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' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Helena Urán Bidegain, in her individual capacity and in her capacity as the legal representative of the estate of her deceased father, Carlos Horacio Urán Rojas, and plaintiffs Xiomara Urán and Mairée Urán Bidegain, in their individual capacity (collectively "Plaintiffs") through undersigned counsel, having been granted leave to file sur-reply (ECF No. 48), respectfully submit this Sur-Reply in response to new arguments and factual claims made by Defendant in Defendant's Reply in Support of Motion Dismiss ("Reply") (ECF No. 46).

ARGUMENT

I. DEFENDANT FAILS TO ESTABLISH THAT A DIRECT CIVIL ACTION AGAINST DEFENDANT INDIVIDUALLY IN COLOMBIA WAS (AND IS) AN AVAILABLE AND ADEQUATE REMEDY

Defendant's new argument – that Plaintiffs supposedly could have but did not file a direct civil action against him in Colombia, for purposes of exhaustion under the Torture Victim Protection Act ("TVPA") (ECF No. 46 at 6, 8-9) – is without merit and provides no basis to dismiss

the Complaint. Defendant claims that a direct civil action is an "obvious local remedy" (*id.* at 9), but apparently not so obvious that Defendant failed to raise it in his initial brief. In any event, Defendant fails to offer any evidence whatsoever showing that a civil suit against him is (or was) even an available remedy in Colombia. Merely asserting that a remedy exists is insufficient; the burden is on Defendant *to prove* the existence of available and adequate local remedies. *See Jean v. Dorelien*, 431 F.3d 776, 783 (11th Cir. 2005) (district court erred in failing to require the defendant to meet "the requisite burden of proof to support an affirmative defense of nonexhaustion of remedies" at the motion to dismiss stage). Defendant thus fails to meet his "substantial" burden of showing "that domestic remedies exist that the claimant did not use." *Id.* at 782 (citation omitted). In addition, "doubts concerning the TVPA and exhaustion" must be "resolved in favor of the plaintiffs." *Id.* at 782 (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005)). Defendant's failure to carry his burden of proving that a direct civil action against him in Colombia was and is an available and adequate remedy warrants the denial of his Motion to Dismiss on this new theory.

Not only has Defendant failed to satisfy his burden of proof, Defendant's new argument is incorrect on its merits. While Plaintiffs disagree with Defendant's new interpretations of the meaning of the statutory phrase "exhausted adequate and available remedies" based on cases that are ***not*** in the TVPA-context (*see* ECF No. 46 at 4-7), including new arguments regarding processes, those arguments are moot because a direct civil action against Defendant in Colombia for the misconduct at issue simply was (and is) not an available remedy in Colombia. ***First***, as Defendant argued in his Motion to Dismiss, remedies for the wrongful actions of government agents while performing their duties are available only as claims against the State of Colombia

under Article 90 of the Colombian Constitution.[1] ECF No. 28 at 3, 8, 11-12. Article 90 further provides that if the State of Colombia is held responsible and pays compensation to the plaintiffs in these cases, then the State "in turn" is to seek "restitution from the agent" for the compensation it had to pay the plaintiffs. ECF No. 28-5 at 50. Thus, only the State of Colombia (not the injured party) can take direct action against individual government agents for misconduct that occurred in their official capacity. Plaintiffs therefore did not (and do not) have access to a civil suit directly against Defendant in Colombia for the torture and extrajudicial killing of Magistrate Urán.

Second, even if a direct civil cause of action could have existed against Defendant in Colombia, Defendant further failed to inform the Court that civil remedies for injuries that arise from a criminal act are not available independent of the criminal prosecution that arises from the same set of facts. Because a criminal investigation and prosecution of Defendant with regard to Magistrate Urán's torture and murder technically exists in Colombia (albeit stalled), civil reparations can only arise after a conviction in a post-conviction proceeding called "integral reparations incident," which is part of the criminal prosecution. In this post-conviction stage of the criminal trial, the criminal court judge would calculate damages to be awarded to the plaintiffs. This process for civil liability was and is not available to Plaintiffs because the criminal investigation and prosecution of Defendant has not concluded. *See* Complaint at ¶¶ 98-100 (the Colombian criminal investigation and prosecution of Defendant for Magistrate Urán's torture and murder has been stalled for over a decade).

[1] Plaintiffs' Opposition demonstrated that Plaintiffs exhausted remedies under Article 90 of the Colombian Constitution. ECF No. 41 at 11-13. Defendant's Reply does not attempt to refute this exhaustion and therefore, Defendant has abandoned this initial theory of non-exhaustion.

In short, Defendant fails to establish that a direct civil action against him in Colombia was and is an available remedy. This new theory does not save Defendant's Motion to Dismiss.

II. DEFENDANT WAIVED ARGUMENTS REGARDING THE NON-MONETARY REPARATIONS UNDER THE VICTIMS' LAW FOR FAILURE TO FULLY PRESENT THEM IN HIS INITIAL BRIEF, WHICH REPARATIONS, IN ANY EVENT, ARE NOT AVAILABLE AND ADEQUATE REMEDIES

Defendant's Reply does not dispute that Plaintiffs are ineligible to recover monetary reparations under the Victims' Law. *See* ECF No. 46 at 7 (conceding that the "double recovery provision [in the Victims' Law] applies" "to monetary judgments" and failing to challenge Plaintiffs' argument that such provision bars their recovery of damages under the Victims' Law).

Instead, Defendant's Reply argues that Plaintiffs failed to exhaust non-monetary remedies under the Victims' Law for "psychological services," "education," "favorable access to loans and credit assistance" and "healthcare coverage." *Id.* Defendant's initial brief, however, did not raise these particular non-monetary reparations but instead, broadly argued that the Victims' Law provided "monetary compensation, rehabilitation, and guarantees of non-repetition." ECF No. 28 at 9. In that regard, Defendant vaguely referred to, in a footnote, "a program that helps victims invest their compensation to build their livelihood, in line with their expectation, personal needs, and local realities." *Id.* at n.14. These arguments are extremely broad and vague and fail to raise the specific non-monetary remedies specified in the Reply. Accordingly, in the words of the Eleventh Circuit, Defendant has "waived this issue *by not presenting it fully* in [his] initial brief." *In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) (emphasis added); *see also Flamenbaum v. Orient Lines, Inc.*, 2004 WL 1773207, at *14 (S.D. Fla. July 20, 2004) (declining to consider argument raised for the first time in reply brief in support of motion to dismiss because plaintiffs had not had an opportunity to respond). The Court should ignore these new arguments because

Defendant "must not be allowed to embellish an argument in a reply brief when [he] failed to fully raise and address the issue in [his] initial brief." *Egidi*, 571 F.3d at 1163.

Even if the Court were inclined to consider the non-monetary reparations identified in Defendant's Reply, all are unavailable to Plaintiffs because Plaintiffs reside outside of Colombia. *See* Complaint at ¶¶ 31-33 (Plaintiffs' places of residence). Defendant fails to inform the Court that only four types of reparations under the Victims' Law are potentially available to victims who live outside of Colombia: "administrative compensation," "satisfaction measures," "psychosocial accompaniment," and "land restitution."[2] Of these, Defendants' Reply mentions "psychological services" (ECF No. 46 at 7), which falls into the category of "psychosocial accompaniment" – a reparation to which victims have access *if they so choose* and is provided as group therapy with unclear timelines and locations.[3] Plaintiffs, however, are not interested in psychological group therapy sponsored by the State of Colombia (*see* ECF No.1 at 18 (prayer for relief)), and Defendant provides no authority to support the notion that Plaintiffs must undergo such therapy as a mandatory prerequisite to filing their TVPA claims. This remedy is plainly inadequate and ineffective. The remaining three types of reparations available to victims who reside outside of

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[2] Unit for Victims' Attention and Integral Reparation. *General Guidance for Colombian Victims of the Law 1448 of 2011 and its implementation abroad*, at 8 (September, 2020). https://www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/victimasenelexterioley1448sept2020final2.pdf (Exhibit A to attached Declaration of Claret Vargas). For the Court's convenience, an English translation of the relevant portions of the General Guidance is attached as Exhibit B to the Vargas Declaration.

[3] "The emotional recovery strategies of the Victims Unit seek to provide victims *who so require*, spaces that allow expression, listening and mitigation of the emotional impact suffered as a result of the conflict." Ex. A at 10; Ex. B at 4 (emphasis added).

Colombia also are either unavailable or inadequate.[4] Because the monetary and non-monetary reparations under the Victims' Law are either unavailable, inadequate or ineffective remedies for Plaintiffs, the Victims' Law is no obstacle to this TVPA suit.

Finally, it bears mentioning that Defendant's shifting exhaustion theories coupled with the growing number of factual errors about the purported availability of remedies demonstrate that Defendant's affirmative defense of non-exhaustion is not suitable for adjudication on a motion to dismiss. Indeed, the parties' briefing to date show that the inadequacy or availability of local remedies is disputed as a matter of fact, which disputes "are not properly considered here, at the motion to dismiss stage . . . ." *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Deriv. Litig.*, 190 F. Supp. 3d 1100, 1115 (S.D. Fla. 2016) (citing *Jean*, 431 F.3d at 783 n.7); *see also Jara v. Nunez*, 2015 WL 8659954, at *2 (M.D. Fla. Dec. 14, 2015) (where the truth of the defendant's non-exhaustion argument "remains to be seen, . . . it is better left for resolution at the summary judgment stage").

CONCLUSION

For the foregoing reasons and for the reasons set forth in Plaintiffs' Opposition (ECF No. 41), the Court should deny Defendant's "Rule 12 Motion to Dismiss" in its entirety.

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[4] The reparation of "satisfaction measures" consists of "symbolic and non-material mechanisms that seek to dignify and make victims visible," primarily through the State's establishment of April 9 as the "National Day of Memory and Solidarity with the Victims of the Armed Conflict" (Ex. A at 9-10; Ex. B at 3-4), which is not an adequate individualized remedy; "land restitution" is only available to victims whose land was forcibly taken or abandoned during the armed conflict in Colombia (Ex. A at 10; Ex. B at 4) and is not an available remedy because Plaintiffs have not asserted that they were deprived of land due to Magistrate Urán's torture and murder; and "administrative compensation" is a monetary benefit (Ex. A at 8; Ex. B at 2), which Defendant's Reply concedes is not available to Plaintiffs due to the prohibition against double recovery. *See* ECF No. 46 at 7; ECF No. 41 at 13-15.

Dated: July 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **hereby certify** that on July 12, 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.

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