EXHIBIT 1

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, *et al*.,

Plaintiffs,

v.

LUIS ALFONSO PLAZAS VEGA,

Defendant.
_____/

[PROPOSED] AMICUS BRIEF OF LAW PROFESSORS WILLIAM S. DODGE, LEILA SADAT, RALPH G. STEINHARDT AND BETH STEVENS

INTEREST OF AMICI[1]

Amici are professors of law with expertise in human rights litigation including litigation under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note). Amici file this brief to explain how the TVPA's legislative history should inform the Court's decision on the parties' pending motions for summary judgment.

William S. Dodge is Martin Luther King, Jr. Professor of Law at the University of California, Davis, School of Law. He is a Reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States*. From 2011 to 2012, he served as Counselor on International Law to the Legal Adviser at the U.S. Department of State.

[1] No party's counsel authored this brief either in whole or in part, and no party or party's counsel, or person or entity other than amici and their counsel, contributed money intended to fund preparing or submitting this brief. Plaintiffs and Defendant consent to the filing of this brief, although Defendant opposes the Conclusion of this brief.

Leila Sadat is James Carr Professor of International Criminal Law at Washington University School of Law and a Fellow at the Schell Center for Human Rights at Yale Law School. She has served as Special Adviser on Crimes Against Humanity to the ICC Prosecutor since 2012.

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Beth Stephens is a Distinguished Professor of Law at Rutgers Law School. She has published extensively on the relationship between international and domestic law and enforcement of international human rights norms through domestic courts. She was an Adviser to the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States*.

INTRODUCTION

In 2022, Plaintiffs sued Defendant under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note), for the torture and murder of their father, Magistrate Carlos Horacio Urán Rojas. Plaintiffs allege that, following an attack by M-19 guerillas on Colombia's Palace of Justice in 1985, soldiers under Defendant's command took Magistrate Urán to military facilities where they tortured and killed him.

Despite denials by Colombia's military that it ever took custody of Magistrate Urán, his belongings were discovered at a military facility in 2007 during a court-ordered search. Responding to Plaintiffs' demands, Colombia's Prosecutor General opened an investigation in 2010. Plaintiffs subsequently filed a petition with the Inter-American Court of Human Rights. In 2014 the Inter-American Court found that government actors had tortured and killed Magistrate Urán and ordered the Colombian government to investigate and to prosecute those responsible. Still, the Prosecutor General's investigation has made little progress for over a decade. In 2016,

Defendant moved to the United States. Having proved unable to obtain redress against Defendant in Colombia, Plaintiffs brought suit under the TVPA.

Enacted by Congress in 1992, the TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation … subjects an individual to torture … [or] extrajudicial killing shall, in a civil action, be liable for damages." In the case of extrajudicial killing, the act states that damages may be recovered by "the individual's legal representative" or "any person who may be a claimant in an action for wrongful death." TVPA § 2(a).

Congress put two limitations on the TVPA's cause of action. First, in § 2(b), Congress provided: "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." Second, in § 2(c), Congress provided: "No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."[2]

Defendant moved to dismiss for failure to exhaust adequate and available remedies in Colombia and on grounds of international comity. This Court denied the motion to dismiss and bifurcated discovery to address the question of exhaustion on summary judgment. Each party has now moved for summary judgment on the affirmative defense of exhaustion.

SUMMARY OF ARGUMENT

The Eleventh Circuit has repeatedly relied on legislative history to interpret the TVPA, including its exhaustion requirement. *See, e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 781-82 (11th Cir.

[2] The Eleventh Circuit has held that the TVPA's "statute of limitations is subject to the doctrine of equitable tolling." *Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005) (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005)). Although Defendant has asserted a statute of limitations defense, this Court has bifurcated discovery to consider only the issue of exhaustion at this stage.

2005). The TVPA's legislative history establishes several propositions with respect to exhaustion that are relevant to this case.

First, the TVPA's exhaustion requirement is an affirmative defense, and the defendant's burden of proof is substantial. The Senate Report accompanying the TVPA states that the defendant "has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use." S. Rep. 102-249, at 10 (1991), 1991 WL 258662. Relying on this Report, the Eleventh Circuit has characterized the defendant's burden of proof as "substantial." *Jean*, 431 F.3d at 781. Indeed, the Report observes that "in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred." S. Rep. 102-249, at 9.

Second, the TVPA's legislative history confirms that only adequate and available remedies need to be exhausted. The Senate Report states explicitly that foreign remedies need not be exhausted if they are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." S. Rep. 102-249, at 10. Relying on this legislative history, courts have held that remedies need not be exhausted when the statute of limitations has run, a precondition to the remedy has not occurred, or relief has been long delayed.

Third, the TVPA's legislative history shows that only remedies against the defendant need to be exhausted. The TVPA creates a cause of action against individual perpetrators rather than the foreign state. And, in discussing the exhaustion requirement, the Senate Report mentions only remedies against the individual perpetrator.

Fourth, the TVPA's legislative history demonstrates that success in obtaining foreign remedies does not bar claims under the TVPA, as the Eleventh Circuit has independently held. *See Mamani v. Berzain*, 825 F.3d 1304, 1311 (11th Cir. 2016).

ARGUMENT

I. THE ELEVENTH CIRCUIT HAS FOUND LEGISLATIVE HISTORY INSTRUCTIVE IN INTERPRETING THE TVPA.

In interpreting the TVPA, the Eleventh Circuit has found its legislative history instructive. In *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005), the Court of Appeals quoted at length from the Senate Report to the TVPA to help it understand the statute's exhaustion requirement. *Id.* at 781-82; *see also Doe v. Drummond Co.*, 782 F.3d 576, 602, 607-10 (11th Cir. 2015) (relying on TVPA's legislative history with respect to extraterritoriality, aiding and abetting liability, and command responsibility); *Baloco ex rel. Tapia v. Drummond Co.,* 640 F.3d 1338, 1347 (11th Cir. 2011) (relying on TVPA's legislative history to hold that children of deceased are proper claimants); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005) (relying on TVPA's legislative history with respect to aiding and abetting liability); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288-89 (11th Cir. 2002) (relying on TVPA's legislative history with respect to command responsibility). The Eleventh Circuit has declined to consult the TVPA's legislative history only when "the plain language is decisive." *Mamani v. Berzain*, 825 F.3d 1304, 1311 (11th Cir. 2016) (holding that successfully exhausting foreign remedies does not bar a TVPA suit). Defendant has acknowledged the relevance of the TPVA's legislative history, quoting from both the House and Senate Reports to the TVPA in his Motion for Summary Judgment. Defendant's Motion for Summary Judgment 6-7.

II. THE TVPA'S LEGISLATIVE HISTORY SUPPORTS PLAINTIFFS' ARGUMENTS THAT FAILURE TO EXHAUST FOREIGN REMEDIES DOES NOT BAR THEIR CLAIMS.

The House Report quoted by Defendant simply states that the TVPA's exhaustion requirement "ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred" and "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, at 5 (1991), 1992 U.S.C.C.A.N. 84, 87-88. It is the Senate Report that explains how Congress expected the exhaustion requirement to operate. *See* S. Rep. 102-249, at 9-10 (1991), 1991 WL 258662.

The Senate Report establishes four propositions with respect to exhaustion that are relevant to this case: (1) the TVPA's exhaustion requirement is an affirmative defense and the defendant's burden of proof is substantial; (2) only adequate and available remedies need to be exhausted; (3) only remedies against the defendant need to be exhausted; and (4) success in obtaining foreign remedies does not bar claims under the TVPA.

A. The TVPA's Exhaustion Requirement Is an Affirmative Defense and the Defendant's Burden of Proof Is Substantial.

The Senate Report accompanying the TVPA explains in detail how Congress expected the exhaustion requirement to operate. "[A]s this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts," the Senate Report explains, "the interpretation of section 2(b), like the other provisions of this act, should be informed by general principles of international law." S. Rep. 102-249, at 10. The Report continues:

> The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once 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. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

Id. This passage makes several things clear. First, nonexhaustion of foreign remedies must be treated as an affirmative defense. Second, only if the defendant makes a showing that foreign remedies have not been exhausted, does the burden shift to the plaintiff to satisfy the exhaustion requirement. Third, even in cases where the burden shifts to the plaintiff to rebut the defendant's showing of nonexhaustion, the ultimate burden of proof and persuasion lies with the defendant.

Relying on the Senate Report, the Eleventh Circuit has characterized the defendant's burden of proof as "substantial." *Jean*, 431 F.3d at 781. Earlier versions of the legislative would have required the defendant to show by "clear and convincing evidence" that the plaintiffs had not exhausted foreign remedies. As Representative Mazzoli explained, the final bill "kept the exhaustion requirement, but removed the 'clear and convincing' standard, and left it to the courts to apply the burden of proof standards that they would normally use." 137 Cong. Rec. H11244-04 (Rep. Mazzoli).

Because the perpetrator generally has more substantial assets outside the United States and it is easier to establish personal jurisdiction there, the Senate Report noted, victims bring suit in the United States "only as a last resort." S. Rep. 102-249, at 9.

> Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation *will be virtually prima facie evidence that the claimant has exhausted his or her remedies* in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

Id. (emphasis added). "[T]o the extent that there is any doubt," the Eleventh Circuit observed in *Jean*, "both Congress and international tribunals have mandated that ... doubts [concerning the TVPA and exhaustion are to] be resolved in favor of the plaintiffs." *Jean*, 431 F.3d at 782 (quoting

Enahoro v. Abubakar, 408 F.3d 877, 892 (7th Cir. 2005) (Cudahy, J., dissenting in part)) (alterations by Eleventh Circuit).

B. Only Adequate and Available Remedies Need to Be Exhausted

The text of the TVPA is explicit that only "adequate and available remedies" need to be exhausted. The Senate Report elaborates on this point, noting that potential remedies identified by a defendant need not be exhausted if they are "ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." S. Rep. 102-249, at 10. Congress listed these defects disjunctively. Thus, Plaintiffs need show only one of them to establish that the remedies advanced by Defendant are not adequate and available.

Quoting this same language from the Senate Report, another District Court has observed: "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." *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995). Obviously, foreign remedies cannot be considered adequate and available if a foreign legal system is "virtually inoperative," *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627 (JSM), 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996) (discussing Rwanda), or if plaintiffs would risk retaliation, *Estate of Rodriquez v. Drummond Co.,* 256 F. Supp. 2d 1250, 1268 (N.D. Ala. 2003) (discussing Colombia). But the facts need not be so stark to establish inadequacy or unavailability. In *Jara v. Nunez*, No. 613CV1426ORL37GJK, 2016 WL 2348658 (M.D. Fla. May 4, 2016), Judge Dalton found that a remedy in Chile was not available simply because the statute of limitations had run. *Id.* at *4.

Other courts have held that foreign remedies are not adequate or available when a foreign case has been filed and made little progress for several years or when a precondition for accessing the remedy has not been satisfied. In *Xuncax*, the District Court found both, noting that "this

criminal case had made no progress for several years; and, under Guatemalan law, a civil action cannot be brought until final judgment has been rendered in the criminal proceedings." *Id.* In *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2021 WL 4427455 (S.D. Fla. Sept. 27, 2021), Magistrate Judge Torres observed that plaintiffs sufficiently exhausted remedies in Colombia when "they sought relief through Colombia's criminal justice system and the Colombia Justice and Peace Process" but "there has been no responsibility for a murder that took place almost 20 years ago." *Id.* at *9. And in *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004), the District Court held—similar to *Xuncax*—that a civil remedy in El Salvador could not be considered available because Salvadoran law required a criminal prosecution first. *Id.* at 1151.

C. Only Remedies Against the Defendant Need to Be Exhausted

In his Motion to Dismiss, Defendant argued that Plaintiffs failed to exhaust remedies against the Government of Colombia available under Colombia's Victims Law (Law 1448/2011) and Article 90 of the Colombian Constitution. Motion to Dismiss 8. In his Motion for Summary Judgment, Defendant appears to have abandoned that argument; he now argues only that Plaintiffs failed to exhaust remedies against the Defendant. Defendant's Motion for Summary Judgment 9-14. This is a wise concession because the TVPA does not require exhaustion of remedies against the Government of Colombia. Rather, it requires only exhaustion of adequate and available remedies against the Defendant.

The TVPA creates a cause of action against the individual perpetrator, not against the foreign government. *See* TVPA § 2(a) (creating liability against "[a]n individual"). In discussing exhaustion of remedies, the Senate Report speaks only of remedies against the perpetrator. "Usually," the Report notes, "*the alleged torturer* has more substantial assets outside the United States and the jurisdictional nexus is easier to prove outside the United States." S. Rep. 102-249,

at 9 (emphasis added). For this reason, "torture victims bring suits in the United States *against their alleged torturers* only as a last resort." *Id.* (emphasis added). If Congress wanted to require exhaustion of remedies against the foreign state, it could have said so either in the text of the TVPA or in the legislative history. Congress's focus on remedies against perpetrators is consistent with the TVPA's aim of "making sure that torturers and death squads will no longer have a safe haven in the United States." *Id.* at 3.

D. Successful Exhaustion of Foreign Remedies Does Not Bar Claims Under the TVPA.

Plaintiffs note that they received administrative reparations from the Colombian government. Plaintiffs' Motion for Summary Judgment 17-18. The Eleventh Circuit has held "that § 2(b)'s exhaustion requirement does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state." *Mamani*, 825 F.3d at 1311.

Although the Court of Appeals in *Mamani* declined to consult the TVPA's legislative history because the text of the statute is clear on this point, *id.*, the Senate Report supports the Court's conclusion. Specifically, the Report states: "A court may 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. 102-249, at 9 (emphases added). This statement supports the proposition that the TVPA does not permit a court to decline jurisdiction when the plaintiff *has* exhausted local remedies, regardless of the outcome.

CONCLUSION

The legislative history of the TVPA suggests that Plaintiffs are entitled to summary judgment on the question of exhaustion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jay B. Shapiro
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