

No. 08-3757

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WINSTON L. MCPHERSON,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; STATE OF NEW JERSEY; DISTRICT
ATTORNEY JOHN DOE I; ASSISTANT DISTRICT ATTORNEY JOHN
DOE II; DETECTIVE JOHN APPEYARD; COMMONWEALTH OF
PENNSYLVANIA; PHILADELPHIA COUNTY; DISTRICT ATTORNEY
LYNNE ABRAHAM; ASSISTANT DISTRICT ATTORNEY PAUL
LAUGHLIN; ASSISTANT DISTRICT ATTORNEY HUGH COLIHAN;
DETECTIVE JAMES DOUGHTERY; DETECTIVE LEON LUBIEJEWSKI,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF AFFIRMANCE

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INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States files this brief as amicus curiae to address the questions posed in the Court's April 3, 2009 order, and to support affirmance of the judgment of dismissal.

At the outset, the United States wishes to emphasize the importance that our Government places on consistent adherence to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77. The consular notification provisions of the Convention serve as a significant protection to U.S. nationals who reside or travel abroad. Our Government regularly advises federal, state, and local officials of their obligations under Article 36, in order to ensure compliance with the Convention.

Nevertheless, the district court correctly dismissed the plaintiff's claims here because the Vienna Convention does not create judicially enforceable individual rights to consular notification and access. Furthermore, even if the Convention did create enforceable rights to consular notification and access, there would be no legal basis for a private suit for money damages for their violation.

The United States has a substantial interest in the interpretation and effect that domestic courts give to international instruments to which our nation is a party. Permitting enforcement of the Vienna Convention's consular notification provisions through private tort actions also could have significant ramifications for law enforcement operations in this country.

In addition, the United States has a significant interest in having district courts dismiss at the threshold legally invalid claims brought against government officials.

As we explain below, the claims here were properly dismissed as time-barred under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).

Accordingly, the United States files this brief as amicus curiae to set out the government's views on the questions posed in the Court's April 3, 2009, order.³

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Vienna Convention creates individually enforceable rights to consular notification and access cognizable in a private money damages action in a U.S. court.

2. Whether *Heck v. Humphrey*, 512 U.S. 477 (1994), bars a suit for damages for violation of consular notification and access requirements.

3. Whether a claim can be dismissed under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b) on statute-of-limitations grounds.

³ Although the United States was named as a defendant in the complaint, the claim against the United States was dismissed as barred by sovereign immunity, and neither the arguments raised in the plaintiff's brief nor the questions posed in the Court's order implicate that ruling. Accordingly, the United States' participation in this appeal is limited to supporting the dismissal of the claims against the other defendants as amicus curiae. The United States has participated as amicus curiae in other appeals raising similar questions, including *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008), *Mora v. People of the State of New York*, 524 F.3d 183 (2d Cir. 2008), *Cornejo v. County of San Diego*, 504 F.3d 853 (9th Cir. 2007), and *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007).

STATEMENT OF THE CASE

1. The Vienna Convention on Consular Relations governs “consular relations, privileges and immunities” between countries that are party to the Convention. *See* Vienna Convention, preamble. The Convention is intended to promote “friendly relations among nations,” and expressly recognizes that the purpose of the privileges and immunities it confers “is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States.” *Ibid.* Consular functions recognized under the Convention include “protecting * * * the interests of the sending State and of its nationals”; “helping and assisting nationals * * * of the sending State”; and “representing or arranging appropriate representation for nationals of the sending State.” Art. 5(a), (e), and (i).

Article 36 of the Vienna Convention governs communications between a foreign consulate and that country’s nationals. Article 36 provides that, “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State,” consular officers will be free to communicate with and have access to their own nationals, and those nationals will be free to communicate with and have access to consular officials. ¶ 1(a). Article 36 directs receiving state officials to inform consular officials, at the request of a foreign national, that the national has been arrested or taken into custody, and also to “inform the person concerned without

delay of his rights” to have his consular officials notified and to communicate with those officials. ¶ 1(b). Finally, Article 36 provides consular officials “the right to visit a national of the sending State” who has been detained “to converse and correspond with him and to arrange for his legal representation.” ¶ 1(c).

2. Winston McPherson is a Jamaican citizen who filed this *pro se* prisoner complaint. McPherson alleges that he was detained by a New Jersey detective in March 1995, and questioned about a murder in Philadelphia. Complaint 4. He was subsequently extradited to Pennsylvania and charged and convicted of murder, manslaughter, and possession of an instrument of crime. Complaint 5, 9-10. McPherson alleges that he was not told of his rights under the Vienna Convention to have his consulate notified of his detention, and to contact consular officials to seek assistance. Complaint 4-5. McPherson also alleges that he was arrested on two earlier occasions when he was not told of his consular notification rights – once in 1988 and a second time in 1993. Complaint 6.

McPherson alleges that, if he had been properly notified in 1995 of his rights of consular notification and access, he would have sought assistance from the Jamaican consulate. Complaint 10. He asserts that consular officials would have provided assistance in his criminal proceedings, including help obtaining defense witnesses and mitigating evidence, that “might have changed the outcome” of the

trial. Complaint 10. McPherson also asserts that consular representatives could have helped him understand local customs, police practices, and criminal proceedings, and provided interpreter services to overcome a language barrier. Complaint 10. Finally, in addition to claiming a violation of his rights under the Vienna Convention, McPherson alleges that he was subjected to coercive interrogation techniques and profiling based on his nationality. Complaint 7-9.

McPherson sued the United States, New Jersey, Pennsylvania, Hudson County, and Philadelphia County. Complaint 14-15. He also sued in their personal capacities five law enforcement officials who were the detectives and prosecuting attorneys in his 1995 criminal case. Complaint 15-16. McPherson alleged violations of the Vienna Convention as well as the Due Process and Equal Protection Clauses, and brought his claims under the Vienna Convention, 42 U.S.C. §§ 1983 and 1985, and the Alien Tort Statute, 28 U.S.C. § 1350. Complaint 1, 13-17.

3. The district court dismissed the complaint prior to service under 28 U.S.C. §§ 1915A and 1915(e)(2), which authorize the threshold dismissal of an action brought by a prisoner against a government official or entity, or by an indigent plaintiff, that fails to state a valid claim or seeks money damages from a defendant who is immune.

In holdings that are not challenged by McPherson on appeal, the district court also held that the claim against the United States was barred by sovereign immunity, and that the claims against Pennsylvania and New Jersey were barred by the Eleventh Amendment. Mem. Op. 11-12.

The district court held that the remaining claims — against the counties and the individual law enforcement officials — were meritless because Article 36 of the Vienna Convention does not create any private rights or remedies that are judicially enforceable by individuals. Mem. Op. 16-17. The district court relied on the Vienna Convention's text and history and the practice of other parties to the Convention, and also gave deference to the United States' construction of the treaty. Mem. Op. 19.

The district court held in the alternative that the claims are time-barred. Mem. Op. 20-23. Although recognizing that a statute of limitations is an affirmative defense, the court reasoned that threshold dismissal is appropriate if it is evident from the face of the complaint that the claims fall outside the applicable limitations period and there is no basis for tolling. Mem. Op. 20-24. The court also held that the constitutional claims in the case were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), which prohibits a § 1983 claim challenging the lawfulness of a criminal conviction or sentence that has not been invalidated, and that the claims against the individual prosecutors were barred by prosecutorial immunity. Mem. Op. 24-26.

4. McPherson filed a *pro se* appeal. On April 3, 2009, this Court issued an order that the case would not be summarily resolved, and invited responsive briefs to address “(1) whether a foreign national who is not informed of his right to consular notification under Article 36 of the Vienna Convention on Consular Relations * * * has any individual remedy available to him in a U.S. court; * * * (2) if so, whether such a claim may be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994) * * *; and (3) whether a district court may *sua sponte* dismiss a complaint under § 1915(e) on statute of limitations grounds.”

SUMMARY OF ARGUMENT

I. The plaintiff’s claims were properly dismissed because the Vienna Convention does not create rights to consular notification and access that may be enforced in court by individuals. The Convention’s text explicitly disclaims an intent to create individual rights. The Convention’s structure and its history also support this construction, which is consistent with its implementation by other parties to the Convention. Any ambiguity should be resolved in favor of the Executive Branch’s construction of the treaty.

Furthermore, even if the Convention did create enforceable individual rights, there would be no basis for a private civil action for money damages for the violation of such rights. The Convention itself does not create a private right of action, nor has

Congress created such a remedy. In this context, § 1983 does not provide a private right to enforce the treaty.

II. *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), does not bar a suit for damages for violation of consular notification and access requirements.

III. The district court properly dismissed the complaint *sua sponte* on the ground that it is barred under the applicable limitations periods. As the Supreme Court explained in *Jones v. Bock*, 549 U.S. 199 (2007), dismissal under § 1915(e)(2)(B) is appropriate if the allegations in a complaint “show that relief is barred by the applicable statute of limitations.” *Id.* at 215.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CREATE RIGHTS TO CONSULAR NOTIFICATION AND ACCESS THAT MAY BE VINDICATED IN A PRIVATE ACTION FOR MONEY DAMAGES.

A. Article 36 Does Not Confer Any Private Right To Sue To Remedy A Violation Of Consular Notification Requirements.

As we set out below, the Vienna Convention’s text, history, context, and implementation establish that the treaty does not provide a private right to sue to remedy a violation of Article 36’s consular notification requirements. Accordingly, this Court should join the overwhelming majority of courts of appeals that have addressed this question, in holding that Article 36 of the Vienna Convention does not

create judicially enforceable individual rights. *See Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008); *Mora v. People of State of New York*, 524 F.3d 183, 188 (2d Cir. , cert. denied, 129 S.Ct. 397 (2008)); *Cornejo v. County of San Diego*, 524 F.3d 183, 192-207 (9th Cir. 2008); *United States v. Emuegbunam*, 268 F.3d 377, 391-394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192, 195-198 (5th Cir. 2001); *but see Jogi v. Voges*, 480 F.3d 822, 832-835 (7th Cir. 2007).

1. “A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Head Money Cases*, 112 U.S. 580, 598 (1884). Violations then may become the subject of international negotiations and other measures between the parties. *Ibid.* “But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country.” *Ibid.* For example, treaties that establish rules for commercial disputes between individuals or corporations to benefit private parties in their international transactions often provide expressly for individual enforcement in domestic courts of the rights afforded. *See, e.g., Clark v. Allen*, 331 U.S. 503, 507-508 (1947) (treaty providing for inheritance of property by German heirs and for “freedom of access to the courts

of justice” to prosecute and defend treaty rights); *accord Head Money Cases*, 112 U.S. at 598; *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (rights invoked under the Warsaw Convention, which explicitly contemplates private enforcement); *Bacardi v. Domenech*, 311 U.S. 150, 159-161 (1940) (finding private right created by treaty providing for international recognition of trademarks).

While some treaties thus are properly construed to provide rights that are judicially enforceable by individuals, “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” Restatement (Third) of Foreign Relations Law of United States § 907, Comment a (1986). In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 & n.10 (1989), for example, the Supreme Court held that treaty language specifying that a merchant ship “shall be compensated for any loss or damage” and that a “belligerent shall indemnify” damage it caused did not create a private right of action for compensation in a U.S. court.

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Supreme Court described the Restatement’s observation (quoted above) that treaties generally do not create private rights or provide for a private cause of action in domestic courts as a “background presumption.” *Id.* at 1357 n.3. Whatever the precise nature of such a presumption,

however, it is not always necessary, in order for a particular treaty to be found to create privately enforceable rights, that the treaty expressly so provide. In certain circumstances, the intent to create such rights may be evidenced by the terms, structure, history, and subject of the treaty. But however that intent may be manifested, it is the private person seeking to enforce a treaty in court who must demonstrate that the treaty creates in him an individually enforceable right.

As we explain below, that burden cannot be met in regard to Article 36 of the Vienna Convention. The Convention's text, structure, and history give no indication that Article 36 was intended to create individually enforceable rights.

2. In the context of a federal statute, the statutory text ordinarily “must be phrased in terms of the persons benefitted” before the statute will be found to create private rights that may in turn give rise to a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Viewed through that lens, the Vienna Convention cannot be read to provide private rights subject to individual enforcement in court. The text of the Convention explicitly “disclaims any intent to create individual rights.” *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-1282 (11th Cir. 2002). The Preamble recognizes that the Convention's purpose is “*not to benefit individuals but to ensure the efficient performance of functions by consular posts.*” Although this specific limitation refers to “privileges and immunities,” it reflects the broader point

that the entire treaty, including Article 36, is intended to enhance States' ability to protect their nationals abroad rather than to create freestanding individual rights. *See, e.g., Mora*, 524 F.3d at 196-197.

Furthermore, while Article 36 uses the term "rights" to refer to a detained foreign national's ability to request that his consulate be notified of his arrest and to have communications forwarded to the consulate, the article "says nothing about the nature of" those rights "or how, if at all, they may be invoked." *Cornejo*, 504 F.3d at 859. Furthermore, the requirement at issue in this case — "a receiving State's obligation to inform a detained foreign national of his 'rights' under paragraph 1(b) — is never itself expressly referred to as a 'right.'" *Mora*, 524 F.3d at 194; *cf. Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 18-19, 22 (1981) (statutory reference to "right to appropriate treatment, services, and habilitation" did not create enforceable individual rights). In any event, "the text of the Convention is entirely silent as to whether private individuals can seek redress for violations of this obligation — or any other obligation set forth in Article 36 — in the domestic courts of States-parties." *Mora*, 524 F.3d at 194.

Significantly, the first protection extended under Article 36 is to consular officials, who "shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of detained foreign nationals were deliberately

placed underneath, *see* 1 Official Records, United Nations Conf. on Consular Relations, Vienna, 4 Mar.- 22 Apr. (1963), 333 (Chile), signaling what Article 36's introductory clause spells out — that the Article's function is not to create freestanding individual rights, but “to facilitat[e] the exercise of consular functions.” *See Mora*, 524 F.3d at 196; *Cornejo*, 504 F.3d at 859-60. As a practical matter, a foreign national's rights are necessarily subordinate to his country's rights, since it is entirely up to a consulate whether to respond to its national's request for assistance. Given that neither a foreign State nor its consular official can sue under the Convention or 42 U.S.C. § 1983 to remedy an alleged violation, *see Breard v. Greene*, 523 U.S. 371, 378 (1998), it follows that an individual alien should not be able to do so either.

Article 36 also provides that consular access rights “shall be exercised in conformity with [domestic law], subject to the proviso *** that [domestic law] must enable full effect to be given to the purposes for which the rights *** are intended.” The reference to how rights “shall be *exercised*” speaks to how rights will be implemented in practice, *i.e.*, how detainees will be told of the right to contact consular officials, how consular officers will be contacted, and how consular officers will be given access to a detainee. That is quite different from the available *remedies* for a violation. *See Cornejo*, 504 F.3d at 861. For example, when a person seeks

damages from an official who has violated his Fourth Amendment rights, he is not exercising those rights in bringing the lawsuit; he is suing to remedy a prior interference with the exercise of those rights. Notably, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), held that the “full effect” provision did not prevent a finding of procedural default, and also expressed “doubt” that there must be a “judicial remedy” for a violation of Article 36, noting that “diplomatic avenues” were the “primary means” of enforcement. *Id.* at 2680-2687.

Moreover, the Optional Protocol to the Vienna Convention creates a dispute resolution mechanism, and that mechanism may be initiated only by a State party to the Convention. The decision that results has “no binding force except between the parties and in respect to the particular case.” Statute of the ICJ, art. 59, 59 Stat. 1062 (1945). The fact that the sole remedy created by the Convention’s drafters is both limited to state parties and purely voluntary is not consistent with an argument that Article 36 of the Convention creates enforceable individual rights. *See Mora*, 524 F.3d at 197; *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-122 (2005).⁴

⁴ On March 7, 2005, the United States gave notice of its withdrawal from the Optional Protocol. *See Medellin v. Texas*, 128 S. Ct. at 1354.

3. The drafting history of Article 36 and the circumstances of its consideration by the President and the Senate also support the conclusion that it was not understood to create privately enforceable rights.

The initial proposed draft of what is now Article 36 was prepared by the International Law Commission (ILC), members of which recognized that the provision “related to the basic function of the consul to protect his nationals,” and that “to regard the question as one involving primarily human rights” was to “confuse the real issue.” Summary Records of 535th Mtg., U.N. Doc. A/CN.4/SR.535, at 48-49 (1960) (Sir Fitzmaurice); *see id.* (Mr. Erim) (article “dealt with the rights and duties of consuls and not with the protection of human rights”). Members of the ILC also observed that the proposed article would be subject to the “normal rule” that a country that did not comply with a provision of the Convention would “be estopped from invoking that provision against other participating countries.” *Id.* at 49.

The final ILC draft submitted to the United Nations Conference required law enforcement officials to notify consular representatives whenever a foreign national was detained. *See* ILC, Draft Articles on Consular Relations, 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Numerous delegates expressed concern that mandatory notice would pose an enormous burden for countries with large tourist or immigrant populations, *see* 1 Official Records at 36-38, 82-83, 81-86, 336-340,

and the Conference ultimately compromised by requiring notice to consular representatives only at the foreign detainee's request. *See id.* at 82 (explaining that change would "lessen the burden on the authorities of receiving States"). In this context, and given the stated purpose for its inclusion, Article 36 cannot reasonably be interpreted to create enforceable private rights.

The history of the Convention's consideration by the Senate and subsequent ratification and implementation by the Executive also support the conclusion that Article 36 was not understood to create individually enforceable rights within our domestic legal system. At the time of the Convention's ratification, the State Department and the Senate Committee on Foreign Relations agreed that the Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department explained that disputes under the Convention "would probably be resolved through diplomatic channels" or, failing resolution, through the process set forth in the Optional Protocol. *Id.* at 19. Consistent with this intent, the State Department's longstanding practice has been to respond to foreign States' complaints about violations of Article 36 by conducting an investigation and, where appropriate, making a formal apology and taking steps to prevent a recurrence.

4. Any ambiguity in the Convention's text or history should be construed in favor of the Executive Branch's construction, which is entitled to "great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989). The longstanding position of the Executive Branch is that the Vienna Convention's consular notification provisions are not enforceable in actions brought by private individuals or foreign governmental officials.⁵ The State Department's practices relating to the Convention also reflect the understanding that it does not create judicially enforceable individual rights.

Thus, the language, context, and history of the Convention do not support a construction that confers individual rights that could in turn be judicially enforced by private parties. Accordingly, the district court's dismissal of the Article 36 claims should be affirmed.

B. Article 36 May Not Be Remedied Through A Private Action For Money Damages.

Even if the Vienna Convention created enforceable individual rights of consular notification and access, there would be no legal basis for a private civil action for retrospective money damages for a violation of such rights.

⁵ In addition to the amicus brief filed on behalf of the United States in the cases cited in n.1, *supra*, see also Brief for United States at 11-30, *Sanchez-Llamas v. Oregon*, 548 U.S. 331(2006) (Nos. 05-51, 04-10566); Brief for United States at 18-30, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief for United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214).

1. The Convention Does Not Create A Private Right Of Action For Money Damages.

Nothing in the text or history of the Vienna Convention suggests that it was intended to create a private right of action for damages for violation of Article 36, and the fact that the drafters found it necessary to create an optional dispute-resolution mechanism suggests strongly that no private remedy was envisioned. *Cf. Abrams*, 544 U.S. at 121-123. In 2007, the State Department surveyed U.S. embassies worldwide about other nations' practice in enforcing the Convention's consular notification requirements. Based on the responses to that survey, it appears that, with one possible exception, no country has allowed an individual claim for money damages for violation of consular notification requirements. *Mora*, 524 F.3d at 188 & n.5. In *Sanchez-Llamas*, the Supreme Court emphasized the unlikelihood that Convention signatories would have intended to require a remedy — there, application of the exclusionary rule in criminal proceedings — that was not recognized under those countries' domestic law. 548 U.S. at 343-44. There is no clear evidence that Article 36 was intended to create the highly unusual enforcement mechanism of a retrospective damages remedy and this Court should decline to hold that it did so *sub silentio*.

2. Article 36 Is Not Enforceable Under 42 U.S.C. § 1983.

Section 1983 does not create a money damages remedy against state officials for their failure to comply with Article 36. As discussed above (pp. __-__), neither the text of the Convention, nor the negotiating record of the Convention, nor the Senate's consideration of the Convention, demonstrates an intent to create individually enforceable rights under Article 36.⁶

The Supreme Court “has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases * * *.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). “The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.” *Ibid.* Accordingly, in the context of a federal statute, only “an unambiguously conferred right [will] support a cause of action brought under § 1983.” *Gonzaga Univ.*, 536 U.S. at 283; *see also id.* at 289 (“[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous

⁶ Although this Court did not specifically invite briefing on that provision, plaintiff's complaint also invokes 28 U.S.C. § 1350. Because Article 36 of the Vienna Convention does not provide rights enforceable by an individual in court, plaintiff fares no better by asserting his treaty violation claim based on Section 1350 than he does under Section 1983.

terms.”); *Sabree v. Richman*, 367 F.3d 180, 187 (3d Cir. 2004) (rights creating language “must clearly impart an individual entitlement, and have an unmistakable focus on the benefitted class.” (internal quotations marks and citations omitted)).

Even legislation that benefits an identified class may not be the basis for a § 1983 claim unless Congress intended to create individually enforceable federal rights. *See City of Rancho Palos Verdes*, 544 U.S. at 119-22 (§ 1983 “does not provide an avenue for relief every time a state actor violates a federal law”). This Court should be particularly reluctant to permit private enforcement under § 1983 of rights asserted under an international treaty, which is entered into by the Executive, with the Senate’s advice and consent, against an understanding that “treaties, even those directly benefiting private persons, generally do not create private rights,” Restatement (Third) of Foreign Relations Law, *supra*, and is also not the product of bicameral legislation. *Cf. Save Our Valley v. Sound Transit*, 335 F.3d 932, 937-938 (9th Cir. 2003) (private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress).

Furthermore, a court should be particularly inclined to hold that a § 1983 remedy is unavailable in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates “in the field that

touche[s] international relations” than in an area of traditional police power). Here, the Senate gave its advice and consent to ratification of the Convention and the Optional Protocol, which set out a specific remedial scheme, to be invoked by one state party against another before an international tribunal. That arrangement weighs greatly against recognition of an implicit personal right that may be enforced by a private person in the domestic courts of one of the parties.

II. *HECK* v. *HUMPHREY* DOES NOT BAR THE PLAINTIFF’S CLAIMS ALLEGING VIOLATION OF THE VIENNA CONVENTION.

This Court invited briefing on whether the plaintiff’s claims alleging violation of the Vienna Convention are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that a § 1983 damages action is barred if liability would necessarily establish the unlawfulness of a criminal conviction or sentence that has not been previously invalidated. A ruling in plaintiff’s favor on the claimed violation of the Vienna Convention would not necessarily demonstrate that his criminal conviction was invalid, because suppression would not be available as a remedy and the claim would be subject to procedural default, *see Sanchez-Llamas*, 548 U.S. at 349-351, 358-360, and possibly review for harmless error. *See Jimenez-Nava*, 243 F.3d at 195 n.2. Furthermore, because nothing in the Vienna Convention requires a consular officers to take steps when informed of a foreign national’s detention, his alleged “injury” is the lost opportunity to seek assistance — *not* the ultimate judgment of

conviction. Under *Heck*, a claim of this type does not violate the prohibition against collateral attacks on a criminal conviction. *See* 512 U.S. at 482-83.

III. DISMISSAL ON STATUTE-OF-LIMITATIONS GROUNDS IS PERMISSIBLE UNDER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b).

This Court also invited briefing on the question whether 28 U.S.C. § 1915(e) authorizes a district court to dismiss a complaint *sua sponte* on the ground that it is barred under the applicable limitations period. Section 1915(e)(2)(B) and the parallel provision of § 1915A(b) authorize dismissal of an action where it is clear from the allegations in the complaint that the claim is invalid. As the Supreme Court explained in *Jones v. Bock*, 549 U.S. 199 (2007), dismissal under § 1915(e)(2)(B) is appropriate if, for example, the allegations in a complaint “show that relief is barred by the applicable statute of limitations.” *Id.* at 215. This Court and other courts of appeals routinely affirm dismissals of complaints under Rule 12(b)(6) on the basis that the allegations in the complaint established that the claims were time-barred. *See, e.g., Robinson v. Johnson*, 313 F.3d 128, 135 & n.3 (3d Cir. 2002) (collecting citations); *Limestone Devel. Corp. v. Village of Lemont*, 520 F.3d 797, 802-803 (7th Cir. 2008); *Jones v. Alcoa, Inc.*, 339 F.3d 359, 365-368 (5th Cir. 2003).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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AUGUST 2009

CERTIFICATE OF COMPLIANCE AND VIRUS DETECTION

I hereby certified that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman. The brief contains 5,220 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2009, I filed and served the foregoing “Brief of the United States as Amicus Curiae in Support of Affirmance” supplemental brief by causing copies to be sent via FedEx overnight delivery to the Court and the pro se plaintiff at this address:

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I further certify, that on the same date, a PDF copy of the brief was filed with the Court by ECF filing.

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