

April 2010

Gandara v. Bennet: Does the Eleventh Circuit's Decision Presage the Future of Article 36 in American Jurisprudence?

Stephen D. Lott

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

Recommended Citation

Lott, Stephen D. (2010) "Gandara v. Bennet: Does the Eleventh Circuit's Decision Presage the Future of Article 36 in American Jurisprudence?," *Florida Journal of International Law*: Vol. 22: Iss. 1, Article 5. Available at: <https://scholarship.law.ufl.edu/fjil/vol22/iss1/5>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

CASE COMMENT

GANDARA V. BENNET: DOES THE ELEVENTH CIRCUIT'S DECISION PRESAGE THE FUTURE OF ARTICLE 36 IN AMERICAN JURISPRUDENCE?

*Stephen D. Lott**

I. SUMMARY

Petitioner, a national of Uruguay, brought suit against respondents in a civil action pursuant to 42 U.S.C. § 1983. Petitioner, seeking money damages, alleged that his rights under the Vienna Convention on Consular Relations, article 36, had been violated when authorities failed to notify him of his right to have the Uruguayan consulate notified of his arrest and detention. The District Court dismissed his complaint. On appeal, the Eleventh Circuit affirmed the dismissal because it found that article 36 created no judicially enforceable individual rights. This decision represents an important evolution because, prior to the instant case, the Eleventh Circuit had not considered the meaning and effect of article 36 in a civil context. The court joins the Ninth Circuit in reaching this conclusion. If the court's decision is adopted by future panels it could lead to an overall reduction in the amount of § 1983 litigation, which might serve to reduce government expenditures on litigation and damage payments. It also might jeopardize Americans abroad if foreign courts decide to mirror the Eleventh Circuit and find that foreign nationals have no enforceable rights under article 36.

DESCRIPTORS: International law, Vienna Convention on Consular Relations, Article 36, Individual Rights, Foreign Nationals, 42 U.S.C. § 1983.

II. FACTS

Hector Gandara, a national of Uruguay, was arrested on September 11, 2004 in Glynn County, Georgia and charged with one count of false imprisonment.¹ After pleading guilty, he was sentenced to five years in

* B.A., May 2008, University of Florida; J.D., May 2011, University of Florida Levin College of Law. This piece is dedicated to my parents, David & Diane Lott. Thank you for always believing in me.

1. *Gandara v. Bennet*, 528 F.3d 823, 825 (11th Cir. 2008).

prison and five years probation.² Gandara subsequently filed a complaint in the U.S. District Court for the Southern District of Georgia against the Glynn County Sheriff's Office, detention center officers, a sheriff, and a county district attorney.³ Pursuant to 42 U.S.C.S. § 1983, Gandara argued that respondents violated his rights under the Vienna Convention on Consular Relations ("treaty") by failing to inform him of his right to have the Uruguayan Consulate notified of his arrest and detention.⁴ He sought a declaratory judgment, compensatory damages, and punitive damages.⁵ The District Court dismissed Gandara's complaint for failure to state a cognizable claim.⁶ On appeal, the Eleventh Circuit affirmed the judgment of the District Court but for different reasons.⁷ It HELD that it was proper to dismiss Gandara's § 1983 claim because article 36 of the treaty does not create judicially enforceable individual rights.⁸

III. HISTORY

In 1963, various nations sent delegates to the Vienna Convention on Consular Relations.⁹ The result of the conference was a treaty which codified international consular practices and procedures. The U.S. Senate ratified the treaty in 1969.¹⁰ In the years since, one section, article 36, has created some confusion within the legal community.¹¹

Section 1(b) of the article states that: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of the State is arrested or committed to prison or to custody pending trial or is detained in any manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 826.

8. *Id.* at 826-29.

9. As of January 2000, 167 countries were signatories to the Vienna Convention on Consular Relations. "Foreign National: International Instruments: The Vienna Convention on Consular Relations," The International Justice Project, <http://www.internationaljusticeproject.org/nationalsInstruments.cfm>.

10. EXEC. REP. NO. 91-9: U.S. Senate Committee on Foreign Relations, Ninety-First Congress, first session, as reprinted in Library of Congress archives.

11. *Jogi v. Voges*, 480 F.3d 822, 829 (7th Cir. 2007).

The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”¹²

Thus, because of its wording, article 36 has given rise to a debate as to whether it creates enforceable individual rights for foreign nationals. The confusion has been exacerbated by further questions of how the treaty’s preamble factors into the equation. The preamble states that “the purpose of [the privileges endowed by the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts.”¹³

The U.S. Supreme Court has weighed in several times as to the significance of article 36 in American jurisprudence. However, it has yet to issue a definitive ruling as to whether article 36 creates individual rights.

In *Breard v. Greene*, the Court considered the claim of a Paraguayan national who had been sentenced to death in Virginia for capital murder.¹⁴ On appeal, petitioner claimed that his rights under the Vienna Convention on Consular Relations had been violated via the failure of Virginia authorities to notify him of his right to have the Paraguayan consulate contacted and informed of his arrest.¹⁵ As a consequence, petitioner argued, his convictions had to be vacated.¹⁶

After considering the issue, the Supreme Court “nearly recognized that . . . the individual petitioner had actionable rights under the Convention that were violated.”¹⁷ The Court, however, stopped short of recognizing the existence of individual rights. Instead, it held that because petitioner had failed to raise the treaty violation claim in state court, he was procedurally barred from asserting it on appeal.¹⁸

In *Sanchez-Llamas v. Oregon*, the Court considered the claims of two foreign nationals who sought the vacation of their criminal convictions based upon violations of the Vienna Convention.¹⁹ The Court’s over-arching holding was that a violation of article 36 does not necessarily require reversal of a criminal conviction or sentence.²⁰ The Court also issued more particular holdings for each of the petitioners.

Regarding Bustillo, a national of Honduras, the Court affirmed its

12. Vienna Convention on Consular Relations, art. 36 1(b), pr. 24, 1963.

13. *Id.* pmb1.

14. *Breard v. Greene*, 523 U.S. 371, 372 (1998).

15. *Id.* at 373.

16. *Id.*

17. JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 394-95 (2000).

18. *Breard*, 523 U.S. at 375.

19. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

20. *Id.* at 360.

holding in *Breard* that “claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.”²¹ In *re Sanchez-Llamas*, a national of Mexico, the Court held that suppression of his statement to the police would not be an appropriate remedy for treaty violation.²²

Several circuits of the U.S. Courts of Appeal have issued more precise rulings as to the meaning and effect of article 36. However, there has been substantial variance of opinion among these courts.

Prior to the instant case, the Eleventh Circuit had only considered whether the treaty conferred individual rights in a criminal context. In *Maharaj v. Sec’y for the Dep’t of Corr.*, the circuit court considered the appeal of Krishna Maharaj, a British national convicted of murder in Florida.²³ Maharaj argued that he was entitled to post-conviction relief because the British Consulate was never notified of his arrest. The circuit court, however, disagreed and found that the treaty does not create enforceable individual rights.²⁴ In support, the circuit court explained that the Vienna Convention was an “agreement between countries, not citizens,” and that the language of the preamble made clear that the delegates did not intend to create individual rights.²⁵

In *Jogi v. Voges*, the Seventh Circuit considered whether Jogi, an Indian national who had been convicted of aggravated battery with a firearm in Illinois, could pursue a § 1983²⁶ claim against law enforcement officials who allegedly failed to inform Jogi that he was entitled to have the Indian consulate notified of his arrest.²⁷ Consequently, the main focus of the circuit court’s inquiry was whether

21. *Id.*

22. *Id.* at 337.

23. *Maharaj v. Sec’y for the Dep’t of Corr.*, 432 F.3d 1292 (11th Cir. 2006).

24. *Id.* at 1307.

25. *Id.* (quoting *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003)). The Eleventh Circuit again considered the meaning of article 36 in *United States v. Rodriguez*, in which it found that “the Vienna Convention does not confer judicially enforceable *individual rights*.” *United States v. Rodriguez*, 162 Fed. Appx. 853, 857 (11th Cir. 2006). The Fifth and Sixth Circuits have issued opinions which hold that the Vienna Convention does not confer individual rights in the context of a criminal proceeding, and that violation of the treaty does not necessarily require reversal of a criminal conviction or sentence. *United States v. Jimenez-Nava*, 243 F.3d 192, 197-98 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 391-94 (6th Cir. 2001).

26. 42 U.S.C.S. § 1983 (2009) (stating that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”).

27. *Jogi v. Voges*, 480 F.3d 822, 829 (7th Cir. 2007).

article 36 creates individual rights that are privately enforceable under § 1983. In this respect, *Jogi* differed from previous cases involving article 36 because it dealt with whether the treaty created rights that could be enforced in a civil, rather than a criminal, context.²⁸

The Seventh Circuit ultimately decided that *Jogi* could pursue his § 1983 claim because, as it found, article 36 creates judicially enforceable individual rights which signatory states are obligated to respect.²⁹ In reaching this conclusion the panel relied upon the Supreme Court's decision in *Gonzaga v. Doe*, which found that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms."³⁰

Employing the Court's reasoning in *Gonzaga*, the Seventh Circuit found that for an individual right to exist, it "must appear unambiguously in either the statute or, as applied here, the treaty."³¹ The court then decided that the text of the treaty satisfied this requirement; that article 36 clearly intended to establish enforceable individual rights.³²

Regarding the treaty's preamble, which disclaims any intention to benefit individuals, the *Jogi* court explained that it should be understood as saying that the Convention was "not designed to benefit diplomats in their individual capacity, but rather to protect them in their official capacity."³³ Thus, because § 1983 protects "against all forms of official violation of federally protected rights," and *Jogi* had rights under the treaty,³⁴ the circuit court held that *Jogi* could go forward with his claim.³⁵

28. The circuit court, emphasizing this difference, noted that *Jogi* was not challenging his criminal conviction. Rather, he was suing the defendants for their supposed violation of his rights under the treaty.

29. *Jogi*, 480 F.3d at 836.

30. *Gonzaga v. Doe*, 536 U.S. 273, 290 (2002).

31. *Jogi*, 480 F.3d at 828.

32. *Id.* at 835-36.

33. *Id.* at 833.

34. The Supremacy Clause of the U.S. Constitution establishes that rights created via treaty enjoy status as the supreme law of the land. In pertinent part, the clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI.

35. Both the International Court of Justice and the Inter-American Court of Human Rights have issued rulings that echo the Seventh Circuit's decision in *Jogi*. In 1999, the latter court issued an advisory opinion which declared that article 36 creates individual rights and is an exception to the rest of the treaty (*Advisory Opinion of the Inter-American Court of Human Rights: Due Process of Law is a Fundamental Right* [OC-16/99], ¶ 82]). The ICJ, in *Avena and other Mexican Nationals* (aka *Mexico v. United States of America*), found that individual and State rights are interdependent; that "violations of the rights of the individual under article 36

In *Cornejo v. County of San Diego*, the Ninth Circuit came to the opposite conclusion, finding that Cornejo, a national of Mexico who was arrested and detained in California, could not pursue a § 1983 claim because article 36 does not create individual rights.³⁶ In so deciding, the *Cornejo* court found that the requirement of *Gonzaga* was not satisfied; that article 36 “does not unambiguously give Cornejo a privately enforceable right to be notified.”³⁷ The *Cornejo* court explained that the “focus of Article 36 is on *consular functions*,” and therefore “[t]he privileges discussed are explicitly those relating to the *consular post*.”³⁸

IV. INSTANT CASE

In *Gandara v. Bennet*, the Eleventh Circuit joined the Ninth Circuit in holding that, because article 36 does not create judicially enforceable individual rights, a foreign national cannot maintain a civil action under § 1983 for violation of such rights.³⁹ In reaching this conclusion, the *Gandara* court acknowledged the complexity of the legal question involved and gave consideration to the other circuits’ findings concerning the meaning and effect of article 36.⁴⁰

First, the *Gandara* court agreed with the Ninth Circuit’s finding in *Cornejo* that “a treaty must be interpreted as a whole . . . including the preamble.”⁴¹ Because the preamble declares that the purpose of the treaty is not to benefit individuals, the *Gandara* court found, as it had in previous cases, that the treaty “disclaims any intent to create individual rights.”⁴²

Second, the Eleventh Circuit agreed with the Ninth Circuit’s finding that “[a]rticle 36 confers legal rights and obligations on *States*,” and not individuals, “in order to facilitate and promote consular

may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual.” *I.C.J. Reports 2004*, at 36. In response, the Supreme Court has said that the ICJ’s interpretation deserves “respectful consideration,” but it is not binding for American courts. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006).

36. *Cornejo v. County of San Diego*, 504 F.3d 853, 863-64 (9th Cir. 2007).

37. *Id.* at 863.

38. *Id.* at 860. The circuit court further explained that “the Vienna Convention on Consular Relations is an agreement among States whose subject matter – ‘Consular Relations’ – is quintessentially State-to-State.”

39. *Gandara v. Bennet*, 528 F.3d at 826-29 (11th Cir. 2008).

40. *Id.* at 825 (finding that “the issue is a close one with strong arguments on both sides.”).

41. *Id.* at 827 (quoting *Cornejo*, 504 F.3d at 861 n.13).

42. *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-82 (11th Cir. 2002).

functions.”⁴³ The *Gandara* court then stated that, as a matter of general judicial policy, courts should not infer the creation of enforceable individual rights from international treaties.⁴⁴

Third, the *Gandara* court pointed to the fact that the text of the treaty makes no mention of how violations of article 36 should be compensated.⁴⁵ It explained that this failure to “provide for private damages actions” is further evidence that the delegates did not intend for individual rights to be created. The *Gandara* court also noted that the U.S. State Department and *travaux preparatoires* share the court’s position.⁴⁶

Lastly, the *Gandara* court found that it was bound by the prior panel rule, which obligates it to adhere to the rulings of “earlier panels unless and until they are clearly overruled *en banc* or by the Supreme Court.”⁴⁷ Thus, even though prior panels’ analyses of the treaty occurred in criminal contexts, the court nonetheless felt that the established rule, that “the Vienna Convention does not confer enforceable individual rights,” was applicable to claims under § 1983.⁴⁸

V. ANALYSIS

Given the Eleventh Circuit’s prior rulings *in re* the Vienna Convention, its holding in the instant case should not come as much of a surprise. It does not seem much of a jump from finding that “the Vienna Convention does not confer judicially enforceable individual rights” in a criminal context, to finding that the treaty does not confer individual rights that can be enforced in a civil action via a § 1983 claim. Nonetheless, the Eleventh Circuit’s expansion of the law from its prior decisions represents a subtle but important evolution.

Since 1961,⁴⁹ “the volume of § 1983 litigation in the federal courts has increased more than one hundredfold,” the result of which has been

43. *Gandara*, 528 F.3d at 828 (quoting *Cornejo*, 504 F.3d at 855).

44. *Id.*

45. *Id.*

46. *Id.* at 828-29 n.3 (quoting *United States v. Stuart*, 489 U.S. 353, 369 (1989) (finding that “the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”)).

47. *Id.* at 829 (quoting *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 837 (11th Cir. 2004)).

48. *Id.*

49. In 1961, the Supreme Court decided *Monroe v. Pape*, in which it found that if a government official, acting under color of state law, violates an individual’s rights, then liability attaches and a civil claim for damages can be made pursuant to § 1983. *Monroe v. Pape*, 365 U.S. 167 (1961).

substantial costs to government and, consequently, to taxpayers.⁵⁰ With the current national debt exceeding 11 trillion dollars, the court's ruling in *Gandara* will likely be viewed favorably from an economic standpoint.⁵¹ Fewer lawsuits against the government mean less public dollars being spent on litigation costs and damage awards.

Conversely, as other commentators have noted, if more courts eventually side with the Seventh Circuit, which found in *Jogi* that article 36 does bestow individual rights, a likely result would be an even greater amount of § 1983 litigation, which will mean a heavier monetary burden for taxpayers.⁵²

In addition, the Eleventh Circuit's decision could have deleterious effects for Americans travelling and living abroad. If foreign courts see more and more American courts refusing to recognize individual rights under the treaty, they might reciprocate by issuing similar rulings, thereby denying Americans rights under the treaty which they might have otherwise enjoyed.

From a purely legal standpoint, the decision seems in several ways, more persuasive than the Seventh Circuit's decision in *Jogi*. For example, the *Gandara* court makes the point that no private damage remedies are mentioned in the text of article 36.⁵³ If the delegates to the convention *did* intend to create individual rights, one would think they might include in the text, at the very least, some suggestion that violations of article 36 ought to be compensated. To leave it to national courts to subsequently infer the existence of an implied damage remedy seems somewhat odd.

Secondly, the decision to consider the treaty's preamble in discerning the meaning of article 36 seems prudent. If article 36 was intended to create individual rights, why would the drafters of the treaty include language in the preamble that seems to deny any intention to create such rights? Thus, public policy ramifications aside, the Eleventh Circuit's legal conclusions seem well-founded.

50. MARY MASSARON ROSS, *SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983*, at 142 (2006).

51. U.S. Department of the Treasury, Bureau of Public Debt, "The Debt to the Penny and Who Holds It," <http://www.treasurydirect.gov/NP/BPDLLogin?application=np> (last visited Jan. 31, 2010).

52. Anthony Jones, Comment, *Jogi v. Voges: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?*, 15 MINN. J. INT'L L. 425 (2006). For further discussion, see also Goubarkov Dmitri, *Federal Courts: Finding a Remedy When None Seems Available*, *Jogi v. Voges*, 20 FLA. J. INT'L L. 235 (2008).

53. *Gandara*, 528 F.3d at 828.

VI. CONCLUSION

It remains to be seen whether the Supreme Court will adopt the Eleventh Circuit's reasoning when and if it makes a decision as to whether article 36 creates individual rights. Whatever the Court decides could have both positive and negative impacts for Americans. If the positions of the Eleventh and Ninth Circuits are embraced, then the U.S. government will save money because it will not have to pay damages to § 1983 claimants for State violations of the Vienna Convention. However, Americans abroad could suffer as a result of the possible reciprocity of foreign courts deciding to mirror the Supreme Court.

