UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

HELENA URÁN BIDEGAIN in her individual capacity and in her capacity as the legal representative of the ESTATE OF CARLOS HORACIO URÁN ROJAS, XIOMARA URÁN, in her individual capacity, and MAIRÉE URÁN BIDEGAIN, in her individual capacity, *Plaintiffs*, v. LUIS ALFONSO PLAZAS VEGA, *Defendant*.	**Civil Action No. 0:22-cv-60338-RAR**

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S RULE 12 MOTION TO DISMISS

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INTRODUCTION

Plaintiffs bring this action pursuant to the Torture Victim Protection Act ("TVPA"), seeking redress and accountability for the torture and extrajudicial killing of their father in a military operation over which Defendant had command as a lieutenant colonel in the Colombian Army and commander of its 13th Brigade Cavalry School. In moving to dismiss the Complaint, Defendant does ***not*** contend that Plaintiffs' well-pled Complaint fails to state the elements of a TVPA claim against him. It does. Rather, Defendant's unenumerated "Rule 12" motion to dismiss is based on the alleged failure to exhaust local remedies and international comity. Neither ground has merit and should be rejected.

Defendant fails to carry his substantial burden of proving his exhaustion affirmative defense. He cannot. Setting aside the substantial procedural defects afflicting Defendant's motion (Section I., *infra*), Plaintiffs *did* exhaust available local remedies, including the very avenues raised by Defendant. Section II.B., *infra*. Defendant's motion is founded on pure conjecture. Section II.A., *infra*. The complete absence of factual support for the crux of Defendant's motion underscores the necessity of abiding by the statutory framework for raising affirmative defenses – via summary judgment. In addition, Defendant's international comity argument fails because his purported criminal acquittal in Colombia concerned a different subject matter, different issues and different parties than those before this Court. Abstention based thereon would violate the Due Process Clause, among other things. Defendant's motion should be denied in its entirety.

RELEVANT FACTS

Defendant Luis Alfonso Plazas Vega ("Defendant") currently resides in Weston, Broward County, Florida, where he owns property. ¶ 22.[1]

[1] All references to "¶" are to the Complaint, filed February 15, 2022 (Dkt. 1).

In November 1985, Defendant was a lieutenant colonel and the commander of the Colombian Army's 13th Brigade Cavalry School in Bogotá. ¶ 6. In response to the November 6, 1985 attack by members of the M-19 guerilla group on Colombia's Palace of Justice, soldiers under Defendant's command stormed the Palace of Justice and took custody of all individuals, including civilian hostages, who were escorted out of the building. *Id*. ¶ 7. Everyone leaving the building was methodically triaged by the military; those suspected of being a guerilla or a guerilla sympathizer were labeled "*especiales*" ("special"). *Id*. The *especiales* were transferred to military facilities, including the Cavalry School over which Defendant had command and control, where they were interrogated, tortured, and in many cases extrajudicially killed or forcibly disappeared. ¶¶ 9, 41-63. Plaintiffs' father, Magistrate Carlos Horacio Urán Rojas ("Magistrate Urán"), was among the civilians designated by the military as an *especial*, then tortured and killed as a result. ¶¶ 64-75.

Following the retaking of the Palace of Justice, the military mounted a campaign of disinformation and intimidation aimed at covering up the existence of the illegal *especiales* system and the crimes committed under that system, including the torture and killing of Magistrate Urán. ¶ 89. For years, Defendant and the military insisted that there was no wrongdoing by the military. ¶ 93. Defendant personally warned individuals seeking information on those killed during the Palace of Justice siege to stop asking questions about the victims. ¶ 91. Defendant also physically assaulted families of victims peacefully protesting against the failure of the Colombian government to investigate and prosecute those responsible for the deaths or disappearances of the *especiales*. *Id.* With respect to Magistrate Urán, the military denied ever having him in its custody. ¶ 94. The military lied to Magistrate Urán's family, telling them that he had died inside the Palace of Justice as a result of crossfire with the guerillas. ¶¶ 3-4, 94.

In 2007, Magistrate Urán's belongings were discovered hidden in a locked vault inside the 13th Brigade during a court-ordered search of the premises. ¶ 96. Video and testimonial evidence also emerged showing that he had exited the Palace of Justice alive, in the custody of the military. ¶ 97. In response to this new evidence, which revealed the military's coverup of Magistrate Urán's death, Plaintiffs pushed Colombian authorities to open a criminal investigation. ¶ 99. In 2008, in response to Plaintiffs' demands, the Colombian Prosecutor General assigned Magistrate Urán's case to prosecutor Angela Buitrago, who opened an investigation into his death in 2010. ¶¶ 98-100. However, when Buitrago launched her investigation and sought to interview prominent military officials, the Prosecutor General removed her from the case and reassigned it to another unit. ¶ 100. The case has since stalled for over a decade. *Id*.

Given the lack of progress in Colombia, Plaintiffs filed a petition before the Inter-American Court of Human Rights. ¶ 101. In 2014, the Inter-American Court of Human Rights found that Colombian state actors tortured and killed Magistrate Urán following his exit from the Palace of Justice, and ordered the Colombian government to investigate and prosecute those responsible. *Id.* To date however, more than three decades after Magistrate Urán's death, no individual has been investigated or held accountable for his killing in Colombia. *Id*.

In light of their inability to obtain justice in Colombia despite their diligent efforts, Plaintiffs filed their Complaint on February 15, 2022, alleging claims of extrajudicial killing and torture against Defendant pursuant to the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note).

ARGUMENT

I. DEFENDANT'S "RULE 12" MOTION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DENIED

Defendant casts his motion as an *unenumerated* "Rule 12" motion to dismiss that is

centered on the exhaustion provision of the TVPA. It is well settled, however, that the TVPA exhaustion requirement "is an affirmative defense" for which Defendant bears a "substantial" burden of proof. *Jean v. Dorélien*, 431 F.3d 776, 781 (11th Cir. 2005). An affirmative defense is not among the enumerated grounds that may be brought by motion in response to a complaint under Rule 12(b). *See* Fed. R. Civ. P. 12(b)(1)-(7). Thus, Defendant's motion is procedurally deficient and should be denied.

Defendant urges the Court to overlook this procedural defect, claiming that not allowing him to proceed on an unspecified motion to dismiss "would place form over substance . . . ." Motion to Dismiss (Dkt. 28) ("MTD") at 5 n.8. The Supreme Court, however, does not view the Federal Rules of Civil Procedure as mere "form." To the contrary, the Supreme Court has unambiguously admonished courts to "not depart from the usual practice under the Federal Rules . . . ." *Jones v. Bock*, 549 U.S. 199, 212 (2007) (affirming that "the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense" and not a pleading requirement). The usual practice is to consider affirmative defenses, such as non-exhaustion, on summary judgment pursuant to Rule 56.[2] The Court should decline Defendant's invitation to disregard Supreme Court precedent and to countenance unenumerated motions, such as the motion at bar. *See Jones*, 549 U.S. at 217 (cautioning that deviations from the usual practice "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation") (citation omitted).

No doubt aware of his precarious procedural posture, Defendant tepidly invokes Rule 12(b)(1) as "the most analogous" Rule 12(b) provision. MTD at 5. That invocation fails. "[A]

[2] *See, e.g.*, *Goebert v. Lee County*, 510 F.3d 1312, 1322 (11th Cir. 2007) (exhaustion under the Prison Litigation Reform Action ("PLRA")); *Miller v. Tanner*, 196 F.3d 1190, 1192 n.5 (11th Cir. 1999) (same); *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 846 (11th Cir. 2000) (exhaustion under Title VII).

failure-to-exhaust defense is non-jurisdictional . . . ." *Bryant v. Rich*, 530 F.3d 1368, 1374 (11th Cir. 2008) (cited by Defendant). Thus, "a Plaintiff's alleged failure to exhaust local remedies would not deprive the court of subject matter jurisdiction."[3] Defendant himself concedes that TVPA's exhaustion does "not define or limit the subject-matter jurisdiction of this Court . . . ." MTD at 4. Rule 12(b)(1) is inapplicable.

In a footnote, Defendant offers Rule 12(b)(6) in the "alternative" (MTD at 7 n.11), but it is well settled that affirmative defenses typically are *not* the proper subject of a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993) ("[G]enerally, the existence of an affirmative defense will not support a Rule 12(b)(6) motion to dismiss for failure to state a claim."); *Prospect Funding Holdings, LLC v. Pilgrim*, No. 1:19-cv-00844, 2019 WL 12528619, at *3 (N.D. Ga. Dec. 12, 2019) (same). Defendant suggests that dismissal is nonetheless proper because the exhaustion defense is allegedly "admitted on the face of [the] complaint . . ." (MTD at 7 n.11), but that argument is belied by Defendant's improper submission of extrinsic evidence in support of his unspecified motion. Moreover, that the Complaint purportedly "makes no mention of" allegedly available remedies (*id.*) is irrelevant. "Because it is an affirmative defense, exhaustion of local remedies *need not be pled in a complaint* under the TVPA . . . ." *Chiquita*, 190 F. Supp. 3d at 1114 (emphasis added); *see Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 n.9 (2017) (affirmative defenses are "not something the plaintiff must anticipate and negate in her pleading"); *LaGrasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) ("plaintiffs are not required to negate an affirmative defense in their complaint"); *Frees v. Duby*,

[3] *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Deriv. Litig.*, 190 F. Supp. 3d 1100, 1114 (S.D. Fla. 2016) (TVPA claims); *see Jara v. Nunez*, No. 613CV1426ORL37GJK, 2015 WL 8659954, at *2 (M.D. Fla. Dec. 14, 2015) (similar; TVPA claims); *Cabello Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360, 1367 (S.D. Fla. 2003) ("the exhaustion requirement of the TVPA is not jurisdictional").

No. 1:10-CV-609, 2010 WL 4923535, at *1 (W.D. Mich. Nov. 29, 2010) (defendants' burden to show failure to exhaust remedies "can rarely be satisfied in the 12(b)(6) context"). Rule 12(b)(6) does not salvage Defendant's defective motion.[4]

Lacking a proper procedural route, Defendant relies on an approach endorsed by a divided Eleventh Circuit panel in *Bryant* (MTD at 4-5), which acknowledged that an exhaustion defense under the PLRA may be raised in a motion to dismiss as a "matter in abatement." *Bryant*, 530 F.3d at 1374. That majority opinion, however, was premised on a Ninth Circuit case, *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), that is no longer good law.

The Ninth Circuit has explicitly "overrule[d] *Wyatt* . . . , in which we held that a failure to exhaust under [the PLRA] should be raised by a defendant as an 'unenumerated Rule 12(b) motion.'" *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc); *see id*. at 1169 (questioning "if [*Wyatt*] ever was good law"). The *Albino* Court reasoned that the "use of an unenumerated Rule 12(b) motion . . . is in tension with the [Supreme] Court's admonition in *Jones* against deviating from 'the usual practice under the Federal Rules.'" *Id.* at 1168-69 (quoting *Jones*, 549 U.S. at 212).[5] It continued, "[t]he very phrase . . . 'an unenumerated Rule 12(b) motion' – is a concession that such a motion is *not contemplated by the rules*." *Id*. at 1169 (emphasis added). Thus, the *en banc* panel "conclude[d] that a failure to exhaust is more appropriately handled under

[4] Finally, Defendant suggests that the Court convert his Rule 12 motion into a summary judgment motion, but then states that conversion "is not necessary . . . ." MTD at 7 n.11. Despite Defendant's uncertainty, should the Court decide to so convert Defendant's motion, Plaintiffs request that the Court defer ruling on such motion until discovery can be taken for the development of a complete evidentiary record on the exhaustion defense. *See* Fed. R. Civ. P. 56(d).

[5] *See Frees*, 2010 WL 4923535, at *3 ("It is impossible to reconcile this [unenumerated Rule 12(b)] approach with the clear guidance the Supreme Court provided in *Jones v. Beck* and the express terms of the Federal Rules of Civil Procedure."); *Bryant*, 530 F.3d at 1382 (Wilson J., dissenting) ("by departing from our usual procedural practice with respect to exhaustion and other affirmative defenses, and treating exhaustion under the PLRA under this novel procedural framework, the majority adopts an approach that is in tension with *Jones*").

the framework of the existing rules than under an 'unenumerated' (that is, *non-existent*) rule." *Id.* at 1166 (emphasis added) (reversing 3-panel Ninth Circuit decision that affirmed the dismissal of the complaint for failure to exhaust). In so doing, the Ninth Circuit "joined" other circuits that "use a motion for summary judgment, as opposed to an unenumerated Rule 12(b) motion, to decide exhaustion . . . ." *Id.* at 1170. Notably, the *Albino* Court relied on the burdens applicable to TVPA cases. *Id.* at 1172. That is, the case that overturned the rationale relied on by the *Bryant* majority expressly considered the application of exhaustion burdens in a TVPA case, as is the case here.

In short, Defendant moves under a "non-existent rule," based on overturned law, in direct contradiction of the Supreme Court's directives in *Jones*. These significant defects warrant the denial of Defendant's motion.

II. EVEN IF THE COURT WERE TO CONSIDER DEFENDANT'S PROCEDURALLY DEFECTIVE MOTION, THE COURT SHOULD DENY IT BECAUSE DEFENDANT FAILS TO MEET HIS SUBSTANTIAL BURDEN OF SHOWING THAT PLAINTIFFS DID NOT EXHAUST LOCAL REMEDIES

A. Defendant's Improperly Proffered Extrinsic Evidence, Which Should Not Be Addressed At The Pleadings Stage, Is Insufficient To Meet His Substantial Burden of Proving Non-Exhaustion

Even if the Court were to consider the exhaustion defense on an unenumerated motion to dismiss, the motion still fails. In support of his motion, Defendant filed five documents (totaling over 900 pages) that are not cited or referred to the Complaint, though he seeks judicial notice of only two.[6] But because exhaustion is an affirmative defense, "the matter is not properly resolved

[6] Defendant seeks judicial notice of Article 90 of the Colombian Constitution of 1991 and Colombian Law 1448/2011 only. *See* Dkt. 29 at 1. Because Defendant did not seek judicial notice of a Colombia Supreme Court decision (Dkt. 28-1) or a policy paper (Dkt. 28-4), those documents are improperly before the Court and should not be considered on a motion to dismiss. Further, the proffered Colombian decision (in Spanish) violates the rule that "documents used in a court proceeding, when not in English, are to be provided with an English translation." *Nassar v. Nassar*, No. 20-14033-CIV-ROSENBERG/MAYNARD, 2022 WL 82335, at *2 (S.D. Fla. Jan. 7,

by reference to extrinsic evidence at the motion to dismiss stage." *Chiquita*, 190 F. Supp. 3d at 1114. Instead, the truth of an exhaustion of local remedies defense under the TVPA is necessarily left for resolution based on a complete evidentiary record. *Id.* (declining to weigh extrinsic evidence in assessing defendant's TVPA exhaustion defense on a motion to dismiss); *Boniface v. Viliena*, 338 F. Supp. 3d 50, 65 (D. Mass. 2018) (same).

Defendant nonetheless argues that "this Court may consider facts outside of the pleadings" at the motion to dismiss stage because exhaustion "is treated as a matter of abatement" based on *Bryant* (MTD at 5), whose reasoning has been overturned. *See* Section I., *supra*. Moreover, "[p]leas in abatement were abolished in 1938 with the adoption of the Federal Rules of Civil Procedure." *Frees*, 2010 WL 4923535, at *3; *see Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 720 (5th Cir. 1995) ("With the adoption of the Federal Rules of Civil Procedure in 1938 . . . the Supreme Court abolished the plead in abatement and replaced it with motions to dismiss under Federal Rules of Civil Procedure 12(b) or 41."). The Court, therefore, need not go beyond the four corners of the well-pled Complaint (and documents incorporated by reference or judicially noticeable) to deny Defendant's procedurally flawed motion to dismiss.

Defendant's reliance on *Jean* and *Rojas Mamani* also is misplaced. *See* MTD at 6. There, the district courts considered affidavits in connection with motions to dismiss for improper venue and for lack of subject matter jurisdiction, respectively. *See Jean v. Dorelien*, No. 03-20161-CIV, 2004 WL 5565022 (S.D. Fla. Apr. 21, 2004), *rev'd and remanded*, 431 F.3d 776 (11th Cir. 2005) (reversing dismissal of complaint for alleged non-exhaustion of remedies); *Rojas Mamani v. Sanchez Berzain*, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009). Defendant's unenumerated motion

2022). Defendant also filed an affidavit by his Colombian counsel (Dkt. 28-3) as purported "evidence," which also is improper and should not be considered at this motion to dismiss stage.

is neither. Moreover, while Defendant argues that the Eleventh Circuit in *Jean* did not "mandate" that failure to exhaust "could not be considered in a motion to dismiss brought under Rule 12(b)" (MTD at 6), neither did it hold that the exhaustion defense *could* be brought in a motion to dismiss. In fact, Defendant ignores one of the grounds for the district court's error: "the motion at issue was a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b), not a motion for summary judgment." *Jean*, 431 F.3d at 783. Thus, contrary to Defendant's suggestion, the Eleventh Circuit *did not* endorse the sort of fact-finding mission that Defendant proposes here, which would turn pleading standards on their head. *Rojas Mamani* is further inapplicable because it followed the now dubious *Bryant* majority view. *See* 636 F. Supp. 2d at 1329; Section I., *supra*.

Assuming *arguendo* that the Court were to go beyond "the four corners" of Plaintiffs' Complaint (MTD at 5), Defendant's proffered extrinsic evidence – on their face – fail to satisfy his "substantial" burden of proving his affirmative defense. *See Jean*, 431 F.3d at 781. Nothing in Defendant's motion or 900+ pages of purported extrinsic "evidence" demonstrates that Plaintiffs did not, in fact, exhaust local remedies. Defendant repeatedly states that Plaintiffs "*appear* to have failed" to exhaust remedies in Colombia.[7] Defendant's motion thus is founded on nothing more than sheer conjecture, which is insufficient to satisfy Defendant's substantial burden of proof. *See, e.g.*, *Jean*, 431 F.3d at 782 ("doubts [concerning the TVPA and exhaustion are to] be resolved in favor of the plaintiffs.") (citation omitted).

Even the improper and incomplete affidavit of Defendant's longtime Colombian attorney[8]

[7] *See* MTD at 3 ("Plaintiffs *appear* to have failed to exhaust their remedies in Colombia") (emphasis added); *id.* ("Plaintiffs *appear* to have failed to avail themselves") (emphasis added); *id.* ("Plaintiffs *appear* to have never availed themselves") (emphasis added); *id.* at 7 ("*If* they did not pursue these available remedies, which *appears* to be the case") (emphasis added).

[8] The González Declaration refers to an "attached" "Exhibit 2," but no such exhibit was attached. Dkt. 28-3, ¶ 10. It also makes no reference to an "Exhibit 1," which would logically exist if there were an "Exhibit 2."

(not a neutral source) does *not* state that Plaintiffs failed to exhaust remedies in Colombia. The declarant merely speculated, based on his "search" of "the national consultation of processes of the Judicial Branch of Colombia" – whatever that may be, as no explanation was offered – that Plaintiffs "*could have* sought reparations under the Victim's Law." González Decl. ¶¶ 11, 14 (emphasis added). Even this conjecture is laden with caveats, the product of the declarant's admittedly perfunctory, limited and non-exhaustive efforts: "in the short time I had for these brief considerations, it has been impossible to carry out more exhaustive and detailed verifications." *Id.* ¶ 13. Had Defendant or his Colombian counsel bothered to review the Inter-American Court of Human Rights' ruling referenced at paragraphs 15 and 101 of the Complaint, they would have located details of the civil case brought by Plaintiffs against the State of Colombia regarding Magistrate Urán's death. *See* Section II.B.2., *infra*. In any event, even taken at face value, not a shred of Defendant's extrinsic submissions constitutes "evidence" of Plaintiffs' exhaustion efforts, let alone establishes non-exhaustion.

B. Defendant Cannot Overcome The Presumption That Plaintiffs Exhausted Available Local Remedies

Plaintiffs are "entitled to a presumption that local remedies have been exhausted, which Defendants must overcome before Plaintiffs are required to prove exhaustion or, presumably, the futility of exhausting local remedies." *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357-58 (S.D. Fla. 2003). The presumption in favor of Plaintiffs is so high, that "in most instances the initiation of litigation under [the TVPA] will be virtually prima facie evidence that the claimant has exhausted his or her remedies . . . ." *Jean*, 431 F.3d at 781-82 (quoting S. REP. NO. 102-249, at 9-10 (1991)); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) ("The legislative history to the TVPA indicates that the exhaustion requirement of § 2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute.").

1. Despite Plaintiffs' Diligent Efforts, the Domestic Criminal Investigation into Magistrate Urán's Death Has Not Progressed

Defendant does not argue that Plaintiffs failed to exhaust Colombian domestic criminal proceedings relating to Magistrate Urán's death, nor can he. Indeed, where, as here, plaintiffs are demonstrably involved in a domestic criminal case that has made little progress over several years,[9] a defendant fails to overcome the presumption that local remedies have been exhausted. *See Jaramillo v. Naranjo*, No. 10-21951-CIV, 2021 WL 4427455, at *9 (S.D. Fla. Sept. 27, 2021) (finding that plaintiffs exhausted local remedies, including where their efforts had "been fruitless because there has been no responsibility for a murder that took place almost 20 years ago."); *see also Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 485 (D. Md. 2009) (holding that defendant failed to meet his burden on his exhaustion affirmative defense because "[t]he record is barren of any evidence that the criminal case against [defendant] is proceeding apace or that there is any reasonably foreseeable date for its conclusion"), *aff'd in part, appeal dismissed in part sub nom. by Ochoa Lizarbe v. Rivera Rondon*, 402 F. App'x 834 (4th Cir. 2010); *Xuncax*, 886 F. Supp. at 178 (plaintiff deemed to have exhausted local remedies where the domestic criminal case had made no progress for several years).

2. Plaintiffs Pursued, and Obtained, the Monetary Remedies Available to Them in Colombia Through the Administrative Judicial System (Article 90 of the Colombian Constitution)

Unable to contest that Plaintiffs have exhausted local remedies related to the criminal proceedings regarding Magistrate Urán's death, Defendant instead argues that Plaintiffs should have sought compensatory damages against the government of Colombia pursuant to Article 90 of the Colombian Constitution. Though not required for TVPA exhaustion purposes, Plaintiffs did.

[9] *See* ¶¶ 98-101 (describing the lack of progress of the criminal investigation into Magistrate Urán's death, which investigation Plaintiffs pushed for after learning of the military coverup).

As a preliminary matter, Plaintiffs disagree with the premise that they were required to seek administrative reparations from the Colombian State prior to filing suit against Defendant under the TVPA. The TVPA contemplates the availability of suit against an individual, not the state. Section 2(a) of the TVPA explicitly creates *individual* liability for damages. 28 U.S.C. § 1350 (note) ("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 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, falls outside the scope of the statute's exhaustion requirement. The Court, however, need not resolve this issue given that, as detailed below, Plaintiffs have sought and obtained such administrative reparations, which, if required, would satisfy the exhaustion requirement. *See Mamani v. Berzain*, 825 F.3d 1304, 1311 (11th Cir. 2016) (holding that the "exhaustion requirement does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state").

As the Inter-American Court of Human Rights ("IACHR") judgment – referenced in paragraphs 15 and 101 of the Complaint – acknowledged, prior to pursuing remedies before the IACHR, Plaintiffs filed a complaint against the Colombian State regarding the death of Magistrate Urán and were awarded damages by a Colombian court. *See Rodríguez Vera, et al. v. Colombia*, IACHR Ser. C No. 287, at ¶¶ 216, 217, 217 n.309 (Nov. 14, 2014) (hereinafter "IACHR

Judgment")[10] (noting that "[f]amily members of . . . Carlos Horacio Urán Rojas . . . have filed actions for direct reparation in the contentious-administrative jurisdiction for the events of this case" and citing the *Judgment of the Contentious-Administrative Chamber of the Council of State* [Colombia] (January 26, 1995)).[11] In the Administrative Judgment, the Colombian court awarded $187,901.13 to Magistrate Urán's wife and daughters, including Plaintiffs. *See* IACHR Judgment at ¶ 592; *see also id.* at ¶ 592 & n.888 (noting that "family members" of Carlos Horacio Urán Rojas "have had recourse to the contentious-administrative jurisdiction" and "the State has granted compensation for 'loss of earnings'").

Further, as part of its 2014 judgment holding the Colombian State liable for the enforced disappearance and extrajudicial killing of Magistrate Urán (¶ 15), the IACHR ordered Colombia to pay an additional $100,000 to each victim of extrajudicial killing or enforced disappearance, including Magistrate Urán, and $80,000 to his widow and children. IACHR Judgment at ¶¶ 603, 606. Thus, even if reparations from the Colombian State constitute an available remedy for TVPA purposes, Plaintiffs exhausted that remedy.

3. Plaintiffs Exhausted Their Remedies as to Law 1448 of 2011 (the Victims' Law)

Defendant compounds his errors and posits that Plaintiffs should have also sought reparations from Colombia under the Victims' Law (1448/2011). This argument too fails. Defendant fails to show that Plaintiffs are eligible to receive any monetary benefits under the

[10] Available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_287_ing.pdf. The Court may consider the IACHR Judgment under the doctrine of incorporation by reference as it is referenced in the Complaint, is central to Plaintiffs' claims, and is of undisputed authenticity. *See, e.g., Hi-Tech Pharms., Inc. v. HBS Int'l Corp.*, 910 F. 3d 1186, 1190 (11th Cir. 2018).

[11] The 1995 *Judgment of the Contentious-Administrative Chamber of the Council of State* ("Administrative Judgment") was rendered pursuant to Article 90 of the Colombian Constitution in the case brought by Plaintiffs against Colombia.

Victims' Law. They are not. The Victims' Law prohibits victims from "double dipping," or claiming reparations if they have received redress through other routes, including through judicial and administrative proceedings. This prohibition is enshrined in Article 20 of Law 1448:

> ARTICLE 20. PRINCIPLE OF PROHIBITION OF DOUBLE REPARATION AND OF COMPENSATION. The compensation received through administrative channels will be deducted from the reparation defined through judicial channels. No one may receive double reparation for the same concept.

Ex. B to MTD (Dkt. 28-2), at 8. Because the amount in compensatory remedies sought and obtained by Plaintiffs under Article 90 of the Colombian Constitution and through the IACHR judgment exceeds that which might be available under the Victims' Law, Plaintiffs are not entitled to any monetary reparations thereunder.

Specifically, the Victims' Law provides for a reparation equivalent to "40 legal minimum wages in force in the year in which the event occurred" for situations of death or enforced disappearance. Victims' Law, Art. 132, ¶ 4 (Dkt. 28-2), at 67. In Colombia, a legal minimum wage ("SML") is equivalent to the minimum monthly salary that the government sets each year. The SML for 1985, the year Magistrate Urán was killed, in Colombian Pesos (COP) was 13,559,[12] the equivalent of $80.04.[13] Under this scheme, Plaintiffs would each be entitled to $3,201.60 (40 times $80.04) – far below the reparations awarded to Plaintiffs in the 1995 Administrative Judgment ($187,901.13), let alone the additional award under the IACHR judgment in 2014. *See*

[12] *See* https://countryeconomy.com/national-minimum-wage/colombia (last accessed on June 9, 2022).

[13] The exchange rate in the last quarter of 1985 was 169.40 COP per 1 U.S. dollar. *See* "Treasury Reporting Rates of Exchange as of December 31, 1985," U.S. Department of the Treasury, at 69, https://www.govinfo.gov/content/pkg/GOVPUB-T63_100-7eddaf4273a66e80b5be6d4909795a8e/pdf/GOVPUB-T63_100-7eddaf4273a66e80b5be6d4909795a8e.pdf.

Section II.B.2, *supra*. Any remedies under the Victims' Law thus would be "unobtainable, ineffective, . . . or obviously futile." *Xuncax*, 886 F. Supp. at 178.[14]

As demonstrated above, Plaintiffs have exhausted available local remedies. Accordingly, Defendant's motion based on the alleged failure to exhaust should be denied.

III. THE COURT SHOULD DENY DEFENDANT'S REQUEST TO ABSTAIN FROM EXERCISING ITS JURISDICTION ON COMITY GROUNDS

Defendant touts his purported Colombian criminal acquittal (which is not even properly before the Court (*see* n.6, *supra*)) as the basis for this Court to abstain from exercising its jurisdiction over Plaintiffs' TVPA claims. *See* MTD at 13-20. This is a bold and baseless request, which the Court should deny. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Cafaro v. Zois*, No. 15-CIV-80150, 2015 WL 3821752, at *5 (S.D. Fla. June 2, 2015) (citation omitted). Federal courts use three factors to determine whether abstention is appropriate: (1) international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources. *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1305 (11th Cir. 2008). Defendant fails to carry his burden on each of these factors. *See Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003) (party raising affirmative defense bears the burden of proving that abstention is warranted).

International Comity Fails Because Plaintiffs Did Not Have a Full and Fair Opportunity to Litigate Their Claims in Defendant's Colombian Criminal Proceedings. Undergirding the

[14] Even assuming *arguendo* that Plaintiffs were eligible for monetary reparations under the Victims' Law (they are not), Plaintiffs would be prepared to present additional evidence regarding the ineffectiveness and futility of the Victims' Law, including but not limited to evidence of budget gaps and decades-long delay in delivering compensation to victims already registered under the Victims' Law, were Defendant's motion a summary judgment motion. But in light of the prohibition in Article 20 of Law 1448, Defendant's exhaustion defense would fail even at the summary judgment stage.

comity doctrine is the century-old bedrock principle that "there has been opportunity for a *full and fair trial abroad*" involving the parties against whom the foreign judgment is invoked. *Hilton v. Guyot*, 159 U.S. 113, 158 (1895) (emphasis added); *see Hershey Co. v. Cadiz*, No. 05-60999-CIV-DIMITROULEAS, 2006 WL 8431631, at *5 (S.D. Fla. Sept. 25, 2006) ("[e]nsuring the ability of the parties to fully and fairly litigate their claims in some tribunal . . . is a paramount goal of international abstention principles") (quoting *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1522 (11th Cir. 1994)). Defendant has not met this threshold requirement. Therefore, the Court need not even reach the *Ungaro-Benages* factors raised by Defendant that largely concern the validity of the foreign judgment. *See RCTV Int'l Corp. v. Rosenfeld*, No. 13-CV-23611-GRAHAM/GOODMAN, 2014 WL 11944274, at *2 (S.D. Fla. Jan. 31, 2014) (denying defendant's motion to abstain "[e]ven without considering the validity of the [foreign] judgment" where plaintiff did not have an opportunity to litigate in the foreign proceeding).

Courts in this District decline to apply international comity where, as here, the party against whom the foreign judgment is invoked has not had a full and fair opportunity to litigate their claims in the foreign jurisdiction. *RCTV* is instructive. The court held that it "need not consider the international comity factor here because there has not been a judgment issued over the subject matter being litigated by the Parties in this action." *Id.* Furthermore, the plaintiff "was not a party in the [foreign] action nor was judgment entered against it." *Id.* The court thus held that the international comity factor was not met and denied defendant's motion to abstain. *Id.* at *2-3. *See also Seaway Two Corp. v. Deutsche Lufthansa Akiengesellschaft*, No. 06-20993-CIV-ALTONAGA/Turnoff, 2007 WL 9702239, at *4 (S.D. Fla. Sept. 6, 2007) (foreign court's decision did not foreclose plaintiff's claims because defendants "were not parties to the [foreign] proceedings and were not the focus of the [foreign] court's order" and the foreign decision was

"not clear" "whether it addressed potential fraud upon [plaintiff] perpetrated by [defendants]"); *Hershey*, 2006 WL 8431631, at *5 (declining to stay U.S. action based on international comity because, *inter alia*, plaintiff "was not a party to the Philippine judgment" and the central issues "are not the same").

Here, there is no dispute that Plaintiffs were *not* parties to Defendant's criminal proceeding and that Plaintiffs were *not* the focus of the alleged acquittal order. Nor is there any dispute that the purported acquittal did *not* concern the subject matter or legal theories that are before this Court, namely Defendant's liability for the torture and extrajudicial killing of Magistrate Urán. Defendant admits, "Urán Rojas' passing was not the subject of Plazas Vega's prosecution . . . ." MTD at 16. Instead, that prosecution addressed Defendant's role in the "crimes of forced disappearances for 11 [other] people." *Id.* at 15. Defendant's international comity argument thus fails at this threshold level.

Furthermore, related to comity's "full and fair opportunity to litigate" principle, Congress has directed, *in the context of TVPA cases* such as this one, that where "a final judgment has been rendered against the plaintiff abroad," courts should apply "principles of res judicata" to determine "whether to recognize that judgment and dismiss the case." S. REP. NO. 102-249, at 10. Defendant cannot establish the applicability of *res judicata*. In short, Defendant's alleged acquittal – which involved different parties, different subject matters, and different theories of liability – provides no basis for this Court to abstain from exercising jurisdiction over Plaintiffs' TVPA suit.[15]

[15] Defendant's assertion that "this action and the prosecution inevitably involve the same facts and issues" (MTD at 16) is overbroad, vague and ignores the fact that Plaintiffs were not parties to that prosecution which did not involve Magistrate Urán's unlawful death. Defendant's cases are inapt. In both, the party against whom the foreign proceeding was asserted either was a party to the earlier foreign proceeding or had a fiduciary relationship with such a party, which is not the case here. *See Trust Int'l Corp. v. Nagy*, No. 15-80253-CIV-ZLOCH, 2017 WL 5248425, at *2

Abstention Would Be Unfair to Plaintiffs and Violate the Due Process Clause. Abstention would violate the Due Process Clause and would be inherently unfair to Plaintiffs. It is clear that "when parties currently before an American court were not parties to the foreign action, the Due Process Clause prohibits application of [preclusion] against them." *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 179 n.9 (S.D.N.Y. 1995). Further, "it would be contrary to United States public policy to consider the [foreign] judgment enforceable against a party without affording the party proper due process." *RCTV*, 2014 WL 11944274, at *2. There is more. A criminal acquittal cannot be the basis of claim or issue preclusion in a subsequent civil suit because a criminal acquittal, decided on a "beyond a reasonable doubt" standard, "d[oes] not negate the possibility that a preponderance of the evidence could show" that the criminal defendant committed the alleged conduct. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984); *see also Helvering v. Mitchell*, 303 U.S. 391, 397 (1938). Thus, abstention in this case based on Defendant's alleged Colombian acquittal would be highly prejudicial to Plaintiffs and deprive them of their Due Process rights.

Moreover, there is "nothing unfair about litigating in the United States causes of action arising under the [Torture Victim Protection Act], between litigants residing in the United States." *RCTV*, 2014 WL 11944274, at *3. "Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." *Hershey*, 2006 WL 8431631, at *4 (quoting *Turner*, 25 F.3d at 1518). And this Court undisputedly has jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the TVPA. ¶ 21.

(S.D. Fla. Mar. 28, 2017) (contract dispute); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1213 (11th Cir. 1999) (commercial dispute).

This Court's Exercise of Jurisdiction is an Efficient Use of Judicial Resources. This factor too weighs against abstention. No court has adjudicated Plaintiffs' TVPA claims against Defendant. And, setting aside the differing legal standards of liability, because the criminal proceeding in Colombia regarding Magistrate Urán's torture and extrajudicial killing has been stalled for more than a decade without any progress (¶¶ 98-100), there is no "prospect of conflicting judgments." *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (in retrospective comity analysis, courts also consider "whether there is a prospect of conflicting judgments"); *Seaway*, 2007 WL 9702239, at *5 (no international comity where, *inter alia*, "[t]here is minimal risk of conflicting judgments"). In addition, this case involves a U.S. federal statute, not foreign law, for which this Court is best equipped to apply. *See Ungaro-Benages*, 379 F.3d at 1238 (courts also consider "whether the central issue in dispute is a matter of foreign law").

In fact, this Court's exercise of its jurisdiction in this case *fulfills* Congress' interest in providing victims of torture and extrajudicial killings a means of civil redress, ensuring that "torturers and death squads [would] no longer have a safe haven in the United States" and holding them "legally accountable for their acts." S. REP. NO. 102-249, at 3; *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) ("The [TVPA] convey[s] the message that torture committed under color of law of a foreign nation in violation of international law is 'our business . . . .'"). As Defendant notes, it is now "nearly 40 years after the actual events occurred" (MTD at 17) and yet, no person has been held accountable for the unlawful torture and death of Magistrate Urán's. That abject failure is the animating force behind this TVPA action.

Grasping for straws, Defendant posits that the Court's exercise of jurisdiction would "imply that Colombia's civil reparations scheme . . . is somehow inadequate." MTD at 17. Not only is this vague and conclusory assertion inadequate to satisfy Defendant's burden of

establishing abstention, it is refuted by the Eleventh Circuit. *See Mamani*, 825 F.3d at 1306 (holding that plaintiffs may proceed on their TVPA claims where they asserted that compensation received through the Bolivian reparation scheme was insufficient). The Court's exercise of jurisdiction pursuant to the TVPA is not a comment on the Colombian civil reparations scheme because the TVPA specifically contemplates personal liability for individuals who are subject to U.S. jurisdiction (like Defendant) whereas the Colombian civil reparations scheme was designed to provide remedies from the State for harms committed by the State.

In sum, the foregoing three factors compel the conclusion that this case is not the exception to the general rule that federal courts should exercise the jurisdiction conferred upon them. Tellingly, Defendant fails to cite a single case where a court has dismissed TVPA claims on international comity grounds.[16] Defendant's international comity argument should be rejected.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss in its entirety. In the event the Court were to grant the motion in whole or in part, Plaintiffs respectfully request leave to amend the complaint. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("the leave sought should, as the rules require, be 'freely given.'").

Dated: June 13, 2022

Respectfully submitted,

By: */s/ Betty Chang Rowe*

Betty Chang Rowe (Florida State Bar No. 0003239)
browe@wsgr.com

[16] *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), is inapposite. There, the court dismissed TVPA claims against an organization because the TVPA only authorized a cause of action against a natural person, not an organization. *Id.* at 591-92. Only plaintiffs' state law claims were dismissed for international comity after the United States filed papers stating its opposition to the litigation as adversely affecting United States' interests and the Colombian government did likewise. *Id.* at 586, 588, 596-615. Neither Colombia nor the United States has filed an opposition to this lawsuit.

Leo P. Cunningham (*pro hac vice*)
lcunningham@wsgr.com
Luke A. Liss (*pro hac vice*)
lliss@wsgr.com
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300

Dylan G. Savage (*pro hac vice*)
dsavage@wsgr.com
Wilson Sonsini Goodrich & Rosati
One Market Plaza
Spear Tower, Suite 3300
San Francisco, CA 94105
Telephone: (415) 947-2000

Estefania Y. Torres Paez (*pro hac vice*)
etorrespaez@wsgr.com
Wilson Sonsini Goodrich & Rosati
1700 K Street NW, 5th Floor
Washington, DC 20006
Telephone: (202) 973-8800

Claret Vargas (*pro hac vice*)
cvargas@cja.org
Daniel McLaughlin (*pro hac vice*)
dmclaughlin@cja.org
Carmen K. Cheung (*pro hac vice*)
ccheung@cja.org
Center for Justice & Accountability
One Hallidie Plaza, Suite 750
San Francisco, CA 94102
Telephone: (415) 544-0444

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I **hereby certify** that on June 13, 2022, a true and correct copy of the foregoing was served by the Court's CM/ECF System on all counsel or parties of record on the Service List below.

Mark J. Heise
mheise@hsmpa.com
Luis E. Suarez
lsuarez@hsmpa.com
Patricia Melville
pmelville@hsmpa.com
HEISE SUAREZ MELVILLE, P.A.
1600 Ponce De Leon Boulevard Suite 1205
Coral Gables, Florida 33134
Telephone (305) 800-4476

Attorneys for Defendant Luis Alfonso Plazas Vega

/s/ *Betty Chang Rowe*
Betty Chang Rowe