IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GERT JANNES KUIPER, *Plaintiff*, v. MARIO ADALBERTO REYES MENA, *Defendant.*	Civil Action No. 1:24-cv-01785-RDA-LRV

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, STAY

Pursuant to Local Civil Rule 7(F) and Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(b)(7), Defendant Mario Adalberto Reyes Mena ("Mr. Reyes Mena") submits this memorandum of law in support of his Motion to Dismiss, or Alternatively, Stay (ECF 22).

Pursuant to Federal Rule of Civil Procedure 44.1, Mr. Reyes Mena provides notice that this pleading and the accompanying declaration includes citations to the laws of El Salvador.

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I. INTRODUCTION

The Torture Victim Protection Act ("TVPA" or "Act")[1] was enacted to provide a federal cause of action to those who are tortured or killed abroad by warlords, state sponsored terrorists, or renegade officials.[2] The Act was not meant to convert U.S. district courts into international tribunals to evaluate the propriety of military operations conducted by foreign governments that are recognized by the United States. Plaintiff, a Dutch citizen residing in the Netherlands, wants to use the TVPA for that improper purpose. In 1982, a decade before the TVPA was enacted, Plaintiff's brother died in a crossfire between a Salvadoran military patrol and armed guerillas in a hostile area. The alleged events took place entirely in El Salvador and during the Salvadoran civil war. Then-Colonel Reyes Mena of the Salvadoran Army was not present at the crossfire, yet Plaintiff wants to hold him accountable for allegedly being present in a meeting in which the military operation was planned.

Mr. Reyes Mena is 85 years old and currently suffers from chronic physical health problems that have required repeated hospitalization and emergency treatment. In 1984, he moved from El Salvador to the United States to serve as a military attaché to the Salvadoran embassy in Washington D.C. He later received a prominent role with the Inter-American Defense Board in D.C. After his diplomatic posting ended, Mr. Reyes Mena stayed in the United States and became a U.S. citizen in 1996. Mr. Reyes Mena stopped visiting El Salvador when the COVID pandemic hit. He has not returned to El Salvador since, due to his physical health problems.

[1] 28 U.S.C. § 1350, note. The TVPA establishes a federal cause of action where "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation … subjects an individual to torture … or extrajudicial killing." *Id.* at note, § 2(a).

[2] *Doe 1 v. Buratai*, 318 F. Supp. 3d 218, 236 (D.D.C. 2018) ("[T]he [TVPA] imposes liability on true outlaws … but not individuals whose conduct is authorized [by their government].").

Before his diplomatic posting in D.C., Mr. Reyes Mena served as a colonel in the Salvadoran Army. In the 1980s, El Salvador was engulfed in a civil war between the Salvadoran government—backed by the United States—and the Farabundo Martí National Liberation Front ("FMLN"), a radical left-wing organization backed by Fidel Castro and the then-Soviet Union. In 1982, then-Colonel Reyes Mena was the commander of the Fourth Infantry Brigade ("Fourth Brigade"), which was stationed in the town of El Paraíso. The Fourth Brigade patrolled the area where the crossfire occurred. FMLN-guerillas routinely sabotaged the roads around El Paraíso and fired into the Fourth Brigade base camp. The Fourth Brigade patrolled the hostile area to prevent acts of sabotage and to drive the guerillas further away from El Paraíso for the safety of those at base camp, which included U.S. military advisors.

In March 1982, Plaintiff's brother and other Dutch journalists were being escorted on-foot at night by armed FMLN-guerillas through a hostile area near the El Paraíso base camp. A crossfire ensued between a Salvadoran military patrol[3] and the armed guerillas. The Dutch journalists were tragically killed in the crossfire. Then-Colonel Reyes Mena was not present at the crossfire. He neither ordered nor planned the killing of the Dutch journalists.

Putting the merits aside, Congress did not intend for the TVPA to convert U.S. district courts into international military tribunals.[4] The TVPA is appropriate when it comes to warlords, state sponsored terrorists, or renegade officials. But when it comes to imposing liability for the official military conduct of foreign governments that are recognized by the United States, that job

[3] In the Complaint, Plaintiff refers to the Salvadoran military and the Salvadoran state security forces collectively as the "Salvadoran Security Forces." (ECF 1 ¶ 2.) However, the military and the state security forces operated independently from one another and had very different purposes.

[4] S. Rep. No. 102-249, at 3 (1991) (discussing the need for the TVPA in the context of curbing "torture and summary execution[s]").

is better left for diplomacy, executive action, or the courts where the events took place. As one Court of Appeals said best:[5]

> [To punish official military action under the TVPA] would open a Pandora's box of liability for foreign military officials. Indeed, any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing. … Under the [plaintiff's] reading, the TVPA would allow foreign officials to be haled into U.S. courts by any person with a family member who had been killed abroad in the course of a military operation conducted by a foreign power. The Judiciary, as a result, would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits. It simply cannot be that Congress intended the TVPA to open the door [of the U.S. district courts] to that sort of litigation.

Such concerns are heightened today by the ongoing foreign military operations in Europe and the Middle East.

This action should be dismissed for five independent reasons. *First*, the Court lacks subject matter jurisdiction because Mr. Reyes Mena is immune under both the Foreign Services Immunity Act ("FSIA")[6] and the common law doctrine of conduct-based foreign official immunity. *Second*, the claim is time-barred by the TVPA's ten-year statute of limitations. The claim accrued in 1982 and therefore expired in 1992. *Third*, the TVPA, which was enacted in 1992, may not be applied retroactively to conduct that occurred in 1982. *Fourth*, Plaintiff lacks standing. This TVPA claim may only be filed by the decedent's legal representative or a proper claimant in a wrongful death action. Plaintiff does not allege that he is his brother's legal representative, and under the applicable law, proper claimants include only the executor or administrator of the decedent's estate. *Fifth*, Plaintiff has not exhausted his remedies in El Salvador, as required by the TVPA. A criminal proceeding about the alleged incident is already underway in El Salvador. Under Salvadoran law,

[5] *Dogan v. Barak*, 932 F.3d 888, 895 (9th Cir. 2019).
[6] 28 U.S.C. §§ 1602, *et seq.*

once the criminal proceeding ends, Plaintiff may then seek civil damages, which must first be pursued in El Salvador before he files a TVPA claim.

For any one of the foregoing reasons, the Court should dismiss this lawsuit. Absent dismissal, the Court should issue a stay pending the resolution of the criminal action in El Salvador and any subsequent proceedings under Salvadoran law for civil damages.

II. MATERIAL STATEMENT OF PLAINTIFF'S ALLEGATIONS[7]

Plaintiff, a Dutch citizen residing in the Netherlands, brings this action following the tragic death of his brother, also a Dutch citizen. (ECF 1 ¶¶ 32, 34.) In February 1982, Plaintiff's brother traveled from the Netherlands to El Salvador as a journalist to report on the Salvadoran civil war. *Id.* ¶¶ 34, 59. Between 1980 to 1992, El Salvador was engulfed in a brutal conflict between the Salvadoran government and the FMLN. *Id.* ¶ 43. During the conflict, the Salvadoran government received monetary aid and military training from the United States. *Id.* ¶¶ 49, 83.

On March 17, 1982, Plaintiff's brother was killed in a crossfire between a Salvadoran military patrol and armed FMLN-guerillas in the department of Chalatenango, a region of contested control. *Id.* ¶¶ 1, 78, 79. That morning, Plaintiff's brother and other Dutch journalists had picked up FMLN-guerillas in San Salvador before heading to Chalatenango, where they met with additional guerillas. *Id.* ¶¶ 90, 93. In the evening, after being dropped off in Chalatenango, the group then walked on foot through the countryside in a single-file formation, with armed guerillas in the lead and at the rear. *Id.* ¶¶ 11, 94. When they reached a hollow in the hills, the armed guerillas and a Salvadoran military patrol engaged in a crossfire that unfortunately resulted in the death of the Dutch journalists. *Id.* ¶¶ 95-96. The journalists were struck by gunfire at distances up to 75 meters (or 82 yards). *Id.* ¶ 120.

[7] Nothing herein shall be construed as an admission by Mr. Reyes Mena.

According to Plaintiff, the Dutch journalists were killed in an authorized military operation conducted and planned by "state actors," with the involvement of high-ranking Salvadoran officials, including the then-Minister of Defense and the then-head of the Treasury Police.[8] *Id.* ¶¶ 23, 85, 130. Then-Colonel Reyes Mena was not present at the crossfire. *Id.* ¶ 87. At the time of the incident, he served as the commander of the Fourth Brigade, which was stationed in El Paraíso, a town within Chalatenango. *Id.* ¶ 38. The Fourth Brigade patrolled the hostile region where the incident occurred. *Id.* ¶ 80. Members of the Atonal Rapid Deployment Infantry Battalion ("Atonal Battalion") were also stationed at the El Paraíso base camp, "while receiving training from American military advisors present at the base." *Id.* ¶ 83. In fact, "U.S. military advisors … were on-site at El Paraíso [on the day of the incident]." *Id.* ¶ 121. The U.N. Truth Commission issued a report in March 1993 that accused the soldiers of the Fourth Brigade and the Atonal Battalion of killing the Dutch Journalists in a military ambush. *Id.* ¶¶ 17-19. The report also accuses then-Colonel Reyes Mena of being present in a meeting with other military officials in which the military operation was allegedly planned. *Id.* ¶ 85.

Very soon after the incident, U.S. embassy officials started investigating the scene of the crossfire and interviewing witnesses, including the Salvadoran soldiers and U.S. military advisors present at the El Paraíso base camp. *Id.* ¶¶ 111-24. The U.S. Embassy in San Salvador notified the U.S. Department of State ("State Department") about the incident and the results of the investigations. *Id.* ¶¶ 119-21. Two years after the investigations, the State Department nevertheless approved for Mr. Reyes Mena to move to the United States for a diplomatic posting in Washington, D.C as a military attaché to the Salvadoran embassy. *Id.* ¶ 39. Mr. Reyes Mena moved to the United States in 1984 and has resided here ever since. *Id.* ¶¶ 39-40.

[8] The Treasury Police was a branch of El Salvador's security forces, which operated independently from the military.

After the civil war, the Salvadoran government enacted an amnesty law to shield war-time acts, including those committed by the FMLN, from prosecution. *Id.* ¶ 19. That amnesty law was declared unconstitutional in 2016. *Id.* ¶ 20. Plaintiff has since pursued legal remedies in El Salvador. He filed criminal complaints in 2018 and 2021, which led to the indictment of Mr. Reyes Mena and two other former officials. *Id.* ¶¶ 152-58. As Plaintiff admits, "[u]nder the Salvadoran legal system, civil remedies are available to civil parties after the conclusion of the criminal proceedings." *Id.* ¶ 156. Thus, once the Salvadoran criminal action ends, Plaintiff may then seek civil remedies under Salvadoran law for the death of his brother. *Id.* But instead of first exhausting his remedies under Salvadoran law, Plaintiff filed this lawsuit while the criminal action is still pending.

III. ANALYSIS

A. The Court lacks subject matter jurisdiction because Mr. Reyes Mena has foreign sovereign immunity.

Courts lack subject matter jurisdiction if a defendant has sovereign immunity. *Saudi Arabian Airlines Corp. v. Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999). Mr. Reyes Mena is immune under the FSIA. He is also immune under the common law doctrine of conduct-based foreign official immunity. When the incident occurred, Mr. Reyes Mena was a colonel in the Salvadoran military acting within his official scope of authority. To be clear, Mr. Reyes Mena did not plan or order the killing of the Dutch journalists. But taking Plaintiff's allegations as true, then-Colonel Reyes Mena's conduct would have been authorized military action, performed in an official capacity, and attributable to the Salvadoran government. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) ("[A nation's] armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state.").

1. Mr. Reyes Mena is immune under the FSIA.

TVPA claims are subject to the FSIA. *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279, 1289 (D.C. Cir. 2008) ("Both the House and Senate reports on the passage of the TVPA state explicitly that the TVPA is not meant to override the FSIA"). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States" unless a statutory exception applies. 28 U.S.C. § 1604. Foreign governments are "presumptively immune" from lawsuits in the United States. *Blenheim Capital Holdings Ltd. v. Lockheed Martin Corp.*, 53 F.4th 286, 292 (4th Cir. 2022).

The Supreme Court has recognized that the FSIA covers an individual, acting on behalf of a foreign nation, in two scenarios. *Samantar v. Yousuf*, 560 U.S. 305, 324-25 (2010). "[W]hen a plaintiff names only a foreign official [as the defendant], it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party [under Federal Rule of Civil Procedure 19(a)(1)]." *Id.* at 324. "If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, *regardless of whether the official is immune or not under the common law*." *Id.* at 324-25 (emphasis added). "Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest." *Id.* at 325. "[N]ot every suit can successfully be pleaded against an individual official alone." *Id.* at 324.

a. El Salvador is the real party in interest.

As recognized by the Supreme Court, for purposes of determining immunity under the FSIA, "some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest." *Id.* at 325; *see also Qandah v. Johor Corp.*, No. 20-1991, 2021 U.S. App. LEXIS 34853, at *13-15 (6th Cir. Nov. 22, 2021) (granting FSIA immunity under the real-party-in-interest theory). "[I]f the state is 'the real party in interest,'

then the suit should be treated as an action against the foreign state itself to which the FSIA would apply." *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 34 (D.D.C. 2013), *aff'd*, 764 F.3d 31 (D.C. Cir. 2014).

El Salvador is the real party in interest. According to Plaintiff, the incident involved an official military operation during a civil war. (ECF 1 ¶ 43.) Plaintiff alleges that his brother was "killed … by a Salvadoran military patrol" about "four miles from the El Paraíso base." *Id.* ¶¶ 1, 11, 79. The military patrol included soldiers from the "Fourth Brigade of the Salvadoran Army," which was "headquartered at a base in El Paraíso" and "had a designated patrol area near the base given the presence of [guerilla] forces nearby and the disputed control of the surrounding areas." *Id.* ¶ 80. The patrol also included members of the Atonal Battalion, who had been trained by U.S. military advisors at the El Paraíso base. *Id.* ¶ 83. The military operation was allegedly planned by "officers of the General Staff of the Fourth Brigade" and "officers of the Atonal Rapid Deployment Infantry Battalion." *Id.* ¶ 85. Ultimately, Plaintiff alleges that the "killing of the Dutch Journalists [were] committed by *state actors*." *Id.* ¶ 130 (emphasis added). The alleged acts by then-Colonel Reyes Mena, in being present at a meeting where the military operation was planned, cannot be divorced from the Salvadoran government. *See Heping Li v. Keqiang Li*, No. 20-2008, 2023 U.S. Dist. LEXIS 60329, at *10 (D.D.C. Apr. 5, 2023), *aff'd*, 2024 U.S. App. LEXIS 27508 (D.C. Cir. Oct. 29, 2024) (applying the FSIA to the defendant-individuals, where the complaint alleged brutal torture by Chinese government officials during a criminal investigation).

The Complaint alleges no conduct by Mr. Reyes Mena that was "either personal or private in nature." *See Belhas*, 515 F.3d at 1283 (applying FSIA immunity to a retired foreign military officer who allegedly planned and had command authority over a military strike that killed

unarmed civilians in a United Nations compound). Nor is there any allegation that then-Colonel Reyes Mena exceeded the scope of his authority as a Salvadoran official. Rather, Plaintiff takes issue with the Salvadoran government and its military policies and operations during the Salvadoran civil war. Because El Salvador is the real party in interest, the FSIA applies here.

b. El Salvador is a required party.

The FSIA also applies in a lawsuit against an individual official, where a foreign nation or its agencies or instrumentalities is a required party. *Samantar*, 560 U.S. at 324 ("Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party.") A necessary party is one who has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." FED. R. CIV. P. 19(a)(1)(B). "A case may not proceed when a required-entity sovereign is not amenable to suit." *Philippines v. Pimentel*, 553 U.S. 851, 867 (2008).

El Salvador's interest in this lawsuit is clearly established in the Complaint. Mr. Reyes Mena is being sued as a colonel in the Salvadoran military, acting on behalf of the Salvadoran government, for events that occurred during a civil war. (ECF 1 ¶¶ 43, 81.) Plaintiff alleges that "[then-Colonel Reyes Mena] met with other military officers and agreed on a plan to ambush the Dutch Journalists on the basis of intelligence indicating that they would try to enter an area controlled by the FMLN … near the El Paraíso military base." *Id.* ¶ 10. That meeting allegedly included "officers of the General Staff of the Fourth Brigade … and officers of the Atonal Rapid Deployment Infantry Battalion." *Id.* ¶ 85. The then-Minister of Defense and the then-head of the Treasury Police were also purportedly involved. *Id.* ¶¶ 23, 158-59. Plaintiff accuses the "Salvadoran government and its Security Forces" of trying to cover up the incident. *Id.* ¶ 102. Without El Salvador as a party in this action, which alleges crimes and a cover-up committed by

its government through "state actors," the interests of the Salvadoran government will not be protected. *Id.* ¶ 130; *see Philippines*, 553 U.S. at 867 ("[W]here sovereign immunity is asserted, … dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.").

A judgment rendered without El Salvador as a party would result in prejudice. *See* FED. R. CIV. P. 19(b)(1). When considering the prejudice to a foreign nation, courts must place great weight on the nation's sovereign status. *Philippines*, 553 U.S. at 865. "The doctrine of foreign sovereign immunity … is designed to give 'foreign states and their instrumentalities some protection from the inconvenience of suit [in the United States].'" *Id.* (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)). "There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right of good cause." *Id.* at 866.

The Salvadoran government is already using its own courts to adjudicate this matter. In El Salvador, a private individual like Plaintiff may file a criminal complaint and be appointed as a civil party in the criminal proceedings. (ECF 1 ¶¶ 152, 155.) A criminal action has been initiated against Mr. Reyes Mena, among others, for the death of the Dutch journalists. *Id.* ¶¶ 152-58. As Plaintiff admits, "[u]nder the Salvadoran legal system, civil remedies are available to civil parties after the conclusion of the criminal proceedings." (ECF 1 ¶ 156). If any one of the three defendants in the Salvadoran criminal action are found guilty, the Salvadoran government would be responsible for the civil damages.[9] RAMOS DECL. at 4 (attached as Exhibit 1);[10] EL SAL. CONST.,

[9] In deciding subject matter jurisdiction, courts may consider evidence outside of the complaint. *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999).

[10] The certified English translation of the Declaration of Doris Anabell Gutiérrez Ramos, who is Mr. Reyes Mena's attorney in El Salvador, is attached as Exhibit 1-A. The original Spanish version is attached as Exhibit 1-B.

art. 245 (attached as Exhibit 2).[11] The Salvadoran government, however, has not consented to suit here.

2. Mr. Reyes Mena has conduct-based foreign official immunity.

Mr. Reyes Mena is also immune under the common law doctrine of conduct-based foreign official immunity. If the FSIA were not to apply here (which it does), "[a TVPA claim] may still be barred by foreign sovereign immunity under the common law." *Samantar*, 560 U.S. at 324. Under conduct-based immunity, a "public minister, official, or agent of the [foreign] state [is immune] with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the [foreign] state." *Yousuf v. Samantar*, 699 F.3d 763, 774, 769 (4th Cir. 2012) (internal quotation marks omitted). "[A] foreign official may assert immunity for official acts performed within the scope of his duty, but not for private acts where the officer purports to act as an individual and not as an official." *Id.* at 775 (internal quotation marks omitted). "This type of immunity … applies *whether the individual is currently a government official or not*." *Id.* at 774 (emphasis added). District courts have the authority to decide whether conduct-based immunity exists. *Id.* at 771.

a. Mr. Reyes Mena meets the three factors for conduct-based immunity.

Conduct-based immunity depends on three factors: (i) whether the defendant was a public minister, official, or agent of a foreign nation at the time of the relevant acts, (ii) whether the acts were performed in an official capacity, and (iii) whether exercising jurisdiction would serve to enforce a rule of law against a foreign nation. *Id.* at 774. A foreign official may not assert

[11] The certified English translation of Article 245 of the Salvadoran Constitution is attached as Exhibit 2-A, and the original Spanish version is attached as Exhibit 2-B.

immunity "for private acts that are not arguably attributable to the state, such as drug possession or fraud." *Id.* at 775.

Mr. Reyes Mena was an official or agent acting on behalf of the Salvadoran government at the time of the alleged military operation. (ECF 1 ¶¶ 37-38.) Thus, the first factor is met.

The Complaint clearly establishes that then-Colonel Reyes Mena was acting in his official capacity. According to Plaintiff, the FMLN-guerillas and the Dutch journalists "were ambushed … by a Salvadoran military patrol … under the command of [Mr. Reyes Mena]." *Id.* ¶ 1. The military operation was allegedly planned and backed by high-ranking officials in the Salvadoran government, including "officers of the General Staff of the Fourth Brigade," "officers of the Atonal Rapid Deployment Infantry Battalion," the then-Minister of Defense, and the then-head of the Treasury Police. *Id.* ¶¶ 22-23, 85. Plaintiff admits the killings were "committed by *state actors*." *Id.* ¶ 130 (emphasis added). The Complaint identifies nothing that then-Colonel Reyes Mena did in an individual capacity or that exceeded the scope of his authority as a Salvadoran official.[12] *See Belhas*, 515 F.3d at 1284 (finding that the defendant acted entirely in an official capacity in allegedly planning a military strike on a United Nations compound filled with unarmed civilians). Therefore, the second factor is met.

Given that the alleged conduct is inextricably tied to the Salvadoran government, exercising jurisdiction over Mr. Reyes Mena would enforce a rule of law—the TVPA—against the sovereign nation of El Salvador. This Court cannot render Mr. Reyes Mena liable without

[12] The fact that Mr. Reyes Mena is a defendant in a criminal action in El Salvador does not destroy his sovereign immunity here in the U.S. courts. The purpose of sovereign immunity is not to make foreign officials immune from any liability whatsoever, but to make them immune from being haled into U.S. courts to litigate the propriety of official acts taken on behalf of a foreign nation. *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250 (D.D.C. 2011), *aff'd*, 808 F. Supp. 2d 247 (D.C. Cir. 2011). Sovereign immunity is premised on "a comity interest in allowing a foreign state to use its own courts for a dispute." *Philippines*, 553 U.S. at 866.

implicating the Salvadoran government. *See Doe 1 v. Buratai*, 318 F. Supp. 3d 218, 233 (D.D.C. 2018) ("A decision by this Court exacting such damages would affect how Nigeria's government, military, and police function, regardless whether the damages come from the defendants' own wallets or Nigeria's coffers. By interfering with Nigeria's government, a decision would effectively enforce a rule of law against Nigeria."). Mr. Reyes Mena is therefore entitled to conduct-based foreign official immunity. *See Yousuf*, 699 F.3d at 774 ("[A]ny act performed by the individual as an act of the State enjoys the immunity which the State enjoys.").

b. The jus cogens *exception from* Yousuf v. Samantar *does not extend to officials of foreign governments recognized by the State Department.*

The *jus cogens* exception to conduct-based immunity does not apply where the defendant-official acted on behalf of a foreign government that is recognized by the State Department. In *Yousuf v. Samantar*, the Fourth Circuit held that "officials from other countries are not entitled to [common law] foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."[13] 699 F.3d at 777. *Yousuf*, however, was limited to a former official from Somalia, which had no recognized government. *Id.* at 767. The *jus cogens* exception from *Yousuf* does not apply to officials who act on behalf of a foreign government that is recognized by the State Department, such as El Salvador.

In *Yousuf*, the court identified torture, summary execution, murder, and genocide as generally recognized violations of the *jus cogens* norms. *Id.* The *Yousuf* court then expanded *jus cogens* violations to extrajudicial killings, which is far broader than a summary execution or murder. *Id.* at 777. The TVPA defines an extrajudicial killing as "a deliberated killing not

[13] A *jus cogens* norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Yousuf*, 699 F.3d at 775.

authorized by a previous judgment pronounced by a regularly constituted court." 28 U.S.C. § 1350, note, § 3(a). In other words, under the *Yousuf* court's rationale, any killing not preauthorized by a court of law—such as those committed during a military operation by one of America's foreign allies—would amount to a *jus cogens* violation that therefore eliminates conduct-based immunity.[14] *See Yousuf*, 699 F.3d at 777. But that cannot be the result for every claim under the TVPA, because military operations, including ambushes, can indeed be officially authorized by a sovereign nation. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) ("However monstrous such abuse [of the police power by the Saudi Government] undoubtedly may be, a foreign state's exercise of that power has long been understood … as peculiarly sovereign in nature."); *cf. Yousuf*, 699 F.3d at 776 (premising the *jus cogens* exception on the notion that "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.").

Yousuf is distinguishable and does not control here, because it is limited to foreign officials from *unrecognized* governments. In *Yousuf*, the State Department opposed conduct-based immunity for the defendant, who was a Somali official acting under a military regime.[15] *Id.* at 766-67. The State Department reasoned that "[the defendant's] claim for immunity was undermined by the fact that he is a former official of a state [Somalia] *with no currently recognized government*." *Id.* at 767 (emphasis added) (internal quotation marks omitted). The State

[14] Mr. Reyes Mena does not concede that the allegations in the Complaint amount to a *jus cogens* violation. In fact, they do not. In *Belhas v. Moshe Ya'Alon*, the plaintiffs accused the defendant-former military official of participating in the decision and planning of a military operation to shell a United Nations compound filled with unarmed civilians. 515 F.3d at 1293. In the concurring opinion, the court noted that "[w]hile plaintiffs characterize this conduct as violating [*jus cogens* norms], they point to no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute torture or extrajudicial killing under international law." *Id.* Here, Plaintiff alleges that then-Colonel Reyes Mena was merely present during a meeting in which a military ambush was planned. (ECF 1 ¶ 85.)

[15] The State Department has the power to grant a "suggestion of [conduct-based] immunity" for a foreign official. *Yousuf*, 699 F.3d at 771. "The State Department's determination regarding conduct-based immunity … is not controlling, but it carries substantial weight in [the court's] analysis of the issue." *Id.* at 773.

Department did not officially recognize a Somali government, and therefore, nothing the defendant did could have been authorized by a sovereign nation. *Id.* at 772 ("[T]he State Department does not recognize the Transitional Federal Government or any other entity as the official government of Somalia, from which immunity would derive in the first place."). Placing "substantial weight" on the State Department's determination, *id.* at 773, the *Yousuf* court ruled that the alleged torture and extrajudicial killings by a former official from an *unrecognized government* did not warrant conduct-based immunity. *Id.* at 777 ("Because the State Department has not officially recognized a Somali government, the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plaintiffs' claims."). Therefore, *Yousuf* is limited to TVPA claims against foreign officials from governments not recognized by the State Department.

Yousuf does not foreclose the application of conduct-based immunity to foreign officials from recognized governments. The court in *Yousuf* did not address a situation, like here, where the State Department has long recognized the government of El Salvador. *U.S. Relations with El Salvador*, U.S. DEP'T OF STATE (Sep. 13, 2024), https://www.state.gov/u-s-relations-with-el-salvador/ (last visited Nov. 11, 2024) ("The United States established diplomatic relations with El Salvador in 1863.").[16] In fact, during the Salvadoran civil war, the United States backed the Salvadoran government and provided billions in monetary aid, weapons, ammunition, and military training. (ECF 1 ¶¶ 49, 54, 83, 121); *see also El Salvador: Military Assistance Has Helped Counter but Not Overcome the Insurgency*, U.S. GEN. ACCT. OFF. (Apr. 23, 1991), https://www.gao.gov/assets/nsiad-91-166.pdf (last visited Nov. 11, 2024). As Plaintiff alleges, the Salvadoran soldiers at the El Paraíso base camp received training from U.S. military advisors who were present at the camp. (ECF 1 ¶¶ 83, 121.) In light of the stark contrast between the

[16] *See supra* note 9.

unrecognized Somali government and the recognized Salvadoran government, this Court is not bound by the *jus cogens* exception from *Yousuf*.

Nor should this Court apply the *jus cogens* exception here. The Ninth Circuit noted the following concerns about applying a *jus cogens* exception to the TVPA:

> "If immunity did not extend to officials whose governments acknowledge that their acts were officially authorized, it would open a Pandora's box of liability for foreign military officials." Indeed, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing." And the TVPA allows suits not only by U.S. citizens but by "any person." Because the whole point of immunity is to enjoy "an immunity from *suit* rather than a mere defense to *liability*," the [plaintiff's] reading of the TVPA would effectively extinguish the common law doctrine of foreign official immunity. Under the [plaintiff's] reading, the TVPA would allow foreign officials to be haled into U.S. courts by "any person" with a family member who had been killed abroad in the course of a military operation conducted by a foreign power. The Judiciary, as a result, would be faced with resolving any number of sensitive foreign policy questions which might arise in the context of such lawsuits. It simply cannot be that Congress intended the TVPA to open the door to that sort of litigation.

Dogan v. Barak, 932 F.3d 888, 895 (9th Cir. 2019) (emphasis in original) (internal citations omitted). The whole point of foreign sovereign immunity is to excuse foreign officials from having to litigate in U.S. courts the propriety of official acts taken on behalf of a foreign nation. *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250-51 (D.D.C. 2011), *aff'd*, 808 F. Supp. 2d 247 (D.C. Cir. 2011). That purpose is destroyed if the foreign official must first litigate the merits to prove that he did not violate a *jus cogens* norm, in order to then receive the benefits of immunity. *Id.* ("[S]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."). Our Executive Branch has even opposed a *jus cogens* exception for fear that the exception would threaten immunity for U.S. officials in foreign courts. *Does v. Obiano*, No. 4:23cv00813, 2024 U.S. Dist. LEXIS 8247, at *16 (S.D. Tex. Jan. 17, 2024); *Buratai*, 318 F. Supp. 3d at 235-36.

Simply put, there is no *jus cogens* exception to conduct-based immunity, where the defendant-official acted on behalf of a foreign government that is recognized by the State Department.[17] The Salvadoran government was recognized by the State Department in 1982, when the incident occurred, and still is to this day. Mr. Reyes Mena is therefore entitled to conduct-based immunity. He is also immune under the FSIA, which has no *jus cogens* exception. *E.g., Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

B. The TVPA claim is barred by the ten-year statute of limitations.

The TVPA claim is barred by the ten-year statute of limitations, which started no later than March 17, 1982 and therefore expired in 1992. A claim under the TVPA must be "commenced within 10 years after the cause of action arose." 28 U.S.C. § 1350 note § 2(c). Plaintiff's brother died on March 17, 1982. (ECF 1 ¶¶ 1, 86.) Therefore, this claim is time barred.

Equitable tolling does not save this time-barred action. For equitable tolling to apply, the plaintiff has the heavy burden of establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance [beyond plaintiffs' control] stood in his way and prevented timely filing." *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016). Importantly, there must be a "causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of [the] filing, a demonstration that cannot be made if the [plaintiff], acting with reasonable diligence, could have filed on time notwithstanding the circumstances." *Hughes v. White*, No. 1:23cv1141, 2024 U.S. Dist. LEXIS 110127, at *9 (E.D. Va. June 20, 2024).

[17] The Fourth Circuit's decision in *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016) does not suggest otherwise. In *Warfaa*, the defendant was also a Somali national and the alleged killings occurred when Somalia was under the same military dictatorship identified in *Yousuf*. *Id.* at 655-56.

Mr. Reyes Mena moved to the United States in 1984. (ECF 1 ¶ 39.) His move to the United States was no secret. He received a diplomatic posting to the Salvadoran embassy in Washington, D.C. and has lived in the United States ever since. *Id.* ¶¶ 39-40. Plaintiff did know or should have known about Mr. Reyes Mena's identity by no later than March 15, 1993, when the U.N. Truth Commission publicly issued a report accusing then-Colonel Reyes Mena of being present in a meeting in which the alleged military ambush was planned. *Id.* ¶¶ 17, 85, 145. This Court, however, need not decide if equitable tolling should apply up to either 1984 or 1993.[18] Either way, this action remains time barred.

The enactment of the Salvadoran amnesty law does not justify equitable tolling, because it did not prevent Plaintiff from filing this lawsuit. (ECF 1 ¶¶ 19-20.) The Sixth Circuit has addressed the impact of the Salvadoran amnesty law on TVPA claims as follows:

> [T]he Salvadoran Amnesty Law cannot be interpreted to apply extraterritorially. … There is nothing in the Salvadoran Amnesty Law to suggest that it should apply or was intended to apply outside of El Salvador. Moreover, compliance with both [U.S.] law and the Salvadoran Amnesty Law is possible. *Plaintiffs may be barred from filing suit in El Salvador, but they are not barred from filing suit in the United States.*

Chavez v. Carranza, 559 F.3d 486, 495 (6th Cir. 2009) (emphasis added). The Salvadoran amnesty law therefore had no impact on Plaintiff's ability to pursue a TVPA claim against Mr. Reyes Mena in a U.S. district court.[19] *See id.* If anything, the Salvadoran amnesty law, before it was struck down, would have theoretically excused Plaintiff from having to first exhaust his remedies in El Salvador before filing this action. *See* 28 U.S.C. § 1350, note, § 2(b).

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[18] Mr. Reyes Mena does not concede that equitable tolling applies. Plaintiff has the burden of proving equitable tolling. *Menominee Indian Tribe*, 577 U.S. at 255.

[19] When equitable tolling applies, a plaintiff must "file suit within a *reasonable period of time* after realizing that such a suit has become necessary." *Herrera v. Clarke*, No. 1:19cv1301, 2021 U.S. Dist. LEXIS 79747, at *7 (E.D. Va. Apr. 22, 2021) (emphasis added). "Once the extraordinary circumstances justifying equitable tolling have ended, [the plaintiff] must file as soon as reasonably possible." *Id.* Waiting eight years after the Salvadoran amnesty law was struck down to file this lawsuit would not be reasonable.

The statute of limitations expired long ago. Equitable tolling will not save the claim. Therefore, this action should be dismissed.

C. The TVPA may not be applied retroactively.

The TVPA may not be applied retroactively to conduct that occurred before its enactment. Plaintiff's brother died in 1982, a decade before the TVPA was enacted in 1992. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) (noting a 1992 enactment date).

For federal statutes imposing civil liability, "retroactivity is not favored" and "prospectivity remains the appropriate default rule." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 264, 272 (1994). Courts presume that "statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment." *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172 (4th Cir. 2010). This is a very strong presumption, "[s]ince legislatures generally intend statutes to apply prospectively only." *Id.*; *see also Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077, 1082 (E.D. Va. 1992) (noting a "very strong" presumption). In fact, the TVPA has no retroactive component. 28 U.S.C. § 1350, note.

To overcome the presumption against retroactivity, there must be "clear congressional intent in favor of retroactivity." *Ward*, 595 F.3d at 172 (internal quotation marks omitted). Absent such intent (which is the case here), if the "new statute would have a retroactive effect if applied to the case at hand," then the application of the statute must be barred. *Id.* (internal quotation marks omitted). "A statute operates retroactively when it would attach new legal consequences to events occurring prior to its enactment[,] … for example, when the statute 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 173 (citing *Landgraf*, 511 U.S. at 280).

1. The TVPA is a new cause of action that covers extraterritorial conduct.

If applied here, the TVPA would increase Mr. Reyes Mena's potential liability for past conduct because the Act imposes a new cause of action that covers extraterritorial conduct. The Fourth Circuit has not yet ruled on whether the TVPA has a retroactive effect. Elsewhere, the Ninth Circuit has held that the TVPA does not have a retroactive effect, because aliens previously had the right to assert claims in federal court for torture or extrajudicial killings that occurred abroad under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA").[20] *Alvarez-Machain v. United States*, 107 F.3d 696, 702 (9th Cir. 1996). *Alvarez-Machain* is not binding on this Court. More importantly, *Alvarez-Machain* is wrong and has been implicitly overruled by the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

The 1996 ruling in *Alvarez-Machain* was based on the mistaken proposition that "the ATCA allows … actions in U.S. courts for *extraterritorial* [torts]." *Alvarez-Machain*, 107 F.3d at 703 (emphasis added). In other words, the court in *Alvarez-Machain* believed that the ATCA covered torts that were committed in a foreign nation. But in 2013, the Supreme Court ruled that the ATCA has no extraterritorial reach. *Kiobel*, 569 U.S. at 124-25 ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."). Thus, the ATCA does not cover torture or extrajudicial killings *that occur outside the United States*. *Id.*

With *Kiobel* in mind, the TVPA must be viewed as "creating a new cause of action" that, if applied here, would subject Mr. Reyes Mena to new civil liability. *See Landgraf*, at 283; *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 950 (1997) ("[T]he [statutory] amendment essentially creates a

[20] Under the ATCA, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The TVPA is an extension of the ATCA. *See* 28 U.S.C. § 1350, note; S. Rep. No. 102-249, at 4-5.

new cause of action not just an increased likelihood that an existing cause of action will be pursued."). Had Plaintiff sued under the ATCA, which allows non-citizens like Plaintiff to file a claim in the U.S. district courts for "a tort … committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, then the claim would have been dismissed because all the relevant conduct took place outside the United States. *See Kiobel*, 569 U.S. at 124. Unlike the ATCA, the TVPA has an extraterritorial component that extends civil liability to extrajudicial killings that occur in "any foreign nation." 28 U.S.C. § 1350, note, § 2(a).

The addition of an extraterritorial component to the TVPA creates a retroactive effect, which bars its application here. In *Adhikari v. Kellogg Brown & Root, Inc.*, the Fifth Circuit addressed the same issue with respect to the Trafficking Victims Protection Reauthorization Act. 845 F.3d 184 (5th Cir. 2017). That act, which prohibits forced labor and human trafficking, did not originally extend to extraterritorial conduct. *Id.* at 201. But in 2008, Congress enacted an amendment extending the act's coverage to trafficking that occurs abroad. *Id.* at 200. The court found that the 2008 amendment "alters a party's substantive rights" because, prior to the amendment, "a private party could not maintain a civil cause of action … for forced labor or human trafficking *that occurred overseas*." *Id.* at 204 (emphasis added). "[T]he 2008 [a]mendment removed the previously available defense of extraterritoriality." *Id.* at 205. *Adhikari* is persuasive and its rationale applies to the extraterritorial component in the TVPA.

By adding an extraterritorial component to the TVPA, Congress eliminated a defense that Mr. Reyes Mena could have successfully asserted had Plaintiff sued under the ATCA. *See Hughes Aircraft Co.*, 520 U.S. at 948. In comparison with the ATCA, Congress extended liability under the TVPA to a new class of defendants—foreign officials acting abroad. *See United States v. 814,254.76 in United States Currency*, 51 F.3d 207, 211 (9th Cir. 1995) (holding that the new law

on civil asset forfeiture had a retroactive effect where the prior law covered defendants with money *directly* traceable to money laundering, but the new law "expand[ed] the universe of potential defendants" by covering money *indirectly* traceable). The TVPA would therefore have an impermissible retroactive effect if applied here.

2. The TVPA increases the statute of limitations from two years to ten years.

If applied here, the TVPA would increase Mr. Reyes Mena's potential liability for past conduct by increasing the statute of limitations from two years to ten years. A statute has a retroactive effect if it extends the limitations period and revives claims that otherwise would have been time barred. *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593, 598 (4th Cir. 2005); *Adhikari*, 845 F.3d at 206.

Before the TVPA's enactment, Plaintiff would have likely sued under the ATCA and therefore been subject to a two-year limitations period. The ATCA specifies no statute of limitations. 28 U.S.C. § 1350. As a result, courts "sought to apply [the statute of] limitations for the closest analogous state court torts."[21] *Estate of Alvarez v. Johns Hopkins Univ.*, 205 F. Supp. 3d 681, 689 (D. Md. 2016). The most analogous state court tort here is a claim for wrongful death under Virginia law, which carries a two-year limitations period. VA. CODE §§ 8.01-50, 8.01-244(B). By the time the TVPA was enacted in 1992, the two-year limitations period for a claim under the ATCA would have already expired.[22]

In contrast to a two-year period, the TVPA would subject Mr. Reyes Mena to a much longer ten-year limitations period. 28 U.S.C. § 1350, note, § 2(c). Under the ten-year limitations period, the TVPA claim is still time barred. *See supra* Part III.B. But if this Court were to rule otherwise,

[21] Only after the TVPA's enactment did courts start applying the ten-year limitations period to claims under the ATCA. *E.g., Yousuf v. Samantar*, No. 1:04cv1360 (LMB/JFA), 2012 U.S. Dist. LEXIS 122403, at *12 (E.D. Va. Aug. 28, 2012).

[22] A two-year limitations period would have expired in March 1984. (ECF 1 ¶ 1.)

then it must necessarily find that the TVPA would have a retroactive effect here. "'[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability.'" *Hughes Aircraft Co.*, 520 U.S. at 950 (quoting *Chenault v. United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994)).

3. If a *jus cogens* exception were to apply here, then the TVPA eliminates the defense of conduct-based foreign official immunity.

Mr. Reyes Mena is entitled to conduct-based foreign official immunity. *See supra* Part III.A.2. The *jus cogens* exception that was created in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) does not apply to the conduct of foreign officials from governments that are recognized by the State Department, such as El Salvador. *See supra* Part III.A.2.b. If, however, this Court were to extend the *jus cogens* exception to Salvadoran officials and therefore find that Mr. Reyes Mena does not have conduct-based immunity,[23] then the TVPA would necessarily have a retroactive effect.

If the *jus cogens* exception were to apply here (which it does not), then the TVPA would eliminate an immunity defense that Mr. Reyes Mena otherwise would have had. *See Hughes Aircraft Co.*, 520 U.S. at 948 ("[T]he [statutory] amendment eliminates a defense to a *qui tam* suit … and therefore changes the substance of the existing cause of action."); *Winfree v. N. P. R. Co.*, 227 U.S. 296, 302 (1913) (finding retroactive effect where the statute "takes from the defendant defenses which formerly were available"). Under the TVPA's predecessor, the ATCA, there is no *jus cogens* exception. *E.g.*, *Matar*, 563 F.3d at 14. Nor does such an exception exist to a common law tort claim. *See Filarsky v. Delia*, 566 U.S. 377, 389 (2012) ("[C]ommon-law principles of …

[23] Mr. Reyes Mena is separately immune under the FSIA. *See supra* Part III.A.1.

immunity … should not be abrogated absent clear legislative intent to do so."). Thus, under any other claim that Plaintiff may have asserted before the TVPA's enactment, Mr. Reyes Mena would have been entitled to the defense of conduct-based immunity.

If applied here, the TVPA would have an impermissible retroactive effect on Mr. Reyes Mena. The TVPA creates a new cause of action that eliminates his defense of exterritoriality, extends the statute of limitations from two years to ten years, and eviscerates his defense of conduct-based immunity (if a *jus cogens* exception were to apply, which it does not). This action should therefore be dismissed.

D. Plaintiff lacks standing.

Plaintiff lacks standing to sue under the TVPA because he is not one of the proper claimants prescribed by the Act. The TVPA identifies two categories of plaintiffs for claims based on an extrajudicial killing: (i) "the individual's legal representative," or (ii) "any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350, note, § 2(a)(2). Plaintiff fails to allege that he meets either requirement.

The term "legal representative" is limited to "the executor or executrix of the decedent's estate." S. Rep. No. 102-249, at 7. Plaintiff does not allege that he is the executor of his brother's estate. *See Sikhs for Justice, Inc. v. Gandhi*, 614 F. App'x 29, 31 (2d Cir. 2015) (dismissing TVPA claim where plaintiffs "failed to adequately allege that they are the appointed 'legal representatives' of the [decedent]").

Plaintiff is not a proper wrongful death claimant. The TVPA does not identify which persons "may be a claimant in an action for wrongful death." 28 U.S.C. § 1350, note, § 2(a)(2). Thus, to determine whether a plaintiff would be a proper wrongful death claimant, courts have sought guidance from the law of the state where the action is filed. *E.g., Estate of Alvarez v. Johns Hopkins Univ.*, 275 F. Supp. 3d 670, 711 (D. Md. 2017); *see also* FED. R. CIV. P. 17(b)(3) (providing

that the capacity to sue, where the plaintiff is acting in a representative capacity, is determined "by the law of the state where the court is located"). Under Virginia law, the only person who can file a wrongful death lawsuit on behalf of a deceased adult is "the *personal representative* of such deceased person." VA. CODE § 8.01-50(C) (emphasis added). A "personal representative" under Virginia law does not include a decedent's sibling, unless that sibling is the executor or administrator of the decedent's estate. *Id.* § 1-234. Plaintiff does not allege that he is the executor or administrator of his brother's estate. Therefore, Plaintiff lacks standing.

E. Plaintiff has not exhausted his remedies in El Salvador.

As a statutory prerequisite, Plaintiff must first exhaust his remedies in El Salvador. But he has not done so.

"A court shall decline to hear a claim under [the TVPA] if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note, § 2(b). The exhaustion requirement must be followed to "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred … [and to] also avoid exposing U.S. courts to unnecessary burdens." H.R. Rep. No. 102-367, at 5 (1991). Failure to exhaust is an affirmative defense, in which the defendant bears the burden of proof. *Jean v. Dorelien*, 431 F.3d 776, 782 (11th Cir. 2005). But "'[o]nce the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.'" *Id.* (quoting S. Rep. No. 102-249, at 9-10).

Adequate remedies exist in El Salvador, and Plaintiff is still in the process of exercising such remedies. As Plaintiff alleges, "[u]nder the Salvadoran legal system, civil remedies are available to civil parties after the conclusion of the criminal proceedings." (ECF 1 ¶ 156.) The

Salvadoran criminal action has already begun and is still ongoing. *Id.* ¶¶ 152-58. Once the criminal action ends, Plaintiff may then seek civil remedies under Salvadoran law. *Id.* ¶ 156; *see also* EL SAL. CODE, art. 74 (attached as Exhibit 3)[24] ("The resolution that denies the constitution of a civil party within a criminal action shall not prevent the subsequent exercise of the action in a forum of civil jurisdiction.").

Plaintiff does not allege any problems with the ongoing criminal action in El Salvador, except that Mr. Reyes Mena has not been arrested or extradited to El Salvador. (ECF 1 ¶¶ 160-63.) But that has not hampered the criminal prosecution against Mr. Reyes Mena, who is being tried in absentia. RAMOS DECL., Ex. 1-A, at 3 ("That in said criminal action … Mr. Mario Adalberto Reyes Mena … is being adjudicated in absentia.").[25] Further, Plaintiff is not seeking to impose criminal penalties under this lawsuit. Nor does the TVPA provide for criminal penalties. Plaintiff is seeking civil damages here, and that remedy is still available and has not been exhausted in El Salvador. (ECF 1 ¶ 156.) In fact, under Salvadoran law, if the accused is a government official acting within an official capacity, the Salvadoran government would be liable for the civil damages. RAMOS DECL., Ex. 1-A, at 3; EL SAL. CONST., Ex. 2-A, art. 245. The criminal proceeding in El Salvador involves two other defendants. (ECF 1 ¶¶ 158-59.) Therefore, Mr. Reyes Mena does not even need to be found guilty in the Salvadoran criminal action for Plaintiff to receive civil damages from the Salvadoran government. As long as one of the criminal defendants is found guilty, Plaintiff would be able to seek civil damages from the Salvadoran government.

[24] The certified English translation of the Salvadoran code article is attached as Exhibit 3-A, and the original Spanish version is attached as Exhibit 3-B.

[25] The Court may dismiss the lawsuit for failure to exhaust remedies based solely on the allegations in the Complaint. (ECF 1 ¶¶ 152-58.) If, however, this Court needs to rely on the Ramos Declaration to decide the exhaustion issue, it may do so under Federal Rule of Civil Procedure 12(d).

Given the ongoing criminal action in El Salvador, it is quite clear that Plaintiff has not exhausted his remedies abroad. Plaintiff may be able to obtain all the civil remedies he seeks through proceedings under Salvadoran law. This action should therefore be dismissed.

F. Absent dismissal, the Court should issue a stay.

Absent dismissal, the Court should issue a stay pending resolution of the criminal action in El Salvador and any subsequent proceedings under Salvadoran law for civil damages. A district court has the power to issue a discretionary stay after exercising its own judgment and weighing the competing interests. *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). A stay is warranted if the circumstances by the moving party outweigh the potential harm to the non-moving party. *Id.*

There is no need for this action to be litigated, when Plaintiff may receive the damages he seeks in this action through proceedings in El Salvador, which are already underway. (ECF 1 ¶¶ 152-58); *see supra* Part III.E. This Court should allow the Salvadoran proceedings to first conclude before committing judicial resources and subjecting Mr. Reyes Mena—who is elderly and suffers from chronic physical health problems—to what would otherwise be a duplicative effort. *See Crummer v. Crane Co.*, No. 4:15cv85, 2016 U.S. Dist. LEXIS 205565, at *13 (E.D. Va. Mar. 25, 2016) ("[D]enying a stay will result in the likely potential for unnecessary litigation by both Parties. … [T]he public interest will best be served by conserving judicial resources.").

Moreover, allowing this civil action to proceed forward with discovery and evidentiary hearings would unfairly prejudice Mr. Reyes Mena's constitutional right to remain silent. *See Dale v. Jordan*, No. 2:16cv733, 2017 U.S. Dist. LEXIS 228045 (E.D. Va. Feb. 27, 2017) (issuing a stay of a civil action to avoid prejudicing the defendant's right to remain silent for a pending criminal action). Mr. Reyes Mena has the right to remain silent under both the U.S. Constitution and the Salvadoran Constitution. U.S. CONST. amend. V; EL SAL. CONST., art. 12 ("The detained person

… cannot be compelled to make a declaration.").[26] He may choose to invoke that right here in this lawsuit, but doing so may permit an adverse inference by the factfinder and thereby prejudice his civil defense. *See Dale*, 2017 U.S. Dist. LEXIS 228045, at *4. On the other hand, if he chooses not to invoke his right to remain silent here, he risks any statements made in this lawsuit being used against him in the Salvadoran criminal action. *See id.* The precarious position that Mr. Reyes Mena faces warrants a stay.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion to Dismiss and dismiss this action with prejudice. Absent a dismissal, the Court should issue a stay pending resolution of the criminal action in El Salvador and any subsequent proceedings under Salvadoran law for civil damages.

Dated: November 22, 2024

Respectfully submitted,

MARIO ADALBERTO REYES MENA

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[26] An English-translated version of article 12 to the Salvadoran Constitution can be accessed here: https://www.constituteproject.org/constitution/El_Salvador_2014.

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will serve a copy on all counsel of record.

/s/ Kang He
Kang He (VSB No. 89237)