of the federal habeas corpus statute, not upon constitutional grounds. Moreover, in finding a statutory habeas right for the Guantanamo detainees, the Court noted that the detainees there were "held in Executive detention for more than two years in territory *subject to the long-term, exclusive jurisdiction and control of the United States.*" *Id.* at 2698 n.15 (emphasis added). The degree of United States control over Guantanamo Bay, which the *Rasul* Court described as "complete" and "permanent," *id.* at 2691 & n.2, stands in stark contrast to the United States' temporary assertion of military control over Iraq in the context of a short-term wartime occupation. Indeed, the United States' occupation of Iraq is more temporary than its years-long occupation of post-World War II Germany, an exercise of control that the Supreme Court held did not confer constitutional rights upon aliens imprisoned there. *See Johnson*, 339 U.S. at 785. Simply put, constitutional rights must flow *either* from United States citizenship *or* the presence of an alien in United States territory, and Plaintiffs satisfy neither of these criteria.

409 U.S. 418, 420 (1973) (holding Fourteenth Amendment inapplicable to the D.C. government). Plaintiffs do not allege that a state or local government has had any role in Iraq. Thus, Plaintiffs could not maintain a Fourteenth Amendment claim against Defendants even if Plaintiffs actually possessed Fourteenth Amendment rights with respect to conduct occurring in Iraq.

G. Plaintiffs' "Geneva Conventions" Claim (Count X) Fails as a Matter of Law

In Count X, Plaintiffs purport to state a cause of action under the Third and Fourth Geneva Conventions. However, the Geneva Conventions are not self-executing, and redress for supposed Geneva Convention violations are addressed between and among the signatory parties, and not through private litigation. *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2633 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (opinion of Bork, J.); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). Federal courts repeatedly have held that the Geneva Conventions do not create a private right of action and that claims asserted under the Geneva Conventions are subject to dismissal on that basis. *See Hamdi*, 316 F.3d at 468; *Tel-Oren*, 726 F.2d at 808-09 (opinion of Bork, J.); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.16 (D.N.J. 1999); *Handel*, 601 F. Supp. at 1425. Because Plaintiffs are not entitled as private litigants to assert claims under the Geneva Conventions, the Court must dismiss Count X of the Complaint.

H. By Its Plain Terms, the Religious Land Use and Institutionalized Persons Act Does Not Apply to CACI or to Prisons in Iraq

In Count XIV, Plaintiffs allege that defendants violated § 2000cc-1 of Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), which provides in pertinent part:

> 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 this title* . . . .

Id. § 2000cc-1 (emphasis added). With respect to § 2000cc-1, "government" is defined as:

> (i) a *State, county, municipality*, or other governmental entity created under the authority of a *State*;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of *State* law . . . .

42 U.S.C. § 2000cc-5(4) (emphasis added). Thus, § 2000cc-1 regulates the conduct only of state and local governments and persons acting under color of state law.

If that were not enough, § 2000cc-1 regulates only activities in "institutions" and specifically points the reader to 42 U.S.C. § 1997 for the appropriate definition of that term. Section 1997 defines an "institution" as "any facility or institution . . . *which 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) (emphasis added). In essence, plaintiffs have sued CACI under a statute regulating the manner in which "governments" operate "institutions" when the definitions contained in the statute itself exclude CACI from the definition of "governments" and exclude Iraqi prisons from the definition of "institutions." Therefore, Count XIV must be dismissed.

I. Plaintiffs' Claim for Alleged Violations of United States Contracting Laws (Count XXV) Fails to State a Claim

Perhaps the most extreme example of Plaintiffs' hubris, in a Complaint filled with them, is their assertion that they, as aliens, should be able to direct the contracting policies of the United States government. In Count XXV, Plaintiffs claim an entitlement to litigate whether the CACI Defendants violated the "laws governing contracting with the United States" and claim an

entitlement to ask this Court to prohibit the United States – a nonparty, by the way – from awarding any contracts to the CACI Defendants. This claim fails for a myriad of reasons.

The most obvious defect in Count XXV is that the Complaint fails to identify the manner in which the CACI Defendants supposedly violated the contracting laws of the United States. While Plaintiffs make the bald assertion that "Defendants violated the United States Federal Acquisition Regulations, the United States Truth in Negotiations Act, the United States Cost Accounting Standards, and other laws and regulations that govern the placement and implementation of contracts," SAC ¶ 319, the Court will not find a single paragraph in the Complaint that describes how the CACI Defendants supposedly violated these statutes and regulations, or even a statement as to which provisions in these voluminous documents the CACI Defendants supposedly violated. All the Court is left with is a conclusory statement that Defendants in some undisclosed manner violated unidentified provisions in United States statutes and/or regulations, including "other laws and regulations" that Plaintiffs apparently would identify at some later date. SAC ¶ 319. Bare legal conclusions such as these do not come close to satisfying the requirement that Plaintiffs state facts sufficient to support their claims. *Ove*, 264 F.3d at 821 ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.").

Moreover, even if Plaintiffs had bothered to allege specific violations of federal contracting regulations, it is difficult to see how they would have standing to assert such a claim. Article III of the United States Constitution requires that a plaintiff "have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," for a federal court to assert jurisdiction over the suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Abstract injury is not

enough" to sustain federal jurisdiction. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219 (1974). Here, Plaintiffs have not only failed to identify the particular statutory or regulatory provisions that Defendants supposedly violated, but they have failed to explain how they suffered an injury *as a result of such violations*. Indeed, as aliens, Plaintiffs could not even seek to assert taxpayer standing over these undisclosed alleged violations of law. Because Plaintiffs have not identified a causal connection between supposed violation of contracting laws and any injuries they allegedly suffered, and because, in any event, aliens should not be permitted to direct the contracting policy of the United States, Plaintiffs lack standing to assert this novel claim.

Finally, Count XXV should be dismissed for failure to join an indispensable party. *See* Fed. R. Civ. P. 19(b). Plaintiffs seek an order that effectively prohibits the United States from entering into contracts with the CACI Defendants as well as Titan. Since such an order to dictate to the United States government whether it can enter into future contracts with Defendants, the United States is an indispensable party to Plaintiffs' claim if, of course, Plaintiffs had standing and bothered to identify the provisions of federal contracting law that Defendants supposedly violated. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002) (reaffirming "the fundamental principle [that] a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract."); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999) ("[A] district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement."); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease

or a contract, all parties who may be affected by the determination of the action are indispensable.").

III. CONCLUSION

Plaintiffs' claims ask this Court to resolve issues that are properly reserved to the political branches of the United States government, essentially asking this Court to serve as a one-person reparations committee. Because Plaintiffs' claims are legally insufficient, the Court should dismiss the Complaint in its entirety. Moreover, because amendment cannot cure the flaws in the Complaint, the Court's dismissal should be with prejudice and without leave to replead.

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