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. 24-cv-1785 Judge Rossie D. Alston, Jr. Magistrate Judge Lindsey R. Vaala

PLAINTIFF GERT JANNES KUIPER'S OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, STAY

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PRELIMINARY STATEMENT

This is a case about the individual civil liability of a former Salvadoran military officer now residing in Virginia for the extrajudicial killing of a journalist, brought under a federal statute, the Torture Victim Protection Act ("TVPA"). The TVPA ensures that foreign officials responsible for extrajudicial killing or torture "will no longer have a safe haven in the United States" by providing victims of such human rights abuses a remedy in federal court. S. Rep. No. 102-249, at 3 (1991). This is precisely the kind of case contemplated by the TVPA.

Defendant Mario Adalberto Reyes Mena ("Defendant") moves to dismiss the TVPA claim of Gert Jannes Kuiper ("Plaintiff")—the brother of the murdered journalist—on a number of grounds, many of them centered on criminal proceedings in El Salvador even though Defendant is avoiding prosecution there. Each of Defendant's arguments fail.

First, Defendant is not entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA") because he is an individual, not a state, nor is he entitled to conduct-based immunity under the common law because an extrajudicial killing by definition cannot be an official act by a state. *Second*, the statute of limitations does not foreclose Plaintiff's relief because extraordinary circumstances justify equitable tolling. *Third*, the TVPA applies to conduct that occurred before its enactment in 1992, as numerous courts agree. *Fourth*, Plaintiff has standing to pursue his TVPA claim because both Virginia choice-of-law principles and the TVPA itself look to Salvadoran law, which grants Plaintiff standing as brother of the decedent. *Fifth*, whether Plaintiff has exhausted Salvadoran remedies is a fact-intensive inquiry best resolved at summary judgment, not the motion to dismiss stage, and in any case, exhaustion does not bar Plaintiff from pursuing his TVPA claim because the purported local remedies are unavailable or inadequate.

Plaintiff has alleged a plausible claim for relief under the TVPA. The Court must therefore deny Defendant's motion to dismiss. Nor do any circumstances warrant a stay, so this case—which is the only way Plaintiff may seek relief from Defendant—should continue.

FACTS

Plaintiff's brother Jan Kuiper was a respected journalist covering the Civil War in El Salvador when he was assassinated by troops under Defendant's command and control. ECF No. 1 ("Compl.") ¶ 1. Kuiper and his colleagues, Koos Koster, Johannes "Joop" Willemsen, and Hans ter Laag ("the Dutch Journalists"), were in El Salvador reporting on the devastating human toll of the country's civil war, and planned to report from areas controlled by the Farabundo Martí National Liberation Front ("FMLN"). (*Id.* ¶ 59). On March 17, 1982, the Dutch Journalists traveled to Chalatenango, near the El Paraíso military base over which Defendant had command, in an attempt to document the lives of civilians in FMLN-controlled areas. (*Id.* ¶¶ 78, 82, 85).

As found by the United Nations-appointed Commission on the Truth for El Salvador ("U.N. Truth Commission"), the body established as part of the 1992 peace agreement between the Salvadoran government and the FMLN, Defendant was aware of the Dutch Journalists' plans. (*Id.* ¶ 85). On March 16, 1982, Defendant met with other military officers to plan an ambush targeting the Dutch Journalists, using soldiers under his command. (*Id.*). "According to those interviewed, the ambush was planned at that meeting, based on precise intelligence data indicating that the journalists would try to enter the zone controlled by the FMLN via the route the next day." (*Id.*). On March 17, 1982, when the Dutch Journalists and their guides were on their way to Chalatenango from San Salvador, a patrol was stationed atop two hills overlooking a hollow where the Dutch Journalists were expected to pass. (*Id.* ¶ 88). As the Dutch Journalists passed through the hollow, the patrol attacked them with heavy fire. (*Id.* ¶ 95). Within minutes, the patrol killed

all four Dutch Journalists and all but one of their guides. (*Id.* ¶¶ 97-99). Kuiper was shot twice in the head. (*Id.* ¶ 98).

Defendant ignores these well-pled allegations and, instead, improperly seeks to reframe the killing as the result of "crossfire between a Salvadoran military patrol and armed guerrillas." ECF No. 23 ("Mot.") at 1-2. But as alleged in the Complaint, the facts corroborate the U.N. Truth Commission's finding that the Dutch Journalists were ambushed: Defendant was aware of the Dutch Journalists' planned travel and participated in a meeting to plan the attack Compl. ¶ 85; the Dutch Journalists' mini-bus marked "PRENSA" ("press" in Spanish) was followed by a vehicle used by the Salvadoran Armed Forces while en route to El Paraíso (*Id.* ¶¶ 90-91); the U.S. Embassy report on the killings indicated that Salvadoran soldiers who participated in the killing "expressed elation at their success and referred to their mission as an 'ambush,'" that the patrol was three kilometers beyond the normal patrol perimeter, that shell casings found at the scene indicated that the soldiers had advanced towards the Dutch Journalists while firing (*Id.* ¶¶ 121-24), these shell casings were for weapons that would be impractical for routine foot patrols (*Id.* ¶¶ 125-26), and that the U.S. Government found "no extensive evidence of guerrilla fire" (*Id.* ¶ 127). As concluded by the U.S. investigator who visited the site shortly after the killing, "the patrol was set up in a tactical position atop two hills overlooking the path below where the Dutch Journalists had planned to pass, creating a 'kill zone' that bore the hallmarks of a classic ambush." (*Id.* ¶ 128).

In the immediate aftermath of the killings, Defendant and the Government of El Salvador stifled any meaningful investigation, let alone prosecutions, of the killings. (*Id.* ¶¶ 110, 114, 141-44). In 1992, a peace agreement between the Salvadoran Government and the FMLN permitted the U.N. Truth Commission to investigate crimes committed during the civil war. (*Id.* ¶¶ 130, 145). The U.N. investigation resulted in the publication of a U.N. Truth Commission Report, which

stated that "the decision to ambush" the Dutch Journalists, including Kuiper, "was taken by Colonel Mario A. Reyes Mena." (*Id.* ¶ 132). *Contra* Mot. at 5 (characterizing the report as merely accusing Defendant of "being present in a meeting"). Five days later, the Salvadoran government enacted a blanket Amnesty Law that shielded perpetrators, including Defendant, from investigations and prosecutions for human rights abuses committed during the civil war. Compl. ¶ 146. The Amnesty Law remained in effect until July 13, 2016, when El Salvador's Supreme Court struck it down as unconstitutional. (*Id.* ¶¶ 20, 148-49).

Plaintiff did not learn of Defendant's presence in Virginia until September 2018, when a Dutch television program aired a documentary on the killings that tracked Defendant to his current residence. (*Id.* ¶ 154). After Plaintiff pursued relief in El Salvador (*Id.* ¶¶ 152, 155), in November 2022, a Salvadoran court indicted three former officers of the Salvadoran Security Forces, including Defendant, for the killing of the Dutch Journalists. (*Id.* ¶ 22.) Since then, Defendant has remained in the United States and has not submitted to the Salvadoran courts' jurisdiction. (*Id.* ¶¶ 24-26). Thus, this forum is the only one available to Plaintiff to seek civil redress against Defendant.

LEGAL STANDARD

For motions under Rule 12(b)(6), the court must accept the facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Warfaa v. Ali*, 33 F. Supp. 3d 653, 658 (E.D. Va. 2014). Dismissal is appropriate only when the pleadings, viewed in the light most favorable to the plaintiff, fail to articulate a cognizable claim for relief. *Id.* To survive dismissal, the factual allegations must "raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim is facially plausible when the alleged facts

permit the court to reasonably infer that the defendant is liable for the misconduct claimed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Claims under the TVPA are subject to a ten-year statute of limitations, with permissible equitable tolling. 28 U.S.C. § 1350 note § 2(c). Equitable tolling requires a fact-sensitive inquiry. *See Holland v. Florida*, 560 U.S. 631, 649-50 (2010) (requiring a "case-by-case" analysis). The TVPA "explicitly calls for consideration of all equitable tolling principles in calculating this period with a view toward giving justice to plaintiff's rights." S. Rep. No. 102-249, at 10-11 (footnotes omitted); *accord Warfaa v. Ali*, 33 F. Supp. 3d at 664, *aff'd*, 811 F.3d 653 (4th Cir. 2016).

Finally, a motion under Rule 12(b)(7) requires showing that a necessary party under Rule 19 is absent and that their absence impairs the court's ability to accord complete relief or prejudices existing parties. Fed. R. Civ. P. 12(b)(7). Courts are reluctant to grant the "drastic remedy" of dismissal on 12(b)(7) motions. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 (4th Cir. 2000). The burden lies on the moving defendant to demonstrate that a party must be joined for a just adjudication. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005).

ARGUMENT

I. The Court Has Subject Matter Jurisdiction Over Plaintiff's Claim.

The Court has federal-question jurisdiction over Plaintiff's TVPA claim. 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiff's TVPA claim "arises under" the laws of the United States because he asserts a single claim, for Defendant's violation of the TVPA, which is a federal law.

Defendant argues that the Court lacks subject matter jurisdiction over Plaintiff's TVPA claim because he is immune from suit (1) as a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 et seq., and (2) pursuant to conduct-based immunity under the common law. Mot. at 6-17. The Court should reject Defendant's immunity arguments, which are foreclosed by Supreme Court and Fourth Circuit precedent.

A. Defendant Is Not a Foreign State Entitled to Immunity Under the Foreign Sovereign Immunities Act.

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") to transfer primary responsibility for deciding whether foreign states are entitled to immunity from the State Department to the courts. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) (citing 28 U.S.C. § 1602). The FSIA is now the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Samantar*, 560 U.S. at 314 (internal citations omitted). By its plain language, the FSIA only regulates the immunity accorded to a foreign state. *See, e.g.*, 28 U.S.C. § 1604 (a "*foreign state* shall be immune from the jurisdiction of the courts of the United States and of the States" except as provided in the exceptions) (emphasis added)); 28 U.S.C. § 1603(a)-(b) (defining a "foreign state" to include only "a political subdivision" and "agency or instrumentality" of a foreign state, which must be an "entity").

In *Samantar*, the Supreme Court held that an individual foreign official sued for conduct undertaken in his official capacity, including pursuant to claims under the TVPA, is not a foreign state entitled to immunity from suit under the FSIA. 560 U.S. at 325. In light of the "text, purpose, and history of the FSIA," a foreign sovereign is deemed distinct from its individual foreign government officials and subject to a different immunity regime. *Samantar*, 560 U.S. at 325; *see also id.* at 319 ("Reading the FSIA as a whole, there is nothing to suggest we should read 'foreign

state' in § 1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted."). As stated by the Fourth Circuit Court of Appeals, "[t]he FSIA displaced the common law regime for resolving questions of foreign *state* immunity and shifted the Executive's role as primary decision maker to the courts. After *Samantar,* it is clear that the FSIA did no such thing with respect to the immunity of *individual* foreign officials; the common law, not the FSIA, continues to govern foreign official immunity." *Yousuf v. Samantar*, 699 F.3d 763, 768 (4th Cir. 2012), *cert. denied*, 571 U.S. 1156 (2014) (emphases in the original) (internal citations omitted).

Defendant maintains that he is immune from suit under the FSIA. Mot. at 6 ("Mr. Reyes Mena has foreign sovereign immunity."). *Samantar*, however, squarely forecloses any argument that Defendant is a foreign state for purposes of the FSIA.

First, relying on pre-*Samantar* caselaw, Defendant wrongly posits that "TVPA claims are subject to the FSIA." Mot. at 7 (citing *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279, 1289 (D.C. Cir. 2008)). But, as the Fourth Circuit has noted, *Belhas* "involved the erroneous (pre-*Samantar*) application of the FSIA to individual foreign officials claiming immunity." *Samantar*, 699 F.3d at 774 (citing *Belhas,* 515 F.3d a 1285). The TVPA and the FSIA are distinct statutes, with distinct bases for establishing subject matter jurisdiction,[1] and distinct immunity regimes. *Samantar*, 560 U.S. at 325.

[1] *Compare* 28 U.S.C. § 1350 note § 2(a) (TVPA) (providing federal courts with jurisdiction over claims against "*an individual* who, under actual or apparent authority, or color of law, of any foreign nation" subjects another to torture or extrajudicial killing), *with Samantar*, 560 U.S. at 314 (holding that the FSIA is the "sole basis for obtaining jurisdiction over a *foreign state* in federal court") (emphasis added).

Second, Defendant argues that Plaintiff's TVPA claim against him is tantamount to a claim against the foreign state of El Salvador, which is the real party in interest. Mot. at 7-9.[2] If accepted, Defendant's argument would eviscerate the central holding of *Samantar*—that an individual foreign official sued for conduct undertaken in his official capacity is not a foreign state entitled to immunity from suit under the FSIA. The cases Defendant cites do not support his real party in interest argument because they all involved suits against a foreign state or a state-owned entity, in which damages were sought from the foreign state's coffers, not from an individual defendant.[3] Here, Plaintiff is suing Defendant in his personal capacity for his role in the ambush that targeted and killed the Dutch Journalists, and seeks damages from Defendant's "own pockets." *See Samantar*, 560 U.S. at 325 ("And we think this case, in which respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is properly governed by the common law because it is not a claim against a foreign state as the [FSIA] defines that term.").

[2] The Fourth Circuit has held that the State cannot be the real party in interest when, as here, a *jus cogens* norm is alleged to have been violated. *Yousuf*, 699 F.3d at 776. This is because *jus cogens* norms are "by definition, acts that are not officially authorized by the Sovereign." *Yousuf*, 699 F.3d at 776.

[3] In *Qandah v. Johor*, Mot. at 7, the Sixth Circuit granted an individual defendant immunity under the FSIA, when the plaintiff sued both a state-owned corporation and the individual head of that corporation, made no distinction between the actions of the individual and the corporation, and sought damages from both defendants collectively. No. 20-1991, 2021 WL 5446767, at *6 (6th Cir. Nov. 22, 2021). In *Odhiambo v. Kenya*, Mot. at 8, the court held that the FSIA applied to bar suit against two individual defendants when they were named in their official capacities alongside a state defendant, and the damages would have been payable only from the state defendant's coffers. 930 F. Supp. 2d 17, 34-35 (D.D.C. 2013). Finally, in *Heping Li v. Keqiang Li*, Mot. at 8, the court held individual defendants to be immune under the FSIA when (1) the individuals were sued alongside a state-owned bank; (2) there was no indication that plaintiffs were seeking damages "directly from the pockets" of the individual defendants; (3) the complaint extensively challenged the state's policies and practices; and (4) many of the defendants were sued under a theory of respondeat superior, which directly tied their actions to those of the state. Civ. No. 20-2008 (JMC), 2023 WL 2784872, at *4 (D.D.C. Apr. 5, 2023).

Finally, Defendant contends that the FSIA governs the suit against him because El Salvador is a required party. Mot. at 9-11.[4] As support, Defendant relies on another pre-*Samantar* case, *Philippines v. Pimentel*, 553 U.S. 851 (2008), decided on a set of facts entirely divorced from those at issue here.[5] In the present case, Plaintiff has asserted a TVPA claim against Defendant in his individual capacity—no foreign state has been sued nor has a foreign state asserted a claim of immunity under the FSIA. As *Samantar* made clear, the fact that Defendant is a former foreign official sued for conduct undertaken in his official capacity does not make El Salvador a required party or render him immune from suit pursuant to the FSIA. *Samantar*, 560 U.S. 305.

B. Fourth Circuit Precedent Forecloses Defendant's Claim of Conduct-Based Immunity for A *Jus Cogens* Violation.

At common law, as articulated by the Supreme Court, "foreign sovereign immunity extends to an individual official for acts committed in his official capacity but not to an official who acts

[4] Defendant argues that not naming El Salvador amounts to Plaintiff's "failure to join a party under Rule 19." *See* Fed. R. Civ. P. 12(b)(7). A party is "required" under Rule 19 if it is both "necessary" under Rule 19(a) and "indispensable" under Rule 19(b). *Nat'l*, 210 F.3d at 249. El Salvador is not a "necessary" party because it has no claimed interest affected by this suit, which is brought against Reyes Mena in his individual capacity, and which seeks monetary damages only from Reyes Mena. Nor is El Salvador "indispensable" because it would not be prejudiced by the outcome of this suit, which furthers the Salvadoran government's goal of holding accountable Reyes Mena and other perpetrators of atrocities during the Salvadoran Civil War. *See* Compl. ¶ 22. Dismissal on Rule 19 grounds would not only be unprecedented for a TVPA case of this kind, but it would also leave Plaintiff without adequate remedy for his harms. *See* Fed. R. Civ. P. 19(b)(4) (requiring courts to consider whether dismissal under Rule 19(b) would leave the plaintiff without adequate remedy).

[5] In *Pimentel*, the plaintiff initiated an interpleader action against the Republic of the Philippines and a state-run Philippine Commission to determine proper ownership of disputed assets allegedly stolen by the former President of the Philippines. *Pimentel*, 553 U.S. at 858-60. All parties agreed that the Republic of the Philippines and the Philippine Commission qualified as a foreign state under the FSIA and that both were "required entities" to the interpleader action. *Id.* at 863-65. The Republic of the Philippines and the Philippine Commission asserted sovereign immunity under the FSIA and moved to dismiss the suit. *Id.* at 859. The Supreme Court found valid assertions of foreign sovereign immunity under the FSIA and that the interpleader action could not proceed without them. Thus the action was properly dismissed. *Id.* at 873.

beyond the scope of his authority." *Samantar*, 560 U.S. at 322 n.17 (internal citations omitted). Applying this principle, the Fourth Circuit recognized that acts of extrajudicial killing are not shielded by foreign official immunity because, by definition, they cannot be legally authorized. *Yousuf*, 699 F.3d at 777 ("[U]nder international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity."); *accord Warfaa v. Ali*, 811 F.3d 653, 661-62 (4th Cir. 2016) (holding in context of TVPA claim that *Yousuf* forecloses a former military official's claim of conduct-based immunity for *jus cogens* violations), *cert. denied*, 582 U.S. 929 (2017).[6]

Defendant asserts that merely because he committed these acts in his position as Commander of the Fourth Brigade, they qualify as official acts. Mot. at 12-13. That is not the law. "[T]here is no contradiction in finding that Defendant[] acted under color of law but that [his] actions were individual and not official actions." *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 752 (D. Md. 2010), *rev'd on other grounds*, 657 F.3d 201 (4th Cir. 2011), *on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012). The law of this Circuit is that Defendant is not entitled to conduct-based immunity for extrajudicial killing, which is a *jus cogens* violation. *See Yousuf*, 699 F.3d at 777-78 (holding that extrajudicial killings are *jus cogens* violations); *Warfaa v. Ali*, 33 F. Supp. 3d 653, 662 (E.D. Va. 2014) (same).

[6] "A *jus cogens* norm, also known as a 'peremptory norm of general international law,' can be 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 (quoting *Vienna Convention on the Law of Treaties* art. 53, May 23, 1969, 1155 U.N.T.S. 331). *Jus cogens* norms include the prohibitions against genocide, torture, and the "murder or disappearance of individuals," among other widely accepted norms. *Id*.

Indeed, the TVPA *requires* a showing that the defendant acted "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note, § 2(a). If acting under color of law is a prerequisite for TVPA liability, then it cannot also create a complete defense. *Doe v. Qi*, 349 F. Supp. 2d 1258, 1282 (N.D. Cal. 2004) ("The mere fact that acts were conducted under color of law or authority, which may form the basis of state liability by attribution, is not sufficient to clothe the [foreign] official with sovereign immunity."); *see also* S. Rep. No. 102-249, at 6 ("the phrase '. . . under color of law' . . . denote[s] torture and extrajudicial killings committed by officials both within *and outside the scope of their authority*." (emphasis added)).

The TVPA's legislative history confirms Congress's intent to distinguish torture and extrajudicial killing from truly "official actions" of the foreign state, because "no state officially condones torture or extrajudicial killings," and "few such acts, if any, would fall under the rubric of 'official actions.'" S. Rep. No. 102-249, at 8; *see also Yousuf*, 699 F.3d at 777 ("Moreover, we find Congress's enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*."). Defendant would have this Court read the TVPA as a dead letter, all the while ignoring that, for decades, U.S. courts have exercised subject matter jurisdiction pursuant to the TVPA to hold foreign officials, including former Salvadoran military officials, responsible for acts carried out under color of foreign law.[7] *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (upholding judgment against El Salvador's former Vice-Minister of Defense); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir.

[7] Defendant relies on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), to argue that "military operations, including ambushes, can indeed be officially authorized by a sovereign nation." Mot. at 14. However, *Nelson,* decided before the Supreme Court's decision in *Samantar*, was an FSIA case in which there was no dispute that the defendants fell under the FSIA definition of foreign state. *Nelson*, 507 U.S. at 351, 356.

2006) (upholding judgment against two former Salvadoran Ministers of Defense); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002) (upholding judgment against the same Ministers of Defense); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 112 (E.D. Cal. 2004) (granting judgment against former captain in Salvadoran Air Force).

Defendant attempts to circumvent the law of this Circuit by claiming that the bar on conduct-based immunity for *jus cogens* violations only applies to foreign officials from governments that are not recognized by the State Department. Mot. at 13-17. Not so. *Cf. Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 968, 970 (E.D. Va. 2019) (denying sovereign immunity because defendants, the United States and U.S. military contractors, were alleged to have committed *jus cogens* violations); *see also Hilao v. Estate of Marcos,* 25 F.3d 1467, 1472 (9th Cir. 1994) (denying former Philippines president's claim of sovereign immunity under the FSIA because "acts of torture, execution, and disappearance were clearly acts outside of his authority as President").[8]

Nor is this a case where a foreign state has authorized or ratified the violation at issue. Unlike the facts of the Ninth Circuit's *Doğan v. Barak* decision,[9] on which Defendant heavily

[8] As the *Yousuf* decision makes apparent, the Fourth Circuit's holding that a *jus cogens* violation forecloses conduct-based official immunity under the common law was made independently of the State Department's suggestion on non-immunity, which noted there was no recognized government in Somalia to assert or waive defendant's immunity. *Yousuf*, 699 F.3d at 778 ("Because this case involves acts that violated *jus cogens norms*, including . . . extrajudicial killings . . . we conclude that Samantar is not entitled to conduct-based official immunity under the common law, which in this area incorporates international law. *Moreover*, the [State Department's suggestion on non-immunity] has supplied us with *additional reasons to support this conclusion*." (emphases added)).

[9] In *Doğan*, Israel confirmed that the defendant's actions "were performed exclusively in his official capacity as Israel's Minister of Defense," and that the lawsuit concerned only "authorized military action taken by the State of Israel." *Doğan v. Barak*, No. 2:15-cv-8130, 2016 WL 6024416, at *12 (C.D. Cal. Oct. 13, 2016) *aff'd*, 932 F.3d 888 (9th Cir. 2019). Israel then asked the State Department to file an SOI, and the State Department did so, concluding that Barak's

relies, the State Department has not filed a suggestion of immunity ("SOI") in this case, nor can Defendant offer any indication that El Salvador made such a request.[10] Even setting aside that a *jus cogens* violation forecloses conduct-based immunity, which is the law of this Circuit, a foreign state's request is a necessary prerequisite for any individual to receive a grant of foreign-official immunity because the immunity belongs to the foreign state and not to the individual. *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("Because it is the state that gives the power to lead and the ensuing trappings of power—including immunity—the state may therefore take back that which it bestowed upon its erstwhile leaders."). The State Department has long recognized this principle, including before this Court. *See Statement of Interest of the United States* ¶ 13, *Yousuf v. Samantar*, No. 4-CV-1360, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), ECF No. 147 ("[A] former official's residual immunity is not a personal right. It is for the benefit of the official's state.").

Here, not only did El Salvador not request a SOI, it criminally charged Defendant for his role in the matter and requested an INTERPOL Red Notice for his provisional arrest, highlighting the extent to which it disavowed the actions he took as a former foreign official. Compl. ¶¶ 22, 24-26; *see Doe 1 v. Buratai*, 318 F. Supp. 3d 218, 237-38 (D.D.C. 2018) (explaining that conduct-based immunity is not available when challenged conduct is not "condoned by the foreign

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actions were "official" government acts "authorized by Israel." 2016 WL 6024416, at *3; 932 F.3d at 891. Similarly, in *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009), *see* Mot. at 17, the United States had granted Israel's request for a suggestion of immunity. The court in *Matar* noted this critical difference and stated: "the TVPA will apply to any individual official whom the Executive declines to immunize[.]" *Matar*, 563 F.3d at 15.

[10] Defendant also cites *Doe 1 v. Buratai* to support his argument that he is entitled to common law foreign official conduct-based immunity. Mot. at 13 (citing 318 F. Supp. 3d 218, 234 (D.D.C. 2018)). But the court in *Buratai* noted and explicitly relied on the fact that "the Nigerian government authorized and ratified the defendants' alleged actions[.]" *Buratai*, 318 F. Supp. 3d at 232. That has not happened here. Further, *Buratai* acknowledges that the Fourth Circuit does not extend conduct-based immunity to *jus cogens* violations. 318 F. Supp. 3d at 234 (citing *Yousuf*, 699 F.3d at 777). Its reasoning cannot apply here.

sovereign"); *see also Yousuf*, 699 F.3d at 777-78 (finding that "as a permanent legal resident, [defendant] has a binding tie to the United States and its court system" that is an additional factor barring the grant of common law immunity).

Finally, Defendant is not entitled to conduct-based immunity because Plaintiff seeks damages against him alone, for actions undertaken in his individual capacity, and exercising jurisdiction against him would therefore not serve to enforce a rule of law against a foreign state. *Yousuf*, 699 F.3d at 774 (holding that conduct-based immunity applies only when "the effect of exercising jurisdiction would be to enforce a rule of law against the state"); *Lewis v. Mutond*, 918 F.3d 142, 146-47 (D.C. Cir. 2019) (holding that defendant was not entitled to conduct-based immunity because plaintiff sought damages from defendant, for actions undertaken in his personal capacity). The Court should decline Defendant's request to ignore governing Supreme Court and Fourth Circuit precedent and rule to deny his immunity requests for his role in the extrajudicial killing of the Dutch Journalists.

II. The Statute Of Limitations In This Case Should Be Equitably Tolled.

Defendant also contends that Plaintiff's claims are time-barred by the TVPA's statute of limitations. Mot. at 17. Claims under the TVPA are governed by a ten-year statute of limitations, which allows for equitable tolling under certain circumstances. 28 U.S.C. 1350, note § 2(c). Congress has stated that the TVPA "calls for consideration of all equitable tolling principles in calculating [the statute of limitations period] with a view toward giving justice to plaintiff's rights." S. Rep. No. 102-249, at 10-11 (footnote omitted). Courts within this district and elsewhere have acknowledged that "[a]llowing tolling is also consistent with the [TVPA]'s legislative history." *Warfaa*, 33 F. Supp. 3d at 664 (collecting cases). To toll the statute of limitations, a plaintiff must demonstrate that he has been "pursuing his rights diligently" and "that some extraordinary

circumstances stood in his way." *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012). Equitable tolling is appropriate when extraordinary circumstances outside the plaintiff's control could not be avoided, even with reasonable diligence. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). "The diligence required for equitable tolling purposes is 'reasonable diligence,' . . . *not* 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653 (internal citations omitted; emphasis added) (reversing Eleventh Circuit on tolling grounds, applying equitable tolling where the petitioner had diligently pursued his rights but was hindered by extraordinary circumstances).

Equitable tolling requires a fact-sensitive inquiry. *See id.* at 650. "A 12(b)(6) motion to dismiss, which tests the sufficiency of the complaint, 'generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's complaint is time-barred.'" *Blackburn v. A.C. Israel Enters.*, No. 3:22-cv-146 (DJN), 2023 WL 4710884, at *10 (E.D. Va. July 24, 2023) (citation omitted) (denying dismissal of plaintiffs' claims as premature where allegations in the complaint may warrant tolling the statute of limitations).

If the Court does examine the issue at the motion to dismiss stage, both the law and the record demonstrate that Plaintiff's TVPA claims are not time-barred under the applicable statute of limitations. Plaintiff's brother was killed in 1982, during the civil war that consumed El Salvador until 1992. Compl. ¶¶ 1-2. "There is a consensus among the federal courts that civil war and a repressive authoritarian regime constitute 'extraordinary circumstances' for purposes of tolling the TVPA's limitations period." *Warfaa*, 33 F. Supp. 3d at 664; *see also Chavez*, 559 F.3d at 493-94 (citing fear of retaliation and absence of an effective justice system in El Salvador as bases for equitable tolling); *Arce*, 434 F.3d at 1262-63 (same). The Complaint alleges that pervasive violence, repression and threats to investigators, judges, and potential witnesses, and the

Salvadoran security forces' cover-up, prevented an effective investigation of human rights abuses committed by Salvadoran security forces during the civil war. Compl. ¶¶ 2-4, 15-19, 141-144. "[C]ivil unrest and general lack of access to a legal remedy" support tolling under the TVPA. *Warfaa v. Ali*, 1 F.4th 289, 295 (4th Cir. 2021) (citing *Jean v. Dorelien*, 431 F. 3d 776, 781 (11th Cir. 2005)). This situation made it impossible for Plaintiff or his family to access information crucial to support his claim. Compl. ¶¶ 141-144.

Nor was Plaintiff sufficiently able to access information to support his claim because of the Salvadoran Amnesty Law. That law, passed days after the release of the U.N. Truth Commission Report, remained in effect from 1993 until 2016 and "made domestic investigations and prosecutions for crimes committed in the context of the armed conflict impossible." Compl. ¶¶ 145-146; *see also id.* ¶ 148 (citing Inter-American Court of Human Rights judgment in *El Mozote v. El Salvador* that held that the Amnesty Law had thus far prevented "the *investigation*, prosecution and, where appropriate, punishment" of those responsible) (emphasis added). "Even with the protection of the Amnesty Law, Salvadoran Security Forces continued to block access to key evidence . . . [of] its involvement in human rights abuses during the civil war, including targeted killings carried out by the Security Forces." (*Id.* ¶ 146). The Fourth Circuit has recognized that "regimes committing egregious human rights violations don't ordinarily foster legal systems in which those abuses can be redressed, so permitting tolling until claimants have the ability to both *compile evidence supporting their claims* and pursue claims without fear of reprisal falls within the purpose of equitable tolling specifically and the TVPA more generally." *Warfaa*, 1 F.4th at 295 (emphasis added); *see also Camps v. Bravo,* No. 1:20-CV-24294, 2023 WL 11959805, at *10 (S.D. Fla. June 30, 2023) (noting that continuing impediments to accountability even after the military regime left power, including the enactment of amnesty laws, were factors in warranting

tolling). Plaintiff's detailed allegations establish that tolling should extend, at a minimum,[11] to 2016, when the Amnesty Law was invalidated.[12]

Alternatively, the Court should toll Plaintiff's claim until September 2018, when Plaintiff first became aware of Defendant's presence in Virginia after a Dutch investigative journalist located Defendant at his current residence in Centreville. Compl. ¶ 154; *see, e.g.*, *Warfaa*, 33 F.Supp.3d at 665 (tolling limitations period in part because of the defendant's absence from the United States).

Plaintiff's diligence[13] and extraordinary circumstances merit the tolling of his TVPA claims against Defendant until at least 2016—when the Amnesty Law was invalidated—or 2018—when Plaintiff became aware of Defendant's location in Virginia. Under either timeline, Plaintiff's claim is timely filed under equitable tolling principles.

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[11] Although the Salvadoran Supreme Court declared the Amnesty Law unconstitutional in 2016, "Salvadoran Security Forces continued to block access to evidence and to obstruct any investigations into its abuses during the civil war, even in the face of court orders." Compl. ¶ 151.

[12] The Sixth Circuit's decision in *Chavez* does not suggest otherwise. It found that before 1994 generalized repression, pervasive violence, and fear prevented plaintiffs from pursuing their claims. *Chavez*, 559 F.3d at 493. Regarding the Amnesty Law, the court concluded that it provided immunity to military officers in El Salvador but not those in the United States; the court did not consider its impact on equitable tolling. *Id.* at 494-96. The *Chavez* case is also distinct because the plaintiffs—torture survivors or witnesses of the extrajudicial killings—had direct access to information in a manner that Plaintiff here lacks. *Id.* at 491.

[13] Soon after the 2016 Supreme Court decision invalidating the Amnesty Law, and the establishment of a Salvadoran Human Rights Unit that could finally properly investigate crimes committed during the civil war, Plaintiff filed a criminal complaint in El Salvador that ultimately led to the indictment of three former military officers, including Defendant. Defendant has since made clear that he is avoiding the prosecution in El Salvador. Compl. ¶¶ 150-55, 158.

III. The TVPA Applies to Conduct Committed Before 1992.

A. Courts Have Consistently Applied the TVPA Retroactively.

Defendant argues that the TVPA does not apply retroactively to conduct before its enactment in 1992. Mot. at 19. In so doing, Defendant obfuscates the fact that numerous courts faced with this question have found precisely the opposite—including courts in this District. In *Warfaa v. Ali*, Judge Brinkema rejected this argument and held that the TVPA granted jurisdiction for conduct occurring in 1987. 33 F. Supp. 3d at 666. In so doing, the court acknowledged that it was far from the first to do so. *Id.* "This line of argument has been considered and rejected by several courts on the grounds that extrajudicial killing and torture have clearly contravened established international law for decades," long before the TVPA's enactment. *Id.* (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (upholding jury verdict in favor of plaintiff who brought TVPA claims based on offending acts which occurred in 1973)).

Indeed, contrary to Defendant's argument that the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum*—a case under the Alien Tort Claims Act ("ATCA")—implicitly overruled prior retroactive TVPA cases, Mot. at 20,[14] the TVPA has consistently been applied to conduct occurring before 1992, including on numerous occasions after *Kiobel* was decided in 2013. *E.g.*, *Samantar*, 699 F.3d at 766 (citing *Yousuf v. Samantar*, 552 F.3d 371, 373-74 (4th Cir. 2009)) (extrajudicial killings, torture, and arbitrary detention committed prior to January 1991); *Chavez*,

[14] Specifically, Defendant argues that because *Kiobel* overruled the ATCA's extraterritorial application, the TVPA can no longer apply retroactively. Mot. at 20-21. Tellingly, Defendant cites no case law for this proposition, because no court has held that *Kiobel* had any impact on the TVPA's retroactive scope. Indeed, *Kiobel* did not overrule the portions of *Alvarez-Machain*, 107 F.3d 696 (9th Cir. 1996), that pertained to the TVPA's retroactive scope, and in his concurring opinion, Justice Kennedy noted that the Court had left the determination of *Kiobel*'s impact on other statutes to "be determined in the future." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013) (Kennedy, J., concurring).

559 F.3d at 493-94 (extrajudicial killings committed during the El Salvador civil war, between 1980 and 1983); *Arce*, 434 F.3d at 1256 (same, between 1979 and 1983); *Cabello*, 402 F.3d at 1148 (extrajudicial killing committed in 1973); *Hilao*, 103 F.3d at 773 (conduct between 1965 and 1981); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195 (S.D.N.Y. 1996) (conduct committed between 1986 and June 1991) ("Under the principles enunciated in *Landgraf*, the retroactive application of the TVPA is entirely proper."); *Bidegain v. Vega*, No. 22-CV-60338-RAR, 2024 WL 3537482, at *8 (S.D. Fla. June 18, 2024) (extrajudicial killing and torture committed in 1985). To hold otherwise would be a stark outlier in a sea of authority applying the TVPA to conduct prior to its enactment. Indeed, Defendant fails to mention or rebut *Warfaa* and similar TVPA-specific authority in this district, and instead relies on authority specific to completely different statutes. *See* Mot. at 20-22 (citing *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017) (Trafficking Victims Protection Reauthorization Act); *United States v. 814,254.76 in United States Currency*, 51 F.3d 207 (9th Cir. 1995) (civil asset forfeiture)).

B. Congress Intended the TVPA to Apply Retroactively.

The Supreme Court has enunciated a three-part test to determine when a statute may apply retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). First, courts must determine "whether Congress has expressly prescribed the statute's proper reach." *Cruz v. Maypa*, 773 F.3d 138, 144 (4th Cir. 2014) (citing *Landgraf*, 511 U.S. at 280). When a statute's text does not address the issue of retroactivity, as with the TVPA, then courts are to employ the normal rules of statutory construction to ascertain the statute's temporal scope. *Cabello*, 402 F.3d at 1153 ("The TVPA could apply retroactively if we find that Congress has clearly indicated its intent to do so.") (citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997)). This includes an analysis of whether there is "clear congressional intent favoring such a result," as informed by the

congressional record and legislative history. *Landgraf*, 511 U.S. at 280; *see United States v. Nader*, 425 F. Supp. 3d 619, 626-27 (E.D. Va. 2019). Then, if the court still cannot determine the statute's intended scope, the statute is invalid only if it "would attach new legal consequences to events occurring prior to its enactment." *Frontier-Kemper Constructors, Inc. v. Director, Officer of Worker's Comp. Programs, U.S. Dep't of Labor*, 876 F.3d 683, 688 (4th Cir. 2017) (citing *Landgraf*, 511 U.S. at 270).

For fear of what lies under the hood, Defendant skips to the last step of this analysis and fails to grapple with the legislative history clarifying that Congress intended that the TVPA apply to conduct prior to 1992. *See* Mot. at 19. Contrary to Defendant's conclusory statements otherwise, *see id.*, Congress expressly stated that the TVPA did *not* create a new cause of action, but merely codified pre-existing federal and international law. H.R. Rep. 102-367(I) at *3-4 ("Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law."); S. Rep. No. 102-249, at 3-5 (the TVPA was intended "to enhance the remedy *already available* under section 1350") (emphasis added). Further, the bill's author indicated that he intended the TVPA to cover torture committed by Saddam Hussein's forces during the Gulf War, which had already occurred as the bill was being debated. Remarks by Sen. Specter, Cong. Rec., Senate, S 1378 (January 31, 1991).

Courts in this District are not blind to this history and have acknowledged Congress's intent that the TVPA codify existing norms. *Kumar v. Republic of Sudan*, No. 2:10CV171, 2019 WL 13251350, at *3 (E.D. Va. July 31, 2019) ("By enacting the TVPA, Congress codified its understanding of the international law norm governing the commission of summary executions")

(quoting *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 (E.D. Va. 2009)). As did the Eleventh Circuit Court of Appeals in *Cabello*. 402 F.3d at 1153-42.

C. In the Alternative, the TVPA Has No Impermissible Retroactive Effect.

Defendant's argument would also fail under the third step of the *Landgraf* retroactivity analysis because the TVPA has no impermissible retroactive effect because the TVPA creates no new cause of action, "creates no new liabilities[,] nor does it impair rights." *E.g.*, *Cabello*, 402 F.3d at 1154; *Xuncax v. Gramajo*, 886 F. Supp. 162, 177 (D. Mass. 1995) ("Applying the TVPA retroactively . . . does not automatically change the rights or obligations of the parties."). Contrary to Defendant's assertion, Mot. at 20, the TVPA creates no new cause of action because "[p]rior to the TVPA, this Court could have exercised extraterritorial jurisdiction to reach wrongful death actions" involving extrajudicial killings by defendants in "locations outside the forum jurisdiction." *Cabello* at 1154 (internal citations omitted); *Xuncax*, 886 F. Supp. at 177 ("The universal condemnation" of the activities actionable under the TVPA were "fully established prior to the events on which the instant claims turn."). "Defendant cannot complain that he had no notice" that the activities actionable under the TVPA were "not a lawful act prior to the enactment of the TVPA." *Cabiri*, 921 F. Supp. at 1196.

Further, extending jurisdiction of United States courts is not a "new legal consequence." *Contra* Mot. at 19. To the extent that the TVPA may be viewed as closing a perceived "jurisdictional gap," retroactive application "is also appropriate." *Xuncax*, 886 F. Supp. at 177 n.14 (citing *Demars v. First Serv. Bank for Savings*, 907 F.2d 1237, 1240 n.5 (1st Cir. 1990) (internal citations omitted) (retroactive application favored where Congress expands courts' jurisdiction in response to a "perceived gap in a statutory jurisdictional scheme")); House Consideration, Amendment and Passage of H.R. 2092 (November 25, 1991) (the TVPA "clarifies existing law to

make explicit that victims" can bring civil suit in federal court against their perpetrators). Further, jurisdictional statutes do not implicate the same "considerations of fair notice, reasonable reliance, and settled expectations" as penal statutes or statutes that "quite radically changed the existing law." *Landgraf*, 511 U.S. at 270; *Winfree v. N. Pac. R.R. Co.*, 227 U.S. 296, 302 (1913). Application of new jurisdictional rules "simply changes the power of the court rather than the rights or obligations of the parties." *Cabiri*, 921 F. Supp. at 1195-96. As such, courts "have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred." *Id.* "Applying the TVPA retroactively allows [plaintiffs] to bring suit in federal court rather than in municipal court. It does not automatically change the rights or obligations of the parties." *Xuncax*, 886 F. Supp. at 177 (holding that the TPVA could be applied retroactively).

Finally, no court has held that the fact that the TVPA imposes a limitations period that differs from analogous state laws impacts its scope. *Contra* Mot. at 19. Defendant's sole case on this point, *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593 (4th Cir. 2005), refers to a statute that by its terms only applied prospectively, and bears no mention of circumstances analogous to Plaintiff's case. *Id.* at 594. Defendant also asserts, despite authority to the contrary, that the applicable statute of limitations absent the TVPA would have been Virginia law. Mot. at 22 (conceding that absent the TVPA, the ATCA would have provided a cause of action). Courts apply the TVPA's statute of limitations retroactively to causes of action brought under the ATS. *See, e.g. Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1367 (S.D. Fla. 2001), *rev'd on other grounds by Aldana v. Del Monte Fresh Produce, N.A.., Inc.*, 416 F.3d 1242 (11th Cir. 2005); 348 F. Supp. 2d at 1145-46. The TVPA's statute of limitations is explicitly set forth in the language of the statute. It is, therefore, substantive, and Defendant offers no rationale for applying a different

statute of limitations when the TVPA applies retroactively. As discussed in Section II, *supra*, the statute of limitations under the TVPA is ten years, and was tolled until at least 2016.

Defendant's arguments regarding available defenses fail for the same reason. As discussed in Section I.B., *supra*, immunity under the *jus cogens* exception was never available to Defendant, so was unmodified by the TVPA. Further, Defendant's one case on this point stems from 1913 and concerned a statute which "quite radically changed the existing law." *Winfree v. N. Pac. R.R. Co.*, 227 U.S. 296, 302 (1913). Defendant's piecemeal arguments fail to show that the TVPA had a similar effect. To the contrary, as discussed at length, the TVPA did not modify existing law or create a new cause of action.

IV. Plaintiff Has Standing to Pursue His TVPA Claim in Virginia.

Pursuant to the TVPA, a claimant has standing to obtain relief for a claim of extrajudicial killing if he is "a legal representative or any person who may be a claimant in an action for wrongful death." *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338, 1346 (11th Cir. 2011) (quoting 18 U.S.C. § 1350, note § 2(a)(2)). Courts look to state law—including its choice-of-law principles—to determine whether a plaintiff is a proper wrongful death claimant under the TVPA. *See id.* at 1348-49. If the application of the state law would result in no remedy for an extrajudicial killing, the TVPA directs courts to apply the law of the place where the harm took place. *Id.* at 1349 (citing S. Rep. No. 102-249, at 7 n.10).

First, because the extrajudicial killing of Plaintiff's brother took place in a foreign jurisdiction, a choice-of-law analysis is necessary. Virginia adheres to *lex loci delicti* for its choice-of-law analysis. *Insteel Indus., Inc. v. Costanza Contracting Co.*, 276 F. Supp. 2d 479, 486 (E.D. Va. 2003). Under this rule, "the law of the place of the wrong determines the substantive issues of tort liability." *Buchanan v. Doe*, 431 S.E.2d 289, 291 (Va. 1993). The extrajudicial killing of Jan

Kuiper took place in El Salvador; therefore, the law of El Salvador applies for purposes of standing.[15] The parties agree that Plaintiff, who is a civil party in the Salvadoran proceedings, has standing in El Salvador to seek compensation for the wrongful death of his brother. Compl. ¶¶ 155-56; Mot. at 26; ECF No. 23-3 at 3 (Crim. Code art. 70 (El Sal.), providing that "heirs" of injured parties may bring civil claims within criminal actions). Plaintiff, therefore, has standing to proceed with his claim.

The result is the same if Virginia law initially applies under choice-of-law analysis. Where, as here, the application of state law would leave the plaintiff without a remedy for a claim of extrajudicial killing,[16] courts considering standing for TVPA claims turn again to the law of the place where the harm occurred. *Baloco*, 640 F.3d at 1348-49, 1349 n.12.[17] The Court should therefore look again to the law of El Salvador, where Jan Kuiper's killing took place. For the same reasons, Plaintiff has standing under the laws of El Salvador and thus under the TVPA.

[15] The standing provision of Virginia's wrongful death statute is substantive law. *See Jones v. Prince George's Cnty., Md.*, 541 F. Supp. 2d 761, 766 n.10 (D. Md. 2008) (applying Virginia law), *aff'd*, 355 F. App'x 724 (4th Cir. 2009).

[16] Under Virginia law, only the estate representative of the decedent may file a wrongful death claim. *See* Va. Code Ann. § 8.01.50(C).

[17] *See also In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 789 F.2d 1092, 1097-98 (5th Cir. 1986) (recognizing the claim of a nephew for the wrongful death of his aunt, where Louisiana law on wrongful death action would have afforded no remedy, but Argentinean law did afford a remedy) (cited in S. Rep. No. 102-249, at 7 n.10); *Cabello*, 157 F. Supp. 2d at 1356-58 (applying Chilean law where Florida wrongful death statute only allowed claims by estate representative and finding that under Chilean law, siblings had standing as wrongful death claimants); *Xuncax*, 886 F. Supp. at 191 (observing that Massachusetts law does not give standing to siblings where parents or issue of decedent are alive, and finding that siblings have standing as wrongful death claimants under Guatemalan law).

V. Defendant's Exhaustion of Remedies Defense Is Not Ripe for Consideration at the Motion to Dismiss Stage, and, Even if Considered, Fails.

Defendant argues that the TVPA is not available to Plaintiff because he has not exhausted remedies in El Salvador. Mot. at 25-27. The TVPA exhaustion requirement "is an affirmative defense, requiring the defendant to bear the burden of proof, a burden which is considered substantial." *al-Suyid v. Hifter*, No. 1:20CV170 (LMB/JFA), 2020 WL 8211457, at *4 (E.D. Va. June 17, 2020) (citing *Jean*, 431 F.3d at 781) (internal quotation marks omitted). Only in the "relatively rare circumstances" when "all facts necessary to the affirmative defense clearly appear on the face of the complaint" may an affirmative defense, such as exhaustion, be considered in a motion filed under Rule 12(b)(6). *L.N.P. v. Kijakazi*, 64 F.4th 577, 586 (4th Cir. 2023). Moreover, "to succeed in these rare circumstances, the defendant must show that the plaintiff's potential [response] to the affirmative defense was foreclosed by the allegations in the complaint." *Id.* (brackets in the original).

The Complaint does not foreclose any of Plaintiff's potential responses to Defendant's affirmative defense, and Defendant has not suggested otherwise. *See* Mot. at 25-27. Indeed, the Complaint does not fully describe those responses, including obstacles to obtaining civil relief, the inability to enforce judgments, and other factors. The exhaustion requirement under the TVPA can be equally satisfied by showing that "foreign remedies are unobtainable, ineffective, inadequate, or obviously futile." *Xuncax*, 886 F. Supp. at 178 (quoting S. Rep. No. 102-249, 10). But a plaintiff does not need "to plead affirmatively in his complaint matters that might be responsive to affirmative defenses even before the affirmative defenses are raised." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007) (en banc). Plaintiff should be allowed to develop the record fully so that the Court can properly conduct the fact-intensive inquiry related to the exhaustion

requirement of the TVPA. The affirmative defense of non-exhaustion does not fit into the narrow exception to consider affirmative defenses at the motion-to-dismiss stage. *See Boniface v. Viliena*, 338 F. Supp. 3d 50, 66 (D. Mass 2018) (collecting cases deferring decision on exhaustion to a later stage).

Even if the Court were to consider the TVPA's exhaustion requirement, Defendant fails to carry his substantial burden. "The legislative history to the TVPA indicates that its exhaustion requirement was not intended to create a prohibitively stringent condition precedent to recovery under the statute." *Xuncax*, 886 F. Supp. at 178; *see also Al-Suyid*, 2020 WL 8211457, at *4 ("in most instances the initiation of litigation under [the TVPA] will be virtually prima facie case evidence that the claimant has exhausted his or her remedies.") (quoting *Boniface*, 338 F. Supp. 3d at 65 (citing *Jean*, 431 F.3d at 781-82)). To the extent there is any doubt surrounding the exhaustion defense, "both Congress and international tribunals have mandated that such doubts be resolved in favor of the plaintiffs." *Al-Suyid*, 2020 WL 8211457, at *4 (quoting *Boniface*, 338 F. Supp. 3d at 65) (citation omitted).

The Complaint alleges facts about the practical obstacles to obtaining remedies, including the extreme delay of the criminal investigation in El Salvador because of the Amnesty Law's decades-long prohibition on investigation and prosecution of civil-war-era crimes, the persecution of judges and investigators of such crimes before the Amnesty Law, and Defendant's refusal to return to El Salvador to face justice. Compl. ¶¶ 141-163.

While the Complaint also alleges that the sibling of a victim of wrongful death has standing to seek civil remedies under Salvadoran law, (*Id.* ¶ 156), it does not show that adequate and available domestic remedies exist there, or that Plaintiff has failed to exhaust them. Not only does Defendant fall short of his substantial burden of showing that remedies exist, but he also falls short

of proving that the purported available remedies are adequate. Defendant does not provide any indication that a judgment against him could be enforced. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832 (9th Cir. 2008) ("[A] judgment that cannot be enforced is an incomplete, and thus ineffective, remedy."). Nor does Defendant consider or negate procedural bars to Plaintiff seeking or obtaining civil remedies, including any applicable statute of limitations. *Bidegain*, 2024 WL 3537482, at *5 ("the TVPA's 'adequate and available' requirement renders a remedy with an expired statute of limitations unavailable."). Defendant's argument about the availability of remedies is speculative at best, and it relies on the possibility that other criminal defendants, not Mr. Reyes, could be found guilty in a criminal trial.[18] But the legislative history of the TVPA directs courts to "decline to exercise the TVPA's grant of jurisdiction *only* if it appears that adequate and available remedies *can be assured* where the conduct complained of occurred, and that the plaintiff has not exhausted local remedies there." S. Rep. No. 102-249, at 9 (emphasis added).

Defendant undermines his own affirmative defense by admitting that remedies in El Salvador against him are unavailable, asserting that any remedies that Plaintiff could obtain would be the responsibility of the state of El Salvador, not Defendant. Mot. at 26-27. However, the TVPA contemplates suit against an individual, not a state. Section 2(a) of the TVPA explicitly creates *individual* liability for damages. 28 U.S.C. § 1350, note § 2(a) ("Liability. An *individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . ."); *see also* TVPA Preamble (stating that the TVPA establishes "a civil action for recovery of damages *from an*

[18] Defendant speculates, for example, that "as long as one of the criminal defendants is found guilty, Plaintiff *would be able to* seek damages from El Salvador" and that "Plaintiff *may be able to obtain all the civil remedies he seeks* through proceedings under Salvadoran law." Mot. at 26-27 (emphasis added).

individual who engages in torture or extrajudicial killing") (emphasis added); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) (holding that the text of the TVPA authorizes liability "solely against natural persons"). The congressional intent behind the TVPA was to ensure that the United States does not offer a "safe haven" to perpetrators of human rights abuses and that they "are held legally accountable for their acts." S. Rep. No. 102-249, at 3. The text and history of the TVPA make clear that the availability of administrative remedies against another defendant, particularly a foreign sovereign, does not prove the availability of adequate remedies against the relevant defendant for purposes of the exhaustion requirement. *Bidegain*, 2024 WL 3537482, at *5 (rejecting similar exhaustion argument because the "TVPA, by its plain language, provides recourse against individuals, not foreign governments, and a remedy against [the foreign sovereign] thus falls outside the scope of the statute's exhaustion requirement.") Defendant has failed to carry his substantial burden of showing that remedies that Plaintiff failed to exhaust against him exist in El Salvador and are adequate and available.

VI. Defendant Fails to Justify a Stay by Clear and Convincing Circumstances That Outweigh the Significant Potential Harm to Plaintiff.

In the alternative to dismissal, Defendant suggests that this Court stay this case pending the outcome of proceedings in El Salvador—even though Defendant is himself avoiding those proceedings. Mot. at 27-28. The party seeking a stay "must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Inds., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). A court should consider three factors when considering a stay: "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; [and,] (3) potential prejudice to the non-moving party."

Gibbs v. Plain Green, LLC, 331 F. Supp. 3d 518, 525 (E.D. Va. 2018) (internal citations omitted). Defendant fails to meet this burden.

First, Defendant's judicial economy argument assumes that resolution of the criminal case in El Salvador will dispose of this case. But that is nonsense when Defendant has refused to submit to the jurisdiction of the Salvadoran court. Defendant's argument rests on speculative civil remedies that are unlikely to be available or adequate after the Salvadoran criminal case concludes. *See* Section V, *supra*. Moreover, awaiting the resolution of the criminal case will not change facts about alleged civil remedies. Thus, granting a stay pending the resolution of the Salvadoran criminal trial would only waste time. *See White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 463 (S.D. W. Va. 2013) (denying stay because plaintiffs would suffer a delay of potentially a year pending a Supreme Court decision that may ultimately not affect the district court's holding).

Second, the alleged hardship for Defendant does not justify a stay. Defendant has no Fifth Amendment right to remain silent when the risk of criminal prosecution is in a foreign country. *See Snider v. Seung Lee*, 584 F.3d 193, 201 (4th Cir. 2009) ("[C]riminal prosecution by a foreign government [is] not subject to U.S. constitutional guarantees."). Even for criminal proceedings in the United States, stays are generally not granted unless the constitutional implications are clear. *See United States v. Rudy's Performance Parts, Inc.*, 647 F. Supp. 3d 408, 418 (M.D.N.C. 2022). Defendant's harm, therefore, is only the inconvenience of litigating this case, and it does not justify a stay. *See Kadel v. Folwell*, 446 F. Supp. 3d 1, 19 (M.D.N.C. 2020), *aff'd sub nom. Kadel v. N.C. State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), *as amended* (Dec. 2, 2021) (denying stay pending Supreme Court ruling because the "harm to [d]efendants of not staying this case appears to be nothing more than the inconvenience of having to begin discovery").

Third, the potential prejudice to Plaintiff is significant. Defendant is not present in El Salvador and has refused to submit to the Salvadoran court's jurisdiction. This TVPA case is the only proceeding where Defendant can be compelled into discovery for his role in the extrajudicial killing of Plaintiff's brother. Defendant has also alluded to his advanced age and ill health. Mot. at 1, 27. Waiting an unspecified amount of time for resolution of a criminal trial abroad could deny Plaintiff his only remaining option for accountability. Further, the mere length of the requested stay would prejudice Plaintiff. A "non-moving party can suffer prejudice when a stay is reasonably expected to cause a significant delay in proceedings." *Gibbs*, 331 F. Supp. 3d at 527. "[T]his court has found potential delays of four to six months to be . . . prejudicial to a non-moving party." *Simpson v. LLAB Trucking, Inc.*, No. 1:21-CV-333-RDA-IDD, 2022 WL 2614876, at *3 (E.D. Va. Jan. 26, 2022) (internal citations omitted). The unspecified length of the stay Defendant requests would significantly prejudice Plaintiff, particularly given the decades-long impunity for his brother's extrajudicial killing.

Defendant has not met his burden, and his request for a stay pending resolution of the criminal trial in El Salvador should be denied.

CONCLUSION

The Court should deny the motion to dismiss and request for stay.[19]

[19] In the alternative, Plaintiff respectfully requests leave to file a first amended complaint to address any perceived deficiency. *See* Fed. R. Civ. P. 15(a) ("The court should freely give leave when justice so requires.").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on December 20, 2024, a copy of **PLAINTIFF GERT JANNES KUIPER'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, STAY** was filed electronically with the Clerk of the Court for the United States Eastern District of Virginia by using the CM/ECF system which will send a notice of electronic filing to counsel of record, including:

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