UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No 22-CV-60338-RAR

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.
_____/

DEFENDANT LUIS ALFONSO PLAZAS VEGA'S
REPLY IN SUPPORT OF HIS MOTION TO DISMISS

I. Defendant's Motion is procedurally proper.

The Motion under Federal Rule of Civil Procedure 12(b) is procedurally proper; it is not defective merely because it does not mechanically cite to a specific subsection of Rule 12(b). In *Bryant v. Rich*, the Eleventh Circuit Court of Appeals provided that when a statutory framework (like the TVPA) prevents a court from reaching the merits absent exhaustion, the appropriate vehicle is ordinarily a motion to dismiss. 530 F.3d 1368, 1374-75 (11th Cir. 2008). *Bryant* also observed that federal courts traditionally have entertained certain pre-answer motions not expressly provided for by the rules. *Id.* ("[t]hat motions to dismiss for failure to exhaust are not expressly mentioned in Rule 12(b) is not unusual or problematic."); *see also* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1360 Preliminary Motions Not Enumerated in Rule 12(b) (3d ed.). *Bryant* has never been overturned and remains good law in our Circuit.

But, Plaintiffs invite this Court to treat *Bryant* as "overturned"—a published, unabrogated Eleventh Circuit decision—because a Ninth Circuit Court of Appeals case it cited as part of its reasoning, *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), was overturned in the Ninth Circuit. Plaintiffs' argument ignores the basic hierarchy of authority and federalist attributes inherent in our federal court system. *Bryant* was never overturned and its reasoning never abrogated *in the Eleventh Circuit*. Plaintiffs' suggestion that the Defendant relied on "overturned law" is, at best, misleading and does not merit further discussion.[1]

Procedural vehicles aside, this Court can consider matters outside the pleadings to determine whether the Plaintiffs exhausted remedies as required by the TVPA. Indeed, the Eleventh Circuit sanctioned this process in *Bryant*:

> [w]here exhaustion—like jurisdiction, venue, and service of process—is treated as a matter in abatement and not an adjudication on the merits, it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.

530 F.3d at 1376. Even if treated as a motion to dismiss for lack of subject matter jurisdiction, instead of a matter of abatement, this Court can consider external facts. *See Rojas Mamani v. Sanchez Berzain*, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009) ("If the evidence conflicts, the court may 'act[ ] as a fact finder in resolving [a] factual dispute' concerning [TVPA] exhaustion of remedies.").

Although the Eleventh Circuit in *Jean v. Dorelien* deemed remedy exhaustion under the TVPA to be an affirmative defense, *Jean* did not foreclose the possibility that such defense could be adjudicated on a motion to dismiss. *See* 431 F.3d 776, 781 (11th Cir. 2005).[2] *Jean* could have

[1] Nor did the Defendant flout Supreme Court precedent. *Bryant* came after *Jones v. Bock*, 549 U.S. 199, 212 (2007), and *Bryant* addressed and fully considered *Jones* in its ruling.

[2] Courts often exercise their authority to field non-descript 12(b) motions on affirmative defenses like *res judicata*, which, like remedy exhaustion, is a threshold issue. *See, e.g., Thistlethwaite v. City of New York*, 362 F. Supp. 88, 91 (S.D.N.Y. 1973), aff'd, 497 F.2d 339 (2d Cir. 1974) ("The defense of res judicata, while contained in the list of affirmative defenses in Fed. R. Civ. P. 8(c), is not enumerated in Fed. R. Civ. P. 12(b) as a ground for pre-trial motion to dismiss. However, it is generally held that, in the interest of efficient and expeditious judicial administration, *res judicata* can be raised and considered at a pre-trial stage."); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976); *Rabo Agrifinance, Inc. v. Wachovia Cap. Fin. Corp.*, No. CIV. 10-983 JRT JSM, 2011 WL 601157, at *2 (D. Minn. Feb. 11, 2011).

summarily denied the motion as procedurally improper without addressing the merits. Instead, *Jean* carefully considered the record to determine whether the defendant had met his burden of demonstrating the failure to exhaust remedies. *Id*. That is all we ask this Court to do here.

Citing both *Jean* and *Bryant*, this Court in *Rojas Mamani* entertained, and ultimately granted, a motion to dismiss based on failure to exhaust remedies. 636 F. Supp. 2d at 1329. As Plaintiffs point out, the motion in *Rojas Mamani* was brought under Rule 12(b)(1), the most analogous Rule 12(b) motion. *Id.* The motion in *Rojas Mamani* could not be more similar to Defendant's Motion here; both move for dismissal based on failure to exhaust remedies the home countries offered to address the specific events giving rise to the complaint. *Id.*

In any event, if needed, this Court can resolve any uncertainty regarding the appropriate procedural vehicle by converting the Motion into a motion for summary judgment under Rule 12(d). Given that there is no discovery Plaintiffs would need from the Defendant to determine whether Plaintiffs have exhausted remedies as required by the TVPA, the Motion is particularly appropriate for conversion to summary judgment, if needed, at this posture in the case. This Court would then require Plaintiffs to rebut our exhaustion claims and satisfy the shifted burden in that regard. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832 (9th Cir. 2008) (detailing the TVPA's burden-shifting exhaustion framework); S.Rep. No. 102–249, at 9 (1991) ("[O]nce the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile…").

II. Plaintiffs failed to exhaust *all* available and adequate remedies, including those against the Colombian government and Plazas Vega individually, as required by the TVPA.

The TVPA bars claims where a "claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." *See* 28 U.S.C.A. § 1350. The plain language of the provision, legislative history, and case law make clear that "exhaust[ion]" means at least the pursuance of all available and adequate remedies, regardless of the form or source of the relief. By failing to pursue any remedies through the Victims Law, and also against Luis Alfonso Plazas Vega ("Plazas Vega") directly, Plaintiffs failed to exhaust their remedies. This Court should dismiss the Complaint (Dkt. 1).

a. The TVPA requires Plaintiffs to have exhausted *all* available, adequate remedies.

The TVPA does not define what it means to have "exhausted adequate and available remedies." We are unaware of any precedent in this Circuit squarely interpreting these terms under the TVPA. This Court is therefore left to decide what Congress intended in writing a broad exhaustion requirement into the TVPA.

Federal statutes "must be construed in the light of Congress' intent." *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 102 (1994). This intent is primarily derived from a plain and ordinary reading of the statute's language and words. *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1165 (2014). This Court must therefore "read the statute according to its text." *See Hui v. Castaneda*, 559 U.S. 799, 812 (2010). The plain language of the TVPA—specifically Congress' use of the words "exhausted" and "remedies" (plural)—makes clear that Plaintiffs must have pursued to exhaustion *all* processes and *all* remedies from *all* sources that are adequate and available:

> (b) Exhaustion of remedies.--A court shall decline to hear a claim under this section if the claimant has not **exhausted** adequate and available **remedies** in the place in which the conduct giving rise to the claim occurred.

See 28 U.S.C.A. § 1350 (emphasis added). In ordinary use, "exhaust" means:

> exhaustion *n.* (17c) 1. The act of consuming something **until nothing is left.** 2. The deprivation of a valuable quality or component by overuse or consumption. 3. The pursuit of options **until none remain**. — exhaust, *vb.*

Black's Law Dictionary (11th ed. 2019) (emphasis added). To "exhaust," it is not sufficient to merely begin a process—Plaintiffs must pursue that process to the degree of obtaining "a final decision of the highest court in the hierarchy of courts in the legal system at issue, or show that the state of the law or availability of remedies would make further appeal futile." *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832 (9th Cir. 2008) (analyzing the TVPA's exhaustion framework to interpret the Alien Tort Statute).

Moreover, to have truly "exhausted" their remedies, Plaintiffs must have pursued to that degree all available and adequate *processes* until none were left. An ordinary and plain reading of the TVPA's "exhausted…remedies" text certainly does not speak to pursuing only one remedy

when multiple remedies are reasonably available. *See generally Burrage v. United States*, 571 U.S. 204, 210 (2014) (courts should give undefined phrases in statutes their ordinary meanings). The TVPA's Senate Report reinforces this point, detailing that the burden should shift to the Plaintiffs to show "that the local *remedies* were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." *See* S.Rep. No. 102–249, at 9 (1991) (emphasis added) (expressly using the term local remedies, plural); *Jean v. Dorelien*, 431 F.3d at 782. The TVPA does not absolve Plaintiffs of this obligation because some processes might be easier than others, or because recovered damages from different available processes might offset.[3]

Moreover, Plaintiffs cannot escape their exhaustion obligation by selecting processes offering certain forms and sources of relief over other adequate and available forms and sources of relief. The form of relief (*e.g.*, equitable or legal) provided by a given adequate and available remedy is irrelevant; all remedies must be pursued to exhaustion. The Supreme Court has explained, in the administrative exhaustion context, that Plaintiffs must exhaust *processes*, not *forms of relief*: "[i]t makes no sense to demand that someone exhaust such administrative redress as is available; one 'exhausts' processes, not forms of relief…." *See Booth v. Churner*, 532 U.S. 731, 739 (2001) (internal quotations omitted). Thus, processes for redress cannot be ignored simply because they only provide non-monetary damages, as opposed to monetary damages, or vice-versa.

Indeed, the phrase "adequate and available remedies" suggests all types of remedies. The word "remedy" is defined in Black's Law as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or **equitable** relief." Black's Law Dictionary (11th ed. 2019) (emphasis added). That is consistent with how similar exhaustion remedies, like the Prison Litigation Reform Act, have been interpreted. *See Booth*, 532 U.S. at 740 (holding that a prisoner must exhaust **non-monetary** administrative remedies under the PLRA despite only seeking monetary remedies). The language of the exhaustion provision in the PLRA is substantially similar to the one in the TVPA: "No action shall be brought with respect to prison conditions under section 1983 of this title, or

[3] What is more, Plaintiffs should not be able to establish exhaustion because once-available Colombian processes might no longer available due to Plaintiffs' inaction, either through preclusive legislative changes over the years, stale evidence, or shifting jurisdictional challenges. *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (explaining that exhaustion requirements in the habeas context typically bar a prisoner's technically exhausted remedies if prisoner procedurally defaulted by failing to seek state-court review). Plaintiffs should not be rewarded for sleeping on their rights in Colombia.

any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *See* 42 U.S.C.A. § 1997e.

Finally, the TVPA is agnostic to the source of the relief (*e.g.*, government or individual tortfeasor). But that should not be read as providing the Plaintiffs the option of cherry-picking sources to pursue. After all, the Plaintiffs must still exhaust all "the local remedies." *See* S.Rep. No. 102–249, at 9. It seems to follow logically that one such remedy source (perhaps the primary source) would be to directly sue the individual who caused the Plaintiffs' harm.

The TVPA's legislative history suggests that relief sourced from governments must also, at minimum, be exhausted. The House Committee Notes show that one purpose of the exhaustion provision is to encourage other countries to develop meaningful remedies to tragedies, exactly like what Colombia did by passing the Victims Law:

> The bill provides that a court shall decline to hear and determine a claim if the defendant establishes that the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred. This requirement ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and **can be expected to encourage the development of meaningful remedies in other countries.**

H.R. REP. 102-367, 5, 1992 U.S.C.C.A.N. 84, 87-88 (emphasis added). Not requiring exhaustion of relief provided by the local government would contravene this purpose. The Southern District of Florida made this clear in *Rojas Mamami*, 636 F. Supp. 2d at 1329. There, Judge Jordan dismissed a TVPA suit because the plaintiff failed to pursue relief from the Bolivian government through an administrative reparations framework that resembled the Victims Law. *Id.* Put simply, if a foreign government enacts a specific law to redress specific events, victims must exhaust that remedy before filing a TVPA suit.

Here, as detailed below, Plaintiffs admittedly failed to pursue the Victims Law process. Plaintiffs also failed to sue Plazas Vega civilly in Colombia, even though he lived there under the jurisdiction of Colombian courts from the Palace of Justice siege in 1985 until February of 2017.[4]

[4] Plaintiffs acknowledge in their Complaint that Plazas Vega did not begin making frequent trips to the United States until 2016. *See* Compl, ¶ 26.

Plaintiffs not only failed to exhaust adequate and available processes in Colombia, but they failed to even engage certain processes to begin with. Plaintiffs' failure cannot be excused just because certain relief might be unavailable or curtailed, particularly considering the significant non-monetary relief available.

b. Plaintiffs failed to seek relief under the Victims Law despite being eligible for, at a minimum, non-monetary relief.

Plaintiffs' Response (Dkt. 41) makes clear that they never exhausted their most on-point remedy, the Victims Law. The Colombian legislature enacted that law to redress the very tragedy over which Plaintiffs now sue. In glossing over this failure, Plaintiffs argue that they were *ineligible* for reparations under the Victims Law, pointing to the judgment they received from the Colombian government and a provision in the Victims Law that forbids double recovery. This argument, although facially appealing, fails as Plaintiffs indisputably were eligible for relief under the Victims Law, but simply failed to pursue relief there.

The Victims Law offers a robust relief package for victims that provides benefits in various aspects of life, including housing, finance, and education. For example, the law grants victims free access to psychological services (article 137(3)), education (Article 51), provides them with favorable access to loans and credit assistance (Article 128), and guarantees that victims' healthcare coverage is guaranteed by the General System of Social Security and Health (Article 52). [5]

The Court would never know it from reading Plaintiffs' opposition, but Plaintiffs are eligible for these benefits. The double recovery provision applies only to monetary judgments; it says nothing about ineligibility for the several other benefits and remedies available through the Victims Law:

> **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.

See Victims Law, Article 20. The words "compensation" and "deducted" clearly imply money judgments.

[5] Plazas Vega attached a copy of the Victims Law (Law 1448/2011) as Exhibit B to the Motion.

In addressing the precise issue of whether the double recovery provision applies to the non-monetary relief under the Victims Law, the Colombian Supreme Court held that such benefits are not subject to double recovery, and are viewed as additional benefits:

> VII. DECISION – First.- Declared ENFORCEABLE, in relation to the position examined, the final paragraph of article 9 of Law 1448 of 2011, and articles 123, 124, 125, 127, 130 and 131 of the same law, which establish as reparation measures for victims preferred access to housing subsidies, training and employment programs and to the administrative career in cases of a tie, on the understanding that **such benefits are additional and may not be deducted from the amount of administrative or judicial compensation to which the victims are entitled.** (emphasis added) (English translation)[6]

Because the non-monetary remedies are "additional," and not subject to deduction, the double recovery provision does not bar Plaintiffs' recovery, let alone eligibility, under the Law. The reality is Plaintiffs could have, but failed to, pursue relief under the Victims Law. Plaintiffs therefore failed to exhaust all their remedies.

c. Plaintiffs also failed to file any direct actions against Plazas individually.

Plaintiffs also argue that they were not required to exhaust remedies from the Colombian government (as opposed to from Defendant). *See* Plaintiffs' Resp. at 12 ("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."). According to Plaintiffs, "[t]he 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." *Id.*

As an initial matter, Plaintiffs are wrong for the reasons outlined earlier. First, the plain language of the TVPA requires pursuance of all remedies, not just direct remedies against

[6] Original version: VII. DECISIÓN- Primero.- Declarar EXEQUIBLES, en relación con el cargo examinado, el inciso final del artículo 9 de la Ley 1448 de 2011, y los artículos 123, 124, 125, 127, 130 y 131 de la misma ley, que consagran como medidas de reparación el acceso preferente de las víctimas a subsidios de vivienda, programas de formación y empleo y a la carrera administrativa en casos de empate, en el entendido que tales prestaciones son adicionales y no podrán descontarse del monto de la indemnización administrativa o judicial a que tienen derecho las víctimas. *See* Corte Constitucional [C.C.] [Constitutional Court], December 3, 2013, Sentencia C-912/13, Gaceta de la Corte Constitucional [G.C.C.] (Colom.). Can be found at the following URL: https://www.corteconstitucional.gov.co/Relatoria/2013/C-912-13.htm

individuals. Second, this Court in *Rojas Mamami* dismissed a TVPA action based on the plaintiffs' failure to pursue state remedies. Third, a purpose of the TVPA's exhaustion requirement is to encourage other countries to develop remedies, like the Victims Law.

But accepting for the moment Plaintiffs' incorrect interpretation, they still failed to exhaust because they failed to file any direct actions against Plazas Vega. The action that Plaintiffs reference in their Response was against the government. *See* Response at n. 11 (stating that the judgment "was rendered pursuant to Article 90 of the Colombian Constitution in the case brought by Plaintiffs **against Colombia**") (emphasis added). Nowhere in their Complaint or Response do they make a showing of direct actions they have filed against Plazas Vega in Colombia. Nor is it apparent why that obvious local remedy is ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. *See* S.Rep. No. 102–249, at 9 (1991) (emphasis added). And, if it is no longer available, it is not clear that it would have been lost absent Plaintiffs' failure to pursue it for decades. *Cf. Gray v. Netherland*, 518 U.S. 152, 162 (1996) (refusing to allow exhaustion based on default in habeas proceeding). Thus, under either interpretation, Plaintiffs appear to have failed to exhaust their remedies.

Ultimately, this is not the type of lawsuit for which the TVPA was intended. The purpose of the TPVA is to make sure "that torturers and death squads will no longer have a safe haven in the United States." S. REP. 102-249, 3. Plazas Vega (who is neither a torturer or murderer) did not flee from Colombia to the United States as a haven; he stayed in Colombia for more than three decades after the Siege took place, led the Country's fight against drug smugglers, and was wrongfully convicted and imprisoned for years based on false accusations of having been involved in wrongdoing in removing the terrorists from the Palace of Justice. Throughout those decades, the Colombian state went to great lengths to atone for any crimes committed related to the Siege. Plaintiffs cannot simply ignore those remedies and choose the TVPA instead.

III. Comity does not require the same parties or issues.

The parties and issues need not be identical to a previous action for a court to abstain based on comity. As referenced in the Motion, the Eleventh Circuit in *Posner v. Essex* held that the international comity factors weighed in favor of abstention despite the action not being identical to the foreign action: "although this case and the Bermuda action are not identical, they do involve significantly common issues and parties." 178 F.3d 1209, 1222 (11th Cir. 1999); *see also Tr. Int'l*

Corp. v. Nagy, No. 15-80253-CIV, 2017 WL 5248425, at *1 (S.D. Fla. Mar. 28, 2017) (abstaining from hearing action in which the parties were different from the international action because "it is not necessary, as the plaintiff seems to argue, that identical claims be brought in a case. What is necessary is that the court, by deciding the case before it, would be entering an arena of dueling courts.") (citing to *Posner*).

The issue in the criminal case against Plazas Vega is substantially similar to the one here: both come down to whether Plazas Vega was responsible for unlawful killings as part of the Palace of Justice Siege. This Court would hear nearly the same evidence and testimony as the Colombian courts heard decades ago, to the extent such evidence is still available; evidence that was later found to be wholly insufficient after leading to Plazas Vega's wrongful conviction and eight years of wrongful imprisonment.

The cases Plaintiffs rely upon are distinguishable. In *RCTV Int'l Corp. v. Rosenfeld*, the court held it unnecessary to consider comity because there was no judgment issued over the subject matter being litigated. By contrast, there is a judgment here. No. 13-CV-23611, 2014 WL 11944274, at *1 (S.D. Fla. Jan. 31, 2014). The *Hershey Co. v. Cadiz* holding is distinguishable because, in addition to the parties being different, the central issues were different: one dealt with a wrongful termination, and the other with a breach of employment agreement/fiduciary duties. No. 05-60999-CIV, 2006 WL 8431631, at *5 (S.D. Fla. Sept. 25, 2006).[7] The central issue here in both actions is whether Plazas Vega is guilty of unlawful killings. The highest court in Colombia ruled that he is not. This Court should respect that decision.

Conclusion

The Complaint (Dkt. 1) should be dismissed in its entirety for failing to exhaust administrative remedies or, alternatively, this Court should abstain from hearing this action based on comity.

Dated: June 27, 2022

Respectfully submitted,

[7] Likewise, none of the cases Plaintiffs cite preclude the application of comity just because the standard of proof in criminal and civil cases are different. The two cases they cite deal with collateral estoppel and *res judicata*, not comity. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) ("It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of **collateral estoppel**.") (emphasis added); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of **res judicata**.") (emphasis added).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 27, 2022, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all parties via transmission of Notice of Electronic Filing generated by CM/ECF.

By*: /s/Mark J. Heise*
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