

MILITARY COMMISSIONS, CRIMINAL COURT, AND THE CHRISTMAS DAY BOMBER

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Abstract: On December 25, 2009, Umar Farouk Abdulmutallab attempted to detonate an explosive device on a plane landing in Detroit. The attack was unsuccessful, but it spurred an important domestic debate regarding U.S. anti-terrorist programs and policies. In particular, the event fueled an argument over the proper forum for the interrogation and prosecution of terrorist suspects captured in the United States. Focusing on national security issues, some contended that treating Abdulmutallab as a criminal defendant in an Article III court, rather than subjecting him to a military commission, was imprudent and dangerous, while others insisted that it was entirely appropriate and responsible. This Note will probe this debate by comparing the two tribunals as each relates to the legal protections for suspects during interrogation. The Note argues that although some differences do exist, it is quite plausible that treating Abdulmutallab and other captured terrorist suspects as criminal defendants in Article III courts does not adversely impact intelligence gathering and national security.

INTRODUCTION

At approximately noon on Christmas Day in 2009, federal officials were notified about a passenger on Northwest Flight 253 who had attempted to detonate an explosive device while on board the aircraft.¹ Just prior to landing in Detroit, Umar Farouk Abdulmutallab, the so-called “Christmas Day Bomber,” lit a device concealed in his clothing, igniting a fire on the plane.² The device failed to fully explode, and passengers and crew restrained the Nigerian national until officials could board the plane and take him into custody.³

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¹ Devlin Barrett, *Rights of Plane Bomb Suspect at Issue*, *NEWSDAY*, Jan. 25, 2010, at A20.

² Indictment at 2, 3, *United States v. Abdulmutallab*, No. 2:10-cr-20005 (E.D. Mich. Jan. 6, 2010).

³ Barrett, *supra* note 1.

the government initiates adversarial judicial proceedings, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”⁵⁹

Even though there are no specific Sixth Amendment obligations, a defendant is still protected before adversarial judicial proceedings commence because the Fifth Amendment demands the government provide the accused certain protections known as *Miranda* warnings.⁶⁰ Generally, under *Miranda*, once a defendant is taken into custody and before any interrogation can take place, law enforcement must advise the individual of their right to remain silent and their right to retain counsel.⁶¹ If the accused asserts his right to counsel, all questioning must cease until an attorney is present.⁶²

There are also significant exceptions to the *Miranda* doctrine.⁶³ Pertinent to this Note is the public safety exception, where the mandate for law enforcement to issue *Miranda* warnings before interrogation is suspended if there is a substantial threat to public safety.⁶⁴ The public safety exception provides that law enforcement may temporarily elect not to administer the warnings if the “need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”⁶⁵ In evaluating the exigency of each situation in which the exception is invoked, the judicial branch will defer to the decisions of the officials on the ground.⁶⁶

B. *Interrogation Limits*

I. Limitations on Interrogations in Military Commissions

In 2006, the Supreme Court of the United States issued a decision in *Hamdan v. Rumsfeld* that struck down the Bush Administration’s procedures for military commissions because, among other requirements, the commissions failed to comport with Article III of the 1949 Geneva Conventions (known as “Common Article III”).⁶⁷ The majority seized

⁵⁹ Kirby v. Illinois, 406 U.S. 682, 689 (1972).

⁶⁰ See *Miranda v. Arizona*, 384 U.S. 436, 439, 444 (1966).

⁶¹ See *id.* at 444.

⁶² *Id.* at 444–45.

⁶³ See, e.g., *New York v. Quarles*, 467 U.S. 649, 657 (1984).

⁶⁴ *Id.* at 657.

⁶⁵ *Id.*

⁶⁶ See *id.* at 659.

⁶⁷ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

on the language in Common Article III that affords combatants “all the judicial guarantees which are recognized as indispensable by civilized peoples,” and then reasoned that the MCA of 2006 did not meet that standard.⁶⁸

The *Hamdan* ruling set the stage for President Obama’s executive order, issued soon after taking office in 2009, in which he pronounced Common Article III as a minimum standard for all interrogations of individuals in U.S. custody.⁶⁹ The order further stipulated that interrogations would be consistent with the nation’s other international obligations, such as the Convention Against Torture (CAT), as well as domestic laws like the Detainee Treatment Act (DTA).⁷⁰ President Obama specifically identified Army Field Manual 2–22.3 as the appropriate guide for interrogators in the field, as it was deemed to be in compliance with all of the aforementioned legal obligations.⁷¹

a. *Common Article III Limitations*

In relevant part, Article III of the 1949 Geneva Conventions requires parties to refrain from “violence to life and person” including “torture” when dealing with detainees, and it prohibits “outrages upon personal dignity, in particular, humiliating and degrading treatment.”⁷² Early in his presidency, President Obama ordered a Department of Defense commission to undertake the question of the specific application of Common Article III to detainee treatment.⁷³ As part of evaluating the treatment of individuals at Guantánamo, the specially-convened commission elaborated on the more specific obligations that flowed from Common Article III’s broad principles.⁷⁴

Specifically, the commission noted that in accordance with Common Article III, any form of sensory deprivation is prohibited.⁷⁵ They further explained that the broad mandate prohibits humiliation including rape, sexual assault, and subjecting detainees to “public curiosity”; moreover, it barred violence, threats of violence, or any physical force upon detainees except when in self-defense or other narrowly defined

⁶⁸ *See id.* at 633–34 (quoting Geneva Conventions Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva]).

⁶⁹ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² Geneva, *supra* note 68, art. 3.

⁷³ Detainee Report, *supra* note 55, at 4.

⁷⁴ *See id.*

⁷⁵ *See id.* at 29.

emergency situations.⁷⁶ As a general rule, the commission announced that if all interrogators adhered to the instructions of Army Field Manual 2–22.3, the methods used would be in concert with Common Article III.⁷⁷

b. *Army Field Manual 2–22.3 Limitations*

Army Field Manual 2–22.3, written and published in 2006, established a minimum standard for the treatment of any detainee in military custody and it identifies interrogation techniques consistent with international law.⁷⁸ The Manual very deliberately lays out the many forms of permissible interrogation methods in extended detail,⁷⁹ and its general overview of forbidden techniques tracks the language of Common Article III by prohibiting “cruel, inhuman or degrading treatment.”⁸⁰ Specifically, among other more extreme techniques, it bans: forced nudity or sexually suggestive poses; placing tape or a hood over the eyes of a detainee; using military dogs in interrogation; and the deprivation of food, water, or medical care.⁸¹

The overall policy of the Manual is further underscored by its proposed method of evaluation for interrogators that question whether a particular technique crosses the line into a banned procedure.⁸² It instructs soldiers to ask, “if the . . . technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?”⁸³ Consequently, the Army Field Manual not only prohibits certain techniques in accordance with international law, but it also drives home the broader notion that enemies should only be subjected to tactics which soldiers would be comfortable having their comrades experience.⁸⁴

⁷⁶ See *id.* at 40, 49.

⁷⁷ See *id.* at 61.

⁷⁸ John Hendren, *Manual Defines Limits of Prisoner Interrogation*, NAT’L PUB. RADIO, (Sep. 6, 2006), <http://www.npr.org/templates/story/story.php?storyId=5776992>.

⁷⁹ See Dep’t of the Army, Field Manual 2–22.3, Human Intelligence Collector Operations [hereinafter Field Manual], ch. 8.

⁸⁰ *Id.* at 5–74.

⁸¹ *Id.* at 5–75.

⁸² See *id.* at 5–76.

⁸³ *Id.*

⁸⁴ See *id.*

c. *Convention Against Torture and Detainee Treatment Act Limitations*

In addition to Common Article III and the Army Field Manual, the CAT and the DTA were also identified by President Obama in Executive Order 13491 as establishing the lawful parameters of detainee interrogation.⁸⁵ While the CAT is an international agreement and the DTA is domestic law, both documents ban torture as well as any “cruel, inhuman or degrading treatment or punishment.”⁸⁶ What is more, in both the CAT and DTA, the United States interprets “cruel, inhuman or degrading treatment or punishment” according to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.⁸⁷ That is, the interrogation or punishment that would contravene those constitutional limitations would also violate the government’s international obligations under the CAT and its domestic law obligations under the DTA.⁸⁸ In this way, two of the laws which President Obama highlights as constraints on interrogation methods are coextensive with the legal protections of the U.S. Constitution on interrogation.⁸⁹

2. Limitations on Interrogation for a Civilian Criminal

Just as the decision by the Supreme Court in *Miranda v. Arizona* expanded the opportunity of a criminal defendant to access counsel, the case similarly impacted a defendant’s protections against law enforcement interrogation.⁹⁰ Once in custody, under *Miranda* and its progeny, a criminal defendant invoking his right to remain silent cuts off all questioning unless he freely chooses to subsequently waive that right and speak with authorities.⁹¹

In addition to the accused’s right to end questioning as articulated in *Miranda*, the Due Process Clause also limits the conduct of law enforcement officials during the interrogation process.⁹² Due process demands that any confession be voluntary, while taking into account

⁸⁵ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

⁸⁶ 42 U.S.C. § 2000dd(a) (2006); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, *adopted* Dec. 10, 1984, S. TREATY DOC. No. 100–20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

⁸⁷ See 42 U.S.C. §§ 2000dd(a), 2000dd(d); WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 403 (3d ed. 2002).

⁸⁸ See 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87, at 403.

⁸⁹ See 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87, at 403.

⁹⁰ See *Miranda*, 384 U.S. at 444.

⁹¹ See ROBERT M. BLOOM & MARK S. BRODIN, *CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE* 282 (5th ed. 2006).

⁹² See *Rogers v. Richmond*, 365 U.S. 534, 541 (1936).

characteristics of the suspect as well as the degree of misconduct and coercion by law enforcement.⁹³ The case law holds that physical force during an interrogation makes any confessions or evidence obtained from those tactics involuntary and thus inadmissible at trial.⁹⁴ Similarly, threats of physical violence also are considered involuntary and violate the Due Process Clause.⁹⁵

In establishing the contours of due process outside of the categorical prohibitions against violence and threats of violence, an inquiry into what is permissible by law enforcement is very fact sensitive.⁹⁶ For instance, the Supreme Court of Minnesota ruled that police threatening to charge a defendant with more crimes if he lied is involuntary, but the Second Circuit Court of Appeals upheld a confession when law enforcement referenced the electric chair as punishment and blatantly misrepresented evidence.⁹⁷ As another example, where police threatened to cut off state aid to a suspect's children if she did not confess, the Supreme Court found such actions "impellingly coercive" and thus involuntary,⁹⁸ but the Eighth Circuit Court of Appeals ruled that police bursting into a suspect's room at 6:30 in the morning, holding him naked, and asserting that he would go to jail for life if he did not cooperate did not render his subsequent confession involuntary.⁹⁹

In another line of cases and constitutional restraints, the Supreme Court held that the substantive due process rights conferred by the Fifth and Fourteenth Amendments bars executive abuse of power that "shocks the conscience."¹⁰⁰ This inquiry is also fact sensitive as "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."¹⁰¹ As a constitutional matter, considering this standard as well as the aforementioned voluntariness requirement, courts have found the following conduct violates the Constitution: hand-cuffing a detainee to a post while standing up for a substantial period of time and beyond the time needed to ensure order; keeping the temperature at unreasonable levels in detention facilities; and questioning that lasts an entire day over the course of multiple

⁹³ See BLOOM & BRODIN, *supra* note 91, at 232.

⁹⁴ See *Commonwealth of Pennsylvania v. Claudy*, 350 U.S. 116, 118 (1956).

⁹⁵ *Sims v. Georgia*, 389 U.S. 404, 407 (1967).

⁹⁶ See BLOOM & BRODIN, *supra* note 91, at 232.

⁹⁷ See *Green v. Scully*, 850 F.2d 894, 903, 904 (2d Cir. 1988); *State v. Garner*, 294 N.W.2d 725, 727 (Minn. 1980).

⁹⁸ *Lynnum v. Illinois*, 372 U.S. 528, 534-35 (1963).

⁹⁹ *U.S. v. Gallardo-Marquez*, 253 F.3d 1121, 1123 (8th Cir. 2001).

¹⁰⁰ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

¹⁰¹ *Id.* at 850.

days.¹⁰² In contrast, courts have not struck down practices such as extended solitary confinement or constant lighting during detention so long as authorities are doing so in order to promote order or safety.¹⁰³

III. ANALYSIS

The provisions for access to counsel and the legal limitations on interrogations for detainees tried before military commissions are substantially similar to those involving an Article III criminal suspect.¹⁰⁴ The principal ground for any differentiation is that, unlike Article III suspects, military commission detainees are not entitled to *Miranda* warnings.¹⁰⁵ Nevertheless, any adverse impact on national security caused by administering or not administering *Miranda* warnings is tenably refuted by scholarship which concludes that *Miranda* does not negatively affect law enforcement efforts in any empirically demonstrable way.¹⁰⁶ Moreover, as a matter of anecdotal evidence, the case of Abdulmutallab does not undermine this argument.¹⁰⁷

A. Right to Counsel Comparison

In certain respects, the right to counsel under military commissions is commensurate with the right to counsel enjoyed by criminal defen-

¹⁰² See *Leyra v. Denno*, 347 U.S. 556, 561 (1954); MICHAEL JOHN GARCIA, INTERROGATION OF DETAINEES: REQUIREMENTS OF THE DETAINEE TREATMENT ACT, H.R. REP. NO. RL33655, at 4 (2009), available at http://assets.opencrs.com/rpts/RL33655_20090826.pdf.

¹⁰³ GARCIA, *supra* note 102, at 4–5.

¹⁰⁴ See 10 U.S.C. § 949c(b) (Supp. III 2009) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (2006) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that a criminal defendant must be represented by counsel after indictment); BLOOM & BRODIN, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).

¹⁰⁵ Compare 10 U.S.C. §§ 948, 949 (Supp. III 2009) (containing no reference to *Miranda* rights or any analogous protections in military commissions), and Ronald Sievert, *A New Historical Perspective on National Security Law Policies During the Bush Administration and Their Implications for the Future: Constitutional in Conception, Problematic in Implementation*, 7 RUTGERS J. L. PUB. POL'Y 35, 92 (2009) (asserting that detainees do not enjoy *Miranda* rights in military commissions), with *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that criminal defendants are entitled to *Miranda* warnings).

¹⁰⁶ See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506 (1996).

¹⁰⁷ See Pincus, *supra* note 9 (noting that Abdulmutallab stopped speaking with authorities before being read his *Miranda* rights).

dants.¹⁰⁸ The 2009 MCA states the accused “shall be represented . . . before a military commission,” and the Constitution similarly requires that the right of the accused to counsel attaches at the commencement of adversarial judicial proceedings.¹⁰⁹ What is more, there is no evidence to suggest the caliber and zeal of counsel representing an unprivileged belligerent—whether it is JAG or a team consisting of civilian attorneys and JAG—would necessarily be less than that of an attorney representing an Article III criminal.¹¹⁰ Despite some past problems with attorney access at Guantánamo, a recent Department of Defense report concludes the attorneys of the most recent detainees who were charged under the MCA have “access to their detainee clients and the means to seek redress in the event they believe their access is unreasonably curtailed.”¹¹¹ In the interests of not being too sanguine, it should be underscored that there are a range of challenges still faced by attorneys representing military commission detainees,¹¹² but as a comparative matter, many defense lawyers in Article III courts also operate in an imperfect criminal justice system with glaring inequities and difficulties.¹¹³

Despite the aforementioned similarities, a critical difference between military commissions and Article III courts is that no constitutional or legal authority asserts that unprivileged belligerents are entitled to the warnings and protections of *Miranda*.¹¹⁴ At the beginning of any custodial interrogation, *Miranda* requires, among other things, that a suspect be explicitly informed of his right to counsel and that questioning cannot proceed in the absence of an attorney without an affirmative waiver of the right.¹¹⁵ Thus, although unprivileged belligerents possess the right to an attorney for the military commission proceedings once they are charged, there is no legal obligation that they be offered

¹⁰⁸ See 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

¹⁰⁹ See 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

¹¹⁰ Luban, *supra* note 51, at 2000 (suggesting that JAGs may even be more effective rule of law defenders than civilian attorneys).

¹¹¹ Detainee Report, *supra* note 55, at 67.

¹¹² See Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism*, 66 N.Y.U. ANN. SURV. AM. L. 211 *passim* (2010) (surveying the many challenges faced by military lawyers representing military commission detainees).

¹¹³ See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 *passim* (2006) (highlighting the myriad difficulties for indigent defendants in the criminal justice system).

¹¹⁴ Compare 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections in military commissions), and Sievert, *supra* note 105, at 92 (asserting that detainees do not enjoy *Miranda* rights in military commissions), with *Miranda*, 384 U.S. at 444 (holding that criminal defendants are entitled to *Miranda* warnings).

¹¹⁵ *Miranda*, 384 U.S. at 444.

access to an attorney before that point.¹¹⁶ Moreover, a very important legal question remains in situations where an unprivileged belligerent requests counsel at the beginning of custodial interrogation. This precise question has not yet been resolved by the courts.¹¹⁷

Another important difference between military commissions and Article III proceedings is that, once formal charges are filed in an Article III court, the attorney becomes the intermediary between the state and the accused, and the Sixth Amendment bars the government from eliciting statements outside the presence of counsel.¹¹⁸ No such constitutional right exists with military commissions, and the 2009 MCA does not prohibit custodial interrogation of the suspect once the military commission commences.¹¹⁹

B. *Comparison of Limitations on Interrogation Techniques*

Myriad sources of law are now interpreted to apply to terrorists held as unprivileged belligerents.¹²⁰ In fact, the standards of treatment in some of those sources explicitly peg the protections of detainees to what is permitted by the U.S. Constitution under the Fifth, Eighth, and Fourteenth Amendments.¹²¹ Both the DTA and CAT use the Constitution to mark the outward bounds of permissible techniques.¹²²

Still, the fact that the Constitution is invoked as a marker of sensible treatment of unprivileged belligerents does not mean that the permissible interrogation techniques of an alleged purse-snatcher will be the same as that for a terrorist suspect.¹²³ Justice Jackson famously remarked that the Constitution is not a “suicide pact,”¹²⁴ and Supreme

¹¹⁶ See 10 U.S.C. § 949c(b); Sievert, *supra* note 105, at 92.

¹¹⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (observing that Hamdi “unquestionably has the right to access counsel” regarding proceedings on remand, but not addressing whether he had the right to counsel immediately after he was detained); Cole, *supra* note 46, at 742 n.227 (noting that the extent of the right to counsel is still being debated by advocates).

¹¹⁸ *Massiah*, 377 U.S. at 206.

¹¹⁹ See 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections); Padilla *ex rel. Newman v. Bush*, 243 F. Supp. 2d 564, 600 (S.D.N.Y. 2002) (finding no Sixth Amendment rights for detained enemy combatants), *aff’d in part and rev’d in part sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d and remanded* 542 U.S. 426 (2004).

¹²⁰ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

¹²¹ See 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

¹²² See 42 U.S.C. §§ 2000dd(a), 2000dd(d); SCHABAS, *supra* note 87.

¹²³ See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998).

¹²⁴ *Terminello v. City of Chicago*, 337 U.S. 1, 37 (1948) (Jackson, J. dissenting).

Court jurisprudence quite reasonably holds that due process is not subject to a “mechanical application” and law enforcement conduct that “shocks in one environment may not be so patently egregious in another.”¹²⁵ To this end, commentators note that permissible techniques for those accused of more pedestrian crimes may be different than those permitted for use on suspected terrorists;¹²⁶ however, this would be the case irrespective of whether the accused is held as an unprivileged belligerent or an Article III criminal.¹²⁷

The notion that the protection for alleged terrorists during interrogation is equivalent to the constitutional safeguards for accused criminals in the Article III context is further bolstered by recent interpretations of Common Article III in the Geneva Conventions.¹²⁸ In a 2009 executive order, President Obama identified Common Article III as a “minimum baseline” for treatment of all detainees under authority of the United States.¹²⁹ Common Article III explicitly bans physical violence, and the Department of Defense interprets the provision to also ban threats of physical violence.¹³⁰ Similarly, the constitutional requirement of due process also prohibits violence and threats of violence in the interrogation process.¹³¹

Conversely, while international and domestic legal limitations on the interrogation of detainees are equivalent to the protection of Article III criminal suspects under the Constitution, unprivileged belligerents do not enjoy the prophylactic constitutional protection of *Miranda*.¹³² Just like the safeguards of the right to counsel, law enforcement is not required to advise belligerents of their right to remain silent as they would with an Article III criminal suspect.¹³³ Of course, the significance of this difference is somewhat mitigated by the current practice at Guantánamo Bay, which makes all of its interrogations voluntary and reports that one-third of its interrogations are initiated by detainees.¹³⁴

¹²⁵ *Lewis*, 523 U.S. at 850.

¹²⁶ GARCIA, *supra* note 102.

¹²⁷ *See id.*

¹²⁸ *See Geneva, supra* note 68, art. 3; Detainee Report, *supra* note 55, at 40.

¹²⁹ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

¹³⁰ *See Geneva, supra* note 68, art. 3; Detainee Report, *supra* note 55, at 40.

¹³¹ *See Sims v. Georgia*, 389 U.S. 404, 407 (1967).

¹³² Sievert, *supra* note 105, at 92.

¹³³ *See Miranda*, 384 U.S. at 444; Sievert, *supra* note 105, at 92.

¹³⁴ *See Detainee Report, supra* note 55, at 61.

C. Are the Republican Criticisms Merited?

Republicans are right to assert that the accused in an Article III criminal court enjoys different rights with respect to counsel and interrogation as compared to a detainee prosecuted in a military commission.¹³⁵ Although unprivileged belligerents and criminal suspects are entitled to the same protection under the Due Process Clause of the Fifth and Fourteenth Amendments as it relates to physical and mental abuse, belligerents do not enjoy the prophylactic constitutional protection of *Miranda*.¹³⁶ Additionally, although there is a right to counsel in military commissions as well as Article III criminal courts,¹³⁷ there is no constitutional mandate requiring belligerents to be advised of this right and no Sixth Amendment obligation that limits authorities from speaking with the belligerent unless his lawyer is present, once adjudicatory proceedings commence.¹³⁸ Importantly, then, the question becomes whether these differences actually undermine intelligence gathering and national security. And, more specifically, whether the treatment of Abdulmutallab as an Article III criminal defendant was sensible in terms of national security, as the Obama Administration insists, or if this argument is “ridiculous” and the “whole process of criminalizing the war is misguided,” as one leading Republican asserted.¹³⁹

I. Practical Effects of the Differences in Procedural Rights

Undermining the Republican argument and perhaps contrary to popular perceptions, it is likely that the issuing of *Miranda* warnings to terrorist suspects does not make a significant difference as far as intelligence gathering goes.¹⁴⁰ Among law enforcement officials, the “pervasively shared” view is that “*Miranda* safeguards do not pose any serious

¹³⁵ Compare 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections in military commissions), and Sievert, *supra* note 105, at 92 (asserting that detainees do not enjoy *Miranda* rights in military commissions), with *Miranda*, 384 U.S. at 444 (holding that criminal defendants are entitled to *Miranda* warnings).

¹³⁶ Compare 10 U.S.C. §§ 948, 949, and Sievert, *supra* note 105, at 92, with *Miranda*, 384 U.S. at 444. See *Rogers v. Richmond*, 365 U.S. 534, 541 (1936) (holding that due process limits interrogation methods by law enforcement); SCHABAS, *supra* note 87, at 403 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

¹³⁷ See 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 206.

¹³⁸ See 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections); *Massiah*, 377 U.S. at 206.

¹³⁹ See Holder, *supra* note 6; Graham, *supra* note 13.

¹⁴⁰ See Schulhofer, *supra* note 106, at 506.

impediment to effective law enforcement.”¹⁴¹ Generally, academics concur with this assessment.¹⁴² In attempting to quantify the effects of *Miranda*, one important study maintained that even accepting an opponent’s questionable methodology, the adverse impacts of *Miranda* could only be estimated to have lost convictions 0.78% of the time.¹⁴³ Moreover, the study concludes that, “[f]or practical purposes, *Miranda*’s empirically demonstrable harm to law enforcement is essentially nil.”¹⁴⁴

A likely rebuttal to this argument is that the metric behind the *Miranda* data focuses on convictions, whereas the argument of Republicans is not that the United States will experience a decline in convictions, but that issuing *Miranda* rights decreases the likelihood of obtaining important intelligence.¹⁴⁵ This line of argument is suspect, however, because the explanation for why so little convictions are lost is that the same information can be obtained using alternative interrogation techniques while nonetheless employing the prophylactic procedure of *Miranda*.¹⁴⁶ That is, experience shows that *Miranda* warnings do not protect against investigators finding the truth, but rather, the warnings protect criminals from investigators’ use of coercive methods of getting to the truth.¹⁴⁷ If one accepts this notion, then it becomes difficult to make the argument that *Miranda* is somehow unduly restrictive of intelligence gathering and should never be issued to a terrorist suspect who could possibly possess national security information.¹⁴⁸ Indeed, scholars and law enforcement generally believe that *Miranda*’s adverse impact on law enforcement is minimal.¹⁴⁹

Even if one does not accept this argument, two more related but distinct points still undercut the assertion that putting alleged terrorists

¹⁴¹ *Id.* at 501.

¹⁴² Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 *Nw. U. L. Rev.* 387, 389 (1996).

¹⁴³ Schulhofer, *supra* note 106, at 506.

¹⁴⁴ *Id.*; see also George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A “Steady-State” Theory of Confessions*, 43 *UCLA L. Rev.* 933, 935 (1996) (concluding that according to available data, *Miranda* “has had no effect on the overall confession rate, using ‘confession’ to include all incriminating statements”). One of the leading studies pointed to by opponents of *Miranda* concludes that *Miranda* has led to 3.8% lost convictions. Cassell, *supra* note 142, at 438. However, the methodology leading to this figure has been vigorously disputed. Schulhofer, *supra* 106, at 505–06.

¹⁴⁵ See Schulhofer, *supra* note 106, at 506 (analyzing the social impacts of *Miranda* in terms of lost convictions).

¹⁴⁶ See *id.* at 561, 562 (the fundamental purpose of *Miranda* is “not to eliminate confessions, but to eliminate compelling pressure in the interrogation process”).

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ *Id.* at 501; Cassell, *supra* note 142.

in Article III criminal courts, and thus following *Miranda* and its progeny, impedes intelligence gathering.¹⁵⁰ First, only one out of every five criminal defendants will actually exercise their *Miranda* rights.¹⁵¹ Moreover, those with felony records are four times as likely to invoke their rights as those without because of their past experience with the criminal justice system.¹⁵² Thus, even if one believed *Miranda* significantly impacted an interrogator's ability to collect national security information, presumably most terrorist suspects would not have previous experience with the U.S. criminal justice system, and thus would be less likely to invoke their *Miranda* rights.¹⁵³

Second, and more importantly, *Miranda* jurisprudence factors in exigencies such as critical national security matters, and makes exceptions in instances where the "need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."¹⁵⁴ Therefore, even if one accepts the argument that *Miranda* warnings restrict intelligence gathering, the public safety exception of *Miranda* mitigates the potential effect of this point because it allows law enforcement to not issue the warnings when there is an immediate need for answers.¹⁵⁵ The fact that *Miranda* entails a balancing test which weighs the potential threat suggests that courts and law enforcement would apply the exception even more broadly in the context of terrorist interrogations.¹⁵⁶ Attorney General Eric Holder has acknowledged the value of this exception to *Miranda* for law enforcement in the case of terrorist plots, and he recently asked Congress for more clarity and guidance in applying the decades-old doctrine in the modern age.¹⁵⁷

¹⁵⁰ See *New York v. Quarles*, 467 U.S. 649, 657 (1984); Richard Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 654 (1996).

¹⁵¹ See Leo, *supra* note 150, at 654.

¹⁵² *Id.* at 654–55.

¹⁵³ See *id.*

¹⁵⁴ See *Quarles*, 467 U.S. at 657.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*; see also John M. Allen, Note, *Expanding Law Enforcement Discretion: How the Supreme Court's Post-September 11th Decisions Reflect Necessary Prudence*, 41 SUFFOLK U. L. REV. 587, 595 (2008) (positing that the public safety exception of *Quarles* is "necessary to [a] successful antiterrorism investigation").

¹⁵⁷ See *The Justice Department: Hearing of the H. Comm. on the Judiciary*, 111th Cong. (2010) (response to questioning by Eric Holder, Att'y Gen. of the United States). In the hearing, Attorney General Holder explained his prior remarks to major press outlets about the Department of Justice seeking guidance with respect to applying the public safety exception of *Miranda*: "[W]e think that with regard to that small sliver—only terrorism-related matters, not in any other way, just terrorism cases—that modernizing, clarify-

Moving beyond *Miranda*, another difference between the interrogations and right to counsel of an unprivileged belligerent in a military commission versus the accused in an Article III criminal court is that a belligerent possesses no Sixth Amendment right barring questioning outside the presence of counsel once judicial proceedings commence.¹⁵⁸ If an alleged terrorist were tried in an Article III court, the required presence of an attorney during interrogations could render interrogations less effective, or simply create a logistical impediment.¹⁵⁹ Thus, it is certainly plausible that this difference could hamper intelligence gathering, as the Sixth Amendment attaches as early as the prosecutor filing an indictment or arraigning the accused.¹⁶⁰

Nevertheless, the Sixth Amendment right to have counsel present during interrogations may be waived by a defendant at any time during the judicial proceedings.¹⁶¹ Moreover, once the military commission commences, although there is no right to have counsel present during interrogations, the unprivileged belligerent still has access to at least one attorney.¹⁶² Thus, whatever supposed interference results from an attorney's presence during interrogations in an Article III proceeding could nonetheless occur during pre-interrogation detainee-counsel meetings; the belligerent can even condition his speaking with authorities on his attorney being present.¹⁶³ In this way, although there is a difference between Article III courts and military commissions in terms of legal rights, these differences become much less apparent when one examines their practical effects.¹⁶⁴

ing, making more flexible the use of the public safety exception would be . . . something beneficial." *Id.* Reports on his initial comments preceding the Congressional hearing framed the issue as the Obama Administration asking the legislature to "carv[e] out a broad new exception" and to "loosen the *Miranda* rule." See Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 10, 2010, at A1. However, his testimony before the House Judiciary Committee made clear that he was only seeking the imprimatur and wisdom of the legislature in applying the Supreme Court case holding to the realities of the threat of terrorism. See *Justice Department Hearing*, *supra*.

¹⁵⁸ Compare 10 U.S.C. §§ 948, 949 (containing no reference to *Miranda* rights or any analogous protections), and *Padilla*, 233 F. Supp. 2d at 600 (finding no Sixth Amendment rights for detained enemy combatant), with *Massiah*, 377 U.S. at 206 (holding that a criminal defendant enjoys a constitutional right to counsel after he is indicted).

¹⁵⁹ See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

¹⁶⁰ See *id.*

¹⁶¹ *Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009).

¹⁶² See 10 U.S.C. § 949c(b).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

2. Application to Abdulmutallab

Applying the aforementioned analysis to the case of Abdulmutallab underscores why it is quite plausible that treating the Christmas Day Bomber as an Article III criminal suspect did not make a significant difference in terms of national security intelligence.¹⁶⁵ Abdulmutallab would have received a lawyer regardless of whether he was charged as an Article III criminal or an unprivileged belligerent.¹⁶⁶ In addition, the Fifth and Fourteenth Amendments would have limited the interrogation practices of authorities irrespective of his status.¹⁶⁷

Of course, if Abdulmutallab were held as an unprivileged belligerent, he would not have been read *Miranda* warnings, and early reports indicate that Abdulmutallab stopped talking to authorities after receiving *Miranda* warnings.¹⁶⁸ Later reports, however, asserted that authorities did not issue *Miranda* warnings until after he refused to speak,¹⁶⁹ and that he was legally questioned by authorities under *Miranda*'s public safety exception in the time before the warnings were issued.¹⁷⁰ Indeed, the event which seemed to trigger his reluctance to speak was not the *Miranda* warnings, but the fact that he spent about four hours in surgery improving what was a "deteriorating" condition over the course of the initial interrogations.¹⁷¹

Whatever the exact course of events, it is undisputed that Abdulmutallab resumed answering questions about a month later, in January 2010.¹⁷² The Federal Bureau of Investigation enlisted the help of his family, and reports indicate that Abdulmutallab subsequently cooperated for a number of days and provided significant intelligence to authorities.¹⁷³

Thus, the case of Abdulmutallab illustrates precisely why treating him as a criminal defendant did not significantly undermine intelligence gathering efforts.¹⁷⁴ The *Miranda* warnings issued to him do not

¹⁶⁵ See *id.*; *Massiah*, 377 U.S. at 205; *Rogers*, 365 U.S. at 541; SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

¹⁶⁶ See 10 U.S.C. § 949c(b); *Massiah*, 377 U.S. at 205.

¹⁶⁷ See *Rogers*, 365 U.S. at 541; SCHABAS, *supra* note 87 (indicating that the obligations of CAT are coextensive with the Fifth and Fourteenth Amendments).

¹⁶⁸ See Sievert, *supra* note 105, at 92; Barrett, *supra* note 1.

¹⁶⁹ Pincus, *supra* note 9.

¹⁷⁰ Holder, *supra* note 6, at 4.

¹⁷¹ Pincus, *supra* note 9.

¹⁷² See Zeleny & Savage, *supra* note 12.

¹⁷³ *Id.*

¹⁷⁴ See *id.*

appear to have altered his decision to stop talking to authorities, and even if they had, shrewd and resourceful interrogation tactics managed to get him to speak again.¹⁷⁵ Moreover, the apparent success with cajoling him to speak a second time suggests that the attached right to counsel was not a major impediment to interrogation efforts.¹⁷⁶

Abdulmutallab's case is not an aberration.¹⁷⁷ There are many cases in recent history where law enforcement treated suspected terrorists with the same procedures as Article III criminal defendants and got similar results.¹⁷⁸ Richard Reid, the infamous shoe bomber, received *Miranda* warnings multiple times over a two-day period without exercising his rights or discontinuing cooperation as a result.¹⁷⁹ Similarly, alleged terrorists L'Houssaine Kherchtou and Nuradin Abdi both provided important counter-terrorism intelligence after receiving *Miranda* warnings.¹⁸⁰ In this way, practical experience does not suggest that putting a terrorist suspect in an Article III court necessarily undermines intelligence collection.¹⁸¹

D. Are Military Commissions Useless?

In spite of the similarities highlighted in the previous discussion between the rights of detainees in military commissions to those of an Article III criminal suspect, military commissions are not useless.¹⁸² Indeed, there are other concerns which support the use of military commissions.¹⁸³ For one, military commissions are "portable" and can be held on any U.S. military base throughout the world; thus, municipal

¹⁷⁵ See Pincus, *supra* note 9; Zeleny & Savage, *supra* note 12. This course of events fits one of the central arguments made by those who argue the social costs of *Miranda* are low. See, e.g., Schulhofer, *supra* note 106, at 561–62. The reason that *Miranda* does not sacrifice confessions is because law enforcement can get a confession even when a person is aware of his constitutional rights. See *id.*

¹⁷⁶ See Zeleny & Savage, *supra* note 12.

¹⁷⁷ See Mike Allen, *Shoe Bomber Was Read His Miranda Rights*, POLITICO (Feb. 2, 2010, 14:40 EST), <http://www.politico.com/news/stories/0210/32399.html>.

¹⁷⁸ See, e.g., *id.*; Holder, *supra* note 6, at 4.

¹⁷⁹ Allen, *supra* note 177.

¹⁸⁰ Holder, *supra* note 6, at 4.

¹⁸¹ See *id.*

¹⁸² See 10 U.S.C. § 949c(b) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); *Mas-siah*, 377 U.S. at 206 (holding that a criminal defendant must be represented by counsel after indictment); BLOOM & BRODIN, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).

¹⁸³ See Silliman, *supra* note 42, at 294.

and state governments would not shoulder the considerable expense of providing security for a terrorist trial.¹⁸⁴ In addition, military commissions are typically considered more efficient and may deliver verdicts more quickly.¹⁸⁵

Another very significant difference between Article III courts and military commissions is that the latter offer the possibility of more flexibility with evidentiary rules.¹⁸⁶ For instance, at a time of military conflict, it may be too onerous for the government to adhere to the strict rules of hearsay, and evidentiary requirements may be adjusted to reflect this reality.¹⁸⁷

Finally, there is some force to the argument that international terrorists are committing acts of war, and thus ought not to be treated as domestic criminals simply as a matter of principle.¹⁸⁸

Yet, while these concerns (and more) are certainly legitimate and may lead one to conclude that military commissions are the most appropriate forum for international terrorists, it goes too far to say that treating the Christmas Day Bomber and other terrorist suspects as Article III criminal suspects inevitably puts the United States at risk.¹⁸⁹ The legal protections provided to suspects in Article III courts in terms of access to counsel and interrogation limits are largely the same as in

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Keith S. Alexander, Note, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 NOTRE DAME L. REV. 885, 913 (2003).

¹⁸⁷ See *Hamdi*, 542 U.S. at 533–34.

¹⁸⁸ See Fred Kaplan, *Cheney's War*, SLATE (Feb. 18, 2010), <http://www.slate.com/id/2245172/pagenum/all/>. Of course, this sort of position cuts both ways, as some have argued al-Qaeda terrorists represent no State and recognizing their attacks as acts of war confers an undeserved “mark of respect” upon them. Wesley K. Clark & Kal Raustiala, Op-Ed., *Why Terrorists Aren't Soldiers*, N.Y. TIMES, Aug. 8, 2007, at A19. The inimitable Judge William Young more forcefully asserted this notion when presiding over the sentencing hearing of the Shoe Bomber Richard Reid. See Hon. William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMP. L. REV. 305 app. at 328 (2009). In response to Reid's declaration that “I am at war with your country,” Judge Young replied:

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice.

See Reid: “I Am at War with Your Country,” CNN (Jan. 31, 2003, 11:10 EST), <http://www.cnn.com/2003/LAW/01/31/reid.transcript/>.

¹⁸⁹ See Schulhofer, *supra* note 106, at 506.

military commissions, and it is quite plausible that the type of tribunal used to handle these types of criminals does not make a difference in terms of national security.¹⁹⁰

CONCLUSION

The issue of terrorism and how the United States treats captured terrorist suspects evokes significant criticism and debate from academic, legal, and political circles as well as everyday citizens. There is no doubt that people passionately disagree on many of the central issues including what to do with terrorists such as Abdulmutallab. Those who argue that terrorists should be treated as unprivileged enemy belligerents and thus tried before military commissions rightfully deserve a place at the table to advance their ideas; however, there is no place for debating without facts, and mischaracterizing the obligations of the United States under domestic and international law. There are some differences between the way Abdulmutallab and terrorists like him would be treated in Article III criminal court as compared to military commissions, but it is far from certain that such differences would adversely impact intelligence gathering efforts. While there are other good reasons to support military commissions, politicians, administration officials, and citizens who passionately care about this issue must not lose sight of this point.

¹⁹⁰ See 10 U.S.C. § 949c(b) (stating that unprivileged belligerents shall be represented by counsel before a military commission); 42 U.S.C. §§ 2000dd(a), 2000dd(d) (asserting that no individual in U.S. custody shall be subject to cruel, inhuman, or degrading treatment as defined by the Fifth and Fourteenth Amendments of the U.S. Constitution); *Mas-siah*, 377 U.S. at 206 (holding that a criminal defendant must be represented by counsel after indictment); BLOOM & BRODIN, *supra* note 91, at 231–32 (discussing the Due Process Clause limitations on interrogations for Article III criminal suspects).

GERMAN HOMESCHOOLERS AS “PARTICULAR SOCIAL GROUP”: EVALUATION UNDER CURRENT U.S. ASYLUM JURISPRUDENCE

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Abstract: Thirty years after the enactment of the Refugee Act of 1980, the Board of Immigration Appeals and U.S. courts and have not reached consensus on a uniform definition for the protected category of “particular social group.” The lack of consensus has created much confusion and inconsistent results for applicants seeking asylum in the United States. This Note examines one family’s grant of asylum as a vehicle for analyzing the two main approaches to “particular social group” and argues that the current treatment of the two standards as mutually exclusive by the BIA and the federal courts is inconsistent with the U.N. Guidelines. The Note concludes that U.S. jurisprudence on “particular social group” should mirror the approach of the U.N. Guidelines, which envisions broader protection under that category.

INTRODUCTION

On January 26, 2010, U.S. Immigration Judge Lawrence Burman granted political asylum to the Romeikes, a German family who fled their native country to escape government persecution for homeschooling their children.¹ In 2006, Uwe and Hannelore Romeike, concerned that the national school curriculum did not comport with their religious beliefs as evangelical Christians, withdrew their children from a public

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¹ *Homeschooling Family Granted Political Asylum*, HOME SCH. LEGAL DEF. ASS’N (Jan. 26, 2010), <http://www.hsllda.org/hs/international/Germany/201001260.asp>. The Homeschool Legal Defense Association (HSLDA) is a nonprofit advocacy organization based in the United States whose mission is to advance the right of parents to direct the education of their children. The Immigration Court usually issues oral decisions after the hearing, and this case is no exception in that regard. REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 127–28, 145 (4th ed. 2005); see Tristana Moore, *Give Me Your Tired, Your Poor, Your Huddled Masses Yearning to Homeschool*, TIME, Mar. 8, 2010, at 47.

school in Bissengen, Germany and began educating them at home.² They considered the public school curriculum to be contrary to their religious beliefs, in part because language and images contained in textbooks conflicted with their moral views.³ Concerned that their children were being bullied as a result of their religious beliefs, they chose to withdraw their children from public school and begin educating them at home.⁴

One morning in October 2006, German police officers entered the Romeike home without a written court order, forcibly removed the Romeike children, and escorted them to public school.⁵ A few days later, the police returned to the home but were prevented from taking the children by a citizens' group protesting outside.⁶ The parents received several notices from the school principal and the chief law enforcement official in Bissengen ordering them to send their children to school or face legal consequences.⁷

From the time they removed their children from public school until they left for the United States, the Romeikes accumulated approximately \$10,000 in fines for refusing to send them to school.⁸ They unsuccessfully petitioned the authorities and filed complaints in the courts.⁹ After court decisions in 2006 and 2007 paved the way for the German government to take custody of home-schooled children,¹⁰ the Romeikes fled Germany out of fear of losing their children.¹¹

The Romeikes entered the United States as tourists in August 2008 and filed for asylum within several months of their arrival.¹² They successfully persuaded the immigration court in Memphis, Tennessee to

² *German Family Seeks U.S. Asylum to Homeschool Kids*, FOX NEWS (Mar. 31, 2009), <http://www.foxnews.com/story/0,2933,511825,00.html>; see Moore, *supra* note 1.

³ See *id.*

⁴ See Moore, *supra* note 1.

⁵ Respondent's Pre-Hearing Brief in Support of Asylum or Withholding of Removal at 6, *In re Romeike*, File No. A087-368-[redacted], Exec. Off. Immigr. Rev., Immigr. Ct. (Dep't of Justice 2009), available at <http://www.hsllda.org/hs/international/Germany/RomeikeBrief.pdf> [hereinafter Respondent's Brief].

⁶ *Id.*

⁷ *Id.*

⁸ See Travis Loller, *German Homeschoolers Granted Political Asylum*, BOSTON GLOBE (Jan. 26, 2010), http://www.boston.com/news/education/k_12/articles/2010/01/26/german_home_schoolers_granted_political_asylum/.

⁹ Respondent's Brief, *supra* note 5, at 6.

¹⁰ See Moore, *supra* note 1; Loller, *supra* note 8; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

¹¹ See Moore, *supra* note 1; Loller, *supra* note 8; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

¹² Respondent's Brief, *supra* note 5, at 7.

grant asylum on the grounds that the German government persecuted the family and violated their basic human rights.¹³ The court's decision was the first grant of political asylum for persecution based on violation of compulsory education laws.¹⁴

In light of the U.S. government's appeal of the immigration court's decision to the Board of Immigration Appeals (BIA),¹⁵ this Note examines the current standard for grant of asylum on the basis of the protected ground of "particular social group."¹⁶ Part I of this Note describes the compulsory education law in Germany under which the Romeikes claim persecution, explores the practice of homeschooling in Germany, and provides a brief procedural overview for gaining "refugee" status in the United States. Part II discusses two distinct approaches adopted by the BIA and federal circuit courts of appeal in defining "particular social group." Part III applies those approaches to the *Romeike* case and identifies inconsistent applications in the various circuits and advocates for a uniform standard to comport with the aims of international law. This Note argues that, on appeal, the BIA should find that all German homeschoolers comprise a "particular social group," regardless of whether the Romeike family successfully established a claim of "well-founded fear of persecution."

I. BACKGROUND

A. *The German Education Law Regime Prohibits Homeschooling*

The unfavorable treatment of homeschoolers in Germany is not a unique phenomenon; indeed, there is a robust debate in the United States and elsewhere regarding the validity of homeschooling as a means of education.¹⁷ For instance, in February 2008 the Second District Court of Appeals in Los Angeles handed down a surprising decision upholding the constitutionality of a state statute prohibiting homeschooling for children between the ages of six and eighteen unless

¹³ See *Homeschooling Family Granted Political Asylum*, *supra* note 1.

¹⁴ See Moore, *supra* note 1.

¹⁵ Telephone interview with Michael Donnelly, Staff Att'y, HSLDA (Mar. 12, 2010).

¹⁶ At the time of this writing, the BIA had not yet issued a decision in the case. *Id.*

¹⁷ See Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 1, 23-30 (2010); Amanda Petric, *Home Education in Europe and the Implementation of Changes to the Law*, 47 INT'L REV. EDUC., 477, 479-80 (2001).

their parents possess teaching credentials.¹⁸ Within six months, however, the same court reversed, holding that as long as parents declare their home to be a private school, they may teach their children even without teaching credentials.¹⁹

Moreover, there is a movement to end homeschooling in United Nations member countries on the theory that a child's right to education may be vindicated only by compulsory education in traditional schools outside the home.²⁰ By the same token, there is also a movement to recognize the right of parents to choose the appropriate form of schooling for their children.²¹ The issue has also concerned U.S. policymakers; the Georgia and Tennessee state legislatures have passed resolutions expressing disapproval of the German compulsory education laws.²²

In Germany, compulsory education laws require that children not only receive formal education from ages six or seven for a period of nine years, they also require all children to attend either a public school or state-approved private school.²³ In addition, German law generally does not recognize correspondence education for children living within Germany.²⁴ Before World War II, the state recognized homeschooling as

¹⁸ See *In re Rachel L.*, 73 Cal. Rptr. 3d 77, 83–84 (Dist. Ct. App. 2008); Kristin Kloberdanz, *A Homeschooling Win in California*, TIME, Aug. 13, 2008, available at <http://www.time.com/time/nation/article/0,8599,1832485,00.html>.

¹⁹ See *In re Jonathan L.*, 81 Cal. Rptr. 3d 571, 590 (Dist. Ct. App. 2008).

²⁰ See Martin, *supra* note 17, at 56; Petrie, *supra* note 17, at 480.

²¹ See e.g., HOME SCH. LEGAL DEF. ASS'N, <http://www.hslda.org> (last visited Apr. 16, 2011) (American homeschooling organization that advocates for parents' freedom of choice over the direction of their children's education); NETZWERK BILDUNGSFREIHEIT, <http://www.netzwerk-bildungsfreiheit.de> (last visited Apr. 16, 2011) (a German lobbying organization advancing educational freedom in Germany and providing support for homeschooling families).

²² See H.R. 850, 149th Gen. Assemb., 2d Sess. (Ga. 2009), available at http://www.legis.state.ga.us/legis/2009_10/pdf/hb850.pdf [hereinafter Georgia Resolution]; H.R. 87, 106th Gen. Assemb., Reg. Sess. (Tenn. 2009), available at <http://www.capitol.tn.gov/Bills/106/Bill/HR0087.pdf> [hereinafter Tennessee Resolution]; see also Martin, *supra* note 17, at 1, 30–31 (noting support for homeschooling movement on the federal and state level).

²³ See Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 EVALUATION & RES. IN EDUC. 179, 180 (2003). By comparison, in the United States, although the education of children is compulsory under the laws of every state, parents are not required to send their children to a state-approved school. See MARILYN GRADY ET AL., COMPULSORY EDUCATION: A POLICY ANALYSIS 15 (Apr. 25, 1994), available at <http://www.eric.ed.gov/PDFS/ED377556.pdf>. Compulsory education statutes differ state by state and impose varying minimum and maximum ages. *Id.* Courts have recognized parents' rights to direct their children's upbringing under the First and Fourteenth Amendments to the U.S. Constitution. See *id.* at 8.

²⁴ *Id.* Correspondence education for children living abroad is accepted. *Id.* Correspondence education, or distance learning, is a method of providing education for students who

a valid exception to laws mandating compulsory education.²⁵ In 1938, however, those exceptions were eliminated, and violations of compulsory education laws triggered criminal penalties.²⁶

Such violations constitute a civil offense in the first instance, and can result in a fine of several thousand Euros for subsequent violations.²⁷ Continued contravention may incur forcible enforcement, and other significant penalties.²⁸ In extreme cases, courts may revoke custody of the children and even imprison the parents for up to six months.²⁹ Alternatively, courts may impose fines that accrue daily for as many as 180 days.³⁰

In 2003, Germany's Federal Constitutional Court, its highest court, reaffirmed the government's authority to compel attendance in state-run schools and held that the state's interest in ensuring access to adequate education outweighed the parents' interest in choosing how to educate their children.³¹ The court recognized an impracticability exemption for children whose parents' occupations required extensive travel.³² It did not, however, create an exemption for homeschooling on the basis of religion or conscience.³³

B. Homeschooling Movement

Notwithstanding the threat of punishment, the parents of approximately 500 German children choose to teach their children at home.³⁴ Teaching children outside of the public school setting is commonly known as "homeschooling," but many parents join together in "learning groups" in a place other than a home to educate their chil-

receive lessons by mail or internet. *Id.* Students typically return their assignments to their instructors for evaluation and comment. See *Correspondence Education Definition*, ENCYCLOPAEDIA BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/138674/correspondence-education> (last visited Apr. 17, 2011).

²⁵ See Martin, *supra* note 17, at 7–8.

²⁶ See *id.* at 8. For instance, in one case a father who homeschooled his children for religious reasons faced a five-day prison sentence and the loss of child custody. *Id.*

²⁷ See Spiegler, *supra* note 23, at 180–81.

²⁸ See *id.* at 181.

²⁹ See *id.*

³⁰ See *id.*

³¹ See Martin, *supra* note 17, at 19, 22; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

³² See *Homeschooling Family Granted Political Asylum*, *supra* note 1.

³³ See *id.*

³⁴ Spiegler, *supra* note 23, at 179.

dren.³⁵ Some parents even opt to join homeschooling organizations for support, to exchange ideas, and to find legal representation.³⁶

German parents have chosen to homeschool for a variety of reasons, including religious concerns or because a child's medical condition precludes conventional schooling.³⁷ Regardless of the impetus for the decision, homeschooling parents generally share one outlook: that they have the right to direct their child's education, tailored to the individual needs and abilities of the child.³⁸ They believe this is consistent with internationally accepted principles of human rights.³⁹ The Universal Declaration of Human Rights provides that "[e]veryone has the right to education[;]" "elementary education shall be compulsory[;]" and, "parents have a prior right to choose the kind of education that shall be given to their children."⁴⁰ Furthermore, Article 13 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes:

[T]he liberty of parents . . . to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.⁴¹

That right is also recognized by the European Convention on Human Rights, which states that "the State shall respect the right of parents to

³⁵ See Petrie, *supra* note 17, at 479; Spiegler, *supra* note 23, at 184.

³⁶ See *id.* For instance, Stuttgart Area Home Schoolers maintains a website that provides resources for curriculum providers, educational requirements, and social gatherings. STUTTGART AREA HOME SCHOOLERS, <http://www.stuttgarthomeschoolers.com> (last visited Apr. 16, 2011).

³⁷ See Spiegler, *supra* note 23, at 182, 183. The decision to homeschool is often motivated by religious beliefs, but not always. See Petrie, *supra* note 17, at 479–80. Parents might have any number of reasons for choosing homeschooling, including a child's specialized needs, practical reasons that hinder a child's attendance, or philosophical outlook, among others. See Martin, *supra* note 17, at 7.

³⁸ See Spiegler, *supra* note 23, at 183.

³⁹ See Universal Declaration of Human Rights, art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social, and Cultural Rights, art. 13(3), Dec. 16, 1966, 1966 U.S.T. 521, 993 U.N.T.S. 3 [hereinafter ICESCR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter European Convention for Human Rights].

⁴⁰ Petrie, *supra* note 17, at 480 (citing Universal Declaration of Human Rights, *supra* note 39, art. 5).

⁴¹ ICESCR, *supra* note 39, art. 13, ¶ 3.

ensure such education and teaching in conformity with their own religions and philosophical convictions."⁴²

In reference to these rights of parents, and relying specifically on the ICESCR, the U.N. Special Rapporteur to the Human Rights Council of the General Assembly has urged the German government to respect a parent's choice for his or her children.⁴³ The report stated that "education may not be reduced to mere school attendance," noted that "[d]istance learning methods and home schooling represent valid options," and urged states to refrain from restricting "forms of education that do not require attendance at a school."⁴⁴

German education law, diverging from international conventions, prioritizes the interest of the state in requiring attendance at public schools, with narrow exceptions.⁴⁵ Having received penalties and threats from the German authorities, the Romeikes feared losing custody of their children.⁴⁶ Ultimately, this fear led them to flee Germany and seek asylum in the United States.⁴⁷

II. DISCUSSION

As previously discussed, to successfully obtain asylum in the United States, a refugee must prove that, on account of⁴⁸ at least one of five protected grounds—race, nationality, religion, political opinion, or membership in a particular social group—he or she either suffered persecution, or has a well-founded fear⁴⁹ of future persecution.⁵⁰ In the

⁴² European Convention on Human Rights, *supra* note 39, art. 2.

⁴³ See U.N. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 62, U.N. Doc. A/HRC/4/29/Add.3 (Feb. 21, 2006) (prepared by Vernor Munoz) [hereinafter Report by U.N. Rapporteur]; Petrie, *supra* note 17, at 480.

⁴⁴ See Report by U.N. Rapporteur, *supra* note 43, ¶ 62. Some countries have confused the right of a child to education with a right to education in a public, state-approved school. See Petrie, *supra* note 17, at 480.

⁴⁵ See Martin, *supra* note 17, at 10; see also Petrie, *supra* note 17, at 480.

⁴⁶ See Moore, *supra* note 1; Loller, *supra* note 8.

⁴⁷ See Moore, *supra* note 1; Loller, *supra* note 8.

⁴⁸ An applicant must show that the past persecution or fear of future persecution was "on account of" one of the protected grounds. See Immigration and Nationality Act (INA) § 1101(a)(42), 8 U.S.C. § 1158 (2009). Courts have interpreted the phrase to signify that a "nexus" must exist between the persecution and the protected grounds. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 268 (3d ed. 1999).

⁴⁹ Under the INA, the applicant can either establish a well-founded fear of future persecution upon returning to his or her home country to satisfy that prong, or show past persecution. See IRA J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* 347, 360 (10th ed. 2006). In *INS v. Cardoza Fonseca*, the Supreme Court ruled that applicants are required to establish that "persecution is a reasonable possibility" to satisfy the burden of proof for "a well-

Romeike case, Immigration Judge Burman found that the family had a “well-founded fear of persecution” on account of membership in the “particular social group” of homeschoolers.⁵¹

A. *Seeking Asylum in the United States—Procedural Overview*

Upon arriving in the United States, the Romeikes sought safe haven as refugees fleeing persecution.⁵² The process begins with an application to the U.S. Citizenship and Immigration Services, to be filed within one year of arrival in the United States.⁵³ Asylum officers process asylum applications, hold “non-adversarial” interviews and make determinations as to the applicant’s eligibility for asylum.⁵⁴ The officer may consider the applicant’s testimony, information presented at the

founded fear.” See 480 U.S. 421, 431, 449 (1987). According to the Court, a fifty percent chance satisfies the requirement, but even a ten percent chance could establish “well-founded fear.” See *id.* at 431, 440.

⁵⁰ INA § 1101(a)(42). The term “persecution” is not defined in U.S. law or in the 1951 Convention. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 860 (6th ed. 2008); see United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter U.N. Convention]; United Nations Protocol Relating to the Status of Refugees art. I(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol]. The drafters of the Convention declined to adopt a comprehensive list of all forms of persecution, instead implementing a framework that could be adapted to changing conditions. See ANKER, *supra* note 48, at 173. The U.N. Handbook provides general guidance, stating that “a threat to life or freedom” on account of one of five protected grounds constitutes persecution. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, ¶ 51, U.N. Doc HCR/IP/4/Eng/REV.1 (1979) [hereinafter U.N. Handbook]. Some prejudicial actions or threats may amount to persecution, depending on the nature and seriousness of the acts. See *id.* ¶¶ 52, 54–55. The *Basic Law Manual*, issued by the Immigration and Naturalization Services (now DHS), instructs asylum officers that basic human rights protected by international law should be the standard for persecution. See U.S. DEP’T OF JUST., IMMIGR. & NATURALIZATION SERV., BASIC LAW MANUAL 20 (1994).

⁵¹ *Homeschooling Family Granted Political Asylum*, *supra* note 1.

⁵² See Respondent’s Brief, *supra* note 5, at 7; Moore, *supra* note 1.

⁵³ See INA § 208(a)(2)(B). Applications by refugees may be divided into three categories: affirmative applications, defensive applications, and expedited removal. ALEINIKOFF, *supra* note 50, at 849–50. Affirmative asylum applications are those filed by applicants who are not in removal proceedings. See *id.* at 850. Defensive asylum applications are cases filed by applicants whose removal proceedings are underway and require a higher burden of proof. See *id.* at 851; ANKER, *supra* note 48, at 17. Expedited removal procedures apply to applicants who enter the United States without an inspection, and must first establish a “credible fear.” ALEINIKOFF, *supra* note 50, at 852. After clearing that initial hurdle, those cases are treated as defensive applications. See *id.* The Romeikes filed an affirmative application a few months after an inspected entry as tourists. See Respondent’s Brief, *supra* note 5, at 7.

⁵⁴ See 8 C.F.R. § 1208.9 (2010); ALEINIKOFF, *supra* note 50, at 851.

interview, and information from the U.S. State Department and "other credible sources," including international organizations.⁵⁵ Given the difficulties of proof in asylum cases, the asylum interview is designed to elicit all relevant information, with little limitation on the types of evidence that may be considered.⁵⁶

The asylum officer decides whether the applicant is eligible for asylum.⁵⁷ Officers may deny a grant of asylum either because the officer does not believe that the applicant satisfied his or her burden of proof in establishing the necessary statutory definition of "refugee," or because the officer believes the applicant falls outside of the scope of that definition.⁵⁸ Where the asylum officer feels the applicant failed to adequately establish his or her case, the officer refers the case to the immigration court for a hearing.⁵⁹

An applicant may appeal an unfavorable decision by the immigration judge to the BIA.⁶⁰ Similarly, the Department of Homeland Security (DHS) may also appeal a decision by the immigration judge to the BIA.⁶¹ In the *Romeike* case, the government has appealed the immigration judge's decision in favor of the applicants.⁶² If the BIA denies the appeal, applicants may file a further appeal to the federal Court of Appeals in the circuit in which the case originated.⁶³ A circuit court is required to afford great deference to the BIA's findings of fact and may reverse a BIA decision only if it finds that the BIA committed legal error or abused its discretion.⁶⁴ Generally, when a court of appeals re-

⁵⁵ See 8 C.F.R. §§ 1208.9(e), 1208.11, 1208.12.

⁵⁶ See ANKER, *supra* note 48, at 88.

⁵⁷ See *id.* Withholding of deportation is unlike an affirmative grant of asylum; it is a mandatory form of relief, and the Attorney General may not return the applicant to his or her home country. An order to withhold deportation, however, is not the same as a grant of permanent residence. See *id.*

⁵⁸ See JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 13 (2009).

⁵⁹ See 8 C.F.R. § 1208.14(c)(1).

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² Telephone interview with Michael Donnelly, *supra* note 15; see also Moore, *supra* note 1.

⁶³ See INA § 242(a)(1); RAMJI-NOGALES, *supra* note 58, at 14; Thomas Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group,"* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 275 (Erika Feller et al. eds., 2003).

⁶⁴ RAMJI-NOGALES, *supra* note 58, at 14.

verses a decision of the BIA, it may only remand to the BIA and cannot grant asylum.⁶⁵

B. Sources of U.S. Asylum Law

U.S. asylum law derives from international law, particularly the 1951 United Nations Convention relating to the Status of Refugees (Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).⁶⁶ In 1980, Congress enacted the Refugee Act, which aimed to tailor its asylum laws to uphold international treaty obligations under the Protocol.⁶⁷ The Act also standardized the procedure and requirements for granting asylum to refugees, repealed restrictions limiting asylum to refugees from certain countries, and extended asylum to people fleeing from “friendly” governments.⁶⁸ Although Congress intended for the definition of “refugee” to mirror the definition in the Protocol, the Protocol is not binding on the BIA or U.S. courts in construing legal requirements.⁶⁹

The definition of “refugee” set forth in § 101(a)(42) of the INA is identical to the Protocol definition:

[A]ny person . . . who is unable to or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁷⁰

When Congress initially ratified the Protocol, however, it omitted the “particular social group” basis, despite modeling the remainder of the definition of “refugee” after the Convention and Protocol.⁷¹ The Refu-

⁶⁵ *Id.*

⁶⁶ GERMAIN, *supra* note 1, at 1.

⁶⁷ See *Cardoza-Fonseca*, 480 U.S. at 436–37; GERMAIN, *supra* note 1, at 2–3.

⁶⁸ Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 744 (1989).

⁶⁹ See *Medellin v. Texas*, 552 U.S. 491, 505–06 (2008); *In re Acosta*, 19 I&N Dec. 211, 220 (BIA 1985).

⁷⁰ See INA § 101(a)(42); U.N. Protocol, *supra* note 50, art. I(2). Although Congress intended the definition of “refugee” to mirror the definition in the Protocol, the Protocol is not binding on the BIA or U.S. courts. See *Medellin*, 552 U.S. at 505–06; *Acosta*, 19 I&N Dec. at 220.

⁷¹ Graves, *supra* note 68, at 746–47.

gee Act did not introduce "particular social group" as an additional ground on which asylum could be granted until 1980.⁷²

Congress did not provide guidance on the meaning or the requirements of "particular social group;"⁷³ for this reason, the Supreme Court sought guidance in the Handbook on Procedures and Criteria on Determining Refugee Status published by the Office of United Nations High Commissioner for Refugees (UNHCR) (U.N. Handbook), which emphasizes conformity with the Protocol.⁷⁴ Accordingly, immigration judges, the BIA, and federal courts frequently cite to the U.N. Handbook in their decisions.⁷⁵ To supplement the U.N. Handbook, the UNHCR issued *Guidelines on International Protection: "Membership of a Particular Social Group,"* which provide further guidance on the interpretation of "particular social group."⁷⁶

C. Defining a "Particular Social Group"

Of the five protected categories, "particular social group" may be the most difficult to define,⁷⁷ and neither the Protocol nor Congress provide any clear guidance.⁷⁸ Due to the lack of a clear definition, conflicting interpretations of the drafters' intended purpose have spawned confusion on the proper construction of "particular social group."⁷⁹ The competing positions may be divided into two camps.⁸⁰

One view is that Congress intended to meet international human rights standards and to adequately respond to humanitarian needs.⁸¹ Proponents of that view cite to the Swedish delegate's observation at the Conference of Plenipotentiaries that "certain refugees have been persecuted because they belonged to particular social groups," which led to the addition of the "particular social group" category to the Con-

⁷² See *id.*

⁷³ See *Acosta*, 19 I&N Dec. at 232.

⁷⁴ See *Cardoza-Fonseca*, 480 U.S. at 436–37.

⁷⁵ See *id.*; *Poradisova v. Gonzalez*, 420 F.3d 70, 79–81 (2d Cir. 2005); *Acosta*, 19 I&N Dec. at 232.

⁷⁶ United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group,"* ¶¶ 7, 8, 10, U.N. Doc HCR/GIP/02/02 (2002) [hereinafter U.N. Guidelines].

⁷⁷ ALEINIKOFF, *supra* note 50, at 897.

⁷⁸ *Acosta*, 19 I&N Dec. at 232.

⁷⁹ See Aleinikoff, *supra* note 63, at 265.

⁸⁰ See ANKER, *supra* note 48, at 379; Aleinikoff, *supra* note 63, at 266.

⁸¹ See Graves, *supra* note 68, at 750.

vention near the end of the deliberations.⁸² Some commentators speculate that the impetus behind this late addition was to establish an expansive category to extend protections to those people not covered by the other four grounds.⁸³

The other competing view derives from a fear that a broad construction of “particular social group” will result in a flood of asylum seekers.⁸⁴ Under this view, limits are necessary to prevent an influx of a large number of people fleeing civil war and ethnic strife.⁸⁵ Another theory underpinning this approach is that expanding the category beyond that intended by the drafters would effectively impose obligations on the signatory states to which they did not consent.⁸⁶

The BIA and courts of appeals have developed general standards for interpreting “particular social group” that generally follow two approaches: one focuses on the immutable characteristics common to the group; the other considers external perceptions of the group.⁸⁷ The following case illustrations explore the tests, their application, and their ramifications.

1. The Internally Defined Approach

a. *Immutable Characteristics Test*

The BIA first introduced this approach in *Matter of Acosta*.⁸⁸ To determine the scope of protection, the BIA employed the doctrine of *ejusdem generis* to identify connections between race, religion, nationality, and political opinion.⁸⁹ The BIA identified immutability as the common thread between race and nationality.⁹⁰ In recognition of the fact that immutability cannot be a basis for the two other protected categories of

⁸² See Aleinikoff, *supra* note 633, at 266; John Hans Thomas, *Seeing Through a Glass, Darkly: The Social Context of “Particular Social Groups” in Lwin v. INS*, 1999 BYU L. REV. 799, 801.

⁸³ See Aleinikoff, *supra* note 63, at 266; Graves, *supra* note 68, at 748.

⁸⁴ See ANKER, *supra* note 48, at 379.

⁸⁵ See ALEINIKOFF, *supra* note 50, at 830; Talia Inlender, *The Imperfect Legacy of Gomez v. INS: Using Social Perceptions to Adjudicate Social Group Claims*, 20 GEO. IMMIGR. L.J. 681, 684 (2006).

⁸⁶ See Aleinikoff, *supra* note 63, at 265.

⁸⁷ See ANKER, *supra* note 48, at 379; Inlender, *supra* note 85, at 709; Thomas, *supra* note 82, at 804–07.

⁸⁸ See *Acosta*, 19 I&N Dec. at 233; Aleinikoff, *supra* note 63, at 275.

⁸⁹ *Acosta*, 19 I&N Dec. at 233. The doctrine of *ejusdem generis*, as the BIA explained, holds that “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.” *Id.*

⁹⁰ See *id.*

religion and political opinion, the BIA added a second factor to the immutability test, explaining that characteristics which "ought not to be required to be changed" are also protected.⁹¹ The *Acosta* definition of "particular social group," as a group sharing "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed," relies on the internal unifying characteristic of group members.⁹² The BIA referred to the U.N. Handbook's suggestion that "a particular social group" connotes "persons of similar background, habits, or social status" in support of the formulation of its standard.⁹³ Examples of such groups are those characterized by gender, clan membership, sexual orientation, family, shared past experiences, and "matter[s] of conscience."⁹⁴

The BIA applied the standard to determine whether *Acosta* was a member of a "particular social group" consisting of taxi drivers in San Salvador who "refus[ed] to participate in guerrilla-sponsored efforts to destabilize the government, such as work-stoppages."⁹⁵ The BIA ruled that neither being a taxi driver nor refusing to participate in guerrilla-sponsored activities qualified as immutable characteristics, because the members of the group could avoid the threats either by changing their jobs or by cooperating in work stoppages.⁹⁶ In upholding the immigration judge's denial of asylum, the BIA noted that, although it would be unfortunate for taxi drivers to have to change their jobs or to have to cooperate with guerrillas, international law does not guarantee an individual's choice of work.⁹⁷

In *Lwin v. INS*, the Seventh Circuit Court of Appeals applied the *Acosta* test for "immutable characteristics," noting that it best "preserve[d] the concept that refugee status is restricted to 'individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.'"⁹⁸ *Lwin*, a Burmese citizen, was the father of a student dissident who fled the Burmese military regime's crackdown on protests.⁹⁹ After being interrogated twice by Burmese police, he agreed to report any future contact with his son.

⁹¹ See Aleinikoff, *supra* note 63, at 276.

⁹² See *Acosta*, 19 I&N Dec. at 233; ANKER, *supra* note 48, at 378.

⁹³ See *Acosta*, 19 I&N Dec. at 233 (citing U.N. Handbook, *supra* note 50, ¶ 77).

⁹⁴ See *id.*; Aleinikoff, *supra* note 63, at 276.

⁹⁵ See *Acosta*, 19 I&N Dec. at 234.

⁹⁶ *Id.*

⁹⁷ See *id.* at 213, 234, 236.

⁹⁸ 144 F.3d 505, 512 (7th Cir. 1998).

⁹⁹ *Id.* at 507.

Ultimately, he refused to do so and his home was searched on three occasions.¹⁰⁰ On a visit to see his son in the United States, Lwin filed for asylum on grounds of persecution for his membership in a “particular social group,” which he defined as parents of student dissidents.¹⁰¹ In support, he provided evidence that a parent of another dissident had been sentenced to twelve years in prison.¹⁰² The court reversed the BIA’s denial of asylum, holding that Lwin had established that he was a member of the social group comprised of parents of Burmese student dissidents who have received punishment by the government because of their contact with their dissident children.¹⁰³ The BIA continues to rely on the “immutable characteristics” test as the primary standard by which it determines whether an applicant is a member of a “particular social group.”¹⁰⁴

The strength of this internally defined “immutable characteristics” approach is that it provides protection for traits that are fundamental to human dignity, and civil and human rights.¹⁰⁵ A weakness, however, is that in the absence of clear guidance, the subjective nature of the inquiry of whether characteristics are fundamental to human dignity and “ought not be required to be changed” might improperly result in value judgments rather than legal judgments.¹⁰⁶ Moreover, critics have argued that the framework denies protection to groups—like students, unions, refugee camp workers, or homeless children—who may be persecuted for an identity that is widely recognized by society, but that nevertheless lacks a sufficient basis in civil or political rights.¹⁰⁷

b. *Voluntary Associational Relationship Test*

The Ninth Circuit Court of Appeals diverged from the BIA’s “immutable characteristics” approach and set forth a different definition of “particular social group” in *Sanchez-Trujillo v. INS*.¹⁰⁸ Although both ap-

¹⁰⁰ *Id.* at 508.

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.* at 510, 512. Ultimately, the case was remanded on the ground that Lwin had failed to establish that he had a well-founded fear of persecution. *See id.* at 508.

¹⁰⁴ *In re C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (explaining that the BIA will “continue to adhere to the Acosta formulation” after “[h]aving reviewed the range of approaches to defining particular social group”).

¹⁰⁵ *See* Inlender, *supra* note 85, at 686.

¹⁰⁶ *See* Acosta, 19 I&N Dec. at 233; Inlender, *supra* note 85, at 693.

¹⁰⁷ *See* Aleinikoff, *supra* note 63, at 295; *see also* Inlender, *supra* note 85, at 686 (citing JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 8 (1991)).

¹⁰⁸ 801 F.2d 1571, 1576 (9th Cir. 1986); Thomas, *supra* note 82, at 805.

proaches focus on immutable characteristics common to the group, the Ninth Circuit further narrowed the category by requiring that the group result from a "voluntary associational relationship."¹⁰⁹ Construing the statutory phrase "particular social group," the court determined that the words "particular" and "social" indicate that the term does not encompass large demographic segments of the population.¹¹⁰ By requiring that individuals take some affirmative action to affiliate with others, the standard excludes those who have chosen not to associate with others with similar characteristics.¹¹¹

Applying this standard, the *Sanchez-Trujillo* court determined that young, working class urban males of military age did not constitute a "particular social group" because such a definition was impermissibly broad.¹¹² In an effort to avoid granting asylum to unacceptably large demographic groups, the court cited the lack of cohesiveness and homogeneity within the group as the basis for denying the group protected status.¹¹³

The court used contrasting examples to illustrate the scope of the test.¹¹⁴ It posited hypothetically that a group of males taller than six feet would fall outside the scope of "particular social group," despite the immutability of a person's physical features.¹¹⁵ By contrast, the court explained that the family unit is a paradigmatic example of a "particular social group" and emphasized its fundamental affiliational concerns, common interests, and size.¹¹⁶ This comparison, however, revealed potential inconsistencies in the Ninth Circuit's test, given that families are not necessarily voluntary associations.¹¹⁷

In *Hernandez-Montiel v. INS*, the court retreated from the *Sanchez-Trujillo* test, apparently in an effort to resolve the tension between the BIA's *Acosta* ruling and the voluntary associations test in *Sanchez-*

¹⁰⁹ See *Sanchez-Trujillo*, 801 F.2d at 1576; Thomas, *supra* note 82, at 806.

¹¹⁰ See *Sanchez-Trujillo*, 801 F.2d at 1576.

¹¹¹ See Aleinikoff, *supra* note 63, at 278 (explaining that classes of gays and lesbians are unlikely to be cohesive or display close affiliation among members); Thomas, *supra* note 82, at 807 (giving as an example Nazi persecution of non-religious Jews despite the victims' lack of interest in associating with each other and complete assimilation into German society).

¹¹² See *Sanchez-Trujillo*, 801 F.2d at 1576.

¹¹³ See *id.* at 1577; see also *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010) (remanding case where BIA denied asylum and declined to recognize "particular social group" consisting of women from Guatemala).

¹¹⁴ See *Sanchez-Trujillo*, 801 F.2d at 1576.

¹¹⁵ See *id.*; *Acosta*, 19 I&N Dec. at 233.

¹¹⁶ See *Sanchez-Trujillo*, 801 F.2d at 1576.

¹¹⁷ See Thomas, *supra* note 82, at 806.

Trujillo.¹¹⁸ Ostensibly, the court combined the *Acosta* and *Sanchez-Trujillo* standards, but it did not provide any guidance for application of this new test in future cases.¹¹⁹ Holding that the test is whether one is “united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it,” the court determined that Mexican “gay men with female sexual identities” qualified as a particular social group.¹²⁰ In its application of the new standard, however, the court implicitly abandoned the “voluntary association” test it purported to be upholding, and instead relied solely on *Acosta*’s “immutable characteristics” test.¹²¹

2. Externally Oriented Social Perceptions Approach

In stark contrast to the internally defined “immutable characteristics test,” the U.S. Court of Appeals for the Second Circuit interpreted “particular social group” from an external perspective.¹²² In *Gomez v. INS*, the court referred to the Ninth Circuit’s holding in *Sanchez-Trujillo*, but imposed an additional requirement: the persecutor or society in general must perceive the common characteristic as recognizable and discrete.¹²³ The court’s emphasis on a common characteristic that “serves to distinguish [a victim] in the eyes of a persecutor—or in the eyes of the outside world in general” departs from precedent.¹²⁴ Despite expressing approval of the *Sanchez-Trujillo* voluntary associations test, the court ultimately ruled based on whether there is an objective perception that a cognizable group exists, rather than on immutable characteristics.¹²⁵

After evaluating whether the attributes of a group comprising El Salvadoran women who had been brutalized by guerillas were recognizable and discrete from the perspective of the persecutor, the *Gomez* court denied asylum to a woman who suffered similar abuse.¹²⁶ The court dismissed the merits of Gomez’s claim without considering the

¹¹⁸ 225 F.3d 1084, 1093–94 (9th Cir. 2000); see Aleinikoff, *supra* note 63, at 278.

¹¹⁹ *See id.*

¹²⁰ *Hernandez-Montiel*, 225 F.3d at 1093.

¹²¹ *See id.* at 1093–96.

¹²² Thomas, *supra* note 82, at 807.

¹²³ 947 F.2d 660, 664 (2d Cir. 1991); Thomas, *supra* note 82, at 807.

¹²⁴ Thomas, *supra* note 82, at 807 (citing *Gomez*, 947 F.2d at 664).

¹²⁵ *See Gomez*, 947 F.2d at 664; Inlender, *supra* note 85, at 696.

¹²⁶ *Gomez*, 947 F.2d at 663–64.

group in the social context of El Salvador.¹²⁷ Despite having announced its test as one that evaluates a group based on the perspective of the persecutor or that of society in general, the court imposed without explanation a limiting principle, stating that "broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group."¹²⁸ Under this new, two-pronged requirement, asylum was denied.¹²⁹

In spite of the ruling in *Gomez*, commentators have praised the adaptability of the social perceptions approach to evolving social contexts, so that a common trait may set a group apart in one particular social context, but not in another.¹³⁰ One commentator argues that whereas some characteristics are immutable because people are born with them or because of past experience, other changeable characteristics such as conduct, manner of dress, or expression of belief are used by persecutors to identify targets.¹³¹ Another commentator, while bemoaning the ruling in *Gomez*, nevertheless believes that the approach, if applied correctly, is actually broader than the immutable characteristics approach; under this view, *Gomez* would give fair opportunity for recognition to groups of people that may not share immutable characteristics under the current doctrine and thus would be ineligible for protection.¹³²

In contrast, in *Gatimi v. Holder*, Judge Richard Posner of the Seventh Circuit was highly critical of the BIA's use of the social perceptions standard.¹³³ *Gatimi* argued that she was subject to persecution for her membership in the Kikuyu tribe in Kenya, which forces women to undergo genital mutilation.¹³⁴ Reversing the BIA's denial of asylum, Judge Posner stated that the BIA's approach was illogical, and concluded that:

If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in re-

¹²⁷ See *Inlender*, *supra* note 85, at 705.

¹²⁸ *Gomez*, 947 F.2d at 664; see *Inlender*, *supra* note 85, at 701.

¹²⁹ *Gomez*, 947 F.2d at 664; see *Inlender*, *supra* note 85, at 701.

¹³⁰ See *Aleinikoff*, *supra* note 63, at 300; *Inlender*, *supra* note 85, at 697.

¹³¹ See *Thomas*, *supra* note 82, at 820.

¹³² See *Inlender*, *supra* note 85, at 705, 709.

¹³³ See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009).

¹³⁴ See *id.* at 613–14.

maining invisible, they will not be “seen” by other people in the society “as a segment of the population.”¹³⁵

Thus, by Judge Posner’s reasoning, the BIA’s reliance on the externally defined test of “visibility” resulted in the denial of “particular social group” status to women who have not yet suffered genital mutilation and, thus, are not visibly distinct from the rest of society.¹³⁶ Such a result would contravene the goal of the Convention to protect targeted individuals from persecution.¹³⁷

Despite Judge Posner’s criticisms, the social perceptions test could be applied in a manner consistent with the humanitarian goals of the Convention.¹³⁸ This result may be achieved if the BIA and the courts consider not only whether the common characteristic of the group “serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general,” but also the entire social context, by hearing evidence such as expert testimony, country conditions reports, and media coverage.¹³⁹

3. Recent Cases Illustrating the BIA’s Approach

In the cases mentioned above, the BIA and the courts applied either the internally-defined immutable characteristics approach or the externally-oriented social perceptions approach, thereby treating the two, effectively, as mutually exclusive standards.¹⁴⁰ More recently, however, the courts and the BIA have issued decisions that discuss both approaches.¹⁴¹ In *Matter of C-A*, the BIA recognized that social perceptions are a “relevant factor,” but ultimately relied more heavily on the immutable characteristics test.¹⁴² Because it concluded that the respondent failed both the immutable characteristics and social perceptions test, however, the BIA did not address whether the immutable characteristics and social perceptions constitute a two-pronged requirement.¹⁴³

¹³⁵ See *id.* at 615.

¹³⁶ *Id.*

¹³⁷ See Inlender, *supra* note 85, at 703.

¹³⁸ See *Gomez*, 947 F.2d at 663–64; Inlender, *supra* note 85, at 708.

¹³⁹ See *Gomez*, 947 F.2d at 663–64; Inlender, *supra* note 85, at 707.

¹⁴⁰ See *Gatimi*, 578 F.3d at 614–16; *Hernandez-Montiel*, 225 F.3d at 1093; *Lwin*, 144 F.3d at 512; *Gomez*, 947 F.2d at 663–64; *Sanchez-Trujillo*, 801 F.2d at 1576; *Acosta*, 19 I&N Dec. at 232.

¹⁴¹ *Santos-Lemus v. Mukasey*, 542 F.3d 738, 744 (9th Cir. 2008) (stating that “social visibility” and “particularity” are factors to consider in determining whether a group constitutes a particular social group under the INA); *In re SE-G*, 24 I&N Dec. 579 (BIA 2008); *C-A*, 23 I&N Dec. at 956–57.

¹⁴² See *C-A*, 23 I&N Dec. at 956–57.

¹⁴³ See *id.*

Two years later, in *Matter of S-E-G*, the BIA rendered a decision exhibiting stronger reliance on the social perceptions test than the immutable characteristics test.¹⁴⁴ Examining a social group of "Salvadoran youths who have resisted gang recruitment," the BIA briefly mentioned that age is a mutable characteristic due to its temporary nature.¹⁴⁵ It then introduced a new test of "particularity" to be satisfied in addition to the social perceptions test.¹⁴⁶ The stated purpose of the "particularity test" is to limit "particular social group" designation to cases where "the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."¹⁴⁷

In a companion case, the BIA held that the "analysis must focus on fundamental characteristics and social visibility within the country in question."¹⁴⁸ The court declined to address issues of "particularity," but focused instead on "the existence and visibility of the group in the society in question."¹⁴⁹ From this line of cases, it remains unclear how the two primary tests will be applied in the future.¹⁵⁰

III. ANALYSIS

A. *The United Nations Guidelines*

The BIA and the courts have relied on the U.N. Handbook for guidance in formulating asylum standards.¹⁵¹ That document defines "particular social group" as "persons of similar background, habits or social status;" moreover, suggesting a focus on internal characteristics common to individual members, it notes that claims may overlap with other grounds such as race, religion, or nationality.¹⁵² The next paragraph, however, implicates the perspective of the persecutor, noting that certain groups may be targeted because of a perceived lack of loy-

¹⁴⁴ See *S-E-G*, 24 I&N Dec. at 587.

¹⁴⁵ See *id.* at 583 (noting the ages of respondents as 18 and 21 years respectively and that they were 16 and 19 years of age at the time of the hearing).

¹⁴⁶ See *id.* at 584.

¹⁴⁷ See *id.* at 585 (declining to recognize social group because it makes up a "potentially large and diffuse segment of society").

¹⁴⁸ *In re E-A-G*, 24 I&N Dec. 591, 595 (BIA 2008).

¹⁴⁹ *Id.*

¹⁵⁰ See *E-A-G*, 24 I&N Dec. at 595; *S-E-G*, 24 I&N Dec. at 584–88; *C-A*, 23 I&N Dec. at 956–57.

¹⁵¹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *In re Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

¹⁵² U.N. Handbook, *supra* note 50, ¶ 77.

alty to the government.¹⁵³ No provision in the U.N. Handbook suggests that the approaches are mutually exclusive.¹⁵⁴

On the contrary, the U.N. Guidelines, issued in 2002, urge the reconciliation of the two standards.¹⁵⁵ The U.N. Guidelines affirm both the immutable characteristics approach and the social perceptions approach.¹⁵⁶ Referring to the immutable characteristics approach as the “protected characteristics approach,” the U.N. Guidelines echo the *Acosta* standard: “an immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status).”¹⁵⁷ To determine whether a group is defined by such a characteristic, the U.N. Guidelines suggest reference to “a past temporary or voluntary status that is unchangeable because of its historical permanence” or, to “a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.”¹⁵⁸ Describing the external approach as the “social perception” test, the U.N. Guidelines look to a common characteristic of group members that “makes them a cognizable group or sets them apart from society at large,” an analysis that “depend[s] on the circumstances of the society in which they exist.”¹⁵⁹

Upon defining the two approaches, the U.N. Guidelines indicate that the two must be reconciled, to prevent gaps in coverage.¹⁶⁰ In a significant move, they formulate a new, unified standard incorporating those two approaches, concluding that:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.¹⁶¹

The new standard would find a “particular social group” in cases where the internal characteristic standard would have excluded them, such as voluntary behavior, conduct, or expression of belief, which are funda-

¹⁵³ *See id.*, ¶ 78.

¹⁵⁴ *See generally id.*

¹⁵⁵ U.N. Guidelines, *supra* note 76, ¶¶ 7, 8, 10.

¹⁵⁶ *Id.*, ¶¶ 6, 7.

¹⁵⁷ *See id.*; *Acosta*, 19 I&N Dec. at 233.

¹⁵⁸ U.N. Guidelines, *supra* note 76, ¶ 6.

¹⁵⁹ *See id.* ¶ 7.

¹⁶⁰ *Id.* ¶¶ 6, 7, 10.

¹⁶¹ *See id.* ¶ 11 (emphasis added).

mental to a person's identity but which courts might not have considered "immutable."¹⁶² Furthermore, that standard would also permit a finding of "particular social group" in cases where, under the social perceptions standard, an applicant would have been excluded from the category for having successfully concealed their identity which would otherwise have been a target.¹⁶³ The U.N. Guidelines suggest that the immutable characteristics and social perceptions test do not comprise two prongs of a test, both of which must be satisfied.¹⁶⁴ Rather, the U.N. Guidelines indicate that an asylum seeker merits the protection as a member of a "particular social group" upon the satisfaction of one of two tests.¹⁶⁵

B. Applying the U.N. Guidelines to the Romeike Case

The BIA should not merely mention the U.N. Guidelines; it should apply both the immutable characteristics and the social perceptions tests to determine whether the Romeikes merit protection as members of a "particular social group."¹⁶⁶ In evaluating the family as part of a group of German parents who choose to homeschool their children, the BIA should assess whether the group shares a common characteristic that could be "innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."¹⁶⁷ It should then thoroughly consider whether that group is perceived as a distinct group by German society.¹⁶⁸ Under this approach, the Romeikes should qualify as a "particular social group" worthy of asylum.¹⁶⁹

First, the decision to homeschool one's children is a characteristic that can be considered immutable.¹⁷⁰ Characteristics that are "so fundamental to individual identity or conscience that [they] ought not be required to be changed" qualify as an immutable characteristic.¹⁷¹ Moreover, under the U.N. Guidelines, "human rights norms may help identify" such characteristics.¹⁷²

¹⁶² See Thomas, *supra* note 82, at 820.

¹⁶³ See Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

¹⁶⁴ See U.N. Guidelines, *supra* note 76, ¶ 11.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*; *Homeschooling Family Granted Political Asylum*, *supra* note 1.

¹⁶⁷ See U.N. Guidelines, *supra* note 76, ¶ 11.

¹⁶⁸ See *id.*

¹⁶⁹ See Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998); Gomez v. INS, 947 F.2d 660, 663-64 (2d Cir. 1991); Acosta, 19 I&N Dec. at 232; U.N. Guidelines, *supra* note 76, ¶ 6.

¹⁷⁰ See U.N. Guidelines, *supra* note 76, ¶ 6.

¹⁷¹ See Acosta, 19 I&N Dec. at 233.

¹⁷² See U.N. Guidelines, *supra* note 76, ¶ 6.

As “parents who for religious, political, social, academic, or conscientious reasons do not send their children to state-approved schools, but choose to educate them at home,” the Romeikes should qualify as members of a “particular social group.”¹⁷³ Their beliefs are “so fundamental to their identities or consciences that they ought not to be required to be changed.”¹⁷⁴ This view is supported by the recognition in the Universal Declaration of Human Rights, the ICESCR, and the European Convention of a parent’s broad latitude to make decisions affecting his or her child’s education, including conscience-based decisions.¹⁷⁵ In light of this broad, international support, the BIA should find that homeschoolers comprise a “particular social group.”¹⁷⁶

Second, German homeschoolers may properly be perceived as a group by German society in general;¹⁷⁷ indeed, there is ample evidence of a broader homeschooling movement throughout Germany.¹⁷⁸ Furthermore, the German Constitutional Court affirmed that compulsory education laws apply to homeschoolers.¹⁷⁹ The court’s description of homeschoolers, as “religiously or philosophically motivated ‘parallel societies,’” evinces the state’s perception of homeschoolers as a recognizable group.¹⁸⁰

Moreover, the resolutions passed by American state legislatures strongly suggest that in the United States, German homeschoolers have already received recognition as a distinct group.¹⁸¹ For example, as previously mentioned, state legislatures in Georgia and Tennessee have passed resolutions urging Germany to allow homeschoolers to determine their children’s education.¹⁸² In order “to prevent the emergence of parallel societies based on separate philosophical convictions,” both resolutions denounce the policy of the German government against

¹⁷³ Respondent’s Brief, *supra* note 5, at 9.

¹⁷⁴ *See id.* at 11.

¹⁷⁵ *See* Universal Declaration of Human Rights, *supra* note 39, art. 5; ICESCR, *supra* note 39, art. 13, § 3; European Convention for Human Rights, *supra* note 39, art. 2.

¹⁷⁶ *See* Universal Declaration of Human Rights, *supra* note 39, art. 5; ICESCR, *supra* note 39, art. 13, § 3; European Convention for Human Rights, *supra* note 39, art. 2.

¹⁷⁷ *See* Inlander, *supra* note 85, at 707.

¹⁷⁸ *See* Respondent’s Brief, *supra* note 5, at 2–3, 9–12; Petrie, *supra* note 17, at 490; Spiegler, *supra* note 23, at 184.

¹⁷⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Entscheidungen des Bundesverwaltungsgerichts Apr. 29, 2003, 436 (03), ¶¶ 8, 11, 12 (certified English translation on file with author).

¹⁸⁰ *See id.*

¹⁸¹ *See* Respondent’s Brief, *supra* note 5, at 11; *supra* text accompanying notes 20–23.

¹⁸² *See supra* text accompanying notes 20–23.

homeschooling.¹⁸³ The resolution passed by the Georgia legislature also refers to the high academic standards achieved by "home educated students," reinforcing the perception of homeschoolers as not merely a recognizable group, but as a viable one as well.¹⁸⁴ Thus, the Romeikes have a strong case for "particular social group" under the social perceptions test recognized by the U.N. Guidelines.¹⁸⁵

The BIA should follow the U.N. Guidelines and accord equal weight to both the immutable characteristics and the social perceptions tests and find that the Romeikes are members of a "particular social group" under either test.¹⁸⁶ By considering the Romeikes' claims in light of the U.N. Guidelines, the BIA would fulfill the humanitarian vision of the Convention Relating to the Status of Refugees.¹⁸⁷ Moreover, the proposed approach would further Congress' intent underlying the enactment of the Refugee Act of 1980—to standardize the procedure and requirement for "particular social group."¹⁸⁸

CONCLUSION

The Romeikes made a conscientious choice to homeschool their children because the public school curriculum did not comport with their religious beliefs. By withdrawing their children from public school, they violated German compulsory education laws. They continued to homeschool their children despite considerable financial penalties, and ultimately fled Germany to avoid losing custody of their children. They came to the United States as tourists and sought asylum.

The requirements under current INA provisions on asylum pertaining to "particular social group," based on the Convention Relating to the Status of Refugees and further implemented by the Refugee Act of 1980, are ill-defined and are the source of much confusion, especially with regard to the "particular social group" category. The BIA and the courts have evaluated "particular social group" under two approaches that have been applied inconsistently, leading to arbitrary denials of asylum. Commenting on the phenomenon, Judge Posner warned that "given the uncertainties in the law, the difficulties in the facts, [and] the seemingly arbitrary variance among the immigration judges, the court of appeals judges are also going to be falling back on

¹⁸³ See Georgia Resolution, *supra* note 22; Tennessee Resolution, *supra* note 22.

¹⁸⁴ See Georgia Resolution, *supra* note 22.

¹⁸⁵ See Report by U.N. Rapporteur, *supra* note 43, ¶ 62.

¹⁸⁶ See U.N. Guidelines, *supra* note 76, ¶ 11.

¹⁸⁷ See U.N. Convention, *supra* note 50, ¶ 62; Inlender, *supra* note 85, at 701.

¹⁸⁸ See Graves, *supra* note 68, at 743–44.

... personal reactions, intuitions, values, and so on. . . . This is supposed to be a uniform body of federal law.”¹⁸⁹

In the *Romeike* case, the BIA can and should find that the family is a member of a “particular social group” under either the immutable characteristics or the social perceptions approaches. German homeschoolers share characteristics, the validity of which are recognized by international law, that ought not to be changed. The U.N. Declaration of Human Rights, the ICESCR, and the European Convention for Human Rights all recognize a parent’s right to choose the appropriate educational venue for her child. Moreover, homeschoolers in Germany join organizations to provide support for each other, exchange ideas, and share legal representation. They are perceived as a recognizable group by their alleged persecutor, as well as by society at large—in Germany and abroad.

While some groups constitute a “particular social group” under one standard and not the other, the U.N. Guidelines address this discrepancy. In the future, the BIA and the courts must uniformly adopt the standard provided by the U.N. Guidelines. Under the guidelines, the two standards do not comprise a two-pronged test; they constitute two distinct tests, and the satisfaction of one test should lead to a finding of “particular social group.” This approach will realize the vision intended by Congress in its enactment of the Refugee Act of 1980. In formulating a cogent standard, DHS, BIA, and the courts must not be blinded by fears of a flood of applicants. They should strive to fulfill the humanitarian obligations required by the Convention, to provide a safe haven for those in dire straits.

¹⁸⁹ RAMJI-NOGALES, *supra* note 58, at 79.

DEFINING INVESTOR CONFIDENCE: AVOIDING INTERPRETIVE UNCERTAINTY IN *CHEVRON CORP. v. ECUADOR*

JASON BURKE*

Abstract: In an increasingly globalized world, foreign direct investment is becoming an incredibly important tool for investors in developed nations and the developed nations in which they are investing. Investors have increasingly been seeking protections for their investments in foreign nations. This is why approximately 2400 bilateral investment treaties were signed between various nations between 1994 and 2006. When conflicts arise, the job of interpreting these treaties often falls to investment arbitration tribunals. Indeed, in 2010, an arbitration tribunal (Tribunal) operating under the United Nations Commission on International Trade Law (UNCITRAL) rules adjudicated a dispute between Chevron and the Republic of Ecuador (Ecuador) and interpreted the bilateral investment treaty between the U.S. and Ecuador (BIT). This Comment argues that the Tribunal's interpretation of the BIT was the most reflective of the investor's expectations and thus encouraged further investment. As incentivizing this investment is the very purpose of the BIT, the Tribunal reached the best possible conclusion as to its meaning.

INTRODUCTION

On March 30, 2010, the Tribunal established under the arbitration rules of UNCITRAL decided *Chevron Corp. v. Ecuador*, which settled several long-standing disputes between Texaco—a subsidiary of Chevron¹—and Ecuador.² The arbitration concerned seven cases filed by Texaco against Ecuador when Texaco's two-decade contract for certain oil-related rights in Ecuador expired in 1992.³ By the time Chevron commenced this arbitration, six of the seven cases in question had sat

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¹ Texaco initially filed the cases at issue in this arbitration against Ecuador; Chevron subsequently acquired Texaco and is now claiming this arbitration through its subsidiary. *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 134, 342 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

² *See id.*

³ *Id.* ¶¶ 133–134.

dormant for between thirteen and fifteen years with little action by the Ecuadorian judiciary.⁴ An Ecuadorian court dismissed the last case for abandonment, but another Ecuadorian court subsequently overturned the dismissal.⁵

Against this background, the Tribunal found that, by the time the action was commenced in December of 2006, Ecuador had violated the BIT by causing undue delay in Texaco's Ecuadorian legal proceedings.⁶ The Tribunal went on to dismiss Ecuador's contention that Chevron was precluded from bringing this arbitration because Texaco and Chevron had failed to exhaust every domestic legal remedy.⁷ Ultimately, the Tribunal awarded Chevron \$698,621,904.84 in damages.⁸ The judgment was met with swift criticism from Ecuador's attorney general who stated that "[t]his new effort to compromise the Ecuadorean state in its firm commitment to respect the independence of its judicial system . . . will not succeed."⁹

Part I of this Comment discusses the origins of the disputes that led to the *Chevron* case and the Interim Award regarding the Tribunal's jurisdiction. Part II discusses the traditional formulation of denial of justice under customary international law and compares it to the standard created by the Tribunal in this case. Part III argues that the Tribunal arrived at the correct decision by heavily utilizing the Vienna Convention on the Law of Treaties (Vienna Convention) to craft a standard that was extremely faithful to the text of the BIT, thus avoiding the type of uncertainty that chills investment.

I. BACKGROUND

A. *Texaco's Operations in Ecuador and Related Lawsuits*

Relations between the parties in the case commenced in 1964 when Ecuador gave certain rights related to the exploration and production of oil to Texaco.¹⁰ In 1973, the 1964 agreement was replaced by a new agreement (1973 Agreement), which granted Texaco explora-

⁴ *Id.* ¶ 270.

⁵ *Id.*

⁶ *Id.*

⁷ See *Chevron*, UNCITRAL Arbitration, ¶¶ 329–331.

⁸ See *id.* ¶¶ 546–550.

⁹ See *Ecuador Rejects Ruling Awarding \$700m to Chevron*, BLOOMBERG BUSINESSWEEK (Mar. 31, 2010), <http://www.businessweek.com/ap/financialnews/D9EPOS7O0.htm>.

¹⁰ *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶ 125 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

tion and drilling rights in Ecuador's Amazon region, so long as Texaco provided for Ecuador's domestic oil needs at a lower price to be set by the nation.¹¹ In 1987, an earthquake shook Ecuador and seriously disrupted Texaco's ability to deliver enough oil to satisfy domestic needs, forcing Ecuador to seek out alternate sources of oil and pay more than the agreed-upon domestic price.¹² Ecuador later would demand that Texaco provide it with many extra barrels of crude oil at the lower agreed-upon price to compensate its government for the oil bought at a higher price during the crisis.¹³

Efforts to negotiate an extension of Texaco's rights to explore and exploit oil in Ecuador failed and in 1992, the 1973 Agreement expired.¹⁴ In this time frame, between 1991 and 1993, Texaco filed the seven claims at issue in this case against Ecuador.¹⁵ Five of these cases claimed that Ecuador had overstated its domestic needs, taking more oil than it was entitled to at the low domestic price.¹⁶ Another case involved a *force majeure*¹⁷ issue related to the 1987 earthquake.¹⁸ The final claim regarded a violation of a refinancing agreement that had been signed between the two parties in 1986.¹⁹ Texaco filed all of these cases between 1991 and 1993.²⁰ A decade later, Ecuadorian politics entered a period of crisis, during which the nation's judicial system experienced profound instability.²¹ During this period, these seven cases sat mostly dormant despite numerous inquiries by Texaco (and Chevron, after it acquired Texaco).²²

B. Filing for Arbitration and the 2008 Interim Award

With little progress on its claims for over a decade, Chevron commenced arbitration in a UNCITRAL tribunal in December of 2006.²³ The BIT, which entered into force in 1997, specifies the rights that each

¹¹ *Id.* ¶¶ 127–128.

¹² *See id.* ¶¶ 130–131.

¹³ *Id.* ¶ 132.

¹⁴ *See id.* ¶ 133.

¹⁵ *See id.* ¶ 134.

¹⁶ *Chevron*, UNCITRAL Arbitration, ¶ 135.

¹⁷ *Force majeure* is “[a]n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).” BLACK’S LAW DICTIONARY 718 (9th ed. 2009).

¹⁸ *Chevron*, UNCITRAL Arbitration, ¶ 135.

¹⁹ *Id.*

²⁰ *See id.* ¶ 149 (Table 1).

²¹ *See id.* ¶ 142–143.

²² *See id.* ¶¶ 255, 270.

²³ *See id.* ¶ 145.

nation shall accord to foreign investors from the other.²⁴ Further, the BIT specifies that an action questioning a breach of the treaty could be commenced in an UNCITRAL tribunal.²⁵ At the jurisdictional phase of this arbitration, Ecuador argued that the Tribunal lacked jurisdiction to hear the claim for a variety of reasons.²⁶ First, Ecuador cited statements made by Chevron and Texaco in a U.S. court action, in which the corporations stated that Ecuador's judiciary was fair and competent.²⁷ Ecuador argued that Chevron should not be allowed to contradict itself and claim that Ecuadorian courts were incompetent to decide the cases at issue in this arbitration.²⁸ Second, Ecuador claimed that the cases in dispute did not concern "investment" as defined by the BIT.²⁹ Third, Ecuador argued that this claim was not ripe for adjudication as Chevron failed to exhaust all domestic remedies.³⁰ Finally, Ecuador claimed that the events giving rise to the claims took place before May 11, 1997, the date on which the BIT came into effect, thus making the BIT inapplicable.³¹ On December 1, 2008, the Tribunal rejected Ecuador's contentions about the Tribunal's lack of jurisdiction and allowed the case to proceed to the merits phase.³²

II. DISCUSSION

A. *Denial of Justice Under Customary International Law*

That states have a "duty to provide decent justice to foreigners" is one of the oldest precepts of international law.³³ A claim of "denial of justice" has long existed as a way for foreigners to vindicate this right.³⁴ Though it is widely accepted as a cause of action in international law, the exact definition of the term has been debated throughout the last

²⁴ See generally Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993) [hereinafter *Investment Treaty*].

²⁵ See *id.* art. VI(3)(a).

²⁶ *Chevron*, UNCITRAL Arbitration, ¶ 9.

²⁷ See *id.* ¶ 10.

²⁸ *Id.*

²⁹ See *id.* ¶ 12.

³⁰ See *id.* ¶ 13.

³¹ *Id.* ¶ 15.

³² *Chevron*, UNCITRAL Arbitration, ¶ 25.

³³ JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 1 (2005).

³⁴ See *id.*

century.³⁵ Much of this debate is related to the fact that the term “denial of justice” has intentionally been kept a broad and abstract concept.³⁶ Moving towards the other extreme, a bright-line rule would allow states to get away with treating foreigners poorly by conforming to legal formalities.³⁷

Nevertheless, the most basic formulation of a standard denial of justice claim has been articulated by scholars with relative consistency.³⁸ Responsibility for denial of justice will attach to a state actor only where “the factual circumstances” are “egregious.”³⁹ Many scholars have historically argued that state actors can be held accountable for denial of justice where the actions of the judiciary are “‘grossly unfair’ or ‘manifestly unjust.’”⁴⁰ Yet the question of what constitutes a “manifestly unjust” judgment is subject to considerable debate.⁴¹ Two other categories of denial of justice—the refusal to allow foreigners to assert their rights before domestic courts and judicial delays that are “equivalent to refusal”—are, however, firmly accepted by a majority of international lawyers.⁴² Under customary international law, the foreigner seeking redress for denial of justice must also prove that she has exhausted all local remedies.⁴³ Thus, a denial of justice claim will usually be based on an allegedly unjust final decision of the nation’s highest appeals court,

³⁵ See ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE*, 96–97 (Kraus Reprint Co. 1970) (1938) (listing six varying definitions of denial of justice); PAULSSON, *supra* note 33, at 65 (stating that “two centuries of debate have focused on” what makes a decision sufficiently “‘manifestly unjust and one-sided’” to amount to a denial of justice); Sir Gerald Fitzmaurice, *The Meaning of the Term “Denial of Justice”*, 13 BRIT. Y.B. INT’L L. 93, 93 (1932) (noting that many possible definitions of denial of justice have been used).

³⁶ See PAULSSON, *supra* note 33, at 59 n.2.

³⁷ See *id.* at 59–60.

³⁸ See J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 10 BRIT. Y.B. INT’L L. 181, 183–84 (1929) (“[A] draft formulated by an American Committee of jurists in 1928 defines denial of justice for which the state is responsible as including the denial, delay, or exceptional difficulty of access to the courts, gross deficiencies in the judicial or remedial process, the absence of those guarantees which are indispensable to the proper administration of justice, or a ‘manifestly unjust’ judgment.”); see also PAULSSON, *supra* note 33, at 65 (citing Vattel with approval, who in 1758 proposed a three-tier definition of denial of justice, including: (1) “not admitting foreigners to establish their rights before the ordinary courts”; (2) “delays which are ruinous or otherwise equivalent to refusal”; and (3) “judgments [that are] ‘manifestly unjust and one-sided’”).

³⁹ PAULSSON, *supra* note 33, at 60.

⁴⁰ See Garner, *supra* note 38, at 183.

⁴¹ See PAULSSON, *supra* note 33, at 65.

⁴² *Id.*

⁴³ See *id.* at 100.

which illustrates that the entire justice system has failed to adequately protect the rights of the foreigner.⁴⁴

Chevron initiated its claim partly upon this customary international law concept of denial of justice.⁴⁵ As a primary matter, Chevron argued that Ecuador had violated customary international law and committed a denial of justice by means of an undue delay in the court cases it filed against Ecuador that were pending for over a decade.⁴⁶ By proving that Ecuador violated customary international law, Chevron asserted that it also proved a violation of the BIT,⁴⁷ which states that “[i]nvestment . . . shall in no case be accorded treatment less than that required by international law.”⁴⁸ In the alternative, Chevron argued that the decisions rendered after the commencement of the action by Ecuador’s courts were so manifestly unjust as to amount to a denial of justice.⁴⁹ As a final matter, Chevron insisted that exhaustion of local remedies was not a requirement under customary international law,⁵⁰ but even if it were a requirement, it would be fulfilled in this case.⁵¹

Ecuador, for its part, emphasized the high burden that the plaintiff carries in an action for denial of justice.⁵² According to Ecuador, a denial of justice claim based upon undue delay must assert that the state’s delay amounted to a “refusal to judge,”⁵³ which Ecuador contended that Chevron had not done.⁵⁴ In response to Chevron’s alternative argument alleging a denial of justice based on manifestly unjust decisions, Ecuador claimed that the decisions were not unjust, and even if they were, they did not reflect a high enough level of judicial impropriety to breach international law and thereby invoke international arbitration.⁵⁵ Finally, Ecuador insisted that Chevron had not exhausted all domestic remedies, as most of the cases had not been appealed to the highest court.⁵⁶ Despite the robust corpus of customary international

⁴⁴ See *id.* at 100–01.

⁴⁵ See *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 167–169, 188, 277 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF>.

⁴⁶ See *id.* ¶¶ 167–171.

⁴⁷ *Id.* ¶ 167.

⁴⁸ Investment Treaty, *supra* note 24, art. II(3)(a).

⁴⁹ *Chevron*, UNCITRAL Arbitration, ¶ 188.

⁵⁰ *Id.* ¶ 277.

⁵¹ See *id.* ¶ 279.

⁵² *Id.* ¶ 178.

⁵³ *Id.* ¶ 180.

⁵⁴ See *id.* ¶ 181.

⁵⁵ See *Chevron*, UNCITRAL Arbitration, ¶ 195.

⁵⁶ See *id.* ¶¶ 295–297.

law concerning denial of justice that both parties cited as central to their arguments, the Tribunal's opinion proceeded in quite a different direction.⁵⁷

B. *A Lower Standard for U.S.-Ecuador Relations:
The BIT's Distinct Standard*

Even though the customary international law framework discussed above informed the Tribunal's decision, the Tribunal noted that its job was to interpret the BIT according to the rules set forth in the Vienna Convention.⁵⁸ As such, the Tribunal used a great deal of the opinion to interpret the text of Article II(7) of the BIT,⁵⁹ which requires that "[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations."⁶⁰

Though the Tribunal observed that the obligations imposed by Article II(7) are similar to those imposed by customary international law,⁶¹ it found that the standard set by the BIT was distinct from the standard for finding a denial of justice under customary international law.⁶² Indeed, the Tribunal observed that the standard necessary for finding a breach of the BIT could be lower than that set by customary international law.⁶³

Thus, rather than having to prove that the state's judicial shortcoming was "egregious," as is the general standard under customary international law,⁶⁴ the claimant must only prove that the state failed to provide an "effective means" for enforcing rights and bringing claims.⁶⁵ Specifically, the Tribunal noted that the standard for finding a denial of justice under customary international law "requires the demonstration of 'a particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety.'"⁶⁶ By contrast, the Tribunal held that "under Article II(7), a failure of domestic courts to enforce

⁵⁷ See *id.* ¶ 242.

⁵⁸ See *id.* ¶¶ 158–159, 244.

⁵⁹ See *id.* ¶¶ 241–275, 321–332.

⁶⁰ Investment Treaty, *supra* note 24, art. II(7).

⁶¹ See *Chevron*, UNCITRAL Arbitration, ¶ 244.

⁶² See *id.* ¶¶ 242–244.

⁶³ See *id.* ¶ 244.

⁶⁴ See PAULSSON, *supra* note 33, at 60.

⁶⁵ See *Chevron*, UNCITRAL Arbitration, ¶ 244.

⁶⁶ *Id.* (quoting Opinion of Jan Paulsson, para. 10 (Nov. 2008) and Respondent's Counter-Memorial on the Merits of Sept. 22, 2008).

rights ‘effectively’ will constitute a violation of Article II(7).⁶⁷ As to the relationship between the two standards, the Tribunal notes that judicial misconduct that violates Article II(7) “may not always be sufficient to find a denial of justice under customary international law.”⁶⁸ The Tribunal’s decision, therefore, creates a standard that is distinct from—and seemingly easier to violate than—the traditional standard.⁶⁹

Moreover, the Tribunal decided that although a party must have exhausted local remedies in order to prove a denial of justice under customary international law, Article II(7) once again creates a distinct standard in this regard.⁷⁰ The Tribunal was convinced that exhaustion of local remedies was a general requirement under customary international law.⁷¹ In contrast, the central issue under Article II(7) is whether the state has provided the claimant with an effective means for enforcing rights.⁷² The Tribunal found that only “a qualified requirement of exhaustion of local remedies applies under the ‘effective means’ standard of Article II(7).”⁷³ If the respondent state can prove that valid local remedies did exist and were not pursued, a claimant’s contention that it was not provided with effective means for enforcing its rights may be defeated.⁷⁴ Nevertheless, proof of exhaustion of local remedies is not necessary to make a *prima facie* case for a breach of Article II(7).⁷⁵

Proceeding with an analysis of the case under this legal framework, the Tribunal found that an undue delay serves to violate the new standard, as Article II(7) mandates that Ecuador “provide foreign investors with means of enforcing legitimate rights *within a reasonable amount of time*.”⁷⁶ Although Ecuador highlighted various legal options not used by Chevron, the Tribunal was ultimately convinced that such options would have been ineffective and thus dismissed Ecuador’s defense.⁷⁷ After considering and dismissing a variety of factors that could have justified a delay,⁷⁸ the Tribunal ruled that Ecuador’s long period of inaction constituted an undue delay, in violation of Article II(7).⁷⁹

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.* ¶¶ 242–244.

⁷⁰ *See id.* ¶ 321.

⁷¹ *Chevron*, UNCITRAL Arbitration, ¶ 321.

⁷² *See id.* ¶¶ 244, 322–324.

⁷³ *Id.* ¶ 323.

⁷⁴ *See id.* ¶¶ 328–329.

⁷⁵ *See id.* ¶ 326.

⁷⁶ *Id.* ¶ 250 (emphasis added).

⁷⁷ *See Chevron*, UNCITRAL Arbitration, ¶¶ 330–331.

⁷⁸ *See id.* ¶¶ 254–255, 263–265.

⁷⁹ *Id.* ¶ 270.

III. ANALYSIS

The Tribunal was correct to use the Vienna Convention to carve out a standard that was distinct from the customary international law standard because such an interpretation of the BIT is the most predictable.⁸⁰ Such predictability best promotes investment.⁸¹ Bilateral investment treaties have flourished as a way to give investors the certainty and security they seek when investing abroad.⁸² Interpretations of bilateral investment treaties that create uncertainty for investors may serve to chill investment,⁸³ which such treaties were often meant to promote.⁸⁴ Ultimately, in the instant case, Chevron's expectations of its own rights under the BIT were based heavily on an interpretation informed by the Vienna Convention.⁸⁵ Thus, by strictly applying the Vienna Convention to its analysis of the BIT,⁸⁶ the Tribunal promoted certainty and security for American investors like Chevron in Ecuador.⁸⁷ Any other interpretation would have created uncertainty about the rights guaranteed to investors by the BIT,⁸⁸ thus chilling investment and contravening the paramount goal of the BIT itself.⁸⁹

⁸⁰ See *Chevron Corp. v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, ¶¶ 159, 161–162, 242–244 (Mar. 30, 2010), <http://ita.law.uvic.ca/documents/ChevronTexacoEcuadorPartialAward.PDF> (stating that both parties relied on the Vienna Convention in making their arguments regarding the substantive provisions of the BIT, explaining that the Tribunal actually applied the Vienna Convention to interpret the BIT, and ultimately creating a standard distinct from the international law standard).

⁸¹ See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1538, 1558 (2005) (arguing that increasing investors' confidence in their ability to enforce rights under bilateral investment treaties promotes foreign investment and asserting that inconsistency in the interpretation of bilateral investment treaties creates uncertainty about and damages expectations of the rights afforded by such a treaty).

⁸² See Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 *GEO. MASON L. REV.* 135, 135–36 (2006).

⁸³ See *id.* at 139 (“Allowing the host State to renege on its agreement in the BIT creates uncertainty in the global marketplace and can serve only to discourage foreign investment.”).

⁸⁴ See *id.* at 135 (“The BIT serves to attract foreign investment by granting broad investment rights to investors and creating flexibility in the resolution of investment disputes.”).

⁸⁵ See *Chevron*, UNCITRAL Arbitration, ¶ 159.

⁸⁶ See *id.* ¶¶ 161–162.

⁸⁷ Cf. Franck, *supra* note 81, at 1558 (claiming that inconsistent interpretations of bilateral investment treaties decrease certainty about the rights guaranteed by the treaty, thereby damaging investors' expectations).

⁸⁸ See *id.*

⁸⁹ See *Investment Treaty*, *supra* note 24, pmbl. (stating that the United States and Ecuador entered into the BIT “desiring to promote greater economic cooperation between

In a globalized world with increasing amounts of investment flowing across national borders, parties looking to invest in foreign nations seek increasing amounts of security.⁹⁰ To this end, many nations have sought to guarantee expansive protection to investors by entering into bilateral investment treaties.⁹¹ These treaties “govern[] the treatment of investments made in the territory of each state by individuals or companies from the other state.”⁹² These investment treaties have proliferated, particularly between 1994 and 2006, by which time there were approximately 2400 bilateral investment treaties between various nations.⁹³

Given that the increasingly popular use of bilateral investment treaties has at its core the goal of securing foreign investment,⁹⁴ interpretations that create uncertainty about the rights enshrined in such treaties ultimately discourage investment.⁹⁵ Jarrod Wong, a former legal adviser at the Iran-U.S. Claims Tribunal, in talking about the “umbrella clause”⁹⁶ of certain bilateral investment treaties, highlights several arbitral decisions that he argues were under-protective of investment because they failed to faithfully interpret the text of the relevant treaties.⁹⁷ Wong argues that a failure to interpret an “umbrella clause” in accordance with its text and history allows host states to renege on their responsibilities under bilateral investment treaties, creating uncertainty for investors from which foreign investment will suffer.⁹⁸

Similarly, in an article addressing a number of inconsistent arbitral decisions arising out of bilateral investment treaties, Susan D. Franck, a practitioner and professor of international arbitration law, also expresses concern about the deleterious effects of interpretive uncertainty

them, with respect to reinvestment by nationals and companies of one Party in the territory of the other Party” and “recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties”); Wong, *supra* note 82, at 139.

⁹⁰ See Franck, *supra* note 81, at 1525.

⁹¹ See Wong, *supra* note 82, at 135–36.

⁹² *Id.* at 141.

⁹³ See *id.* at 135–36.

⁹⁴ See *id.*

⁹⁵ See *id.* at 139.

⁹⁶ An “umbrella clause” is a clause that “imposes a requirement on each Contracting State to observe all investment obligations entered into with investors from the other Contracting State.” *Id.* at 136. Liberally interpreted, such a clause allows an arbitration tribunal interpreting a bilateral investment treaty to exercise “jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause.” See Wong, *supra* note 82, at 137.

⁹⁷ See *id.*

⁹⁸ See *id.* at 139.

on foreign investment.⁹⁹ She states that “[i]nconsistency creates uncertainty and damages the legitimate expectations of investors and Sovereigns.”¹⁰⁰ Franck notes that one main effect of bilateral investment treaties is to increase investment incentives by granting rights to investors and thus reducing the risks associated with investment; it logically follows that throwing such rights into doubt will increase risk and thereby stifle investment.¹⁰¹

The interpretation of the BIT at issue in *Chevron* that best encourages investment is one that protects the expectations of investors by applying the source widely accepted as an accurate statement of customary international law on treaty interpretation—the Vienna Convention.¹⁰² Such an interpretation is the least likely to create the type of confusion that would chill the very investment that a bilateral investment treaty is designed to ensure.¹⁰³ To that end, the Tribunal noted that *Chevron* firmly accepted that the correct way to interpret the BIT was by using the Vienna Convention, which reflects customary international law with regard to treaty interpretation.¹⁰⁴ Therefore, an interpretation of the BIT based firmly in the Vienna Convention would be most reflective of the investor’s expectations and therefore most likely to create the desired certainty and investment.¹⁰⁵

The Tribunal found that the relevant provisions of the Vienna Convention with regard to treaty interpretation are Articles 31 and 32.¹⁰⁶ First, Article 31 states that a treaty should be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰⁷ As stated by the Tribunal, the explicit refusal to include customary international law as the standard for finding a breach of the BIT meant that there was a different standard.¹⁰⁸ Indeed, the “effective means” standard created by the court is exceptionally consistent with this interpretive tenet in that it specifically uses the words of the BIT

⁹⁹ See Franck, *supra* note 81, at 1558.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1538.

¹⁰² See *Chevron*, UNCITRAL Arbitration, ¶ 159; Franck, *supra* note 81, at 1538, 1558.

¹⁰³ See Wong, *supra* note 82, at 135, 139.

¹⁰⁴ See *Chevron*, UNCITRAL Arbitration, ¶ 159.

¹⁰⁵ See *id.*; Franck, *supra* note 81, at 1538.

¹⁰⁶ See *Chevron*, UNCITRAL Arbitration, ¶¶ 161–162.

¹⁰⁷ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁰⁸ *Chevron*, UNCITRAL Arbitration, ¶ 242.

itself.¹⁰⁹ Further, Article 32 of the Vienna Convention allows a tribunal to consider other factors—such as the “preparatory work of the treaty and the circumstances of its conclusion”—but only to confirm the meaning dictated by Article 31.¹¹⁰ Applying Article 32, the Tribunal noted that this BIT was drafted at a time when the United States deemed more specific protection for investors to be desirable, thus confirming the “effective means” standard mandated by Article 31.¹¹¹ Ultimately, the Tribunal’s interpretation of the BIT was remarkably consistent with the Vienna Convention.¹¹² As *Chevron* had based its arguments around the Vienna Convention, this interpretation most closely reflected its expectations.¹¹³ Ultimately, this interpretation promoted the most possible certainty for potential future investors.¹¹⁴

CONCLUSION

The concept of denial of justice is not a new one under customary international law. Indeed, decades of scholarship have coalesced around a general theory that, to amount to a denial of justice, judicial misconduct must be egregious. Moreover, a party claiming to be a victim of denial of justice must prove that it has exhausted all local remedies. In *Chevron*, however, the Tribunal found that while the customary international law standard of denial of justice was influential, it was not determinative, as the job of the Tribunal was to interpret the BIT. As such, the Tribunal found that Article II(7) set forth a distinct “effective means” standard, which was less demanding than customary international law with regard to proving denial of justice and exhaustion of local remedies. This less demanding standard is preferential because the Tribunal strictly applied the Vienna Convention to create a faithful, text-based interpretation of the BIT. Because the Vienna Convention had in-

¹⁰⁹ See Investment Treaty, *supra* note 24, art. II(7) (“Each party shall provide *effective means* of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”) (emphasis added); Vienna Convention, *supra* note 107, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); *Chevron*, UNCITRAL Arbitration, ¶ 242 (“The Tribunal thus finds that Article II(7), setting out an ‘effective means’ standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.”).

¹¹⁰ Vienna Convention, *supra* note 107, art. 32.

¹¹¹ See *Chevron*, UNCITRAL Arbitration, ¶ 243.

¹¹² See Vienna Convention, *supra* note 107, arts. 31–32; *Chevron*, UNCITRAL Arbitration, ¶¶ 242–244.

¹¹³ See *Chevron*, UNCITRAL Arbitration, ¶ 159.

¹¹⁴ See Franck, *supra* note 81, at 1538.

formed Chevron's interpretation of the BIT and its rights as an investor, the Tribunal ultimately confirmed Chevron's expectations and avoided creating the type of interpretive uncertainty that can chill the very investment that the BIT was meant to foster. Such an approach for future Tribunals interpreting the BIT would further increase certainty for investors and incentivize U.S. investment in Ecuador.

THE INTERNET IS NOT A LAWLESS PRAIRIE: DATA PROTECTION AND PRIVACY IN ITALY

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Abstract: As the Internet has become more pervasive, so too have concerns about the security of personal data online. The rapid evolution of Internet technology has outpaced the legislative process, leaving courts to resolve complex and important questions of policy. Their answers to these questions can have dramatic implications for the future of the Internet as a platform for global communication. The judicial decisions in this area are frequently issued ad hoc by judges who may be unfamiliar with the technology at issue and unaware of the potential ramifications of their rulings. The February 2010 conviction in Italy of three Google executives for violations of data protection laws sparked widespread controversy and criticism on this basis. This Comment argues that the Italian court's decision is a prominent example of the broader trend of inexpert judicial regulation of the Internet.

INTRODUCTION

On February 24, 2010, Italian Judge Oscar Magi convicted three Google executives for violations of Italian data protection laws after a video was uploaded to Google Video showing an autistic student being bullied by classmates.¹ Although the substance of the court's decision was not released until April 12, the announcement immediately ignited controversy and debate over the decision's ramifications for Internet regulation and freedom of expression.² Some commentators assailed

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¹ See Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at 108, available at http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf.

² See, e.g., Rachel Donadio, *Larger Threat Is Seen in Google Case*, N.Y. TIMES, Feb. 24, 2010, at A1, available at <https://www.nytimes.com/2010/02/25/technology/companies/25google.html?pagewanted=1&r=1>; Thomas Claburn, *Google Execs Convicted in Italy*, INFORMATIONWEEK (Feb. 24, 2010), http://www.informationweek.com/news/hardware/utility_ondemand/showArticle.jhtml?articleID=223100601; Paul McNamara, *Conviction of Google*

the verdict as a threat to commercial Internet companies and to the freedom of the World Wide Web.³ Others welcomed it as a vindication of an individual's right to privacy.⁴

Prosecutors originally charged four Google executives with defamation, and three with violating Italy's Personal Data Protection Code.⁵ When the decision was finally released, it revealed that the court had convicted the executives charged with violation of data protection law but had acquitted them all of the defamation charge.⁶ Surprisingly, the court imposed liability despite Italian regulations,⁷ European Union directives,⁸ and a contemporaneous judgment by the European Court of Justice,⁹ all of which exempted certain categories of information society service providers (ISSPs) from liability for user-generated content.¹⁰ The court's decision substantiates concerns that advances in technology vastly exceed the pace of formal Internet regulation.¹¹ The

Execs in Italy Sheer Madness, NETWORK WORLD (Feb. 24, 2010), <https://www.networkworld.com/news/2010/022410-buzzblog-google-execs-convicted.html>.

³ See, e.g., Charles Arthur, *Google Italy Ruling Threatens YouTube Pursuit of Profitability*, GUARDIAN (London) (Feb. 24, 2010), <http://www.guardian.co.uk/technology/2010/feb/24/google-italy-youtube-video-analysis>; Mike Melanson, *Italy Attacks Web Democracy with Google Convictions*, READWRITEWEB (Feb. 24, 2010), http://www.readwriteweb.com/archives/italy_at-tacks_basis_of_web_20_with_google_convicti.php.

⁴ See Marc Rotenberg, *Brandeis in Italy: The Privacy Issues in the Google Video Case*, HUFFINGTON POST (Mar. 1, 2010), http://www.huffingtonpost.com/marc-rotenberg/brandeis-in-italy-the-pri_b_481115.html.

⁵ Sentenza n. 1972/2010, at I-II; Giovanni Sartor & Mario Viola de Azevedo Cunha, *The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Contents*, 18 INT'L J.L. & INFO. TECH. 356, 357 (2010).

⁶ Sentenza n. 1972/2010, at I-II, 108; Sartor & Viola, *supra* note 5, at 358.

⁷ See Decreto Legislativo, 30 Giugno 2003, n. 196, in G.U. 29 Luglio 2003, n. 174 (It.) [Legislative Decree, June 30, 2003, n. 196, in G.U. July 29 2003]; Decreto Legislativo, 9 Aprile 2003, n. 70, in G.U. 14 Aprile 2003, n. 87 (It.) [Legislative Decree, Apr. 9, 2003, n. 70, in G.U. Apr. 14 2003, n. 87], art. 16.

⁸ See Council Directive 2000/31, art. 15, 2000 O.J. (L 178) 1 (EC).

⁹ See Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, para. 109 (2010) available at <http://eur-lex.europa.eu/en/index.htm>, (follow "Case-law" hyperlink under "Collections"; search "2010" under "Access by Year"; follow "March" hyperlink; select Case "C-236/08").

¹⁰ See Sartor & Viola, *supra* note 5, at 360-61; Philip Willan, *Milan Judge: The Internet Is Not a Lawless Prairie*, NETWORK WORLD (Apr. 12, 2010), <http://www.networkworld.com/news/2010/041210-milan-judge-the-internet-is.html>. "Information society service" is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." Council Directive 98/48, art. 1(1)-(2)(a), 1998 O.J. (L 217) 18 (EC).

¹¹ See, e.g., David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (arguing that the Internet undermines the link between geographical location and government power to regulate online behavior); Paul Krugman, *Facing the Music*, N.Y. TIMES, July 30, 2000, at WK15 (suggesting that technology

decision also raises serious questions about the data protection responsibilities of ISSPs and the viability of a truly “free” Internet in the international marketplace.¹²

Part I of this Comment provides background on the trial and the case against Google. Part II discusses existing European Union and Italian law pertaining to data protection and Internet privacy. It also explains a recent judgment by the European Court of Justice interpreting the responsibilities of ISSPs with regard to personal privacy. Part III analyzes the reasoning by which the court reconciled its decision to impose liability with seemingly contradictory precedent. This section also interprets the Google decision in the context of the broader international debate over Internet regulation; specifically, it focuses on the increasingly prominent role of courts in regulating the Internet. Finally, this Comment concludes that because the rate of technological advances far outpaces efforts at formal rulemaking, Internet regulation is occurring in courts around the world on an ad hoc basis, with significant ramifications for privacy rights, freedom of expression, and the future of the Internet itself.

I. BACKGROUND

On September 8, 2006, an Internet user named Giulia Lisa uploaded a three-minute video to Google Video depicting an autistic boy named Francesco Giovanni De Leon being harassed and insulted by a group of schoolmates in Turin, Italy.¹³ Over the next two months, the video was viewed more than five thousand times and became one of the most popular videos in Google Video’s “Funny” category.¹⁴ During that

is eliminating national boundaries and hindering government’s ability to collect tax revenue); Peter H. Lewis, *Limiting a Medium Without Boundaries*, N.Y. TIMES, Jan. 15, 1996, at D1 (noting that the “Internet has evolved faster than the laws and technical structures of the countries it touches”).

¹² See Adam Liptak, *When American and European Ideas of Privacy Collide*, N.Y. TIMES, Feb. 27, 2010, at WK1, available at <https://www.nytimes.com/2010/02/28/weekinreview/28liptak.html>; Danny O’Brien, *The Google Three: Italy’s Personal Attack on Intermediary Liability*, ELEC. FRONTIER FOUND. (Feb. 27, 2010), <https://www.eff.org/deeplinks/2010/02/google-three-italys-personal-attack-intermediary-0>; *Reflecting on Google in Italy (and Beyond): Implications for Online Privacy and Freedom of Expression in the Internet Age*, GLOBAL NETWORK INITIATIVE (Mar. 10, 2010), http://www.globalnetworkinitiative.org/issues/Google_Italy.php.

¹³ Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at II, 102, available at http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf; see Sartor & Viola, *supra* note 5, at 356–57. Lisa, the uploader, was not charged in this action. Sentenza, at 102.

¹⁴ Sartor & Viola, *supra* note 5, at 357.

time, users commented on the video and some may even have flagged it for inappropriate content.¹⁵ On November 6, 2006 Google received an email from a user complaining about the video and requesting its removal.¹⁶ Although there is evidence that Google employees undertook to remove it within twenty-four hours,¹⁷ the video was not actually removed until Italian police contacted Google and demanded that the video be taken down.¹⁸ A two-year investigation ensued, and in early November 2008 four Google executives—David Drummond, senior vice-president and chief legal officer; Peter Fleischer, global privacy counsel; Arvind Desikan, senior product marketing manager; and George Reyes, former chief financial officer—were charged in Italian court with defamation and violation of Italy’s Personal Data Protection Code.¹⁹

The defamation charge alleged that Google and its executives had contributed to the defamation of the student depicted in the video.²⁰ Prosecutors argued that by failing to exercise any positive control to prevent defamatory content from appearing on Google Video, Google had violated Article 40 of the Italian Criminal Code.²¹ The data protection charge alleged that Google illegally processed sensitive personal data for the purpose of obtaining a gain in violation of Section 167 of Italy’s Personal Data Protection Code.²² After a bench trial presided over by Judge Magi, all four executives were ultimately acquitted of the defamation charge, but three were convicted of violating provisions of the Personal Data Protection Code and sentenced to six-month suspended prison terms.²³

¹⁵ *Id.*

¹⁶ Sentenza n. 1972/2010, at 102; *Caso Google, Com’è Andata* [*The Google Case, What Happened*], *IL REPUBBLICA* (Mar. 1, 2010), <http://espresso.repubblica.it/dettaglio//2121920>.

¹⁷ See *Caso Google, Com’è Andata*, *supra* note 16.

¹⁸ See Sartor & Viola, *supra* note 5, at 357; *Caso Google, Com’è Andata*, *supra* note 16.

¹⁹ See Sartor & Viola, *supra* note 5, at 357.

²⁰ *Id.*

²¹ See *id.* at 359 (explaining that Article 40 imposes criminal liability for “failing to prevent an event which one has the legal obligation to prevent,” and that such failure “amounts to causing” that event).

²² *Id.* at 361–62.

²³ Sentenza n. 1972/2010 at 108; Sartor & Viola, *supra* note 5, at 358. Arvind Desikan was acquitted of all charges. Sentenza n. 1972/2010, at 108.

II. DISCUSSION

A. *The European Union Directives*

In the past fifteen years, the European Parliament has issued several Directives to member states of the European Union concerning Internet regulations. In particular, Directive 2000/31 (Liability Directive) promulgates regulations intended to ensure “a high level of Community legal integration in order to establish a real area without internal borders for information society services.”²⁴ Although the Directive provides that “the protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council . . . and Directive 97/66/EC of the European Parliament and of the Council,”²⁵ Articles 12–14 establish certain liability exemptions for information society services.²⁶ These Articles specifically exempt services that are limited to a “mere conduit” of data,²⁷ “caching,”²⁸ or “hosting.”²⁹ In addition, Article 15 prevents member states from imposing a general obligation on providers of these services to monitor information they transmit or store.³⁰ It also prevents member states from imposing a general obligation to actively investigate illegal activity.³¹

With regard to personal data, Directive 95/46 (Privacy Directive) articulates principles for the protection of “fundamental rights and freedoms” of natural persons—in particular the right to privacy—in the processing of personal data.³² The Privacy Directive also prohibits interference with the free flow of personal data between member states

²⁴ Council Directive 2000/31, para. 3, 2000 O.J. (L 178) 1 (EC).

²⁵ *Id.* para. 14.

²⁶ *See id.* arts. 12–14.

²⁷ *Id.* art. 12.

²⁸ *Id.* art. 13.

²⁹ *Id.* art. 14.

³⁰ Directive 2000/31, art. 15.

³¹ *Id.*

³² Council Directive 95/46, art. 1(1), 1995 O.J. (L 281) 31 (EC). “Personal data” is defined as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” *Id.* art. 2(a). “Processing” is defined as “any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.” *Id.* art. 2(b).

except under certain circumstances.³³ The overarching purpose is to coordinate regulation across member states, thereby ensuring uniform protection of individual rights, removing impediments to economic activity and law enforcement, and still leaving some latitude for states to tailor national data protection laws within a limited margin.³⁴

B. Italian Law

Italian Legislative Decree no. 196 of 30 June 2003, known as the Personal Data Protection Code (PDPC), regulates all personal data processing in Italy.³⁵ Unlike the Privacy Directive, which addresses concerns relating both to protection of personal data and to preserving the free flow of information between EU member states,³⁶ the purpose of the PDPC is to “ensure that personal data are processed by respecting data subjects’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity, and the right to personal data protection.”³⁷ Pursuant to the Privacy Directive, Section 153 establishes the Italian personal data protection supervisory authority charged with enforcing data protection rules: the Garante Per La Protezione Dei Dati Personali (Garante).³⁸ The PDPC requires the consent of the data subject before personal data may be processed.³⁹ Additionally, when the data consist of “sensitive” information, the written consent of the data subject is required, as well as written permission from the Garante.⁴⁰

³³ *Id.* art. 1(2).

³⁴ *See id.* paras.7–9.

³⁵ Sartor & Viola, *supra* note 5, at 362 n.15; *see* Decreto Legislativo, 30 Giugno 2003, n. 196, in G.U. 29 Luglio 2003, n. 174 (It.) [Legislative Decree, June 30, 2003, n. 196, in G.U. July 29 2003] § 2.

³⁶ Directive 95/46, art. 1.

³⁷ D.Lgs. n. 196/2003, § 2. Paragraph 2 of Section 2 notes that “[t]he processing of personal data shall be regulated by affording a high level of protection for the rights and protections referred to in paragraph 1 in compliance with the principles . . . by which data subjects can exercise such rights and data controllers can fulfill the relevant obligations.” *Id.* § 1(2).

³⁸ *Id.* §§ 153–154.

³⁹ *Id.* § 23. “Processing” and “personal data” are both defined in the PDPC largely the same as they are defined in Article 2 of Directive 95/46. *Compare id.* § 4(1)(a)–(b), *with* Directive 95/46, art. 2(a)–(b).

⁴⁰ D.Lgs. n. 196/2003, § 26(1). “Sensitive data” is defined in the PDPC as “personal data allowing the disclosure of racial or ethnic origin, religious, philosophical or other beliefs, political opinions, membership of parties, trade unions, associations or organizations of a religious, philosophical, political or trade-unionist character, as well as personal data disclosing health and sex life.” *Id.* § 4(1)(d). Moreover, Section 26(5) explicitly forbids the dissemination of health data. *Id.* § 26(5).

Section 167 of the PDPC—the provision under which the Google executives were sentenced—provides that persons who process personal data “with a view to gain for himself or another or with intent to cause harm to another”⁴¹ in breach of certain other provisions of the PDPC shall be punished by imprisonment for six to thirty-six months, depending on the nature of the violation.⁴² Thus, the Google executives were convicted of participating in the processing of De Leon’s sensitive personal data without his consent or that of his guardians, without the permission of the Garante, and with a view to profit.⁴³

Legislative Decree no. 70 of 9 April 2003 implemented the Liability Directive in Italy and governs certain aspects of electronic commerce.⁴⁴ Article 16 of the Decree exempts ISSPs from liability for user-generated content, provided they have no actual knowledge of illegal content or activity, and that upon learning of illegal content or activity the provider acts “immediately to remove or to disable access” to the content.⁴⁵ For ISSPs whose activities are limited to that of a “mere conduit,” “hosting,” or “caching,” Article 17 provides that there is no general duty to monitor content.⁴⁶

C. *The European Court of Justice*

Not long after the convictions were announced, but before the court’s decision was released, the European Court of Justice (ECJ) issued a judgment in a trademark infringement case in which it interpreted the exemption provisions of the Liability Directive as applied to Google’s AdWords marketing system.⁴⁷ The plaintiffs, purveyors of luxury goods, sued Google for contributory trademark infringement after AdWords advertisements for counterfeits of the plaintiffs’ products appeared online.⁴⁸ AdWords is a paid information referencing service which displays “sponsored links” alongside the natural search results of a user’s query in Google’s search engine.⁴⁹ AdWords was also used to

⁴¹ *Id.* § 167(1).

⁴² *See id.* § 167(1)–(2).

⁴³ Sartor & Viola, *supra* note 5, at 362.

⁴⁴ D.Lgs. n. 70/2003, art. 16; Sartor & Viola, *supra* note 5, at 360.

⁴⁵ *See* D.Lgs. n. 70/2003, art. 16; Sartor & Viola, *supra* note 5, at 360.

⁴⁶ D.Lgs. n. 70/2003, art. 17.

⁴⁷ Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, paras. 1, 29 (2010) available at <http://eur-lex.europa.eu/en/index.htm>, (follow “Case-law” hyperlink under “Collections”; search “2010” under “Access by Year”; follow “March” hyperlink; select Case “C-236/08”).

⁴⁸ *Id.* paras. 28–30.

⁴⁹ *Id.* paras. 23–24.

place advertising on Google Video.⁵⁰ Advertisers are able to reserve one or more keywords, and when a search is entered containing those keywords a link to the advertised website appears accompanied by a short commercial message.⁵¹ The process of choosing and reserving keywords, drafting the commercial message, and attaching a link, is performed exclusively by the advertiser; the advertisements are generated automatically by AdWords.⁵² Google charges a fee for this service based, among other factors, on the number of clicks the link receives and a maximum price per click selected by the advertiser.⁵³

The ECJ ruled that Article 14 of the Directive must be interpreted to mean that the exemption from liability applies to a service like AdWords if that service “has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.”⁵⁴ If it has not, the service “cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.”⁵⁵ The ECJ did not rule on whether Google played a sufficiently active role, nor if it failed to act expeditiously upon receiving information concerning the alleged infringement.⁵⁶ The ECJ did note, however, that it was necessary to determine whether Google was a neutral participant, and to examine Google’s role in selecting keywords and drafting the commercial message that accompanied the sponsored links.⁵⁷ The court also noted that the mere fact that Google charges a fee for AdWords, and that a relationship may exist between the appearance of an advertiser’s keyword and the terms in a user’s query, does not deprive Google of the exemption from liability provided for in the Liability Directive.⁵⁸

The ECJ’s judgment reflects the principle embodied in the Liability Directive that the free flow of information over the Internet should be protected.⁵⁹ Because of the risk to free expression and electronic commerce, the Liability Directive suggests—and the ECJ confirmed—

⁵⁰ Sentenza n. 1972/2010, at 17–18 n.30; see Sartor & Viola, *supra* note 5, at 363, 372–73.

⁵¹ Joined Cases C-236/08 to C-238/08, paras. 23–24.

⁵² *See id.* para. 27.

⁵³ *Id.* para. 25.

⁵⁴ *Id.* para. 120.

⁵⁵ *Id.*

⁵⁶ *See id.* para. 119.

⁵⁷ Joined Cases C-236/08 to C-238/08, paras. 114, 118.

⁵⁸ *Id.* paras. 116–117.

⁵⁹ *See* Directive 2000/31, paras. 1–3.

that liability for user-generated content should be limited to instances in which the ISSP has either participated in illegal activity, or failed to prevent or mitigate the damage caused by it.⁶⁰

III. ANALYSIS

Given the level of statutory protection afforded to ISSPs under both EU and Italian law, the conviction of the Google executives is surprising for several reasons. First, the court acknowledges that requiring ISSPs to monitor all user-generated content in order to prevent the upload of personal data would be impossible; indeed, the court states that ISSPs have no legal obligation to do so.⁶¹ Because the prohibition on legally required monitoring is derived from Article 15 of the Liability Directive, it is noteworthy that the court did not discuss the Directive or the corresponding Italian Legislative Decree that implemented the Liability Directive in Italy.⁶² This omission may be partially explained by the court's conclusion that Google Video is not a "mere conduit," a "host," or limited to "caching" services, but is instead an "active" content provider and as such is ineligible for the exemption.⁶³ Nevertheless, if it is impossible for Google to monitor all content, then imposing liability for failing to prevent uploading of illegal content would severely burden Google's operations in Italy.⁶⁴ After all, the decision implies that Italian law requires Google to do something that the court itself acknowledges is impossible.⁶⁵

Second, several aspects of the court's decision contradict the ECJ's judgment concerning Google's AdWords platform.⁶⁶ The judgment suggests that to lose the liability exemption provided in the Liability Directive, an ISSP's activity must cross a certain threshold of active par-

⁶⁰ See *id.* paras. 1–3, 5, 8–10; Joined Cases C-236/08 to C-238/08, para. 120.

⁶¹ Trib. Ordinario di Milano, 24 febbraio 2010, Sentenza n. 1972/2010 [Ordinary Tribunal of Milan, Feb. 24, 2010, Judgment n. 1972/2010] at 103, available at http://speciali.espresso.repubblica.it/pdf/Motivazioni_sentenza_Google.pdf; see Sartor & Viola, *supra* note 5, at 360.

⁶² See Sentenza n. 1972/2010, at 105; Sartor & Viola, *supra* note 5, at 360.

⁶³ See Sentenza n. 1972/2010, at 103; Sartor & Viola, *supra* note 5, at 370.

⁶⁴ Cf. Sartor & Viola, *supra* note 5, at 360, 370 (noting that court's approach "would have a broad impact on providers of platforms for user-generated contents," and that "they would be in principle liable for all content").

⁶⁵ See Sentenza n. 1972/2010, at 104; Sartor & Viola, *supra* note 5, at 360. *But see* Milton Mueller, *There's More to the Google-Italy Case Than Meets the Eye*, INTERNET GOVERNANCE PROJECT (Feb. 25, 2004, 4:31 PM), http://blog.internetgovernance.org/blog/_archives/2010/2/25/4466212.html (noting that Google has implemented monitoring for copyright violations through an automated recognition system).

⁶⁶ See Sartor & Viola, *supra* note 5, at 370–71.

participation in the processing of data.⁶⁷ That is, the ECJ construes the Article 14 exemption broadly, requiring that the ISSP's participation give it actual knowledge of or control over the content.⁶⁸ By contrast, the Italian court implicitly endorses the view that any activity that is more than mere storage and the simple facilitation of access is de facto active participation, regardless of whether there is knowledge or control.⁶⁹ Such a narrow construction of the liability exemption may reflect the court's failure to appreciate the complexity of current technology and modern web hosting models.⁷⁰ Although the ECJ's judgment preceded the release of the opinion by the Italian court, the ECJ case was decided after the conviction had been announced.⁷¹ Consequently, it is difficult to know whether, and to what extent, the ECJ's judgment played a role in Judge Magi's decision.

Nevertheless, the Italian court's decision also contradicts other aspects of the ECJ's ruling on ISSP exemption from liability.⁷² In classifying Google as an active content provider, the Italian court pointed to advertising revenues and actions taken by Google to encourage users to upload video, and reasoned that Google promoted the absence of content control as an inducement to attract users.⁷³ This reasoning conflicts with the ECJ's determination that liability depends on the relationship of the ISSP to the content, not on the commercial nature of the service, or even whether there is a clear link between keyword advertising and user queries.⁷⁴ By construing the liability exemption so

⁶⁷ See Joined Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, para. 120 (2010), available at <http://eur-lex.europa.eu/en/index.htm>, (follow "Case-law" hyperlink under "Collections"; search "2010" under "Access by Year"; follow "March" hyperlink; select Case "C-236/08").

⁶⁸ See *id.*

⁶⁹ See Sartor & Viola, *supra* note 5, at 369–71.

⁷⁰ See *id.* at 369–70. When the liability exemptions were drafted, web hosting was a far simpler enterprise than it is today with the advent of Web 2.0 and the proliferation of user-generated content. *Id.* at 369–70, 374–75; see also TIM O'REILLY & JOHN BATTELLE, *WEB SQUARED: WEB 2.0 FIVE YEARS ON 2*, available at http://assets.en.oreilly.com/1/event/28/web2009_websquared-whitepaper.pdf [hereinafter *Web 2.0 White Paper*] ("The Web is no longer a collection of static pages of HTML that describe something in the world. Increasingly, the Web is the world—everything and everyone in the world casts an 'information shadow,' an aura of data which . . . offers extraordinary opportunity and mind-bending implications.")

⁷¹ See Joined Cases C-236/08 to C-238/08 *passim*; Sentenza n. 1972/2010, at I.

⁷² See Sartor & Viola, *supra* note 5, at 371.

⁷³ See *id.* at 370–71.

⁷⁴ See Joined Cases C-236/08 to C-238/08, paras. 109, 116–117; Sartor & Viola, *supra* note 5, at 371. The ECJ explicitly provided that the "mere fact" that a service provided by the ISSP was in exchange for payment does not deprive the ISSP of the liability exemptions under the Directive. Joined Cases C-236/08 to C-238/08, para. 116.

narrowly, the Italian court excludes ISSPs like Google, YouTube, and Facebook, such that operating sites featuring user-generated content may be far more difficult or even impossible.⁷⁵

The Italian decision is emblematic of a broader trend in which courts have emerged as a source of Internet regulation.⁷⁶ Given the novel, transnational, and ever-evolving nature of the Web, questions of Internet governance are difficult and controversial; indeed, a major theme in the ongoing debate is whether it ought to be formally regulated at all.⁷⁷ Additionally, despite the Internet's growing ubiquity, questions of Internet governance are still embryonic in the popular consciousness.⁷⁸ Although many people have cultivated Second Lives online,⁷⁹ far fewer are likely to have considered what rules should govern the Internet "world."⁸⁰ Courts likely reflect this pattern: judges almost certainly use the Internet for personal purposes, and some even cite Internet sources in judicial opinions.⁸¹ But ordinary or even regular use of a thing does not an expert make.⁸²

Beyond the question of judicial familiarity with technology, however, the potential impact of governments or private interests seeking to

⁷⁵ See Donadio, *supra* note 2; Arthur, *supra* note 3; Claburn, *supra* note 2.

⁷⁶ See, e.g., *Reno v. ACLU*, 521 U.S. 844 *passim* (1997) (striking down Communications Decency Act on overbreadth challenge); *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617 *passim* (4th Cir. 2003) (resolving dispute over domain name ownership); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, *La Ligue Contre le Racisme et L'Antisemitisme (L.I.C.R.A.) & L'Union des Etudiants Juifs de France (U.E.J.F.) v. Yahoo! Inc. & Yahoo France*, available at http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20001221_yahoo_us_complaint.pdf *passim* (enjoining Yahoo from permitting sale of Nazi merchandise in France).

⁷⁷ See e.g., JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? 179–81 (2006) (noting that despite its transformative potential as a global communication tool, the Internet cannot function effectively without underlying law and territorial government); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 127–30 (2008) (describing the merits of a standard-based approach to internet governance as compared to a rule-based approach).

⁷⁸ See *The Consensus Machine*, ECONOMIST, June 8, 2000, available at <http://www.economist.com/node/335281>.

⁷⁹ See Nelson Linden, *Second Life Economy Stable in Q2 2010*, SECOND LIFE BLOGS, (Sept. 10, 2010, 9:28 AM), <http://blogs.secondlife.com/community/features/blog/2010/09/10/second-life-economy-stable-in-q2-2010> (showing an average of 805,000 monthly repeat logins in the second quarter of 2010).

⁸⁰ See *The Consensus Machine*, *supra* note 78.

⁸¹ See Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 418 n. 3, 428, 448–49 (2002).

⁸² See, e.g., Babbage, *Yes, The Justices Are Old*, ECONOMIST: SCI. & TECH. BLOG (Apr. 23, 2010, 13:26), http://www.economist.com/blogs/babbage/2010/04/judges_and_technology; Nadya Labi, *UK Terrorism-Trial Judge Gets Lesson on Internet*, WIRED (Aug. 21, 2007), http://www.wired.com/politics/onlinerights/magazine/15-09/ps_luddite.

control or limit the flow of information is another major area of concern.⁸³ Some commentators have suggested that the Italian decision may be an example of such influence; rumors abound that efforts to control new media enterprises like Google and YouTube are motivated by a desire to protect the business interests of media magnate and Italian Prime Minister Silvio Berlusconi.⁸⁴

The upshot is that this scenario results in inapt decisions, and it permits important questions of policy to be decided on an ad hoc basis by inexpert and possibly even biased judges.⁸⁵ Inevitably, this pattern makes the rule of law unpredictable, and as ISSPs are forced to bear the burden of this uncertainty, many will attempt to limit the risk of liability by avoiding certain markets.⁸⁶ Indeed, some Internet companies have declined to operate in up to half of the world's fifty largest economies out of concern for legal uncertainty.⁸⁷ If, as some say, the promise of the Internet lies in its ability to empower people by democratizing access to information and eliminating barriers to communication,⁸⁸ a legal environment that inhibits Internet development through unpredictability threatens to retard the realization of that promise.⁸⁹

CONCLUSION

The conviction of the Google executives is a recent example of a ruling that contradicts existing laws and precedent governing ISSPs and the Internet generally. It reveals serious limitations in the ability of the existing regulatory edifice to address the complex and novel questions presented by the evolution of the Internet. Given the dynamic

⁸³ See, e.g., GOLDSMITH & WU, *supra* note 77, at 184 (noting that the influence of the Chinese government is changing the nature of the Internet); ZITTRAIN, *supra* note 77, at 112–13 (describing the potential benefits non-democratic regimes might derive from exercising control over technology); Bruce Einhorn, *How China Controls the Internet*, BLOOMBERG BUSINESSWEEK (Jan. 13, 2006), http://www.businessweek.com/bwdaily/dnflash/jan2006/nf20060113_6735_db053.htm (arguing that by acceding to Chinese censorship requirements Internet companies facilitate political suppression).

⁸⁴ See, e.g., Donadio, *supra* note 2; Colleen Barry, *Berlusconi Moves to Impose Internet Regulation*, BUSINESS INSIDER (Jan. 22, 2010, 1:45 PM), <http://www.businessinsider.com/berlusconi-moves-to-impose-internet-regulation-2010-1>; Jeff Israely, *Berlusconi vs. Google: Will Italy Censor YouTube?*, TIME (Jan. 22, 2010), <http://www.time.com/time/world/article/0,8599,1955569,00.html>; Mueller, *supra* note 65.

⁸⁵ Cf. GOLDSMITH & WU, *supra* note 77, at 142 (noting that the judiciary can be “corrupt or incompetent, and can fail to follow the law or reflect the wishes of the people”).

⁸⁶ See *id.* at 144–45.

⁸⁷ See *id.*

⁸⁸ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 1–2, 10 (2006).

⁸⁹ See GOLDSMITH & WU, *supra* note 77, at 144–45.

and rapid nature of technological development, and the comparatively static pace of legislation, it is nearly certain that courts will continue to have a central role in regulating the Internet for the foreseeable future. The likelihood of similarly dissonant rulings from other courts threatens innovation and technological development, which, in turn, limits the fundamental promise of the Internet as a force for good.