

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BABAJIDE SOBITAN,
Plaintiff-Appellant,

v.

LORI GLUD, JOHN PODLISKA,
and UNITED STATES OF AMERICA
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-3119

BABAJIDE SOBITAN,
Plaintiff-Appellant,

v.

LORI GLUD, JOHN PODLISKA,
and UNITED STATES OF AMERICA
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES

The defendants-appellees submit this brief pursuant to the Court's Order of October 9, 2008, and in response to the questions posed in that Order. As we next explain, the plaintiff-appellant, Babajide Sobitan, has not alleged a claim cognizable under the Federal Tort Claims Act (FTCA), because that statute waives the Government's sovereign immunity only for claims arising under state law, and not a claim, such as Sobitan's, for alleged violation of an international treaty. In addition, the Vienna Convention on Consular Relations does not itself create a private cause of action to enforce Article 36. In any event, it is unnecessary for this Court to decide

these questions, because regardless of whether Sobitan's claim is cognizable under the FTCA or the Convention, any such claim would be barred. Under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988), codified in relevant part at 28 U.S.C. § 2679(b)(1), Sobitan's exclusive remedy for money damages for wrongdoing committed by federal officials within the scope of their employment was an FTCA claim against the United States. An FTCA claim against the United States could not go forward, however, because Sobitan failed to satisfy the statutory requirement of exhausting administrative remedies before bringing suit.

STATEMENT OF THE ISSUES PRESENTED

The Court has posed the following two questions:

1. Whether Mr. Sobitan, in alleging a violation of Article 36 of the Vienna Convention, has alleged a cause of action under the Federal Tort Claims Act or whether such a violation, being based on a treaty rather than state law, is not within the coverage of this Act.

2. Whether, assuming that the Federal Tort Claims Act does not provide a remedy for the violation of a treaty provision, Mr. Sobitan is entitled to enforce his individual right under the Vienna Convention through a private action based on the Convention itself. In answering this second question, the parties also should address

whether Mr. Sobitan has waived or forfeited reliance on such a cause of action by failing to press it on appeal.

STATEMENT

1. The Westfall Act, codified in relevant part at 28 U.S.C. § 2679(b)(1), amended the FTCA to provide a government employee with absolute immunity from civil liability “for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission” of the employee “while acting within the scope of his office or employment.” “Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee * * * is precluded * * *.” *Id.* The only exceptions to this grant of immunity to individual government employees for claims arising out of “negligent or wrongful act[s]” committed within the scope of employment are: (i) a claim for an alleged constitutional violation; and (ii) a claim brought under a federal statute that authorizes “such action against an individual.” 28 U.S.C. § 2679(b)(2).

When a claim of wrongful conduct is brought against a government official in his individual capacity, and it does not fall within the specified exceptions to immunity in § 2679(b)(2), the Attorney General’s certification that the defendant “was acting within the scope of his office or employment at the time of the incident out of which the claim arose” requires substitution of the United States as the

defendant. *See* 28 U.S.C. § 2679(d)(1). The suit then proceeds as though it had been filed against the United States under the FTCA. *See id.* § 2679(d)(4). If the claim is subject to one of the “limitations and exceptions” to the FTCA, it must be dismissed on the ground of sovereign immunity. *See id.*; *see also, e.g., United States v. Smith*, 499 U.S. 160, 165-167 (1991). Even if the claim might otherwise be brought under the FTCA, it is barred unless the plaintiff has first exhausted administrative remedies. *See* 28 U.S.C. § 2675(a).

2. Plaintiff Sobitan alleges that, when he was taken into detention by federal officials upon his arrival at O’Hare Airport in 2003, and subsequently arrested and prosecuted for attempted illegal re-entry into the United States, he was not informed of his right to contact consular officials for assistance. D. Ct. Dkt. 9, Amended Complaint 6-7. Sobitan brought suit in federal district court against Lori Glud, a U.S. Customs and Border Protection Enforcement officer, and John Podliska, the Assistant United States Attorney who prosecuted him, for their alleged violation of Article 36 of the Vienna Convention on Consular Relations. *Id.* at 2-3, 6-8.¹

¹ Although this Court’s October 9, 2008 Order describes the plaintiff’s allegations as true — and the Government acknowledges that they must be assumed to be true at this stage of the litigation — it is worth noting that the defendants vigorously dispute any suggestion that they failed to comply with Article 36 of the Vienna Convention. In fact, Sobitan was specifically informed of his right to contact consular officials to request assistance, and in addition the Nigerian Consulate was notified of the fact of Sobitan’s detention.

The Attorney General certified that Glud and Podliska “were acting within the scope of their employment as employees of the United States at the time of the incidents out of which the claims arose,” *see* D. Ct. Dkt. 23, Exhibit to Motion to Dismiss, and the Government moved to substitute the United States as the defendant in the case. *See* D. Ct. Dkt. 21, Motion to Dismiss. In addition, the Government sought to dismiss the action on the ground that Sobitan had failed to present his claim administratively to a federal agency prior to bringing suit, as required under 28 U.S.C. § 2675(a). *See id.*

The district court granted the motion to dismiss. Holding that Sobitan’s claim did not fall within the two narrow exceptions to the Westfall Act for constitutional claims and claims brought under a federal statute specifically authorizing a claim against individual government employees, the district court substituted the United States as the defendant. *See* D. Ct. Dkt. 37, Sept. 4, 2007 Amended Opinion and Order 4-5. Because Sobitan had not exhausted his administrative remedies, the district court dismissed his claim under 28 U.S.C. § 2675(a). *See* D. Ct. Dkt. 37, Sept. 4, 2007 Amended Opinion and Order 5.

3. Sobitan’s sole argument on appeal is that his claim under the Vienna Convention is a “a civil action * * * for a violation of a statute of the United States under which such action against an individual is otherwise authorized,” 28 U.S.C. § 2679(b)(2)(B), and thus falls within one of the two narrow exceptions under the

Westfall Act to the grant of immunity to individual government employees for civil liability for their wrongful acts committed in the scope of their employment. Brief for Plaintiff-Appellant 7-22. Sobitan does not contest that, if his claim was not within that exception, the United States was properly substituted as the defendant and the claims were properly dismissed for failure to exhaust administrative remedies. In response to Sobitan's argument, the Government has explained in its appellee brief that, as a matter of plain language, precedent, and logic, an international treaty is not a "statute" as that term is used in § 2679(b)(2)(B). Brief of the Defendant-Appellee 4-11.

On October 9, 2008, this Court ordered the parties to file supplemental briefs. In its order, the Court noted that the district court had not addressed the question whether a violation of Article 36 of the Vienna Convention on Consular Relations "is the sort of violation that can be said to arise under either 28 U.S.C. § 1346(b) or 28 U.S.C. § 2672." Order 3. The Court also raised the question whether the Vienna Convention on Consular Relations itself creates a private cause of action — and whether Sobitan had adequately preserved this issue on appeal. Order 5. The Court ordered the parties to provide supplemental briefs to address these questions.

SUMMARY OF ARGUMENT

_____A. Sobitan’s claim for violation of Article 36 of the Vienna Convention on Consular Relations is not cognizable under the Federal Tort Claims Act, because the FTCA’s reference to “law of the place” does not include an international treaty. The Supreme Court held in *FDIC v. Meyer*, 510 U.S. 471 (1994), that “law of the place” means state law, *not* federal law. That holding precludes an interpretation of the statute to encompass an international treaty. Such a construction would also be at odds with the text of 28 U.S.C. § 1346(b) and its legislative history, which show that the “law of the place” was limited to “state” or “local” law. It would also contravene the interpretive principles that waivers of the United States’ sovereign immunity are strictly construed, and that international treaties are presumed not to be individually enforceable.

Furthermore, because Sobitan failed to comply with the statutory requirement to exhaust administrative remedies before bringing suit against the United States under the FTCA, *see* 28 U.S.C. § 2675(a), his claim against the Government was properly dismissed regardless of whether it was cognizable under the FTCA.

B. The Vienna Convention on Consular Relations does not create a private cause of action under U.S. law to sue the United States or individual federal employees for money damages for an alleged violation of Article 36. As an initial

matter, Sobitan’s claim against the individual defendants is barred because it arises out of the alleged “wrongful act[s]” of government employees “while acting within the scope of [their] office or employment,” 28 U.S.C. § 2679(b)(1). Accordingly, the individual defendants are immune from “[a]ny * * * civil action or proceeding for money damages” arising out of this alleged conduct, for which the FTCA provides the “exclusive” remedy, *id.*, with two narrow exceptions not applicable here. In addition, any claim for money damages under the Vienna Convention brought against the United States is barred by sovereign immunity. The FTCA provides the only potentially applicable waiver of sovereign immunity, but Sobitan failed to exhaust his administrative remedies before bringing a claim, as required under the FTCA.

In any event, the Vienna Convention does not create a private right of action for money damages for an alleged violation of consular notification requirements. In *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007), this Court held that the Convention creates individual rights to consular notification and access that may be enforced in an action against local law enforcement officials under 42 U.S.C. § 1983. However, the Court specifically reserved the question whether the Convention itself creates a private money damages remedy. *Id.* at 825. Nothing in the text or history of the Convention suggests that it was intended to create such a remedy, and the fact that the Convention’s drafters created an optional remedial mechanism weighs decisively against any inference that it also implicitly created a broader, compulsory private

right of action for enforcement of the Convention. Finally, the State Department’s longstanding construction of the Convention not to create any private means of enforcement is entitled to great weight.

ARGUMENT

I. The District Court Lacks Jurisdiction Under The FTCA Over A Claim Arising Under An International Treaty.

A. The FTCA’s Reference To “Law Of The Place” Encompasses Only State Law, Not An International Treaty.

Under 28 U.S.C. § 1346(b)(1), a district court has jurisdiction over a civil action against the United States for money damages for personal injury or property loss caused by the wrongful conduct of a federal employee committed within the scope of his employment, if a private person in the same circumstances as the Government “would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” However, the FTCA’s reference to “the law of the place” includes only state law, *not* federal law such as an international treaty. This conclusion is mandated by the Supreme Court’s holding in *FDIC v. Meyer*, and is also supported by the text and history of § 1346(b)(1), the uniform holdings of other courts of appeals, and multiple canons of construction.

The Supreme Court held in *FDIC v. Meyer*, 510 U.S. 471 (1994), that the FTCA’s reference to “law of the place” “means law of the State — the source of

substantive liability under the FTCA,” and does not include “federal law,” which “provides the source of liability for a claim alleging the deprivation of a federal constitutional right.” *Id.* at 478.² If “law of the place” does not include federal law, then necessarily it does not include international treaties. An international treaty is no more part of “state law” than is a federal statute or the U.S. Constitution.

Even if this conclusion were not mandated by *Meyer*, furthermore, it would flow from the text and history of § 1346(b)(1), which make clear that the “law of the place” referred to in that provision is state or local law, *not* federal or national law. In the context of a federal statute conferring federal jurisdiction, the textual reference to the “law of the place” where conduct occurred is best understood as referring to “a more localized law than the national law.” *Williams v. United States*, 242 F.3d 169, 173 (4th Cir. 2001). The repeated references in the legislative history of § 1346(b)(1) to “state” and “local” law also make clear that the “law of the place” does not encompass an international treaty. *See, e.g.*, S. Rep. 79-1196, at 6 (1942) (explaining in bill relating to tort claims that United States’ liability “is to be the same as that of

² *See also, e.g., Richards v. United States*, 369 U.S. 1, 13-14 & n.29 (1962) (holding that the “law of the place” includes state choice-of-law rules, not federal rules, and emphasizing evidence that Congress understood the term to refer only to state law); *United States v. Olson*, 546 U.S. 43, 46 (2005) (FTCA “requires a court to look to the state-law liability of private entities”); *United States v. Muniz*, 374 U.S. 150, 153 (1963) (whether a claim is cognizable under the FTCA “depend[s] upon whether a private individual under like circumstances would be liable under state law”).

a private individual under like circumstances and is to be determined under the local law”); Hearings on H.R. 5373 and H.R. 6463 before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess. 24, 26, 30, 35 (Jan. 29, 1942) (testimony of Assistant Attorney General Francis Shea that liability under the draft bill, which had been prepared in consultation with Attorney General’s Office, would be determined under “State” or “local” law).

The courts of appeals have uniformly held that “the law of the place” in § 1346(b)(1) includes only state law, and not federal statutes, federal regulations, or the U.S. Constitution. *See, e.g., Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001) (holding that “law of the place” in § 1346(b)(1) does not include federal law); *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1024-1025 (9th Cir. 2001) (holding that FTCA action cannot be premised on a violation of federal law), *cert. denied*, 534 U.S. 1082 (2002); *Williams*, 242 F.3d at 173 (FTCA “does not waive the United States immunity against liability for violation of its own statutes”); *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (FTCA requirement that a private person be liable under the “law of the place” “is not satisfied by direct violations of the Federal Constitution, or of federal statutes `or regulations standing alone” (citations omitted)).

Finally, it would make little sense as a matter of statutory construction to hold that, although the “law of the place” in the FTCA does not include federal statutes or

the U.S. Constitution, it nevertheless includes international treaties. Such a construction would be inconsistent with the principle that a waiver of the United States' sovereign immunity must be strictly construed. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). It would also be at odds with the canon of construction under which international treaties — unlike federal statutes or the Constitution — are presumed *not* to be individually enforceable. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 & n.10 (1989); Restatement (Third) of Foreign Relations Law of United States § 907 cmt. a (1987). Although no court of appeals has addressed this question, district courts faced with the question have uniformly agreed that alleged violations of customary international law or an international treaty — including the Vienna Convention — are not cognizable under the FTCA. *See Bansal v. Russ*, 513 F. Supp. 2d 264, 280 (E.D. Pa. 2007) (holding that claim for alleged violation of Article 36 of the Vienna Convention is not cognizable under FTCA); *Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 WL 1662663, *50 (E.D.N.Y. June 14, 2006) (holding that international law claims are not cognizable under FTCA).

Accordingly, § 1346(b)(1)'s reference to the “law of the place” should be construed not to include international treaties, as required by the Supreme Court's holding in *Meyer* that “law of the place” is state law, *not* federal law, and consistent with the provision's text, legislative history, and construction by the federal courts.

B. Sobitan Failed To Exhaust Administrative Remedies, As Required Before Bringing A Claim Under The FTCA.

Regardless of whether Sobitan's claim is cognizable under § 1346(b)(1), it was properly dismissed on the ground that Sobitan failed to exhaust administrative remedies before bringing suit. *See* 28 U.S.C. § 2675(a). Indeed, Sobitan does not contest on appeal that, if his claim was outside the narrow exception to Westfall Act immunity set out in 28 U.S.C. § 2679(b)(2)(B), the district court ruled correctly in substituting the United States as the defendant and in dismissing the claim for failure to exhaust administrative remedies. Because, as we next show, the FTCA claim against the United States was Sobitan's exclusive remedy, his failure to exhaust administrative remedies is fatal to his claim, and the district court's dismissal must be affirmed.

II. Sobitan May Not Sue The United States Or The Individual Defendants For Money Damages Directly Under The Vienna Convention Itself.

The Court has also directed the Government to address whether Sobitan is entitled to enforce his individual right under the Vienna Convention to consular notification through a private action brought under the Convention itself. Any claim brought directly against the Vienna Convention is barred. Under the Westfall Act, the exclusive remedy for Sobitan's alleged injury is a claim for money damages brought against the United States pursuant to the FTCA. Sobitan's failure to exhaust

administrative remedies precludes him from bringing such a claim. In any event, the Vienna Convention does not create a private right of action for money damages in a U.S. Court.

A. Any Claim Brought Directly Under The Vienna Convention Is Barred By The Westfall Act And Sovereign Immunity.

At the outset, any claim that Sobitan might have directly under the Vienna Convention is barred by the Westfall Act and the FTCA.

To the extent Sobitan's claim under the Vienna Convention is construed as a claim against the individual defendants, it is barred by the Westfall Act. With two narrow exceptions, where a plaintiff seeks money damages for wrongful conduct by a government employee within the scope of his employment that is alleged to have caused the plaintiff personal injury or property loss, the exclusive remedy is a claim against the United States under the FTCA. *See* 28 U.S.C. § 2679(b)(1) (conferring immunity on an individual government employees for liability for any injury or property loss "arising or resulting from the negligent or wrongful act or omission" of the employee "while acting within the scope of his office or employment"); *see also id.* ("Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee * * * is precluded * * *").

The Westfall Act’s grant of immunity is not limited to tort claims, nor is it limited to claims that would be cognizable under the FTCA. *See id.*³

Courts have repeatedly recognized that the Westfall Act requires substitution of the United States as the sole defendant, and bars any claims except for those permitted under the FTCA, even where the claims are brought under customary international law or international treaties. *See, e.g., Rasul v. Myers*, 512 F.3d 644, 660-663 (D.C. Cir. 2008) (holding that claims against individual government officials for alleged Geneva Convention violations and other violations of international law are barred by Westfall Act, which requires substitution of the United States and permits claims to proceed only if cognizable under FTCA); *Alvarez-Machain v. United States*, 331 F.3d 604, 631-632 (9th Cir. 2003) (en banc) (holding that international-law claims against individual government officials are precluded by Westfall Act), *rev’d on other grounds, Sosa v. Alvarez-Machain*, 542 U.S. 692

³ The Westfall Act immunity provision in § 2679(b)(1) differs in this respect from the provision in 28 U.S.C. § 2679(a), which makes FTCA remedies exclusive for “suits against * * * federal agenc[ies] on claims which are cognizable under section 1346(b) of this title.” 28 U.S.C. § 2679(a) (emphasis added); *see FDIC v. Meyer*, 510 U.S. 471, 476-478 (1994). The Westfall Act contains no similar limitation. Rather, apart from the express exceptions in § 2679(b)(2), the Westfall Act confers immunity on federal employees for “any” claim based on the employee’s negligent or wrongful act or omission taken “while acting within the scope of his office or employment.” 28 U.S.C. § 2679(b)(1). The “remedy against the United States provided by” the FTCA is “exclusive,” *id.*, whether or not the claim is one that is cognizable under the FTCA.

(2004); *Pauling v. McElroy*, 278 F.2d 252, 253 n.2 (D.C. Cir.) (recognizing that damages claims for alleged violations of international treaty by government officials acting within the scope of their employment “would be recognizable, if at all, only against the United States, under the Federal Tort Claims Act”), *cert. denied*, 364 U.S. 835 (1960); *In re: Iraq Detainees Litig.*, 479 F. Supp. 2d 85, 112-115 (D.D.C. 2007); *Harbury v. Hayden*, 444 F. Supp. 2d 19, 37-39 (D.D.C. 2006), *aff’d*, 522 F.3d 413 (D.C. Cir. 2008).

Therefore, unless the plaintiff’s claim against the individual defendants falls within the exception set out in 28 U.S.C. § 2679(b)(2)(B) “for a violation of a statute of the United States under which such action against an individual is otherwise authorized,” it would necessarily be subject to dismissal regardless of whether the Vienna Convention creates a private right of action. The Government has shown in its appellee brief that the exception to Westfall Act immunity under § 2679(b)(2)(B) does not apply because an international treaty is not a “statute of the United States.” In addition, even if the Vienna Convention were deemed to be a “statute of the United States,” it does not authorize an “action against an individual,” as required under that narrow exception to immunity. Accordingly, any claim that could be brought against the individual defendants under the Vienna Convention necessarily fails.

To the extent that Sobitan’s claim under the Vienna Convention is construed as a claim against the United States, it is barred by sovereign immunity. In order to

bring a claim for money damages against the United States, Sobitan must identify a “basis for concluding that sovereign immunity has been waived.” *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *see also, e.g., Clark v. United States*, 326 F.3d 911, 912 (7th Cir. 2003) (a plaintiff seeking to maintain an action against the United States “must identify a statute that confers subject matter jurisdiction on the district court and a federal law that waives the sovereign immunity of the United States to the cause of action”); *Cole v. United States*, 657 F.2d 107, 109 (7th Cir.) (holding that the plaintiff in an action against the United States “has the burden of pointing to a congressional act that gives consent”), *cert. denied*, 454 U.S. 1083 (1981). The FTCA does not waive the United States’ immunity with regard to treaty claims, as explained above, and the plaintiff has identified no other waiver of immunity. Certainly nothing in the Vienna Convention itself reflects an agreement by the United States “to be held liable in damages if the treaty is violated.” *Canadian Transport Co.*, 663 F.3d at 1092 (holding that, “[i]n the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom”). Accordingly, any claim against the United States for money damages that Sobitan might have under the Vienna Convention must be dismissed on the ground of sovereign immunity. *See, e.g., Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir.)

(dismissing action against the United States for money damages for alleged violation of an international treaty, where the claim was not within the scope of the FTCA's waiver of sovereign immunity), *cert. denied*, 506 U.S. 908 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (holding that sovereign immunity bars claims against United States for money damages for alleged violations of international law).

B. The Vienna Convention Does Not Create A Private Right Of Action For Money Damages For Alleged Violation Of Consular Notification Requirements.

Sobitan's claim under the Vienna Convention would fail even if it were not barred by the Westfall Act and the Government's sovereign immunity, because the Vienna Convention does not create a private right of action in a U.S. court for an aggrieved foreign national to sue for money damages for an alleged violation of Article 36.

A panel of this Court held in *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007), that an alleged violation of Article 36 of the Vienna Convention on Consular Relations may be the basis for a claim under 42 U.S.C. § 1983 against individual state or local law enforcement officials. The Court reasoned that the Vienna Convention confers individual rights to consular notification and access, and that Congress in enacting 42 U.S.C. § 1983 has created a cause of action to sue for the violation of such rights.

Id. at 835-836. However, the Court specifically declined to consider whether the Convention itself creates a private right of action for money damages for violation of rights of consular notification or access. *See Jogi*, 480 F.3d at 824-825 (withdrawing panel’s earlier decision and reserving the question). Notably, the panel’s holding that Article 36 of the Vienna Convention creates judicially enforceable individual rights is in sharp conflict to the otherwise uniform holdings of other courts of appeals that the Vienna Convention does *not* create any judicially enforceable individual rights to consular notification and access. *See Gandara v. Bennett*, 528 F.3d 823, 827-829 (11th Cir. 2008); *Mora v. New York*, 524 F.3d 183, 188-189 (2d Cir.), *cert. denied*, 129 S. Ct. 397 (2008); *Cornejo v. County of San Diego*, 504 F.3d 853, 855 (9th Cir. 2007); *United States v. Jimenez-Nava*, 243 F.3d 192, 197-198 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002).

In the Government’s view — which “is entitled to great weight,” *United States v. Stuart*, 489 U.S. 353, 369 (1989) — even if the Convention is interpreted to create judicially enforceable individual rights,⁴ it should not be construed to create a private

⁴ The longstanding construction of the Executive Branch is that the Convention’s consular notification provisions are not enforceable in actions brought by private individuals or foreign governmental officials. *See* 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 (continued...)

cause of action for money damages for violation of rights of consular notification and access. This Court should require clear evidence that the Convention was intended to create such a judicial remedy before injecting itself into the “elaborate regime of practices” by which nations choose to enforce or forego enforcement of treaties “for reasons of prudence,* * * convenience, or *** to secure advantage in unrelated matters.” *United States v. Li*, 206 F.3d 56, 68 (1st Cir.) (en banc), *cert. denied*, 531 U.S. 956 (2000). As we next show, the text, structure, and history of the Vienna Convention fail to support a novel private remedy for money damages for violation of rights of consular notification or access.

The text and structure of the Vienna Convention suggest that Article 36 was not intended to create a right of private judicial enforcement. 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 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 the introductory clause to Article 36 spells out — that the Article’s function is not to create freestanding individual rights, but “to facilitat[e] the exercise

⁴(...continued)
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).

of consular functions.” As a practical matter, a foreign national’s rights are necessarily subordinate to his country’s rights. An individual may ask for consular assistance, but it is entirely up to his country whether to provide it. Neither a foreign State nor its consular official can sue under the Convention to remedy an alleged violation. *See Breard v. Greene*, 523 U.S. 371, 378 (1998); *see also Federal Republic of Germany v. United States*, 526 U.S. 111, 111-112 (1999) (foreign government’s attempt to enforce consular notification provision in U.S. courts “is without evident support in the Vienna Convention”). It follows that an individual alien should not be able to do so either.

Furthermore, there is no indication in the Convention that the “right[s]” referred to in Article 36 are privately enforceable in an action under the Convention, and construing the provision in this manner would be unreasonable in light of the fact that the Convention’s drafters explicitly drafted a remedial mechanism for its enforcement. Under Articles I and II of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, parties may resolve disputes over the application of the Vienna Convention by bringing a claim in the International Court of Justice or before an arbitral tribunal. Even under the optional protocol (from which the United States noticed its withdrawal on March 7, 2005, *see Medellin v. Texas*, 128 S. Ct. 1346, 1354 (2008)), enforcement is by States, rather than their nationals. Having created this specific,

narrowly crafted, and purely optional enforcement mechanism, the drafters of the Convention surely did not intend to create *sub silentio* a vastly broader and mandatory private judicial remedy. See, e.g., *Medellin*, 128 S. Ct. at 1359 (relying on U.N. Charter’s explicit provision of a diplomatic remedy for failure to comply with a judgment of the International Court of Justice as evidence that such judgments are not automatically enforceable in U.S. courts); *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (relying on Geneva Convention’s explicit enforcement mechanisms in rejecting implied private enforcement right), *rev’d on other grounds*, 548 U.S. 557 (2006); see also *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-122 (2005).

Finally, the provision of Article 36 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,” does not support a construction of Article 36 as creating a private right of action for its enforcement. 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. When a person seeks damages from an official who has violated his First 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, the Supreme Court held in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), that the “full effect” provision in Article 36 did not bar the application of domestic procedural default rules. *Id.* at 351-360. The Court also expressed “doubt” that there must be a “judicial remedy” for a violation of the Convention, noting that “diplomatic avenues” were the “primary means” of enforcement. *Id.* at 347, 350.

The history of the Vienna Convention’s drafting and consideration by the International Law Commission supports the view that it was not understood to create a private right of enforcement through a civil damages suit. In preparing the initial proposed draft of what became Article 36, the members of the International Law Commission recognized that it “related to the basic function of the consul to protect his nationals,” and that “[t]o regard the question as one involving primarily human rights” was to “confuse the real issue.” International Law Commission, 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”). The International Law Commission drafters also observed that the proposed article would be subject to the “normal rule” of enforcement under which a country that “did not carry out a provision” of the Convention would “be estopped from invoking that provision against other

participating countries,” *id.* at 49 — an understanding that is inconsistent with any intent to create a private means of enforcement.

Similarly, the history of the Convention’s consideration by the Senate and implementation by the Executive show that the Convention was not understood or intended to create a novel private damages remedy, but instead was intended primarily to replicate existing law. The State Department, in presenting the Convention to the Senate, stated that it does not “overcom[e] Federal or State laws beyond the scope long authorized in existing consular conventions.” S. Exec. Doc. No. 9, 91st Cong., 1st Sess. 18 (1969). The State Department informed the Senate Foreign Relations Committee that disputes under the Convention “would probably be resolved through diplomatic channels” or, failing resolution, through the process set forth in the Optional Protocol. S. Exec. Rep. 91-9, app., at 19 (1969). The Senate Foreign Relations Committee explained that “[t]he Convention does not change or affect present U.S. laws or practice.” S. Exec. Rep. 91-9, at 2 (1969). And following approval of the Vienna Convention, the State Department informed governors nationwide that it would not require “significant departures from the existing practice within the several states.” *See Li*, 206 F.3d at 64.

Consistent with these descriptions of the Vienna Convention, 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. *See Li*, 206 F.3d at 65. This evidence precludes any inference that the Convention was intended to create a private damages remedy for foreign nationals who were not notified of their right to consular notification and access.

Finally, the fact that the Vienna Convention has been held by this Court to create an enforceable individual right to consular notification is not a sufficient basis to imply a monetary damages remedy. In determining whether an Act of Congress confers a private right of action for damages, the Court must find an intent “to create not just a private right, but also a private *remedy*.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added). Similarly, the creation of a domestic civil cause of action for money damages for violation of a treaty would ordinarily be for Congress, in enacting a law necessary and proper to carry a treaty into effect. *Cf. Missouri v. Holland*, 252 U.S. 416, 432 (1920). For a treaty to have the unusual effect of creating a private damages remedy without an implementing Act of Congress, it would need to do so with a high degree of clarity, if not explicitly. Here, not only do the text and history fail to demonstrate the requisite degree of clarity, but the fact that the drafters found it necessary to create an optional dispute mechanism suggests strongly that no implied remedy was intended. We are unaware of any country that has permitted enforcement of Article 36 through a private damages suit. *Cf. Sanchez-Llamas*, 548 U.S. at 344 (emphasizing unlikelihood that signatories to

Convention would intend to permit remedy that had been rejected in most domestic legal systems); *Medellin*, 128 S. Ct. at 1363. This Court should decline to hold that the Convention created such an unlikely enforcement mechanism *sub silentio*.

C. Sobitan Has Asserted The Vienna Convention As The Purported Basis For His Claim.

This Court has also directed the Government to address whether, if the Vienna Convention itself creates a private cause of action for money damages, Sobitan has waived or forfeited reliance on such a claim. 10/9/08 Order 5. Because, as noted above, the FTCA does not waive the United States' sovereign immunity with regard to treaty claims, and the plaintiff has identified no other waiver of immunity, any claim directly against the United States is barred. In addition, any claim against the individual defendants is barred by the Westfall Act. Accordingly, it is unnecessary to consider the question of waiver. Should the Court choose nevertheless to reach the issue, the Government construes Sobitan's amended complaint to allege a claim directly under the Vienna Convention. His briefs on appeal to this Court similarly appear to rely on the Vienna Convention itself as the basis for his cause of action. If the Court disagrees with this characterization, however, it would be appropriate to hold that Sobitan's failure to preserve the argument precludes him from raising it for the first time on appeal. *See, e.g., Dumas v. City of Chicago*, No. 00-1389, 2000 WL 1597787, *2 (7th Cir. Oct. 24, 2000) (refusing to consider whether allegations

establish a valid claim under statutory provision identified for the first time on appeal); *Bricker v. Crane*, 468 F.2d 1228, 1233 (1st Cir. 1972) (refusing to consider whether plaintiff's allegations established a valid claim under statutory provision that had not been relied on prior to appeal in the case), *cert. denied*, 440 U.S. 930 (1973); *see generally Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007) (“[A]rguments not raised in the district court are waived on appeal.”).

CONCLUSION

For the foregoing reasons and the reasons set out in the Brief of the Defendants-Appellee United States, this Court should affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 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 6,523 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

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