

AVE MARIA INTERNATIONAL LAW JOURNAL

SYMPOSIUM: THE HOLY SEE: INTERNATIONAL PERSON AND SOVEREIGN

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- Foreign Sovereign Immunity and the Holy See *Robert John Araujo*
- The New *Delicta Graviora* Laws *Davide Cito*
- Le nuove norme sui *delicta graviora* *Davide Cito*
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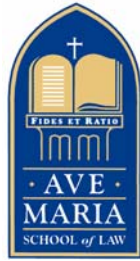
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Inaugural Issue

Volume 1
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Dedicated to Robert John Araujo, S.J.



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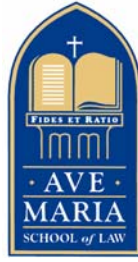
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LETTER FROM EUGENE R. MILHIZER

DEAN AND PRESIDENT,

AVE MARIA SCHOOL OF LAW

The inaugural edition of the *Ave Maria School of Law International Law Journal* is at once a unique and important contribution to the legal community, and the next milestone in our advancement as a law school. It is indeed a blessing that both of these ambitious objectives can be achieved in one event. I will briefly explain what I mean by this.

Law schools today produce about 650 law reviews and secondary publications of all sorts. Over 100 of these journals are devoted to international law and related topics. These statistics reflect that legal scholarship is definitely plentiful and no doubt diverse. None of these existing journals, however, are dedicated to publishing scholarship that considers international legal issues from the perspective of the natural law and the Catholic intellectual tradition. This will be the unique and singularly important contribution of our *International Law Journal*. As our Journal's founding documents explain, this publication will be "[e]ver mindful of international law's foundational concept of *jus cogens*, and [it] recognize[s] the Catholic Church's contribution to its development." In light of this historical reality, "the *Ave Maria International Law Journal* endeavors to continue the contribution of the Catholic Intellectual Tradition in the development of International Law."

Besides being unique, our Journal's focus on the natural law and the Catholic intellectual tradition is fundamental and indispensable. Natural law is the foundational source of all law. This includes international law, which is inseparable from Catholic tradition and its underlying Judeo-Christian viewpoint. Notable examples of the profound influence of Catholic thought in international realm include the Augustinian origins of the just war theory and the development of modern diplomacy. Looking to the future, Catholic thinking has much to contribute to the wide array of contemporary global issues such as nuclear proliferation, state-sponsored terrorism, the protection of women and children, immigration and freedom to travel, racial and religious hostility and discrimination, political self-

determination movements, and widespread financial crises. These and other international concerns cannot be adequately considered absent a proper appreciation of basic concepts such as human dignity and the common good, and without reference to the treasure trove of sophisticated Catholic thinking about specific global matters. In a post-modern age where might makes right, and where moral relativism and a conscious rejection of religious tradition hold sway, our *International Law Journal* will give voice to an authentic Catholic perspective so that it may engage in the debate and influence decisions and policy.

While these are ambitious goals, they are no grander than the vision that led to the creation of Ave Maria School of Law. Our law school's Mission Statement beautifully expresses this vision.

Ave Maria School of Law is a Catholic law school dedicated to educating lawyers with the finest professional skills. Inspired by Pope John Paul II's encyclical *Fides et Ratio*, Ave Maria School of Law offers a distinctive legal education – an education characterized by the harmony of faith and reason. Formed by outstanding professional training and a distinctive educational philosophy, Ave Maria's graduates are equipped for leading positions in law firms, corporate legal offices, the judiciary, and national, state, and local government.

Ave Maria School of Law offers an outstanding legal education in fidelity to the Catholic Faith, as expressed through Sacred Tradition, Sacred Scripture, and the teaching authority of the Church. University legal education began in Catholic universities, and Catholic law schools have been the bearers of a tradition that safeguards the dignity of the human person and the common good. Ave Maria School of Law affirms Catholic legal education's traditional emphasis on the only secure foundation for human freedom – the natural law written on the heart of every human being. We affirm the need for society to rediscover those human and moral truths that flow from the nature of the human person and that safeguard human freedom.

Since its founding little more than a decade ago, and consistent with this vision, Ave Maria School of Law has achieved an outstanding record of accomplishment. The school rapidly obtained full accreditation by the American Bar Association, built an outstanding faculty of teachers and scholars, and attracted a cadre of

pioneering students. In the law school's third year, with the publication of the first edition of the *Ave Maria Law Review* in 2003, we began our scholarly engagement with the American legal community about the American legal culture. The results have surpassed our most optimistic hopes, as our Law Review has quickly distinguished itself as a journal of excellence and consequence.

During the summer of 2009, the school accomplished a successful and unprecedented relocation from Ann Arbor, Michigan, to Naples, Florida. Today Ave Maria enjoys record enrollment, boasts several hundred alumni, is financially self-sufficient, and attracts unprecedented support from the broader community. Now in our eleventh year, and with the launching of the *International Law Journal*, our school has taken the next step in its institutional journey as we transcend American legal culture and offer the same, authentically Catholic perspective to matters of universal concern. In this regard, the *International Law Journal* represents a milestone in our school's maturation and advancement. I would also note that all of the students who will work on the Journal's inaugural issue have matriculated since our relocation to Florida.

In closing, I recall the words of Blessed Pope John Paul II, who said, "Down the centuries, the teaching of the Church, drawing upon the philosophical and theological reflection of many Christian thinkers, has made a significant contribution in directing international law to the common good of the whole human family." It is with great anticipation and humility that we will seek, through our *International Law Journal*, to join in this noble effort.

A handwritten signature in black ink, appearing to read "Earl Miller". The signature is fluid and cursive, with a long horizontal stroke at the end.

October 17, 2011

INTRODUCTION

This is the inaugural issue of the Ave Maria Law School's International Law Journal (ILJ). It is being published after faculty approval of the journal as an official publication of the Ave Maria Law School. As faculty advisors, we hope you enjoy this flagship volume devoted to the topic "The Holy See, Person and Sovereign" and dedicated to Robert Araujo, S.J., and his distinguished career as an international law scholar and diplomat.

Fr. Araujo was born and raised in Dighton, Massachusetts. Prior to entering the Society of Jesus in 1986, Fr. Araujo entered military service upon completion of law school. He was commissioned in the Field Artillery and served in the Quartermaster Corps. He practiced law from 1974 to 1986 and was admitted to the Bars of Massachusetts (1973), the District of Columbia (1975), the Seventh Circuit, and the District of Columbia Circuit.

He has held the following academic appointments: 1988-1993: Lecturer in Law, Boston College Law School, Newton, MA.; 1989-1990: Chamberlain Fellow, Columbia Law School, New York, NY; 1993: Adjunct Professor of Law, Georgetown University Law Center, Washington, D.C.; 1994-2005: Professor of Law, Gonzaga University, Spokane, WA. In the Fall of 1997, he was a Visiting Professor of Law, Saint Louis University School of Law, St. Louis, MO. During the academic year 2000-2001, he was a visiting fellow at the Stein Center for Ethics at Fordham University School of Law. He was a member of the Board of Members of Gonzaga University from 1998-2003. In 2005 he was assigned to the Pontifical Gregorian University in Rome where he was a *Professore Ordinario* (full professor). In the academic year 2008-09, he was a visiting professor at Boston College Law School.

In 2009 he was appointed as the inaugural holder of the John Courtney Murray, S.J. University Professorship at Loyola University Chicago. Fr. Araujo holds eight academic degrees that include the A.B. (1970) and J.D. (1973) from Georgetown University; the Ph.B. from St. Michael's Institute, Gonzaga University; the LL.M. and J.S.D. from Columbia University; the M.Div. and S.T.L. from the Weston Jesuit School of Theology; and, the B.C.L. from Oxford University. In addition to his teaching duties, he has served as an expert and legal advisor to the Holy See and frequently assists the Holy See's Permanent Observer to the United Nations. He has been active in pastoral ministry in the United States, England, and Rome.

The Ave Maria Law School's International Law Journal (ILJ) is dedicated to the research and publication of articles that address issues in international law. Ever mindful of the Catholic Church's contributions to the development of international law dependent as it is upon the natural law: the means by which every human person formulates legal principles.¹ The human person grasps intuitively by speculative reasoning, the first principle of the moral life: the principle of non-contradiction; and knows immediately by practical reasoning the first precept upon which all others are based: one must to good and avoid evil.² As Professor Araujo has emphasized in his scholarship, key to international law are the principles of "a common humanity" (the human person by nature endowed with intelligence and free will); "the common good" (the good of human life in communion); "solidarity" (the bonds between persons); "subsidiarity" (reasoned and effective decision-making at the lowest level of social and political life); and "justice" (to give to the other what is his or her due).³ The ILJ will underline the inseparable link between International Law and the Judeo-Christian viewpoint upon which it was drawn. This is quite evident in the scholarship of Robert Araujo on the Augustinian origins of the just war theory in 4th century with additional contributions to this topic and others of Thomas Aquinas in the 13th cent. to the work of Francisco de Vitoria and Francisco Suárez on the rights of the Indians in the 16th century⁴

1. Robert Araujo, S.J., *International Law Clients: The Wisdom of Natural Law*, 28 *FORDHAM URB. L. J.* 1751 (2000-2001) at 1753.

2. ST, I-II, q. 94, a.2 (See also: *Ibid.*, at 1753-1755; INTERNATIONAL THEOLOGICAL COMMISSION, *IN THE SEARCH OF A UNIVERSAL ETHIC: A NEW LOOK AT THE NATURAL LAW*, para. 29 (2009) (translation from French to English by Dr. Robert Fastiggi: See generally J. BUDZISZEWSKI, *NATURAL LAW FOR LAWYERS* 21 (ACW Press: 2006).

3. Robert Araujo, S.J., *International Law Clients: The Wisdom of Natural Law*, 28 *FORDHAM URB. L. J.* 1751 (2000-2001); See also Robert Araujo, S.J., *The Church and the International Legal Order: The Lens of "Pacem in Terris,"* 66/67 *NOTES ET DOCUMENTS*, Institute International Jacques Maritain, Nouvell Série, Janvier-Août 2003, pp. 11-29.

4.Cf. Robert Araujo, S.J., *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 *AVE MARIA LAW REVIEW* 159 (2003).

finally to the development of modern diplomacy with special contributions of Pope John Paul II in the 20th century.⁵

The ILJ seeks to elucidate and continue the contributions of the Catholic Intellectual Tradition with specific attention to contemporary issues. To achieve this goal this journal will:

1. Promote high quality legal scholarship in areas of International Law dealing with issues where Catholic thought can provide insight into meeting the needs of the international community. In doing so, the journal will serve as an outlet for scholars from around the world to publish articles on a variety of issues of International Law.
2. Further the development of the research, writing, and technical skills of its student editors and staff, through an integration of faculty and student projects. Through this, students and faculty will have an opportunity to work together, furthering the ability for students to work with faculty on a closer basis.
3. Create and maintain a dialogue with the international community on various issues in international law, faithfully representing the Catholic thought on those issues.

As faculty advisors, we hope you enjoy this and future volumes as we endeavour to provide a unique, authentically Catholic and natural law perspective regarding issues of international legal concern.

Professor Jane Adolphe
Professor Kevin Govern
Professor Daniel P. Ryan

5.Cf. Robert Araujo, S.J., *John Paul II—A Man of God and A Servant of Man: The Pope at the United Nations*, 5 AVE MARIA LAW REVIEW 367 (2007); cf. *John Paul II and the Rule of Law: Bringing Order to International Disorder*, 45 JOURNAL OF CATHOLIC LEGAL STUDIES 293 (2006).

DEDICATION TO ROBERT ARAUJO, S.J.

Archbishop Francis Chullikatt

With great pleasure I congratulate the Ave Maria School of Law, its faculty, staff, students, and the *Ave Maria International Law Journal* for their excellent work in presenting this symposium on the nature of the Holy See in the international order. This is a vital and timely topic, and I commend the editors of the *International Law Journal* in particular for the insight shown in choosing the topics addressed. This work and the contributions of the authors, well-chosen to investigate and address these topics of significance, will assist the reading public to understand better the role of the Holy See in the realm of international law and international relations. Moreover, these contributions will dispel myths that linger to this day about the Holy See and the Catholic Church. This is the work of the academy that serves beyond its immediate community: to study carefully and fully and to report accurately in its search for the truth that must include the Truth of God! To your reading public, I borrow from St. Augustine's Confessions and exhort: *tolle et lege*—take up and read!

In addition, I take this opportunity to commend the authors who have generously contributed of their intellect to make this volume possible. I am familiar with a number of them and their work, and I express my gratitude to each for their respective labors which have made this scholarly edition of the *Law Journal* a significant submission for the consideration of students, international lawyers, judges and interested citizens everywhere. We who follow the topics they have investigated are in their debt.

But there is one contributor in particular whom I wish to offer special thanks: the Reverend Father Robert John Araujo of the Society of Jesus. His name joins a list of other Jesuits such as Pietro Tacchi Venturi, Robert A. Graham, Pierre Blet, Bruno Schneider, Gustav Gundlach and John LaFarge, to mention a few, who have responded generously to the Holy See's requests in modern times for assistance in various dimensions of Papal diplomacy. Sometimes this assistance has necessitated great personal sacrifice. Like all sons of St. Ignatius, Fr. Araujo has responded to the call for help quietly and faithfully, not only without objection but brimming with enthusiasm.

Having completed his legal education in the early 1970s, he entered the military service of his country, the United States of America. After his military service, he continued his work in public service as an attorney for the Federal Government of the United States. In 1979, he left his public service and lent his skills to the private sector until he finally responded to

God's call to enter religious life in 1986. During his formation, he had the opportunity to expand on his practical skills by returning to the academy to obtain advanced degrees that would prepare him for new service both scholastic and ecclesiastical.

As a consequence of his academic, professional and religious formation, he was asked by his superiors to be available to assist the work of the Holy See at the United Nations with various matters dealing with public international law in 1996. In February of 1997, he commenced his service as an advisor to the Permanent Observer Mission of the Holy See in New York and provided assistance on the negotiations for the International Criminal Court. As a consequence of his generous service, he was asked on subsequent occasions to assist the Secretariat of State on a variety of other tasks demanding sensitivity and steadfastness. In some instances, Father would juggle his academic schedule to ensure that his students and the Holy See were simultaneously well served. On other occasions, it was necessary for him to take leaves of absence from his teaching and other duties in order to work full time for the Holy See. No request for his assistance has ever been rejected or gone unanswered. His only response would be: "How can I help?"

I had the occasion to come to know Father Araujo in 2001 when I was assigned to be the First Counselor of the Permanent Observer Mission of the Holy See to the United Nations. From that point to the present day, he has generously assisted me on many projects. I know he much prefers to avoid the spotlight of attention, an important attribute of those entrusted with the confidential and delicate matters that are the substance of international diplomacy and the practice of international law that goes along with this international service. Today I recognize him as a faithful son of the Church and a valued collaborator in her mission in the international order. As a priest, he displays compassion to those in need. With the UN delegates and diplomats, he exercised patience, discretion, cooperation, objective reason and resolve.

My prayer for him is that God will reward him for his many areas of service to the Church and the Society of Jesus, sustaining him in the pursuit of the common good for a long time to come! *Ad multos annos!*

DEDICATION TO ROBERT ARAUJO, S.J.

ROBERT ARAUJO – PRIEST AND DIPLOMAT

Rev. Carlos Fernando Díaz Paniagua †

I met Fr. Araujo in February 1997, during one of the preparatory meetings of the Rome Conference on the Establishment of the International Criminal Court. It was the first time Fr. Araujo took part in a diplomatic conference. He came full of energy, fresh from his work as a Professor of Law, convinced that the Truth (with a capital T) and sound legal reasoning would win the day.

What a disappointment it was! At the time, the *Women's Caucus for Gender Justice*, a transnational coalition of feminist NGOs, was instrumentalizing the suffering of Bosnian Women to get a back door approval for an “international right to abortion”. They proposed a new crime against humanity: *Enforced Pregnancy*, arguing that not permitting a woman to have an abortion constituted a grave violation of her rights.

Fr. Araujo took pains to explain to them that no international instrument had ever recognized such crime, that it was unknown in domestic law, that there was no supporting jurisprudence, and that women would be better protected if international criminal law focused instead on the already recognized crimes of rape and detention, which are easier to prove in court. But it was of no avail. They had an Agenda. He tried to explain to them that, if such a crime were created, countries that forbid abortion would find themselves in an impossible situation and even parents that prevented their minor children from having an abortion could be prosecuted. But that was precisely what the *Women's Caucus for Gender Justice* wanted to attain.

Father Araujo then presented his sound arguments to the delegations, but many diplomats were already committed to the agenda of the *Women's Gender Caucus*. It was only with great difficulty that Fr. Araujo succeeded in having objections of the Holy See to the proposed language noted in the negotiating document. In the end, the ultimate definition of *Enforced Pregnancy* contained in the Rome Statute, although not entirely satisfactory, takes into account most of Fr. Araujo's objections and it cannot be used to promote the legalization of abortion.

† Ph.D. (CUNY), LL.M. (Cambridge), *Lic. en Derecho* (Universidad de Costa Rica), Th.B. (Pontifical Gregorian University), Legal Advisor to the Permanent Mission of Costa Rica to the United Nations from 1994 to 2006. Currently a priest of the Dioceses of Tilarán-Liberia (Costa Rica) collaborating with the Secretariat of State of the Holy See.

In the following years, Fr. Araujo became a fine diplomat. He paired his love for the Truth and legal argument with good networking abilities and a fine sense of procedural opportunities. He lost his innocence; he learnt that you cannot always trust your counterparts, that you have to also be on your guard, watch, listen and anticipate what their next move will be.

More importantly, though, Fr. Araujo never stopped being a priest. When I met Fr. Araujo, I was a young diplomat for my country, Costa Rica, dealing with legal questions, such as those pertaining to the creation of the International Criminal Court, and political issues since Costa Rica was then a Non-Permanent Member of the UN Security Council. I became his friend during those negotiations and I used to share with him my delusions about the Security Council's inability to live up to its responsibilities. How could we, as diplomats, be satisfied with adopting resolutions, when massacres were ongoing in the former Zaire and in Sierra Leone?

Latter, we worked together for five years pushing for the adoption of the Declaration to ban all forms of Human Cloning, one of the few pro-life documents agreed to by States at the United Nations. At the same time, our friendship deepened and he began to guide my spiritual life. But perhaps even more importantly, he was a real witness of dedication, devotion and holiness of life. In 2006, thanks to his guidance, prayers, good example and the witness of other priests linked to the Holy See's Observer Mission to the UN, I left the Costa Rican Foreign Service and entered the seminary, and now, I am a priest.

I'm overjoyed for the fact that this inaugural issue of the Ave Maria International Law Journal is dedicated to him and I look forward to the day when I will stand next to him before the altar of Our Lord.

DEDICATION TO ROBERT ARAUJO, S.J.

ROBERT ARAUJO – INTERNATIONAL LEGAL SCHOLAR AND MENTOR

Jane Adolphe[†]

Over the course of his academic career spanning twenty-two years or so, Robert John Araujo, S.J. has authored numerous law review articles and book chapters on various topics within the area of public international law. His most recent contributions are a series of books that he co-authored with the late Fr. John A. Lucal, S.J. on papal diplomacy and international organizations.¹

But, perhaps Robert Araujo's most substantial contribution to public international law is his careful study of "The International Personality and Sovereignty of the Holy See."² He wrote this article during a vigorous campaign against the Holy See initiated by "Catholics for a Free Choice", now "Catholics for Choice" (CFC). This non-governmental organization (NGO) has presented itself as promoting "*an expression of Catholicism . . . [that] disagrees with the dictates of the Vatican on matters related to sex, marriage, family life and motherhood.*"³ Through its unsuccessful "See Change Campaign"⁴ it has sought to influence member States to modify the status of the Holy See at the United Nations from a unique sovereign and

[†] Associate Professor of Law, Ave Maria School of Law, Naples, Florida. The author holds a Bachelor of Arts Degree (B.A.) from the University of Calgary in Calgary, Alberta, Canada; Common Law and Civil Law Degrees (LL.B/B.C.L.) from McGill University in Montreal, Quebec, Canada; and a License and Doctorate in Canon Law (J.C.L./J.C.D.) from the *Pontificia Università della Santa Croce* in Rome, Italy. Adolphe is currently based in Rome working for the Secretariat of State of the Holy See in Rome, Italy. This dedication is written in her capacity as Associate Professor of Ave Maria School of Law.

1. ROBERT JOHN ARAUJO, S.J. JOHN LUCAL, S.J., *PAPAL DIPLOMACY AND INTERNATIONAL ORGANIZATIONS: THE QUEST FOR PEACE AT THE UNITED NATIONS—FROM PIUS XII TO PAUL VI*, St. Joseph's University Press: 2010; ROBERT JOHN ARAUJO, S.J. JOHN LUCAL, S.J. *PAPAL DIPLOMACY AND INTERNATIONAL ORGANIZATIONS: THE QUEST FOR PEACE AT THE LEAGUE OF NATIONS*, Sapientia Press: 2004.

2. Robert John Araujo, S.J., *The International Personality and Sovereignty of the Holy See*, 50 *CATH. U. L. REV.* 291 (2001), also in book form.

3. Catholics for Choice, "About Our Work" available at <http://www.catholicsforchoice.org/about/ourwork/default.asp> (last accessed October 7, 2011).

4. Catholics for Choice, "See Change Campaign" available at <http://www.seechange.org/> (last accessed October 7, 2011).

subject of international law, enjoying and exercising international personality to that of a mere religious NGO or lobbying group. According to CFC, such a change was needed to combat “*The Vatican’s attempts to obstruct general agreement on matters relating to reproductive health and choices*” within the *United Nations system*.⁵ This claim, of course, is tainted as there is no common understanding of the meaning of “reproductive health” and choices that may be associated with this nebulous phrase. The CFC had hoped to capitalize on the fact that the nature and identity of the Holy See was often misunderstood because it did not neatly fall within traditional explanations of statehood, international personality and sovereignty.

In response, Robert Araujo has carefully described the different entities that one has to consider (the Holy See, the Pope, the Vatican City State) and the relationships between and among them and the Church as a whole. The term “see” derives from “*sedes*,” a Latin word that refers to the chair or seat of Saint Peter, which all subsequent Popes occupy, as successors of Peter. Within canon law, “Holy See” is defined, in the narrow sense, as the Pope or in a broader sense, as the Pope and the Roman Curia. Since 1929 and the finalization of the Lateran Treaty, the Holy See has exercised sovereignty over the small territory of Vatican City State (VCS) to ensure the Holy See’s absolute independence and sovereignty for the accomplishment of its essentially religious and moral mission, universal in scope. Accordingly, the Holy See is not synonymous with Vatican City State, nor Rome or the Vatican. Robert Araujo ultimately concludes that the Holy See is not simply a religion but a subject of international law possessing international personality and exercising sovereignty within the international community.

He fleshes out his thesis with reference to the historical background of the Holy See in international affairs and diplomatic relations - presently with 179 States and participation in a wide assortment of regional and international organizations. Commencing with scripture and the origins of the apostolic mission terminating with the contemporary era, he considers the nature and longevity of the Holy See’s participation as a sovereign with international personality. On the question of international personality and sovereignty, he carefully makes his case that the Holy See successfully meets the relevant criteria, although its statehood-like status is unique. He then demonstrates how the sovereignty and personality of the Holy See have been treated in state practice, custom and treaty law. In specific regard to treaties,

5. Frances Kissling, “See Change Campaign gathers Support; Urks Vatican” in CHOICES, Vol. 18, no. 1, available on the Catholics for Choice website at <http://www.catholicsforchoice.org/news/op-eds/2000/2000choicesschangecampaigngathersupport.asp> (last accessed October 7, 2011).

the Holy See has negotiated and entered into both bilateral and multilateral conventions on a number of topics as well as concordats, which specifically address Church-State issues. Treaty law, in turn, has directly addressed the status of the Holy See. But he does not finish there. He turns to a study of the Holy See's participation in matters regarding the United Nations from its very beginnings and then as a Permanent Observer Status since 1964. He then concludes by demolishing each and every argument put forth by CFC through its "See Change Campaign."

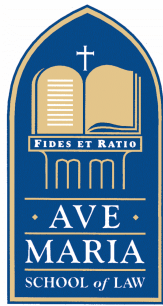
In this inaugural issue, he has agreed to submit another version of this powerful article to include, among other things, the 2004 Resolution of the General Assembly on the "Participation of the Holy See in the work of the United Nations."⁶ This important article, "The Holy See: International Person and Sovereign," provides an important backdrop to his second submission on "Foreign Sovereign Immunity and the Holy See," wherein he explores the legal position of the Holy See concerning law suits filed by plaintiffs against Catholic Institutions at the local level, namely in the United States. In such cases, the plaintiffs are seeking remedies for sexual abuse alleged to have been committed by those working for Catholic institutions, including clerics, religious, and laity. Certainly, the sexual abuse of children is abhorrent, especially in such circumstances, but the legal issue is whether the Holy See, as an international sovereign, should be rendered a defendant in such proceedings in accordance with the Foreign Sovereign Immunities Act (FSIA), the only legal mechanism by which a foreign sovereign may be sued in American courts. In arguing that the tort exception under the FSIA cannot be applied to the Holy See, he once again must wade into issues concerning the International Personality and Sovereignty of the Holy See. In addition, he must address other questions pertaining to the relationship between Catholic bishops and priests in the United States, and the Holy See and whether the same are employees or officials of the Holy See – something that can only be answered with reference to the internal legal system of the Catholic Church. Needless to say, Robert Araujo has again taken on a monumental task and has rightly pointed out that the question has international ramifications: if the Holy See's "sovereign immunity is to be challenged, the precedent will raise questions about the limitations of other sovereigns and their immunity in tribunals around the world."

In closing, few law professors would disagree that a law review article entails perseverance and hard work, however, anyone familiar with the

6. General Assembly Resolution on the Participation of the Holy See in the work of the United Nations, A/RES/58/314 16 July 2004.

writings of Robert Araujo would recognize that his articles are real labour of love, with a greater purpose than simply educating judges.

He shall see the fruit of the travail of his soul and shall be satisfied.
(Isaiah 53)



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THE HOLY SEE—INTERNATIONAL PERSON AND SOVEREIGN¹

Robert John Araujo, S.J.

INTRODUCTION

The Holy See, often in international law circles erroneously referred to as the Vatican, is a unique sovereign that enjoys and exercises international personality. Within the ambit of international order, the concepts of statehood, international personality, and sovereignty are generally well understood. Each of these subjects is characterized by essential components as defined by international law. For example, the essential criterion for the constitutive elements of statehood are often considered to be: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.² However, it would seem that the critical component includes the existence of a government. The other three elements follow this element and fall into place. In addition, the matter of what constitutes a subject under international law was also examined and debated.³ Finally, the matter of sovereignty not only involves the authority of the government, but the authority of the people in the exercise of their self-determination.⁴ Despite this variety regarding particular issues, there is general agreement on the definition of a State, what constitutes international personality and the elements of sovereignty.

This article concerns the Holy See, and with this subject traditional categories of sovereignty and personality falter. When the Holy See is the subject of discussion, a variety of perspectives concerning its sovereignty and personality emerge.⁵ One common concern involves the person and status of

1. This article is a revision and update of an essay previously published under the title *The International Personality and Sovereignty of the Holy See*, 50 *Cath. U. L. Rev.* 291 (2001).

2. See Article 1, Convention on Rights and Duties of States (Inter-American), Dec. 26, 1933 [Montevideo Convention of 1933]; see also Restatement (THIRD) of the Law, Foreign Relations, § 201 (1986).

3. See discussion *infra* Part III.

4. See, e.g., ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995).

5. See generally, JACQUES MARITAIN, *THE THINGS THAT ARE NOT CEASAR'S* (J.F. Scanlan, trans., French ed.) (1930); CARL CONRAD ECKHARDT, *THE PAPACY AND WORLD AFFAIRS* (1937); JOSEPH BERNHART, *THE VATICAN AS A WORLD POWER* (George N. Shuster, trans.) (1939); CHARLES PICHON, *THE VATICAN AND ITS ROLE IN WORLD AFFAIRS* (Jean Misrahi, trans.) (1950); ROBERT A. GRAHAM, S.J.,

the Pope. Another issue includes the position of the Vatican City State. A third issue may entail a synthesis of the two, i.e., their relationship to one another and to the Church as a whole. The Holy See, the Pope, and the Vatican City State do not conveniently fall within traditional explanations of statehood, international personality, or sovereignty. In fact, the Holy See is a unique entity, which needs further explanation.⁶

The term “Holy See” is frequently used in the worlds of international law and international relations. The word “see” derives from the Latin word *sedes*⁷ and refers to the seat or chair of Saint Peter. All subsequent Popes, who are successors of Peter, occupy this seat or chair. The Holy See also refers to the residence of the Pope along with the Roman Curia and the central administration of the Catholic Church. This term, however, is not synonymous with Rome, the Vatican, or the Vatican City State.⁸ Its import, in essence transcends the restraint of geographic location. Consequently, deciphering the nature of the Holy See’s personality and the sovereignty it

VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE (1959); HYGINUS EUGENE CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER* (1976); J. DEREK HOLMES, *THE PAPACY IN THE MODERN WORLD* (1981); ERIC O. HANSON, *THE CATHOLIC CHURCH IN WORLD POLITICS* (1987); *see also* CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES (1954) (Sidney Z. Ehler, LL.D. & John B. Morralli, M.A., PH.D trans. & eds.) [hereinafter CHURCH AND STATE] (containing an anthology of documents and commentary on the general themes of this essay). A work not yet published in English that contains significant insight on the general topic is: RICHARD ARÈS, S.J., *L’EGLISE CATHOLIQUE ET L’ORGANISATION DE LA SOCIÉTÉ INTERNATIONALE CONTEMPORAINE* (1949).

6. 1917 Code c.7. states that: “[i]n the Code, by the term ‘Holy’ or ‘Apostolic See’ is meant not only the Roman Pontiff but also, unless a different meaning appears from the very nature of the matter or the context itself, the congregations, tribunals and offices which the same Roman Pontiff is accustomed to make use of in affairs concerning the Church as a whole.”

1983 Code c.361 now states:

In this Code the term “Apostolic See” or “Holy See” applies not only to the Roman Pontiff, but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutions of the Roman Curia, unless the nature of the matter or the context of the words makes the contrary evident.

1983 Code c.361: Canon 100 of the 1917 Code refined the notion of the Holy See by distinguishing between itself and the Church—the two are distinct juridical entities with their own separate juridical personalities. Nonetheless, these two moral persons are united by the Roman Pontiff who heads each respectively. Canon 113, § 1 of the 1983 Code states that “The Catholic Church and the Apostolic See have the nature of a moral person by the divine law itself.” Both of these entities, the Catholic Church and the Apostolic (Holy) See constitute distinct *juridical* persons.

7. The original Latin term *Sancta Sedes* is therefore translated as “Holy See.” *See* CASSELL’S LATIN DICTIONARY 533, 543 (5th ed. 1968).

8. *See* C.G. Fenwick, *The New City of the Vatican*, 23 AM. J. INT’L L. 371 (1929) (distinguishing between the Holy See and the Vatican City State); *see also* Gordon Ireland, *The State of the City of the Vatican*, 27 AM. J. INT’L L. 271 (1933).

exercises illustrates that the Holy See is a unique entity in both regards. It does not, and cannot, fit comfortably within the criteria of State sovereignty and personality.

The unique nature of the Holy See often causes it to be misunderstood. In some instances, the desire to simplify the Holy See's essential characteristics shows that it is simply a religion and not an international personality able to exercise sovereignty. However, this conclusion is flawed and erroneous. This paper attempts to explain why this position inaccurately characterizes the Holy See's nature and identity. This paper also seeks to demonstrate why the Holy See is a subject of international law, which possesses a recognized personality and exercises sovereignty in the law of nations.

Part I provides a brief historical background of the evolution of the papacy's sovereignty and the Holy See's participation in international affairs and diplomatic relations. Part II examines the general principles of international law that define the concepts of international personality, sovereignty, and how the Holy See's circumstances fall within the relevant criteria. Next, Part III assesses the manner in which state practice, state custom, and treaty law regard the Holy See as a unique subject of international law. Finally, Part IV explains the status of the Holy See at the United Nations.

I. HISTORICAL BACKGROUND

The quotations cited in the beginning of this essay set the stage for the historical background needed to understand the role of the Holy See in world affairs.⁹ History plays an essential role in comprehending the participation and evolution of the Holy See in international affairs and relations. The first quotation comes from St. Matthew's Gospel, wherein Jesus commissioned his apostles—the predecessors of the college of bishops—to continue His work in the world by bringing the Good News to those they met.¹⁰ The

9. See *THE CATHOLIC CHURCH IN WORLD AFFAIRS*, (Waldemar Gurian & M.A. Fitzsimons eds.) (1954) (providing an overview of essays focusing on the Twentieth Century).

10. Francois Guizot has offered one explanation of this exhortation:

Christianity considered all men, all peoples as bound together by other bonds than force, by bonds independent of the diversity of territories and governments While working to *convert* all nations, Christianity wished also to *unite* them, and to introduce into their relations principles of justice and peace, of law and mutual duties. It was in the name of the Faith, and of the Christian law that the Law of Nations was born in Christendom.

second quotation points to St. Mark's counterpart passage found at the end of his Gospel, which emphasizes the universal mission of teaching God's commandments throughout the world.¹¹ The third quotation comes from Jesus's commission of Peter as His principal follower and successor, wherein Peter receives the keys of the Kingdom of Heaven [a symbol of the papacy], and the conferral of Peter's primacy among the college of apostles.¹²

These ancient exhortations represent the origins of the apostolic mission in the undertakings of the Holy See and the Roman Pontiff, which continue to this day. From the beginning of the Church's history, the Holy See and the Papacy actively participated in international relations.¹³ Although categories may distinguish an ongoing work that began almost two thousand years ago, these categories provide some structure in the evolution of the Holy See's work. The work may be categorized as follows: (1) the early years of persecution and the Christianization of Rome; (2) the medieval era; (3) the period of European exploration and colonization; (4) the era of the Reformation, Post-Reformation, the Enlightenment, and Revolution; (5) the Italian Unification and the loss of the Papal States; and (6) the Contemporary Era.

A. *The Early Years of Persecution and the Christianization of Rome*

In its early years, the Christian Church received little recognition from the Roman Empire or local authorities. That trend began to change, however, during the Valerian persecutions of the Christians; the Church was no longer ignored. Once the Christian community became the target of persecution, Christians, particularly the successors of Peter, found it difficult to engage in relations that would confer an international personality recognized by sovereign powers. The conversion of the Emperor Constantine caused the Church's presence in the world to change for the better.¹⁴

John K. Cartwright, *Contributions of the Papacy to International Peace*, 8 CATH. HIST. REV. 157, 159 (1928) (quoting Francois Guizot).

11. See CATECHISM OF THE CATHOLIC CHURCH, § 869 (explaining that Peter, the remaining apostles, and their successors, the Pope and bishops, have continued to preach this message).

12. See *id.* § 553 (noting that Peter's succession included the authority to govern the Church, to absolve sins, to pronounce doctrine, and to exercise discipline within the Church).

13. See generally Philip Hughes, *The International Action of the Papacy*, THE TABLET, Nov. 2, 1940 at 345-346; Nov. 9, 1940 at 365-366; Nov. 16, 1940 at 386-387; and Nov. 23, 1940 at 405-407.

14. See Francis X. Murphy, *Vatican Politics: The Metapolitique of the Papacy*, 19 CASE W. RES. J. INT'L L. 375 (1987) (reviewing the Church's history in the realm of international politics and relations); see also JOSEPH LECLER, S.J., THE TWO SOVEREIGNTIES: A STUDY OF THE RELATIONSHIP BETWEEN

The rise of the Church's role became evident through the convocation of a series of important councils that addressed issues about which the universal Church expressed concern.¹⁵ These councils were not simply concerned with spiritual and Church issues. They also considered the Church's relationship with persons and entities that exercised temporal sovereign power. In this regard, Pope Leo the Great sent emissaries to both Church councils and to the courts of temporal sovereigns.¹⁶ These early legations did not represent the purely spiritual sovereignty of the Holy See, but a temporal sovereignty whose voice would be heard throughout the world's political communities.¹⁷ As the secular authority of the Empire reinforced the Church's position, the Church, the papacy, and the Holy See began to acquire territory. Although the legend of the Donation of Constantine has proven to be false,¹⁸ it is evident that the Holy See began to acquire territory on the Italian peninsula during the reigns of Pepin and Charlemagne.¹⁹ These territories eventually enabled the Holy See to resemble other temporal powers with few interruptions from the Eighth Century until 1870.²⁰ These territories never proved to be essential in preserving the sovereignty of universal spiritual leadership. During this early period of territorial possession, one of the Holy See's major preoccupations with the temporal world comprised protecting these territories and the rest of Christendom from the invasions of non-Christian intruders from the North and East.²¹

CHURCH AND STATE (1952) (providing a more detailed, historical perspective about the transformation of the Christian church).

15. See generally THE CATHOLIC ENCYCLOPEDIA, General Councils <http://newadvent.org/cathen/04423f.htm> (last visited Mar. 30, 2000).

16. See *id.*; J.N.D. KELLY, OXFORD DICTIONARY OF POPES 44 (1986). Pope Leo the Great sent an emissary to the Council of Calcedon in 453. See *id.* He also sent Julian of Cos as his legate to the Emperor in Constantinople to serve as the Pope's representative at court.

17. See CARDINALE, *supra* note 5, at 34-35. To this day, the Holy See continues to be in, but not of, the political world. It does so principally through Papal diplomacy, serving as an arbitrator or mediator in disputes between other sovereigns; entering into treaties, concordats, or other international agreements; and, participating in International Organizations. See *id.*

18. See CHURCH AND STATE, *supra* note 5, at 15-22 (discussing the "Donation of Constantine" along with a reproduction of the text).

19. See L. DUCHESNE, THE BEGINNINGS OF THE TEMPORAL SOVEREIGNTY OF THE POPES: A.D. 754-1073 (1908).

20. See discussion *infra* Part II.E.

21. See THOMAS F. X. NOBLE, THE REPUBLIC OF ST. PETER: THE BIRTH OF THE PAPAL STATE 680-825 (1984) at 9 (noting that "[f]rom the time of Pope Gregory I [590-604] the Church had become de facto the key power in Italy"). Noble continues: "Gregory I accelerated and expanded the scope of previously secular business handled by the Church as no other pope in history. He did this not as a grasping politician but instead as a pastor with a profound sense of his responsibilities." *Id.* at 10 (emphasis added).

B. *The Medieval Era*

The arrival of the Eleventh Century and the Reforms of Pope Gregory VII transformed the exercise of papal power and the authority of the Holy See.²² While the position of temporal sovereigns, including the Holy Roman Emperor, waxed and waned, the power of the Pope grew and stabilized with few exceptions.²³ At the dawn of the Second Millennium, Europe essentially functioned as a Christian realm united in faith under the Papal tiara.²⁴

The Holy See wielded considerable influence throughout this period because Western Europe remained largely a Catholic world under the spiritual and temporal authority of the popes until the end of the Fifteenth Century.²⁵ Although he would ultimately prevail over Pope Gregory, Emperor Henry IV succumbed to and dealt with papal authority for some years.²⁶ For example, in October of 1076, Henry declared his obedience to the Holy See before God, Pope, and empire.²⁷ While the temporal authorities expected him to bend to the wishes of temporal authorities, Boniface VIII advanced the formidable papal European presence and papal primacy against King Phillip the Fair of France in 1302.²⁸ A further illustration of the Holy

22. See generally CHURCH AND STATE, *supra* note 5, at 23-37; see also WALTER ULLMANN, THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES: A STUDY IN THE IDEOLOGICAL RELATION OF CLERICAL TO LAY POWER (1955); R. F. WRIGHT, MEDIEVAL INTERNATIONALISM: THE CONTRIBUTION OF THE MEDIEVAL CHURCH TO INTERNATIONAL LAW AND PEACE (1930).

23. See I. S. ROBINSON, THE PAPACY 1073-1198: CONTINUITY AND INNOVATION (1990) (providing a detailed introduction to this growth of the Papacy's influence in the western world during this era).

24. See *id.*

25. Philip Hughes, *The International Action of the Papacy—Introductory: Before the Reformation*, THE TABLET, November 2, 1940, at 346. For a useful understanding of the relationship between the exercise of Papal and temporal authority during the Medieval era, see Walter Ullmann, *The Development of the Medieval Idea of Sovereignty*, ENG. HIST. REV., 1 January 1949, no. CCL.

26. See BRIAN TIERNEY, THE CRISIS OF CHURCH AND STATE 53-73 (1980) (discussing the dispute between Gregory VII and Henry IV in which the latter prevailed).

27. As King Henry stated:

Being admonished to do so by the counsel of our faithful ones, I promise to observe in all things the obedience due to the apostolic see and to thee, Pope Gregory, and will take care devoutly to correct and render satisfaction for anything whereby a derogation to the honour of that same see, or to shine, has arisen through us.

(The Avalon Project at the Yale Law School, *Documents Relating to the War of the Investitures: Convention of Oppenheim; October 1076* <http://www.yale.edu/lawweb/avalon/medieval/inv07.htm> (last visited Oct. 16, 2000).

28. See Papal Bull *Unam Sanctam*, promulgated on Nov. 18, 1302, available at <http://www.newadvent.org/docs/bo08us.htm> (last visited Oct. 12, 2000) in which the Pope asserted papal primacy over temporal primacy in the “two swords” doctrine. Boniface stated that: “We are informed by the texts of the gospels that in this Church and in its power are two swords; namely, the spiritual and the

See's position emerges from events in 1155 when Pope Adrian IV issued a papal bull that empowered King Henry II to conquer Ireland.²⁹

The Holy See also began to demonstrate more clearly that its international mission, regardless of territorial holdings, was not a duplication of those held by temporal leaders. Rather, its mission should establish a moral voice in the realm of international relations. The Holy See began to express to a skeptical world a sense of mutually shared rights and dignities for every person regardless of race, ethnicity, or religion. For example, while anti-Semitism surfaced in Western Europe, Pope Gregory X, in 1272, exhorted the Christian world to acknowledge the rights of self-determination and existence of the Jewish people.³⁰ The Holy See made its moral voice known in an area that would later be known as international human rights by directing "faithful Christians" to protect Jews from persecution and forced conversion.³¹ The Holy See, through this declaration, began its efforts to

temporal." *Id.* "Certainly the one who denies that the temporal sword is in the power of Peter has not listened well to the word of the Lord. . . ." *Id.* The Pope continued by saying:

Both [swords], therefore, are in the power of the Church, that is to say, the spiritual and the material sword, but the former is to be administered *for* the Church but the latter *by* the Church; the former in the hands of the priest; the latter by the hands of kings and soldiers, but at the will and sufferance of the priest.

Id.; see also CHURCH AND STATE, *supra* note 5, at 3-37 (explaining the "two swords" theory in an historical context); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (1959) (analyzing the relationship between the spiritual and temporal powers). See also Pope Leo XIII's, *Immortale Dei*, [Encyclical Letter on the Christian Constitution of States] ¶ 11-13 (1885) where the pope addresses, in a more contemporary light, the Church's powers and sovereignties.

29. See Pope Adrian IV, *The Bull of Pope Adrian IV Empowering Henry II to Conquer Ireland. A.D. 1155*, The Avalon Project, Yale Law School <http://www.yale.edu/lawweb/avalon/medieval/bullad.htm> (last visited Sept. 25, 1999).

30. Pope Gregory X, *Papal Protection of the Jews* promulgated on Oct. 7, 1272, The Jewish Student Online Resource Center, http://www.us-israel.org/jsource/anti-semitis/Papal_Protection_of_the_Jews.html (last visited Aug. 28, 2000). Not all popes shared Pope Gregory's sentiments. For example, on June 14, 1751, Pope Benedict XIV issued an encyclical *A Quo Primum* that addressed Judaism in Poland and identified potential threats that the Jewish people allegedly posed to the Christian communities. See *A Quo Primum*, <http://www.newadvent.org/docs/be14aq.htm> (last visited July 25, 2000). Throughout its history, members of the Church mistreated Jewish people. Consequently, the Church has sought atonement and forgiveness over the last several decades. For example, during the Second Vatican Council, the Church fathers issued the Declaration on the Relationship of the Church to the Non-Christian Religions [*Nostra Aetate*] on Oct. 28, 1965, which repudiated past actions and attitudes against the Jewish people. See also *We Remember: A Reflection on the Shoah*, promulgated on Mar. 16, 1998 by the Commission for Religious Relations with the Jews.

31. As this Pope exhorted:

We decree . . . that no Christian shall compel [the Jews] or any one of their group to come to baptism unwillingly. But if anyone of them shall take refuge of his own accord with Christians, because of conviction, then, after his intention will have been manifest, he shall be

protect human rights well before the enactment of the Universal Declaration of Human Rights of 1948.

The Papacy also mediated conflicts among rival temporal powers. This enterprise enabled the Holy See to prevail over potential belligerents to avoid war or at least delay it in some instances.³² On other occasions, the Holy See resolved disputes among world powers before the disputes became hostile. For example, Pope Alexander VI established the Line of Demarcation that separated the zones of colonial exploration between the then great world powers, Portugal and Spain.³³

C. *The Period of European Exploration and Colonization*

The end of the medieval period and the rise of European global exploration and colonization introduced a new role for the Holy See to play in the international world. As feudal Europe collapsed and strong nation-states emerged, the Holy See and the Roman Pontiff remained crucial members of a world that no longer considered itself a flat disk surrounded by an immense void. Exploration strengthened of national monarchs and their temporal sovereignty. National challenges arose against the Holy Roman Emperor and the Papacy. The Holy See also participated in the quest of strong monarchs for new empires by bringing the message of Christ to those who had not yet heard of Him. Some commentators believe that the Church either participated or acted as a silent bystander in the brutal exploitation of

made a Christian without any intrigue. . . . Moreover, no Christian shall presume to seize, imprison, wound, torture, mutilate, kill or inflict violence on them. . . . We decree in order to stop the wickedness and avarice of bad men, that no one shall dare to devastate or to destroy a cemetery of the Jews or to dig up human bodies for the sake of getting money. . . . Moreover, if anyone, after having known the contents of this decree—which we hope will never happen—attempt audaciously to act contrary to it, then let him suffer punishment in his rank and position, or let him be punished by the penalty of excommunication, unless he makes amends for his boldness by proper recompense. . . .

32. See John Keating Cartwright, *Contributions of the Papacy to International Peace*, 8 CATH. HIST. REV. 155, 160 (1928); F. Matthews-Giba, O.F.M., *Religious Dimensions of Mediation*, 27 FORDHAM URB. L.J. 1695 (2000).

33. See Edward G. Bourne, *The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries*, 1 YALE REVIEW 35, 55 (1892). Bourne states:

Men now smile when they read or hear Alexander Sixth to divide the undiscovered world between Spain and Portugal, but what single Act of any Pope in the history of the Church has exercised directly and indirectly a more momentous influence on human affairs than this last reminder of the bygone world-sovereignty of the Holy See?

Id. at 55 (footnote omitted). The text of the Bull *Inter Caetera Divinae* promulgated on May 4, 1493, reprinted in CHURCH AND STATE, *supra* note 5, at 155-59.

native peoples. However, the voice of Francisco de Vitoria, a Spanish Dominican priest, paved the way for the Holy See to advocate the rights of native peoples.³⁴ This development set the stage for Pope Paul III of the Papal Brief's *Sublimus Dei*, which urged that native peoples be recognized by European colonialists not as objects for enslavement, but as fellow human beings.³⁵

At the end of the Sixteenth Century, permanent diplomatic representatives of the Holy See replaced the earlier temporary legations and were stationed in capitols and in the courts of Catholic temporal sovereigns.³⁶ These legations included those at Venice, Naples, Tuscany, Savoy, Spain, France, Portugal, Belgium, The Holy Roman Empire, Cologne, Switzerland [Como, Graz, and Lucerne], and Poland.³⁷ Unmistakably, this early stable diplomatic presence reflected the attitudes of temporal sovereigns toward the Holy See's personality as a participant in the world of diplomatic relations despite the dissolution of the European Catholic World.

While this voice in the international community contrasted with those of the temporal powers vying for new lands, resources, and riches, a new voice began to materialize—one that questioned papal authority. The Protestant Reformation consequently created a new role for the Holy See and altered its presence in the international world.

34. See generally JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW 22-59 (1928); JAMES BROWN SCOTT, THE CATHOLIC CONCEPTION OF INTERNATIONAL LAW (1934); JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS (1934).

35. Pope Paul III, *Sublimus Dei*, promulgated May 29, 1537, available at <http://www.newadvent.org/docs/pa03sd.htm> (Oct. 12, 2000). While noting that Jesus encouraged Christians to go and teach all nations, Pope Paul III stated that in any missionary activities, Christians must acknowledge that "the Indians are truly men and that they are not only capable of understanding the Catholic Faith but, according to our information, they desire exceedingly to receive it." *Id.* He added that "the Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property . . . and that they . . . should, freely and legitimately, enjoy their liberty and the possession of their property. . . . *Id.* He concluded by saying that the Indians should not be in any way enslaved; should the contrary happen, it shall be null and have no effect." *Id.* Other Popes reiterated Paul III's concerns during their pontificates. More specifically, in 1435, Eugene IV condemned the Canary Islands' slave trade. Subsequent popes, such as Urban VIII's Bull of Apr. 22, 1639, Benedict XIV's Bull of Dec. 20, 1741, and Gregory XVI's Constitution Against the Slave Trade of Nov. 3, 1839, did the same. See John Eppstein, THE CATHOLIC TRADITION OF THE LAW OF NATIONS 418-26 (1935).

36. Joseph J. Murphy, *The Pontifical Diplomatic Service*, 41 THE ECCLESIASTICAL REV. 1 (1909).

37. See CARDINALE, *supra* note 5, at 70.

D. *The Era of the Reformation and Post-Reformation, Enlightenment, and Revolution*

The Act of Succession, enacted under the reign of King Henry VIII, asserted a new vitality in the temporal sovereigns' power against, and conflicts with, the Holy See.³⁸ The Peace of Augsburg in 1555,³⁹ the Edict of Nantes in 1598,⁴⁰ and the Peace of Westphalia in 1648,⁴¹ decreased the likelihood of papal restoration of the *Respublica Christiana*. By the early Seventeenth Century it became apparent that Europe, insofar as it was a Christian region, was no longer unified by ties to Rome and the Holy See. Neither rivalry nor competition within the Christian world eliminated the Holy See's presence and voice from the nascent world of international law. While the American and French Revolutions increased the authority of the secular and temporal ruler or government, the European powers and the Congress of Vienna in the early Nineteenth Century recognized that the Holy See was still a sovereign they were required to engage.⁴²

E. *The Italian Unification and the Loss of the Papal States*

The Nineteenth Century brought serious and material challenges to the Holy See. For example, in the early part of this century, Napoleon Bonaparte briefly incarcerated the Pope and the Papal States remained under French control from 1809 to 1814.⁴³ The movement toward Italian unification posed another critical, but ultimately successful threat to the temporal sovereignty of the Holy See based upon the existence of the Papal States. On December 8, 1849, Pope Pius IX issued the encyclical *Nostis Et Nobiscum* regarding the increasing tension regarding secularism in Italy and threats to the security of the Papal States.⁴⁴ The actual invasion of Rome by unification troops and the occupation of the Papal domain in 1870 prompted Pius IX to issue his encyclical *Respicentes*, which registered the Holy See's protest to and condemnation of the confiscation of the Pontifical territories. The Holy See

38. See CHURCH AND STATE, *supra* note 5, at 163-64.

39. *Id.* at 166-73.

40. *Id.* at 184-88.

41. *Id.* at 190-93.

42. See discussion *infra* notes 255-57 and accompanying text.

43. See LASSA FRANCIS LAWRENCE OPPENHEIM, INTERNATIONAL LAW: A TREATISE 251 n. 1 (Lauterpacht ed., 8th ed. 1955).

44. Pope Pius IX, *Nostis Et Nobiscum* [Encyclical Letter On the Church in the Pontifical States] (1849).

did not disappear as a subject of international law nor did it lose its international personality due to the loss of Papal States in 1870.⁴⁵

Even without territorial possession, the Holy See increased the number of States with which it exchanged legations.⁴⁶ New diplomatic missions continued to arise during this era.⁴⁷ As one observer of this period noted, “Governments which had no relations have established them. Governments that had broken off relations have restored them. Governments which had second-class relations have raised them to first class.”⁴⁸ Moreover, this

45. See generally S. WILLIAM HALPERIN, *ITALY AND THE VATICAN AT WAR: A STUDY OF THEIR RELATIONS FROM THE OUTBREAK OF THE FRANCO-PRUSSIAN WAR TO THE DEATH OF PIUS IX* (1939); see also LILLIAN PARKER WALLACE, *THE PAPACY AND EUROPEAN DIPLOMACY—1869-1878* (1948).

46. See ROBERT A. GRAHAM, S.J., *THE RISE OF THE DOUBLE DIPLOMATIC CORPS IN ROME: A STUDY IN INTERNATIONAL PRACTICE (1870-1875)* 1 (1952). Father Graham illustrates that sovereign States recognized the need to have two distinct legations in Rome—one to represent itself before the new unified Italian State and one to represent the Holy See. *Id.* at 97. As Father Graham points out, this situation developed in stages. *Id.* at 97. The diplomatic exchange with the Holy See became significantly more important during this era. As the author notes:

In the following decades [after 1870] the growing European rivalries inevitably had their repercussions in the Vatican and made this diplomatic post more important than it had ever been when the Pontiff's were in peaceful possession of the Temporal Power. The outbreak of the first World War only confirmed this trend.

Id. at 101.

47. See, e.g., Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 311 (1952).

[A]fter the first World War more states established diplomatic relations with the Vatican than prior to 1914. The states did so because they recognized that the Vatican is a unique diplomatic observation point. In 1930 about thirty states were diplomatically represented at the Vatican and the Vatican in about forty states.

Kunz notes that by the end of 1951, the number of states with which the Holy See had diplomatic relations totaled 43. See *id.* at 314 n.27.

See also LUKE LEE, M.A., LL.B., PH.D., *VIENNA CONVENTION ON CONSULAR RELATIONS* 176 n.18 (1966). Lee points out that:

It should be emphasized that, between 1870 and 1929, the diplomatic corps accredited at the Vatican was not only not dissolved, but also increased through the years, except for a period just before World War I. Thus, there were 18 permanent diplomatic missions at the Vatican in 1890. The number was dropped to 14 on the eve of World War I, but rose to 24 in 1921. At the time of the Lateran Treaty in 1929, there were 27 permanent diplomatic missions at the Vatican.

LEE, *supra* note 47 at 176 n.18.

48. L. J. S. Wood, *Vatican Politics and Policies*, 128 ATLANTIC MONTHLY 398, 404 (1921).

growth in diplomatic relations was “not with Catholic princes, but with ‘democratic’ states, represented by parliaments and prime ministers.”⁴⁹

Even without territorial sovereignty, other states called upon the Holy See for assistance in a variety of ways, and the Holy See maintained its involvement in international mediation and arbitration. For example, in 1885 Germany and Spain engaged in one of the better known dispute resolutions, and the parties requested that the Holy See mediate their competing claims for the Caroline Islands.⁵⁰ Other states, in Europe, Latin America or elsewhere, followed suit and requested that the Holy See arbitrate or mediate their disputes.⁵¹ Some of the requesting countries were not traditionally Catholic countries such as Great Britain, the United States, and Germany.⁵² States have also relied upon the neutrality and unique moral voice of the Holy See for an amicable resolve of their international disputes.⁵³ The United States turned to the Holy See for assistance in settling land disputes in the Philippine Islands about ecclesiastical property, which stemmed from the Spanish-American war. Governor Taft traveled to Rome during the summer of 1901 in an effort to resolve these disputes. While one commentator suggested that the Taft mission essentially constituted negotiations with a private owner of property rather than a sovereign with international personality,⁵⁴ other commentators argued the contrary.⁵⁵

49. *Id.* at 405. (Interestingly, this same commentator speculated about a rapprochement between the Holy See and Italy). *Id.* at 403-04. (This reconciliation came about eight years later with the Lateran Treaty of February 11, 1929).

50. JAMES BROWN SCOTT, *SOVEREIGN STATES AND SUITS BEFORE ARBITRAL TRIBUNALS AND COURTS OF JUSTICE* 95 (1925). Scott stated that the “case of the Carolines [between Spain and Germany] is very famous, and shows that the role of the Papacy in the settlement of disputes is not ended, if it be desired, as it was frequently and to good effect in times past.” *Id.* Scott further details that the Pope “gladly complied with their request to mediate between them, and in 1885 proposed a method of adjustment which, accepted by both and incorporated in a treaty, ended the difficulty.” *Id.* at 96.

51. *See* Eppstein, *supra* note 35, at 470-74 (cataloguing 30 instances in which the Holy See either mediated or arbitrated disputes between rival States).

52. *See* CARDINALE, *supra* note 5, at 89.

53. *See id.* at 88-89.

54. *See* Simon E. Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 *YALE L.J.* 1 (1902). The author minimizes the Taft Mission by stating that Governor Taft simply acted as a messenger with no official credentials from the United States Department of State, and any negotiations must be followed by a binding act of the U.S. Congress. *See id.* at 3. Baldwin fails to mention that Article II of the U.S. Constitution requires Senate confirmation in order to approve treaties. U.S. CONST. art. II, §2, cl.2. Even when the agreement is not an Article II treaty, Congress must approve an international agreement, particularly when monies must be authorized to conclude the agreement. U.S. CONST. art.I, § 9, cl. 10. The author continues to suggest that the Cardinal Secretary of State “may be pardoned for not always noting—perhaps for not always caring to note—these subtle distinctions, belonging to the American system of constitutional government, with its formal division of sovereign powers.” BALDWIN, *supra*, at 5. It may also be said that Mr. Baldwin neglected to understand the intricacies of Papal diplomacy

In the late Nineteenth Century, Pope Leo XIII, without the benefit of a territorial sovereignty, reminded the world of the Holy See's international personality and its status as a subject of international law:

It cannot be called in question that in the making of treaties, in the transaction of business matters, in the sending and receiving ambassadors, and in the interchange of other kinds of official dealings [temporal rulers] have been wont to treat the Church as with a supreme and legitimate power. And assuredly, all ought to hold that it was not without a singular disposition of God's providence that this power of the Church was provided with a civil sovereignty as the surest safeguard of her independence.⁵⁶

This Pope, along with his successors in the Twentieth Century, understood that peace in the world must be accompanied by justice on a domestic and an international level. Leo XIII also acknowledged this principle in his encyclical *Rerum Novarum*.⁵⁷ This same pontiff also instructed that while no particular form of government is outright condemned,⁵⁸ the mutual goal of every political structure is the fostering of the common good.⁵⁹

involving the instructions needed to be sent from Rome to the Apostolic Delegate assigned to the Philippines. *See id.* at 1-2.

55. For a different perspective on the significance of the Taft Mission and the extremely delicate issue of the presence of Spanish clergy in the Philippines, see Edward F. Gross, S.J., *The Taft Commission to the Vatican, 1902*, 45 REC. AMER. CATH. HIST. SOC'Y 184 (1935); *see also* John T. Farrell, *Background of the 1902 Taft Mission to Rome*, 36 CATH. HIST. REV. 1 (1950). Chile and Argentina, in the early 1980's, made one of the most recent requests for the Holy See to resolve a boundary dispute between them. I will discuss this situation in greater detail during the discussion on treaties.

56. Pope Leo XIII, *Imortale Dei* [Encyclical Letter on the Christian Constitution of States] ¶ 12 (1885).

57. *See Rerum Novarum* [Encyclical Letter on the Condition of Workers] (1891). Succeeding popes, recalled and renewed this encyclical in Pius XI, *Quadragesimo Anno* [Encyclical Letter on Social Reconstruction] (1931); Paul VI, *Octogesima Adveniens*, [Apostolic Letter] (1971); and John Paul II, *Centesimus Annus* [Encyclical Letter] (1991). Each statement called attention to the domestic and international consequences of failing to respond to the needs of people and to advance the common good.

58. *See Immortale Dei*, *supra* note 28, at ¶ 36.

59. *See id.* at No. 18. Philip Hughes notes that Leo "understood that, to save the world, the Church must consent to remain in the world, to make all possible contacts with the world, and to explain itself to the world in the only language that the world now understood." Hughes, *The International Action of the Papacy: The New Papacy—1878-1940*, THE TABLET, November 23, 1940, at 406. The social teachings of the Church and in the pronouncements of the Holy See frequently confront the theme of common good. *See generally* Jacques Maritain, THE PERSON AND THE COMMON GOOD (1948).

F. *The Contemporary Era—The Twentieth Century and Beyond*

Lack of territory did not permanently prevent the Holy See from exercising its distinctive sovereignty as a subject of international law during the first three decades of the Twentieth Century. As one commentator suggested in 1920:

Governments are striving, each from its own centre, to control the world, and are keenly realizing how powerless they are in the confusion of things—how their writ does not run far or effectively beyond their own realm; whereas the Vatican, which has no territorial realm, which has only a centre, has its spiritual kingdom everywhere.⁶⁰

However, a need to make clear its role as a non-territorial sovereign possessing international personality still existed. While it was not concerned about purely temporal matters,⁶¹ the Holy See viewed itself as an essential component of international discussions and action taken concerning peace in the world.⁶²

60. Sisley Huddleston, *The Vatican's New Place in World Politics*, 13 CURRENT HISTORY, November 1920, at 200. Huddleston continued by saying:

It will be observed that there is, in spite of the alleged loss of temporal, or rather of territorial power, a State Department at the Vatican to which are attached Ambassadors. Now, it is precisely the number of Ambassadors or other Ministers attached to the Holy See which will serve to prove the reality of the diplomatic power of the Pope and the extent of that power.

Id. at 202; see also HUMPHREY JOHNSON, *VATICAN DIPLOMACY IN THE WORLD WAR* (1933); EMIL GUERRY, *THE POPES AND WORLD GOVERNMENT* (1964) (providing a general overview of the Holy See's rule in Twentieth Century international relations).

61. See also Robert A. Graham, S.J., *The Vatican in World Diplomacy: France, AMERICA*, November 10, 1951, at 149 (discussing the "unique blend" of the temporal sovereignty and religious and moral authority of the Holy See in the context of restoring diplomatic relations with France).

62. See, e.g., Editorial Comments, *The British Mission to the Vatican*, 9 AM. J. INTL. L. 206, 208 (1915). The author states:

In a material world we are over inclined to underestimate the force of spiritual power and of spiritual agencies [T]he spiritual power of the Pope stands out in broad relief untrammelled and unspotted by temporal connections, and there is reason to believe that the Pope as the spiritual head of the Church can exercise a greater and a more beneficent influence in the world at large in the future than in the past.

Id. at 208; see also Bishop Frederick William *The Neutrality of the Holy See*, 157 THE DUBLIN REVIEW 134, 138 (1915). Bishop Frederick William describes the Holy See's neutrality in World War I as:

is poles asunder from cold indifference or inactivity [The Pope] has spared no pains, and has shrunk from no humiliations in his persistent endeavors to arrange mutual concessions on behalf of all the victims of war without distinction Perhaps these are not very great achievements. But no other Power has achieved or even attempted anything.

Id. at 138.

William Montavon points out that:

[W]ith the new freedom which will flow from the [Lateran] Treaty and the openly accepted sovereignty of the Holy See, it requires no flight of fancy to vision in Vatican City a diplomatic corps, composed of men not immersed in the intrigues and bargaining of a materialistic world, whose activities will centre around the higher interests of the soul and be devoted to the promotion of international peace, of justice, of the well-being of man based on international cooperation and not on international rivalry.

William Montavon *The Italian-Vatican Agreement*, 30 CURRENT HISTORY 541, 544 (1929). With the ascent of fascism in Italy, Max Ascoli indicated that:

[T]he Church knows how to make good out of evil. When her territorial power was crushed, her spiritual power was immensely increased all over the world. At the present moment her loss of direct political influence in certain European countries is perhaps giving her an even greater advantage: the Church is put out of politics in the countries where politics are banished for every group but one. She can keep her hands clean from political contamination and enjoy the privilege of being the one solidly organized spiritual power that modern Caesarisms have to respect.

Max Ascoli, *The Roman Church and Political Action*, 13 FOREIGN AFF. 441, 449-50 (1935). Luigi Sturzo has pointed out, neutrality and justice can be siblings. See Luigi Sturzo, *The Vatican's Position in Europe*, 23 FOREIGN AFF. 211, 220 (1945). Sturzo notes that:

The papacy cannot blindly follow the flags of the victors, even when they are the victors in a just cause as the United Nations will be. The Pope must act as a mediator in a suffering world. This does not mean that justice be not applied to enemies and that the precautions necessary for the maintenance of peace should not be taken. But should the Allies deem Germans guilty as a people and embark upon a policy of their destruction as a people, the voice of the Pope will not fail to impress upon them the need of observance of Christian duties even in political life.

Pius XII has repeatedly pointed out the basis of a sound international order. The five points of his Christmas speech of 1939 anticipated the Atlantic Charter by almost two years and still remain the keystone of any lasting international structure.

STURZO, *supra*, at 62.

Remaining neutral while speaking about justice is not an easy task. See D. A. Binchy, *The Vatican and International Diplomacy*, 22 INT'L AFF. 47, 51 (1946). Binchy remarks that while it labors to help others avoid armed conflict:

[T]he Vatican tries to observe an attitude of strict neutrality [when war breaks out]. Indeed it adopts an attitude, not merely of neutrality, but of extreme reserve; it has to be even more careful than usual about what it says, so as to avoid giving offence to either side It is quite true, too, that papal pronouncements sometimes reflect the varying fortunes of war In 1939 the Pope spoke out strongly indeed against the attack on Poland, but after some months he was informed by the German Minister to the Vatican that if his advocacy of the rights of Poland did not cease, measures would be taken against his spiritual subjects not merely in Poland itself but also in Germany Yet, even if one makes allowance for such considerations of expediency, there are fairly clear signs of the sympathies of the Vatican in the present war.

As Francis Murphy has pointed out, "Whatever else it may stand for in the international order, Vatican diplomacy has been in favor of peace and against violence since at least the start of the modern age."

As a result of rising tensions in Europe, Pius X sent a letter concerning world peace to the Holy See's Apostolic Delegate in Washington, D.C., that the secular and the religious worlds noticed.⁶³ However, Pius X also expressed concern about global issues that did not focus on the growing tensions within Europe. Following in the footsteps of his remote predecessor, Paul III of the Sixteenth Century,⁶⁴ he issued an encyclical exhorting Latin Americans to act more justly in the social and economic spheres, especially with regard to native peoples.⁶⁵ Specifically, he spoke about the outrageous practice of trafficking women and children for pecuniary benefit.⁶⁶ He further noted that Christian charity required Catholics to "hold all men, without distinction of nation or color, as true brethren. . . . [T]his charity must be made manifest not so much by words as by deeds."⁶⁷

Benedict XV, Pius X's immediate successor, faced the events preceding, during, and following World War I. Initially, he eloquently and painstakingly attempted to counsel parties against war.⁶⁸ While his efforts to avert war proved unsuccessful, they may have delayed the commencement of hostilities. At the conclusion of the First World War, Pope Benedict advanced his views concerning international peace when he stated, "We seize this opportunity to renew for the same reasons the protests which Our Predecessors have several times made, not in the least moved thereto by human interests, but in fulfillment of the sacred duty of their charge to defend the rights and dignity of this Apostolic See."⁶⁹ The Popes of the

MURPHY, *supra* note 14, at 384.

63. See Editorial Comment, *The Pontifical Letter of June 11, 1911, on International Peace*, 5 AM. J. INT'L L. 707, 708 (1911).

64. See discussion *supra* note 35 and accompanying text.

65. See POPE PIUS X, *Lacrimabili Statu* [On the Indians of South America], promulgated on June 7, 1912.

66. See *id.* at No. 2. The Second Vatican Council reiterated this concern among many others. See VATICAN II, *Gaudium et Spes*, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *in*, THE DOCUMENTS OF VATICAN II, 199, 226 (1965) (stating in pertinent part, "whatever insults human dignity, such as . . . the selling of women and children"). Interestingly, many years later the drafters of the Statute for the International Criminal Court, acknowledged these concerns as crimes against humanity. See Rome Statute of the International Criminal Court, art. 7.1(c), July 1, 2002, 2187 U.N.T.S. 90 (noting that Article 7.2(c), which deals with crime against humanity specifically addresses enslavement, trafficking in persons, particularly women and children).

67. *Lacrimabili Statu*, *supra* note 65, at No. 5. *Id.* at No. 5.

68. See, e.g., Pope Benedict XV, *Ad Beatissimi Apostolorum* [Encyclical Letter on Appealing for Peace] (1914).

69. Benedict XV, *Pacem, Dei Munus Pulcherrimum* [Encyclical Letter on Peace and Christian Reconciliation], ¶16 (1920). See also Denis Gwynn, *Vatican Diplomacy and Peace*, 413 DUBLIN REV., 233 (April 1940).

Twentieth Century reiterated this sacred duty time after time. The aftermath of the war generated concern in Benedict XV, and he consequently pursued concrete measures to avoid and minimize armed conflict.

Pope Benedict also took steps to relieve the victims of the war's devastation—especially children.⁷⁰ Pope Benedict also sought permanent peace and devised measures necessary to implement this peace. As a result, he issued two encyclicals on the issues during his pontificate. The first exhorted the worldwide community to participate in an international conference that would guarantee peace.⁷¹ The second encyclical called all individuals to practice forgiveness and reconciliation.⁷² It also urged all States to put aside mutual suspicion and unite in one league or a family of peoples “calculated both to maintain their own independence and safeguard the order of human society.”⁷³ States, through the establishment of an “association of nations,” could:

Abolish or reduce the enormous burden of the military expenditure which [they] can no longer bear, in order to prevent these disastrous wars or at least to remove the danger of them as far as possible. So would each nation be assured not only of its independence but also of the integrity of its territory within its just frontiers.⁷⁴

Benedict also encouraged others to join the Holy See in providing humanitarian aid to the many innocents victimized by the war.⁷⁵ His understanding of the importance of diplomatic relations and its contribution toward world peace caused him to increase the number of diplomatic exchanges from fourteen to twenty-six during his Pontificate.⁷⁶

At the League of Nations Conference, States such as Germany wanted the Holy See to assist in resolving some of their disputes. Italy, however, objected—most likely on the grounds that papal participation would create an international status for the Holy See, which the Italian government was not yet prepared to confer.⁷⁷ However, these efforts to ignore the Holy See's

70. See, e.g., Pope Benedict XV, *Paterno Iam Diu* [Encyclical Letter on the Children of Central Europe] (1919).

71. See Pope Benedict XV, *Quod Iam Diu* [Encyclical Letter on the Future Peace Conference] (1918).

72. See Pope Benedict XV, *Dei Munus Pulcherrimum* [Encyclical Letter on the Peace, the Beautiful Gift of God] ¶¶ 8 and 14 (1920).

73. *Id.* ¶ 17.

74. *Id.*

75. See ECKHARDT, *supra* note 5, at 260-61.

76. See 2 NEW CATHOLIC ENCYCLOPEDIA 280 (1967).

77. See CARDINALE, *supra* note 5, at 88.

international personality did not interfere with its contributions to the causes of international and domestic peace and justice.

Some of the most important aspects of the Holy See's work during the Twentieth Century involved the great efforts of Pius XI and Pius XII to avoid the Second World War and the Holocaust.⁷⁸ Shortly after he was installed as Pope, Pius XI noted in his 1922 encyclical *Ubi Arcano Dei Consilio* that individuals, classes of societies, and the nations of the world had not found "true peace" since the close of World War I.⁷⁹ This encyclical elaborated on and warned about continuing tensions that endangered global and regional stability and a just peace. This exercise of sovereignty allowed Pius XI to encourage nations to avoid the type of ardent nationalism that insulates one group of people from others.⁸⁰ This encyclical catalyzed Pius XI's goals of avoiding war and maintaining peace. As time passed, Pius XI recognized that not all temporal leaders—particularly the German and Italian leaders had accepted the wisdom of his moral teaching, which contained essential elements for global justice and peace.⁸¹

Pius XI, in an extraordinary measure, addressed two subsequent encyclicals to Italy and Germany because he perceived correctly that their actions threatened peace in the world. Also, he issued these encyclicals in the language of each country, instead of the customary manner of issuing them in Latin, to avoid any mistake about his intentions. In *Non Abbiamo Bisogno*, Pius spoke out against two matters: (1) the restrictions that Fascist Italy had imposed on Italy's flourishing Christian political and social movements, and (2) the attacks on the Church, clergy, and faithful.⁸² As the Pope publicly raised his concerns, he also judiciously noted that his voice and the moral and sovereign authority for which it spoke transcend all party politics.⁸³

78. See ANTHONY RHODES, *THE VATICAN IN THE AGE OF DICTATORS: 1922-1945* (1973) (investigating how the Holy See dealt with the totalitarian States during the first half of the Twentieth Century).

79. See Pope Pius XI, *Ubi Arcano Dei Consilio* [Encyclical Letter on the Peace of Christ in the Kingdom of Christ] ¶ 7 (1922).

80. See *id.* ¶ 25.

81. See Christopher Dawson, *Religion and the Totalitarian State*, 14 *CRITERION* 1, (1934). The author concludes with the reflection: "The Church exists to be the light of the world . . . A secularist culture can only exist . . . in the dark. It is a prison in which the human spirit confines itself when it is shut out of the wider world of reality." *Id.* at 16; see also Douglas L. Reed, *The German Church Conflict*, 13 *FOREIGN AFF.* 483 (1935).

82. See Pope Pius XI, *Non Abbiamo Bisogno* [Encyclical Letter on Catholic Action in Italy] (1931). Professor Binchy offers one of the most detailed studies of the relationship between Fascism and the Holy See. See generally D. A. BINCHY, *CHURCH AND STATE IN FASCIST ITALY* (1941).

83. *Non Abbiamo Bisogno*, *supra* note 82, ¶ 22.

Several years later, the horrifying developments in Nazi Germany compelled Pius XI to promulgate his encyclical *Mit Brennender Sorge*.⁸⁴ The publication of this encyclical in Germany proved to be difficult and entailed great risk that produced devastating consequences, which the Nazis realized would adversely affect their immediate interests.⁸⁵ In the Concordat of 1933, Pius catalogued the abuses of the Third Reich,⁸⁶ the threats to religious freedom,⁸⁷ and the persecution of certain groups of people such as those belonging to the Jewish faith.⁸⁸ His simple, but unmistakable references to the Old Testament and the “so-called myth of race and blood” called attention to the plight of the Jewish people.⁸⁹

On the eve of the Second World War, Pope Pius XI died and his Secretary of State, Eugenio Cardinal Pacelli quickly succeeded him. Pius XII inherited the challenges of global and regional unrest that faced his immediate predecessor.⁹⁰ Within several months of ascending to the Throne of Peter on March 2, 1939, Pius XII, through his first encyclical letter, *Summi Pontificatus*, acknowledged the need to address the growing military tension that began to consume Europe and the rest of the world.⁹¹ The Pope considered the mounting hostilities between Germany and Poland,⁹² and noted that the underlying cause of evil in the world, and in Europe, included “the denial and rejection of a universal norm of morality as well for

84. See Pope Pius XI, *Mit Brennender Sorge* [Encyclical letter on the Church and the German Reich] (1937).

85. See CHURCH AND STATE, *supra* note 5, at 518-19.

86. *Mit Brennender Sorge*, *supra* note 84, ¶¶ 5-6.

87. See *id.*

88. See *id.* ¶¶ 8, 10, 23.

89. See *id.* ¶¶ 15-17, 23.

90. See generally Gwynn, *supra* note 69.

91. Pope Pius XII, *Summi Pontificatus* [Encyclical letter On the Unity of Human Society] (1939). A week after the Pope issued this encyclical, *The New York Times* published an article under the common banner, *Pope Condemns Dictators, Treaty Violators, Racism; Urges Restoring of Poland* on Saturday, October 28, 1939. *Pope Condemns Dictators, Treaty Violators, Racism; Urges Restoring of Poland: The International Situation*, N.Y. TIMES, Oct. 28, 1939, at 1 [hereinafter *Pope Condemns Dictators*]. The first article, entitled, *The International Situation* stated that “[i]n the first encyclical of his reign Pope Pius XII delivered a powerful attack upon totalitarianism and racism.” *Pope Condemns Dictators*, *supra* note 91, at 1. A front page article in *The New York Times* revealed the beginning of the brutal deportations in Poland in which “Jews and Poles [we]re being herded into separate ghettos, hermetically sealed and pitifully inadequate for the economic subsistence of the millions destined to live there.” *Vatican Denounces Atrocities in Poland; Germans Called Even Worse Than Russians*, N.Y. TIMES, Jan. 23, 1940, at 1, 5. *The New York Times* also announced, on March 14, 1940, that the Pope in “burning words,” spoke to the Third Reich’s Foreign Minister von Ribbentrop about religious persecution and defended the Jews in Germany and Poland. See generally, *Pope is Emphatic About Just Peace*, N.Y. TIMES, Mar. 14, 1940.

92. See *Summi Pontificatus*, *supra* note 91, ¶ 22.

individuals as for international relations.”⁹³ He pointed out two “pernicious errors” that played a part in corrupting Germany. First, “that law of human solidarity and charity which is dictated and imposed by our common origin and by the equality or rational nature in all men” had been betrayed.⁹⁴ The second error incorporated “those ideas which do not hesitate to divorce civil authority from every kind of dependence upon the Supreme Being . . . and from every restraint of a Higher Law derived from God.”⁹⁵ The Pope cautiously highlighted the grave dangers posed by national socialism which elevated the State and certain groups as “the last end of life.”⁹⁶ Pope Pius XII further noted that states must “control, aid and direct the private and individual activities of national life [so] that they converge harmoniously towards the common good.”⁹⁷ German policies that considered “the State as something ultimate to which everything else should be subordinated and directed” threatened the international prosperity of all persons, especially those in Europe.⁹⁸ If one state were to control others, corrosion of the mutual independence of all peoples who are “bound together by reciprocal ties . . . into a great commonwealth directed to the good of all nations” would result.⁹⁹

93. *Id.* at 28. The Pope spoke diplomatically when he addressed the evils of National Socialism as “signs of a corrupt and corrupting paganism.” *Id.* ¶ 30. Further, the Pope lamented over the number of people abandoning the teachings of Christ and “being led astray by a mirage of glittering phrases” who failed to foresee the consequences of “bartering the truth that sets free, for error which enslaves.” *Id.* at 31.

94. *Id.* at 35. The Pope elaborated on the meaning of our “common origin” when he quoted from St. Paul’s letter to the Colossians, which asserted that, “there is neither Gentile nor Jew, circumcision nor uncircumcision, barbarian nor Scythian, bond nor free.” *Id.* at 48; *Colossians* 3:10-11.

95. See *Summi Pontificatus*, *supra* note 91, at ¶ 52 (describing how a State may attribute to itself the power that belongs to God and how this practice grates the Christian conscience).

96. *Id.* at 53.

97. *Id.* at 59. He also suggested that the common good “can neither be defined according to arbitrary ideas nor can it accept for its standard primarily the material prosperity of society, but rather it should be defined according to the harmonious development and the natural perfection of man.” *Id.*

98. *Id.* at 60.

99. *Id.* at 72. As one trained in the law, Pope Pius XII understood the principles of international natural law as those that “regulate [peoples’] normal development and activity” and “demand respect for corresponding rights to independence, to life and to the possibility of continuous development in the paths of civilization.” *Id.* at 74. In fact, they require “fidelity to compacts agreed upon and sanctioned in conformity with the principles of the law of nations.” *Id.* at 74. Pius envisioned the Church’s role in this struggle as one that would inform consciences so:

that the truth which she preaches, the charity which she teaches and practices, will be the indispensable counselors and aids to men of good will in the reconstruction of a new world based on justice and love, when mankind, weary from its course along the way of error, has tasted the bitter fruits of hate and violence.

Id. at 108.

Pope Pius XII issued the customary Christmas messages on the state of the world and the presence or absence of the spirit of the Prince of Peace.¹⁰⁰ Pope Pius issued one of his most significant Christmas messages in 1941, in which he called attention to Europe's plight and spoke against "oppression of minorities"—a careful, but obvious reference to the Jewish people.¹⁰¹ The Western press saluted this bold initiative and Pius XII for placing "himself squarely against Hitlerism."¹⁰² In subsequent Christmas messages, Pope Pius delivered equally blunt messages about those responsible for the suffering of millions of the Second World War's innocent victims.¹⁰³ Pius XII wisely maintained neutrality once hostilities commenced, but his prudence did not signify that the Holy See would be neutral on the moral issues surrounding

100. See GUIDO GONELLA, *THE PAPACY AND WORLD PEACE: A STUDY OF THE CHRISTMAS MESSAGES OF POPE PIUS XII* (A.C.F. Beales & Andrew Beck, A.A. eds., Venerable English College trans., 1945). Guido Gonella, a former philosophy professor at the University of Rome who was removed from his post during the Fascist regime in Italy, has studied Pope Pius XII's annual Christmas messages. Professor Gonella's work made several important contributions. First, it analyzes major themes presented by the Pope during a period of great turmoil throughout the world. Second, it clarifies the contribution that Pope Pius XII has made to international order and world peace.

101. See *Pope Broadcasts Five Peace Points: Condemns Aggression, Curbs on Minorities, Total War and Persecutions*, N.Y. TIMES, Dec. 25, 1941, at 1 [hereinafter *Pope Broadcasts Five Peace Points*]. The publishers, in that same edition, stated that, "[t]he voice of Pius XII is a lonely voice in the silence and darkness enveloping Europe this Christmas." *Id.* at 24. Further, this editorial acknowledged that the Pope's words "sound[ed] strange and bold in . . . Europe . . . and we comprehend the complete submergence and enslavement of great nations, the very sources of our civilization, as we realize that *he is about the only ruler left on the Continent of Europe* who dares to raise his voice at all." *Id.* (emphasis added). Pope Pius XII also spoke about the treatment of minorities:

Within the limits of a new order founded on moral principles there is no place for open or secret oppression of the cultural and linguistic characteristics of national minorities . . . for the limitation or abolition of their natural fertility [(a reference to genocide)]. The more consciously the government of a State respects the rights of minorities, the more confidently and the more effectively can it demand from its subjects a loyal fulfillment of those obligations which are common to all citizens.

Pope Pius XII, *Christmas Message (1941)*, in *PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER* 200-01 (Francis J. Powers ed., 1952).

102. See *Pope Broadcasts Five Peace Points*, *supra* note 101, at 24. This editorial concluded by noting that the Pope "left no doubt that the Nazi aims are also irreconcilable with his own conception of a Christian peace. 'The new order which must arise out of this war,' [the Pope] asserted, 'must be based on moral principles,' and that implies only one end to the war." *Id.*

103. See, e.g., Pope Pius XII, *The Internal Order of States and People (Christmas Message 1942)*, in *PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER* 209 (Francis J. Powers, C.S.V. ed. 1952). The Pope declared that while the Church does not intend to take sides during the conflict, it "cannot renounce her right to proclaim to her sons and to the whole world the unchanging basic laws, saving them from every perversion, frustration, corruption, false interpretation and error." *Id.*

conflict.¹⁰⁴ The influential press repeatedly acknowledged the Pope's public efforts to assist the victims of the atrocities of National Socialism, including the Jewish people.¹⁰⁵ Shortly after the conclusion of hostilities, Pope Pius quickly mustered the world's attention to the plight of destitute children victimized by the war.¹⁰⁶ He reminded all people of good will that "these children will be pillars of the next generation and . . . it is essential that they grow up healthy in mind and body if we are to avoid a race infected with sickness and vice."¹⁰⁷

Pius' successor, Pope John XXIII, was no stranger to the world of international affairs since he served as a papal diplomat for many years.¹⁰⁸ Pope John XXIII dealt with the Cold War among the nuclear powers, and pleaded for peace and international security of the human family in his encyclical *Pacem in Terris*.¹⁰⁹ This important declaration, which was filled with references to the common good, drew attention to the interrelated rights and responsibilities of individuals and nations.¹¹⁰ Perhaps one of the most

104. See *Id.* On Christmas Eve 1942, the Pope declared that the Church "does not intend to take sides for any of the particular forms in which the several peoples and States strive to solve the gigantic problems of domestic order or international collaborations, as long as these forms conform to the law of God." *Id.*

105. See, e.g., *Pope Is Said to Plead for Jews Listed for Removal from France*, N.Y. TIMES, Aug. 6, 1942, at 1; *Vichy Seizes Jews; Pope Pius Ignored*, N.Y. TIMES, Aug. 27, 1942, at 1, 3; *Pope Said to Help In Ransoming Jews*, N.Y. TIMES, Oct. 17, 1943, at 1; *Vatican Scores Germans: Denounces Decision to Intern and Strip All Jews in Italy*, N.Y. TIMES, Dec. 5, 1943, at 3. Some 55 years later, however, *The New York Times* printed an editorial, which commented:

John Paul, however, has resisted a critical look at the Catholic response to the Holocaust and has defended the silence of Pope Pius XII during the Third Reich The document does not even mention Pope Pius's failure to speak out against Nazi atrocities

It now falls to John Paul and his successors to take the next step toward full acceptance of the Vatican's failure to stand squarely against the evil that swept across Europe.

Editorial, The Vatican's Holocaust Report, N.Y. TIMES, March 18, 1998, at A20. Perhaps those responsible for drafting this editorial lacked familiarity with the newspaper's earlier editorials, which reported Pope Pius XII neither remained silent nor failed to stand against Nazi atrocities. For detailed discussions of Pope Pius XII's role during the Holocaust, see PIERRE BLET, S.J., *PIUS XII AND THE SECOND WORLD WAR* (Lawrence J. Johnson trans., 1999); SAUL FRIEDLÄNDER, *PIUS XII AND THE THIRD REICH: A DOCUMENTATION* (Charles Fullman trans., 1966), which relies principally upon German sources of the era; PINCHAS LAPIDE, *THREE POPES AND THE JEWS* (1967); and RONALD J. RYCHLAK, *HITLER, THE WAR AND THE POPE* (2000).

106. See Pope Pius XII, *Quemadmodum* [Encyclical Letter Pleading for the Care of the World's Destitute Children] (1946).

107. *Id.* at 6.

108. See KELLY, *supra* note 16, at 320-21.

109. See Pope John XXIII, *Pacem in Terris* [Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity, and Liberty] (1920).

110. See generally Pope John XXIII, *Mater et Magistra* [Encyclical Letter on Christianity and Social Progress] (1961). In this earlier encyclical, Pope John XXIII stated:

important elements of this encyclical acknowledges the role of the United Nations in achieving the common good for all peoples.¹¹¹ The Holy See's particular role "safeguarded the principles of ethics and religion, but also . . . intervene[d] authoritatively with Her children in the temporal sphere, when there is a question of judging the application of [principles of the natural law] to concrete cases."¹¹² This declaration restrictively interpreted on Article 24 of the Lateran Treaty, which suggested that the Holy See would not involve itself in the affairs of the temporal world.¹¹³ Legal commentary, however, has noted that this had not prevented the Holy See, *sua sponte*, from speaking out on right and wrong in the realm of international affairs—especially in times of armed conflict.¹¹⁴

Pope John's immediate successor, Pope Paul VI, left the Vatican, in October 1965, to proclaim his version of this same message before the United Nations. In the first papal address made before the General Assembly, Pope Paul VI commented on his role and the presence of the Holy See in the world community:

He is your brother, and even one of the least among you, representing as you do sovereign States, for he is vested—if it please you so to think of Us—with only a mute and quasi-symbolic temporal sovereignty, only so much as is needed to leave him free to exercise his spiritual mission and to assure all those who treat with him that he is independent of every worldly sovereignty. He has no temporal power, no ambition to compete with you. In point of fact, We have nothing to ask for, no question to raise; at most a

As regards the common good of human society as a whole, the following conditions should be fulfilled: that the competitive striving of peoples to increase output be free of bad faith; that harmony in economic affairs and a friendly and beneficial cooperation be fostered; and, finally, that effective aid be given in developing the economically underdeveloped nations.

Id. at 80.

111. See *Pacem in Terris*, *supra* note 109, at 142-145.

112. *Id.* at 160. Pope John XXIII called attention to the encyclicals of his predecessors Leo XIII [*Immortale Dei*] and Pius XI [*Ubi Arcano*], which were discussed earlier. See *supra* notes 28 and 79 and accompanying text.

113. Article 24 of the Lateran Treaty states:

The Holy See in relation to the sovereignty it possesses also in the international sphere, declares that it wishes to remain and will remain extraneous to all temporal disputes between States and to international congresses held for such objects, unless the contending parties make concordant appeal to its mission of peace; at the same time reserving the right to exercise its moral and spiritual power. In consequence of this declaration, Vatican City will always and in every case be considered neutral and inviolable territory.

114. See MARJORIE M. WHITEMAN, 1 DIGEST OF INTERNATIONAL LAW 591 (1963).

wish to express and a permission to request: to serve you, within Our competence, disinterestedly, humbly and in love . . . Whatever your opinion of the Roman Pontiff, you know Our mission: We are the bearer of a message for all mankind.¹¹⁵

In essence, Pope Paul's address delivered a message of peace to the whole world, and spoke on the obvious issues as well as the subtle.¹¹⁶ His message also offered hope to a world filled with human-generated misery.¹¹⁷ Approximately four years after his UN address, Pope Paul VI specified further details about the Holy See's role in the international order when he

115. *Address of Pope Paul VI to the United Nations*, Oct. 4, 1965. The Pope continued by saying that:

We have been carrying in Our heart for nearly twenty centuries [a wish]. We have been on the way for a long time and We bear with Us a long history; here We celebrate the end of a laborious pilgrimage in search of a colloquy with the whole world, a pilgrimage which began when We were given the command: 'Go and bring the good news to all nations.' And it is you who represent all nations.

Id. Pope Paul noted that the Holy See's position as an "expert in humanity" provided the foundation for the "moral and solemn ratification" of the UN. *Id.* The Pope's UN address reflected the Pastoral Constitution on the Church in the Modern World [*Gaudium et Spes*], which was to be promulgated at the end of the Second Vatican Council on December 7, 1965. While noting that Christ did not give the Church a "proper mission in the political, economic or social order," the Pastoral Constitution also acknowledged that the Church functioned as "a light and energy which can serve to structure and consolidate the human community. As a matter of fact, when circumstances of time and place create the need, she can and indeed should initiate activities on behalf of all men." *Gaudium et Spes*, at No. 42.

116. *Id.* For example, Pope Paul eloquently pronounced the need to end armed conflict once and for all when he declared: "never again one against another, never, never again! Is it not to this end above all that the United Nations was born: against war and for peace? . . . Never again war, war never again! Peace, it is peace, which must guard the destiny of the peoples and of all mankind." *The New York Times*, in an editorial, labeled the Pope's critique of artificial birth control as irrational and "an unnecessarily narrow, old-fashioned interpretation of natural law doctrine," but nonetheless argued that the address "remains a compelling document. It happily mingles old wisdom and fresh moral urgency . . . His own speech does much to advance that universal conversation on the most imperative theme—peace." *Editorial, The Pope's Message*, N.Y. TIMES INT'L EDITION, Oct. 6, 1965, at 4. The Times [London], in another editorial, remarked that the Pope's "noble address . . . has brought the United Nations face to face with its charter, and so, collectively and individually, with its conscience." *See Generally, Editorial, To the World*, THE TIMES, Oct. 5, 1965.

117. About a year and a half after his UN address, Pope Paul VI issued his encyclical *Populorum Progressio* [On the Development of Peoples], promulgated on March 26, 1967. Pope Paul VI described society as ill, and attributed that illness to the "lack of brotherhood among individuals." *Id.* at No. 66. The Pope relied on the work of John XXIII in *Pacem in Terris* and further defined peace as not the absence of war, but as "something that is built up day after day, in the pursuit of an order intended by God, which implies a more perfect form of justice among men." *Id.* His conclusion addressed Catholics, Christians, and all men of good will and exhorted them to define the respective and complementary roles of the laity whose "own proper task [is] the renewal of the temporal order" and the Church's role as teacher who interprets authentically "the norms of morality to be followed" in the temporal world. *Populorum Progressio*, at Nos. 81-84.

promulgated his apostolic letter on the duties of papal representatives sent into the world of diplomacy.¹¹⁸ The major purpose for continuing the practice of active and passive diplomatic exchange embraced an open dialogue on the “good of the individual and of the community of peoples.”¹¹⁹ Accordingly, in 1964, Pope Paul took the initiative to send an Observer of the Holy See to the United Nations. The Holy See’s “supra-national” voice would become a part of the global dialogue in the UN deliberations affecting peace and the common good.¹²⁰

Pope John Paul I’s month-long papacy failed to give Paul VI’s immediate successor much time to define or to implement the Holy See’s sovereignty or to exercise its international personality. In an address to the diplomatic corps accredited to the Holy See, John Paul I provided some insight on the Holy See’s role in world affairs. The Pope commented on the uniqueness of the Holy See’s mission and its competence as an international person.¹²¹ He also identified two services that the exchange of legations

118. See Pope Paul VI, *Sollicitudo Omnium Ecclesiarum* [Apostolic Letter on The Care of all the Churches] (1969), reprinted in CARDINALE, *supra* note 5, at 309-18.

119. *Id.* at 312. Pope Paul also observed that:

[W]hile this dialogue aims at guaranteeing for the Church free exercise of its activity so that it may be able to fulfill the mission entrusted to it by God, it ensures the civil authority of the always peaceful and beneficial aims pursued by the Church, and offers the precious aid of its spiritual energies and of its organisation [sic] for the achievement of the common good of society. *The trusting colloquy which thus begins when there exists between the two societies and official relationship sanctioned by the body of habits and customs collected and codified in international law makes it possible to establish a fruitful understanding and to organize [sic] an activity truly salutary for all.*

Id. (emphasis added).

120. See CARDINALE, *supra* note 5, at 93-94. Archbishop Cardinale explains an important point:

In recent years one finds the term supra-national often used as an attribute of the Church and the Holy See. This is to be understood in an entirely different sense from the meaning of the word used in a political context, where it is perfectly homogeneous. For this reason such an attribute should be applied sparingly and cautiously to religious bodies [They] are often referred to as supra-national rather than international entities in the sense that by their very nature they are not tied to any particular people, nation or form of political government but carry out a spiritual mission that is universal, i.e. directed to all mankind without distinction.

Id.

121. See *Pope John Paul: Purposes of Vatican Diplomacy*, ORIGINS, Sept. 14, 1978, at 198. The Holy Father elaborated:

Obviously we have no temporal goods to exchange, no economic interests to discuss, such as your States have. Our possibilities for diplomatic interventions are limited and of a special character. They do not interfere with purely temporal, technical and political affairs, which are matters for your governments. In this way, our diplomatic missions to your highest civil authorities, far from being a survival from the past, are a witness to our deep-seated respect for

could accomplish. First, the exchange could search for better solutions to contemporary world issues including détente, disarmament, peace, justice, humanitarian measures and aid, and development.¹²² Second, John Paul I suggested developing the consciences of people “regarding the fundamental principles that guarantee authentic civilization and real brotherhood between peoples. These principles . . . help peoples and the international community to ensure more effectively the conditions for the common good.”¹²³

The present pontiff, John Paul II, is no stranger to the exercise of sovereignty and projecting the Holy See’s presence in the world. He first visited the United Nations on October 2, 1979, when he addressed the General Assembly as his predecessor, Paul VI, had done fourteen years earlier. A few years later, on June 7, 1982 he sent a message to the General Assembly stressing the immediate need to concentrate on the interrelation of peace and disarmament.¹²⁴ His second appearance before the General Assembly occurred on the thirtieth anniversary of Paul VI’s October 4, 1965 appearance and speech at the UN.¹²⁵ His 1995 address focused on universal human rights, the rights of nations, and the search for freedom and moral truth.¹²⁶ John Paul II followed his predecessors lead when he noted that he spoke “not as one who exercises temporal power . . . nor as a religious leader seeking special privileges . . . [but] as a witness . . . to human dignity, a witness to hope, a witness to the conviction that the destiny of all nations lies in the hands of a merciful Providence.”¹²⁷

Some may describe John Paul as a frequent pastoral visitor throughout the world, and he regularly participates in international dialogue and diplomatic conversation. Throughout his pontificate, he followed the

lawful temporal power, and to our lively interest in the humane causes that the temporal power is intended to advance On both sides there is presence, respect, exchange and collaboration, without confusing competences.

Id.

122. *See id.* at 198.

123. *See id.* at 199.

124. *See* John Paul II, *Message to the General Assembly of the United Nations* (June 7, 1982), reprinted in ORIGINS, June 24, 1982, at 81. The Pope used moral arguments when he noted that the production and possession of both nuclear and conventional arms reflected “an ethical crisis gnawing into society in all directions, political, social and economic. Peace . . . is the result of respect for ethical principles.” *Id.* at 86.

125. *See* discussion *supra* note 115 and accompanying text.

126. *See* John Paul II, Address of His Holiness Pope John Paul II to the Fiftieth General Assembly of the United Nations Organization, (Oct. 5, 1995), reprinted in ORIGINS, Oct. 19, 1995, at 293.

127. *See The Fabric of Relations Among Peoples*, reprinted in 25 ORIGINS, Oct. 19, 1995, 1, 299; *see also* Lateran Treaty, *supra* note 113, art. 24 (demonstrating that Popes did not consider themselves prohibited from participating in discussions regarding important international issues).

practice initiated by Pope Paul VI and has issued a World Day of Peace Message on the first of the New Year. Shortly after New Year's Day, he convenes the Diplomatic Corps accredited to the Holy See for discussions on contemporary issues of international concern. In May 2000, he observed several important things about the nature of the Holy See in addresses to new ambassadors who were presenting their credentials. The Pope reiterated the unique status of the Holy See in international affairs in his address to the new Ambassador from the Republic of Ghana. He also pointed out that the Holy See engages the political community to foster solidarity, humanitarian missions, and many forms of cooperation and mutual support.¹²⁸ In his May, 2000 address to the ambassador from New Zealand, the Pope commented that the Holy See's position enables it to share with other sovereigns its unique perspective on international issues such as the dignity of the human person, the notion of a freedom that is linked to truth, and the pursuit of the common good.¹²⁹ The Pope greeted the new ambassador from Kuwait by expressing his hope for peace in the Middle East and stressing the need for dialogue between Muslims and Christians to encourage harmony and a lasting peace.¹³⁰ John Paul commented to the new ambassador from Greece that the supra-national interests of the Holy See enable it to focus on the "loving concern for the common good of all peoples and nations." The Holy See's diplomatic efforts seek to help others embrace the dignity and inalienable rights of every individual, "especially the weakest and most vulnerable."¹³¹ During the reign of this pontiff, the number of the Holy See's diplomatic exchanges had grown from 86 in 1979 (the first full year of his pontificate) to 178 in 2011.¹³² Many of the more recent

128. See Pope John Paul II, Address of the Holy Father to the New Ambassador of the Republic of Ghana to the Holy See (May 25, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 4, 5.

129. See Pope John Paul II, Address of the Holy Father to the New Ambassador of New Zealand to the Holy See, (May 25, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 5.

130. See Pope John Paul II, Address of the Holy Father to the New Ambassador of Kuwait to the Holy See (May 25, 2000); see also Alessandra Stanley, *Pope Arrives in Israel and Gets Taste of Mideast*, N.Y. TIMES, March 22, 2000, at A8 (detailing the Pope's trip to the Middle East, which focused on reconciling Israel-Palestinian relations).

131. Pope John Paul II, Address of the Holy Father to the New Ambassador of the Hellenic Republic to the Holy See, (May 6, 2000), reprinted in *L'Osservatore Romano*, May 31, 2000, at 6.

132. See ANNUARIO PONTIFICIO 1110-1150 (1979); *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html. The Holy See has diplomatic relations with the European Union and the Sovereign Order of Malta; it also has relations of a special nature with the Russian Federation and with the Palestine Liberation Organization. *Id.*

diplomatic exchanges involved States that are neither traditionally Catholic nor Christian.¹³³

As this discussion comes to a close, it should be apparent that the Holy See's traditional exercise of sovereignty, while diversified, frequently emphasizes peace, human dignity, human rights, and the common good. The Holy See also actively participates with other sovereigns in negotiating and formulating international legal instruments that are the principal means for achieving specific goals relating to global affairs. Part IV will examine in greater detail the Holy See's participation in the formation of bilateral and multilateral treaties and concordats, which provide additional evidence of its attempt to incorporate involvement in peace, human dignity, and the common good into international affairs. Prior to this examination, it would be beneficial to obtain an understanding of the international personality and sovereignty as these concepts are generally understood in international law, and how the Holy See relates to them.

II. INTERNATIONAL PERSONALITY AND SOVEREIGNTY AND THE HOLY SEE

A. *The Traditional Understanding of Personality*

Traditionally, States were viewed as the only subjects of international law.¹³⁴ This perspective continues, in part, because only States can bring cases before the International Court of Justice.¹³⁵ The conventional understanding of statehood in international law¹³⁶ requires four elements: (1)

133. ANNUARIO PONTIFICIO 1398-1457 (2000). These States include most of the traditionally non-Catholic and non-Christian States of the world. In addition, States with traditional ties to Islam or connections with various types of Eastern religions also participated in these diplomatic exchanges. See generally George Huntston Williams, *John Paul II's Relations with Non-Catholic States and Current Political Movements*, 25 J. CHURCH & STATE 13 (1983).

134. See L. OPPENHEIM, INTERNATIONAL LAW (2d ed. 1912), reprinted in REBECCA WALLACE, INTERNATIONAL LAW 59 (2d ed. 1992).

135. See Statute of the International Court of Justice, art. 34.1, June 26, 1945, (1945). (indicating that only States may be parties in cases before the Court). The Statute of the Permanent Court of International Justice contained a similar provision: "[o]nly States may be parties in cases before the Court." Statute of the Permanent Court of International Justice, art. 34 (1946).

136. See WILLIAM BISHOP, JR., INTERNATIONAL LAW 209 (2d ed. 1962). Professor Bishop recognized that "[u]nder the generally recognized theories of international law, this system of law applies only to states, and more recently to international organizations, as the 'persons' who have rights and duties under international law." *Id.*

a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.¹³⁷

The number of persons in the population and the size of the defined territory, however, does not exclude those entities with small populations or small territories.¹³⁸ The capacity to enter into relations with other States would not be limited to the exchange of diplomatic missions, but may include recognition of the State's "equality, dignity, independence, [and] territorial and personal supremacy"¹³⁹ The ability to enter into treaties or other agreements with other states is an integral component of international relations.¹⁴⁰ This concept suggests something about the sovereignty of the state as a self-governing entity—the third traditional criterion of a State.

Sovereignty, or the capability to govern, includes two dimensions. The first is "negative" in the sense that the State must be independent of all others. The second is "positive" in that the State executes ministerial functions through its officials as it deems proper.

137. See Pan American Convention on the Rights and Duties of States of 1933, Dec. 26, 1933, art. I, reprinted in 49 Stat. 3097, 3100; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

138. See L. OPPENHEIM, INTERNATIONAL LAW § 169 (8th ed. 1955). The author noted that "[a] State without a territory is not possible, although the necessary territory may be very small, as in the case of the Vatican City, the Principality of Monaco, the Republic of San Marino, or the Principality of Liechtenstein." *Id.* § 108.

139. See *id.* § 113. Ian Brownlie has suggested that the key formal contexts surrounding the issue of international personality are: "capacity to make claims in respect of breaches of international law, capacity to make treaties and agreements valid on the international plane, and the enjoyment of privileges and immunities from national jurisdictions." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57 (5th ed. 1998) [hereinafter BROWNLIE, PRINCIPLES]. Professor Rebecca Wallace has remarked that:

An entity which possesses the ability to conduct foreign relations does not terminate its statehood if it voluntarily hands over all or part of the conduct of its foreign relations to another state, for example San Marino (Italy), Monaco (France). Another "mini" European state is Liechtenstein, which operates within the Swiss economic system and has delegated a number of sovereign powers to Switzerland, but nevertheless is still recognised [sic] as a sovereign state.

REBECCA WALLACE, M.A., LL.B., PH.D., INTERNATIONAL LAW 64 (3d ed. 1997).

140. See *id.* at 71. Professor Wallace notes that:

While treaty-making power is evidence of international personality, a general treaty-making power should not be deduced from the possession of some degree of personality. In other words, entities having a treaty-making capacity possess some international personality, but not all international entities necessarily possess a general treaty-making capacity.

Id. at 71.

In the context of formal, juridical structures, it is noted that a State has the capacity to bring a claim against another State.¹⁴¹ This suggests that States as international persons or subjects have rights to bring claims against other States and duties or responsibilities to refrain from those actions or failures to act against which another State may seek legal redress.¹⁴² Although the traditional understanding of personality may be attractive to some, it is clear that the meaning of “international personality” has changed. States are no longer the only entities recognized with international personality or regarded as subjects of the law.

B. *A Contemporary Understanding of Personality*

During the last several decades, developments beyond the traditional understanding of international personality and subjects of international law emerged. As Prof. Rebecca Wallace suggests, “The concept of international personality is neither static nor uniform”¹⁴³ For example, governments-in-exile, regional conferences of States such as the European Union, national liberation movements, and even organizations such as the United Nations enjoy non-State international personality.¹⁴⁴ Hugo Hahn analyzed the European Atomic Energy Community (Euratom) and concluded that such an entity must be included amongst those having some type of international personality.¹⁴⁵ Hahn made the important point that it is in the exercise of their sovereignty that States can, through their recognition, confer a type of international personality on non-State entities.¹⁴⁶

Arguably, with the signing of the Lateran Treaty between Italy and the Holy See in 1929, Italy conferred upon the Holy See its international personality.¹⁴⁷ However, is this truly the case? Regardless of Italy’s actions in 1929, the Holy See enjoyed status as a subject of international law since

141. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 177.

142. See BROWNLIE, *supra* note 139, at 57. Professor Ian Brownlie argues that the contention that a subject of international law is any entity which has international rights and duties and has the ability to protect its rights by pursuing international claims, while “conventional” is “circular.” See *id.*

143. See WALLACE, *supra* note 139, at 59.

144. See, e.g., BROWNLIE, *PRINCIPLES*, *supra* note 139, at 61-62.

145. See generally Hugo J. Hahn, *Euratom: The Conception of an International Personality*, 71 HARV. L. REV. 1001 (1958).

146. See *id.* at 1050. As Hahn argued, “International organizations, then, are derivative, not original, members of the international community. They derive their international personality from the assent of the original subjects of international law as the need or the inclination of the latter may be” *Id.*

147. See Lateran Treaty, It.-Holy See, art. 2, June 7, 1929 reprinted in THOMAS EWING MOORE, *PETER’S CITY: AN ACCOUNT OF THE ORIGIN, DEVELOPMENT AND SOLUTION OF THE ROMAN QUESTION* 209, 210 (1930).

the Fifth Century. As a consequence, the Holy See already enjoyed uninterrupted personality under the law of nations. Advocates of this position point to Article II of the Lateran Treaty of 1929 which states, "Italy recognizes the sovereignty of the Holy See in the international field as an inherent attribute of its nature, in conformity with its tradition and the exigencies of its mission in the world."

Under international law, however, no State can confer sovereignty on another entity that is binding on other States. The relevant point is that these other States must themselves accept the sovereignty of the entity in question.¹⁴⁸ Often the best evidence of such acceptance is the establishment of diplomatic relations. Another important indicator is the invitation of the entity to diplomatic conferences and treaty negotiations as an equal. The sovereignty and personality of the Holy See "[are] not created by the states through their recognition of it, but exists independently from the recognition of the states."¹⁴⁹ This is manifest by the continued exercise by the Holy See of its sovereign authority without a territory, service as an international mediator, and the increased number of diplomatic exchanges in the period from 1870 to 1929.

These points raise several questions about the status of the Holy See. Is it a State? Is it a lesser entity which may still enjoy international personality of the sort that can be conferred by one or several States? Or, is it a unique entity that escapes characterization under conventional norms used to determine if the entity is a subject of international law, but that nonetheless has the corresponding personality acknowledged under this law?

The answers to these questions inhabit the reality of international affairs as practiced by sovereign States throughout the world. Inevitably, one reaches the inescapable conclusion that the Holy See has international personality and is a subject of international law. This also demonstrates that the Holy See has a sovereignty that can be and is recognized under international law. However, its personality as a subject of international law

148. See CHRIS N. OKEKE, *CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY* (1974). In the early 1970's, Dr. Chris Okeke engaged in the fascinating and timely study of evolving and contentious subjects of international law. See *id.* Dr. Ekeke argued that the power to enter international agreements is "one of the most effective and important evidences of personality in international law." *Id.* at 65. However, he also posited that during the period from 1870 to 1929 the Holy See "possessed a doubtful legal personality and sovereignty in the international sphere." The Lateran Treaty of 1929, however, granted the Holy See personality under international law. *Id.* at 68-69.

149. See G. LaPiana, 25 AM. J. INT'L. L. 405, 406 (1931) (reviewing LOUIS LEFOR, *LESAINT-SIEGE ET LE DROIT DES GENS* (1929)).

and the sovereignty it exercises are not precisely those of other subjects of the law of nations.

C. *The Unique Legal Status of the Holy See Under International Law*

It is generally understood that the Holy See's international personality materializes from its religious and spiritual authority and mission in the world as opposed to a claim over purely temporal matters.¹⁵⁰ This is an incomplete understanding, however, of the grounds on which its claim as a subject of international law can be justified. In partial explanation of its status as a subject of the law of nations enjoying international personality, it is said that the Holy See is an "anomaly,"¹⁵¹ an "atypical organism,"¹⁵² or is an entity *sui generis*.¹⁵³ Some commentators questioned the status and international personality of the Holy See during the period from 1870 to 1929 when it held no territorial sovereignty.¹⁵⁴ Such critics concede that:

[its] international personality is here recognised [sic] to be vested in an entity pursuing objects essentially different from those inherent in national States A way is thus opened for direct representation in the sphere of International Law of spiritual, economic, and other interests lying on a plane different from the political interests of States.¹⁵⁵

While the Holy See's status may be an anomaly or unique, the statehood-like status of the Holy See cannot be denied.¹⁵⁶ As Prof. Crawford has affirmed, "recognition by other States is of considerable importance

150. See discussion *supra* notes 115, 116, & 124, and accompanying texts.

151. WALLACE, *supra* note 139, at 76.

152. See CARDINALE, *supra* note 5, at 80-81. Archbishop Cardinale suggests that,

[a]s a subject of international law, the Catholic Church is an atypical organism. That is to say, considering her particular purpose, the social means she employs to further this purpose and her peculiar nature and social structure, the Church cannot be put on exactly the same level as a State, or any other subject of international law. Hence her position is analogous to, but not identical with, that of a national State.

Id.

153. See BROWNLIE, *supra* note 139, at 64; accord MALCOLM SHAW, INTERNATIONAL LAW 172 (Cambridge, 4th ed. 1997); Finn Seyersted, *International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon Their Constitutions*, 4 INDIAN J. INT'L L. 1, 42, 61 (1964).

154. See OPPENHEIM, 1 INTERNATIONAL LAW §§ 106, 107 (Lauterpacht ed., 8th ed. 1955).

155. *Id.* at § 107.

156. See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 154 (1979).

especially in marginal or borderline cases.”¹⁵⁷ Currently the Holy See is recognized through the diplomatic exchange by one hundred and seventy-six States, which makes the point clearly.¹⁵⁸

It has been amply demonstrated that the Holy See’s sovereignty was not adversely affected by the loss of temporal power when the Papal States were confiscated by and absorbed into the Italian unification of 1870.¹⁵⁹ Just prior to the confiscation of the Papal States, the Italian sovereign acknowledged the independence of the Holy see as “outside the imperium of ‘any human power.’”¹⁶⁰ A significant number of states maintained diplomatic relations with the Holy See, which was “for various purposes treated as an international person.”¹⁶¹ Notwithstanding the Lateran Treaty’s recognition of the Vatican City State,¹⁶² some authorities contend that the States¹⁶³ were increasingly recognizing the non-territorial sovereignty of the Papacy.¹⁶⁴ For example, the Czar of Russia asked for Papal support and involvement in the 1898 Hague peace initiative.¹⁶⁵ After the First World War, Germany asked

157. *Id.* In the context of the Holy See, Crawford explains that, “[t]he chief peculiarity of the international status of the Vatican City is not size or population — or lack of them—but the unique and complex relation between the City itself and its government, the Holy See.” *Id.*

158. See *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html. See, John Paul II *supra*, note 131 concerning the relations with European Union, the Sovereign Order of Malta, the Russian Federation, and the Palestine Liberation Organization.

159. See LaPiana, *supra* note 149, at 406. As this author argued, “The only usefulness of the creation of an independent Vatican City is in meeting the objection of those who deny the possibility of a sovereignty existing without a territory” *Supra*. See also Crawford, *supra* note 156, at 157. Crawford argues:

[T]hough some writers denied that the Holy See had any international standing at all after 1870, the true position is that it retained after the annexation of the Papal States what it had always had, a degree of international personality, measured by the extent of its existing legal rights and duties, together with its capacity to conclude treaties and to receive and accredit envoys.

Id.

160. Horace F. Cumbo, *The Holy See and International Law*, 2 INT’L L. Q. 603, 607 (1948-1949).

161. BISHOP, *supra* note 136, at 218; accord BROWNLIE, *supra* note 139, at 64.

162. See Lateran Treaty of 1929, art. 3 and 4.

163. For example, in a 1935 decision of the Italian Court of Cassation (*Nanni and Others v. Pace and the Sovereign Order of Malta*) noted that independence and sovereignty were never denied to the Holy See even prior to the existence of the Lateran Treaty of 1929. See 1 DIGEST OF INTERNATIONAL LAW 42 Whiteman, ed., (U.S. Dept. of State, 1963).

164. See ROBERT GRAHAM, S.J., VATICAN DIPLOMACY: A STUDY OF CHURCH AND STATE ON THE INTERNATIONAL PLANE 201-02 (1959).

165. See CARDINALE, *supra* note 5, at 88.

the Holy See to participate in and become a member of the League of Nations. Italian opposition, however, may have prevented this participation.¹⁶⁶

Though the United States allowed diplomatic relations with the Holy See to expire in the 1870s, some of its government organs still recognized the Holy See as an international personality of note. In 1908, the United States Supreme Court, observing that the U.S. and the Holy See maintained diplomatic relations until 1870, acknowledged that the Holy See “still occupies a recognized position in international law, of which the courts must take judicial notice.”¹⁶⁷ Full diplomatic relations between the Holy See and the United States were not restored until 1984, yet the U.S. Secretary of State observed in an 1887 dispatch that, “[w]hile the probabilities seem to be almost entirely against the possibility of the restoration of any temporal power to the Pope, he is still recognized as a sovereign by many powers of the world With all such arrangements this Government abstains from interference or criticism.”¹⁶⁸ The Philippines Supreme Court, in a 1994

166. *See id.*

167. *Municipality of Ponce v. Roman Catholic Church*, 210 U.S. 296, 318 (1908). The Court then stated:

The Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of the Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged His relations with the Kingdom of Italy are governed, unilaterally, by the Italian law of May 13, 1871, called ‘the law of guarantees,’ against which Pius IX and Leo XIII have not ceased to protest.

Id. at 318-19.

168. I JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 39 (1906) (quoting Dispatch of Mr. Bayard, Secretary of State to Mr. Dwyer (November 7, 1887)). The dispatch continued with instruction that should a diplomat of the United States be at a court in which the Holy See is also represented, it is the “duty” of the American diplomat to observe those conventions extended to the Papal representative due to the 1815 agreements emerging from the Congress of Vienna. *See id.* *See* discussion *infra* Part IV.A.3 (discussing the history of past and present relations between the Holy See and the United States). In 1984, the Holy See and the United States re-established full diplomatic relations. Court challenges based on the First Amendment of the U.S. Constitution to the re-establishment of diplomatic relations were dismissed. *See* discussion *infra* notes 216-220 and accompanying text. During World War II, Presidents Roosevelt and Truman sent Mr. Myron Taylor as a “personal representative” of the President of the United States to the Holy See from 1939-1949. Mr. Taylor held the title of “Ambassador.” *See generally* WARTIME CORRESPONDENCE BETWEEN PRESIDENT ROOSEVELT AND POPE PIUS XII (1947); CORRESPONDENCE BETWEEN PRESIDENT TRUMAN AND POPE PIUS XII. The first collection contains twenty-seven letters exchanged between President Roosevelt and Pope Pius XII from December of 1939 to November of 1944. The neutrality of the Holy See during the War did not preclude this warm exchange between two world leaders who were both in search of peace in the world. *See also* Marian Nash Leich, *International Status of States—The Vatican (Holy See)*, 78 AM. J. INT’L L. 427 (1984). In a widely cited article appearing in 1952 in THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Josef Kunz commented that, “[t]he protests in the United States against the nomination by the President of

decision, similarly acknowledged the international personality of the Holy See and its status as a foreign sovereign.¹⁶⁹

A commonly held view is that the Holy See, without interruption, has been a subject of international law and has lawfully exercised the attendant rights and duties of an international personality. The contention that the Holy See had no international personality from 1870 to 1929 is “wholly untenable in the light of the practice of states.”¹⁷⁰

In his 1934 lectures at Oxford University, Prof. Mario Falco reached similar conclusions.¹⁷¹ The crux of his argument concentrated on the relation between the rights of an entity and its status of international personality. He argued:

[W]herever there are rights there is a person or subject of rights; hence it follows that, if positive international law recognizes in the Holy See one or more international rights, then the Holy See is a legal person in international law. The existence of some such right . . . is necessary, but it is also sufficient; it is sufficient because the holder’s status as a subject of rights is not enhanced or diminished according to the quantity of rights held, and so the fact that the Holy See happens to enjoy a lesser quantity of international rights than is enjoyed by states has no importance. Now the international rights which the predominant doctrine recognizes in the Holy See are the active and passive right of legation and the right of concluding concordats.¹⁷²

an American Ambassador to the Vatican reveal an astonishing lack of knowledge and understanding of the legal problem of the status of the Holy See in international law.” Kunz, *supra* note 47, at 308.

169. See *The Holy See v. Starbright Sales Enter. Inc.*, 102 I.L.R. 163 (1994). The Court in an opinion by Quason, J., stated:

Inasmuch as the Pope prefers to conduct foreign relations and enter into transactions as The Holy See and not in the name of the Vatican City, one can conclude that the Pope’s own view, it is The Holy See that is the international person. The Republic of the Philippines has accorded The Holy See the status of a foreign sovereign. The Holy See, through its Ambassador, the Papal Nuncio, has had diplomatic representations with the Philippine Government since 1957. This appears to be the universal practice in international relations.

Id. at 169-70 (citation omitted).

170. Kunz, *supra* note 47, at 309.

171. See generally, MARIO FALCO, THE LEGAL POSITION OF THE HOLY SEE BEFORE AND AFTER THE LATERAN AGREEMENTS: TWO LECTURES DELIVERED AT THE UNIVERSITY OF OXFORD (1935).

172. *Id.* at 15. Falco continues:

In reality the attitude of states in general towards the Holy See proves that they have recognized in the person of the Pope the supreme head of the Catholic religion, who as such possesses not only the highest moral authority but also exceedingly great political influence;

Another and more recent investigation of the legal status of the Holy See was pursued by Prof. Tiyanjana Maluwa.¹⁷³ Like Prof. Falco's work of fifty years earlier, Prof. Maluwa's work is careful and exacting. It is familiar with the long history of the Papacy and its diplomatic exchanges. Like others,¹⁷⁴ Prof. Maluwa acknowledged the general legal principle that personhood or personality is defined in terms of capacity to have rights and shoulder duties.¹⁷⁵ While also recognizing the circular danger that imperils some conventional analyses of the Holy See's legal status, Maluwa pushed the investigation further and ultimately reached a novel conclusion: the Holy See's international personality, while it may be *sui generis*, is based on social need—that is, the needs of the community—rather than a conventional application of personality accorded to states.¹⁷⁶

Maluwa suggested that an entity such as the Holy See, which is neither strictly a state nor an international organization, derives its international personality by executing functions “recognized as significant for the international community.”¹⁷⁷ The definition of international personality depends on the answer to this important question: does such an entity as the Holy See engage in functions or activities that are useful in serving the interests of the international community? Maluwa's answer was in the affirmative and relied on the evidence of the utility of the Holy See's participation in the creation of international agreements and other legal instruments, its exchange in diplomatic relations, and its involvement in and contribution to various international organizations.¹⁷⁸

A recent investigation of the Holy See's status of international personality declared: “[o]f course, nobody nowadays doubts that the Roman Church is endowed with an international legal personality.”¹⁷⁹ After

hence they have recognized in the Pope one who has the capacity of willing and acting not only in the spiritual sphere but also in the sphere of temporal interests and inter-state relations—an international person.

FALCO, *supra* note 171, at 16.

173. See Tiyanjana Maluwa, *The Holy See and the Concept of International Legal Personality: Some Reflections*, 19 COMP. & INT'L L.J. OF S. AFR. 1 (1986).

174. See BROWNLIE, *supra* note 139, at 57-58. While agreeing that this concept of legal personality is standard, Prof. Brownlie points out that it is circular and explains in depth what it means. See *id.*

175. See Maluwa, *supra* note 173, at 7.

176. See *id.* at 11.

177. *Id.* at 12.

178. See *id.* at 23-24, 26.

179. Gaetano Arangio-Ruiz, *On the Nature of the International Personality of the Holy See*, 29 REVUE BELGE DE DROIT INTERNATIONAL [R.B.D.I.] 354 (1996). Arangio-Ruiz hastens to add that the relationship amongst the Church, the Holy See, and the Vatican City State creates some ambiguities and doubts. See *id.*

scrutinizing the “constitutional” and “inter-state systems” of international personality over the centuries, Prof. Arangio-Ruiz recognized that the Holy See was a part of evolving law since before the creation of strong nation-states. He concluded that, “international personality . . . has thus been maintained by the Holy See without interruption from the time of the inception of the rules governing international relations up to the present time. It has never been seriously contested and it seems very unlikely that it ever would be.”¹⁸⁰ Arangio-Ruiz believes that the Holy See’s unique or *sui generis* personality is not restricted to purely spiritual or religious matters.¹⁸¹ Although the Holy See does enjoy roles that are a part of the sovereignty it exercises, there is considerably more that makes it a “power” in the world of international relations. He states:

The truth seems to me to be that the Holy See has become a power among the powers: where by power I understand any entity factually existing as a sovereign and independent unit and participating as such in international relations. This concept has nothing to do with any major or superior military, economic, and/or political power. Despite the lack of “divisions” the Roman Church appears to be, as a moral power, far more powerful than many if not most States.¹⁸²

In this context, it should be recalled that the Pope, as the head that directs the Holy See, sits upon the chair of Peter, and he is the Vicar of Christ.¹⁸³ As a result, it is not essential in the exercise of sovereignty to preside over a specific territory with an identifiable population. Unlike most, this

180. *Id.* at 360.

181. *See id.* at 362-363.

182. *Id.* at 364-365. Professor Arangio-Ruiz continues by saying,

It is hardly necessary to add that, just as there is no real foundation for the alleged “specialty” of the Holy See’s personality there is no foundation for the alleged limitations of the Holy See’s legal capacity mentioned by some scholars. If the Holy See has ceased, for example, to participate in military operations, it is because of its lofty inspiration, its own constitution and legal order and its choices, not because of any international legal incapacity.

ARANGIO-RUIZ, *supra* at 365-66.

I suggest that this certainly goes to the heart of sovereignty: each entity having international legal personality, each subject of international law exercises its own identity formed by its self-determination. In the exercise of its rights and obligations under international law, it looks to no other entity for permission or approval in determining who it is and how it operates within the rule of international law. It alone makes that determination and, as the next discussion illustrates, that is what the Holy See has done.

183. *See* CATECHISM OF THE CATHOLIC CHURCH §§ 881-882, and *Lumen Gentium* [The Dogmatic Constitution of the Church, promulgated on November 21, 1964], at Nos. 22 and 23.

sovereignty is not restricted by a specific territory.¹⁸⁴ The place where the Holy See exercises its sovereignty transcends a particular territory because it is exercised throughout the world. This is why the sovereignty of the Holy See has sometimes been described as “supra-national.”¹⁸⁵ However, the “supra” does not equate to superiority, but rather to something along the lines of being different.

In the exercise of its international personality, the Holy See identifies itself as possessing an “exceptional nature within the community of nations; as a sovereign subject of international law, it has a mission of an essentially religious and moral order, universal in scope, which is based on minimal territorial dimensions guaranteeing a basis of autonomy for the pastoral ministry of the Sovereign Pontiff.”¹⁸⁶ Yet, it would be mistaken to conclude that the Holy See does not view itself having a role in the world of international order concerned with issues of peace, the common good, and the general welfare of all men, women, and children.¹⁸⁷ This point

184. See generally BROWNLIE, *supra* note 139, at 98-117.

185. See *supra* note 120 and accompanying text.

186. SHAW, *supra* note 153, at 172 (quoting the Joint 11th and 12th Reports to the United Nations Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/226/Add.6,(1993)); *accord* Summary Record of the 991st Meeting of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/SR.991 (1993). The Summary Record of the Committee states in part: “As the supreme governing body of the Catholic Church, the Holy See was recognized as a sovereign subject of international law. Its territory, the Vatican City State, was very small, its only function being to guarantee its independence and the free exercise of its religious, moral and pastoral mission. Its participation in international organizations, most notably the United Nations, and its accession to international conventions such as the Convention on the Elimination of All Forms of Racial Discrimination differed profoundly from those of States which were communities in the political and temporal sense.” *Id.* at No. 2. Professor Falco noted that, “It may seem paradoxical, but, although the Church has always taught that sovereignty does not belong to states alone and that spiritual sovereignty is superior to temporal sovereignty, yet the Holy See has never abandoned the principle that a basis of territorial sovereignty is absolutely necessary to it in order to make its independence absolute and visible. Moreover, the Holy See has never been willing to admit that its status and the inviolability and immunity of the Popes could rest upon Italian municipal law, that is to say, upon a unilateral act. For these reasons the Holy See never ceased after 1870 to claim restoration of the temporal power and the settlement of its status by means of a convention.” See Falco, *The Legal Position of the Holy See*, *supra* note 171, at 17-18.

187. See Kunz, *The Status of the Holy See in International Law*, *supra* note 47, at 310, where Mr. Kunz noted that,

The Holy See is . . . a *permanent* subject of *general* customary international law *vis-à-vis* all states, Catholic or not. That does not mean that the Holy See has the same international status as a sovereign state. But the Holy see has, under general international law, the capacity to conclude agreements with states . . . [be they concordats or general international treaties].

Id. (citations omitted).

was made in Pope Paul's October 4, 1965 address before the United Nations General Assembly.¹⁸⁸

In addition, a similar argument was advanced by the Second Vatican Council, stating that the Church, and therefore the Holy See, is not only concerned with, but also involved in, the affairs of the world as a consequence of its spiritual and religious mission. As the Council noted in the Pastoral Constitution on the Church in the Modern World, the Holy See "does not lodge its hope in privileges conferred by civil authority. Indeed, it stands ready to renounce the exercise of certain legitimately acquired rights if it becomes clear that their use raises doubt about the sincerity of its witness"¹⁸⁹ Nonetheless, the Council stated that:

[It] hastened to add that due to its teaching authority and moral vision for all people throughout the world, it is always and everywhere legitimate for her to preach the faith with true freedom, to teach her social doctrine, and to discharge her duty among men without hindrance. She also has the right to pass moral judgments, *even on matters touching the political order*, whenever basic personal rights or the salvation of souls make such judgments necessary . . . [h]olding faithfully to the gospel and exercising her mission in the world, the Church consolidates peace among men, to God's glory. For it is her task to uncover, cherish, and ennoble all that is true, good, and beautiful in the human community.¹⁹⁰

188. See *supra* notes 115-116 and accompanying texts.

189. *Gaudium et Spes*, *supra* note 66, at No. 76.

190. *Id.* (emphasis added). Toward the conclusion of the Pastoral Constitution, the Council stated that,

In pursuit of her divine mission, the Church preaches the gospel to all men and dispenses the treasures of grace. Thus, by imparting knowledge of the divine and natural law, she everywhere contributes to strengthening peace and to placing brotherly relations between individuals and peoples on solid ground. Therefore, to encourage and stimulate cooperation among men, *the Church must be thoroughly present in the midst of the community of nations*. She must achieve such a presence both through her public institutions and through the full and sincere collaboration of all Christians

Id. at No. 89 (emphasis added). The views of the Council would thus tend to alter the meaning and the impact of Article 24 of the Lateran Treaty which states:

The Holy See, in relation to the sovereignty it possesses also in the international sphere, declares that it wishes to remain and will remain extraneous to all temporal disputes between States and to international congresses held for such objects, unless the contending parties make concordant appeal to its mission of peace; at the same time reserving the right to exercise its moral and spiritual power. In consequence of this declaration, Vatican City will always and in every case be considered neutral and inviolable territory.

Id.

At this stage in the investigation, it would be useful to take account of how the Holy See has featured in several areas relevant to the task of defining the nature of the Holy See's international personality: (1) State practice and custom and (2) treaty law.

III. STATE PRACTICE, CUSTOM, AND TREATY LAW

The roles of State practice, custom, and treaty law have already been alluded to in assessing the status of the Holy See's international personality. However, I shall provide more structure to the previous examination.

A. *State Practice and Custom*

The past two sections of the article have dealt with an overview of how temporal States have dealt with the Holy See as an international person. In essence, the practice of the States confirmed the status of the Holy See's uninterrupted international personality, even during the period of 1870-1929.¹⁹¹ Formal diplomatic exchanges with States at the ambassadorial level have grown since the first exchanges of the 1500's. In 1972, the Holy See sent first class representatives to sixty-eight states. In return, it received sixty-five representatives who held the title of Ambassador.¹⁹² In 1979, Pope John Paul II first visited the United Nations (UN) headquarters in New York and delivered an address to the General Assembly. That same year, the Holy See sent first class representatives to eighty-six states and received eighty-seven in return.¹⁹³

In 1995, when the Pope made his second trip to the UN and again delivered an address to the General Assembly, the numbers of active and passive legation had grown to one hundred and fifty-six and one hundred and fifty-seven respectively.¹⁹⁴ Most recently, this number again increased to the point where the Holy See has diplomatic relations with one hundred and seventy-six states.¹⁹⁵ Examination of the approach of various States in dealing with the Holy See in diplomatic and other relations deepens the understanding of the latter's international personality.¹⁹⁶

191. See 1 DIGEST OF INTERNATIONAL LAW 58 (U.S. Dept. of State, 1963, Whiteman, ed.).

192. See ANNUARIO PONTIFICIO 1048-80 (1972).

193. *Id.* at 1110-1150 (1979).

194. *Id.* at 1294-1344 (1995).

195. *Bilateral and Multilateral Relations of the Holy See*, THE VATICAN, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html (last visited Jan. 24, 2010).

196. State practice can be a source of international law. See Article 38.1(c) of the Statute of the International Court of Justice, which acknowledges that "the general principles of law recognized by

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England has a long history of diplomatic exchange with the Holy See. Select periods of its history witnessed withdrawal of diplomatic relations as a result of the establishment of the Church of England, yet diplomatic exchanges between the two sovereigns have been chronicled from the Eleventh Century to the present day.¹⁹⁷ Even without exchange of first class legations, these two sovereigns found it necessary to engage one another as sovereigns would typically do to discuss issues of mutual concern, especially during times of international armed conflict.¹⁹⁸

Like Great Britain, France also has a long history of diplomatic exchange with the Holy See. However, two major stormy periods occurred when relations between the two sovereigns were discontinued by France. With the French Revolution and Napoleon's rise to power, Napoleon kidnapped the Pope and confiscated the Papal States. However, the Holy See attempted to continue diplomatic exchange during this era.¹⁹⁹ In 1905, France enacted legislation essentially secularizing the State.²⁰⁰ As a consequence, diplomatic relations were temporarily broken off with the Holy See. These relations were ultimately restored in 1921.²⁰¹

civilised [sic] nations" can be a source of law upon which the Court may rely in deciding disputes brought before it. Statute of the International Court of Justice, 1947 I.C.J. Acts & Docs. 38.1(c), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

197. See, e.g., Gordon Albion, *England and the Holy See: A Survey of Diplomatic Relations*, THE MONTH, Jan. 1939, at 74-78; Dorothy M. Williamson, *Some Aspects of the Legation of Cardinal Otto in England*, 1237-41, 64 THE ENG. HIST. REV. 144 (1949); William A. Hinnebusch, *Diplomatic Activities of the English Dominicans in the Thirteenth Century*, 28 THE CATH. HIST. REV. 309 (1942) (demonstrating how the Order of Preachers was used as legates of the temporal sovereign in addition to providing some history of Rome's diplomatic exchanges with England); Robert Noakes, *Cardinal Erskine's Mission*, 1793-1801, 204 THE DUBLIN REV. 338 (1939); Sir Stephen Gaselee, *British Diplomatic Relations with the Holy See*, 204 THE DUBLIN REV. 1 (1939); Harold Temperley & George Canning, *The Catholics and the Holy See*, 193 THE DUBLIN REV. 1 (1933); H. A. Smith, *Diplomatic Relations with the Holy See, 1815-1930*, 48 THE LAW Q. REV. 374 (1932); Sir Alec Randall, *British Diplomatic Representation at the Holy See*, 37 BLACKFRIARS 356 (1956); OWEN CHADWICK, *BRITAIN AND THE VATICAN DURING THE SECOND WORLD WAR* (1986). For a history of an important period in British-Rome relations, see JOHN TRACY ELLIS, *CARDINAL CONSALVI AND ANGLO-PAPAL RELATIONS 1814-1824* (1942).

198. See *The British Mission to the Vatican*, *supra* note 62, at 206-208.

199. See Robert Noakes, *Cardinal Erskine and Napoleon*, 206 THE DUBLIN REV. 102, 102-14 (1940).

200. See *CHURCH AND STATE*, *supra* note 5, at 355-71.

201. See Raymond L. Buell, *France and the Vatican*, 36 POL. SCI. Q. 30 (1921). As a result of the movement toward secularization, Pope Pius X issued the encyclicals *Vehementer Nos* (On the French Law of Separation) promulgated on Feb. 11, 1906, and *Une Fois Encore* (On the Separation of Church and State) promulgated on Jan. 6, 1907. See also Abbe Felix Klein, *Breaking and Renewing Diplomatic Relations Between France and the Holy See*, 112 THE CATH. WORLD 577 (1921). For an interesting legal case involving the display of the Vatican Flag in France during this era see Editorial Comment, *The Papacy in International Law*, 8 AM. J. INT'L L. 864 (1914). When Portugal followed France's example a

2. *Central and South America*

While many of the States of Central and South America are traditionally Catholic, their past diplomatic relations with the Holy See have been characterized by periods of exchanges followed by termination of diplomatic relations on the part of the temporal sovereign.²⁰² The restoration of better and meaningful relations with various states was demonstrated by the Holy See's assistance to the government of Peru during the 1997 take-over of the Japanese embassy by rebel forces.²⁰³ Another important Latin American illustration concerns both the involvement as a mediator and as a signatory of the 1980's mediation during the tense border dispute between Chile and Argentina.²⁰⁴

3. *The United States*

The legal relationship between the United States and the Holy See was addressed previously.²⁰⁵ As was mentioned earlier, the U.S. and the Holy See had engaged in diplomatic exchanges up to 1870.²⁰⁶ Subsequently, the U.S. sent the Holy See a "personal representative of the President" during World War II.²⁰⁷ When efforts were made to reestablish diplomatic relations after the Lateran Treaty entered into force, opposition within the United States was raised.²⁰⁸ Some of this opposition suggested that the

few years later by enacting secularizing legislation that separated the relation between Church and State, Pius X promulgated *Iam dudum* (On the Law of Separation in Portugal) on May 24, 1911.

202. See, e.g., J. Lloyd Mechem, *The Papacy and Spanish-American Independence*, 9 THE HISP. AM. REV. 154 (1929); Almon R. Wright, *Argentina and the Papacy, 1810-1827*, 18 THE HISP. AM. HIST. REV. 15 (1938). Dr. Mechem has chronicled these situations in greater detail in his *CHURCH AND STATE IN LATIN AMERICA: A HISTORY OF POLITICO-ECCLESIASTICAL RELATIONS* (1966).

203. See Gabriel Escobar, *Peru Softens Stance on Rebels: Lima Proposes Special Commission*, available at 1997 WL 2245980.

204. See Act of Montevideo, Chile-Arg., Jan. 8, 1979, U.N.T.S. 17838; Chile-Arg., Oct. 26, 1982, U.N.T.S. 21289.

205. See *supra* note 167 concerning the U.S. Supreme Court taking judicial notice of the status of the Holy See's international personality, and *supra* notes 57 & 58 and accompanying text concerning the importance of stabilizing the relationship between the United States and the Philippines after the Peace of Paris and the conclusion of hostilities between Spain and the United States.

206. See generally Howard R. Marraro, *The Closing of the American Diplomatic Mission to the Vatican and Efforts to Revive It, 1868-1870*, 33 THE CATH. HIST. REV. 423 (1948) and Martin Hastings, *United States-Vatican Relations*, 69 REC. OF THE AM. CATH. HIST. SOC'Y OF PHILADELPHIA 20 (1958) (for a general overview of the periods of diplomatic exchanges and those times in which they were suspended).

207. See *supra* note 168 and accompanying text.

208. See, e.g., John H. Wigmore, *Should A Papal State Be Recognized Internationally by the United States?*, 22 ILL. L. REV. 881 (1928). While objecting on other grounds, including the status of statehood of

Establishment Clause of the First Amendment of the Constitution would be violated should diplomatic relations be restored. Apparently, this constitutional issue was not a concern prior to 1870. Presidents Eisenhower and Nixon, like Presidents Roosevelt and Truman, continued to send “personal representatives” to the Holy See during their administrations.

When President Reagan proposed reestablishment of diplomatic exchange with the Holy See, questions were again raised about the legality of such action. One problem concerned the possible constitutional implications of the Establishment Clause of the First Amendment of the United States Constitution.²⁰⁹ However, other voices demonstrated why these concerns were immaterial and should not prevent the exchange.²¹⁰ The Reagan Administration proceeded with its plan, and the two sovereigns established diplomatic relations once again on January 10, 1984.²¹¹

Shortly after the restoration of the exchange, several lawsuits were filed in federal court challenging the renewal of diplomatic relations. Several groups and individuals, including the Americans United for Separation of Church and State, based their complaint on a number of grounds including violations of the First and Fifth Amendments of the United States Constitution.²¹² The District Court dismissed the complaint on two grounds. First, the Court concluded that the plaintiffs lacked standing.²¹³ Second, the Court deduced that the case was unjudicial because the question posed in the complaint was a political one falling outside the jurisdiction of the Court.²¹⁴ The Court of Appeals for the Third Circuit affirmed the District

the Holy See, Prof. Wigmore was particularly concerned about the exchange of diplomatic representatives and the ensuing “power and influence” that Vatican representatives could have on the United States. *Id.* at 883.

209. See, e.g., Mark Thomas Van Der Molen, Note, *Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall*, 19 VAL. U. L. REV. 197 (1984); Maria Louisa Hekker, Note, *Constitutional Issues Raised by Diplomatic Relations Between the United States and the Holy See*, 15 HASTINGS CONST. L.Q. 101 (1987). Objections were also raised on theological grounds. See, e.g., James Coriden, *Diplomatic Relations Between the United States and the Holy See*, 19 CASE W. RES. J. INT'L L. 361 (1987).

210. See Samuel W. Bettwy and Michael K. Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L.J. 1 (1981).

211. On January 10, 1984, the U.S. Department of State issued a formal announcement stating: “The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States, and Nunciature on the part of the Holy See, as of today, January 10, 1984.” *Americans United for Separation of Church & State v. Reagan*, 607 F. Supp. 747 (E.D. Pa. 1985).

212. *Id.* at 748-49.

213. See *id.* at 751.

214. See *id.* at 751-52.

Court's decision.²¹⁵ The Tenth Circuit Court of Appeals reached similar conclusions in a challenge filed in federal court in Kansas.²¹⁶

While it is not the purpose of this article to engage in a protracted examination of these United States constitutional issues, it does address the impact of any successful court challenge to the diplomatic exchange between the Holy See and the United States. Any ruling in favor of those challenging this exchange would jeopardize diplomatic relations with, and foreign aid to, a host of other states with explicit connections with Islam,²¹⁷ Judaism,²¹⁸ or Christianity.²¹⁹

4. *Non-Christian State and Other Recognitions of the Holy See*

As mentioned above, the magnitude of diplomatic exchanges with other sovereigns has grown dramatically over the centuries. As demonstrated, the Holy See presently engages in active legation with one hundred and seventy-six States.²²⁰ Two recent, major diplomatic encounters between the Holy See

215. See *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 196 (1986). The Third Circuit noted that, "The State of the City of the Vatican is a territorial sovereignty, however small its size and population. The head of the Roman Catholic Church controls the government of that sovereign territory. No other religious organization that is a plaintiff, or in which individual plaintiffs are members, is similarly situated. If the Roman Catholic Church's unique position of control of a sovereign territory gives it certain advantages that other religious organizations do not enjoy, those advantages cannot be the concern of the constitutional provisions upon which the plaintiffs rely." *Id.* at 198.

216. See *Phelps v. Reagan*, 812 F.2d 1293, 1294 (1987). In a brief opinion, the Tenth Circuit noted its agreement with the Third Circuit in *Americans United for Separation of Church and State v. Reagan*. See *Phelps*, 812 F.2d at 1294.

217. For example, Article 1 of the Bahrain Constitution states that, "Bahrain is an Arab Islamic State," and Article 2 indicates that, "Islam shall be the religion of the State; Islamic Shariah (Islamic Law) a main source of legislation." See [CONSTITUTION] art.1-2 (Bahr.); Articles 1, 6, 7, and 8 of the Constitution of Saudi Arabia indicate similar ties between the State, Islam, the Holy Koran, and Islamic Shariah. See [Constitution] art. 1, 6-8 (Saudi Arabia); Article 2 of the Constitutions of both Oman and Kuwait state that Islamic Shariah is a source or basis of legislation. See [CONSTITUTION] art. 2 (Oman) and [CONSTITUTION] art. 2 (Kuwait). The Preamble of the Iranian Constitution similarly notes the strong nexus between the State and Islamic principles. See [CONSTITUTION] (Iran).

218. Section 1a of the Basic Law of Israel states, "The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law values of the State of Israel as a Jewish and democratic state." For a different perspective on the meaning of Israel as a Jewish State, see Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 443-444 (1998).

219. Section 2 of both the Maltese and Argentine Constitutions indicate that Roman Catholicism is the religion of the domain. In the case of the Maltese Constitution, further provisions mandate the teaching of this faith in all State schools "as a part of compulsory education." While Article 2 of the Norwegian Constitution provides for the free exercise of religion, it also declares that, "The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same."

220. See CARDINALE, *supra* note 5.

and others include those with Israel and the Palestinian Liberation Organization (PLO). The 1993 agreement and diplomatic recognition with Israel²²¹ and the Basic Agreement with the PLO²²² demonstrate a contemporary renewal of a long-standing interest by the Holy See in this region of the world.²²³ The significance of these agreements is the formal recognition that the Holy See extended to Israel as a State and to the PLO as the representative of the Palestinian people. In the latter case, the Holy See and the PLO entered into “official relations” on October 26, 1994.²²⁴ The formal agreements indicate that the Holy See and these two entities recognize the importance of formal relations in order to discuss peace in a troubled region of the world, in addition to religious rights and freedom of conscience, protection of sacred areas of interest to the three monotheistic religions of the world, and the advancement of other human rights.

B. *Treaty Law*

Several important subjects require examination of the Holy See’s international personality in the context of treaty law. The first entails the participation by the Holy See in treaties (both bilateral and multilateral) and concordats. The second concerns the substance of multilateral treaties that address the status of the Holy See. In both cases, the Holy See has exercised and been accorded the status of an international person, capable of negotiating and entering treaties as an equal with States’ parties.²²⁵

1. *Treaties and Concordats*

The Holy See has a long history of negotiating international agreements, including treaties.²²⁶ These agreements fall into two categories: (1) treaties

221. See *infra* note 239 and accompanying text.

222. See BASIC AGREEMENT BETWEEN THE HOLY SEE AND THE PALESTINE LIBERATION ORGANIZATION, The Vatican, http://www.vatican.va/roman_curia/secretariat_state/2000/documents/rc_seg-st_20000215_santa-sede-olp_en.html (lasted visited Feb. 15, 2000).

223. For a detailed analysis of the Holy See’s religious and other interests in this region, see GEORGE E. IRANI, *THE PAPACY AND THE MIDDLE EAST: THE ROLE OF THE HOLY SEE IN THE ARAB-ISRAELI CONFLICT, 1962-1984* (1986).

224. BASIC AGREEMENT BETWEEN THE HOLY SEE AND THE PLO *supra* note 222 at Preamble.

225. For a helpful and careful analysis of the Holy See’s exercise of treaty-making authority, see Tiyanjana Maluwa, *The Treaty-Making Capacity of the Holy See in Theory and Practice: A Study of the Jus Tractum of a Non-State Entity*, 20 COMP. & INT’L L.J. OF SO. AFR. 155 (1987).

226. See Geoffrey R. Watson, *Progress for Pilgrims? An Analysis of the Holy See-Israel Fundamental Agreement*, 47 CATH. U. L. REV. 497, 500-01 (1998).

and agreements dealing with conventional topics entered by States and (2) concordats.²²⁷

With regard to conventional treaties and other international agreements, the Holy See has participated in the negotiating, signing, and ratification of major international agreements prior to 1870, during the period of 1870-1929, and after 1929. The Concordat of Worms between Pope Calixtus II and King Henry V, concluded in 1122, was between sovereigns and involved more than simply church relations. In addition, it dealt with issues of temporal sovereignties and became something of a customary law that was followed by succeeding popes and temporal leaders.²²⁸ There are many other illustrations of negotiations between the Holy See and temporal sovereigns with respect to formulating treaties and other agreements, including consular matters.²²⁹

The Holy See's participation in international agreements and understandings has taken other forms. For example, The Holy See became an "adhering State" and was bound by the agreement reached at the Conference on the Limitation of Armament (Washington, D.C.) from

227. Concordats are agreements between the Holy See and another sovereign that address issues concerning the Church in that State. They have been defined as, "Public treaties or agreements, with the force of international law, between the Church and states, regulating relations in areas of mutual concern." J. A. Abbo, 4 NEW CATHOLIC ENCYCLOPEDIA 117 (1981). They have "as their object civil or religious or, more commonly, mixed matters (*res mixtae*) compounded of both elements, hence subject to both authorities." *Id.* at 118. The contracting parties are "the universal Church—personified by the Holy See—and a sovereign state." *Id.* When duly ratified and promulgated, a concordat immediately becomes civil as well as Canon law. *Id.* For the classic and insightful treatment of concordats and their role in international law, see HENRI WAGNON, CONCORDATS ET DROIT INTERNATIONAL (1935). Dr. Wagnon's remarkable work was reviewed in English by C. G. Fenwick, who states that the author traces a close parallel "between the law of concordats and the general law of treaties" because the Holy See "has the requisite capacity to enter into agreements valid at international law." C. G. Fenwick, 30 AM. J. INT'L L. 568, 569 (1936) (book review). See also Msgr. Roland Minnerath, The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective, Address Before the Symposium at the Catholic University of America, Columbus School of Law (Apr. 8, 1997), in 47 CATH. U. L. REV. 467, 476 (1998), who notes that,

By establishing concordats with all types of states, common principles have arisen and are being enforced as conforming to the self-understanding of the Church and the demands of states under the rule of law. There is no question anymore of privileges, but strictly of human rights. Thus, the international character of the Holy See indirectly confers to the parallel agreements concluded between states and other religious communities, the support of an international treaty, as it is the first duty of the state to treat all its citizens equally.

Id.

228. See CHURCH AND STATE, *supra* note 5, at 48-49.

229. See CARDINALE, *supra* note 5, at 275-94.

November 12, 1921, to February 6, 1922.²³⁰ After the Lateran Treaty, the Holy See became involved with international agreements on both bilateral and multilateral levels.²³¹

On the multilateral level, the Holy See participated in negotiations leading to some of the principal Twentieth Century international legal instruments. For example, it signed, ratified, or acceded to such agreements as: The Geneva Conventions of August 12, 1949 (along with the two additional Protocols of 1977); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; two of the Law of the Sea Conventions of 1958; the Vienna Convention on Diplomatic Relations of April 18, 1961; the Vienna Convention on Consular Relations of April 24, 1963; the Vienna Convention on the Law of Treaties of May 23, 1969; the Vienna Convention on Succession of States with Respect to Treaties of August 22, 1978; the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965; the Convention on the Rights of the Child of November 20, 1989; the Convention Relating to the Status of Refugees of April 22, 1954; the Convention on Long-Range Transboundary Air Pollution of November 13, 1979; and the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction) of March 1, 1999. In addition, the Holy See has also assisted in drafting and signing the 1975 Final Act (Helsinki Accords) of the Conference on Security and Co-Operation in Europe (now the Organization for Security and Co-Operation in Europe), and it is a member of the Organization. The Holy See is also a signatory to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of March 14, 1975.

On a bilateral level, the Holy See and Spain entered a variety of treaties involving common interests in the Holy Land (December 21, 1994), economic issues (October 10, 1980 and January 3, 1979), religious assistance to the Spanish armed forces (August 5, 1980)], and education and cultural matters (January 3, 1979). Noted elsewhere are the agreements with

230. *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment*, 33 AM. J. INT'L L. SUP 167, 550 (1939).

231. In 1936 an American doctoral candidate at the University of Geneva completed his dissertation on the impact of the Lateran Treaty on the Holy See's treaty and concordat-making power and diplomatic practice. Whilst the author's work contained in his published thesis is somewhat dated, it nonetheless provides an important contemporary insight into the impact of the 1929 Agreement between the Holy See and Italy. See Oliver Earl Benson, *Vatican Diplomatic Practice as Affected by the Lateran Agreements*, (1936) (Imprimerie Georges Thone, Liege).

Sweden²³² and Israel.²³³ Each of these three State sovereigns registered their respective agreements with the Holy See with the United Nations. The act of registration suggests that the instrument has legal implications and provides “tangible evidence that the agreement is to be regarded as a treaty and that that is the intention of the parties concerned.”²³⁴

Due to their significance, two recent instruments involving the Holy See as one of the parties need to be mentioned. The first is the agreement between Israel and the Holy See of December 30, 1993, addressing the issues of freedom of religion and conscience, condemnation of anti-Semitism, protection of sacred places and pilgrims, cultural exchanges, freedom of expression, freedom to carry out charitable works, and provisions addressing property, economic, and fiscal matters.²³⁵ In accordance with this agreement, Israel and the Holy See entered diplomatic relations under Article 14 of the Agreement.²³⁶ As Marshall Breger points out, “[t]he Vatican-Israel Accord of 1993 was clearly a political document—one undertaken between two sovereign states.”²³⁷ As with his many other official visits abroad, the Pope was received by Israel as a head of State during his Middle East visit during March 2000.²³⁸

A second recent bilateral agreement deserving of attention is the understanding signed by the Holy See and the Palestine Liberation Organization addressing the questions of human rights and inter-religious

232. See *infra* note 264 and accompanying text.

233. See *infra* note 239 and accompanying text.

234. See, e.g., WALLACE, *supra* note 139, at 221. See also Article 102.2 of the United Nations Charter which states that, “No party to any such treaty or international agreement which has not been registered . . . may invoke that treaty or agreement before any organ of the United Nations.”

235. 33 I.L.M. 153 (1994).

236. *Id.*

237. Marshall J. Breger, *Introduction to The Fundamental Agreement Between the Holy See and the State of Israel—A Symposium*, 47 CATH. U. L. REV. 369 (1998).

238. See Alessandra Stanley, *Pope Arrives in Israel and Gets Taste of Mideast Politics*, N.Y. TIMES, March 22, 2000, at A8. As was reported by the New York Times upon the arrival of Pope John Paul II in Israel,

The import of John Paul’s visit to Israel, the first by a pope officially as a head of state, was underscored by the welcome he received at Ben Gurion International Airport. He was greeted by President Weizman, Prime Minister Ehud Barak and several Cabinet ministers—though no ultra-Orthodox government minister attended The pope hopes to use his visit to Israel to promote interfaith reconciliation and lend his moral authority to the quest for peace. But his unique international stature is equally coveted by Israelis, who want him to reinforce their sovereign rights, and by Palestinians, who hope his visits to Palestinian leaders and a Palestinian refugee camp . . . will lend legitimacy to their cause.

For an important discussion on the Holy See’s role in the Middle East, see IRANI, *supra* note 223.

dialogue, the respect for a status quo concerning Christian holy places, the freedom of the Catholic Church to carry out its mission, and the Catholic Church's right to its legal personality.²³⁹ The Holy See's participation as becoming a party to these agreements with many States, demonstrates an important point: most States consider the Holy See a necessary international personality to participate with the sovereign States of the world in the development and codification of international law.

With regard to concordats, some commentators suggest that these are not international agreements equivalent to treaties or other instruments indicative of international personality of the contracting parties. However, other commentators are persuaded by the force of judicial argument.²⁴⁰ A further view compares concordats to general conventions "by which one State obtains from another an agreement to refrain or limit the exercise of its jurisdiction over its own citizens."²⁴¹ When carefully examined, their content frequently covers issues typical of any agreement between two sovereigns.²⁴² The argument is made that concordats cover issues which are solely of concern to the Catholic Church of the State in which the other contracting party is located. However, concordats include issues that cover not only internal Church matters but also those addressing morality, religion and its observance, education, matrimony, and other family issues identified in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant of Economic, Social, and Cultural Rights. Moreover, concordats frequently address issues of State aid to Church affiliated hospitals and schools in addition to the resolution of property disputes.²⁴³ Through a comparison of concordats with bilateral

239. Basic Agreement Between the Holy See and the Palestine Liberation Organization, February 15, 2000.

240. See OPPENHEIM, *supra* note 43, at 252 n.2 and the discussion of the 1934 Bavarian Supreme District Court decision in the case, *In Re A Nun's Dress*, where the court expressed its view that concordats "had the same internal validity as treaties."

241. See Cumbo, *supra* note 160, at 608.

242. See, e.g., Fundamental Agreement Between the Holy See and the State of Israel.

243. See Roland Minnerath, The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective, Address Before the Symposium at the Catholic University of America, Columbus School of Law (Apr. 8, 1997), in 47 CATH. U. L. REV. 467 (1998). As Msgr. Minnerath has stated in regard to their being agreements of international law:

[T]hese instruments have all the same legal force. They are treaties between two subjects of international law, each one sovereign in its own sphere: spiritual and political. They are negotiated, signed, and ratified according to current international practice. Under the regime of the League of Nations, some concordats were even registered in the Record Book of International Treaties in Geneva.

treaties between States, there is little distinction between many of the topics addressed. As one commentary to the 1983 Code of Canon Law mentions about concordats:

The interests of the Holy See can be of a purely religious or moral nature, such as questions of justice, development of peoples, world peace, etc. They can also be of a material nature, ranging from seeking aid for needy areas and relief for disaster victims to special support for the Church in its ministry and various apostolates.²⁴⁴

While detailed discussion could be pursued regarding the similarities and differences between concordats and treaties, an important study by Dr. Tiyanjana Maluwa cogently demonstrates why any distinction between concordats and other treaties is artificial and lacks substance.²⁴⁵

One final consideration on the international significance of concordats is their status in the context of Canon Law. While some States unilaterally walked away from concordat responsibilities and broke off diplomatic relations with the Holy See,²⁴⁶ the Holy See observed and practiced the legal principle *pacta sunt servanda*. Consequently, the 1983 Code of Canon Law expressly states that any provision in the Code, even though it is the most serious of Church law, cannot “abrogate or derogate from the pacts [concordats, treaties, other international agreements, etc.] entered upon by the Apostolic See with nations or other political societies.”²⁴⁷

Before concluding this discussion, we should consider the position of the International Law Commission (ILC) regarding the Holy See’s status as an international personality competent to negotiate and enter treaties and other

Id.

244. See Commentary, 1983 CODE c.365.

245. See MALUWA, *supra* note 225, at 162-74.

246. See *supra* note 201 and accompanying text.

247. 1983 CODE c.3. This same canon continues by stating, “[these pacts] therefore continue in force as presently, notwithstanding any prescriptions of this Code to the contrary.” *Id.* The Commentary to this canon states that the Code only regulates the “internal life” of the Church, and

it does not apply to international legal relations. The activities of the Church among the family of nations and its participation in international organizations are subject to the general norms of international law. Since the Holy See is an international juridic person, it has the capacity to conclude agreements with other such persons, i.e., all sovereign states and international associations and organizations formed by them Should there ever be a conflict between the canons and the pacts, the pacts must stand.

Id. In addition, Canon 365 reminds pontifical legates that they must act in accordance with the “norms of international law.” 1983 CODE c.354.

international agreements with temporal sovereigns. When the Vienna Convention on the Law of Treaties was in its early drafting stages in 1959, the ILC made a number of significant observations about the Holy See:

[I]t has always been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the Papacy particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State . . . under the territorial sovereignty of the Holy See, treaties . . . are . . . entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State.²⁴⁸

The ILC reexamined the status of the Holy See a few years later as the drafting of the Convention resumed. When deliberations continued, the ILC noted that:

The term “treaty” as used in the draft article covers only international agreements made between two or more States or other subjects of international laws. The phrase “other subjects of international law” is designed to provide for treaties concluded by: . . . (b) the Holy See, which enters into treaties *on the same basis as states*²⁴⁹

In its commentary on Article 3 of the Convention on the Law of Treaties which addresses “other subjects of international law,” the ILC hastened to add that, “[t]he phrase ‘other subjects of international law’ is primarily intended to cover international organizations, to remove any doubt about the

248. See *Documents of the Eleventh Session including the Report of the Commission to the General Assembly*, [1959] 2 Y.B. Int'l L. Comm'n 96, ¶ 7 UN Doc. A/CN.4/SER.A/1959/Add.1 (commentary to Art. 2 of the Vienna Convention on the Law of Treaties), see also CRAWFORD, *supra* note 156, at 158-60 (explaining the relation between the Holy See and the Vatican City State). As Professor Crawford suggests:

To some extent the desire to particularize or categorize the relationship between the two entities reduces itself to a semantic dispute The position would appear to be that the relation is one of State and government, but with the peculiarity that the government in question, the Holy See, has an additional non-territorial status, which is in practice more significant than its status *qua* government of the City of the Vatican.

Id. at 159-60.

249. *Documents of the Fourteenth Session including the Report of the Commission to the General Assembly*, [1962] 2 Y.B. Int'l L. Comm'n 162, ¶ 8, UN Doc. A/CN.4/SER.A/1962/Add.1 (commentary to Art. 1 of the Law of Treaties) (emphasis added).

Holy See[,] and to leave room for more special cases such as an insurgent community to which a measure of recognition had been accorded.”²⁵⁰

2. *Specific Treaty Provisions Addressing the Status of the Holy See*

After the Congress of Vienna in 1815, several important multilateral treaties specifically acknowledged the role and status of the Holy See as a subject of international law. The treaty references are compelling evidence demonstrating that the State members of the international community did not question the status of the Holy See as a subject of international law but openly accepted this status as a fact of international law.

At the conclusion of the Congress of Vienna, the eight States²⁵¹ agreed upon a regulation concerning the precedence of Diplomatic Agents.²⁵² These regulations of March 19, 1815, while brief, revealed several critical points regarding the legal status of the Holy See. The first point is found in Article 1, which states that there are three classes of diplomatic agents, and the first, or highest level, include “ambassadors, legates[,] or nuncios.”²⁵³ Nuncios are those representatives of the Holy See who are permanent representatives of the Pope vested with both political and ecclesiastical authority and accredited to the court or government of a sovereign State.²⁵⁴ The second point is taken from Article 2, which equates the status of nuncios with ambassadors.²⁵⁵ The third point comes from Article 4, which states that the precedence or rank given to diplomats based on the date of assuming official duties (usually involving the presentation of credentials) would not in any way prejudice the precedence accorded to Papal representatives.²⁵⁶

The significance and effect of these regulations concerning diplomatic relations continue to this day. The categories of diplomats, and the

250. *Id.* at 164, ¶ 2.

251. The eight states were: Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden. *See* 1 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967 519 (Fred L. Israel, ed., 1967).

252. *See Id.* at 570. Annex VII of the Congress of Vienna refers to these regulations of March 19, 1815. *Id.* at 575. Interestingly, the Congress in Article 103 restored the Papal States which had briefly been confiscated by Napoleon. *Id.* at 565.

253. *See* 64 THE CONSOLIDATED TREATY SERIES 1 (Clive Parry ed., 1964). Article 1, *Règlement sur le Rang entre les Agents Diplomatiques*, which states in pertinent part, “Les Employés Diplomatiques sont partagés en trois Classes. Celle des Ambassadeurs, Legats ou Nonces.” *Id.* at 2.

254. *See* THE CATHOLIC ENCYCLOPEDIA DICTIONARY 687 (1941); *see also Sollicitudo Omnium Ecclesiarum*, Apostolic Letter of Pope Paul VI, promulgated 24 June 1969, *supra* note 118, at No. 10.

255. *See* THE CONSOLIDATED TREATY SERIES, *supra* note 253, at 2.

256. *See id.* The original text of Article 4 reads, “Les Employés Diplomatiques prendront Rang entre eux dans chaque Classe, d’après la Date de la Notification officielle de leur Arrivée. Le présent Règlement n’apportera aucune innovation relativement aux Représentans du Pape.” *Id.*

precedence that could be given to Papal representatives, were largely incorporated into the Vienna Convention on Diplomatic Relations of April 14, 1961.²⁵⁷ As with the 1815 Regulations from the Congress of Vienna, the Vienna Convention on Diplomatic Relations divides diplomatic missions into three classifications, the first of which includes ambassadors or nuncios.²⁵⁸ Like the 1815 Regulations, the 1961 Vienna Convention also specifies that precedence (given in the respective classes) is based on the order in which representatives assumed their posts and presented their credentials.²⁵⁹ However, as with the 1815 Regulations, the 1961 Convention does not discriminate or interfere with “any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.”²⁶⁰

The consequence of these practices, which spanned almost two hundred years, is that notwithstanding its status as a unique person in international law, the Holy See deals with virtually all other sovereign States in the world today as a co-equal. While it holds Observer rather than State member status at the United Nations, the final topic that will be examined in Part V, the Holy See is respected by the international community of sovereign States and treated as a subject of international law having the capacity to engage in diplomatic relations and to enter into binding agreements with one, several, or many States under international law. It is unequivocal that the sovereign States of the world do acknowledge no impediment in the Holy See’s unique

257. Over 170 States are parties to this convention. The Holy See is a party and ratified the convention on April 17, 1964. The convention entered into force on April 24, 1964.

258. Vienna Convention on Diplomatic Relations, Article 14.1(a). The second class includes envoys, ministers, and internuncios. Article 14.1(b). Internuncios are in the order of pontifical diplomats who are equivalent to the ministers of the second class. *See* Legates, THE CATHOLIC ENCYCLOPEDIA (1910) at <http://www.newadvent.org/cathen/09118a.htm>. Eileen Denza has noted that, “Articles 14 to 16, and Article 18 of the Vienna Convention are a restatement in modern terms of the rules enunciated in 1815 by the eight signatories of the Regulation of Vienna: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden.” *See* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 58 (1976).

259. Vienna Convention on Diplomatic Relations art. 16.1, Apr. 18, 1961, 500 U.N.T.S. 95.

260. Vienna Convention on Diplomatic Relations art. 16.3, Apr. 18, 1961, 500 U.N.T.S. 95. As Eileen Denza points out,

At the Vienna Conference an amendment introduced by the Holy See replaced the word ‘existing’ by ‘accepted’, so making clear that States were entitled if they wished to adopt in the future the practice of giving precedence to the representative of the Holy See. This was opposed . . . only by representatives of the Communist states . . . who abstained in the voting in Committee on this amendment. *See* DENZA, *supra* note 258, at 97. The amendment of the Holy See was accepted as the final text indicates; moreover, the concerns of “Communist delegations” after 1990 would have begun to disappear.

status that would deprive it of the ability to exercise fully its membership in the community of sovereigns who are subjects of the law of nations.

IV. THE STATUS OF THE HOLY SEE AT THE UNITED NATIONS

A. *The History of the Holy See at the United Nations*

Although the Holy See became a Permanent Observer at the United Nations in March of 1964, its role and participation in the work of this international organization began shortly after the United Nations was founded in 1945. When plans for the United Nations were first discussed at the Dumbarton Oaks conference, President Truman's personal representative to the Holy See,²⁶¹ Myron C. Taylor, was approached by the Holy See to inquire about the status of smaller States joining the new organization.²⁶² At that time, the United States Department of State took the position that it would discourage membership of entities that were "too small to be able to undertake the responsibilities, such as participation in measures of force to preserve or restore peace," that the members of the UN would be obliged to honor.²⁶³

Notwithstanding these observations made by U.S. Secretary of State Cordell Hull, the Holy See was invited to participate in UN activities shortly thereafter. In 1951, the Economic and Social Council, through Resolution 393B (XIII) asked fifteen States to serve as members of an Advisory Committee on Refugees.²⁶⁴ The Holy See was one of these fifteen entities appointed to this advisory group.²⁶⁵ In addition, the Holy See was invited to the Conference of Plenipotentiaries "to consider the draft Convention

261. Mr. Myron Taylor, who was the personal representative of President Franklin Roosevelt continued in that capacity under President Truman. *See supra*, note 168.

262. *See* RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 509 (1958).

263. *Id.* These concerns expressed by the United States in the earliest stages of the UN have disappeared. Moreover, Secretary Hull was concerned about the ability of a State to contribute military assistance to peacekeeping activities. But an entity can contribute many other services to peacekeeping besides military personnel and hardware, and the Secretary's statement does not take account of this. *See* R. G. SYBESMA-KNOL, THE STATUS OF OBSERVERS IN THE UNITED NATIONS 324-25 (1981). The author points to the different circumstances of Liechtenstein, Germany after the Second World War, and the Holy See, but concludes that an important factor in granting Permanent Observer status is "international (political) standing." *Id.* She concludes by stating that, "Normally however, observers from States [after mentioning Liechtenstein, the German Republics, and the Holy See] are fully accepted by UN Members; they enjoy the usual diplomatic status, and there are no problems of representativity involved." *Id.* at 325.

264. *See* 1951 U.N.Y.B. 36, 527 n.55, U.N. Sales No. 1952.1.30.

265. *Id.*

Relating to the Status of Refugees and the draft Protocol Relating to the Status of Stateless Persons” that was also held in 1951.²⁶⁶ Moreover, the Holy See participated in several Charter and Treaty organizations of the United Nations including the Food and Agriculture Organization (observer) (1948); the World Health Organization (observer) (1951); and the United Nations Educational, Scientific, and Cultural Organization (observer) (1951). In 1955, the Holy See, at the request of the Secretary General, Dag Hammarskjöld, was invited to the conference that established the International Atomic Energy Agency (IAEA).²⁶⁷ Since the goal of the IAEA was to ensure the peaceful use of atomic energy, it was believed by the Secretary General and others that the Holy See’s presence at the conference and participation in the Agency would be vital to the organization’s success.²⁶⁸ The Holy See also became an Observer to the UN’s Economic and Social Council (ECOSOC) in 1956.²⁶⁹

On March 21, 1964, the Holy See joined the United Nations as a Permanent Observer. While some of these States who previously held Permanent Observer Status have subsequently joined the United Nations as Member States,²⁷⁰ the Holy See remains as non-Member State who participates in the UN’s work through the Status of Permanent Observer.²⁷¹

B. *The Status of Permanent Observer*

Article 1 of the United Nations Charter declares that the purposes of the United Nations include: (1) maintaining international peace and security; (2) developing friendly relations amongst nations “based on respect for the principle of equal rights and self-determination of peoples; and (3) achieving international cooperation to solve “international problems of an economic, social, cultural, or humanitarian character” and promoting and encouraging “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” As the discussion in Parts II and IV demonstrates, these purposes are consistent with and

266. *Id.* at 520.

267. See, Henri de Riedmatten, *Présence du Saint-Siège dans les organismes internationaux*, at 73 (copy on file with the *Catholic University Law Review*); see also, CARDINALE, *supra* note 5, at 233.

268. See, RIEDMATTEN, *supra*, note 267, at 73-74.

269. See U.N.Y.B. *supra* note 264, at 532.

270. See *infra* note 286 and accompanying text.

271. See *Permanent Missions to the United Nations—List of Non-Member States Maintaining Permanent Observer Missions at UN Headquarters*, <http://www.un.org/en/members/nonmembers.shtml> (last visited Aug. 15, 2000).

complementary to the mission that the Holy See has exercised in international affairs for many centuries.

Articles 3 and 4 of the Charter address membership in the United Nations. While Article 3 largely deals with the original membership of the organization, Article 4 concerns membership in general and begins by stating that membership in the UN “is open to all other peace-loving states.”²⁷² This same provision goes on to indicate that it is necessary for the UN itself to conclude that, in its judgment, the State that is applying for membership will “carry out these obligations.”²⁷³ In essence, for a petitioning State to be admitted as a member of the United Nations, three things must occur: (1) a conclusion is made that the petitioning State is peace-loving; (2) the UN is satisfied that the petitioner accepts the obligations of membership as defined by the Charter; and (3) the General Assembly approves the recommendation of the Security Council to admit the applicant.

Neither the Charter nor any other official document of the UN defines what a State is for purposes of membership application. Professor Konrad Ginther, however, has provided some commentary on the membership criteria of Article 4.²⁷⁴ He noted that a crucial element of statehood is the entity’s independence as evidenced by its own self-governing autonomy.²⁷⁵ In addition, there are the traditional requirements under international law: “a defined territory, a permanent population, and an independent government.”²⁷⁶

However, those States which have elected to be permanent observers are not regulated by the same norms as those with member status. The procedures regulating participation and status of the permanent observer states developed through the practice of the Secretary General and the General Assembly.²⁷⁷ Although the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character has not entered into force, its text provides some insight into the relationship between international organizations, such as the United Nations, and states which elect to be observers rather than

272. U.N. Charter art. 4, para. 1.

273. *Id.* U.N. Charter art. 4, para. 2 goes on to state that, “The admission of any such state to membership . . . will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

274. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 162-66 (Bruno Simma et. al eds. 1994) [hereinafter Commentary].

275. *Id.* at 162.

276. *Id.* This author observes that the suggestion of the Legal Counsel of the UN to provide for associate membership in the organization was not pursued. *Id.*

277. *Id.* at 168.

members.²⁷⁸ The text of the convention states that observer missions²⁷⁹ accomplish several vital roles. First, the permanent observer mission represents the State that sends it and safeguards the State's interests with the Organization.²⁸⁰ Second, the observer mission enables the observer state to understand the work of the Organization and keeps its government informed of such work.²⁸¹ Third, the observer mission provides a structure for cooperation and negotiation between the observer state and the Organization.²⁸²

Several publicists involved with the 1994 compilation of the commentary on the United Nations charter²⁸³ identified, in their essays, a number of subjects that elected, at least for a time, the status of permanent observers.²⁸⁴ As of today, the Holy See remains the only permanent observer state observer, whereas the others have petitioned and been admitted as member states.²⁸⁵ It is important to understand that throughout the history of the United Nations, there have been permanent observer missions present at and taking part in UN activities. For example, in 1949, the Secretary General stated that Italy, the Republic of Korea, and Switzerland "had appointed observers to follow the work of the United Nations . . . [and] the Secretary-General reported that he had welcomed the observers and had given their missions every possible facility, though their status had not yet been determined."²⁸⁶

Although a number of states petitioned for and received observer status, the United Nations never developed a formal policy for considering and

278. See *Official Documents—United Nations Conference on the Representation of States in Their Relations with International Organizations*, 69 AM. J. INT'L L. 730 (1975).

279. *Id.* at 731. Article 1(8) defines "permanent observer mission" as "a mission of permanent character, representing the State, sent to an international organization by a State not a member of the Organization."

280. *Id.* at Article 7(a).

281. *Id.* at Article 7(b).

282. *Id.* at Article 7(c).

283. See COMMENTARY, *supra* note 274.

284. See COMMENTARY, *supra* note 274, at 169 (commentary by Professor Ginther) and at 363 (commentary by Professor Schaefer).

285. Nauru on September 14, 1999; Tonga on September 14, 1999; Monaco on May 28, 1993; and Kiribati on September 14, 1999. Switzerland as of September 10, 2002.

286. See 1948-49 U.N.Y.B. 973, U.N. Sales No. 1950.1.11. The Secretary General also indicated that Albania had informed him of its wish to send an observer to the UN. *Id.* Other observer States have included the Federal Republic of Germany, the Republic of Vietnam, Austria, Finland, Japan, and Spain. See A. Glenn Mower, Jr., *Observer Countries: Quasi Members of the United Nations*, 20 INT'L ORG. 266, 266-67 (1966).

granting these requests.²⁸⁷ Permanent observer status has been described as “an institutional device . . . unplanned and vaguely defined [that] has permitted states not Members of it to enjoy a meaningful relationship to the Organization.”²⁸⁸ Switzerland’s request, in 1946, to be an observer rather than a member, appears to have been motivated by its desire to maintain its neutrality without sacrificing some relevant level of participation in an international organization destined to become an important arena for international relations.²⁸⁹ Of course, as previously discussed, the Holy See also exercised neutrality for many years *vis-à-vis* certain issues, so that it might be able to discuss peace with the belligerents involved in any armed conflict.²⁹⁰ In short, observer status provides a useful mechanism that allows neutral international personalities to refrain from participation that would compromise their neutrality. Nevertheless, such entities are presented with ample opportunities to contribute to the general purposes and goals of the UN which include: maintaining international peace and security, developing friendly relations, achieving international cooperation, and promoting and encouraging respect for human rights and fundamental freedoms.²⁹¹

It is essential to consider several important factors that legitimate the status of State Observer. First, no state member objected to permanent observers through formal United Nations channels or procedures. Second, several Secretaries-General have approved and encouraged the participation of permanent observers in prominent UN activities. Secretary-General Trygve Lie’s approval was previously discussed.²⁹² Secretary General U Thant observed that, in the interest of keeping peace — a frequent activity of the Holy See²⁹³ and a fundamental purpose of the UN²⁹⁴ — non-member

287. See generally, Erik Suy, *The Status of Observers in International Law*, 160 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1978 II (RECUEIL DES COURS) (1979); see also MOWER, JR., *supra* note 286.

288. MOWER, JR., *supra* note 286, at 266.

289. *Id.* at 271; see also SUY, *supra* note 287, at 91, 94. In a 1962 opinion, the Office of Legal Affairs of the UN pointed out that, “A Permanent Observer was designated by the Government of Switzerland in the summer of 1946 and the practice of designating such Observers has been followed by Switzerland since that time. Observers were subsequently appointed by certain States which later became Members of the United Nations, including Austria, Finland, Italy and Japan.” 1962 U.N. Jurid. Y.B. 263 n.1 (Provisional Edition). As previously noted, Switzerland became a State Member of the United Nations in 2002.

290. See *supra* note 65.

291. U.N. Charter art. 1.

292. See *supra* note 290 and accompanying text.

293. See generally, Part II.F and the activities of the Twentieth Century popes in their various peace initiatives.

294. UN Charter, Article 1.

states should be “encouraged to maintain observers at [the] United Nations”²⁹⁵ In 1960, Secretary-General Dag Hammarskjöld mentioned that he would continue to accept the presence and participation of observer states “where the country in question is recognized diplomatically . . . by a majority of United Nations Members.”²⁹⁶ In the case of the Holy See, when it became a permanent observer in March of 1964, it had diplomatic relations with thirty-eight of the existing one hundred and fifteen Members of the United Nations.²⁹⁷ Members of the Soviet Bloc did not exchange diplomatic relations with the Holy See at that time.²⁹⁸ However, by the same token, no member of this bloc raised an objection to the Holy See participating as a permanent observer. The Soviet Bloc did not protest the Holy See’s participation in the 1949 Geneva diplomatic conference; consequently, the Holy See participated in the negotiations that led to the four Geneva Conventions of 1949. Moreover, even though the Soviet Union, and states subjected to its influence, did not engage in diplomatic relations with the Holy See for many years, Soviet diplomats nonetheless recognized the Holy See as a world power despite its lack of territory.²⁹⁹ As already stated, today the Holy See enjoys diplomatic relations with most of the member states of the United Nations.³⁰⁰

In an opinion prepared by the UN’s Office of Legal Affairs, another factor considered in a request by a non-member to be a permanent observer, is whether it is a member of any specialized agency or other international organization affiliated with the United Nations.³⁰¹ The Office of Legal Affairs acknowledged that there “are no specific provisions relating to Permanent Observers” in the Charter, Headquarters Agreement, or in the General Assembly resolution of December 3, 1948, addressing Permanent Members.³⁰² While taking into account the words and actions of the Secretary-General, the Office of Legal Affairs further noted that no action of the General Assembly, or any express legal provision, addresses the status of

295. MOWER, JR., *supra* note 286, at 277.

296. *Id.* at 273.

297. ANNUARIO PONTIFICIO 949-71 (1964); 1964 U.N.Y.B. 579-80, U.N. Sales No. 65.I.1.

298. *See* GRAHAM, *supra* note 5, at 349-384; *see also* Okeke, *supra* note 148, at 70-72.

299. GRAHAM, *supra* note 5, at 381 n. 20.

300. *See supra* note 198 and accompanying text.

301. *See* 1962 U.N. Jurid. Y.B. 236 (Provisional Edition) (stating: “In deciding whether or not to accord certain facilities to a Permanent Observer, it has been the policy of the Organization [UN] to make such facilities available only to those appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations.”).

302. *Id.*

permanent observers; consequently, the granting of this status “rests purely on practice as so far followed.”³⁰³

The Holy See has been a member of specialized agencies and organizations.³⁰⁴ In addition to being a Permanent Observer at the United Nations headquarters in New York and the United Nations offices in Geneva and Vienna, it participates in the following international organizations in the specified manner: it is a member of the CTBTO (Comprehensive Nuclear Test Ban Treaty Organization Preparatory Commission); the IAEA; the ICMM (International Committee of Military Medicine); the OPCW (Organization for the Prohibition of Chemical Weapons); UNCTAD (UN Conference on Trade and Development); UNHCR (UN High Commissioner for Refugees); UNIDROIT (International Institute for the Unification of Private Law); and the WIPO (World Intellectual Property Organization). It holds observer status in: the FAO (Food and Agriculture Organization); the ILO (International Labour Organisation); the IOM (International Organization for Migration); the UNDCP (UN International Drug Control Programme); UNEP (UN Environment Programme); UNESCO; UNIDO (UN Industrial Development Organization); the WFP (World Food Programme); the WHO (World Health Organization); and the WTO (both the World Trade Organization and the World Tourist Organization).³⁰⁵ Under the charge of the Holy See, the Vatican City State is a regular member of the Universal Postal Union, the International Telecommunications Union, the International Wheat Council, INTELSAT, EUTELSAT, and the European Conference for the Administration of Postal and Telecommunications.³⁰⁶

A final illustration of the significance of the Holy See’s permanent observer status is demonstrated by its “voluntary contributions” to the Organization’s work.³⁰⁷ In this context, the Holy See, along with the United Kingdom and Norway, recently contributed to a trust fund enabling some of the “least developed countries” to participate in the work of the Preparatory Commission for the International Criminal Court that has convened in New

303. *Id.*

304. *See supra* note 271 and accompanying text.

305. *Bilateral and Multilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/...0010123_holy-see-relations_en.html.

306. ANNUARIO PONTIFICIO *supra* note 132, at 1428.

307. MOWER, JR., *supra* note 286, at 278.

York since the 1998 Rome Diplomatic Conference of Plenipotentiaries for the International Criminal Court.³⁰⁸

Finally, the Holy See's position as a permanent observer at the United Nations is not a unique circumstance. Furthermore, its status is in accordance with all established norms. The Holy See's presence has been accepted by the other sovereign States. Through their acceptance of the Holy See, these member states recognize and publicly acknowledge its many contributions to the purposes and goals of the United Nations.³⁰⁹

In 2004, after a series of fruitful discussions including the Holy See, United Nations officials, and consultations with various Member States, the General Assembly adopted GA resolution 58/314 on July 16, 2004, formalizing the participation of the Holy See in the work of the United Nations. This resolution formally acknowledged the Holy See as an Observer State rather than some other kind of legal entity. The rights and privileges of the Holy See include the right to participate in the general debate of the General Assembly; the right to be inscribed on the speakers' list; the right to make interventions like other States; the right of reply; the right to have its communications circulated directly among the Member States of the organization; the right to raise points of order relating to any proceedings involving the Holy See; the right to co-sponsor draft resolutions and decisions that make reference to the Holy See; and the right to be seated after the final State Member and before other observers when it participates as a non-Member State observer.³¹⁰

This resolution dealing with the rights of State Observers is believed to be the first of its kind within the United Nations organization. A copy of this resolution appears at the end of this essay as Appendix I.

CONCLUSION

The Holy See is a unique entity amongst other subjects of international law. Notwithstanding its uniqueness, the Holy See enjoys an international personality similar to that of other States. Its ancient existence as a sovereign

308. Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000), PCNICC/2000/L.1, 30 March 2000; and Proceedings of the Preparatory Commission at its fifth session (12-30 June 2000), PCNICC/2000/INF/3, 6 July 2000.

309. *See supra* Part V.B. and related text concerning the purposes of the United Nations Organization.

310. When an "all States" formula is used to convene any gathering sponsored by the United Nations, e.g., a diplomatic conference working on a treaty, the Holy See is a full Member of such a gathering and is seated in alphabetical order with other States.

transcends territorial possession. It is a truly international person because its presence, unlike that of individual States, is universal.

Due to its uniqueness, it often seems to be an entity that defies understanding. Yet, with a patient examination of the extensive history of its participation in the international realm, the essential nature of the Holy See can be understood. The inquirer reaches the inevitable conclusion that the Holy See is not simply a religion, but an international personality that exercises sovereignty as any subject of international law. These conclusions are supported by the history of longevity and participation in international affairs and diplomatic relations. This essay has also demonstrated that the Holy See meets the relevant criteria that define international personality and sovereignty under international law. It illustrates how State practice, custom, and treaty law treat the Holy See as a subject of international law. Lastly, this essay has met and answered the questions raised regarding the status of the Holy See at the United Nations.

In essence, the Holy See has been and remains a vibrant part of the international realm. Its voice in this realm speaks not just for some, but for all of humanity. Although some may prefer to remove this voice, it is a presence that brings light to the world.³¹¹

311. *John* 1:5.

Appendix I

UNITED NATIONS
GENERAL ASSEMBLY

Distr.: General
16 July 2004

Fifty-eighth session
Agenda item 59

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[without reference to a Main Committee (A/58/L.64)]

58/314 Participation of the Holy See in the work of the United Nations

The General Assembly,

Recalling that the Holy See became a Permanent Observer State at the United Nations on 6 April 1964, and since then has always been invited to participate in the meetings of all the sessions of the General Assembly,

Recalling also that the Holy See is a party to diverse international instruments, including the Vienna Convention on Diplomatic Relations,¹ the Vienna Convention on the Law of Treaties,² the Convention relating to the Status of Refugees³ and the Protocol thereto,⁴ the Convention on the Rights of the Child⁵ and the Optional Protocols thereto,⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁷

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1. United Nations, *Treaty Series*, vol. 500, No. 7310.
 2. *Ibid.*, vol. 1155, No. 18232.
 3. *Ibid.*, vol. 189, No. 2545.
 4. *Ibid.*, vol. 606, No. 8791.
 5. Resolution 44/25, annex.
 6. Resolution 54/263, annexes I and II.
 7. Resolution 39/46, annex.

the International Convention on the Elimination of All Forms of Racial Discrimination,⁸ the Convention for the Protection of Cultural Property in the Event of Armed Conflict,⁹ the Paris Convention for the Protection of Industrial Property,¹⁰ the Treaty on the Non-Proliferation of Nuclear Weapons,¹¹ the main disarmament treaties and the Geneva Conventions¹² and the Additional Protocols thereto,¹³

Recalling further that the Holy See enjoys membership in various United Nations subsidiary bodies, specialized agencies and international intergovernmental organizations, including the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, the United Nations Conference on Trade and Development, the World Intellectual Property Organization, the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the International Committee of Military Medicine,

Aware that the Holy See actively participates as an observer in many of the specialized agencies, such as the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Industrial Development Organization, the International Fund for Agricultural Development and the World Tourism Organization, as well as in the World Trade Organization, that it is a full member of the Organization for Security and Cooperation in Europe and a Guest of Honour in its Parliamentary Assembly, and that it participates as an observer in various other regional intergovernmental organizations, including the Council of Europe, the Organization of American States and the African Union, and is regularly invited to take part in the main meetings of the Asian-African Legal Consultative Organization,

Aware also that the Economic and Social Council, by its decision 244 (LXIII) of 22 July 1977, recommended that the Holy See attend sessions of the regional commissions on a basis similar to that provided for in the

8. Resolution 2106 A (XX), annex.

9. United Nations, *Treaty Series*, vol. 249, No. 3511.

10. *Ibid.*, vol. 828, No. 11851.

11. *Ibid.*, vol. 729, No. 10485.

12. *Ibid.* vol. 75, Nos. 970–973.

13. *Ibid.* vol. 1125, Nos. 17512 and 17513.

relevant terms of reference applicable to States Members of the United Nations not members of the regional commissions,

Recalling that the Holy See contributes financially to the general administration of the United Nations in accordance with the rate of assessment for the Holy See as a non-member State, as adopted by the General Assembly in its resolution 58/1 B of 23 December 2003,

Considering that it is in the interest of the United Nations that all States be invited to participate in its work,

Desirous of contributing to the appropriate participation of the Holy See in the work of the General Assembly in the context of the revitalization of the work of the Assembly,

Acknowledges that the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex to the present resolution;

Requests the Secretary-General to inform the General Assembly during the current session about the implementation of the modalities annexed to the present resolution.

*92nd plenary meeting
1 July 2004*

Annex

The rights and privileges of participation of the Holy See shall be effected through the following modalities, without prejudice to the existing rights and privileges:

1. The right to participate in the general debate of the General Assembly;

2. Without prejudice to the priority of Member States, the Holy See shall have the right of inscription on the list of speakers under agenda items at any plenary meeting of the General Assembly, after the last Member State inscribed on the list;

3. The right to make interventions, with a precusory explanation or the recall of relevant General Assembly resolutions being made only once by the President of the General Assembly at the start of each session of the Assembly;

4. The right of reply;

5. The right to have its communications relating to the sessions and work of the General Assembly issued and circulated directly, and without intermediary, as official documents of the Assembly;

6. The right to have its communications relating to the sessions and work of all international conferences convened under the auspices of the General Assembly issued and circulated directly, and without intermediary, as official documents of those conferences;

7. The right to raise points of order relating to any proceedings involving the Holy See, provided that the right to raise such a point of order shall not include the right to challenge the decision of the presiding officer;

8. The right to co-sponsor draft resolutions and decisions that make reference to the Holy See; such draft resolutions and decisions shall be put to a vote only upon request from a Member State;

9. Seating for the Holy See shall be arranged immediately after Member States and before the other observers when it participates as a non-member State observer, with the allocation of six seats in the General Assembly Hall;

10. The Holy See shall not have the right to vote or put forward candidates in the General Assembly.

FOREIGN SOVEREIGN IMMUNITY AND THE HOLY SEE

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INTRODUCTION

As a result of the publicity of the sex abuse scandal in the world, the Roman Catholic Church has come under particular scrutiny by many people.¹ The civil and canonical instruments of due process of law and remedy for harm brought by sexual abuse committed against minors are necessary in order to utilize those means available that might begin to restore victims to the dignity to which they are entitled. Within the American legal context, some institutions such as the public school systems have, without statutory directive, largely been deemed immune from lawsuits brought by victims of sexual abuse under the protective doctrine of sovereign immunity.² However, private organizations and religious institutions, including the Catholic Church, have not experienced this same immunity. In this regard, many dioceses, religious orders, and other religious institutions have been sued by plaintiffs for monetary and other relief, whereas public institutions such as schools, where there exists widespread sexual abuse, have not. As a result of this disparate treatment, numerous cases have been settled by these religious organizations with plaintiffs and their counsel.³

Nevertheless, some attorneys representing the plaintiffs in sex abuse cases have decided to attempt to make the Holy See a party defendant in these legal proceedings. In the words of one of these lawyers, he is “doing what any lawyer trained in representing injured people would do: that is, hold the perpetrator accountable . . . [i]n the case of sexual abuse of children in the

[†] Thanks to Mary Kate Fitzgerald, J.D. 2011 for her excellent research work.

1. The extent of sexual abuse of minors is widespread and is not confined to any particular category of person. It exists within families, public institutions (including government schools), associations, and other organizations.

2. *See generally* Allan E. Korpela, Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning, 33 A.L.R. 3d 703 (2010).

3. *See, e.g.*, Center for Applied Research in the Apostolate Georgetown University Washington, D.C., 2009 SURVEY OF ALLEGATIONS AND COSTS: A SUMMARY REPORT FOR THE SECRETARIAT OF CHILD AND YOUTH PROTECTION UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, n.p. (Feb. 2010).

Catholic Church in the United States, the buck stops with the policy maker, and that's the Holy See."⁴ However, is this indeed the case? Is this allegation consistent with the applicable law?

This article will explore the overarching issue of the Holy See's legal position concerning suits brought by sexual abuse plaintiffs against Catholic institutions in the United States. The need to restore victims is essential to the requirements of the due process of law. However, it must be understood and remembered that victims have been able to sue and to receive remedy from Catholic institutions for sexual abuse claims. Moreover, it must also be asserted that the Holy See is not a proper party to suits filed in the United States courts for sexual abuse alleged to have been committed by clergy, members of religious congregations who are not clergy, and laity who work within the context of Catholic parishes, schools, and other institutions having a relationship with the Catholic Church. The fundamental reason for this is that the Holy See is an international sovereign; moreover, if its sovereign immunity is to be challenged, the precedent will raise questions about the limitations of other sovereigns and their immunity in tribunals around the world.

This article will examine the applicable issues by first, in a background section, examining briefly the personality and sovereignty of the Holy See (Part I). This background will supply the legal basis for enabling the Holy See to rely on the doctrine of sovereign immunity. Next, through this analysis this article will consider the doctrine of sovereign immunity as it exists and is applied under the law of the United States (Part II). With this overview of the general provisions of the doctrine of sovereign immunity, the article will then examine how the doctrine of sovereign immunity applies to the Holy See and how it is protected from liability and why it is not subject to the statutory tort exception found in the Foreign Sovereign Immunity Act (FSIA) of 1976, as amended (Part III). In the final segment of this article, I shall offer some conclusions as to why the claims against the Holy See are inadmissible.

I. BACKGROUND—THE PERSONALITY AND SOVEREIGNTY OF THE HOLY SEE

Within the realm of international order, the concepts of statehood, international personality, and sovereignty are well established. Each of these

4. *US Clergy Abuse Victims Hope Ky. Suit Will Begin Healing, Offer Insight into Vatican's Role*, FOXNEWS.COM, (June 30, 2010), <http://www.foxnews.com/us/2010/06/30/clergy-abuse-victims-hope-ky-suit-begin-healing-offer-insight-vaticans-role/#> (statement of William McMurry).

subjects is characterized by some measure of variety in their essential components as defined by international law. The focus of attention in this article is on the Holy See, which is an international person and sovereign that is entitled to rely on the doctrine of foreign sovereign immunity. A more detailed consideration of these important issues of personality and sovereignty appears in a companion article I authored entitled “The Holy See-International Person and Sovereign.” However, a brief discussion of these two inextricably related issues of personality and sovereignty needs to be presented here. Although the Holy See is a unique entity in international law, it nonetheless is entitled to enjoy the status of an international person and sovereign and assume the attending rights accorded to foreign sovereigns.⁵

The status of the Holy See’s longstanding international personality—even during the period of 1870-1929, after the unification of Italy when the Papal States were absorbed and the resolution of the “Roman Question” with the entry into force of the Lateran Treaty of 1929—has been confirmed by the practice of many other state sovereigns.⁶ Convincing evidence supporting this point presents the fact that the formal diplomatic exchanges between the Holy See and other states have grown since the first modern

5. Under the 1917 Code of Canon Law, it is stated that,

In the Code, by the term “Holy” or “Apostolic See” is meant not only the Roman Pontiff but also, unless a different meaning appears from the very nature of the matter or the context itself, the congregations, tribunals and offices which the same Roman Pontiff is accustomed to make use of in affairs concerning the Church as a whole.

1917 CODE C. 7.

The 1983 Code of Canon Law in Canon 361 now states,

In this Code the term ‘Apostolic See’ or ‘Holy See’ applies not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church and other institutions of the Roman Curia, unless the nature of the matter or the context of the words makes the contrary evident.

1983 CODE C. 361.

Canon 100 of the 1917 Code refined the notion of the Holy See by making a distinction between it and the Church—the two are distinct juridical entities with their own separate juridical personalities. Nonetheless, these two moral persons are united by the person of the Roman Pontiff who is head of each respectively. 1917 CODE C. 100. Canon 113, § 1 of the 1983 Code states that, “The Catholic Church and the Apostolic See have the nature of a moral person by the divine law itself.” *Id.* As was the case with the 1917 Code, both of these entities, i.e., the Catholic Church and the Apostolic (Holy) See are distinct juridical persons.

6. *See*, U.S. Department of State, 1 WHITEMAN DIGEST § 3, at 58.

exchanges of the 1500s. In the current year, the Holy See's active legations with other sovereigns amounts to one hundred and seventy-eight.⁷

Some particulars of the legal relationship between the United States and the Holy See need further consideration since this article specifically addresses the foreign sovereign immunity of the Holy See in the courts of the United States. The United States and the Holy See had engaged in diplomatic exchanges prior to 1870, the year that the Papal States were absorbed into the Italian unification.⁸ In subsequent years, the United States sent and the Holy See received a "personal representative of the President" during World War II. When efforts were made to reestablish diplomatic relations after the Lateran Treaty entered into force, some opposition to diplomatic relations within the United States was raised.⁹ However, Presidents Roosevelt, Truman, Eisenhower, and Nixon continued to send "personal representatives" to the Holy See during their administrations.

When President Reagan proposed reestablishment of diplomatic exchange with the Holy See during his first term of office, questions were again raised about the legality of diplomatic relations with the Holy See. A major concern existed with the misconceived Constitutional prohibition of establishing religion under the First Amendment of the United States Constitution.¹⁰ However, other voices demonstrated why these concerns were immaterial and would not prevent diplomatic exchange under United States Constitutional law.¹¹ The Reagan Administration proceeded with its plan, and diplomatic relations were once again established between the two

7. See, *Bilateral Relations of the Holy See*, http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html. Last visited, September 21, 2011.

8. For a general overview of the periods of diplomatic exchanges and those times in which they were suspended, see Howard R. Marraro, *The Closing of the American Diplomatic Mission to the Vatican and Efforts to Revive It, 1868-1870*, 33 CATH. HIST. REV. 423 (1948); and, Martin Hastings, S.J., *United States-Vatican Relations*, 69 REC. AM. CATH. HIST. SOC'Y OF PHILA. 20 (1958).

9. See, e.g., John H. Wigmore, *Should A Papal State Be Recognized Internationally by the United States?*, 22 ILL. L. REV. 881 (1928) (While objecting on other grounds including the status of statehood of the Holy See, Professor Wigmore was particularly concerned about the exchange of diplomatic representatives and the ensuing "power and influence" that Vatican representatives could have on the United States). *Id.* at 883.

10. See generally, Mark Thomas van der Molen, *Diplomatic Relations Between the United States [sic] the Holy See: Another Brick from the Wall*, 19 VAL. U. L. REV. 197 (1984); and, Maria Louisa Hekker, *Constitutional Issues Raised by Diplomatic Relations Between the United States and the Holy See*, 15 HASTINGS CONST. L. Q. 101 (1987). Objections were also raised on theological grounds. See, e.g., James Coriden, *Diplomatic Relations Between the United States and the Holy See*, 19 CASE W. RES. J. INT'L L. 361 (1987).

11. See, Samuel W. Bettwy and Michael K. Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L. J. 1 (1981).

sovereigns on January 10, 1984.¹² Although several lawsuits were filed in federal courts challenging the renewal of diplomatic relations,¹³ these suits were found to be without merit and were eventually dismissed.

It is generally understood that the Holy See's international personality materializes from its religious and spiritual authority and missions in the world, as distinguished from a claim which emerges from the exercise of purely temporal sovereignty.¹⁴ In further explanation about its status as a subject of the Law of Nations, enjoying international personality, it has been said that the Holy See is an "anomaly,"¹⁵ an "atypical organism,"¹⁶ or is an entity *sui generis*.¹⁷

While the Holy See's status may be an anomaly or considered as unique, these grounds are insufficient for denying the Holy See a status similar to that of statehood, that is, the status of being a subject of international law capable of interacting with sovereign States as an equal.¹⁸ As Professor Crawford has affirmed, "recognition by other States is of considerable importance especially in marginal or borderline cases."¹⁹ Even though the United States had allowed diplomatic relations with the Holy See to expire in

12. On January 10, 1984, the U.S. Department of State issued a formal announcement stating:

The United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States, and Nunciature on the part of the Holy See, as of today, January 10, 1984.

Americans United for Separation of Church & State v. Reagan, 607 F. Supp. 747, 748 (E.D. Pa. 1985).

13. Robert Araujo, *The Holy See—International Person and Sovereign*, 2011 AVE MARIA INT'L L. J. 101 (2011), <http://www.avemarialaw.edu/index.cfm?event=IntlJournal.CIissue>.

14. See generally, Statements of Paul VI at http://www.vatican.va/holy_father/paul_vi/speeches/1965/documents/hf_p-vi_spe_19651004_united-nations_fr.html; and of John Paul II at http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/october/documents/hf_jpii_spe_19791002_general-assembly-onu_en.html before the General Assembly of the UN.

15. REBECCA M. WALLACE, *INTERNATIONAL LAW* 76 (Sweet and Maxwell, 2nd ed. 1992).

16. See, H.E. HYGINUS EUGENE CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER*, (Colin Smythe, 1976) at 80, where Archbishop Cardinale suggests that, "As a subject of international law, the Catholic Church is an *atypical organism*. That is to say, considering her particular purpose, the social means she employs to further this purpose and her peculiar nature and social structure, the Church cannot be put on exactly the same level as a State, or any other subject of international law. Hence her position is analogous to, but not identical with, that of a national State." [need full citation here]

17. MALCOLM SHAW, *INTERNATIONAL LAW*, 172 (Cambridge University Press 1997); Finn Seyersted, *International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon Their Constitutions*, 4 IND. J. INT'L L. 1, 42, 61 (1964).

18. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 154 (Clarendon Press 1979).

19. *Id.* In the context of the Holy See, Professor Crawford explains that, "The chief peculiarity of the international status of the Vatican City is not size or population—or lack of them—but the unique and complex relation between the City itself and its government, the Holy See." *Id.*

the 1870s, some of its government organs still accepted the Holy See as an international personality of note. In 1908 for example, the United States Supreme Court acknowledged that the Holy See “still occupies a recognized position in international law, of which this court must take judicial notice.”²⁰

In the exercise of its international personality, the Holy See has identified itself as possessing an “exceptional nature within the community of nations; as a sovereign subject of international law, it has a mission of an essentially religious and moral order, universal in its scope, which is based on minimal territorial dimensions guaranteeing a basis of autonomy for the pastoral ministry of the Sovereign Pontiff.”²¹ Yet, it would be a mistake to conclude

20. *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 210 U.S. 296, 318 (1908). The Court then quoted jurist and historian Alphonse Rivier who stated,

the Pope, though deprived of the territorial dominion which he formerly enjoyed, holds, as sovereign pontiff and head of a Roman Catholic Church, an exceptional position. Though, in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his apostolic nuncios, are specially privileged ... His relations with the Kingdom of Italy are governed, unilaterally, by the Italian law of MAY 13, 1871, called “the law of guarantees,” against which Pius IX and Leo XIII have not ceased to protest.

Id. at 318-19, *quoted in* ALPHONSE RIVIER, *PRINCIPES DU DROIT DES GENS* 120-123 (1896).

21. Twelfth Periodic State Party Report of the Holy See, U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/226/Add.6 (Feb. 15, 1993), *quoted in* SHAW, *INTERNATIONAL LAW*, *supra* note 17 at 172; accord Comm. on the Elimination of Racial Discrimination, Provisional Summary Record of the 991st Meeting, 43d Sess., Aug. 5, 1993, U.N. Doc. CERD/C/SR.991 (Aug. 10, 1993). The Summary Record of the Committee states in part:

As the supreme governing body of the Catholic Church, the Holy See was recognized as a sovereign subject of international law. Its territory, the Vatican City State, was very small, its only function being to guarantee its independence and the free exercise of its religious, moral and pastoral mission. Its participation in international organizations, most notably the United Nations, and its accession to international conventions such as the Convention on the Elimination of All Forms of Racial Discrimination differed profoundly from those of States which were communities in the political and temporal sense.

Id. at No. 2.

Professor Falco noted that,

It may seem paradoxical, but, although the Church has always taught that sovereignty does not belong to states alone and that spiritual sovereignty is superior to temporal sovereignty, yet the Holy See has never abandoned the principle that a basis of territorial sovereignty is absolutely necessary to it in order to make its independence absolute and visible. Moreover, the Holy See has never been willing to admit that its status and the inviolability and immunity of the Popes could rest upon Italian municipal law, that is to say, upon a unilateral act. For these reasons the Holy See never ceased after 1870 to claim restoration of the temporal power and the settlement of its status by means of a convention.

that the Holy See does not view itself as having a role in the world of international order concerned with issues of peace, the common good, and the general welfare of all men, women, and children.²² This point was made in Pope Paul's October 4, 1965 address before the United Nations General Assembly.

Finally, when considering the Holy See's international personality and sovereignty, stock must be taken of the General Assembly action taken in July of 2004, when any doubt about the status of the Holy See in the international community was put to rest once and for all. After a series of fruitful discussions with the Holy See, United Nations officials, and Member States, the General Assembly adopted GA resolution 58/314 on July 16, 2004, formalizing the participation of the Holy See in the work of the United Nations. This resolution formally acknowledged the Holy See as a State rather than some other kind of legal entity. The rights and privileges of the Holy See include the right to participate in the general debate of the General Assembly like other states; the right to be inscribed on the speakers' list like other states; the right to make interventions like other states; the right of reply as is accorded to other states; the right to have its communications circulated directly among the Member States of the organization as if it were a Member State; the right to raise points of order relating to any proceedings involving the Holy See; the right to co-sponsor draft resolutions and decisions that make reference to the Holy See; and the right to be seated after the final State Member, and before other observers, when it participates as a non-Member State observer.²³ In short, when the General Assembly unanimously approved this resolution, any question about the status of the Holy See's personality and sovereignty dissolved.

See MARIO FALCO, *THE LEGAL POSITION OF THE HOLY SEE BEFORE AND AFTER THE LATERAN AGREEMENTS: TWO LECTURES DELIVERED AT THE UNIVERSITY OF OXFORD* 17 (Oxford University Press 1935).

22. See Josef Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 310 (1952). Mr. Kunz noted that,

The Holy See is, therefore, a *permanent* subject of *general* customary international law *vis-à-vis* all states, Catholic or not. That does not mean that the Holy See has the same international status as a sovereign state. But the Holy See has, under general international law, the capacity to conclude agreements with states [be they concordats or general international treaties].

Id. (citations omitted).

23. When an "all States" formula is used to convene any gathering sponsored by the United Nations, e.g., a diplomatic conference working on a treaty, the Holy See is a full Member of such a gathering and is seated in alphabetical order with other States.

II. THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY IN GENERAL

The doctrine of foreign sovereign immunity is a well-settled principle of public international law. The subject has been exhaustively covered elsewhere,²⁴ but a few words about it should be mentioned here, even though others have investigated the doctrine in the context of attempts to name the Holy See in suits alleging sexual child abuse by clergy and those brought against individual members and institutions of the Roman Catholic Church.²⁵

In general, the doctrine of foreign sovereign immunity began as a principle of customary law, which insulates sovereigns, and their particular agents, from the jurisdiction of other states and the courts of these other sovereigns.²⁶ Of course, a sovereign may consent to subjecting itself to the jurisdiction of another state. Furthermore, domestic legislation can have a bearing on the definition and application of the doctrine. In the early legal history of the United States, the Supreme Court recognized the principle of foreign sovereign immunity in the case of *The Schooner Exchange v. McFaddon*.²⁷ Like other states that recognized and observed the doctrine, the United States traditionally followed the so-called absolute rule. However, in 1952, the State Department, through the Tate Letter, advocated a more restrictive following of foreign sovereign immunity, which would, in essence, retain the doctrine but distinguish between the public or ministerial acts of the sovereign from those determined to be private.²⁸ The modified doctrine would continue to immunize the sovereign for its public or ministerial acts, but not those deemed private.

In 1976, Congress codified the restrictive doctrine in the Foreign Sovereign Immunities Act (FSIA).²⁹ While the statute respects the traditional doctrine of sovereign immunity, it provides a number of exceptions that can open the door to liability for the sovereign on particular grounds. Under the

24. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7TH ED.), at 323-48.

25. See, e.g., Jacob William Neu, "Workers of God": The Holy See's Liability for Clerical Sexual Abuse, 63 VAND. L. REV. 1507 (2010); Melanie Black, *The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for Its Role in the Global Priest Sexual Abuse Scandal*, 27 WISC. INT'L L. J. 299 (2009); Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L. J. 123 (2008); and, William Brian Mason, *A New Call for Reform: Sex Abuse and the Foreign Sovereign Immunities Act*, 33 BROOK. J. INT'L L. 655 (2008).

26. J. L. BRIERLY, THE LAW OF NATIONS—AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 243 (Humphrey Waldock ed., Clarendon Press 6th ed. 1963).

27. 11 U.S. 116, 136-137 (1812).

28. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983).

29. *Id.* at 488.

FSIA, the first exception is based on contract, and specifies that the sovereign is not immune from liabilities due to its commercial activities.³⁰ In cases brought by plaintiffs against the Holy See for sexual abuse claims, the commercial activities exception has proven to be inapplicable.³¹ Moreover, it would be dubious to rely on this exception, given the scope of its subject matter and the need to establish some kind of commercial enterprise where the sovereign was acting not as a sovereign but as a business enterprise.

There are, however, other circumstances in which the foreign sovereign would not be immune under the provisions of the FSIA. Clearly, a foreign sovereign may waive its immunity explicitly or implicitly.³² That has not been the case with the Holy See, and it has taken no action to waive its immunity. The sovereign may also be vulnerable to matters dealing with property rights situated in the United States.³³ Once again, this ground for potential liability is not applicable to those cases in which plaintiffs are trying to overcome the immunity defense of the Holy See.

A further statutory ground for liability, notwithstanding general sovereign immunity, is premised on monetary damages for tort resulting in personal injury, death, damage to, or loss of property that results from tort.³⁴

30. 28 U.S.C.A. § 1602 (2011); and § 1605 (a)(2) (2011). Section 1603 (d) defines a “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” Section 1603 (e) elaborates that a commercial activity that is carried on in the U.S. “means commercial activity carried on by such state and having substantial contact with the United States.”

31. In both the *Doe v. Holy See*, 434 F.Supp.2d 925, 947 (D.Or. 2006) and *O’Bryan v. Holy See*, 471 F.Supp.2d 784, 788 (W.D.Ky. 2007) cases, the district courts concluded that the commercial activities exception is not applicable because religious institutions, while having some financial dimensions, are not essentially commercial.

32. 28 U.S.C.A. § 1605 (a)(1).

33. 28 U.S.C.A. § 1605 (a)(3) and (a)(4).

34. 28 U.S.C.A. § 1605 (a)(5), which premises liability for cases:

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

The final tort provision, § 1605(7) would not apply since it covers the effects of state-sponsored terrorism where there is:

personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency

It is generally argued by plaintiffs' lawyers that the Holy See is liable for the torts committed by itself, or by any of its officials or employees "while acting within the scope of his office or employment." It is on these words and their objective meaning that cases brought against the Holy See for sexual abuse committed by Roman Catholic clergy rest under the law of the United States. As will be seen, these words, and the purposive intent upon which they rely, cannot bear the weight that plaintiffs' lawyers attempt to place on them for a variety of reasons, which will follow in due course. While it is an undisputed fact that victims exist, it must be recalled here that those who have been wronged by Catholic clergy and other members of the Church have not been denied their claims or their days in court, considering the magnitude of settlements which the Catholic Church has agreed to settle in recent years.³⁵ The facts surrounding these settlements with individual Catholics, dioceses, religious orders, and other persons, both natural and juridical, demonstrate a fundamental distinction between general cases involving the doctrine of foreign sovereign immunity, where plaintiffs have not been able to recover for torts and cases brought against Catholic institutions, and instances where plaintiffs have been able to recover. Now, let us consider why they have not, and should not, recover against the foreign sovereign, the Holy See.

III. THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY PROTECTS THE HOLY SEE FROM SUIT FOR ALLEGED SEXUAL ABUSE

An important fact regulating the application of the exceptions to the FSIA emerged in 1989 when the Supreme Court held that the FSIA was the sole basis for securing jurisdiction over a foreign sovereign in U.S. courts; consequently, a foreign sovereign can be sued only on the basis of the exceptions to immunity addressed by the FSIA for torts committed within the United States.³⁶ This important ruling is at the heart of the question that exists before us and will be addressed in this article. The questions surrounding the liability of the Holy See must therefore be answered in the context of the language of the FSIA and how this statute has been interpreted by courts of competent jurisdiction, specifically § 1605 (a)(5), specifying that liability is based on "the tortious act or omission of that foreign state or of

Thus the scope of this provision does not apply to sexual abuse cases. If the argument were made that it does, the argument is specious and anyone making it needs to study more carefully the nature of state-sponsored terrorism.

35. See, *supra* note 3, at 41-43, 51-55.

36. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

any official or employee of that foreign state while acting within the scope of his office or employment.”

In addressing the legal issues surrounding these important matters involving the Holy See, one cannot solely rely, however, on the law of the United States to determine if Catholics who allegedly abused or did abuse victims are “an agency or instrumentality of a foreign state” or an “official or employee of that foreign state while acting within the scope of his office or employment.” While the law of the United States is relevant, so is the law of the foreign sovereign for therein resides the answers to critical issues about whether someone is an official or employee of the foreign sovereign whose immunity is under review within the context of the tortious act or omission theory of liability.

Let us begin with the law of the United States and examine the relevant provisions of the FSIA. Section 1603 (a) of the FSIA notes that a “foreign state” also “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).” The statute’s definition of what is an “agency or instrumentality of a foreign state” is relevant to the status of the Holy See in sexual abuse cases. I shall submit here that by the terms of this section of the FSIA, those Catholics who allegedly abused or did abuse victims do not fall within the FSIA’s ambit of being agents or instrumentalities of the sovereign.

Section 1603 (b) defines for purposes of the FSIA what is an “agency or instrumentality of a foreign state.” The “agency or instrumentality” of the foreign state must meet three conditions. The first is that it is a “separate legal person, corporate or otherwise.”³⁷ This would mean that such a person can be juridical, such as a corporation, which is evidenced in the language of this subsection or a natural person. The second condition is that the entity, which is the “agency or instrumentality,” is an organ of the foreign state or one of its political subdivisions.³⁸ The third and final condition needed is that the entity, which is the “agency or instrumentality,” cannot be a citizen of a state of the United States nor can the entity be “created under the laws of any third country.”³⁹ However, when one

37. Foreign Sovereign Immunity Act, §1603 (b)(1).

38. §1603 (b)(2). The subsection continues stating that the entity consists of “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.” It is difficult to see how this “ownership” in shares or otherwise comes into play regarding the Holy See.

39. §1603 (b)(3). Citizenship under this sub-subsection is defined in accordance with 28 U.S.C.A. § 1332 (c) and (d). However, sub-subsection (c) deals with the citizenship of a corporation as defined by the state of incorporation and the state of its principal place of business. There is also the citizenship of those who are overseeing the probate of estates of deceased persons. Sub-subsection (d) addresses citizenship in class action suits.

considers the meaning of these provisions, it becomes clear that Congress viewed the “agency or instrumentality” as a business entity that might be the source of the “commercial activity” which is the first major exception to sovereign immunity.

Section 1603(b) was initially construed by the Ninth Circuit.⁴⁰ In *Chuidian v. Philippine Nat’l Bank*,⁴¹ the plaintiff brought suit against the bank and a Philippine government official. The focus of the case was whether a government official is entitled to sovereign immunity for acts committed in his official capacity as a member of a government commission.⁴² The bank took action on a government official’s instructions and dishonored a letter of credit issued to the plaintiff by the government. Although the complaint was dismissed by the district court, the plaintiff’s appeal argued that an “agency or instrumentality” includes only official government entities, not individuals.⁴³ The Ninth Circuit concluded that the language of section 1603(b) does not expressly exclude or include individuals.⁴⁴ Nevertheless, the court further found that FSIA was intended to codify existing common law principles of sovereign immunity which were in place at the time of enactment, and these extended immunity to individuals acting in their official capacity.⁴⁵ The court observed that a suit against an individual in that person’s official capacity is the practical equivalent of a suit against the state itself.⁴⁶ The court held that permitting such suits would be incompatible with the FSIA because they would “amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly.”⁴⁷ It thus construed § 1603(b) “to include individuals sued in their official capacity.”⁴⁸ However, this holding was abrogated in *Samantar v. Yousuf*.⁴⁹

In *Samantar v. Yousuf*, the Supreme Court construed the phrase “an agency or instrumentality of a foreign state.”⁵⁰ While noting that the petitioner’s argument that “an agency or instrumentality” could include a foreign official, the Court found that this explanation is not the meaning that

40. *Chuidian v. Philippine Nat’l Bank* 912 F.2d 1095, 1097 (9th Cir. 1990).

41. *Id.* at 1097.

42. *Id.* at 1099.

43. *Id.* at 1100.

44. *Id.* at 1101.

45. *Id.* at 1101.

46. *Id.* at 1101.

47. *Id.* 1102.

48. *Id.* at 1103.

49. *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010).

50. *Id.* at 2286.

Congress enacted.⁵¹ As the Court stated, “[i]f the term ‘foreign state’ by definition includes an individual acting within the scope of his office, the phrase ‘or any official or employee . . .’ in 28 U.S.C. § 1605(a)(5) would be unnecessary.”⁵² The Court then held that when reading all of the FSIA together, there is no reason to conclude that the term “foreign state” in § 1603(a) includes an official acting on behalf of the foreign state.⁵³ The Court then emphasized that to hold otherwise would adopt a meaning that “was not what Congress enacted.”⁵⁴ However, this conclusion does not preclude the official being immune under the doctrines of diplomatic and consular immunity.⁵⁵ But again, the question before us is not the immunity of agents or instrumentalities; rather, it is the immunity of the Holy See itself, and thus we must turn to another provision of the FSIA, § 1605(a)(5).

The question of whether the Holy See is liable under the tortious act or omission exception must depend on whether the act or omission was done (1) by an official or employee of the foreign sovereign (2) “while acting within the scope of his office or employment.”⁵⁶ When the suit is based, then, on tortious act or omission, the “agency or instrumentality” concept no longer is applicable. It is the language of § 1605(a)(5) rather than that of § 1603(b) which governs. Here the text of the FSIA § 1605(a)(5) specifies that the tort is “caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.”

As a matter of course, a crucial question dealing with critical employment issues that may make a foreign sovereign exposed to liability is this: who is an official or employee of a foreign sovereign? A second question follows: if this person is an official or employee of the foreign sovereign, was this person acting within the scope of his office or employment? In two cases brought against the Holy See for tort based on sexual abuse, the laws of the state in which the alleged acts or omissions were relied upon.⁵⁷ But reliance on this law conflicts with the fundamental

51. *Id.* at 2286.

52. *Id.* at 2288.

53. *Id.* at 2289.

54. *Id.* at 2289.

55. *Id.* at 2289 n.12.

56. 28 U.S.C. § 1605(a)(5).

57. For example, in *Doe v. Holy See*, 434 F.Supp.2d 925 (2006), the District Court concluded that the priest was an employee of the Holy See under Oregon law; moreover, it justified this conclusion on the basis of *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 325 (9th Cir.1996). In a similar vein, the District Court in *O’Bryan v. Holy See*, 471 F.Supp.2d 784, 790 (2007) reached a similar conclusion also based on *Randolph*. However, reliance on *Randolph* by the District Court is misplaced. In *Randolph*, the Ninth

principle established in *Zschernig v. Miller* that state law is preempted in the realm of foreign affairs,⁵⁸ which would include the application of the restrictive concept of immunity under the FSIA. Moreover, under the *Verlinden* doctrine,⁵⁹ there is need under the FSIA to develop a uniform body of law. In the context of the Holy See where there is the likelihood of cases in many states claiming that the Holy See is the “employer” of Catholics who allegedly commit sexual abuse, the need for a uniform body of law becomes all the more evident and essential. Otherwise, in cases brought under the FSIA and its § 1605(a)(5) tort exception, this sovereign would be subjected to a plethora of different standards of the laws of fifty states and the District of Columbia.

Since the FSIA is the sole basis for suing a foreign sovereign, it necessarily and logically follows that uniformity rather than diversity must govern the vital questions associated with whether a foreign sovereign is or is not liable under the FSIA. The FSIA was enacted by the Congress of the nation to provide a uniform standard for foreign sovereigns who may find themselves drawn into civil litigation within the United States. Otherwise, any foreign sovereign would be subjected to having to defend itself under diverse and potentially conflicting state laws that would be relied upon by plaintiffs to assess whether any sovereign, including the Holy See, is immune or not. A federal statute dealing with foreign sovereign immunity must be applied under a system of uniform, clear, and predictable principles. In short, state regulation on matters involving a foreign sovereign’s liability

Circuit stated that the “question of whether Maghrabi was a Saudi employee is governed by California law.” 97 F.3d at 325. It cited as authority *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n. 11 (1983) (“where state law provides a rule of liability governing private individuals, the FSIA requires application of that rule to foreign states in like circumstances.”). However, in this footnote 11, the Supreme Court went on to state that,

When it enacted the FSIA, Congress expressly acknowledged ‘the importance of developing a uniform body of law’ concerning the amenability of a foreign sovereign to suit in United States courts. H.R.Rep. No. 94-1487, at 32 (1976). See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489, (1983). In our view, these same considerations preclude the application of New York law here.

First Nat’l City Bank, 462 U.S. at 622 n.11. As will be seen in subsequent discussion that relies on *Zschernig v. Miller*, 389 U.S. 429 (1967) the need for having a uniform body of law regarding the liability for tort allegedly committed by an official or employee of the Holy See becomes all the more critical. In *Randolph*, the Ninth Circuit concluded that even if Maghrabi was an employee of Saudi Arabian Airlines, “the record fails to show he was acting within the scope of his employment at the time of the accident.” 97 F.3d at 326.

58. *Zschernig v. Miller*, 389 U.S. 429, 432 (1967).

59. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

under the FSIA must give way to the uniform federal policies contained within the FSIA.⁶⁰

Considering that the preponderance of claims against Catholics for the sexual abuse of others is against members of the clergy, it has been or might be argued that priests or bishops are agencies or instrumentalities of the Holy See as defined by the FSIA. However, as explained by *Samantar v. Yousuf, supra*, this argument cannot be made any longer. Questions regarding the Holy See's liability for sex abuse claims under the FSIA must then focus on whether these persons, i.e., bishops and priests, are officials or employees of the foreign state, i.e., the Holy See.⁶¹ Again, it is vital to the uniform application of the FSIA to apply a body of law that homogeneously determines who is an official or employee of the foreign state and whether bishops and priests may be lawfully considered as such.

While stock must be taken of the legal reality that the FSIA is the only mechanism by which a foreign sovereign may be sued in the courts of the United States,⁶² it is necessary to simultaneously consider the law of the Holy See, i.e., the Code of Canon Law, in determining the relationship between members of the clergy in the United States (i.e., bishops and priests) and the Holy See and whether these clergy are employees or officials of the Holy See.⁶³ It is contended here that the claims made by plaintiffs that bishops and priests are officials or employees of the Holy See are without merit. By turning to the authoritative and normative laws of the Church, we will see that the provisions of § 1605(a)(5), the tort exception, of the FSIA cannot be applied against the Holy See because those who committed the torts are not employees or officials of the sovereign.

We must begin this part of the investigation by considering the bishops of the Roman Catholic Church. Are they officials or employees of the Holy See? Do they receive their support from the Holy See or elsewhere? These

60. 389 U.S. at 440-441.

61. In this context, see Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?* *supra* note 25.

62. See, *supra*, footnote 37 and accompanying text.

63. As the Rev. John P. Beal has noted,

Flawed and human though it is, the Code of Canon Law does sketch a path through the mine field of clerical sexual misconduct cases, a path that threads its way between the extremes of the past and the excesses of the present. . . . Following the prescriptions of the code may, however, dispel the widespread perception that church authorities are more prone to cover-up than to address complaints of clerical misconduct, demonstrate that they have exercised a reasonable standard of care, and honor the obligations assumed toward clerics at ordination.

John P. Beal, *Doing What One Can: Canon Law and Clerical Sexual Misconduct*, 52 JURIST 642, 643 (1992).

questions are crucial to assessing whether bishops and priests can expose the foreign state (here, the Holy See) to liability under 28 U.S.C. § 1605 (a)(5).

We begin by taking stock of the pope who is a bishop and who is the successor of Saint Peter, the first of the Apostles, who heads the college of bishops and who is the Vicar of Christ and pastor of the universal Church on earth.⁶⁴ While the pope's authority and power are universal, he is joined in communion with the other bishops of the universal Church.⁶⁵ This is not an employment relationship nor is it a relationship of superior and inferior in an employment relationship. There is a relationship, but it is not one of employment where work assignments are given and compensation of wages and other benefits are conferred by the pope or the Holy See to bishops and priests in the United States. The canonical formulation just stated describes and addresses an ecclesial relationship, not one of employment or appointment of an official of the foreign state.

It has been argued that bishops and priests, be they diocesan (secular) or members of religious orders, are employees of the Church and, therefore, employees of the Holy See.⁶⁶ As will be demonstrated by the following review of the internal law of the Roman Catholic Church, this is not the case.⁶⁷ Under the Church's law, bishops are entrusted with the pastoral care of individual dioceses around the world, and it is in these dioceses where "the one, holy, catholic and apostolic Church of Christ" is present and where it operates.⁶⁸ While bishops are appointed by the Holy See⁶⁹ and pledge their

64. 1983 CODE C.331,

The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.

65. 1983 CODE C.333, § 2, "In fulfilling the office of supreme pastor of the Church, the Roman Pontiff is always joined in communion with the other bishops and with the universal Church. He nevertheless has the right, according to the needs of the Church, to determine the manner, whether personal or collegial, of exercising this office."

66. *Zschernig v. Miller*, 389 U.S. 429, 432 (1967).

67. See, Stephen M. Bainbridge and Aaron H. Cole, *The Bishops' Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATH. LEGAL STUD. 65 (2007), for a helpful background discussion on the ecclesial relationships of priests, bishops, and the Holy See.

68. 1983 CODE C.369,

A diocese is a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of the *presbyterium*, so that, adhering to its pastor and gathered by him in the Holy Spirit through the gospel and the Eucharist, it constitutes a particular church in which the one, holy, catholic, and apostolic Church of Christ is truly present and operative.

seventy-five and when it is accepted, he is entitled to support not from the Holy See but, typically from his diocese in accord with any instructions from the national conference of bishops.⁷⁶

To exercise these functions, each bishop has an important relation with the priests in his diocese.⁷⁷ Thus the bishop, rather than the Holy See, has the responsibility to see that priests properly fulfill the obligations and duties with which they are charged.⁷⁸ Each bishop is also charged with the duty to

Since clerics dedicate themselves to ecclesiastical ministry, they deserve remuneration which is consistent with their condition, taking into account the nature of their function and the conditions of places and times, and by which they can provide for the necessities of their life as well as for the equitable payment of those whose services they need. §2. Provision must also be made so that they possess that social assistance which provides for their needs suitably if they suffer from illness, incapacity, or old age.

c. 281, §§ 1 and 2, in particular,

With special solicitude, a diocesan bishop is to attend to presbyters [i.e., priests] and listen to them as assistants and counselors. He is to protect their rights and take care that they correctly fulfill the obligations proper to their state and that the means and institutions which they need to foster spiritual and intellectual life are available to them. He also is to take care that provision is made for their decent support and social assistance, according to the norm of law.

c. 384,

Although another person has performed a certain parochial function, that person is to put the offerings received from the Christian faithful on that occasion in the parochial account, unless in the case of voluntary openings the contrary intention of the donor is certain. The diocesan bishop, after having heard the presbyteral council, is competent to establish prescripts which provide for the allocation of these openings and the remuneration of clerics fulfilling the same function.

c.531, and

Each diocese is to have a special institute which is to collect goods or offerings for the purpose of providing, according to the norm of can. 281, for the support of clerics who offer service for the benefit of the diocese, unless provision is made for them in another way; §2. Where social provision for the benefit of clergy has not yet been suitably arranged, the conference of bishops is to take care that there is an institute which provides sufficiently for the social security of clerics.

c.1274, §§ 1 and 2.

76. *See id.* at c.402, § 2 (“The conference of bishops must take care that suitable and decent support is provided for a retired bishop, with attention given to the primary obligation which binds the diocese he has served.”).

77. See, James H. Provost, *Some Canonical Considerations Relative to Clerical Sexual Misconduct*, 52 THE JURIST 615 (1992), for a helpful development of the points briefly presented here regarding the office of a priest and his relationship with and supervision by his bishop or religious superior.

78. With special solicitude, a diocesan bishop is to attend to presbyters and listen to them as assistants and counselors. He is to protect their rights and take care that they correctly fulfill the obligations proper to their state and that the means and institutions which they need to foster spiritual and

teach and explain to all those entrusted to his care the truths of the Catholic faith and the moral issues which attend to them.⁷⁹ The core truth that is related to the cases involving sexual abuse is the offense of the sexual abuse of children and adolescents, an offense which “is compounded by the scandalous harm done to the physical and moral integrity of the young, who will remain scarred by it all their lives.”⁸⁰ The CCL itself makes it a crime for a priest to have sexual relations with a minor.⁸¹ Clearly then, permitting or engaging in sexual abuse does not fall within the scope of a bishop’s or priest’s responsibilities of office since it contravenes the very purpose of such office. As has been noted in related litigation involving claims of sexual abuse by priests, “sexual assault was not within the scope of [the priest’s] employment.”⁸² A priest (or bishop) acts *in persona Christi*, that is, he acts not in his person but in that of Christ.⁸³ To tolerate or to engage in the sexual abuse of another person would contravene this solemn obligation of acting *in persona Christi*. The nexus between his duties and the universal Church is not one of employment. There is no contract of employment with the Holy See; there are no job announcements posted by the Holy See; there

intellectual life are available to them. He also is to take care that provision is made for their decent support and social assistance, according to the norm of law.

CCL, *supra* note 63, at c.384.

79. A diocesan bishop, frequently preaching in person, is bound to propose and explain to the faithful the truths of the faith which are to be believed and applied to morals. He is also to take care that the prescripts of the canons on the ministry of the word, especially those on the homily and catechetical instruction, are carefully observed so that the whole Christian doctrine is handed on to all.

See id. at c.386, § 1.

80. CATECHISM OF THE CATHOLIC CHURCH ¶ 2389 (2d ed. 1997). In this context, another element of the Catechism reminds us that,

Rape is the forcible violation of the sexual intimacy of another person. It does injury to justice and charity. Rape deeply wounds the respect, freedom, and physical and moral integrity to which every person has a right. It causes grave damage that can mark the victim for life. It is always an intrinsically evil act. Graver still is the rape of children committed by parents (incest) or those responsible for the education of the children entrusted to them.

Id. at ¶ 2356.

81. A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

CCL, *supra* note 63, at c.1395, § 2.

82. *Schmidt v. Archdiocese of Portland*, 180 P.3d 160, 177 (Or. Ct. App. 2008), rev’d on other grounds *sub nom Schmidt v. Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009).

83. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 80, ¶ 1548. *See also* Second Vatican Council, *Lumen Gentium* [*The Dogmatic Constitution of the Church*] ¶¶ 10, 28 (1964), reprinted in THE DOCUMENTS OF VATICAN II 14, 26-27, 52-5 (Walter M. Abbott, S.J. ed., 1966) [hereinafter *Lumen Gentium*].

is no letter of agreement with the Holy See. In addition, there is no paycheck from or other compensation delivered by the Holy See. Moreover, there is no benefits package provided by the Holy See. There is, rather, an obligation to act *in persona Christi* in ways that conform to the teachings of the Catholic Church.

Each bishop possesses and exercises the administration and governance of his respective diocese. Thus, he governs his diocese with legislative, executive, and judicial authority as has been mentioned,⁸⁴ and these powers are exercised either by himself or through various assistants in accordance with the Code of Canon Law.⁸⁵ Once again, the bishop does not exercise these responsibilities in the name of someone in Rome or the Holy See. He exercises them in his own name and right as the bishop of a particular diocese.

In the execution of these duties, each bishop is assisted by a presbyteral council consisting of priests in and from the bishop's diocese.⁸⁶ In this regard, it is the bishop of the diocese, not the Holy See, who appoints pastors to lead particular parishes within the diocese.⁸⁷ It is vital to note here that with regard to all diocesan clergy, each priest is incardinated in a diocese and labors solely within that diocese unless released by his bishop to work somewhere else outside of this diocese.⁸⁸ In turn, a pastor may have parochial vicars, i.e., priests who assist the pastor in his work, who are

84. 1983 CODE C., *supra* note 64, at c.391, § 1 (“It is for the diocesan bishop to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law.”).

85. *Id.* at c.392, § 2 (“He is to exercise vigilance so that abuses do not creep into ecclesiastical discipline, especially regarding the ministry of the word, the celebration of the sacraments and sacramentals, the worship of God and the veneration of the saints, and the administration of goods.”).

86. *Id.* at c.495, § 1:

In each diocese a presbyteral council is to be established, that is, a group of priests which, representing the presbyterium, is to be like a senate of the bishop and which assists the bishop in the governance of the diocese according to the norm of law to promote as much as possible the pastoral good of the portion of the people of God entrusted to him.

87. *Id.* at c.523 (“Without prejudice to the prescript of can. 682, §1, the provision of the office of pastor belongs to the diocesan bishop, and indeed by free conferral, unless someone has the right of presentation or election.”).

88. *Id.* at c.265 (“Every cleric must be incardinated either in a particular church or personal prelature, or in an institute of consecrated life or society endowed with this faculty, in such a way that unattached or transient clerics are not allowed at all.”). *See also, Id.* at c.266-272 (Incardination establishes life-long juridic bonds between the priest and his diocese and bishop.). *See, Bertram Griffin, The Reassignment of a Cleric Who Has Been Professionally Evaluated and Treated for Sexual Misconduct with Minors: Canonical Considerations*, 51 THE JURIST 326, 327 (1991) (Illuminating many of the issues addressed in this article).

assigned by the bishop.⁸⁹ Other priests working within diocese, primarily chaplains who are entrusted with particular pastoral duties at educational, health-care, penal or other institutions are also appointed by the bishop of the diocese.⁹⁰ Of course, the authority of appointment of any priest by the bishop is complemented by the authority of the bishop to remove and, where necessary, re-assign priests.⁹¹ The Holy See is not involved in these removals or assignments. Its juridical tribunals may be called upon to adjudicate appeals of these personnel decisions,⁹² but the Holy See does not, by itself, take any action regarding the appointment of priests. Thus, it is possible that the juridical bodies, i.e., the courts, of the Holy See, may eventually be involved in the juridical review of removals or assignments after the diocesan mechanisms have been exhausted. However, these institutions of the Holy See do not initiate any of these actions. The local bishop does. Typically, religious priests, i.e., priests who are members of

89. *Id.* at c.545, § 1:

Whenever it is necessary or opportune in order to carry out the pastoral care of a parish fittingly, one or more parochial vicars can be associated with the pastor. As co-workers with the pastor and sharers in his solicitude, they are to offer service in the pastoral ministry by common counsel and effort with the pastor and under his authority,

c.546 (“To be appointed a parochial vicar validly, one must be in the sacred order of the presbyterate”), and c.547 (“The diocesan bishop freely appoints a parochial vicar, after he has heard, if he has judged it opportune, the pastor or pastors of the parishes for which the parochial vicar is appointed . . .”).

90. *Id.* at c.564 (“A chaplain is a priest to whom is entrusted in a stable manner the pastoral care, at least in part, of some community or particular group of the Christian faithful, which is to be exercised according to the norm of universal and particular law”), c.565 (“Unless the law provides otherwise or someone legitimately has special rights, a chaplain is appointed by the local ordinary to whom it also belongs to install the one presented or to confirm the one elected”).

91. *Id.* at c.538:

§1. A pastor ceases from office by removal or transfer carried out by the diocesan bishop according to the norm of law, by resignation made by the pastor himself for a just cause and accepted by the same bishop for validity, and by lapse of time if he had been appointed for a definite period according to the prescripts of particular law mentioned in can. 522

and

§3. When a pastor has completed seventy-five years of age, he is requested to submit his resignation from office to the diocesan bishop who is to decide to accept or defer it after he has considered all the circumstances of the person and place. Attentive to the norms established by the conference of bishops, the diocesan bishop must provide suitable support and housing for a retired pastor,

c.552 (“The diocesan bishop or diocesan administrator can remove a parochial vicar for a just cause”), and c.572 (the bishop’s authority to remove a chaplain).

92. *Id.* at c.1443-1445 (Details the jurisdiction and responsibilities of the Roman Rota and the Supreme Tribunal of the Apostolic Signatura).

orders (consecrated religious life) are assigned by their religious superiors and, in some cases, with collaboration by local diocesan bishops.⁹³ While their governance is ruled by these and other provisions of the Code of Canon Law, it becomes clear upon the review of these canonical provisions that religious priests are, like diocesan priests, not appointed, assigned, or directed by the Holy See in the execution of their official duties but are appointed by bishops, religious superiors, or a combination of both.

These issues naturally raise the question about who enables one to become a priest, either diocesan or religious. It follows that either a bishop or appropriate religious superior has the competence to approve candidates for clerical orders.⁹⁴ Bishops and religious superiors are also responsible for the formation of candidates for ordination as they are also responsible for all aspects of their assignments, including their supervision.⁹⁵ Bishops and religious superiors, not the Holy See, are responsible for removing a priest who violates the Church's law, including Canon 1395.⁹⁶ They, rather than the Holy See, also commence juridical proceedings that necessitate dismissal from the clerical state.⁹⁷

CONCLUSION—THE CLAIMS AGAINST THE HOLY SEE FOR SEX ABUSE ARE INADMISSIBLE

The Federal courts of the United States should hold that the doctrine of foreign sovereign immunity must bar suits brought against the Holy See for sexual abuse claims in which Catholics have or allegedly abused victims. In

93. *See id.* at c.678 and 679..

94. *Id.* at c.1025.

95. *Id.* at c.1028 (“The diocesan bishop or the competent superior is to take care that before candidates are promoted to any order, they are instructed properly about those things which belong to the order and its obligations.”).

96. *Id.* at c.1395 § 2:

A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants,

Under c.277 § 3, the diocesan bishop has the competence to enforce and adjudicate cases brought under c.1395, Beal, *Doing What One Can Do*, *supra* note 63 at 645 (arguing that since the diocesan bishop bears the responsibility for initiating investigations of complaints of sexual misconduct by clerics, all denunciations should be brought promptly to the bishop's attention), *Id.*, at 670 (Bishop is also responsible for making determinations about the status of the priest once due process has completed its course).

97. Canon law first requires that the bishop conduct an investigation in accord with c.1717 and, where necessary, contemplate the juridical process to address legally the case involving the priest under c.1718.

doing so, it should also be acknowledged that what happened to the victims was and remains very wrong; furthermore, it should also be recognized that the civil claims for their victimization are being brought against those responsible and legally competent to defend against these actions. As has been demonstrated, settlements of these claims are in the billions of dollars and have been paid by the proper juridical entities. However, the tort exception to the Foreign Sovereign Immunities Act of 1976, which otherwise bars suits against foreign sovereigns, cannot be relied on to make the Holy See a party-defendant to these claims in that no agency or instrumentality or no official or employee of the Holy See, while acting within the scope of his office or employment, has committed a tort. In searching for applicable law to determine the issues surrounding employment that are crucial to the immunity of the Holy See, the courts of the United States must rely on the Code of Canon Law in order to determine if those Catholics who committed or allegedly committed sexual abuse are, in fact, officials or employees of this foreign sovereign.

Furthermore, the Federal courts cannot rely on state law to determine the issues surrounding the matter of employment as this would violate the doctrine established in *Zschernig v. Miller* that preempts the use of state law in matters involving foreign affairs. Since the FSIA is the sole basis for securing jurisdiction over a foreign sovereign in U.S. courts and since this codification of the restricted doctrine of sovereign immunity is designed to address a delicate matter of foreign affairs that deals with the potential liability of foreign sovereigns for torts committed in the United States, reliance on state law in determining who is an official or employee would be problematic.

As the law of the foreign sovereign clearly establishes that those responsible for or accused of sexual abuse are not officials or employees of the Holy See, the cases brought against it for sexual abuse are inadmissible.

THE NEW *DELICTA GRAVIORA* LAWS

Davide Cito[†]

INTRODUCTION

The new *delicta graviora* laws were published in the *Acta Apostolicae Sedis*, updating the April 2001 *motu proprio* Apostolic Letter *Sacramentorum sanctitatis tutela*. Pope Benedict XVI approved the new laws on May 21, 2010.¹ At the time of their publication, the content of the new laws had previously appeared on the Holy See's website on July 15, 2010, because of the announcement of their imminent release.² The purpose of this paper is to discuss the procedural and substantive changes made to the *motu proprio* by the new *delicta graviora* laws.³ Part one summarizes the circumstances surrounding the publication of the new *delicta graviora* laws. Part two discusses the substantive law changes to the *delicta graviora*. Part three analyzes the procedural law changes to the *delicta graviora*, including an overview of the constitution and competence of the Church tribunals that apply these new laws. The paper concludes by reiterating the reasons for the substantive and procedural changes to the *delicta graviora* and how these changes will allow the Church to better serve her followers in justice.

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1. See Pope Benedict XVI, *Congregatio pro Doctrina Fidei*, in 102 *Acta Apostolicae Sedis* [hereinafter AAS] No. 7, 419-432 (2010) (consists of four elements: the *Rescriptum ex Audientia* that published the laws themselves pg.419; The *Substantive and Procedural Laws* pgs. 419-430; the *Letter to the Bishops* signed by the Prefect and Secretary of the Congregation for the Doctrine of the Faith pg.431; and finally, the *Essay* about the primary changes made to the m.p. *Sacramentorum sanctitatis tutela* pgs.432-434).

2. See Congregation for the Doctrine of the Faith, *Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations* (2010), http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html,

[T]he CDF has undertaken a revision of some of the articles of *Motu Proprio Sacramentorum Sanctitatis tutela*, in order to update the said *Motu Proprio* of 2001 in the light of special faculties granted to the CDF by Popes John Paul II and Benedict XVI. The proposed modifications under discussion will not change the above-mentioned procedures.

3. Congregation for the Doctrine of the Faith, *Substantive Norms*, available at http://www.vatican.va/resources/resources_norme_en.html (last visited Sept. 27, 2011) (*Motu proprio* is Latin for "Substantive Norms" and *delicta gravora* means "grave delicts.") [hereinafter *Motu proprio*].

I. BACKGROUND OF THE DELICTA GRAVIORA

Before focusing on the changes made to the substantive and procedural laws of the first version of the *motu proprio*,⁴ I wish to highlight how the circumstances surrounding their publication constitute a turning point in the Holy See's procedures. We are confronted with a ministry that has characterized itself as reserved, even regarding promulgated laws throughout the centuries, because of the sensitivity of the areas of its competence. To this effect, the 1962 document *Crimen sollicitationis* immediately preceded the publication of *Sacramentorum sanctitatis tutela*. The *Crimen sollicitationis* was subtitled "This text is to be diligently stored in the secret archives of the Curia for internal use only."⁵ Moreover, the procedure for the publication of the *motu proprio* coupled with an *Epistula* "sent from the Congregation for the Doctrine of the Faith to Bishops of the entire Catholic Church and other ordinaries and Hierarchs having an interest," in which the content of the new procedural and substantive laws was summarized, and their subsequent non-publication raised quite a few questions.⁶ The *motu proprio* and its subsequent revisions were then published in W.H. Woestman and other works.⁷ To better understand how the opinions surrounding the *delicta graviora* laws have changed in just a few years, it is helpful to look at an interview with the former Secretary of the Congregation for the Doctrine for the Faith, Monsignor Bertone concerning the laws themselves:

4. See Velasio De Paolis, *Norme "de gravioribus delictis" riservati alla Congregazione per la Dottrina della Fede* [Provisions "of gravioribus delictis" reserved to the Congregation for the Doctrine of the Faith] 91 *Periodica* fasc. 2, 239-271 (2002). See also José Bernal, *Procesos penales canónicos por los delitos más graves. El m.p. Sacramentorum sanctitatis tutela* [Criminal proceedings canonical by the most serious crimes. The mp Sacramentorum sanctitatis protection], in *Cuestiones vivas de Derecho matrimonial, procesal y penal canónico. Instituciones canónicas en el marco de la libertad religiosa: Actas de las XXV Jornadas de la Asociación Española de Canonistas, 2005* [Live issues marriage, law criminal procedure and canonical. Canonical Institutions under religious freedom: XXV Conference of the Spanish Association of canonists, 2005] 163-200 (R. Rodríguez Chacón & L. Ruano Espina eds., Universidad Pontificia de Salamanca, 2006) (Spain). See also Kurt Martens, *Les délits les plus graves réservés à la Congrégation pour la Doctrine de la Foi* [The most serious offenses reserved to the Congregation for the Doctrine of Faith], 56 *Revue de Droit Canonique* [R.D.Can.] 201-221 (2006) (Fr.) (Comments following the changes made to the *motu proprio* in 2002 and 2003).

5. Pope John XXII, *Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation*, Office of the Sacred Congregation, (March 16, 1962), available at http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (last visited Aug. 27, 2011).

6. See Pope John Paul II, *Litterae Apostolicae Motu Proprio Datae*, in 93 AAS, 738-739 (2001).

7. See William H. Woestman, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law* (St. Paul Univ.) (2000). See also Bruno Fabio Pigin, *Diritto Penale Canonico* [Criminal Law Canon], 602-618 (Venezia: Marcianum, 2008) (It.).

Question: “Why were the new *delicta graviora* laws made public in such a reserved manner, without a press conference and without publication in the *Osservatore Romano*?” *Answer:* “I understand that reporters and the media prefer numerous press conferences, but the topic is a very delicate one. To avoid media sensationalism, we prefer disseminating them in an official way without too much emphasis.” *Question:* “To tell you the truth, the actual text of the new procedural and substantive laws was never officially published . . .” *Answer:* “That is true. They are sent to the Bishops and religious Superiors that deal with these problems upon express request. The substantive laws are condensed into a letter from the Congregation to the Bishops and also published in the *Acta Apostolicae Sedis*. The procedural laws then take their general course. The procedure for publication is delineated in Code of Canons.” The same thing occurred with the modifications approved in 2002 and 2003; they were published on the Internet but not officially.⁸

Today, the Holy See’s position regarding publishing modifications has noticeably changed, as evidenced by the fact that the news of the changes made to the laws were filtered through the press to prepare the public opinion for their reception. Additionally, the Holy See created a *focus* link on their official website months ago, dedicated to the topic of child abuse and the Church’s response to it. This has facilitated the access to documents that contain the Church’s response, along with other related materials. The materials have also been translated into many languages in an effort to reach the vast majority of the public and offer them detailed insight and information on this problem.⁹

A. *Translation of the Delicta Graviora*

The changes to the *motu proprio* have not just been made public in the Latin language (the *Acta Apostolicae Sedis* is officially written in Latin), but in order to make them comprehensible and accessible to the general public, they are published on the website in seven languages.¹⁰ They are also accompanied by four documents: “Letter to the Bishops of the Catholic Church and the other Ordinaries and officials about the changes introduced in the apostolic letter of his own accord given the *Sacramentorum sanctitatis*

8. *Interview with Monsignor Bertone*, 30 GIORNI, (February 2002) (It.).

9. *See Abuse of Minors. The Church’s Response*, THE HOLY SEE available at http://www.vatican.va/resources/index_en.htm (last visited September 16, 2011).

10. *See generally Motu Proprio*, *supra* note 3.

tutela,”¹¹ translated into five languages, dated May 21 2010, signed by both the Prefect and Secretary of the Congregation for the Doctrine of the Faith. This letter is also accompanied by an essay in six languages that explains the changes introduced in the new text of the laws. The remaining two documents are a “Historic Introduction by the Congregation for the Doctrine of the Faith,”¹² that illustrates the evolution of the laws from their inception in the 1917 Code of Canons, and a letter from P. Federico Lombardi, Director of the Vatican press agency, entitled “The meaning of the publication of the new laws of the *delicta graviora*,”¹³ is available in five languages.

B. *Abuse of Minors and the Delicta Graviora*

What propelled this complete change in communication between the Holy See and the public is the terrible abuse of minors that has been perpetrated by some Clerics and in the words of P. Lombardi:

[T]he vast public sentiment in recent years, this type of crime has attracted a great deal of attention and created an intense debate on the laws and procedures applied by the Church to punish these crimes. It is right for there to be transparency about the laws that are in place to combat these crimes, and it is appropriate that those laws be presented in their entirety to enable anyone who needs information on the topic to have full access to them.¹⁴

Although the abuse of minors by a Cleric is a particularly odious and very serious crime, it is certainly not the only crime contained in the *delicta graviora*. However, recent events have made this particular type of crime the driving force of reform, and in a sense, the central point in the Holy See’s current penal legal system. The new procedural laws and all the progressive changes are modeled after the *motu proprio* to ensure the quick and efficient prosecution and punishment of these crimes. They have also been crafted to create a different relationship between the Church and the political sphere in

11. Congregation for the Doctrine of the Faith, *The Norms of the Motu Proprio*, “*Sacramentorum sanctitatis tutela*,” *Historic Introduction* (2001), available at http://www.vatican.va/resources/resources_introd-storica_en.html (last visited Sept. 27, 2011).

12. *Id.*

13. Letter from P. Federico Lombardi, Director of the Vatican Press Agency, *The significance of the Publication of the new “Norms concerning the most serious crimes,”* available at www.vatican.va/resources/resources_lombardi-nota-norme_en.html (last visited Sept. 16, 2011).

14. *Id.*

this area, which is no longer based on rigid separation and almost nonexistent communication, but rather on a collaborative model. As well as a “Guide to the Congregation for the Doctrine of the Faith’s general procedures regarding accusations of sexual abuse,”¹⁵ there are numerous other resources available on the topic. The Guide opens up its preliminary procedures section with “[w]e must always follow applicable criminal laws, as far as reporting these crimes to the appropriate civil authorities.”¹⁶ An interview with Monsignor Charles Scicluna, Promoter of Justice for the Congregation for the Doctrine of the Faith, stresses that “the laws on sexual abuse have never been meant to prohibit the reporting of these crimes to the civil authorities.”¹⁷ Additionally, as far as the concern that “Clerical Superiors are frequently accused of not reporting instances of pedophilia to the civil authorities that have been brought to their attention.”¹⁸ He responds:

In some countries with an Anglo-Saxon justice system, as well as in France, if the Bishops find out about crimes committed by their priests outside the realm of the sacramental seal of confession, they must report them to the appropriate civil authorities. It is an onerous duty, a Bishop reporting his Priest is comparable to a parent reporting his child. Although it is a particularly difficult duty, our instructions are always to respect the law.¹⁹

When asked again about “cases in which Bishops are not legally required to report them,” his answer is along the same lines:

In these cases, we do not force the Bishops to report their Priests, but we encourage them to reach out to the victims and to ask them to report the Priests who committed these crimes against them. We also instruct the Bishops to give the victims all the consolation, spiritual help, and any other type of help that they can. In a recent case regarding a Priest convicted by an Italian court, it was the Congregation that suggested to the victim, who

15. *Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*, THE HOLY SEE available at http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html (last visited Sept. 27, 2011).

16. *Id.*

17. Interview with Monsignor Charles Scicluna, Promoter of Justice for the Congregation for the Doctrine of the Faith on *The Strictness of the Church in Cases of Paedophilia* (2010) available at http://www.vatican.va/resources/resources_mons-sciicluna-2010_en.html (last visited Sept. 27, 2011).

18. *Id.*

19. *Id.*

was involved in a Canonic trial, to report the crime to the secular authorities in order to prevent more abuse.²⁰

Thereafter, the President of the Italian Episcopal Conference, Cardinal Angelo Bagnasco addressed the same issues in an interview with the National Italian newspaper, *Il sole24ore*, on April 11, 2010, stating that:

Pope Benedict XVI, to whom he renewed his affection, closeness of the episcopacy, and of the entire Italian Catholic Church for the gratuitous and shameful accusations that were made towards him, has taken a severe and critical approach, calling for the Church to examine itself, an examination that will lead to its purification from its members and those individuals who have painfully obfuscated its image and credibility. But this vigorous “purification” of the Church- that obviously includes loyal cooperation with the judicial system- cannot erase the suffering and disenchantment of victims, children and young adults whose trust was betrayed. Towards every person who has been violated, towards their families, I feel shame and remorse, especially in those cases where victims were not heard by the people who should have immediately intervened on their behalf. The confirmed cases of underestimating incidents, internal disorganization, and even cover-ups, will be rigorously prosecuted both within the Church and under Civil laws, and similarly to what has happened in certain cases, will also necessarily include the dismissal and removal of the people involved.²¹

C. *Role of Pope Benedict XVI*

Without the decisive action of Pope Benedict XVI, the changes in laws mentioned would not have happened.²² When he was still Prefect of the Congregation for the Doctrine of the Faith, he asked Pope John Paul II for special powers that would allow him to make the laws enacted in 2001 more efficient in prosecuting violations thereof, particularly, Clerical abuse of minors.²³

20. *Id.*

21. Gianni Riotta, *Chiesa, lavoro, politica, pedofilia Bagnasco parla a cuore aperto* (Apr. 11, 2010), <http://www.ilsole24ore.com/art/SoleOnline4/Italia/2010/04/intervista-bagnasco-riotta.shtml> (last visited Sept. 27, 2011).

22. *Cf.* Interview with Cardinal Bagnasco, and J.I. Arrieta, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, *La civiltà Cattolica*, Dec. 4, 2010, at 430; *see also*, J.I. Arrieta, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, *La civiltà Cattolica*, Dec. 4, 2010, at 430.

23. *Cf.* Davide Cito, *La probità morale nel sacerdozio ministeriale*, *Fidelium Iura*, at 119 (2003):

Following the Murphy Report, published in Ireland in fall 2009,²⁴ a painful pattern of abuse over time drastically opened the eyes of the Church to the magnitude of the widespread problem that knows no geographical barriers. The Holy Father chose direct spiritual, pastoral, and judicial action to help the Church develop new sensibility to the problem of sexual abuse of minors, while offering specific guidance for Pastors. In this regard, it is useful to mention that the Pope stressed that these are crimes against the person and the defense of the victims always prevails over protecting the Church's name or any other matters.²⁵ Pope Benedict XVI says:

[I]t seems that we must create a time for penance, a time for humility, to renew and relearn absolute sincerity. As far as the victims are concerned, there are three things I think are important. The first concern is for the victims - how we can heal them, what we can do to help these people overcome this trauma, find life again, come back and find renewed faith in Christ again. Care and commitment to the victims are our first priority, coupled with material help, psychologists, and spiritual help. The second concern is for the guilty parties involved: just punishment, precluding them from any kind of contact with young people, because we know that this is a disease and that free will has no bearing on this disease. Consequently, we must protect these people from themselves and keep them far away from young adults and children. The third concern is prevention, during the education and in choosing candidates for the Priesthood, to be as careful as humanly possible to prevent future case.²⁶

Although the central intervention of the Holy Father on this issue can be reviewed in the March 19, 2010 *Pastoral Letter* to Irish Catholics, in the past few months the Pope has always voiced his position on these crimes during every Pastoral occasion, particularly on Pastoral visits. Chronologically, we can recall some of Pope Benedict XVI's most influential statements on the

The changes made to the motu proprio *Sacramentorum sanctitatis tutela* in 2002 and 2003 brought up many doubts and even seemed to harm the rights of the accused. After nearly ten years, I must admit that they were necessary changes to protect the weaker party in this crime, the victims of the abuses, particularly in cases where the Church has difficulties in carrying out a trial because of the lack of qualified personnel.

24. See generally Commission of Investigation into the handling by Church and State authorities of allegations and suspicions of child abuse against clerics of the Catholic Archdiocese of Dublin, Murphy Report (July 2009) (Ir.), available at <http://www.justice.ie/en/JELR/Pages/PB09000504> (last visited Sept. 27, 2011).

25. Pope Benedict XVI, *Letter to the Catholics of Ireland* (March 19, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/letters/2010/index_en.htm (last visited September 16, 2011).

26. *Id.* at 2.

issue.²⁷ “The Church is doing, and will continue to do everything within its power to investigate these accusations, to ensure the guilty parties are brought to justice for these abuses, and to put effective measures into place to protect young people in the future.”²⁸

This problem has always existed, but today, we see it on a terrifying rampant scale: the greatest threat to the Church are not external enemies, but it comes from the sin within the Church and the Church has the profound need to relearn penance, to accept purification, to learn forgiveness on the one hand, but on the other realize the need for justice. Forgiveness cannot be a substitute to justice.²⁹

Pope Benedict further stated:

Another topic that has received much attention in the past months which seriously undermines the moral credibility of those responsible in the Church is the shameful abuse of children and young adults by Priests and other members of the Clergy. I have spoken about the deep wounds that this behavior has caused many times, primarily to the victims, but also to the fiduciary relationship that should exist between Priests and parishioners, Priests and their Bishops, and likewise between the authority of the Church and the people. I know that you have taken many serious steps to combat and remedy this situation, to ensure that the children are protected in an effective way from any harm, and to confront any future allegations of abuse in a transparent and appropriate manner if they arise. You have publicly voiced your profuse sadness for everything that has happened and for the often inadequate ways this topic was dealt with in the past. Your growing understanding of the extent of the abuse of children in society, of its devastating effects, and the necessity to give extensive support to the victims, should serve as an incentive to share the lesson you have learned with the public. What better method could there be of atonement for those sins than humbling oneself and with a compassionate spirit get closer to the children who have suffered because of the abuse? Our duty to take care of the youth requires nothing less than that. While we reflect on human fragility, something that these tragic events reveal in such a harsh way, we

27. *Id.* at 1 & 2.

28. Pope Benedict XVI, *Visit to Malta of the Special Envoy of Pope Benedict XVI his Eminence Cardinal Ennio Antonelli* (June 28, 2009), available at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20090628_malta-2_en.html (last visited Sept. 27, 2011).

29. Benedict XVI, *Apostolic Journey of Pope Benedict XVI To Portugal on the Occasion of the Tenth Anniversary of the Beatification of Jacinta and Francisco, Young Shepherds of Fatima* (May 11, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/homilies/2010/documents/hf_ben-xvi_hom_20100513_fatima_en.html (last visited Sept. 27, 211).

are also reminded that in order to be efficient Christian guides, we have to live in the utmost integrity, humility, and sanctity.³⁰

But it is precisely the *Pastoral Letter* to Irish Catholics that has in many ways been a turning point both in an intraecclesiastical sense, by recalling the duties of all faithful, particularly Pastors, in preventing and punishing this crime, and as far as relations between civil and ecclesiastical authorities, in confronting this painful problem. Certainly the Pope, just as John Paul II had done years ago, takes the fact that the actions of the Pastors had been influenced by factors that impeded or at least made it difficult to both perceive the phenomenon and confront it with the right methods into account,³¹ although “there is no doubt that you and some of your predecessors have failed, sometimes gravely failed, to apply the Canon law that had already been codified long before regarding child abuse. Serious mistakes were made in responding to these accusations.”³²

30. Benedict XVI, *Apostolic Journey to the United Kingdom, Meeting with the Bishops of England, Scotland and Wales: Address of His Holiness Benedict XVI*, (Sept. 19, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_benxvi_spe_20100919_vescovi-inghilterra_en.html (last visited Sept. 27, 2011).

31. See John Paul II, *Address to the Cardinals of the U.S.* (Apr. 23, 2002),

It is true that a generalized lack of knowledge on the nature of the problem and sometimes even consultations with medical experts have brought Bishops to make decisions that were later discovered to be wrong. Now you are working to establish more reliable criteria, in order to ensure that similar mistakes do not happen again.

Benedict XVI, *Pastoral Letter to the Catholics in Ireland*, (Mar. 19, 2010) (“I understand how difficult it was to understand the complexity and extension of the problem and to obtain reliable information and make the right decisions in light of the conflicting advice from experts”). John Paul II, *Christmas Speech to Roman Curia* (Dec. 20, 2010),

In the seventies, pedophilia was theorized as something acceptable for mankind and child. However, this was part of a deep perversion of the concept of *ethos*. They went so far-even within Catholic theology- to say that it was neither categorically wrong, nor right. There is only better than or worse than, nothing in and of itself was right or wrong. Everything depended on the circumstances and the purpose intended. According to them, depending on the circumstances, anything could be wrong or right. Morality was substituted for a calculation of consequences and by doing so, had ceased to exist.

The effects of such theories today are evident in the encyclical by John Paul II, *Veritatis Splendor* (Aug. 6, 1993) (emphasizing with prophetic force and in the great tradition of Christian *ethos*, the essential and permanent pillars of morality. Today, this text must be the focal point in the path towards forming our consciences. It is our responsibility to make these criteria heard and comprehensible to mankind to pave the clear path to true humanity, amidst the current concern for mankind).

32. Benedict XVI, *Pastoral Letter of the Holy Father, Pope Benedict XVI, to the Catholics of Ireland*, para. 11 (Mar. 19, 2010) available at http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_en.html (last visited Sept. 27, 2011).

The Pope's letter addresses present and future remedies, indicating the precise courses of action to be taken, that have also been stressed on other occasions: "I appreciate all the efforts that you have made to remedy past mistakes and to ensure that they will not be repeated. In addition to putting the Canonic laws into action in facing the instances of child abuse, you continue to cooperate with the civil authorities within their jurisdiction."³³ There are two directions to go from here: the rigorous application of the existing canonic laws and the cooperation with civil authorities.

It is precisely those two areas that have been modified by the *motu proprio Sacramentorum sanctitatis tutela*, "in order to improve their concrete implementation,"³⁴ and that, in my opinion, justifies this long preface before examining the concrete changes made to them.

II. THE SUBSTANTIVE LAWS

Even from just a year from its entry into force, the *motu proprio Sacramentorum sanctitatis tutela* already had proposed modifications that were deemed necessary for its efficient application. The first of these changes was dated November 7, 2002. It concerned the choice to derogate the statute of limitations upon the Bishop's request, of the *delicta graviora*, fixed at ten years, calculated from the victim's eighteenth birthday if it is abuse of minors. Other changes followed and they were all confirmed May 6, 2005 by Benedict XVI. One of the objectives of publishing the new laws is to insert certain changes into the formal text of the laws, so as to not ask the Holy Father to confirm the power to derogate each individual time. Both the substantive and procedural laws contain all of the previous changes. In addition to the changes made to the laws, there are other specifications that will be succinctly presented. The *motu proprio* is now composed of 31 articles, compared to the 26 of the first edition.³⁵

Following the order of the articles, the first major change was the modification that now better circumscribes the "material" jurisdiction of the Congregation for the Doctrine of the Faith. The interpretation of Article 52 of the Apostolic Constitution *Pastor bonus*³⁶ in conjunction with the

33. *Id.*

34. William Cardinal Levada, *Letter to the Bishops of the Catholic Church*, (May 21, 2010), http://www.vatican.va/resources/resources_lettera-modifiche_en.html (last visited Sept. 27, 2011).

35. Pope Benedict XVI, *Motu Proprio data, Quaerit semper* (Aug. 30, 2011), available at http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/index_en.html (last visited Sept. 27, 2011).

36. See John Paul II, *Apostolic Constitution, Art. 52* (June 28, 1988),

Apostolic Letter m.p. *Sacramentorum sanctitatis tutela* stated: “After we had approved the *Agendi ratio*, it was necessary to specifically define both ‘the more grave crimes against morals or crimes committed during the celebration of the sacraments’ for which the competence of the Congregation for the Doctrine of the Faith remains exclusive, and that also have the special procedural norms to declare and impose Canon sanctions.”³⁷ This leads one to believe that the competence for crimes against the Faith was entirely with the *Nova agendi ratio*. Not only does Article 1, Section 1 of the *motu proprio* add the expression “*delicta contra fidem*,”³⁸ or crime against the Faith, but it adds Article 2 in which these crimes against the Faith are indicated with their individual reference to each of the Code of Canons for Eastern and Latin Churches and the Latin Code.³⁹ In these cases, the Congregation acts as a second degree appeals Court, leaving the jurisdiction of the Ordinary local tribunal in place for sentencing and the entire trial (at the trial court level) in both the judicial and administrative systems. The specification of the jurisdiction for crimes against the Faith, as indicated by Article 1, does not compromise the efficiency of the *Agendi ratio in examine doctrinarum*, because the *Agendi* is meant to be a specific tool to intervene on more broad doctrinal conflicts which require a more qualified and scientific response.

The Congregation for the Doctrine of the Faith is also entrusted with penal jurisdiction for *delicta graviora*, against Cardinals, Patriarchs, representatives of the Holy See, and Bishops, the Holy Father, and upon his previous mandate, and also other physical persons listed in Can. 1405 section 3 CIC and 1061 CCEO.⁴⁰ There has been a progressive widening of the

The Congregation examines offences against the faith and more serious ones both in behaviour or in the celebration of the sacraments which have been reported to it and, if need be, proceeds to the declaration or imposition of canonical sanctions in accordance with the norms of common or proper law.

available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index_en.html (last visited Sept. 27, 2011).

37. See John Paul II, *Apostolic Constitution, Art. 52* (June 28, 1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-roman-curia_en.html (last visited Sept. 27, 2011). In conjunction with, *Sacramentorum sanctitatis tutela* (2001) http://www.vatican.va/resources/resources_introd-storica_en.html (last visited Sept. 27, 2011).

38. The specification of crimes *contra fidem*, or against the faith was missing in the 2001 draft.

39. See CODE OF CANON LAW cans. 909, 1365, 1367, 1378 §2 n.1, 1379 (1983).

40. CODE OF CANON LAW, *supra* note 39, can. 3. See also CODE OF CANONS OF THE EASTERN CHURCHES, can. 1061 (1990).

Congregation for the Doctrine of the Faith's jurisdiction, even if it is limited to the most serious of crimes of the Roman Rota Tribunal.

A. *Offenses against the Eucharist*

Crimes against the Eucharist remain unchanged, even though they have been reorganized by separating the attempted liturgical action of the Eucharistic sacrifice from its simulation. The first crime presupposes that the offender is not a Priest, and in the latter offense, that he is. Additionally, the consecration for sacrilegious purposes is punished if it implicates either of the two Eucharistic species (bread or wine), both when it occurs within the Eucharistic celebration and outside of it, clarifying the previous language that may have caused confusion.

Article 3 regulates the most serious of crimes since the Eucharist encompasses all of the good in the Church.⁴¹ The penal protection is that of preserving the legitimate Eucharistic celebration and ensuring the actual presence of Jesus Christ that is an irrepressible requirement in order for the Church to conserve its identity.

Five crimes are described in Article 3.⁴² First, there is the crime of removal or conservation of consecrated species for sacrilegious purposes, regulated in Can. 1367 CIC and 1442 CCEO,⁴³ integrated by the authentic response of the Pontifical Council for the Legislative Texts in June 1999. While in the case of removal or conservation, the element that constitutes the crime is the sacrilegious purpose (for example use in a satanic ritual), for cases of desecration, defined as “any voluntary action that is gravely derogatory.”⁴⁴ The crime is punished with the sanction of excommunication *latae sententiae* reserved to the Holy See and if the crime is perpetrated by a Cleric, the optional penalty in the most serious cases of dismissal from the Clerical state. If the faithful is of an oriental denomination, the penalty is major excommunication, because the CCEO does not allow for *latae sententiae* sanctions, but it retains the institution of reserved sins according to Can. 728 and 729 CCEO and if the offender is a Cleric, the sanction is possible dismissal.⁴⁵

41. *Motu Proprio*, *supra* note 3, at art. 3.

42. *Id.* at arts. §1 and §2.

43. CODE OF CANON LAW, *supra* note 39, can. 1367. *See also* Code of CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1442.

44. Pontifical Council, *Il disprezzo delle sacre specie* [*The Contempt of The Sacred Species*] (1999), in L'OSSERVATORIO ROMANO (1999), available at <http://www.internetsv.info/ResponsoE.html>.

45. *See* CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 728, 729.

The second crime, regulated by Article 2⁴⁶ is the attempted Eucharistic celebration by someone who is not an ordained Priest (Can. 1378 §2, 1° CIC).⁴⁷ This crime is contained in the Latin Code of Canons, but because it is part of the *delicta graviora*, it is also imputable to members of the Oriental Church. The crime consists of an attempt, because someone who is not ordained cannot validly consecrate the Eucharist. The punishment is the penalty of an interdicted person, *latae sententiae*. If the offender is a Deacon, the consequence is suspension; and for members of the Oriental Church, it must be a sanction that is proportional to *ferendae sententiae*.

The third crime of Article 3⁴⁸ includes among the *delicta graviora* the simulation of Eucharistic celebration described in Can. 1379 CIC and 1443 CCEO that had been combined with the attempted Eucharistic celebration.⁴⁹ As previously mentioned, the separation of these crimes is important because the attempted celebration is committed by someone who is not an ordained Priest, while the simulation can only be committed by a Priest that is capable of celebrating a valid Eucharist and voluntarily chooses not to do so, knowing that he is leading his followers to believe that they are celebrating the Eucharist. Both Can. 1379 CIC and Can. 1443 CCEO contain a general statute of limitations regarding the simulation of sacraments. According to Article 4, n.3 of the *motu proprio*, only the simulation of the sacraments of Eucharist and Confession are categorized as *graviora delicta*⁵⁰. Meanwhile, other instances of simulation, for instance, the administration of a sacrament remain a common disciplinary crime, which of course does not make them any less criminal. The sanction required for a similar offense, remains the same in both the Latin and Eastern Oriental Canons, a perpetual penalty that must be proportional to the individual offense, and does not exclude major excommunication.

The fourth and clear-cut crime is explained in the *communicatio in sacris* and expressly prohibited by Can. 1365 CIC and 1440 CCEO. In fact, although the Code of Canons categorically prohibits any illegitimate *communicatio in sacris*, leaving its legal classification to the universal or particular laws, both Can. 908 CIC and Can. 702 CCEO prohibit the

46. *Motu Proprio*, *supra* note 3, at art. 2.

47. See CODE OF CANON LAW, *supra* note 39, can. 1378 §2, 1°. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

48. *Motu Proprio*, *supra* note 3, art. 3.

49. See CODE OF CANON LAW, *supra* note 39, can. 1379. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

50. *Motu Proprio*, *supra* note 3, at art. 4, n. 3.

Eucharistic celebration with ministers that are not Catholic.⁵¹ In this case however, the area of the crime is narrowed down because the text does not generically refer to non-Catholic ministers or ministers, who are not in full communion with the Holy See, but specifies only ministers of the Ecclesiastic community who do not possess the Apostolic succession or that do not recognize the sacramental dignity of the Priesthood. Although still prohibited, the Eucharistic celebration with ministers of Orthodox churches does not fall within the realm of the *graviora delicta*. The sanction applied to such an offense according to both the Latin and Eastern Code of Canons is a perpetual, proportional penalty.

The fifth and final crime against the Eucharist was a legislative innovation in 2001 because it framed a crime that was not explicitly contained in either the CIC or the CCEO, even if such behavior was still categorically reprimanded. Canon 927 CIC categorically prohibited the consecration of one species without the other (bread or wine), or of both outside of the Eucharistic celebration even if not for sacrilegious purposes (the sacrilegious purpose heightens its unlawfulness).⁵² However, there was still no penal classification for it and in many cases it could have fit into Can. 1367 on the desecration of the consecrated Eucharistic species. Considering the fact that the Canonic Penal law is subject to strict interpretation,⁵³ we can infer that it was necessary for the legislature to specifically delineate the elements of the crime for all of the cases in which the criminal behavior did not formally consist of desecration of the Eucharistic species as delineated in Can. 1367 CIC and 1442 CCEO. The current text extends the crime to include all instances of consecration for sacrilegious purposes without expressly citing Can. 927 CIC. The crime includes both the consecration for sacrilegious purposes of one Eucharistic species without the other, or of both, during the Eucharistic celebration or outside of it. As far as the penalty imposed, it can span up to dismissal or deposition.

B. *Offenses against the Sanctity of Penance*

Article 4 of the *motu proprio* is dedicated to the *delicta graviora* of crimes committed against the sanctity of Penance.⁵⁴ The category of *delicta graviora* contains a large number of crimes surrounding the Sacrament of

51. See CODE OF CANON LAW, *supra* note 39, can. 908. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 702.

52. See CODE OF CANON LAW, *supra* note 39, can. 927.

53. *Id.*, can. 18. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1500.

54. *Motu proprio*, *supra* note 3 at art. 4

Penance, indicating the great care the Church takes in protecting the celebration of this Sacrament by also punishing frequent abuses during its celebration or during Confession. In fact, in the 2001 version of the *motu proprio*, abuse against the Sacrament of Penance were comprised of only three crimes- the absolution of an accomplice in sin against the sixth precept of the Decalogue, while not in danger of death,⁵⁵ the solicitation to sin against the sixth precept of the Decalogue, during or under the pretext of confession in order to absolve the confessor of the sin committed (Can. 1387 CIC and 1458 CCEO),⁵⁶ and the direct violation of the sacramental seal.⁵⁷ In 2003, the crime of indirectly violating the sacramental seal was added because of the frequent difficulties in discerning the cases of direct and indirect violations. In the modifications made, three more crimes have been added, so that all of the crimes committed against the sanctity of the sacrament of Penance will be considered *delicta graviora*.

The first of these crimes is the attempted sacramental absolution by unlawfully listening to a confession, included in the *motu proprio* and described in art. 4 §1 n. 2.⁵⁸ The aforementioned crime recalls Can. 965 CIC and 722 §1 CCEO.⁵⁹ Anyone who has not received the sacred order is “incompetent” and cannot impart a valid absolution because of the prohibition to do so imposed by divine law; he who has not received the power, is “unable” to do so under ecclesiastic law. However, in either situation the absolution is invalid and like the attempted Eucharistic celebration, this criminal act is appropriately categorized as an “attempt,” because the individual can only attempt the action without the possibility of obtaining the results of absolution. The individual that cannot validly impart sacramental absolution is not only prohibited from attempting to absolve, but also may not listen to a confession for any reason whatsoever even should the reason seem justifiable and even if he has no intention to impart an invalid absolution. Because the Canon recalled in art. 4 §1, n. 2 of the *motu proprio* is only contained in the Latin Code, its inclusion in the m.p. *Sacramentorum sanctitatis tutela*, extends the offense to Eastern Rite followers of the Church,

55. See CODE OF CANON LAW, *supra* note 39, can. 1378 §1. See also Code of Canons of the Eastern Churches, *supra* note 40, can. 1457.

56. See CODE OF CANON LAW, *supra* note 39, can. 1457. See also Code of Canons of the Eastern Churches, *supra* note 40, can. 1458.

57. See CODE OF CANON LAW, *supra* note 39, can. 1388 §1.

58. *Motu proprio*, *supra* note 3 at art. 4, § 1, n. 2.

59. See CODE OF CANON LAW, *supra* note 39, CAN. 965 §1 (“The valid absolution of sins requires that the minister have, in addition to the power of orders, the faculty of exercising it for the faithful to whom he imparts absolution.”). See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 772 (“the ministry of the sacrament of penance belongs to the priests.”).

to whom a proportional *ferendae sententiae* penalty should be applied, and when taking can. 1378 §3 CIC into consideration could reach even major excommunication. Article 4, §1, n. 3⁶⁰ also includes the simulation of the sacramental absolution within the *delicta graviora*.⁶¹ Similarly to the Eucharist, it is a crime committed by a Priest with the valid power and ability to impart absolution, who instead voluntarily chooses to merely simulate the administration of the sacrament.

The third crime added concerning the sacrament of Penance contained in the *delicta graviora* is delineated in art. 4, §2. It is configured in a decree from the Congregation for the Doctrine of the Faith dated September 23, 1988 that recalls the previous 1973 decree, prohibiting both the recording and the dissemination through any form of media any content of a confession.⁶² The crime may be perpetrated in three ways: recording a confession, divulging anything in a recorded confession, or both, recording and divulging a confession. In the first two cases, they are treated as two distinct crimes that can be committed by different people, while in the last case, they are aggregated into one crime. When a confession is recorded, it has to actually be recorded, not merely overheard. If there is no recording involved, then overhearing a confession would fall within the realm of Can. 983 §2 CIC and there would be no point in punishing someone who listens to a confession and uses a recording device, while not punishing someone who is still violating the sacramental seal, even without the use of an external recording device, because the offender is still driven by the same illicit intentions.⁶³ As far as divulging the content of the confession, the dissemination of information has to be done through some form of media outlet, either written publications, broadcasted television, radio, computer technology, internet outlets, otherwise, it would fall within a different offense, Can. 1388 §2⁶⁴ punishes the violation of the secrecy of confession. During the commission of this crime, the position of the “necessary accomplices,” or those without whom the commission of the crime would have been impossible;⁶⁵ for example, editors or curators of a television or

60. *Motu proprio*, *supra* note 3 at art. 4 § 1, n. 3.

61. See CODE OF CANON LAW, *supra* note 39, can. 1379. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

62. See Congregation for the Doctrine of the Faith, *Urbis Et Orbis* [The City and County] at para. 3 (1988), in 80 AAS No. 1, 1367 (1988).

63. See CODE OF CANON LAW, *supra* note 39, can. 983 §2.

64. *Id.* can. 1388 §2.

65. *Id.* can. 1329 §2:

radio show, even if their motive is purely economic is explained. Compared to the 1988 decree, the canonic penalty has changed from what was previously known as the excommunication *latae sententiae* to what is now a *ferendae sententiae* penalty, which is both perpetual and preceptive. The penalty could include even dismissal from the Clerical state, if the offender is a Cleric. Personally, I would have maintained the previous penalty of *latae sententiae* excommunication, with the addition of a perpetual, preceptive, and expiatory sanction⁶⁶ in an effort to further discourage a crime that desecrates the sincerity of the sacrament between the penitent with God who is “full of mercy and forgiveness.”⁶⁷

C. *The Proposed Ordination of Women*

The newly modified Article 5 of the *motu proprio* creates a new crime not present in the 2001 edition, the attempted ordination of a woman. The newly modified article applies the excommunication *latae sententiae* reserved to the Holy See, and the expiatory penalty of removal from the Priesthood, if the offender is a cleric. The Congregation for the Doctrine of the Faith promulgated the decree December 19, 2007.⁶⁸ The attempted ordination of a woman is a peculiar type of crime both because of its dynamic and the different potential categories of offenders. Firstly, Article 5, n.1 recalls Can. 1378 CIC on attempted Eucharistic celebration, which is an independent crime, but is also closely linked to attempted ordination, particularly to the Priesthood.⁶⁹ It then goes on to examine the perpetrators of the crime, both those who attempt to confer the ordination and the women who receive or attempt to receive it. Generally, the crime is based on a prior agreement between coconspirators. According to Can. 1329 §1 particularly in more recent developments, the doctrinal positions taken are in contrast with the Magisterium of the Church on the subject, even though

Accomplices who are not named in law or precept incur a *latae sententiae* penalty attached to a delict if without their assistance the delict would not have committed, and the penalty is of such a nature that it can affect them; otherwise, they can be punished by *ferendae sententiae* penalties.

66. See CODE OF CANON LAW, *supra* note 39, can. 1364 (medical and expiatory sanctions are not to be applied in conjunction with another, as is written in ¶ 1364 where they coexist; therefore, medical and expiatory sanctions may be applied together for the same crime because they have different objectives).

67. CATECHISM OF THE CATHOLIC CHURCH ¶ 277 (2d ed. 1997).

68. Congregation for the Doctrine of the Faith, *General Decree regarding the delict of attempt sacred ordination of a woman* (Dec. 19, 2007) available at http://www.vatican.va/roman_curia/congregations/cfaith/doc_dis_index.htm (written in seven languages) (last visited September 16, 2011).

69. *Motu proprio*, *supra* note 3 at art. 5(1).

hypothetically it could also be committed by only one offender attempting to receive the sacred order by deceiving the minister who confers it.⁷⁰ For all coconspirators, the penalty remains the same, the *latae sententiae* excommunication, applied by the Holy See, for Latin rite followers. For Eastern followers, major excommunication is the applicable sanction and is also reserved to the Holy See. In the event that the attempt to confer the sacred order is committed by a cleric, in addition to being excommunicated, he may also be punished with dismissal or deposition. This specification made by article 5, n.3 of the *motu proprio*, shows that the individual who attempts to ordain may be a lay faithful man or woman, it would not change the substance of the crime, it would still remain an attempt and never a simulation, even if the offender was a validly ordained Bishop because even though the Bishop would be “capable” of conferring the order, a woman is incapable of validly receiving that sacred order, as established in Can. 1024 CIC and 754 CCEO.⁷¹ However, the addition of an expiatory penalty like dismissal or deposition shows the gravity of the behavior of a cleric who commits the crime. We could ask ourselves why the choice was made to punish his crime with excommunication, when the attempted Eucharistic celebration, or the abuse of a minor is punishable only with expiatory penalties, up to dismissal or deposition, which themselves depend on the gravity of the individual offense.

We have to keep two things in mind: the nature and goal of the penalty as well as its social significance. Censures or medical penalties are meant as remedial measures, their implementation depends on the repentance of the offender. They are always issued indefinitely until the offender ceases his contumacy or until his repentance.⁷² The penalty of excommunication is the most serious of the penalties and is linked to offenses having to do with the faith and ecclesiastic communion, and its effects are directly related to the areas which these crimes offend; that is why they have the effect of prohibiting receiving the sacraments and dismissal from an ecclesiastic position or assignment.⁷³ The publication of the Apostolic letter, *Ordinatio*

70. See CODE OF CANON LAW, *supra* note 39, can. 1329 §1. (“Those who conspire to commit the crime and are not mentioned explicitly by the law or precept, may be sanctioned with *ferendae sententiae* sanctions if they are applicable to the principal and must be subject to the same or lesser sanctions.”).

71. *Motu proprio*, *supra* note 3 at Art. 5(3). (“Only the baptized man has validly received the sacred ordination.”).

72. In contrast the views expressed in CODE OF CANON LAW *supra* note 39, can. 1347, *see Id.* can. 1358 §1.

73. See CODE OF CANON LAW, *supra* note 39, can. 1331 §1:

*sacerdotalis*⁷⁴ definitively conveyed the Magisterium's teaching, specifying that the Church lacks the power to bestow on women ordination to the priesthood, evidencing the close link this offense has with the Faith and the Ecclesiastic communion, as well as bringing attention that it has received in the last few years as a result of similar problems in non-Catholic faiths. The penalty of excommunication appears to be a penalty that is proportional to the characteristics of this crime, differing greatly from other more serious offenses, such as the abuse of a minor, for which the most serious penalty is the dismissal from the clerical state, regardless of whether the offender has repented. The goal of this type of sanction is to not allow the offender to exercise the ministry, thus protecting the community from recidivism. Censure or expiatory penalties, are not penalties comparable to one another as far as gravity, but only in their prevalent goals⁷⁵ and they can also be applied in conjunction with one another.

D. Abuse of Minors by a Cleric

Article 6 (previously article 4), specifically outlines the *delictum gravius contra mores*, or abuse of minors perpetrated by a Cleric (Can. 1395 §2 CIC).⁷⁶ It been modified twice and it has guided the adaptation of the m.p. *Sacramentorum sanctitatis tutela* to delineate punishment for the crime.

The first change was to equate the crime against a minor at n.1, initially limited to the effects of this crime, now equal to a crime against an incapacitated person. Prior to this change, recourse for a similar crime was found in Canon 1395 §2, that generally punished a crime committed with violence, regardless of the age of the victim, as is certainly the case with the abuse of an incapacitated person, but this would have extended the jurisdiction of the Congregation in this area of offenses. On the other hand,

An excommunicated person is forbidden: 1) to have any ministerial participation in celebrating the sacrifice of the Eucharist or any other ceremonies of worship whatsoever; 2) to celebrate the sacraments or sacramentals and to receive the sacraments; 3) to exercise any ecclesiastical offices, ministries, or functions whatsoever or to place acts of governance.

74. See Pope John Paul II, *Ordinatio sacerdotalis* [*Apostolic Letter of the Priestly Ordination*] (1994).

75. See CODE OF CANON LAW, *supra* note 39, can. 1341 ("An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.") (All of the canonic sanctions have this tripartite purpose, although in the case of censure, the primary purpose is the amendment of the offender. Meanwhile, the main purpose of the expiatory sanctions is to remedy the scandal and reestablish justice. This is cognizable from the differences in application, remission, and duration of expiatory sanctions and opposed to censure).

76. *Motu proprio*, *supra* note 3 at art. 6.

it was useful and practical to equate a crime that the Congregation encountered frequently to a similar category of crimes such as the abuse of minors.

Article 6, n.2, §1 created the criminal offense the acquisition, possession, or divulging for vile motives, of pornographic images depicting minors below the age of fourteen by a Cleric. The Congregation for the Doctrine of the Faith had already placed it into the offense *delictum cum minore*.⁷⁷ This does not only mean physical contact, or direct abuse, but also includes indirect abuse, such as showing pornography to, or exposing oneself to a minor. The crime also includes searching and downloading child pornography from the Internet, for example. This type of behavior constitutes a crime in some nations. While *browsing* can be involuntary, downloading rarely is. Downloading usually requires a choice or specific option, sometimes requires payment with a credit card, and the subsequent communication of personal data of the buyer that rarely remains anonymous and is frequently traceable. Some Priests have been convicted and incarcerated for possession of thousands of pornographic images of children and other minors. According CDF procedure, this behavior falls within the *delictum gravius*.⁷⁸ The classification made by article 6, n.2, appears necessary to dissipate any doubts or interpretive questions that could arise because the penal laws are subject to strict interpretation and are not subject to interpretation and would not be applied by analogy.⁷⁸ The three activities indicating this type of criminal behavior are also modeled on similar secular laws.

E. *Statute of Limitations*

The final change made to the substantive laws of the *motu proprio*, was made to the statute of limitations for *delicta graviora*. For one thing, the power conceded to the Congregation in 2002 to derogate the statute of limitations was included, thus eliminating any reference to an express Bishop request for derogation. The Congregation itself can concede derogation to the statute of limitations administratively. The Statute of Limitations has also been extended from ten to twenty years starting from the eighteenth birthday of the victim, for crimes committed against a minor. Undoubtedly,

77. Congregation for the Doctrine of Faith, *e prassi presso la Congregazione per la Dottrina della Fede riguardo ai delicta graviora* [Procedures and Practices at the Congregation for the Doctrine of the Faith for Grave Offenses] art. 4(a) (2004).

78. CODE OF CANON LAW, *supra* note 39, cans. 18, 19. *See also* CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, cans. 1500, 1501.

the extension of the statute of limitations to twenty years (that has been interpreted as being retroactive, thus applicable to crimes committed before these modifications were made) was made to avoid an excessive use of the derogation to the statute of limitations. The current legislation, however, remains problematic and not easy to reconcile with the principle of *favor rei*. Additionally, in my opinion, an unlimited statute of limitations would be the most viable solution, rather than having a twenty-year statute that can be lengthened indefinitely by conceding a derogation on a case by case basis. The derogation can seem like an arbitrary exercise of judiciary power.

III. THE PROCEDURAL LAWS

Since the m.p. *Sacramentorum sanctitatis tutela* is primarily procedural, it was the procedural laws within the *motu proprio* that were modified to adapt them to the concrete cases and to allow for swift and efficient trials for abuse of minors. In this regard, as previously stated, the laws that were promulgated substantially mirror the changes created in 2002 and 2003 except for two new dispositions. The first innovation is geared to clarify the changes and the second is a more substantial change. The clarification comes in Article 17 of the new text and provides that if the case is deferred to the Congregation without conducting the investigation contained in Can. 1717 CIC and 1468 CCEO, the preliminary acts in the trial *may* and no longer *must* be conducted by the Congregation itself.⁷⁹

The most considerable addition appears to be the insertion of the wording in the current art. 19, “to impose from the outset of the preliminary investigation those (cautionary) measures which are” that are also contained in Can. 1722 CIC and 1473 CCEO.⁸⁰ This was the most controversial topic, since the doctrine had previously been against this possibility.⁸¹ The innovation does not appear ill-timed, especially because of the recent widespread public accusations. Although there is a presumption of innocence until one is proven guilty, not applying cautionary measures would make the exercise of the ministry difficult, but to me, it is not easy to harmonize it with Can. 1717 §2 CIC and 1468 §2 CCEO. Both Canons

79. See *Motu proprio*, *supra* note 3, at art. 17.

80. See *id.* at art. 19.

81. See F. Daneels, *L'investigazione previa nei casi di abuso sessuale di minori* [*The Preliminary Investigation in Cases of Sexual Abuse of Minors*], in *Iustitia in Caritate: Miscellanea di studi in onore di Velasio de Paolis* 503 (J. Conn & L. Sabbarese eds., 2005) (“The cautionary measures contained in Can. 1722, cannot be applied during the preliminary investigation or even at its completion, they can only be applied once the actual penal trial has begun.”) He is almost saying that not even the administrative procedure that is aimed at declaring the sanction would suffice for the application of a cautionary measure.

equally establish that: “Care must be taken so that the good name of anyone is not endangered from this investigation.”⁸² This is true particularly when information regarding a crime has not been made public yet, because the new article 19 does not limit the use of the cautionary measures to when the trial has begun.⁸³ Currently, except for the limits placed by the Canons, cautionary measures can now be applied even in the preliminary phases of an investigation.

To synthetically describe the current procedural laws with the numerous modifications made throughout the years, you could say that the laws are certainly sensitive to the problem of abuse. However, they are still problematic as far as harmonizing them with the penal system in the Latin and Eastern Code of Canons. These difficulties exist because in large part, they seem to keep the 2001 system unchanged. This lack of change can be inferred from then-Secretary of the Congregation of the Doctrine the Faith, Monsignor Bertone’s words at the beginning of this article, the introduction of derogations as gap fillers, and the lack of competent personnel with the resulting complexity of a possible judicial proceeding with all of its implications. These derogations touch upon all relevant aspects of the judicial process, except the right of the defendant to defend himself. This right may seem insufficiently protected by the current procedure because to the outsider it seems like a temporary system full of derogations, in which different laws that conflict with one another and with the codified penal system coexist.

Like the 2001 version, the procedural laws have been subdivided into two titles, dedicated to the “Constitution and competence of the Tribunal” and to the “Judicial Order”.⁸⁴ As far as the first section, the previous laws have remained unaltered, except for the section on the cautionary measures in Can. 1722 CIC and 1473 CCEO placed in article 19.⁸⁵ Two new articles were added (currently articles 15 and 18) that recall the faculties conceded February 7, 2003.⁸⁶ These articles have a dual purpose, on the one hand to allow the execution of the trials at the local level even with the lack of personnel holding a doctorate in Canon Law, and on the other hand, not to

82. See CODE OF CANON LAW, *supra* note 39, can. 1717 §2; see also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1468 §2.

83. See *Motu proprio*, *supra* note 3, at art. 19.

84. See Congregation for the Doctrine of the Faith, *Sacramentorum Sanctitatis Tutela*, (2001), available at <http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm> (last visited Sept. 27, 2011).

85. See *Motu proprio*, *supra* note 3, at art.19.

86. *Id.* at arts. 15 & 18.

block the progression of a trial for purely procedural reasons. The risk before this change was that the violation of procedural laws could lead to subsequent pleadings being nullities, which would in turn lead to an excessively long trial or worse, the dismissal of a case for reasons instead of substantive ones.

A. *Constitution and Competence*

The Tribunal within the Congregation for the Doctrine of the Faith has actual jurisdiction on all crimes listed in the Substantive laws and geographically for the Latin and the Eastern Catholic Churches. Judges in the Tribunals are the Fathers of the Congregation, specifically the Cardinals and Bishops that are members of the Congregation. The Prefect of the Congregation can also nominate judges whose prerequisites are codified in article 10.⁸⁷ The articles that follow, eleven through thirteen, are dedicated to the internal organization of the Tribunal, while article 14 is dedicated to the personnel of the lower Tribunals.⁸⁸

Article 15 allows the Congregation for the Doctrine of the Faith to exempt individuals in articles ten through fourteen of the *motu proprio* from the prerequisite of holding a Doctorate in Canon Law.⁸⁹ This exemption does not affect Can. 1421 CIC and 1087 CCEO. These articles establish that in order to be a practicing Judge, a person must hold a license in Canon Law as a bare minimum and if the candidate were a lay person, he may only be appointed to form a Judge panel. The exemption from the requirement of the Priesthood seems to mean that both men and women may be appointed as lay persons to the position.

Additionally, article 18 gives the Congregation the faculty to reform and cure the pleadings and court documents done in lower Courts that violate procedural laws, upon the Congregation's request, or in accordance with Can. 1717 §1 CIC and 1468 §1 CCEO.⁹⁰ In order to do so, the Ordinary or Hierarch has to conduct an investigation upon receiving plausible information of the commission of a crime.

87. *Id.* at art. 10. ("It is necessary to nominate judges who are priests and of a mature age, holding a doctorate in Canon Law, with good customs, particularly distinguished for their prudence and legal experience, even if they are contemporaneously judges or counselors in another Dicastery in the Roman Curia.").

88. *See id.* at arts. 11–14.

89. *See id.* at art. 15.

90. *See id.* at art. 18.

This *facultas sanandi* shows the *motu proprio* does not intend for the Congregation for the Doctrine of the Faith to substitute the lower courts in the initial investigation, and the avocation of the trial to the Congregation is allowed by article 16 only under particular circumstances. The lower courts are not expected to give up their right and duty by passing the case on to the Congregation. Article 18 is a practical tool to make up for possible shortcomings of the lower courts, but obviously, this is not an incentive to treat these cases superficially.

Before further delving into judicial organization, while I stress that the *motu proprio* does not intend to deviate from the common law, the *motu proprio* is composed of a few brief articles, and I will attempt to show the discrepancies between these and the codified laws.

First, the important modification to the previous article 17 (now article 21) established in accord with the 1962 *Instructio*,⁹¹ was the obligatory nature of the judicial trial.⁹² This is what Can. 1342 §2 CIC and 1402 §2 CCEO now establish. They require the use of a trial if perpetual penalties may be imposed, such as dismissal from the clerical state or deposition. Currently, because of an exemption given in 2003, included as paragraph 2 of article 21, besides a trial, an administrative procedure can be initiated within the Congregation and in local courts. The procedure is regulated by Can. 1720 CIC and 1486 CCEO, and is sometimes referred to as “reinforced” because the councilors deliberate with their votes,⁹³ and it can result in the direct referral to the Holy Father for the dismissal from the clerical state in the most serious of cases. In both the judicial and administrative processes, all penalties can be inflicted except the perpetual penalties that can only be imposed by the Congregation (if the trial takes place under their jurisdiction) or on its mandate (in case the trial takes place in local courts).

B. *Judicial Order*

This all seems like a practical confirmation of the reversal of the principle contained in the Code, of preferring the judicial as opposed to the administrative process; although article 21 recalls verbatim what is said in the 2001 version of article 17, suppressing the *nonnisi* disposition that

91. See *Instruction of the Supreme Sacred Congregation of the Holy Office: Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation* (1962), available at http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (last visited Sept. 27, 2011).

92. See *Motu proprio*, *supra* note 3, at art.21 (previously 17).

93. See CODE OF CANON LAW, *supra* note 39, can. 1720 §2; CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1486.

indicated the obligation to utilize the judicial process. Though §2, n.1 allows the Church to proceed administratively both on the impulse of the local Ordinary, without the attachment of a reason to justify this decision (such as just cause contained in can. 1342 §1 CIC or in severe cases such as the *facultas dispensandi* conceded in 2003), even if the decision to file will certainly be made according to justifiable and acceptable criteria.⁹⁴ Conversely, n.2 in the same paragraph provides the possibility of bringing the case directly to the Holy Father only when the crime has a two-fold requirement: it has to be severe and its commission must seem founded after giving the accused the opportunity to defend himself.⁹⁵ Even if the choice adopted by the legislature has shown great efficiency in prosecuting the most serious of crimes over the years, we should not forget that the preference of the judicial process regulated by the codes and not denied by the m.p. *Sacramentorum sanctitatis tutela* does not favor only the accused, but also the individuals that are called to judge him, so that their decision will be a carefully pondered one and they can reach moral certainty. It also ensures that the judicial process aims to serve everyone. In this sense, the hope is that the judicial process will not be supplanted by the administrative process, especially when the administrative process does not offer the same guarantees of moral certainty, but the administrative process can also be justified and desirable.⁹⁶

Another modification introduced in 2003 and stressed in the current version by article 27 concerns the scope of the right of the accused to defend himself.⁹⁷ It establishes that the only way to appeal administrative documents from the Congregation is directly to the Congregation itself within sixty days, excluding the appeals process in article 123 of the *Pastor bonus* constitution and it also specified the appeal to the Apostolic Signatura. Of course, different people are called to review and decide the appeal than those who approved the appealed decrees, but this exception to the common

94. See *Motu proprio*, *supra* note 3, at art.21(1) (previously art. 17).

95. See *id.* at art.21(2) (previously art. 17).

96. See P. Ciprotti, *Diritto Penale Canonico*, 11 Enciclopedia giuridica Treccani 13 (1990) identified the reasons that might make one decide against a trial and the subsequent administrative procedure:

1) [T]hat the offender does not contest the commission of the crime and admits he is guilty of it; in this case, the need for certainty is satisfied outside of the courtroom and a trial would be superfluous because a just sentence will still be imposed; 2) that the information of the crime has not been divulged or is not easily spread, and an ordinary penal trial would be inadvisable, because of the risk of societal damage that would negate the reparation to the social damage that the sanction seeks to achieve, thereby also causing a useless injury to the offender.

97. See *Motu proprio*, *supra* note 3, at art. 27.

laws in force for all the Dicastries of the Roman Curia would appear not entirely justified.

Staying on the same topic of the accused's right to defend himself, article 24 stresses the prohibition to communicate to the accused and to his patron the name of his accuser, when the crime surrounds the sacrament of Penance.⁹⁸ Compared to the *Crimen sollicitationis* laws, that do not allow exceptions, article 24 allows the communication of this information with the consent of the accused. As indicated in the third paragraph of the article, the principal concern is that of avoiding whatever type of violation of the sacramental seal and it applies only to crimes against the sacrament of Penance. However, the position of the accused is undoubtedly weakened by this prohibition and thus paragraph 2 of the same article recommends that the Tribunal carefully evaluate the credibility of the accuser.

Lastly, considering that these laws are the ones in force within the ecclesiastic community, exclusively concerning the dispositions for the Canon procedure relative to the prosecution and punishment of the *delicta graviora*, the absence of any reference to civil authorities is not surprising, because in any case, a Catholic's duties towards their nations as citizens are not diminished by being Catholic.

CONCLUSION

In conclusion, the new laws on the most serious crimes cannot be adequately explained if we do not take into account the incidence of the crime of abuse of minors in the life of the Church in the past few years and the tenaciously proposed efforts by the Holy Father to promote even on a judicial level, tools that enable the Church to protect the victims of these abuses by impeding the repetition of these criminal acts. All this must be done while taking the current situation the entire Church is in into account. There is no doubt that the current legislation can help combat criticism, especially if it is compared to the previous legislation, and not just from a technical standpoint,⁹⁹ and among the possible critical future changes is the harmonizing of these laws with the general canon law contained in

98. *See id.* at art. 24.

99. *See* J. Llobell *Contemperamento tra gli interessi lesi e i diritti degli imputati: il diritto all'equo processo*, in D. Cito *Processo penale e tutela dei diritti nell'ordinamento canonico* 63-143 (2004). The considerations made by J. Llobell are still very current because they highlight how these seemingly technical and pragmatic issues can mean a compression of the rights of the faithful that is not always justifiable.

both the Latin and Oriental Codes of Canons. I think this contribution¹⁰⁰ seems to foreshadow a revision of the penal laws contained in the VI Book of the 1983 Code, to conform it to the circumstances that have been maturing over the course of the past few years, so as to have an adequate tool to confront the grave discipline problems there have been.

Still, the hope is that this penal and judicial emergency that is coming to light in the lives of God's people, will serve to promote the crucial importance of not just having adequate laws, but where possible, to also have faithful that are ready to collaborate with the onerous duty of Pastors to protect the common good of the ecclesiastic community.¹⁰¹

100. See Pontifical Council, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*[The Influence of Cardinal Ratzinger in the revision of the canonical penal system] (2010), in 161 *La Civiltà Cattolica* 430 (2010), available at http://translate.google.com/translate?hl=en&sl=it&u=http://www.vatican.va/resources/resources_arrieta20101204_it.html&ei=JSx5TrPNFMi1twf5huEL&sa=X&oi=translate&ct=result&resnum=1&ved=0CCkQ7gEwAA&prev=/search%3Fq%3DL%25E2%2580%2599influsso%2Bdel%2BCardinale%2BRatzinger%2Bnella%2Brevisione%2Bdel%2Bsystema%2Bpenale%2Bcanonico%26hl%3Den%26prmd%3Dimvns.

101. See CODE OF CANON LAW, *supra* note 39, can. 392 (among the functions that configure the Episcopal ministry, can. 392 CIC underlines the duty of diocesan Bishops to promote the Church's universal discipline, while being vigilant against abuses especially concerning the ministry of the Word, celebration of sacraments, the cult of God and the Saints, and the administration of goods).

LE NUOVE NORME SUI *DELICTA GRAVIORA*

Davide Cito

SOMMARIO: Premessa. I. L'azione di Benedetto XVI. II. Le norme sostanziali. III. Le norme procedurali. Conclusioni

PREMESSA

Sul numero di luglio degli *Acta Apostolicae Sedis* uscito nel gennaio 2011, sono state pubblicate le nuove norme sui *delicta graviora* che aggiornano il motu proprio *Sacramentorum sanctitatis tutela* del 30 aprile 2001 e che sono state approvate dal Papa il 21 maggio 2010¹. Il testo delle norme era peraltro già apparso il 15 luglio 2010, sul sito internet della Santa Sede dopo che nei mesi precedenti ne era stata annunciata la sua elaborazione².

Prima di soffermarmi sulle modifiche apportate alle norme sostanziali e processuali della prima versione del motu proprio³, desidero ora sottolineare come le modalità che hanno accompagnato la pubblicazione di queste norme

1. Il fascicolo degli *Acta Apostolicae Sedis* è il 102 (2010) 419-434, e la pubblicazione è costituita da 4 elementi: il *Rescriptum ex Audientia* con cui vengono promulgate le norme (419); le *Norme sostanziali e processuali* (419-430); la *Lettera* ai Vescovi a firma del Prefetto e del Segretario della Congregazione per la dottrina della Fede (431); ed infine la *Relazione* sulle principali modifiche apportate al m.p. *Sacramentorum sanctitatis tutela* (432-434).

2. Cf. *Guida alla comprensione delle procedure di base della Congregazione per la Dottrina della Fede (CDF) riguardo alle accuse di abusi sessuali* in cui, alla sezione C si afferma: «La CDF ha in corso una revisione di alcuni articoli del Motu Proprio *Sacramentorum sanctitatis tutela*, al fine di aggiornare il suddetto motu proprio del 2001 alla luce delle speciali facoltà riconosciute alla CDF dai Pontefici Giovanni Paolo II e Benedetto XVI. Le modifiche proposte e sotto discussione non cambieranno le suddette procedure». Reperibile in sei lingue su internet all'indirizzo: http://www.vatican.va/resources/resources_guide-CDF-procedures_it.html

3. Tra i commenti al m.p. *Sacramentorum sanctitatis tutela* che sono stati fatti subito dopo la sua pubblicazione cf. V. DE PAOLIS, *Norme de gravioribus delictis reservati alla Congregazione per la Dottrina della Fede*, in «Periodica», 91 (2002) 273-312 e più brevemente D. CITO, *Nota al m.p. Sacramentorum sanctitatis tutela*, in «Ius Ecclesiae» 14 (2002) 321-328 che ovviamente non considerano le successive modificazioni. Commenti successivi alle modifiche apportate al motu proprio nel 2002 e nel 2003 si possono trovare in J. BERNAL, *Procesos penales canónicos por los delitos más graves. El m.p. Sacramentorum sanctitatis tutela*, in R. RODRÍGUEZ CHACÓN - L. RUANO ESPINA (cur.) «*Cuestiones vivas de Derecho matrimonial, procesal y penal canónico. Instituciones canónicas en el marco de la libertad religiosa*», Actas de las XXV Jornadas de la Asociación Española de Canonistas, Salamanca 2005, 163-200 e, più di recente, K. MARTENS, *Les délits les plus graves réservés à la Congrégation pour la Doctrine de la Foi*, in «Revue de Droit Canonique» 56 (2009) 201-221.

rappresentino un punto di svolta nella prassi della Santa Sede, tanto più significativo se si pensa che riguardano un Dicastero che, non solo nei secoli passati ma anche di recente, si è sempre caratterizzato per uno stretto riserbo anche nei riguardi della normativa adottata, dovuto generalmente alla delicatezza della materie oggetto delle sue competenze. A questo proposito basta pensare non soltanto all'Istruzione *Crimen sollicitationis*, del 1962, precedente immediato del m.p. *Sacramentorum sanctitatis tutela*, il cui sottotitolo diceva: «Servanda diligenter in Archivio secreto Curiae pro norma interna non publicanda nec ullis commentariis augenda», ma anche alle modalità di pubblicazione dello stesso motu proprio sugli *Acta Apostolicae Sedis*⁴. Il motu proprio, infatti, apparve insieme ad una *Epistula* della Congregazione per la Dottrina della Fede indirizzata «ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarcas quorum interest», in cui veniva riprodotto sinteticamente il contenuto delle norme sostanziali e processuali ma senza la pubblicazione integrale della nuova normativa, cosa che sollevò qualche perplessità. Il motu proprio e le sue successive modificazioni fu poi pubblicato da W.H. Woestman e da altri⁵. Per farsi peraltro un'idea di come, nel giro di pochi anni, il clima che circondava le norme sui *delicta graviora* e la loro conoscenza sia cambiato, mi permetto di riportare uno stralcio di un'intervista all'allora Segretario della Congregazione della Dottrina della Fede, mons. Bertone, apparsa sulla rivista *30 Giorni* del febbraio 2002 proprio su questo argomento: *Domanda*: «Perché le nuove norme sui *delicta graviora* sono state rese note in questa maniera un po' riservata, senza una conferenza stampa e senza la pubblicazione sull'Osservatore Romano?». *Risposta*: «Capisco che i giornalisti preferiscono una moltiplicazione delle conferenze stampa. Ma l'argomento trattato è molto particolare, molto delicato. Per evitare facili sensazionalismi si è preferito diffonderle per vie ufficiali senza troppa enfasi». *Domanda*: «A dire il vero anche per le vie ufficiali le Norme vere e proprie, quelle sostanziali e quelle procedurali, non sono state pubblicate...». *Risposta*: «È vero. Vengono mandate ai Vescovi e ai Superiori religiosi che avendo di questi problemi ne fanno espressa richiesta. La normativa sostanziale comunque è praticamente condensata nella Lettera della Congregazione ai Vescovi e pubblicata sugli *Acta Apostolicae Sedis*. La normativa procedurale, poi riprende le procedure generali fissate dal Codice di Diritto Canonico». Stessa sorte capitò per le modifiche anche

4. AAS 93 (2001) 738-739.

5. W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process, Second Edition Revised and Updates*, Ottawa 2003, 303-316, da «Ius Ecclesiae» 16 (2004) 313-321 e da in B.F. PIGHIN, *Diritto Penale Canonico*, Venezia 2008, 602-618.

profonde alla normativa che furono approvate negli anni 2002 e 2003 e che si conobbero su internet ma senza nessuna ufficialità.

Ora invece l'atteggiamento è notevolmente mutato, e in questa linea va sottolineato innanzitutto il fatto che la notizia delle modifiche era stata ampiamente filtrata alla stampa, preparando quindi l'opinione pubblica alla loro ricezione. Inoltre va segnalata la collocazione già da alcuni mesi sulla *home page* del sito internet della Santa Sede di un "focus" dedicato esplicitamente al tema dell'abuso dei minori e ad alla corrispondente risposta della Chiesa e che ha fatto sì che in modo accessibile (anche perché multilingua) e pubblico fossero raccolti documenti certamente di indole e di portata diversa ma che presentano all'opinione pubblica le linee su cui la Chiesa si muove in questo campo offrendo così, a chi lo desidera, un'informazione sufficientemente dettagliata della problematica⁶.

Le modifiche al motu proprio, poi, non sono state semplicemente rese pubbliche in lingua latina (come avviene però con la loro promulgazione sugli *Acta Apostolicae Sedis* in cui sono nella versione ufficiale in latino) ma, al fine di renderle comprensibili anche ai non specialisti, oltre al fatto che sul sito internet le suddette norme sono apparse in sette lingue, esse sono pure accompagnate da quattro documenti ossia: la "Lettera ai Vescovi della Chiesa Cattolica e agli altri Ordinari e Gerarchi interessati circa le *modifiche introdotte* nella lettera apostolica motu proprio data *Sacramentorum sacntitatis tutela*", in cinque lingue, datata 21 maggio, a firma del Prefetto e del Segretario della Congregazione per la Dottrina della Fede. Questa lettera è anche accompagnata da una *Relazione*, in sei lingue, che elenca le modifiche introdotte nel nuovo testo delle Norme. Gli altri due documenti sono un' "Introduzione storica a cura della Congregazione per la Dottrina della Fede", in tre lingue, che illustra l'evoluzione di questa normativa a partire dal Codice del 1917 e, infine, una Nota di P. Federico Lombardi, Direttore della Sala Stampa della Santa Sede dal titolo "Il significato della pubblicazione delle nuove *Norme sui delitti più gravi*", in cinque lingue.

A fare da traino a questo profondo mutamento "comunicativo" è stato il terribile delitto dell'abuso sui minori perpetrato da chierici che, con parole di P. Lombardi, proprio per: «la vasta risonanza pubblica avuta negli anni recenti da quest'ultimo tipo di delitti ha attirato grande attenzione e sviluppato un intenso dibattito sulle norme e procedure applicate dalla Chiesa per il giudizio e la punizione di essi. È giusto quindi che vi sia piena chiarezza sulla normativa oggi in vigore in questo campo e che questa stessa

6. E proprio da questo sito, dove non diversamente indicato, ho preso i testi citati in queste note.

normativa si presenti in modo organico, così da facilitare l'orientamento di chiunque debba occuparsi di queste materie»⁷.

Sebbene l'abuso sui minori commesso da un chierico sia un delitto di particolare odiosità e gravità non è certamente l'unico tra i *delicta graviora*, tuttavia le circostanze storiche dell'epoca presente hanno fatto sì che esso diventasse il motore di tutta la riforma e in certo senso il punto centrale del vigente sistema penale della Chiesa. Al suo perseguimento ed alla sua rapida ed efficace punizione sono infatti modellate non solo le norme processuali del motu proprio e le modifiche man mano intervenute, ma anche un diverso rapporto tra la Chiesa e la comunità politica in questo ambito, improntato non più su una rigida separazione e quasi incomunicabilità, bensì su un modello collaborativo in grado di ottenere una "giustizia" più piena e completa. In proposito non solo vi è il testo della *Guida* alla comprensione delle procedure di base della Congregazione per la Dottrina della Fede riguardo alle accuse di abusi sessuali, in cui si afferma nella parte iniziale dedicata alle procedure preliminari che «Va sempre dato seguito alle disposizioni della legge civile per quanto riguarda il deferimento di crimini alle autorità preposte», ma anche l'intervista concessa da mons. Charles Scicluna, Promotore di Giustizia della Congregazione per la Dottrina della Fede, al quotidiano *Avvenire* il 13 marzo 2010, e riportata poi in cinque lingue sul sito della Santa Sede in cui, dopo aver ribadito che «la normativa sugli abusi sessuali non è stata mai intesa come divieto di denuncia alle autorità civili», alla domanda che «un'accusa ricorrente fatta alle gerarchie ecclesiastiche è quella di non denunciare anche alle autorità civili i reati di pedofilia di cui vengono a conoscenza», risponde: «In alcuni paesi di cultura giuridica anglosassone, ma anche in Francia, i Vescovi, se vengono a conoscenza di reati commessi dai propri sacerdoti al di fuori del sigillo sacramentale della confessione, sono obbligati a denunciarli all'autorità giudiziaria. Si tratta di un dovere gravoso perché questi Vescovi sono costretti a compiere un gesto paragonabile a quello compiuto da un genitore che denuncia un proprio figlio. Ciononostante, la nostra indicazione in questi casi è di rispettare la legge». Incalzato nuovamente sui «casi in cui i Vescovi non hanno questo obbligo per legge», la risposta è dello stesso tenore: «In questi casi noi non imponiamo ai Vescovi di denunciare i propri sacerdoti, ma li incoraggiamo a rivolgersi alle vittime per invitarle a denunciare quei sacerdoti di cui sono state vittime. Inoltre li invitiamo a dare tutta l'assistenza spirituale, ma non solo spirituale, a queste vittime. In un recente caso riguardante un sacerdote

7. P. F. LOMBARDI, Il significato della pubblicazione delle nuove Norme sui delitti più gravi, in www.vatican.va/resources/resources_lombardi-nota-norme_it.html

condannato da un tribunale civile italiano, è stata proprio questa Congregazione a suggerire ai denunciatori, che si erano rivolti a noi per un processo canonico, di adire anche alle autorità civili nell'interesse delle vittime e per evitare altri reati».

In seguito, il Presidente della Conferenza Episcopale Italiana, Card. Angelo Bagnasco, in un'intervista al quotidiano *Il sole24ore* dell'11 aprile 2010 tornò su questa problematica affermando che: «Benedetto XVI, al quale rinnovo l'affetto e la vicinanza dell'episcopato e dell'intera Chiesa italiana per accuse tanto gratuite quanto infamanti di cui è fatto oggetto, ha intrapreso, non da oggi, una severa azione di autoesame che conduca la Chiesa a purificare se stessa da singoli membri che ne hanno dolorosamente offuscato l'immagine e la credibilità. Ma questa vigorosa opera di pulizia – che comprende ovviamente una leale e corretta cooperazione con la magistratura – non può cancellare la sofferenza e il disincanto delle vittime: bambini e giovani che sono stati traditi nel loro spontaneo affidarsi. Verso ciascuna delle persone violate, verso le loro famiglie, provo vergogna e rimorso, specie in quei casi in cui non sono state ascoltate da chi avrebbe dovuto tempestivamente intervenire. I casi acclarati di non governo e di sottovalutazione dei fatti, quando non addirittura di copertura, dovranno essere rigorosamente perseguiti dentro e fuori la Chiesa e, come già accaduto in alcuni casi, dovranno avere come effetto l'allontanamento e il dimissionamento delle persone coinvolte»⁸.

I. L'AZIONE DI BENEDETTO XVI

Quanto detto finora non sarebbe stato possibile, senza il decisivo apporto di Benedetto XVI⁹ che, ancora da Prefetto della Congregazione per la Dottrina della Fede, richiese facoltà speciali a Giovanni Paolo II che permettessero di rendere la normativa approvata nel 2001 più efficace nel perseguire questi delitti¹⁰ ed in particolare, come si è detto, l'abuso di minori perpetrato da chierici.

8. Il testo è reperibile all'indirizzo: www.ilssole24ore.com/art/SoleOnLine4/Italia/2010/04/intervista-bagnasco-riotta.shtml.

9. Cf. l'intervista al Card. Bagnasco citata in precedenza, ma anche, più in generale, J.I. ARRIETA, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, in «La civiltà Cattolica» (2010) 430-440 che verrà richiamato alla fine di queste note.

10. Le modifiche al motu proprio *Sacramentorum sanctitatis tutela*, avvenute negli anni 2002 e 2003 suscitarono nella dottrina grosse perplessità e sembrarono, anche a chi scrive, poco opportune e perfino lesive dei diritti dell'imputato (cf. D. CITO, *La probità morale nel sacerdozio ministeriale*, in «Fidelium Iura» 13 [2003] 119-133). A distanza di quasi dieci anni devo ammettere invece che sono risultate necessarie per poter tutelare efficacemente la "parte" debole di questo delitto, e che sono proprio

Ma è a partire dal cosiddetto Rapporto Murphy, pubblicato in Irlanda nell'autunno 2009¹¹, che ha evidenziato una situazione dolorosa di abusi che si era protratta nel tempo e che ha fatto prendere drammaticamente coscienza del problema non circoscrivibile ad alcune zone geografiche ma largamente diffuso in molte parti del mondo, che il Santo Padre ha intrapreso più direttamente un'azione spirituale, pastorale e giuridica per aiutare la Chiesa a sviluppare non solo una nuova sensibilità verso il problema degli abusi sui minori ma anche offrendo criteri orientativi per l'azione dei Pastori. E su questo aspetto mi pare doveroso richiamare quanto da lui affermato il 16 settembre 2010 durante il volo che lo ha portato nel Regno Unito perché, nell'indicare le priorità da tenere presente nel perseguire questi delitti ha, una volta ancora, sottolineato che questi crimini sono violenze sulle persone e pertanto la difesa delle vittime prevale su un'ipotetica tutela del buon nome della Chiesa o su altre questioni. Come affermato da Benedetto XVI: «mi sembra che dobbiamo adesso realizzare proprio un tempo di penitenza, un tempo di umiltà, e rinnovare e reimparare un'assoluta sincerità. Quanto alle vittime, direi, tre cose sono importanti. *Primo* interesse sono le vittime, come possiamo riparare, che cosa possiamo fare per aiutare queste persone a superare questo trauma, a ritrovare la vita, a ritrovare anche la fiducia nel messaggio di Cristo. Cura, impegno per le vittime è la prima priorità con aiuti materiali, psicologici, spirituali. *Secondo*, è il problema delle persone colpevoli: la giusta pena, escluderli da ogni possibilità di accesso ai giovani, perché sappiamo che questa è una malattia e la libera volontà non funziona dove c'è questa malattia; quindi dobbiamo proteggere queste persone contro se stesse, e trovare il modo di aiutarle e di proteggerle contro se stesse ed escluderle da ogni accesso ai giovani. E il *terzo* punto è la prevenzione nella educazione e nella scelta dei candidati al sacerdozio. Essere così attenti che secondo le possibilità umane si escludano futuri casi».

Inoltre, sebbene l'intervento centrale del Santo Padre su questa problematica vada ravvisato nell'accorata quanto precisa *Lettera Pastorale* ai cattolici di Irlanda del 19 marzo 2010, in questi mesi non ha mai fatto mancare la sua voce e la sua decisa presa di posizione nei confronti di questo delitto nelle diverse occasioni pastorali determinate soprattutto dai viaggi pastorali da lui effettuati. E così, in ordine cronologico, si possono richiamare alcune delle parole di Benedetto XVI più significative

le vittime degli abusi, anche in situazioni di scarsa possibilità per la Chiesa di istruire processi tecnicamente adeguati per mancanza di personale preparato.

11. E consultabile on-line all'indirizzo <http://www.justice.ie/en/JELR/Pages/PB09000504>.

sull'argomento¹². «La Chiesa sta facendo, e continuerà a fare, tutto ciò che è in suo potere per indagare sulle accuse, per assicurare alla giustizia i responsabili degli abusi e per mettere in pratica misure efficaci volte a tutelare i giovani in futuro» (viaggio a Malta, 17 aprile 2010).

«Questo si è sempre saputo, ma oggi lo vediamo in modo realmente terrificante: che la più grande persecuzione della Chiesa non viene dai nemici fuori, ma nasce dal peccato nella Chiesa e che la Chiesa quindi ha profondo bisogno di ri-imparare la penitenza, di accettare la purificazione, di imparare da una parte il perdono, ma anche la necessità della giustizia. Il perdono non sostituisce la giustizia» (viaggio a Fatima, 11 maggio 2010).

«Un altro argomento che ha ricevuto molta attenzione nei mesi trascorsi e che mina seriamente la credibilità morale dei responsabili della Chiesa è il vergogno abuso di ragazzi e di giovani da parte di sacerdoti e di religiosi. In molte occasioni ho parlato delle profonde ferite che tale comportamento ha causato, anzitutto nelle vittime ma anche nel rapporto di fiducia che dovrebbe esistere fra sacerdoti e popolo, fra sacerdoti e i loro Vescovi, come pure fra le autorità della Chiesa e la gente. So bene che avete fatto passi molto seri per portare rimedio a questa situazione, per assicurare che i ragazzi siano protetti in maniera efficace da qualsiasi danno, e per affrontare in modo appropriato e trasparente le accuse quando esse sorgono. Avete pubblicamente fatto conoscere il vostro profondo dispiacere per quanto accaduto e per i modi spesso inadeguati con i quali, in passato, si è affrontata la questione. La vostra crescente comprensione dell'estensione degli abusi sui ragazzi nella società, dei suoi effetti devastanti, e della necessità di fornire adeguato sostegno alle vittime, dovrebbe servire da incentivo per condividere, con la società più ampia, la lezione da voi appresa. In realtà, quale via migliore potrebbe esserci se non quella di fare riparazione per tali peccati avvicinandovi, in umile spirito di compassione, ai ragazzi che soffrono anche altrove per gli abusi? Il nostro dovere di prenderci cura della gioventù esige proprio questo e niente di meno. Mentre riflettiamo sulla fragilità umana che questi tragici eventi rivelano in maniera così dura, ci viene ricordato che, per essere guide cristiane efficaci, dobbiamo vivere nella più alta integrità, umiltà e santità» (incontro con i Vescovi di Inghilterra, Galles e Scozia, 19 settembre 2010).

Ma è proprio la *Lettera Pastorale* ai cattolici di Irlanda che ha costituito per molti versi un *punto di svolta* sia intraecclesiale, nel senso di richiamare i doveri di tutti i fedeli, e in particolare dei Pastori, nei confronti della

12. Tutte queste citazioni sono reperibili in diverse lingue sul sito della Santa Sede citato in precedenza.

prevenzione e della punizione di questo delitto, sia per quanto concerne le relazioni tra le autorità civili e quelle ecclesiastiche nel fronteggiare questa dolorosa problematica. Certamente il Papa, come aveva già fatto anni fa Giovanni Paolo II, tiene conto del fatto che spesso l'azione dei Pastori era stata influenzata da fattori che impedivano o quantomeno rendevano loro arduo sia la percezione del fenomeno che il poterlo affrontare con mezzi adeguati¹³, anche se «non si può negare che alcuni di voi e dei vostri predecessori avete mancato, a volte gravemente, nell'applicare le norme del diritto canonico codificate da lungo tempo circa i crimini di abusi di ragazzi. Seri errori furono commessi nel trattare le accuse» (n.11).

Tuttavia la *Lettera* del Pontefice guarda alle prospettive presenti e future indicando precise linee di azione che sono state poi ribadite in altre occasioni: «Apprezzo gli sforzi che avete fatto per porre rimedio agli errori del passato e per assicurare che non si ripetano. Oltre a mettere pienamente in atto le norme del diritto canonico nell'affrontare i casi di abuso dei ragazzi, continuate a cooperare con le autorità civili nell'ambito di loro competenza» (n.11). Due sono quindi le direttrici su cui muoversi: l'applicazione rigorosa della normativa canonica esistente, e la collaborazione con le autorità civili.

13. «È vero che una mancanza di conoscenza generalizzata della natura del problema, e talvolta anche le consulenze di esperti medici, hanno portato i Vescovi a prendere decisioni che gli eventi successivi hanno mostrato essere sbagliate. Ora state lavorando per stabilire criteri più affidabili, al fine di assicurare che simili errori non vengano ripetuti» (GIOVANNI PAOLO II, Discorso ai partecipanti alla riunione interdicasteriale con i Cardinali degli Stati Uniti d'America, 23 aprile 2002, n.2), in http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_it.html

«Capisco quanto era difficile afferrare l'estensione e la complessità del problema, ottenere informazioni affidabili e prendere decisioni giuste alla luce di consigli divergenti di esperti» BENEDETTO XVI, *Lettera* pastorale ai cattolici di Irlanda, n.11).

Da ultimo il Papa ha ripreso quest'argomentazione nel *Discorso* alla Curia Romana per gli auguri natalizi del 20 dicembre 2010, in cui dolorosamente constatava che: «negli anni Settanta, la pedofilia venne teorizzata come una cosa del tutto conforme all'uomo e anche al bambino. Questo, però, faceva parte di una perversione di fondo del concetto di *ethos*. Si asseriva – persino nell'ambito della teologia cattolica – che non esisterebbero né il male in sé, né il bene in sé. Esisterebbe soltanto un “meglio di” e un “peggio di”. Niente sarebbe in se stesso bene o male. Tutto dipenderebbe dalle circostanze e dal fine inteso. A seconda degli scopi e delle circostanze, tutto potrebbe essere bene o anche male. La morale viene sostituita da un calcolo delle conseguenze e con ciò cessa di esistere. Gli effetti di tali teorie sono oggi evidenti. Contro di esse Papa Giovanni Paolo II, nella sua Enciclica *Veritatis Splendor* del 1993, indicò con forza profetica nella grande tradizione razionale dell'*ethos* cristiano le basi essenziali e permanenti dell'agire morale. Questo testo oggi deve essere messo nuovamente al centro come cammino nella formazione della coscienza. È nostra responsabilità rendere nuovamente udibili e comprensibili tra gli uomini questi criteri come vie della vera umanità, nel contesto della preoccupazione per l'uomo, nella quale siamo immersi».

Ed è proprio alla luce di queste due ultime direttrici che, ritengo, vadano inquadrare le modifiche al motu proprio *Sacramentorum sanctitatis tutela*, «al fine di migliorarne l'operatività concreta»¹⁴, e che a mio avviso giustifica questo lungo preambolo prima di esaminare i concreti mutamenti ad esso apportati.

II. LE NORME SOSTANZIALI

Come è noto, già a distanza di poco più di un anno dall'entrata in vigore del m.p. *Sacramentorum sanctitatis tutela*, esso fu oggetto di modifiche ritenute necessarie per consentirne un'efficace applicazione. La prima di esse, datata 7 novembre 2002, concerneva la facoltà di poter derogare la prescrizione dei *delicta graviora*, fissata in dieci anni da computarsi, se il delitto consisteva nell'abuso di minore, a partire dalla maggiore età della vittima, su motivata richiesta dei Vescovi. A ciò ne seguirono altre, tutte riconfermate il 6 maggio 2005 da Benedetto XVI. Uno degli scopi della pubblicazione delle nuove Norme è stato proprio quello di inserire in modo stabile detti cambiamenti nel testo di legge, in modo da non dover ogni volta richiedere al Santo Padre la conferma di queste facoltà. Pertanto sia nelle norme sostanziali che processuali ritroviamo tutte le modifiche avvenute in precedenza. Ad esse si aggiungono altre specificazioni che verranno sinteticamente presentate di seguito. Il motu proprio si presenta ora composta da 31 articoli rispetto ai 26 della prima edizione.

Seguendo l'ordine degli articoli, innanzitutto si può segnalare la modifica che circoscrive meglio l'ambito "materiale" di competenza della Congregazione della Dottrina della Fede nell'interpretazione dell'art. 52 dalla cost. ap. *Pastor bonus*¹⁵ rispetto a come era stato fatto dal m.p. *Sacramentorum sanctitatis tutela* che affermava: «Approbata a Nobis Agendi ratione in doctrinarum examine, necesse quidem erat pressius definire sive graviora delicta tum contra mores tum in sacramentorum celebratione commissa», lasciando quasi intendere che la competenza sui delitti contro la fede si esaurisse nella *Nova agendi ratio*. E quindi non solo l'art.1 §1 del motu proprio aggiunge l'espressione «delicta contra fidem»¹⁶, ma inserisce pure un art. 2 dove questi delitti *contra fidem* vengono indicati facendo

14. Lettera ai Vescovi della Chiesa Cattolica... cit., a firma del Prefetto e del Segretario della Congregazione per la Dottrina della Fede, 21 maggio 2010.

15. L'art. 52 della cost. ap. *Pastor bonus* così dispone riguardo alla competenza giudiziaria della CDF: «Delicta contra fidem necnon graviora delicta tum contra mores tum in sacramentorum celebratione commissa, quae ipsi delata fuerint, cognoscit...»

16. La specificazione dei delitti *contra fidem* mancava, infatti, nella redazione del 2001.

riferimento ai rispettivi canoni dei Codici latino ed orientale¹⁷. In questi casi la Congregazione agisce in seconda istanza come giudice di appello o di ricorso, lasciando inalterate le competenze dell'Ordinario locale quanto alla remissione della pena ed allo svolgimento in prima istanza del processo giudiziario o amministrativo per la inflizione o la dichiarazione della pena. La specificazione della competenza sui delitti contro la fede, come indicato dall'art. 1 §1, non pregiudica peraltro l'operatività dell'*Agendi ratio in examine doctrinarum* giacché quest'ultima si pone come uno strumento più specifico per intervenire di fronte a problematiche dottrinali di portata più ampia e che richiedono spesso una risposta di particolare qualificazione scientifica.

Alla Congregazione per la Dottrina della Fede è affidata pure la competenza penale, nel caso di *delicta graviora*, nei confronti dei Padri Cardinali, Patriarchi, Legati della Sede Apostolica e Vescovi, spettante al Romano Pontefice e quindi su suo previo mandato, ed anche delle altre persone fisiche indicate nel can. 1405 §3 CIC e 1061 CCEO. Viene quindi stabilito un ampliamento stabile delle competenze giudiziarie della Congregazione per la Dottrina della Fede, sebbene limitata ai delitti più gravi, nei confronti del Tribunale della Rota Romana.

I delitti contro l'Eucaristia restano inalterati benché uno venga riproposto in modo più ordinato, ossia separando l'attentata azione liturgica del sacrificio eucaristico dalla sua simulazione giacché i due delitti presuppongono, rispettivamente, che il reo nel primo caso non sia sacerdote, ma invece lo sia nel secondo. Inoltre la consacrazione per finalità sacrilega viene punita sia che riguardi una o tutte e due le specie eucaristiche, sia quando ciò avvenga entro o fuori della celebrazione eucaristica, chiarendo in questo modo la dizione precedente che poteva prestarsi ad equivoci.

L'art. 3 ricomprende tali delitti che, oggettivamente, sono i più gravi in assoluto dal momento che l'Eucaristia racchiude tutto il bene della Chiesa e pertanto la tutela penale sia della legittima celebrazione eucaristica che della presenza reale di Gesù Cristo nelle specie eucaristiche risulta essere un'esigenza insopprimibile per la Chiesa se vuole conservare la propria identità.

Sono descritte cinque fattispecie delittuose: innanzitutto vi è il delitto contemplato nei cann. 1367 CIC e 1442 CCEO, integrato dalla risposta autentica del Pontificio Consiglio per i Testi Legislativi del giugno 1999, ossia l'asportazione o la conservazione a scopo sacrilego o la profanazione delle specie consacrate. Mentre nel caso di asportazione o conservazione, a

17. Cann. 751 e 1364 CIC; 1436 e 1437 CCEO.

determinarne la qualifica delittuosa è lo scopo sacrilego (ad esempio per l'utilizzo successivo in riti satanici), nel caso di profanazione essa è da intendersi come «qualunque azione volontariamente e gravemente spregiativa»¹⁸ Esso comporta la pena della scomunica *latae sententiae* riservata alla Sede Apostolica e, se il delitto è stato commesso da un chierico, anche la pena facoltativa, nei casi più gravi, della dimissione dallo stato clericale. Se il fedele è di rito orientale la pena è la scomunica maggiore (*ferendae sententiae* dal momento che il CCEO non prevede pene *latae sententiae* ma conserva invece l'istituto dei peccati riservati ai sensi dei cann. 728 e 729 CCEO) e, se chierico, anche la possibilità della deposizione.

Il secondo delitto, previsto nel n. 2, è costituito dalla tentata celebrazione eucaristica da parte di chi non è ordinato sacerdote (can. 1378 §2, 1° CIC). È un delitto tipicizzato solo nel Codice latino ma, in quanto incluso tra i *delicta graviora*, destinato anche ai fedeli di rito orientale. Il delitto consiste proprio nel tentativo dal momento che chi non ha ricevuto il sacerdozio non può validamente consacrare le specie eucaristiche. La punizione è la pena dell'interdetto *latae sententiae* e, se diacono, anche della sospensione e, nel caso di fedeli di rito orientale dovrà essere una pena proporzionata *ferendae sententiae*.

Il n. 3 dell'art. 3 include tra i *delicta graviora* la simulazione della celebrazione eucaristica ripresa nei cann. 1379 CIC e 1443 CCEO e che invece nella redazione precedente era unita alla tentata celebrazione eucaristica. Come detto in precedenza la separazione appare quantomai opportuna dal momento che la tentata celebrazione è compiuta da chi non è sacerdote mentre la simulazione solo può essere commessa da un sacerdote che, pur potendo validamente celebrare l'Eucaristia, volontariamente e liberamente non lo fa, con la consapevolezza di far credere ai presenti di celebrare un'autentica Eucaristia. Va anche sottolineato che sia il can. 1379 CIC che il can. 1443 CCEO contengono una prescrizione più generale concernente la simulazione dei sacramenti. In questo caso solo la simulazione della celebrazione eucaristica, e quella della confessione ai sensi dell'art. 4 n. 3 del motu proprio, rientrano fra i *graviora delicta* mentre gli altri casi di simulazione nell'amministrazione di un sacramento rimangono delitti di disciplina comune, senza che per questo smettano di essere comportamente gravemente delittuosi. La pena prevista, comunque, non varia rispetto al dettato dei Codici latino ed orientale ed è, rispettivamente, una pena indeterminata e precettiva o una congrua pena non esclusa la scomunica maggiore.

18. In «L'Osservatore Romano», 9 luglio 1999, 1

Il quarto delitto è costituito da uno dei casi, certamente il più chiaro, di *communicatio in sacris* vietata ai sensi dei cann. 1365 CIC e 1440 CCEO. Infatti, sebbene i canoni in questione si limitino a proibire ogni *communicatio in sacris* illegittima, lasciando al diritto universale o particolare la sua determinazione giuridica, sia il can. 908 CIC che il corrispettivo can. 702 CCEO proibiscono la concelebrazione eucaristica con ministri acattolici. In questo caso, però, l'ambito del delitto si restringe ancor di più giacché il testo non parla, genericamente, di ministri acattolici o non in piena comunione con la Sede Apostolica, bensì solo di ministri di comunità ecclesiali che non possiedono la successione apostolica o che non riconoscono la dignità sacramentale dell'ordinazione sacerdotale. Resta quindi proibita, ma non rientra tra i *graviora delicta* la concelebrazione eucaristica con i ministri delle Chiese ortodosse. Anche in questo caso si mantiene la pena indicata dal CIC e dal CCEO ossia una congrua pena indeterminata e precettiva.

Il quinto e ultimo dei delitti contro l'Eucaristia rappresentò nel 2001 una novità legislativa poiché configurava un delitto non direttamente contenuto né nel CIC né nel CCEO sebbene fosse riprovato in modo netto tale comportamento. Infatti, il can. 927 CIC proibiva in modo tassativo e senza eccezione («Nefas est, urgente etiam extrema necessitate») la consacrazione di una materia senza l'altra, o di entrambe fuori della celebrazione eucaristica anche senza la finalità sacrilega (che ne aggrava ulteriormente l'illiceità), tuttavia non vi era in proposito una tipicizzazione penale (che in non pochi casi sarebbe potuta rientrare nella fattispecie del can. 1367 sulla profanazione delle specie consacrate). Considerato il fatto che la norma penale canonica soggiace ad interpretazione stretta (cf. cann. 18 CIC e 1500 CCEO), si può desumere che era parso opportuno al Legislatore stabilire il delitto in questione per tutti i casi in cui questa azione delittuosa non comportasse formalmente la profanazione delle specie eucaristiche ai sensi dei cann. 1367 CIC e 1442 CCEO. Il testo attuale amplia ulteriormente la fattispecie includendo tutte le ipotesi di consacrazione a fine sacrilego senza richiamare direttamente il can. 927 CIC. Vengono quindi punite la consacrazione per finalità sacrileghe di una specie eucaristica senza l'altra oppure di entrambe nella celebrazione eucaristica o fuori di essa. Quanto alla pena essa può arrivare fino alla dimissione o alla deposizione.

L'art. 4 del motu proprio è dedicato ai *delicta graviora* contro la santità del sacramento della Penitenza. Vengono ricomprese entro il novero dei *delicta graviora* un maggior numero di fattispecie delittuose riguardanti il sacramento della penitenza ad indicare la grande cura con cui la Chiesa cerca di proteggere la degna celebrazione di questo sacramento ed anche la relativa

frequenza di abusi nella celebrazione o in occasione della confessione. Infatti, nella versione del 2001 del motu proprio venivano indicati solo tre delitti, ossia, l'assoluzione del complice nel peccato contro il sesto precetto del Decalogo al di fuori del pericolo di morte (cann. 1378 §1 CIC e 1457 CCEO), la sollecitazione al peccato contro il sesto precetto del Decalogo, nell'atto o in occasione o con il pretesto della confessione, indirizzata al peccato con lo stesso confessore (cann. 1387 CIC e 1458 CCEO) e la violazione diretta del sigillo sacramentale (cann. 1388 §1 CIC e 1456 §1 CCEO). Nel 2003 era stata aggiunta anche la violazione indiretta del sigillo sacramentale, a motivo delle difficoltà a discernere in certi casi la violazione diretta da quella indiretta. Nelle modifiche apportate ora vengono incluse altre tre ipotesi delittuose facendo sì che tutti i delitti commessi contro la santità del sacramento della Penitenza siano considerati *delicta graviora*.

La prima di queste fattispecie delittuose incluse nel motu proprio, e indicata nell'art. 4 §1 n. 2, è l'attentata assoluzione sacramentale o l'ascolto vietato della confessione (can. 1378 §2, 2° CIC). Il delitto in esame richiama non solo i cann. 965 CIC e 722 §1 CCEO («ministro del sacramento della penitenza è il solo sacerdote») ma anche il 966 §1¹⁹ e il corrispondente can. 722 §3 CCEO. Pertanto chi non ha ricevuto l'ordine sacro è «incapace» di impartire una valida assoluzione in virtù dello stesso diritto divino; chi non ha ricevuto la facoltà, invece, è «inabile» per disposizione di diritto ecclesiastico. Tuttavia in entrambe le ipotesi l'assoluzione è invalida e pertanto, come nel caso della tentata celebrazione eucaristica, l'azione delittuosa posta in essere viene propriamente chiamata «attentato» dal momento che il soggetto può solo «tentare» l'azione senza conseguirne gli effetti. A chi non potesse dare validamente l'assoluzione sacramentale non solo gli è vietata la «tentata» assoluzione ma anche il semplice ascolto della confessione sacramentale qualunque ne sia il motivo che possa sembrare giustificarlo anche se non abbia nessuna intenzione di impartire una assoluzione invalida. Poiché il canone richiamato dall'art. 4 §1, n. 2 del motu proprio è solo quello del Codice latino con la sua inclusione nel m.p. *Sacramentorum sanctitatis tutela* il delitto viene esteso anche ai fedeli di rito orientale cui dovrà essere applicata una congrua pena *ferendae sententiae* e che, considerato il can. 1378 §3 CIC potrebbe arrivare anche alla scomunica maggiore.

L'art. 4 §1, n. 3 include tra i *delicta graviora* la simulazione dell'assoluzione sacramentale (can. 1379 CIC e 1443 CCEO). Come nel

19. «Per la valida assoluzione dei peccati si richiede che il ministro, oltre alla potestà di ordine, abbia la facoltà di esercitarla sui fedeli ai quali imparte l'assoluzione».

caso dell'Eucaristia si tratta di un delitto commesso da un sacerdote provvisto della debita facoltà e che quindi potrebbe validamente assolvere ma che invece volontariamente e liberamente simula l'amministrazione del sacramento.

L'ultimo delitto concernente il sacramento della penitenza inserito tra i *delicta graviora* nell'art. 4 §2, è quello configurato da un decreto della Congregazione per la Dottrina della Fede del 23 settembre 1988²⁰ che richiamava un suo precedente decreto del 1973 e che proibisce sia la registrazione che la divulgazione con qualsiasi mezzo di comunicazione sociale del contenuto di una confessione vera o falsa. Il delitto si può configurare in tre modi diversi: come registrazione della confessione, come divulgazione della confessione registrata o come registrazione e divulgazione della confessione. Nei primi due casi si tratta di due delitti differenti che possono essere commessi da persone distinte, mentre nell'ultimo caso si tratta di un unico delitto. Va rilevato che nel caso di registrazione della confessione si deve trattare proprio di *registrazione* e non semplicemente di *ascolto*. Infatti, se si trattasse solo di ascoltare la confessione si ricadrebbe nell'ipotesi del can. 983 §2 CIC e non vi sarebbe motivo di punire chi ascoltasse una confessione utilizzando uno strumento tecnico e non costituisse invece delitto ascoltarla senza far uso di strumenti ma spinto dalla medesima intenzione ed ottenendo lo stesso risultato. Quanto alla divulgazione va notato che essa deve essere fatta attraverso i mezzi di comunicazione sociale, vale a dire scritti pubblicati, trasmissioni televisive o radiofoniche, supporti informatici, internet ecc., altrimenti rientrerebbe nella fattispecie del can. 1388 §2 che punisce la violazione del segreto della confessione. Va anche sottolineato che nella commissione di questo delitto va valutata la posizione dei cosiddetti "complici necessari" ossia di coloro senza la cui opera il delitto non sarebbe stato commesso (cf. can. 1329 §2)²¹; si pensi ad esempio agli editori o ai curatori di una trasmissione televisiva o radiofonica anche se il loro scopo possa essere puramente economico o pubblicitario. Rispetto al decreto del 1988 viene mutata la pena canonica che precedentemente era la scomunica *latae sententiae* ed ora, invece, è una pena *ferendae sententiae* indeterminata e precettiva che potrebbe includere anche la dimissione dallo stato clericale se il reo sia un chierico. Personalmente avrei mantenuto la pena precedente della scomunica *latae sententiae* con

20. In «Acta Apostolicae Sedis» 80 (1988) 1367

21. «Incorrono nella pena *latae sententiae* annessa al delitto i complici non nominati dalla legge o dal precetto, se senza la loro opera il delitto non sarebbe stato commesso e la pena sia di tal natura che possa essere loro applicata, altrimenti possono essere puniti con pene *ferendae sententiae*».

l'aggiunta di una pena espiatoria indeterminata e precettiva²² in modo da scoraggiare un delitto che profana il sacramento dell'incontro sincero del penitente con il Dio "ricco di misericordia e di perdono".

L'art. 5 del motu proprio modificato riporta un nuovo delitto non presente nell'edizione del 2001, includendo il decreto che sanziona con la scomunica *latae sententiae* riservata alla Sede Apostolica, e la pena espiatoria della dimissione dallo stato clericale se il reo è chierico, la attentata ordinazione sacra di una donna, decreto emanato il 19 dicembre 2007 dalla Congregazione per la Dottrina della Fede²³. La fattispecie delittuosa è considerata sia nella sua dinamica che nelle diverse categorie di soggetti che vi prendono parte. Innanzitutto l'art. 5 n. 1 richiama il disposto del can. 1378 CIC sulla tentata celebrazione eucaristica, delitto autonomo ma intimamente collegato alla tentata ordinazione soprattutto se sacerdotale. Successivamente considera poi gli autori del delitto, ossia colui o coloro che attentano il conferimento dell'ordine sacro e la donna o le donne che attentano la ricezione dell'ordine sacro. Il delitto generalmente si basa sul previo accordo dei coautori del delitto ai sensi del can. 1329 §1²⁴ anzi nei suoi recenti sviluppi è espressivo di tale accordo che è conseguenza di prese di posizioni dottrinali in contrasto con il Magistero della Chiesa sull'argomento, anche se ipoteticamente potrebbe essere commesso solo da chi tentasse di ricevere l'ordine sacro ingannando il ministro che lo conferisce. Per tutti i coautori la pena è la medesima, cioè la scomunica *latae sententiae* riservata alla Sede Apostolica per i fedeli di rito latino e la scomunica maggiore pure riservata alla Sede Apostolica per i fedeli di rito orientale. Qualora chi tentasse il conferimento dell'ordine sacro fosse un chierico oltre alla scomunica potrebbe essere punito anche con la dimissione o la deposizione. Questa precisazione dell'art. 5, n. 3 del motu proprio evidenzia che colui che attenta il conferimento dell'ordine sacro potrebbe essere anche un fedele laico, uomo o donna, e ciò non cambierebbe la sostanza del delitto che resterebbe sempre un attentato e mai una simulazione quand'anche il reo fosse un Vescovo validamente ordinato, giacché in quest'ultimo caso il Vescovo sarebbe soggetto "capace" di conferire l'ordine

22. Infatti le pene medicinali e quelle espiatorie non sono alternative fra loro, come del resto si vede bene nel can. 1364 dove coesistono; per cui possono essere previste contemporaneamente pene medicinali ed espiatorie per il medesimo delitto giacché hanno finalità prevalenti differenti.

23. E riportato in sette lingue sul sito della Santa Sede all'indirizzo:
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20071219_attenta-ord-donna_lt.html

24. «§1. Coloro che di comune accordo concorrono nel delitto, e non vengono espressamente nominati dalla legge o dal precetto, se sono stabilite pene *ferendae sententiae* contro l'autore principale, sono soggetti alle stesse pene o ad altre di pari o minore gravità».

ma, come stabiliscono i cann. 1024 CIC e 754 CCEO la donna non sarebbe capace di ricevere validamente l'ordine sacro²⁵. Tuttavia l'aggiunta di una pena espiatoria quale la dimissione o la deposizione, mostra la gravità del comportamento del chierico che commette questo delitto. Ci si può chiedere come mai si sia voluto punire con la scomunica, la cui remissione è inoltre riservata alla Sede Apostolica, questo delitto quando, ad esempio, la tentata celebrazione eucaristica è punita con l'interdetto oppure l'abuso di minori con pene espiatorie a seconda della gravità del delitto e che possono giungere fino alla dimissione od alla deposizione. A questo proposito occorre tenere presente due elementi: la natura e la finalità della pena in sé e il suo rilievo sociale. In questo senso le censure o pene medicinali hanno una finalità soprattutto emendativa, vale a dire dipendono dal ravvedimento del reo, e infatti sono sempre inflitte a tempo indeterminato fino a che il reo non cessi dalla contumacia cioè non si sia pentito²⁶. Tra queste la scomunica, che è la censura più grave, è legata generalmente ai delitti che riguardano la fede e la comunione ecclesiale, e i suoi effetti toccano proprio questi aspetti, vietando, tra l'altro la ricezione dei sacramenti e il disimpegno di un ufficio o incarico ecclesiale²⁷. Il delitto in esame, soprattutto dopo la pubblicazione della lettera apostolica *Ordinatio sacerdotalis*²⁸ che propone in modo definitivo l'insegnamento magisteriale concernente la mancanza della Chiesa della potestà di poter conferire l'ordinazione sacerdotale alle donne, evidenzia lo stretto collegamento di questo delitto con la fede e la comunione ecclesiale oltre al grande rilievo sociale che ha ricevuto in questi ultimi anni anche per analoghe situazioni in comunità cristiane non cattoliche. La scomunica appare quindi una pena adeguata alle caratteristiche di questo delitto, del tutto diverse ad esempio dai casi di abuso in cui la pena più grave applicabile, ossia la dimissione dallo stato clericale, non dipende tanto dal pentimento o meno del reo ma vuole solo impedirgli di esercitare il ministero ed in tal modo proteggere la comunità dall'eventuale ripetersi di questo delitto. Le censure e le pene espiatorie non sono pene paragonabili tra loro in

25. «Riceve validamente la sacra ordinazione esclusivamente il battezzato di sesso maschile».

26. A questo proposito si confronti il combinato disposto dei cann. 1347 3 1358 §1 CIC.

27. Come precisa il can. 1331 §1 «Allo scomunicato è fatto divieto: 1) di prendere parte in alcun modo come ministro alla celebrazione del Sacrificio dell'Eucaristia o di qualunque altra cerimonia di culto pubblico; 2) di celebrare sacramenti o sacramentali e di ricevere i sacramenti; 3) di esercitare funzioni in uffici o ministeri o incarichi ecclesiastici qualsiasi, o di porre atti di governo».

28. GIOVANNI PAOLO II, Lettera apostolica *Ordinatio sacerdotalis*, 22 maggio 1994, in «L'Osservatore Romano» 30-31 maggio 1994, ora anche in:

http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_it.html

termini di gravità ma solo di finalità prevalente²⁹ e infatti possono essere applicate congiuntamente.

L'art. 6 (in precedenza art. 4) riguardante l'unico *delictum gravius contra mores*, e cioè l'abuso su minori perpetrato da un chierico (can. 1395 §2 CIC), ha visto due modifiche di particolare interesse proprio alla luce di quanto detto in precedenza, ossia che questo delitto ha guidato l'adattamento del m.p. *Sacramentorum sanctitatis tutela* alle concrete esigenze della sua punizione.

Innanzitutto l'inserzione al n. 1 dell'equiparazione al minore, limitatamente agli effetti di questo delitto, della persona che abitualmente ha un uso imperfetto di ragione. In un caso del genere si sarebbe potuto pure fare ricorso all'inciso del canone 1395 §2 che punisce il delitto in questione se sia stato commesso con violenza, indipendentemente dall'età della vittima, ed è certamente questo il caso di abuso su una persona in tale situazione, ma ciò avrebbe potuto estendere troppo l'ambito di competenza della Congregazione in questo delitto. Viceversa, in tal modo non si è fatto altro che circoscrivere, sulla base dell'esperienza raccolta, i delitti realmente perpetrati che più frequentemente sono avvenuti.

In secondo luogo il n. 2 dell'art. 6 §1 ha tipicizzato la fattispecie delittuosa che ha per oggetto l'acquisizione, la detenzione o la divulgazione, per scopi turpi, di immagini pornografiche di minori degli anni quattordici da parte di un chierico. In realtà già da tempo la Congregazione per la Dottrina della Fede aveva ritenuto queste fattispecie rientranti nell'ipotesi di *delictum cum minore*³⁰, e a questo proposito scriveva mons. Scicluna: « il m.p. parla di "delictum cum minore". Questo non significa solo il contatto fisico o l'abuso diretto ma include anche l'abuso indiretto (per esempio: mostrare pornografia ai minori, esibirsi nudi davanti ai minori). Include anche il recupero e il salvataggio (*downloading*) di pornografia pedofila, per esempio da internet. Questo tipo di comportamento è anche un delitto civile in alcune Nazioni. Mentre il *browsing* può essere involontario, difficilmente lo è il

29. Come indica il can. 1341: « L'Ordinario provveda ad avviare la procedura giudiziaria o amministrativa per infliggere o dichiarare le pene solo quando abbia constatato che nè con l'ammonizione fraterna nè con la riprensione nè per altre vie dettate dalla sollecitudine pastorale è possibile ottenere sufficientemente la riparazione dello scandalo, il ristabilimento della giustizia, l'emendamento del reo». Tutte le pene canoniche partecipano di questa triplice finalità tuttavia nel caso delle censure la finalità prevalente è l'emendamento del reo mentre nelle pene espiatorie è la riparazione dello scandalo e il ristabilimento della giustizia. Ciò si desume anche dalla diversa regolamentazione giuridica tra le censure e le pene espiatorie sia per quanto riguarda la loro applicazione, durata e remissione.

30. C. SCICLUNA, *Procedura e prassi presso la Congregazione per la Dottrina della Fede riguardo ai delicta graviora*, in D. CITO (cur.) «Processo penale e tutela dei diritti nell'ordinamento canonico», Milano 2005, 282-283).

downloading che non solo richiede una scelta o opzione specifica ma molte volte presuppone un servizio a pagamento con carta di credito e la conseguente comunicazione dei dati personali dell'acquirente che difficilmente rimane anonimo e molte volte è rintracciabile. Alcuni sacerdoti sono stati condannati ed incarcerati per possesso di migliaia di foto pornografiche raffiguranti bambini ed altri minori. Secondo la prassi della CDF questo comportamento rientra sotto il *delictum gravius* in parola». La tipicizzazione del delitto fatta nell'art. 6, n. 2 appare quantomai opportuna anche per dissipare eventuali dubbi interpretativi che spesso ricorrono dal momento che la norma penale soggiace ad interpretazione stretta ed al divieto dell'analogia³¹. Le tre attività indicanti la fattispecie delittuosa sono anche modulate sulle analoghe prescrizioni delle leggi penali secolari.

L'ultima modifica concernente la norme sostanziali del motu proprio riguarda la durata della prescrizione dei *delicta graviora*. Da un lato, infatti, si è inserita la facoltà, già concessa nel 2002 alla Congregazione di potersi derogare, eliminando però il riferimento alla richiesta motivata dei Vescovi per cui è da ritenere che questa deroga possa essere anche data d'ufficio dalla Congregazione stessa, e dall'altro è stata estesa da dieci a venti anni, mantenendo la sua decorrenza a partire dal compimento della maggiore età della vittima se si tratta di delitto su minori. Indubbiamente l'estensione da dieci a venti anni (che dal tenore del testo ha carattere retroattivo ossia applicabile anche ai delitti commessi prima dell'entrata in vigore di queste norme) sembrerebbe poter evitare un uso eccessivo della deroga dei termini in questione, tuttavia la normativa vigente rimane problematica e non facilmente conciliabile con il principio del *favor rei*. Inoltre, a mio parere, sarebbe quasi preferibile un regime di imprescrittibilità valevole per tutti piuttosto che un regime di venti anni ma derogabile e quindi imprescrittibile solo per alcuni casi ritenuti meritevoli della deroga, in quanto parrebbe insinuare un possibile esercizio arbitrario della potestà giudiziaria.

III. LE NORME PROCEDURALI

Dal momento che il m.p. *Sacramentorum sanctitatis tutela* ha principalmente carattere processuale, sono state proprio le norme procedurali all'interno del motu proprio ad essere state oggetto, fin dall'inizio, di modifiche per adattare alle situazioni concrete in modo da permettere lo svolgimento rapido ed efficace dei processi nei casi di abuso di minori. In questo senso, come già accennato in precedenza, le norme promulgate

31. Cf. cann. 18-19 CIC, 1500-1501 CCEO.

riprendono sostanzialmente i cambiamenti prodottisi negli anni 2002 e 2003 fatte salve due novità, una di tipo per lo più chiarificatore, l'altra di carattere più sostanziale. All'art. 17 del nuovo testo, infatti, si prevede che, qualora il caso sia deferito alla Congregazione senza aver prima condotto l'indagine previa prevista nei cann. 1717 CIC e 1468 CCEO, gli atti preliminari del processo *possano* e non *debbano* essere svolti dalla Congregazione medesima.

Più rilevante, invece appare l'inserzione, nell'attuale art. 19, della dicitura «ab investigatione praevia inchoata» delle misure cautelari a carico dell'indagato previste nei cann. 1722 CIC e 1473 CCEO. Il tema è spinoso giacché la dottrina, generalmente, si era espressa negativamente su questa possibilità³². L'innovazione, di per sé, non pare inopportuna, soprattutto in presenza di una pubblica diffusione delle accuse che, indipendentemente dal principio della presunzione di innocenza dell'accusato fino alla condanna, renderebbero problematico, ad esempio, l'esercizio del ministero, ma, a mio avviso, non è di facile armonizzazione con il disposto dei cann. 1717 §2 CIC e 1468 §2 CCEO che, in modo identico, stabiliscono che: «cavendum est, ne ex hac investigatione bonum cuiusquam nomen in discrimen vocetur», soprattutto in presenza di notizie di delitto che risultano di fatto riservate, anche perché l'art. 19 in questione non pone limiti all'adozione di tali misure se non quelli dei rispettivi canoni che però presuppongono che il processo abbia già preso l'avvio.

Descrivendo ora, in modo sintetico, l'assetto vigente delle norme procedurali con le varie modifiche che sono state introdotte lungo gli anni e che sono state riprese nelle attuali disposizioni, si può dire che esse si presentano in modo certamente sensibile alla situazione reale ma al tempo stesso problematico dal punto di vista della loro armonizzazione con il sistema penale contenuto nei Codici latino ed orientale giacché da un lato presentano sostanzialmente inalterato l'impianto previsto nel 2001, che seguiva da vicino il dettato codiciale, come del resto si evince dalle parole dell'allora Segretario della Congregazione per la Dottrina della Fede mons. Bertone citate all'inizio di queste pagine, e dall'altro vengono introdotte deroghe al fine di sopperire a varie problematiche quali soprattutto la mancanza di personale preparato e la complessità di un'eventuale procedura giudiziaria con tutte le sue implicazioni. Tali deroghe, poi, toccano tutti gli

32. Cf. per tutti F. DANEELS, *L'investigazione previa nei casi di abuso sessuale di minori*, in J. CONN – L. SABBARESE (cur.), «Iustitia in Caritate. Miscellanea di studi in onore di Velasio de Paolis», Roma 2005, 503, il quale afferma: «le misure cautelari di cui al can. 1722, dunque non possono essere applicate nell'investigazione previa e neanche alla sua conclusione, ma soltanto avviato il vero processo penale». Quasi a dire che nemmeno la procedura amministrativa diretta ad infliggere o dichiarare le pene sarebbe idonea ad un tale tipo di provvedimento.

aspetti rilevanti della procedura eccezion fatta, ovviamente, del diritto di difesa dell'imputato che però potrebbe apparire non sempre sufficientemente tutelato dalla procedura in vigore, proprio perché sembra di muoversi in un sistema provvisorio, in cui convivono disposizioni non sempre facilmente armonizzabili tra loro e con il sistema penale codiciale.

Come nella versione del 2001 le Norme processuali sono state suddivise in due titoli rispettivamente dedicati alla "Costituzione e competenza del Tribunale" e all'"Ordine giudiziario". Per quanto riguarda il primo titolo, le norme precedenti sono rimaste inalterate tranne l'inciso riguardante le misure cautelari ai sensi dei cann. 1722 CIC e 1473 CCEO inserito nell'art. 19 cui ho fatto cenno prima, e l'aggiunta di due nuovi articoli (gli attuali artt. 15 e 18) che riprendono delle facoltà concesse il 7 febbraio 2003 e che hanno il duplice scopo da un lato di consentire lo svolgimento dei processi presso le istanze locali nonostante la carenza di personale munito di dottorato in diritto canonico e, dall'altro, di non bloccare lo svolgimento per ragioni solamente procedurali la cui inosservanza, certamente non meritoria ma purtroppo a volte possibile, potrebbe portare alla nullità degli stessi con l'allungamento a dismisura del processo per ragioni non sostanziali ma formali.

Il Tribunale costituito presso la Congregazione per la Dottrina della Fede ha competenza materiale su tutti i delitti elencati nelle Norme sostanziali e geograficamente lo è per la Chiesa latina e le Chiese orientali cattoliche. Giudici del Tribunale sono i Padri della Congregazione, ossia i Cardinali e i Vescovi membri di essa. Il Prefetto della Congregazione può altresì nominare giudici stabili o incaricati i cui requisiti sono stabiliti nell'art.10³³. I successivi artt. 11-13 sono dedicati agli altri compiti all'interno del Tribunale, mentre l'art. 14 è dedicato al personale dei Tribunali inferiori.

L'art. 15 consente alla Congregazione per la Dottrina della Fede di dispensare dal requisito del sacerdozio e del dottorato in diritto canonico i soggetti indicati negli artt. 10-14 del motu proprio, ossia Giudici, Promotori di Giustizia, Notai, Cancellieri, Avvocati e Procuratori sia nei giudizi presso la Congregazione che nelle istanze locali. Questa dispensa fa salvo comunque il disposto dei cann. 1421 CIC e 1087 CCEO che stabiliscono, per chi svolge l'ufficio di Giudice, di possedere almeno la licenza in Diritto canonico e, qualora fosse un laico, di essere assunto *solo* a formare un collegio. La dispensa dal requisito del sacerdozio sembra indurre che,

33. «È necessario che siano nominati giudici sacerdoti di età matura, provvisti di dottorato in diritto canonico, di buoni costumi, particolarmente distinti per prudenza ed esperienza giuridica, anche se esercitano contemporaneamente l'ufficio di giudice o di consultore in un altro Dicastero della Curia Romana».

per tali compiti, potrebbero essere nominati laici sia di sesso maschile che femminile.

L'art. 18, invece, concede alla Congregazione, fatto sempre salvo il diritto di difesa dell'imputato, la facoltà di sanare gli atti posti in violazione delle leggi meramente processuali da parte dei Tribunali inferiori che hanno agito su mandato della medesima o in forza dell'art. 16 del motu proprio che, sulla scia dei cann. 1717 §1 CIC e 1468 §1 CCEO, prevede che l'Ordinario o il Gerarca svolgano l'indagine previa una volta ricevuta una notizia almeno verosimile di delitto.

Questa *facultas sanandi* evidenzia come il motu proprio non voglia in nessun modo far sì che la Congregazione per la Dottrina della Fede si sostituisca ai Tribunali inferiori nell'indagine previa e nel giudizio di primo grado, e difatti l'avocazione della causa alla Congregazione è prevista dall'art. 16 solo per circostanze particolari, e nemmeno è previsto che i Tribunali inferiori rinuncino a questo loro diritto-dovere deferendo alla Congregazione il caso. L'art. 18 è quindi uno strumento pratico per sopprimere ad eventuali mancanze nelle istanze inferiori, ma ovviamente non è da intendersi in nessun modo come un incentivo a trattare queste cause con superficialità o approssimazione.

Passando all'Ordine giudiziario, una volta ribadito che in linea di massima il motu proprio non vuole discostarsi dalla normativa comune, e infatti è composto di pochi e brevi articoli, cercherò in questa sede di mostrare soprattutto le divergenze con il dettato codiciale.

Innanzitutto va rilevata l'importante modifica al precedente art. 17 (ora art. 21) che stabiliva, d'accordo anche con la *Instructio* del 1962, l'obbligatorietà in queste fattispecie del processo penale giudiziario. Del resto ciò è quanto viene stabilito nei cann. 1342 §2 CIC e 1402 §2 CCEO che impongono l'adozione del processo giudiziario qualora debbano essere inflitte pene perpetue come ad esempio la dimissione dallo stato clericale o la deposizione. Attualmente, invece, in forza di una dispensa concessa nel 2003 e inclusa come paragrafo 2 dell'art. 21, accanto al processo giudiziario si potrà esperire, sia presso la Congregazione che nelle istanze locali, la procedura amministrativa prevista nei cann. 1720 CIC e 1486 CCEO, anche se a volte in forma "rinforzata" ossia attribuendo voto deliberativo agli "assessori" di cui al can. 1720, 2° CIC, ed anche il deferimento diretto al Santo Padre per la dimissione dallo stato clericale nei casi più gravi. Sia con la procedura giudiziaria che con quella amministrativa possono essere inflitte tutte le pene ad eccezione di quelle perpetue che potranno essere inflitte o dalla Congregazione (qualora il procedimento si svolga presso di essa) o su suo mandato (nel caso la procedura si svolga nelle istanze locali).

Tutto ciò appare come una sorta di conferma pratica dell'inversione del principio sancito dal Codice della preferenza della via giudiziaria rispetto a quella amministrativa, in quanto sebbene l'art. 21 riprenda alla lettera il dettato dell'art. 17 del 2001, ovviamente sopprimendo l'inciso *nonnisi* che indicava nella prima versione l'obbligo tassativo di utilizzare il processo giudiziario, attraverso il §2 permette nel n. 1 di procedere per via amministrativa sia d'ufficio che su istanza dell'Ordinario locale senza allegare nessun motivo che giustifichi questa scelta (ad esempio *giusta causa* come nel can. 1342 §1 CIC oppure *nei casi gravi e chiari* come nella *facultas dispensandi* concessa nel 2003), anche se certamente la scelta verrà fatta seguendo criteri prudenzialmente accettabili e giustificati. Il n. 2 del medesimo paragrafo prevede invece la possibilità di portare il caso direttamente al Santo Padre solo qualora il delitto abbia il duplice requisito di essere *gravissimo* e inoltre che la sua commissione appaia il modo manifesto, dopo aver dato la possibilità al reo di difendersi. Anche se questa scelta adottata dal Legislatore ha mostrato negli anni una grande efficacia per poter perseguire i delitti più odiosi, non va dimenticato che la preferenza verso la procedura giudiziaria prevista dai Codici e per la verità non smentita dal m.p. *Sacramentorum sacntitatis tutela* non è posta solo a favore dell'accusato ma anche di colui che è chiamato a giudicare, affinché la sua decisione sia ponderata e possa raggiungere quella certezza morale al cui servizio il contraddittorio processuale è posto come strumento prezioso. E in questo senso l'augurio è che il processo giudiziario non venga di fatto soppiantato dalla procedura amministrativa se non quando, effettivamente, la procedura amministrativa non solo offra le medesime garanzie di certezza morale, ma sia anche giustificata e quindi auspicabile³⁴.

Un'altra modifica introdotta nel 2003, e concernente il possibile ambito di garanzie del diritto di difesa dell'imputato, viene confermata nell'attuale art. 27 che stabilisce che contro gli atti amministrativi emessi dalla Congregazione è ammesso solo il ricorso entro sessanta giorni alla medesima Congregazione, escludendo i ricorsi previsti dall'art. 123 della cost. ap.

34. In questo senso P. CIPROTTI, voce *Diritto Penale Canonico*, in *Enciclopedia giuridica Treccani*, XI, Milano 1990, 13 individuava tra le cause che possono sconsigliare il processo giudiziario e la conseguente adozione della procura amministrativa: «1. che il colpevole di un delitto non contesti di averlo commesso e di esserne responsabile; in tal caso l'esigenza della certezza è soddisfatta indipendentemente dal processo giudiziario, e quindi sarebbe superfluo, ai fini della giustizia della condanna, spendere previamente tutte le energie necessarie per il procedimento stesso; ovvero: 2. che la notizia del delitto non sia già divulgata o facilmente divulgabile, e quindi sia sconsigliabile l'uso del procedimento penale ordinario, che potrebbe dar luogo ad un pericolo o danno alla società, che supererebbe o neutralizzerebbe o attenuerebbe la riparazione del danno sociale a cui tende la punizione del colpevole, e potrebbe inoltre causare al colpevole un inutile danno».

Pastor bonus e segnatamente il ricorso alla Segnatura Apostolica. Certamente non sono chiamate a giudicare le medesime persone che hanno emesso o approvato i decreti impugnati, tuttavia questa eccezione alla normativa comune in vigore per tutti i Dicasteri della Curia Romana potrebbe apparire non del tutto giustificata.

Sempre in tema di diritto di difesa, l'art. 24 ribadisce il divieto di comunicare all'accusato ed al suo patrono il nome del denunciante qualora il delitto riguardi il sacramento della Penitenza. Rispetto alla normativa dell'istruzione *Crimen sollicitationis*, che non ammetteva eccezioni, l'art 24 permette questa comunicazione se il denunciante ne dà espresso consenso. Come indicato dal paragrafo 3 dell'articolo, la principale preoccupazione è quella di evitare assolutamente qualunque pericolo di violazione del sigillo sacramentale e in questo senso è da intendersi questo divieto, che pertanto riguarda solo i delitti contro il sacramento della Penitenza. Tuttavia la posizione dell'accusato viene indubbiamente indebolita da questo divieto e pertanto il paragrafo 2 del medesimo articolo raccomanda al Tribunale una valutazione particolarmente attenta della credibilità del denunciante.

Considerato infine che queste norme sono quelle in vigore all'interno della comunità ecclesiale e concernenti esclusivamente le disposizioni valevoli per la procedura canonica relativa al perseguimento ed alla punizione dei *delicta gravora*, non stupisce l'assenza di un riferimento ad eventuali ed analoghe competenze dell'autorità civile in materia dal momento che, in ogni caso, non vengono diminuiti i doveri che i fedeli hanno come cittadini delle rispettive Nazioni di appartenenza.

CONCLUSIONI

In conclusione, come ricordato in precedenza, le nuove norme sui delitti più gravi non possono essere adeguatamente comprese se non si tiene conto dell'incidenza del delitto di abuso sui minori nella vita della Chiesa di questi ultimi anni e dello sforzo promosso tenacemente dal Santo Padre di promuovere, anche a livello giuridico, strumenti che consentano di tutelare le vittime di tali abusi, impedendo anche, nel limite del possibile, il ripetersi di tali azioni delittuose. Tutto ciò, però, fatto tenendo conto della situazione reale in cui la Chiesa e la sua organizzazione giudiziaria versa nel momento presente. Non vi è dubbio che la normativa vigente può prestare il fianco a critiche soprattutto se paragonata a quella vigente nei decenni precedenti, e

non solo dal punto di vista squisitamente tecnico³⁵, e tra le possibili criticità vi è innanzitutto l'armonizzazione di queste norme con l'assetto generale del diritto penale stabilito nei Codici latino ed orientale. In questo senso mi pare utile richiamare un recente contributo³⁶ che sembra prospettare una revisione del diritto penale contenuto nel Libro VI del Codice del 1983 adeguandolo alle circostanze che sono andate maturando nel corso degli anni in modo da avere uno strumento adatto per venire incontro ai gravi problemi di disciplina che si sono verificati.

Tuttavia l'augurio è che proprio l'emergenza giuridico penale che gli ultimi anni stanno evidenziando nella vita del popolo di Dio, serva a promuovere la consapevolezza dell'importanza di avere non solo norme adeguate ma anche, nel limite del possibile, fedeli preparati a collaborare con il gravoso dovere dei Pastori di tutelare il bene comune della comunità ecclesiale³⁷.

35. In questo senso sono ancora attuali le riflessioni proposte da J. LLOBELL, *Contemperamento tra gli interessi lesi e i diritti degli imputati: il diritto all'equo processo*, in D. CITO (cur.) «Processo penale...» cit., 63-143, perché evidenziano come questioni apparentemente tecniche e pragmatiche possano comportare una compressione dei diritti dei fedeli non sempre giustificabile.

36. Cf. J.I. ARRIETA, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, cit., soprattutto 430-432

37. Tra le funzioni che configurano il ministero episcopale, il can. 392 CIC (riprendendo LG 27 e CD 16) sottolinea l'obbligo del Vescovo diocesano di promuovere la disciplina della Chiesa universale vigilando al contempo affinché non si insinuino abusi soprattutto per ciò che concerne il ministero della Parola, la celebrazione dei sacramenti e dei sacramentali, il culto di Dio e dei santi e l'amministrazione dei beni.

THE HOLY SEE IN DIALOGUE WITH THE COMMITTEE ON THE RIGHTS OF THE CHILD

Jane Adolphe[†]

INTRODUCTION

The Holy See's commitment to the well being of children, born and unborn, is longstanding. By reason of their vulnerability children occupy a special place in the heart of the Catholic Church and are the beneficiaries of special care. Since 2002, however, the Church's commitment to children has been the subject matter of intense scrutiny, by Catholics and non-Catholics alike, due to increasing awareness about the sexual abuse of children by some Catholic clergy, religious and laity.¹ In response, both Pope John Paul II and Pope Benedict XVI, as part of their pastoral ministry,² have publicly

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1. See, e.g., ERLANDSON, GREGORY & BUNSON, MATTHEW, POPE BENEDICT XVI AND THE SEXUAL ABUSE CRISIS (Our Sunday Visitor (OSV), 2010); NICHOLAS P. CAFARDI, BEFORE DALLAS: THE U.S. BISHOP'S RESPONSE TO CLERGY SEXUAL ABUSE OF CHILDREN (Paulist Press: 2008); R. KARL HANSON, FRIEDEMANN, PFÄFFLIN, MANFRED LÜTZ, EDS. PONTIFICIA ACADEMIA PRO VITA, SEXUAL ABUSE IN THE CATHOLIC CHURCH SCIENTIFIC AND LEGAL PERSPECTIVES, PROCEEDINGS OF THE CONFERENCE "ABUSE OF CHILDREN AND YOUNG PEOPLE BY CATHOLIC PRIESTS AND RELIGIOUS" (*Libreria Editrice Vaticana*: 2004); GEORGE WEIGEL, THE COURAGE TO BE CATHOLIC: CRISIS, REFORM, AND THE FUTURE OF THE CHURCH (Basic Books, 2002); GROESCHEL, F. BENEDICT, FROM SCANDAL TO HOPE (OSV, 2002); JENKINS PHILIP, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS (Oxford University Press, 2001).

2. The universal Church "with its moral, spiritual, and religious mission, it is constituted as a society founded on the communion of faith, sacraments and discipline . . . The Church has the inherent right, acquired at the time of its foundation by Jesus Christ and independent of any civil authority, to urge and persuade [delinquent] faithful to lead authentic Christian lives by ceasing their misbehaviour. Such means, for example, include the pastoral path (e.g. exhortation, preaching, good example, correction), the sacramental path (e.g. [sacrament of penance and reconciliation, which includes] confession), the disciplinary path (e.g. norms as regards the . . . sacraments, the suitability of [ministers], the correct exercise of office), and the penal path (e.g. penal sanctions, penal remedies, and penances)." (INITIAL REPORT OF THE HOLY SEE TO THE COMMITTEE ON THE RIGHTS OF THE CHILD ON THE OPTIONAL PROTOCOL OF THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (hereinafter "The Holy See's Initial Report on OPSC"), CRC/C/OPSC/VAT/1 para. 26 a-c; THE HOLY SEE'S SECOND

acknowledged the failings of these individuals to respect the dignity of children.³ Pope Benedict XVI, in particular, has made it a priority to meet with victims of these horrendous offenses, many of which are crimes.⁴ In addition, both Pope John Paul II and Pope Benedict XVI amended the internal law of the Church to ensure that offenders are appropriately punished according to canon law,⁵ a system whose nature and scope differ

PERIODIC REPORT TO THE COMMITTEE ON THE RIGHTS OF THE CHILD ON THE CONVENTION ON THE RIGHTS OF THE CHILD (hereinafter "THE HOLY SEE'S SECOND REPORT ON CRC") CRC/C/VAT/2, para 77.

3. Cf. Pope John Paul II, *Address to the Cardinals of the United States* (Apr. 23, 2002) ("The abuse which has caused this crisis is by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God."); Pope John Paul II, *Homily at 17th World Youth Day* (July 28, 2002) ("The harm done by some priests and religious to the young and vulnerable fills us all with a deep sense of sadness and shame." [emphasis omitted]); Pope Benedict XVI, *Address to the Bishops of Ireland on their Ad Limina Visit* (Oct. 28, 2006) ("In the exercise of your pastoral ministry, you have had to respond in recent years to many heart-rending cases of sexual abuse of minors. These are all the more tragic when the abuser is a cleric."); Pope Benedict XVI, *Interview During the Flight to the United States of America* (Apr. 15, 2008) ("We will absolutely exclude paedophiles from the sacred ministry; it is absolutely incompatible, and whoever is really guilty of being a paedophile cannot be a priest."); POPE BENEDICT XVI, *Address to the Bishops of the United States of America* (Apr. 16, 2008) ("Many of you have spoken to me of the enormous pain that your communities have suffered when clerics have betrayed their priestly obligations and duties by such gravely immoral behavior."); Pope Benedict XVI, *Homily of his Holiness Benedict XVI: Washington Nationals Stadium* (Apr. 17, 2008) ("No words of mine could describe the pain and harm inflicted by such abuse."); POPE BENEDICT XVI, *Interview During the Flight to Australia* (July 12, 2008) ("[T]o be a priest, is incompatible with this behaviour There are things which are always bad, and paedophilia is always bad.") [hereinafter Pope's Speeches, Homilies, & Interviews] (all available at http://www.vatican.va/holy_father/index.htm) (last accessed January 18, 2012). Cf. The Holy See, Abuse of Minors. The Church's Response, http://www.vatican.va/resources/index_en.htm (for additional information).

4. See Rachel Donadio, *The Pope Meets Victims Abused by Priests in Malta*, N.Y. TIMES, (April 18, 2010), <http://www.nytimes.com/2008/04/18/us/nationalspecial2/18pope.html?pagewanted=all>; Ian Fisher & Laurie Goodstein, *Benedict Meets With the Victims of Sexual Abuse*, N.Y. TIMES, Apr. 18, 2008, at A1; John Hooker & Riazat Butt, *Pope Meets Victims of Child Abuse and Expresses Deep Sorrow and Shame*, THE GUARDIAN UK, (September 18, 2010, 8:31 PM), <http://www.guardian.co.uk/world/2010/sep/18/pope-victims-child-abuse-sorrow>; *Pope Meets German Victims of Sexual Abuse*, BBC NEWS, (September 23, 2011, 5:14 PM), <http://www.bbc.co.uk/news/world-europe-15042358>; Auskar Surbakti, *Pope Meets Sex Abuse Victims*, SBS WORLD NEWS AUSTRALIA, (July 21, 2008, 8:30 AM), <http://www.sbs.com.au/news/article/552299/pope-meets-sex-abuse-victims>.

5. HOLY SEE'S SECOND PERIODIC REPORT ON CRC, *supra* note 2, paras. 78 h-i (In the year 2001, "the Roman Pontiff, who 'gives judgment either personally, or through the ordinary tribunals of the Apostolic See, or through judges whom he delegates' (c. 1442 CIC; cf. 1059 (1), CCEO) placed this offense [sexual abuse of a minor] under the special competence reserved to the CDF. These offenses are referred to as 'grave delicts against morals,' and are now treated according to the substantive procedural norms applicable for the whole Church, to be considered together with the 1983 Code of Canon Law. (cf. Apostolic Letter *motu proprio, Sacramentorum sanctitatis tutela*, 30 April 2001). Pope Benedict XVI approved and promulgated a revised set of substantive and procedural norms in 2010, a brief description of the changes and amendments of the normative text is available in an explanatory letter of the CDF, which can be found on the Holy See's website along with other materials under the topic: "Abuse of Minors. The Church's Response", http://www.vatican.va/resources/index_en.htm (last accessed 12 Jan.

“greatly from State criminal laws, and is not intended to usurp or otherwise interfere with them or with State civil actions.”⁶

The Church’s heartfelt concern has taken concrete form in international law. The Holy See, a subject of international law⁷ with a moral and religious mission, participated in the drafting process of the 1989 Convention on the Rights of the Child (hereinafter “CRC”),⁸ which it ultimately ratified in 1990 with three reservations and one interpretative declaration.⁹ In accordance

2011).” See also, Davide Cito, *The New “Delicta Graviora” Laws*, 1 AVE MARIA INT’L L. J. 98 (2012) www.amslij.org.

6. THE HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 78. (The following points are especially noteworthy: “(a) Since canon law is an original or non derived law that regards only the baptized faithful and those belonging to the Catholic Church, only these people are bound by penal canon law. Penal canon law addresses disturbances to the public order of the Church, it therefore, briefly treats the subject matter of delicts (e.g. homicide, theft, aggression, and sexual abuse). (b) These particular offenses also trigger sanctions by the State since the public order of civil society has also been disturbed. Penal canon law specifically acknowledges the State’s concurrent legislative jurisdiction, for example, a judge who is determining the appropriate sanction within the canonical order, may take into consideration whether “the offender has been or foreseeably will be sufficiently punished by the civil authority.” (*c. 1344 (2), CIC*). (c) Penal canon law contains norms for ecclesiastical delicts, which are definite, externally unjust actions, imputable to the author, that disturb the social order of the Church. Such delicts predominantly concern the unity and functioning of the Church and the administration of sacraments. (d) The Church does not address in a detailed or exhaustive manner the few ecclesiastical delicts mentioned in canon law, nor does it legislate as regards many more crimes which are generally sanctioned by the State. The reasons for this are stated in the aforementioned paragraphs. (e) The juridical system of the Church does not use physical force for exercising coercive punishment, neither through the use of prisons nor other such places. The penal sanctions in the Church are: medicinal penalties or censures (excommunication, interdict, suspension); and expiatory penalties (e.g. loss of the clerical state, loss of office, order to reside). (f) The universal law of the Church has always viewed sexual abuse of a minor by a cleric/religious as one of the most serious offenses that sacred ministers can commit. Accordingly, canon law has provided the most severe penalties, not excluding dismissal from the clerical state. The offense relates to the obligations founded in divine law regarding human sexuality as revealed in the sixth commandment of the Decalogue (*cf. c. 1395 (2), CIC; c. 1453 (1) CCEO*)... The Church conducts the aforementioned penal canon law proceedings in confidence in order to protect the witnesses, the accused and the integrity of the Church process. Although, the general public is not admitted to these proceedings, this fact does not forbid or even discourage anyone from reporting the underlying allegations to civil authorities. The Church has constantly taught the moral obligation to obey just civil laws (*cf. Matt. 22: 21; Rom. 13:1; Catechism of the Council of Trent, 1566; Second Vatican Council, Gaudium et spes, 1965; Catechism of the Catholic Church, 1987*)”).

7. Robert John Araujo, S.J., *The Holy See*, 1 AVE MARIA INT’L L. J. 1 (2012) www.amslij.org; See also Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291 (2001). Vincenzo Buonomo, *The Holy See in the Contemporary International Community*, II CIVITAS ET IUSTITIA 7 (2004); See also *Id.* at 10 n.5.

8. CONVENTION ON THE RIGHTS OF THE CHILD, Apr. 20, 1999, 1577 U.N.T.S. 3; G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989); G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. [hereinafter CRC].

9. See INITIAL REPORT OF THE HOLY SEE TO THE COMMITTEE ON THE RIGHTS OF THE CHILD ON THE CONVENTION ON THE RIGHTS OF THE CHILD U.N. Doc. CRC/C/3/Add.27 (Mar. 28, 1994) [hereinafter

with the CRC, it submitted its Initial Report¹⁰ and Second Periodic Report¹¹ to the Committee on the Rights of the Child (hereinafter “the Committee”), the monitoring body under the CRC. Then, in 2001, the Holy See strengthened its specific international commitment to the protection of children by acceding to the 2000 Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (OPSC)¹² as well as the 2000 Optional Protocol on the Involvement of Children in Armed Conflict (OPAC).¹³ Subsequently, the Holy See submitted its Initial Reports per the State reporting requirements under both OPSC and OPAC.¹⁴

The Reports the Holy See has provided pursuant to its obligations under the aforementioned treaties have common provisions. The purpose of this paper is to discuss these particular provisions, with special attention to those related to the general principles concerning the rights of the child as developed by the Committee and then compare and contrast the said principles with important principles highlighted by the Holy See. The paper will argue that the Holy See’s faithful interpretation to the terms and content of the texts of treaties is congruent with international law on treaty interpretation. It offers points for consideration that better reflect the object and purpose of the Convention and an integral vision of the rights and duties of child within the context of the family and society, where he or she is protected from conception until nature death.

To flesh out this thesis, the paper will be divided into two Parts. Part I will give an overview of what the Reports say about the Holy See and international order with special attention to its uniqueness in international law, its three Reservations and one Interpretative Declaration to the CRC,

“THE HOLY SEE’S INITIAL REPORT ON CRC”]. The reservations and interpretations of the declaration are repeated and discussed.

10. *Id.*

11. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2.

12. OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, (hereinafter “OPSC”) Oct. 10, 2000, G.A. res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49 (2000) (entered in force on January 18, 2002).

13. OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICTS, (hereinafter “OPAC”) G.A. res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49 (2000), (entered in force on February 12, 2002) [hereinafter “OPSC”].

14. THE HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2; INITIAL REPORT OF THE HOLY SEE TO THE COMMITTEE ON THE RIGHTS OF CHILDREN IN ARMED CONFLCIT (hereinafter “THE HOLY SEE’S INITIAL REPORT ON OPAC”) (*See also*: OPSC, *supra* note 12, arts. 12.1, and 12.2 Parties must submit an initial report to the Committee on the Rights of the Child two years following ratification or accession and then every five years thereafter, they are to include updates in their reports submitted under the CRC); OPAC, *supra*, note 13, arts. 8.1, 8.2. (the same reporting rules applies).

and its position on treaty interpretation. Part II will consider the general or core principles contained in the CRC as first developed by the Committee and then compared and contrasted with those proposed by the Holy See.

I. THE HOLY SEE AND INTERNATIONAL ORDER

A. Introduction

The Holy See, the fourth State to ratify the CRC, has submitted both its Initial Report and Second Report,¹⁵ and in regard to the latter, is waiting for a meeting to be set for dialogue with the Committee. In addition, the Holy See was the eleventh State to ratify the OPSC, and the seventh to ratify the OPAC. It has submitted its Initial Reports pursuant to reporting obligations under both treaties and is also waiting to speak with the Committee.¹⁶

The eighteen member Committee was established under art. 43 of CRC and is mandated to monitor implementation of the CRC and its Optional Protocols (OPSC and OPAC). In regard to the reporting requirements under the CRC, State Parties must report periodically every five years after their initial report, submitted within two years of ratification or accession (art. 44.1.(a)-(b)). The reports are to outline “the measures adopted which give effect to the rights [prescribed in the CRC] and the progress made in enjoyment of those rights” (art. 44.1). In addition, State Parties are required to indicate factors and difficulties, if any, involved in fulfilling their obligations under the CRC (44.2.). The Committee eventually produce concluding observations that highlight: positive and negative aspects of the reports, impediments the State Party is facing, or has created; principal points of concern; and suggestions and recommendations. With respect to the

15. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, was filed about seventeen years late, however, this is not an uncommon event. For example, at its 32nd Session, the Committee noted that “many states” had not submitted their reports and consequently, it recommend a new procedure for overdue reports which allowed states to “catch up with the established periodicity” (GAOR, 59TH SESS., REPORT OF THE COMMITTEE ON THE RIGHTS OF THE CHILD, A/59/41/Add.1 Sept. 6, 2004) In addition, the Committee’s recommendation adopted at the 34th Session, noted that “13 initial reports and 100 second periodic reports [were overdue].” (*Id.*) Although these recommendations occurred some years ago, the pattern of delayed reporting, even up to 15 years or more for some States, continues to persist (SUBMISSION OF REPORTS BY STATE PARTIES: STATE PARTIES TO THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS TWO OPTIONAL PROTOCOLS AND RELATED STATUS OF SUBMISSION OF REPORTS, CRC/C/53/2, at 13,15 Nov. 11, 2009). See also the recent statistics noting the current “backlog of 263 reports and 459 individual communications pending consideration under 9 human rights treaty bodies.” (GAOR, 66TH SESS., MEASURES TO IMPROVE FURTHER THE EFFECTIVENESS HARMONIZATION AND REFORM OF THE TREATY BODY SYSTEM, UN Doc. A/66/344, para. 11, at 7 Sept. 7, 2011).

16. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2.

OPSC, State Parties must submit an initial report to the Committee on the Rights of the Child two years following ratification or accession (art. 12.1); and then every five years thereafter, as part of the main report submitted under the CRC (art. 12.2). In regard to OPAC, equivalent reporting rules apply (arts. 8.1, 8.2).

In terms of what the Committee is required to monitor, the following is noteworthy. The CRC consists of thirteen preambular paragraphs followed by fifty-four articles, which are in turn divided into three parts. The Preamble to the CRC, while not legally binding, sets out basic principles that should guide interpretation of the Convention.¹⁷ It emphasizes the vulnerability of children, their need for “special care and assistance,” the importance of protecting the “natural family,” the “natural environment for the growth and well-being of children,” and the “need for legal protections before as well as after birth.”¹⁸ The preamble is followed by fifty-four articles, which are divided into three Parts. Part I covers the full spectrum of rights ranging from the right to life through to the civil and political rights on to economic and social rights. This part can be summarized as including provisions that: 1) are applicable to the interpretation of all provisions;¹⁹ 2) place the child’s rights within the context of the family;²⁰ 3) acknowledge the

17. See, e.g., that “childhood is entitled to special care and assistance” (CRC, supra note 8, pmbl. para. 4); that the “child, for the full and harmonious development of his or her personality, should grow up in a family environment” (Id. pmbl. para. 6); that the family, based on marriage between one man and one woman, is entitled to protection from society and the State (Id., pmbl. para. 3 citing International Bill of Human Rights, which protects the “natural family”); that the family is “the natural environment for the growth and well-being of all its members and particularly children” (Id., pmbl. para. 5); that the family should be protected and assisted in fully assuming its “responsibilities within the community” (Id., pmbl. para. 5); that “the child should be fully prepared to live” in society (Id., pmbl. para. 7); “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” (Id., pmbl. para.9); that “importance of the traditions and cultural values of each people for the protection and harmonious development of the child” should not be neglected (Id., pmbl. para. 11).

18. *Id.*

19. *Id.* at arts. 1-5, respectively (the definition of the child (under 18); the non-discrimination principle; the best interests of the child principle which takes into account the rights and duties of parents; the obligations of State Parties to implement the rights of the child; respect for the rights and duties of parents to provide direction and guidance to their child in the exercise of his or her rights in a manner consistent with the evolving capacities of the child).

20. *Id.* at arts. 6-11 (child’s right to life, survival and development; right to a name, registration, acquire a nationality, to know and be cared for by his or her parents; right to preserve his or her identity, including nationality, name and family relations; right not to be separated from his or her parents except in accordance with national law and the best interest of the child (e.g. abuse, neglect); right to maintain regular contacts with both parents, save in exceptional circumstances; right to be protected from illicit transfer and non-return from abroad).

child's civil and political rights, as qualified and limited;²¹ 4) recognize the rights and duties of parents and the subsidiary role of the State²²; and 5) oblige State Parties to render special support and protection to children and give assistance to parents in this regard.²³ Part II contains provisions for

21. *Id.* at arts. 12-17 (right to freedom of expression by he or she who is capable of forming his or her own views, that they be given due weight in accordance with the age and maturity of the child, and have the opportunity to be heard in judicial and administrative proceedings; freedom of expression, including to seek, receive and impart information with limitations regarding rights of others, national security, public order, public health or morals; freedom of thought, conscience and religion taking into account the rights and duties of parents, and the same limitations mentioned above; freedom of association and peaceful assembly limited by the same concerns previously mentioned; right to protection from unlawful-interference of his or her privacy, family, home or correspondence, honour and reputation; right to information and material through the media, "especially those aimed at the promotion of his or her social, spiritual and moral well-being and mental health").

22. *Id.* at arts. 18-20 (States must recognize "the principle that both parents have common responsibilities for the upbringing and development of the child," parents have the "primary responsibility for the upbringing and development of the child. The best interests will be their basic concern." State parties shall render appropriate assistance to parents in the performance of their child-rearing responsibilities; States shall take appropriate measures to protect children from all forms of physical or mental violence while in the care of parents; a child temporarily or permanently deprived from his or her family shall receive alternative care, and special protection and assistance from the State).

23. *Id.* at arts. 21-40. The child must be protected from illicit adoption in view of the child's status concerning his or her parents, and given the dangers associated with inter-country adoption, the best interest of the child shall be the paramount consideration (art. 21). The child must be protected during a refugee status application process, whether accompanied or unaccompanied, and efforts must be made to trace parents and reunite families (art. 22). The child has a right to special care and assistance and resources, in cases where he or she is disabled, and such resources should be extended to his or her caregiver including parents to ensure that the child has access to education, training, health care, rehabilitation services and other opportunities including "cultural and spiritual development" (art. 23) and ensured the right to the "highest attainable standard of health" including appropriate "pre-natal and post-natal health care" (art. 24). The child must be ensured periodic review of his or her treatment in State institutions (art. 25). The child has the right to benefit from social security (art. 26). The child has the "right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development", the parents "have the primary responsibility" in this regard, and the State must assist parents (art. 27). The child has a right to education that should be directed, among other things, to the integral development of the child, and "respect for the child's parents" as well as others and the environment (arts. 28, 29). State Parties must ensure that rights relevant to children belonging to "ethnic, religious or linguistic minorities or persons of indigenous origin" are respected, including the right to "profess and practice his or her own religion or to use his or her own language" (art. 30). The child has a right to rest and leisure as well as participation in cultural life and the arts is respected (art. 31). The child must be protected from "economic exploitation," "performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development (art. 32)." The child must be protected from "illicit use of narcotic drugs and psychotropic substances" and prevent use of children in the illicit production and trafficking of the same (art. 33). The child must be protected from "all forms of sexual exploitation and sexual abuse" including: inducement or coercion to engage in unlawful sexual activity, exploitation in prostitution or other unlawful sexual practices, and pornographic performances and materials (art. 34), from "abduction," "sale" or trafficking" for any purpose or in any form (art. 35), from "all other forms of exploitation prejudicial to any aspects" of his or her welfare (art. 36), from torture or other cruel, inhuman or degrading treatment or punishment,

establishing the Committee having jurisdiction to monitor State implementation through a State reporting system,²⁴ while Part III sets out miscellaneous rules pertaining to the legal effects of the CRC.²⁵

The OPSC constitutes more decisive efforts to implement provisions of the CRC, especially articles relating to the sale of children, child prostitution, and child pornography.²⁶ It consists of twelve preamble paragraphs followed by seventeen articles. The preamble of the OPSC, like that of the CRC, emphasizes the vulnerability of children, especially the girl child,²⁷ with specific reference to economic exploitation,²⁸ international trafficking,²⁹ sex tourism,³⁰ sale of children, child prostitution and child pornography. It obliges State Parties to ensure that certain acts are treated as offenses in penal law and to enact laws, and/or take measures in relation to penalties, jurisdiction, extradition, prosecution, seizure and confiscation, victim assistance, prevention, public awareness, and international cooperation.³¹

including capital punishment, and life imprisonment without release (art. 37), from direct participation of hostilities in cases of armed conflict, and from recruiting, if under the age of 15 (art. 38). State parties must promote physical and psychological recovery, and social integration of a child victims of any form of neglect, exploitation, or abuse, torture or armed conflicts (art. 39). State Parties must recognize the rights of the child or juvenile offender, especially his or her presumption of innocence, right to know the charge, if appropriate through his or her parents, right to obtain legal assistance, to be tried within a reasonable time, to judicial review, to an interpreter, and to his or her privacy (art. 40).

24. *Id.* at art. 44.1.

25. *Id.*, Part III: consists of rules concerning: signature, ratification and accession (arts. 46-48); entry into force (art. 49); amendments (art. 50); reservations (art. 51); denouncement (art. 52); depositary of the documents (art. 53); and official languages of the text (art. 54).

26. OPSC, *supra* note 12, preamble para. 1 (cf. CRC, *supra* note 8, especially art. 1 (definition of the child), art. 11 (illicit transfer and non-return), art. 21 (illicit adoption), art. 32 (economic exploitation), art. 33 (illicit use, production and trafficking of narcotic drugs and psychotropic substances), art. 34 (sexual exploitation and sexual abuse), art. 35 (abduction, sale and trafficking), and art. 36 (all other forms of exploitation)).

27. OPSC, *supra* note 12, preamble para. 5.

28. *Id.* at preamble para. 2.

29. *Id.* at preamble para. 3.

30. *Id.* at preamble para. 4.

31. *Id.* The articles of the OPSC may be loosely grouped into two blocks. Arts. 1-10 address the following themes. *Prohibition*: State Parties must prohibit the sale of children, child prostitution and child pornography (art. 1); and to render these acts criminal or penal offenses in accordance with the definitions of these crimes provided therein (arts. 1-3); *Jurisdiction*: State Parties are required to establish jurisdiction over such offenses when they have been committed in their respective territories (art. 4.1) and are encouraged to take measure to establish jurisdiction when the alleged offender is a national of the respective State or has habitual residence in the same or when the victim is a national of the same (art. 4.2.) *Extradition*: the said offenses are deemed to be "extraditable offenses" in any extradition treaty existing between State Parties, and shall be explicitly included in future extradition treaties (art. 5) and in the absence of an extradition treaty, State Parties may consider the OPSC to be the legal basis for extradition (art. 5.2); *Mutual legal assistance*: State Parties must offer assistance in the investigation or criminal or extradition proceedings, including the obtaining of evidence (art. 6.1); *Seizure, confiscation*

The OPAC consists of eighteen preamble paragraphs followed by thirteen articles. The preamble notes the need to protect children from involvement in armed conflict, and draws attention to their vulnerability and special needs.³² It obliges State Parties “to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities” (art. 1); and are “not compulsorily recruited into their armed forces” (art. 2). It also obliges States Parties to “raise the minimum age for the voluntary recruitment of persons into their national armed forces” from that of 15 years of age (art. 38.3, CRC) to be more inline with recognizing that children are “persons under the age of 18 years [who] are entitled to special protection.”³³

and closing of premises: State Parties must take measures to ensure the seizure and confiscation of goods and proceeds of crime together with the closing of premises used to commit such crimes (art. 7); *Child victim assistance:* the rights and interests of child victims shall be protected “at all stages of the criminal justice process” (art.8.1), the uncertainty of a child’s age shall not be an obstacle to criminal investigation (art. 8.2), the best interests of the child shall be the primary consideration (art. 8.3), and measures should be taken to protect their safety, integrity along with those that help them (art. 8.5); *Prevention, Public Awareness and Victim Assistance:* State Parties shall also develop policies and programmes to prevent the said offenses (art. 9.1), promote public awareness, (art. 9.2), assist victims to attain full social reintegration as well as physical and psychological recovery (art.9.3), and ensure access to compensation procedures (art. 9.4); *International cooperation:* State Parties must pursue transnational cooperation on issues of prevention, detection, investigation, prosecution, punishment, recovery, social reintegration, repatriation and financial or technical assistance (art. 10). The remaining issues are treated in articles 11 to 17: State Parties must submit an initial report to the Committee on the Rights of the Child two years following ratification or accession (art. 12.1); and then every five years thereafter, they are to include updates in their reports submitted under the CRC (art. 12.2). The remaining articles deal with miscellaneous rules concerning: signature, ratification, entry into force, denunciation, amendment, and official languages of the text (arts. 13-17, respectively).

32. OPAC, *supra* note 13. In particular, the preamble recognizes the overwhelming support of the CRC (*Id.*, preamble para. 1); its definition of a child as “every human being below the age of 18 years” (*Id.*, preamble para.7); and the best interests of the child principle (*Id.*, preamble para. 8 cf. CRC, *supra* note 8, art. 3.1., 3.2., 3.3). In addition, the preamble underlines the vulnerability of children *per se* in reaffirming that children require “special protection” necessitating “continuous improvement of the situation of children” (*Id.*, preamble para.2) as well as “increase[ed] protection . . . from involvement in armed conflict” (*Id.*, preamble para.6), including “recruit[ment], train[ing] and use” for direct participation in hostilities (*Id.*, preamble para. 11.). It also recognizes that children have “special needs,” particularly those “vulnerable to recruitment or use in hostilities” owing to their economic, social status or sex (*Id.*, preamble para. 15).

33. *Id.* at art. 3.1 (cf. CRC, *supra* note 8, art. 38 provides: “1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. 3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest. 4. In accordance with their obligations under international humanitarian law to protect the civilian population in

B. *The Holy See: A Unique Subject of International Law*

The Holy See's Initial Reports on OPSC, OPAC and the Second CRC Report (hereinafter "the Reports") to the Committee on the Rights of the Child describe the Holy See as "a sovereign subject of international law having an original, non-derived legal personality independent of any authority or jurisdiction."³⁴ This point alludes to the divine constitution of the Catholic Church as established by Jesus Christ. The Reports also refer to canon law in noting that the Holy See is described as "the government of the universal Church composed of the Roman Pontiff and of the institutions which proceed from him."³⁵ A closer reading of the canons³⁶ reveals that one might also describe the Holy See as the Pope, in the narrow sense, or the Pope and the Roman Curia,³⁷ in the broader sense.³⁸

The Reports make a third distinction, namely between the Holy See and Vatican City State (hereinafter VCS).³⁹ For example, a common provision

armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.").

34. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 4; HOLY SEE'S INITIAL REPORT ON OPAC, para. 4; HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 2, para. 1; *Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 1 ("The Holy See wishes to draw the attention of the Committee on the Rights of the Child to its singular nature within the international community. As the highest organ of government of the Catholic Church, the Holy See is recognized as a sovereign subject of international law. It is nevertheless distinguished by its particular nature, which is essentially of a universal religious and moral character. Similarly, its jurisdiction over a territory, known as the Vatican City State, serves solely to provide a basis for its autonomy and to guarantee the free exercise of its spiritual mission. The presence of the Holy See in the international organizations, beginning with the United Nations, and its accession to international conventions such as the Convention on the Rights of the Child, which it was among the first to ratify, are prompted by the same reasons.").

35. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 4.a; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 4.a; HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 1.a.

36. *Cf.* *CODEX IURIS CANONICI* c. 361 (*Nomine Sedis Apostolicae vel Sanctae Sedis in hoc Codice veniunt non solum Romanus Pontifex, sed etiam, nisi ex rei natura vel sermonis contextu aliud appareat, Secretaria Status, Consilium pro publicis Ecclesiae negotiis, aliaque Romanae Curiae Instituta*); see also *CODEX CANONUM ECCLESIAE ORIENTALIU* c. 48.

37. See the special law on the Roman Curia: *CONSTITUTIO APOSTOLICA PASTOR BONUS* 28 Iunii 1998 *Acta Apostolicae Sedis [AAS]* 80 [1988] 841-930, 1867; 87 [1995] 588; For a commentary on the same see: *A CURA DI Mons. PIO VITO PINTO, COMMENTO ALLA PASTOR BONUS E ALLE NORME SUSSIDIARIE DELLA CURIA ROMANA* (Libreria Editrice Vaticana: 2003).

38. See, e.g., HOLY SEE'S SECOND PERIODIC REPORT ON CRC, *supra* note 2, Table of Contents: (Pontifical Council for Culture, Pontifical Council for the Family, Pontifical Council for Justice and Peace, Pontifical Council for the Pastoral Assistance to Health Care Workers, Pontifical Council for the Laity, Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Pontifical Council for Social Communications, the Congregation for Catholic Education, Congregation for the Doctrine of the Faith, Pontifical Missionary Society of the Holy Childhood, and Pontifical Council "Cor Unum")

39. The territory of Vatican City State (hereinafter "VCS") is "neutral and inviolable" (*TRATTATO FRA LA SANTA SEDE E L'ITALIA*, 11 Febbraio 1929, art. 24, 21 [AAS] 209-221 (1929), (It.)). The sole and

states that the “Holy See also exercises its sovereignty over the territory of VCS, established in 1929 to ensure the Holy See’s absolute and evident independence and sovereignty for the accomplishment of its worldwide moral mission, including all actions related to international relations.”⁴⁰ It notes that the “international personality of the Holy See has never been confused with that of the territories over which it has exercised State sovereignty (e.g. the Papal States from 754 to 1870 and VCS since 1929).”⁴¹ To further clarify this last point, the Reports underline that “following the loss of the traditional Papal States in 1870 until the establishment of VCS in 1929, the Holy See continued to act as a subject of international law by concluding concordats and international treaties with States, participating in international conferences, conducting mediation and arbitration missions, and maintaining both active and passive diplomatic relations.”⁴²

The Reports also underline the Holy See’s diplomatic relations with over 170 States,⁴³ currently the number is 179 States,⁴⁴ and the fact that the Holy See also participates as a “Member or Permanent Observer to the United Nations and several specialized Agencies of the UN System, as well as in various universal or regional Intergovernmental Organizations.”⁴⁵ To date,

exclusive purpose of VCS is to assure the absolute and visible independence of the Holy See in the free exercise of its spiritual and moral mission in the world, and to guarantee its sovereignty in international matters which is an “inherent attribute in conformity with its traditions and the requirements of its mission in the world” (*Id.* pmbl. paras. 1, 3, art. 2). VCS has territorial jurisdiction over that which is necessary to facilitate the spiritual and moral mission of the Holy See; it encompasses a small territory with borders which is represented by its walls and the pavement curve that joins the two wings of the colonnades in St Peter’s Square and also includes extraterritorial areas within and outside Rome (*Id.* annex I). The form of government in VCS, might be described, as an elected and absolute Monarchy (*Id.* art. 26(2)). The fullness of legislative, executive and judicial power resides in the Supreme Pontiff as Sovereign and Head of State who represents the VCS in relations with States, and other subjects of international law through the Secretariat of State (*MOTU PROPRIO, LEGGE FONDAMENTALE DELLO STATO DELLA CITTÀ DEL VATICANO*, 26 Novembre 2000, arts. 1, 2 respectively, supp. 71 [AAS] 75-83 (2000), (It.)).

40. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 4.b; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 4.b; HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 1.b; *Cf.* Lateran Treaty, preamble and arts. 2-3.

41. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 4.c; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 4.c; HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 1.b; *Cf.* Lateran Treaty, preamble and arts. 2-3.

42. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 4.c; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 4.c; HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 1.b; *Cf.* Lateran Treaty, preamble and arts. 2-3.

43. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 4; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 4; HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 1.

44. *Malaysia: the 179th State with Diplomatic Ties with the Holy See*, ZENIT (27 July 2011), <http://www.zenit.org/article-33164?l=english> (last accessed Feb. 2, 2012)

45. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 4; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 4; HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 1.

this participation is realized within about thirty-three such organizations.⁴⁶ The Holy See also enters into relations with States and inter-governmental organizations on behalf of VCS,⁴⁷ an important distinction, and to date, VCS is a regular member of about six such organizations.⁴⁸

46. UNITED NATIONS, GENERAL ASSEMBLY RESOLUTION PARTICIPATION OF THE HOLY SEE IN THE WORK OF THE UNITED NATIONS, A/RES/58/314, July 16, 2004 (Cf. “the Holy See enjoys membership in various United Nations subsidiary bodies, specialized agencies and international intergovernmental organizations, including the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, the United Nations Conference on Trade and Development, the World Intellectual Property Organization, the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons, the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the International Committee of Military Medicine...the Holy See actively participates as an observer in many of the specialized agencies, such as the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Industrial Development Organization, the International Fund for Agricultural Development and the World Tourism Organization, as well as in the World Trade Organization, that it is a full member of the Organization for Security and Cooperation in Europe and a Guest of Honour in its Parliamentary Assembly, and that it participates as an observer in various other regional intergovernmental organizations, including the Council of Europe, the Organization of American States and the African Union, and is regularly invited to take part in the main meetings of the Asian-African Legal Consultative Organization.”)

47. See HOLY SEE’S SECOND PERIODIC REPORT ON CRC, *supra* note 2, para. 38. The Supreme Pontiff as Sovereign and Head of State has the fullness of legislative, executive and judicial power represents the VCS in relations with States, and other subjects of international law through the Secretariat of State (POPE JOHN PAUL II, *LEGGE FONDAMENTALE DELLO STATO DELLA CITTÀ DEL VATICANO*, 26 Novembre 2000, AAS suppl. 71, art. 1-2, 75-83 (2000)). In regard to day-to-day activities legislative authority is delegated in collegial form to a Commission of Cardinals appointed to a five-year term by the Supreme Pontiff and chaired by a Cardinal President (*Id.* art. 3). The Commission “exercises its powers within the limits of the ‘Law Concerning the Sources of Law’” (*Id.* art. 4), and the Commission’s by-laws (*Id.* art. 4; Cf. PRESIDENTE DELLA PONTIFICIA COMMISSIONE PER LO STATO DELLA CITTÀ DEL VATICANO, *DECRETO N. CCCLVIII CON IL QUALE È PROMULGATO IL REGOLAMENTO DELLA PONTIFICIA COMMISSIONE PER LO STATO DELLA CITTÀ DEL VATICANO*, AAS Suppl. 79, 13-17 (2008)). Executive authority is delegated by the Supreme Pontiff to the Cardinal President of the Pontifical Commission who is assisted by a General Secretary and by a Deputy General Secretary (*LEGGE FONDAMENTALE*, *supra*, art. 5.1, 5.2). The Cardinal President may issue ordinances to implement laws or regulations and may in cases of special emergency enact provisions having the force of law which, however, lose their effect if not confirmed by the Commission within 90 days (*Id.* art. 7). He also represents the Supreme Pontiff as the sovereign of VCS on those matters not reserved to the Supreme Pontiff or other competent authority (e.g. diplomatic relations or vacant see) (*Id.* art.2). Judicial power is exercised in an ordinary vicarious way through the tribunals of VCS in the name of the Supreme Pontiff who can always judge a case himself whether civil or penal and who also has the faculty to grant amnesties, indults, remissions, and graces (*Id.* arts. 15, 16, 19). Judicial authority is vested in a Judge, a Tribunal, a Court of Appeal and a Supreme Court (*SEGRETARIO DI STATO*, *LEGGE N. CXIX CHE APPROVA L’ORDINAMENTO GIUDIZIARIO DELLO STATO DELLA CITTÀ DEL VATICANO*, 21 novembre 1987, AAS Suppl. 58, art. 1, 45-50 (1987)). For a helpful compilation of the norms of VCS see: JUAN IGNACIO ARRIETA, *CODICE DI NORME VATICANE* (Marcianum Press 2006).

48. *ANNUARIO PONTIFICIO (Città del Vaticano: Libreria Editrice Vaticana, 2011)* at 1341 (Universal Postal Union, Bern, *Member*; International Telecommunication Union, Geneva, *Member*; International Telecommunications Satellite Organization, Washington D.C., *Member*; International Grains

A common provision includes the assertion that State Reporting Guidelines, as prepared by the Committee, cannot be strictly followed but rather respected only in so far as possible given the Holy See's proper nature,⁴⁹ taking into consideration its moral and spiritual mission as well as its internal law, which is not capable of receiving or applying every treaty provision. These reporting guidelines as amended over time, especially as regards the CRC,⁵⁰ have been developed to standardize the form and content of the initial reports submitted on CRC, OPSC⁵¹ and OPAC⁵² as well

Council, London, *Member*; European Conference of Postal and Telecommunications, Copenhagen, *Member*; European Telecommunication Satellite Organization, Paris, *Member*).

49. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 3; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 3; HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 4.

50. *See, e.g.*, CRC, *General Guidelines Regarding the Form and Content of Initial Reports*, CRC/C/5 (Oct. 30, 1991); CRC, *Overview of the Reporting Procedures*, CRC/C/33 (Oct. 24, 1994); CRC, *General Guidelines Regarding the Form and Content of Periodic Reports*, CRC/C/58/Rev. 1 (Nov. 29, 2005); and CRC, *Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be submitted by State Parties under art. 44, para. 1 (b), of the Convention on the Rights of the Child*, CRC/C/58/Rev.2 (Nov. 23, 2010) (On Nov. 23 2010, the Committee released new guidelines encouraging State Parties to submit a "common core" document and a "treaty-specific" document with annex attached. The former constitutes the first part of any report in that it ought to contain "general information about the reporting of State, the general framework for the protection and promotion of human rights, as well as information on non-discrimination, equality and effective remedies." The "treaty-specific report," on the other hand, should contain "additional information specific to the implementation of the Convention and its Optional Protocols...information on the framework for the protection of human rights provided in the common core document should not be repeated."). CRC, *Annex to the general guidelines regarding the form and contents of periodic reports to be submitted by state parties under article 44, paragraph 1(b), of the convention*, (Oct. 1, 2010) (The Annex requests information and statistical data disaggregated by certain indicators such as "age and/or age group, gender, location in rural/urban area, membership of minority and/or indigenous group, ethnicity, religion, disability or any other category considered appropriate." The newest set of reporting guidelines for the main Convention maintains the same clusters of rights identified by the Committee in the past: general measures of implementation (arts. 4, 42, 44.6); definition of child (art. 1); general principles (arts. 2, 3, 6, 12); civil rights and freedoms (arts. 7, 8, 13-17, 37.a); family environment and alternative care (arts. 5, 9-11, 18.1-2, 19.21, 25, 27.4, 39); basic health and welfare (art. 6.2, 18.3, 23, 24, 26, 27.1-3); education, leisure and cultural activities (arts. 28, 29, 31); and special protection measures (arts. 22, 30, 32-40).

51. The reporting guidelines for the OPSC cluster the rights in the following manner: general guidelines; data; general measures for implementation; prevention (arts. 9.1.2); prohibition and related matters (arts. 3, 4.2, 4.3, 5-7); protection of the rights of the victims (arts. 8, 9.3, 9.4); international assistance and cooperation (art. 10); other legal provisions (art.11). (REVISED GUIDELINES REGARDING INITIAL REPORTS TO BE SUBMITTED BY STATE PARTIES UNDER ARTICLE 12, PARAGRAPH 1, OF OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, CRC/C/OPSC/2 November 3, 2006.).

52. According to the reporting guidelines for OPAC information is requested as follows: general measures of implementation, prevention (arts. 1, 2, 4.2, 6.2); prohibition and related matters (art. 1, 2, 4.1, 4.2); protection, recovery and reintegration (art. 6.3); international assistance and cooperation (art. 7.1); other legal provisions (art. 5). (REVISED GUIDELINES REGARDING INITIAL REPORTS TO BE SUBMITTED BY STATE PARTIES UNDER ARTICLE 8, PARAGRAPH 1, OF OPTIONAL PROTOCOL TO THE CONVENTION ON THE

as periodic reports on the CRC, with a view to facilitating the process of reporting.

Another standard provision emphasizes the moral and spiritual mission of the Holy See: “When the Holy See ratifies or accedes to an international agreement following international law and practice, it intends also to manifest its moral authority and thereby encourages States to ratify the treaty and to accomplish their respective obligations.”⁵³ In other words, while the Holy See assumes international legal obligations in acceding to or ratifying such treaties, its mission, nonetheless remains moral and religious. Pursuant to this moral, spiritual and religious mission, the Holy See elaborates “juridical, social and moral principles founded upon right reason. . . addressed to the whole of humanity and not to Catholic believers alone.”⁵⁴ In particular, the Holy See promotes “common moral values of an objective nature” as the bedrock of international law and advances the same as well as conditions that ensure “peace, justice and social progress in a context of ever more effective respect and promotion of the human person and of his or her rights.”⁵⁵

For this reason, each of the Holy See’s Reports on CRC, OPSC and OPAC are structured in a way that gives precedence to the Holy See commencing with the Roman Pontiff and then followed by his dicasteries (departments) with many paragraphs emphasizing the relevant teachings of the Holy See, on the topic in issue.⁵⁶ In addition to these teachings, the Reports set out the activities of the Roman Pontiff and his dicasteries. The Reports also discuss activities at the local level that are encouraged by the Holy See, but are carried out by local Catholic institutions in accordance with their own authority and responsibilities under canon law and pursuant to the laws of the respective States, in which they operate.⁵⁷ In other words, the Holy See is not responsible for the activities of such organizations or the

RIGHTS OF THE CHILD ON INVOLVEMENT OF CHILDREN IN ARMED CONFLICT, CRC/C/OPAC/2 October 19, 2007).

53. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 5; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 5; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 2.

54. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 5; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 5; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 2.

55. *Id.* HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 5; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 5; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 2.

56. *See, e.g.* HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, Part III, paras. 10-22, 27-31; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, at Part III, paras. 11-14; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, paras. 20, 22-28, 32, 37, 38-40, 53-56, 58, 60, 73, 75.

57. *See, e.g.* HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, paras. 40-43, 47-54; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, paras. 15, 21-25; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, paras. 33-35, 62-71, 79.

implementation of them, although such activities are inspired and moved by the Catholic faith. This is a critical point that is often overlooked by outside observers. Finally, since the Holy See is sovereign over the territory of VCS, a small part of each of the Reports is devoted to the implementation of the various treaties in this unique territory.⁵⁸ In this last regard, both the Holy See's Second Report on CRC and Initial Report on OPSC remind the Committee that application of any treaty must be compatible with the particular nature of VCS and the sources of its objective law: canon law as the primary source of law and primary criterion for interpretation; principal sources of law, that is, the Fundamental Law and other laws enacted by the Pope's authority to whom he has conferred legislative power; and supplementary law of Italy, received into the law of VCS.⁵⁹ It is noteworthy that the Holy See's Report on OPAC emphasizes that the Holy See does not have armed forces, within the accepted meaning of the term, but a body of guards (the Swiss Guards) who protect the Pope, and therefore the report says very little about VCS. It is, however, a good example of the Holy See ratifying documents "also to manifest its moral authority" and thereby to encourage States to ratify the respective treaty and to accomplish their respective obligations.⁶⁰

C. *The Holy See: Reservations and Declarations*

Other common provisions include a series of statements reaffirming the Holy See's three Reservations and one Interpretative Declaration to the CRC. This is necessary given the Committee's request for the Holy See to consider withdrawing its reservations.⁶¹ In response, the Holy See maintains its Reservations that are summarized as follows. However, it needs to be remembered that reservations are permitted under art. 51, CRC. The Holy See "interprets the phrase 'Family planning education and services' in art. 24. 2, to mean only those methods of family planning which it considers morally acceptable, that is, the natural methods of family planning."⁶² The

58. See, e.g. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, paras. 55-63; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 12; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, paras. 83-92.

59. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, paras. 55-56; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, paras. 84-85.

60. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 5; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 5; HOLY SEE'S SECOND REPORT ON CRR, *supra* note 2, para. 2.

61. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 7 (cf. CRC/C/15/Add.46, para. 10).

62. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 8; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 8; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 8.

Holy See “interprets the articles of the [CRC] in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education (articles 13, 28), religion (article 14), association with others (article 15) and privacy (article 16).”⁶³ The Holy See deems it necessary that “the application of the [CRC] be compatible in practice with the particular nature of [VCS] and of the sources of its objective law. . . and, in consideration of its limited extent, with its legislation in the matters of citizenship, access, and residence.”⁶⁴

The Holy See also takes the opportunity to reaffirm its Interpretative Declaration. In all three Reports a common provision maintains that the CRC is “a proper and laudable instrument aimed at protecting the rights and interests of children⁶⁵ . . . [and] enactment of principles previously adopted by the United Nations, and. . . will safeguard the rights of the child before as well as after birth, as expressly affirmed in the [1959 Declaration of the Rights of the Child, preamble, para. 3] and restated in the ninth preambular paragraph of the [CRC].”⁶⁶ Another provision highlights that the “ninth preamble paragraph will serve as the perspective through which the rest of the [CRC] will be interpreted, in conformity with art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969.” A third provision underlines, that “by acceding to the CRC, the Holy See intends to ‘give renewed expression to its constant concern for the well-being of children and families,’”⁶⁷ but due to its “singular nature and position, the Holy See. . . does not intend to [derogate] in any way from its specific mission which is of a religious and moral character.”⁶⁸

The Holy See’s Second Periodic Report on the CRC differs from its reports on OPSC and OPAC, insofar it includes an explanation for why it intends to maintain its Reservations and Interpretative Declaration. As previously, mentioned, this is in response to the Concluding Observations of

63. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 8; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 8; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 8.

64. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 8; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 8; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 8 (Cf. art. 1, Law of 7 June 1929, n. II; cf. Law of 1 October 2008, n. LXXI, on sources of law, in force as of 1 January 2009, replaced the law of 7 June 1929, n. II as regards the sources of law).

65. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 9; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 9; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 9.

66. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 9; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 9; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 9.

67. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 9; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 9; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 9.

68. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 9; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 9; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 9.

the Committee to the Holy See's Initial Report on the CRC, wherein it asked the Holy See to consider withdrawing the same.⁶⁹ The Holy See sets out eight arguments.

One, the said reservations and declaration are necessary in light of the minimal standard of behavior expected of States, however, the Holy See "works to further extend the protection and 'to develop the natural talents of children, and most importantly, to provide an opportunity for the spiritual fulfillment of its youngest citizens – from the first moment of conception.'"⁷⁰ Two, they "emphasize the moral concepts" and "definitive positions" which the Holy See holds to be of "paramount importance,"⁷¹ and which "were the object of the extensive debate that led to the formulation of the text of the Convention."⁷² Three, they are "not contrary to the object and purpose" of the CRC, which would be prohibited.⁷³ Four, "no State Party has raised an objection to them as being incompatible with the object and purpose" of the CRC, something they are permitted to do pursuant to the 1969 Vienna Convention on the Law of Treaties.⁷⁴ Five, they are line with the "original spirit of the CRC and contribute to its object and purpose."⁷⁵ Six, the theory of reservations is based on the concept that "no State is bound in international law without its consent to the treaty,"⁷⁶ and since consent is the "very essence of any treaty commitment," reservations promote ratification of the largest number of State Parties possible, when the same cannot agree upon every provision of the written text. This last point is something enormously difficult in the context of multilateral treaties such as the CRC,⁷⁷ but also extremely helpful in that such ratifications produce "impressive statistics as to the number of State Parties." Certainly, in the case of the Holy

69. HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 7 ("With respect to Guideline 10, and the Committee's Suggestion/Recommendation that the Holy See review and withdraw its reservations (CRC/C/15/Add.46, para. 10), the Holy See has reviewed and will maintain its three Reservations and Interpretative Declaration to the Convention on the Rights of the Child (CRC), which were entered under art. 51 of the same. They are reproduced in their entirety in Initial Report CRC/C/3Add.27, paras. 15, and 16 (a) –(c) and they have recently been reaffirmed in the Holy See's First Report on the Optional Protocols.")

70. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 10, cf. CRC, *supra* note 8, art. 41.

71. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 11.

72. *Id.* para. 11.

73. *Id.* para. 10, cf. CRC, *supra* note 8, art. 51.2.

74. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 12, cf. 1969 VIENNA CONVENTION ON THE LAW OF TREATIES May 23, 1969, 1155 U.N.T.S. 331, arts. 20 - 21 (entered into force Jan. 27, 1980).

75. HOLY SEE'S SECOND REPORT ON CRC, para. 12.

76. *Id.* para. 13.

77. *Id.* para. 13.

See, it ratified the instrument notwithstanding its ethical concerns.⁷⁸ The reservations thus serve as a memorial to these concerns. Lastly, the Holy See contends such reservations are necessary “given the attempted redefinition or creation of new terms and/or rights and/or principles, which do not correspond to an authentic and holistic vision of the human person and his or her rights and duties, nor present a good faith interpretation” of the CRC.⁷⁹ The Holy See concludes by emphasizing that it “has never agreed to such terms, rights or principles often contained in the Committee’s General Comments⁸⁰ and its Concluding Observations,” and also underlines that they “do not enjoy international consensus.”⁸¹

D. *The Holy See: Treaty Interpretation*

The Holy See’s Second Periodic Report also differs from its Reports on OPSC and OPAC, in addressing the question of treaty interpretation. This particular section acts as a sort of preamble to the Holy See’s responses to the Committee’s questions asking the Holy See to explain its position on three matters: a) “the relationship between the responsibilities, duties and rights of parents (art. 5) and the right of the child to be heard (art. 12); and b) the principle of non-discrimination (art. 2), of the best interests of the child (art. 3) and of the respect for the views of the child (art. 12).”⁸² The Committee’s also expressed concerns for: 1) “discrimination ‘between children’ in Catholic schools, in particular with regard to girls; 2) education of children on health matters, including preventive health care, family

78. *Id.* para. 13.

79. *Id.* para. 15.

80. The term “general comments” does not exist in the text of the CRC, *supra* note 8. According to article 45 (d) of the CRC, the Committee may make “suggestions and *general recommendations* based on information received pursuant to articles 44 and 45.” The term “general comments” were included in the Rules of Procedures. Pursuant to these rules, as developed by the Committee, there are three types of general recommendations: “general recommendations” *per se*; “other general recommendations”, and “general comments.” Pursuant to Rule 75 of the Committee’s Rules of Procedure, the Committee may “[a]fter consideration of each report of a State party, together with such reports, information or advice, if any, received pursuant to article 44 and article 45, subparagraph (a), of the Convention, ...make such suggestions and *general recommendations* on the implementation on of the Convention by the reporting State as it may consider appropriate.” See COMMITTEE ON THE RIGHTS OF THE CHILD, RULES OF PROCEDURE, CRC/C/4/Rev.2 December 2, 2010. Rule 76 envisions the Committee making “*other general recommendations* based on information received pursuant to articles 44 and 45 of the Convention.” *Id.* Rule 77.1 purports to give the Committee jurisdiction to “prepare *general comments* based on the articles and provisions of the Convention with a view to promoting its further implementation and assisting States parties in fulfilling their reporting obligations.” *Id.*

81. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 15.

82. *Id.* at para. 16; *Cf.* COMMITTEE’S CONCLUDING OBSERVATIONS CRC/C15/Add.46, paras. 13-14.

planning; and 3) promotion of the CRC in school curricula as well as training of professionals and volunteer.”⁸³

Since the answers to the aforementioned queries require consideration of the text, and the Committee has developed its own interpretation of the text, that can be construed as departing from the text as well as its intent and purpose, the Holy See commences its response in reference to the rules of international law on the topic of treaty interpretation, which presumably applies to both the Committee and State Parties. The Holy See commences the discussion by highlighting six key principles.

One, the Holy See interprets the CRC, pursuant to arts. 31 and 32 of the 1966 Vienna Convention on the Law of Treaties (hereinafter “VCLT”)⁸⁴ which it is bound in treaty law having ratified it, and “to which it is nonetheless bound insofar as the provisions contained therein form part of customary international law.”⁸⁵ Two, the Holy See will render a “‘good faith’ interpretation in accordance with the ‘ordinary meaning’ of the terms of the treaty in their ‘context and in light of [its] object and purpose.’”⁸⁶ Three, the Holy See acknowledges that “such context comprises the text including the preamble and annexes and any agreement relating to the Treaty made between all the parties and any instrument made by one or more parties” which will include its instrument of ratification with three Reservations and Interpretative Declaration.⁸⁷ Four, the Holy See notes that art. 32 VCLT provides recourse to “supplementary means of interpretation to confirm or to determine the meaning resulting from the application of art. 31 VCLT when the general rule articulated in the same ‘leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.’”⁸⁸ Five, the Holy See underlines that it has not “subsequently agreed with any party as to the interpretation of the treaty or its application in a way that differs from or contradicts its three Reservations and one Interpretative Declaration and all that which is explained in its Initial Report.”⁸⁹ Indeed, the Holy See duly notes that a “special meaning shall be given to a term if it is established that the parties so intended,” but does not

83. *Id.* at para. 21; *Cf.* COMMITTEE’S CONCLUDING OBSERVATIONS CRC/C/15/Add.46, paras. 8-9, 12.

84. VIENNA CONVENTION ON THE LAW OF TREATIES (hereinafter “VCLT”) May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

85. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 17 (The Holy See ratified the VCLT on February 25, 1977).

86. *Id.*; *cf.* VCLT, *supra* note 84, art. 31.1.

87. *Id.* at para. 17a; *cf.* *Id.*, art. 31.1.

88. *Id.*; *cf.* *Id.*, art. 31.2(a)-(b).

89. *Id.* at para. 17(b); *cf.* *Id.*, art. 31.3(a)-(b).

admit of agreeing to any special meaning of a term.⁹⁰ Six, the Holy See emphasizes that the three Reservations and one Interpretative Declaration constitute “an essential basis of [its] consent to be bound by the Convention on the Rights of the Child under art. 62 (1) (a), VCLT.”⁹¹

Applying the aforementioned legal principles, the Holy See interprets the CRC “in a way that was foreseen at the time of the conclusion of the treaty, namely in line with the aforementioned international rules of interpretation taking into account its own Reservations and Interpretative Declaration.”⁹² The Holy See interprets a treaty provision in an integral way, in light of its Interpretative Declaration and three Reservations together with the whole of CRC including its preamble together with arts. 1-5.⁹³ The Holy See maintains that the object and purpose of the CRC (or the CRC’s “living heart”) is the promotion and protection of “the rights and duties of the child, before as well as after birth, within the context of the family, the natural and fundamental unit of society, which itself has rights and duties in addition to those of parents.”⁹⁴ Indeed, the Holy See acceded to and continues to endorse the CRC in the expectation that all initiatives: a) will “respect that children best learn about themselves and others, first and foremost, in the reality of ‘mutually supportive relationships in the family itself, where there is profound respect for all human life, unborn as well as born, and where both mother and father jointly make responsible decisions regarding the exercise of their parenthood;’”⁹⁵ and b) will “respect the moral and religious convictions of those to whom they are directed, in particular the moral convictions of parents regarding the transmission of life, with no urging to resort to means which are morally unacceptable, as well as their freedom in relation to the religious life and education of their children.”⁹⁶ It is clear that the position of the Holy See *vis-a-vis* the CRC is consistent with well respected principles of public international law.

The Holy See reminds the Committee that any other interpretation imposed on the Holy See would “depart from the original spirit” of the CRC and thereby constitute an “unforeseen and fundamental change of circumstances,” which in turn, would “radically” transform the extent of the

90. *Id.* at para. 17(f); *cf. Id.*, art. 31.4.

91. *Id.* at para. 7(c); *cf. Id.*, art. 31.3(c), 62.1(a).

92. HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 17(d).

93. *Id.* at para. 18.

94. *Id.*, para.19.

95. *Id.*, para. 19(a).

96. *Id.*, para. 9(b).

Holy See's "obligations still to be performed" under the CRC.⁹⁷ Accordingly, the Holy See would "be permitted to invoke such a fundamental change of circumstances as a ground for 'terminating or withdrawing' from the treaty or from 'suspending the operation' of the same."⁹⁸

II. THE CRC: GENERAL PRINCIPLES

A. *The Committee's General Principles*

1. *The General Principles*

The Committee established four general principles under the CRC: 1) non-discrimination; 2) best interests of the child; 3) right to life, survival and development; and 4) respect for the views of the child (also referred to as the right to participate or the right to be heard).⁹⁹ These general principles are based on art. 2, 3, 6 and 12, respectively of the CRC.

A perusal of these articles immediately reveals that any stark reference to such principles is misleading because they have been taken out of their context. For example, in regard to the principle of non-discrimination in article 2.1, this provision should be read with article 2.2, which places the principle within the context of the family and the child's parents.¹⁰⁰ With respect to article 3, the principle that the best interests of child shall be a paramount consideration is to be applied within the context of public or private legal or administrative proceedings, which must also "take into account the rights and duties of parents" where protection and care of the

97. *Id.*, para.17(e); cf. VCLT, *supra* note 84, art. 62.1(b).

98. *Id.*; cf. *Id.*, art. 62.3.

99. See, e.g. Committee on the Rights of the Child, *General Guidelines regarding the form and content of initial reports to be submitted by State Parties under article 44, paragraph 1(a) of the Convention*, para. 13, CRC/C/5 (October 30, 1991) ("General principles 13. Relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen, factors and difficulties encountered and progress achieved in implementing the provisions of the Convention, and implementation priorities and specific goals for the future should be provided in respect of: (a) Non-discrimination (art. 2); (b) Best interests of the child (art. 3); (c) The right to life, survival and development (art. 6); (d) Respect for the views of the child (art. 12)."): See also Committee On the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, CRC/C/GC/12, July 20, 2009.

100. CRC, *supra* note 8, art. 2(1)-(2) ("1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction *without discrimination* of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth* or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the *basis of the status, activities, expressed opinions, or beliefs of the child's parents*, legal guardians, or family members." [emphasis added]).

child is at stake.¹⁰¹ In regard to article 6, the child has an inherent right to life, survival and development, however, the Committee purports to take a neutral stand on abortion, even in the face of other articles which, when read together, clearly protect the life of the unborn: preamble para. 9, art. 1, art. 2, art 24.2.d.¹⁰²

In response to the “amoral or neutral” position, by analogy, the question is whether there is a way to have equal concern and respect for the torturer and the torture victim.¹⁰³ Either the torturer torments the person because this is right or good, or the torturer does not torture the person because this is right or good. States condemn the acts of the torturer, and protect the other’s right not to be tortured because the acts of the two individuals do not “deserve equal respect and concern.”¹⁰⁴ A similar dilemma is evident in discussions pertaining to the pre-natal child’s right to life versus the “new right” of the mother to abortion. Frequently, the issue is framed as whether the unborn child is even a human being (and/or human person); so the argument goes, because both views (the fetus is not a person vs. the fetus is a person) deserve equal respect and concern, the mother should be free to

101. *Id.*, art. 3. (“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.” [emphasis added].)

102. *Id.*, art. 6. (“1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.” [emphasis added].) (The argument that the CRC is neutral on abortion relies for support upon a document that has no value in international law, namely a statement by the Working group stating: “In adopting this preambular paragraph [“legal protections before or after birth” para. 9], the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention.” RACHEL HODGKIN, PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD, 3rd edition, (UNICEF: 2007) at 85.) (So the argument goes: “Article 1 deliberately leaves open the starting point of childhood, that is, whether it is conception, birth or sometime in between. Thus, the Convention leaves individual States to decide for themselves the conflicting rights and interests involved in issues such as abortion and family planning, and the Committee on the Rights of the Child has therefore suggested that reservations to preserve state laws on abortion are unnecessary” *Id.*). It is noteworthy that the words of that preamble and other related provisions are clear and not ambiguous. Therefore there is no need to go to the working papers as a supplementary means of interpretation (VCLT, *supra* note 84, at arts. 31, 32). Moreover, there is a dispute as to the value of the Working Group’s statement itself in international law.

103. J. Budziszewski, NATURAL LAW FOR LAWYERS, 15 (ACW Press and The Blackstone Legal Fellowship eds., 2006)

104. *Id.*

abort.¹⁰⁵ Significantly every person has shared the same position as the prenatal child because each person has been an unborn child. This is a fact which many today elude or attempt to forget. In the end, the so-called “amoral or neutral” position does not award equal concern and respect to both views on whether the unborn child is a human being, but rather “covertly supposes the truth of one of them [the “fetus” in the mother’s womb is not a human being and/or a human person] but spares itself the trouble of demonstration.”¹⁰⁶ Moreover, the Committee has questioned the “illegality of abortions,” which brings into question its so-called neutrality.

Lastly, with respect to article 12(1), the child’s right to express his or her views is limited to the “child who is capable of forming his or her own views” and the “due weight” to given to such views will be “in accordance with the age and maturity of the child.” Article 12(2) provides for an “opportunity to be heard,” not a right to be heard, and places this opportunity within the context of “judicial and administrative proceedings affecting the child,” and “in a manner consistent with the procedural rules of national law.”¹⁰⁷ The Committee frequently refers to article 12 as proof that the child should be regarded as an active subject of rights, and frequently, connects this article with the child’s freedom of expression (art. 13), freedom of thought, conscience and religion (art. 14) and freedom of association (art. 15). However, again any naked reference to such principles is misleading in that each of these articles contains language regarding limitations (e.g. rights of others, public health, public order, morals) contained in these provisions. In addition, such references ought to be mentioned alongside the general principle set out in art. 5, that State Parties are obliged to “respect the responsibilities, rights and duties of parents. . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights.” These evolving capacities are crucial to the objective meaning of “rights” that are to be accorded to the child. If they are not considered, the child could erroneously be construed as an autonomous entity having the capacity to make claims or have claims

105. *Id.* at 16.

106. *Id.* at 17.

107. CRC, *supra* note 8, art. 12 (1) “States Parties shall assure to the child who is *capable of forming his or her own views* the right to express those views freely in all matters affecting the child, the *views of the child being given due weight in accordance with the age and maturity of the child.* (2) For this purpose, the child shall in particular be provided the *opportunity to be heard* in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” (emphasis added).

made without acknowledging any corresponding duties, responsibilities, or obligations to others, especially parents.

2. *Application of the General Principles*

The aforementioned general principles of the Committee have been frequently referred to in the Concluding Observations of the Committee¹⁰⁸ and used in its General Comments to create new principles and terminology. It is beyond the scope of this paper to give a comprehensive review of every interpretation that raises issues for the Holy See. This paper will limit itself only to terminology and new principles that directly relate to the possible sexualisation of children, a tragic phenomenon, recognized worldwide.¹⁰⁹ In

108. See e.g. Committee on the Rights of the Child, “Concluding Observations: Paraguay,” Seventh Session, 24/10/94, CRC/C/15/Add. 27, par. 7 (The Committee expressed “its general concern that the State Party [Paraguay] does not appear to have fully taken into account the provisions of the Convention, including its general principles, as reflected in its articles 2, 3, 6, and 12, in the legislative and other measures relevant to children” [emphasis added]). See also RACHEL HODGKIN, PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD, 3rd edition, (UNICEF: 2007): art. 2 (non-discrimination) pp. 17-31; art. 3, (bests interests of the child) pp. 35-43; art. 6 (right, survival and development) pp. 83-94; and art. 12 (respect for the views of the child) pp. 149-172.

109. Although, there is no global unanimously accepted definition of sexualisation, it has been defined as “to make or to become sexual or sexually aware; to give or acquire sexual associations.” COLLINS ENGLISH DICTIONARY – COMPLETE & UNABRIDGED (10th ed. 2009); It has also been defined to include “sexuality as inappropriately imposed upon a person.” AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALISATION OF GIRLS, 2007; In specific regard to reports on the phenomenon of sexualisation, it is noteworthy that they recognize the essential role of parents in protecting children, and do not purport to exclude them as does the General Comments of the Committee, See REG BAILEY, UNITED KINGDOM DEPARTMENT OF EDUCATION, LETTING CHILDREN BE CHILDREN: REPORT OF AN INDEPENDENT REVIEW OF THE COMMERCIALISATION AND SEXUALISATION OF CHILDHOOD, June 2011; Nearly nine out of 10 parents surveyed for this Review agreed with the statement that ‘these days children are under pressure to grow up too quickly.’ This confirms what many parents, politicians, academics and commentators have suspected for some time, that this is a widely held concern of parents that needs to be taken seriously. This pressure on children to grow up takes two different but related forms: the pressure to take part in sexualized life before they are ready to do so; and the commercial pressure to consume a vast range of goods and services that are available to children and young people of all ages.” *Id.* para. 2, at 6; THE SCOTTISH PARLIAMENT, EQUAL OPPORTUNITIES COMMITTEE REPORT, 2ND REPORT, 2010 (SESSION 3) EXTERNAL RESEARCH ON SEXUALISING GOODS AIMED AT CHILDREN, EO/S3/10/R2, ANNEX A: David Buckingham, et al *Final Report Sexualised Goods Aimed at Children, Research Conducted for the Scottish Parliament*, June – December 2009; “Ultimately parents tended to conclude that it was their responsibility to take action on sexualised products...However, they also revealed how difficult this was in practice due to the availability of the products; peer pressure or general adolescent culture; children’s ‘nagging’ and persuasive tactics; decisions made by other parents and institutions; and economic structures and values limiting choice and shaping tastes.” *Id.* at 5 PARLIAMENT OF AUSTRALIA SENATE REPORT ON SEXUALISATION OF CHILDREN IN CONTEMPORARY MEDIA, June 26, 2008; “Throughout this report the committee has made a number of recommendations and suggestions whose object is to assist parents in managing the influences to which their children are exposed, to assist children in dealing with these influences. It is also the primary responsibility of parents to make decisions

this regard, the Holy See is concerned with the following expressions, which are not contained in the text of the CRC: “gender,” “sexual orientation,” “abortion,” “safe-abortion”, “life skills,” “sexual and reproductive health services,” “condoms” and “contraceptives.” Moreover, in contrast to provisions in the text that protect and promote respect for the rights and duties of parents, the Holy See is troubled by the General Comments which purport to create new principles that minimize and even exclude the role of parents, especially in areas where the sexualisation of children is at issue. Consider the following excerpts from various General Comments.

In General Comment No. 3 (2003) on HIV/AIDS the following appears with respect to the non-discrimination principle (art. 2):

Of particular concern is gender-based discrimination combined with taboos or negative or judgmental attitudes to sexual activity of girls often limiting their access to preventive measures and other services. Of course also is discrimination based on sexual orientation. . . State parties must give careful consideration to prescribed gender norms. . .with a view to eliminating gender discrimination as these norms impact on the vulnerability of both girls and boys to HIV/AIDS. . . Strategies should also promote education and training programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS.¹¹⁰

In regard to the discussion of life, survival and development (art. 6), in the same report, the following appears:

*State [Parties have the] obligation. . . to give careful attention to *sexuality* as well as to the behaviours and lifestyles of children, even if they do not conform with what society determines to be acceptable under prevailing cultural norms for a particular age group. . . *Effective prevention programs are only those that acknowledge the realities of the lives of adolescents,**

about what their children see, hear, read or purchase. These parental decisions can have a significant impact on the marketing for sexualising products and services.” *Id.* para. 1.17; AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALISATION OF GIRLS, 2007; In study after study, findings have indicated that women more often than men are portrayed in a sexual manner (e.g. dressed in revealing clothing, with bodily postures or facial expressions that imply sexual readiness) and are objectified (e.g. used as decorative object, or as body parts rather than a whole person). In addition, a narrow and (and unrealistic) standard of physical beauty is heavily emphasized. These are the models of femininity presented for young girls to study and emulate. . . . Actions by parents and families have been effective in confronting sources of sexualised images of girls (*Id.*, Executive summary).

110. Committee on the Rights of the Child, *General Comment No. 3, HIV/AIDS and the Rights of the Child*, paras. 8, 9, U.N. Doc CRC/GC/2003/3 (Mar. 17, 2003). [emphasis added].

*while addressing sexuality by ensuring equal access to appropriate information, life skills and to preventive measures.*¹¹¹

The term “*life skills*” is later fleshed out in the report:

*...[children can] acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality”... “life skills education within schools, including skills in communicating on sexuality and healthy living”... “State parties must...ensure that children are reached with appropriate prevention messages even if they face constraints due to language, religion, disability or other factors of discrimination.*¹¹²

With respect to civil rights and freedoms, the following is noteworthy:

Child and adolescent sensitive health services... [mean that they] are accessible, affordable, confidential, and non-judgmental, *do not require parental consent* and are not discriminatory ...that health services employ trained personnel who fully respect the rights of children to privacy (art. 16) and non-discrimination in offering. . .*confidential sexual and reproductive health services, and free and low-cost contraceptive, methods and services.* . .¹¹³

Similar problems are raised in General Comment No. 4 (2003) on Adolescent Health and Development in the Context of the Rights of the Child.

[Civil rights and freedoms (art. 13-17) are fundamental in guaranteeing right to health and development especially for State initiatives as regards] “*family planning.* . .” [State parties must strictly respect their] “*right to privacy and confidentiality.* . .*information may only be disclosed with the consent of the adolescent.* . .*Adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services.*”¹¹⁴

Later in the same General Comment the following is stated:

111. *Id.* at para. 11. [emphasis added].

112. *Id.* at paras. 16, 17. [emphasis added].

113. *Id.* at para. 20. [emphasis added].

114. Committee on the Rights of the Child, , *General Comment No. 4, Adolescent Health and Development in the Context of the CRC* ¶ 27, 28, 31, 30, , U.N.Doc CRC/GC/2003/4 (July 1, 2003) [emphasis added].

[Adolescents must develop necessary] “self-care skills” [and State parties should provide] “access to *sexual and reproductive information*, including on family planning and contraceptives. . .[and] access. . .regardless of their marital status and whether their parents or guardians consent.” [State Parties must give access to] “*safe abortion services* where abortion is not against the law. . .[as well as] foster positive and supportive attitudes towards adolescent parenthood for their mothers and fathers. . .” [State parties are urged to provide programmes] “*aimed at changing cultural views about adolescents’ need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality [and] to take measure to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms.*”¹¹⁵

B. *The Holy See and Key Principles*

The Holy See’s Reports include common provisions regarding “longstanding convictions.”¹¹⁶ These provisions emphasize key principles in promoting an authentic perspective of the rights and duties of the child. They may be articulated as the following: 1) the child has inherent dignity from the moment of conception (moment of fertilization); 2) the child’s rights and duties must be viewed within the context of the family; 3) the child’s rights and duties require special protection and promotion of the family; 4) the child’s well-being is the primary responsibility of parents and the family rather than those of self-proclaimed “expert”; and 5) the child’s right and duty as regards life and parents’ duties and rights in their regard; 6) the child’s right and duty as regards education and the parents’ duties and rights in this regard; and 7) the child’s right and duty as regards religious freedom and parents’ duties and rights in their regard.¹¹⁷ The Holy See contends that from a reading of the preamble together with its substantive provisions one can find support for these principles in the CRC, as well as other international treaties and long standing principles of customary international law. In regard to this last argument, the Holy See’s Second

115. *Id.*, paras. 28, 30, 31. [emphasis added].

116. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 10; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para.10; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20 (“reaffirms what it has always taught”).

117. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 10; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para.10; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20 (“reaffirms what it has always taught”) (*See also*, HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 2, paras. 4 -16).

Report on CRC goes further than its Reports on OPSC and OPAC, in providing support for its propositions in international law.¹¹⁸

1. *The Inherent Dignity of the Child*

The Holy See's Reports emphasize that every human being, from the moment of conception and in every particular stage of his or her human development until natural death has inherent dignity.¹¹⁹ That is to say, every human being has inherent dignity as human persons, by nature endowed with intelligence and free will.¹²⁰ The Holy See's Second Report to the CRC explicitly underlines the point that human rights flow from the child's inherent dignity, an understanding that falls within the natural law tradition.¹²¹ It does not make a reference to the inherent dignity of the child as made in the image and likeness of God which constitutes a profound understanding of the phrase "inherent human dignity" going beyond the order of natural reason to that of divinely revealed truth to reflect upon the person of Jesus Christ.¹²² This Second Periodic Report also underlines that the "inherent dignity of the child is founded on something more profound than his ability to express his views."¹²³ This last point is alluding to the Committee's promotion of art. 12 as one of the key principles to ensure that children are treated as subjects. Obviously, an unborn child, an infant and some disabled children cannot express their views but are subjects of rights and duties nevertheless.

118. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, paras. 20 b, d, f, h, j, l, n.

119. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10.a; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10.a; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20.a. (See also, HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 4).

120. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10.a; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10.a; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20.a. (Cf. Pope John XXIII, *Pacem in Terris* [Encyclical Letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty] paras. 9-10 (1963) [hereinafter *Pacem in Terris*]; see also Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] paras. 12-22 (1965), reprinted in *The Sixteen Documents of Vatican II* 515-624 (Nat'l Catholic Welfare Conference trans., 1967) [hereinafter *Gaudium et Spes*]).

121. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10.a; HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10.a; HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20.a. (See also: Fr. Thomas D. Williams, *Who Is My Neighbor?: Personalism and the Foundations of Human Rights* 82-104 (Washington, D.C.: Catholic University of America Press, 2005), for a more detailed response to the debate among Catholics whether "human rights" language falls within the natural law tradition).

122. *Gaudium et Spes*, *supra* note 6, para. 22 (The new Adam "fully reveals man to man himself and makes his supreme calling clear;" every human person has been redeemed by Christ and is destined for eternal happiness.).

123. HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20.a.

The preamble of the CRC affirms the “inherent dignity” and “equal and inalienable rights of all members of the human family.”¹²⁴ It incorporates the Charter of the United Nations that reaffirms the “fundamental human rights” and “the dignity and worth of the human person.”¹²⁵ The CRC defines the child as under the age of eighteen and acknowledges his or her “physical and mental immaturity” noting the need for “special safeguards and care, including appropriate legal protection, *before as well as after birth.*”¹²⁶ Indeed, every child has the right to “*pre-natal*” as well as “post-natal health care.”¹²⁷ Lastly, the CRC incorporates the 1948 Universal Declaration of Human Rights (hereinafter “UDHR”), which acknowledges in art. 1 the essential characteristics of man as a human being “free and equal,” “endowed with reason and conscience” in relationship with others in that he or she “should act towards one another in a spirit of brotherhood.”¹²⁸

2. *The Child within the Context of the Family*

By reason of his or her origin, end and formative state, the child can only be understood within the context of the family, the basic cell of society. For this reason, the Holy See notes that the “protection of children’s rights cannot become fully effective unless the family and its rights are fully respected by the legal systems of States and the international community.”¹²⁹

The CRC recognizes the aforementioned principle. “The child, for the full and harmonious development of his or her personality, should grow up in

124. CRC, *supra* note 8, preamble para. 1.

125. Compare U.N. Charter, with CRC, *supra* note 8, preamble para. 2.

126. CRC, *supra* note 2, preamble para. 9, art. 1.

127. *Id.*, art. 1; pmbl. para. 3, arts. 1, 2(1), 3, 24(d); for a more expansive discussion, see also BRUCE ABRAMSON, VIOLENCE AGAINST BABIES: PROTECTION OF PRE- AND POST-NATAL CHILDREN UNDER THE FRAMEWORK OF THE CONVENTION ON THE RIGHTS OF THE CHILD (2005) (One might argue that because the child cannot be discriminated against on the ground of “birth” this might provide further evidence of pre-natal protection of the child, however, Abramson expresses a contrary view).

128. *Id.*, pmbl. paras. 3, 4 (This point, however, needs further clarification with recourse to the working papers given the word “born” in art. 1 of the UDHR); for further discussion, see JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999); see also *The Family and Human Rights* (Dec. 9, 1999), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html (quoting the UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]) (an interesting study by the Pontifical Council for the Family).

129. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, at para. 10(b); HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, at para. 10(b); HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, at para. 20(c) (Cf. HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 5; Cf. The Holy See, *Charter of the Rights of the Family*, preamble para. E (Oct. 22, 1983) [hereinafter *Charter on the Rights of the Family*]).

a family environment, in an atmosphere of happiness, love and understanding.”¹³⁰ This principle in turn is supported by numerous references to the family and parents¹³¹ most notably those contained in the umbrella provisions which require that the best interest of the child principle be applied “taking into account the rights and duties of parents,” and that “responsibilities, rights and duties of parents” be respected by State Parties.¹³²

3. *Special Protection and Promotion of the Family*

The Holy See argues that the first and most vital unit of society, the family, is the natural community which exists prior to the State or any other community, and possesses inherent rights and duties.¹³³ For this reason protection of children’s rights and duties means respect for the promotion and protection of the family and respect for the rights and duties of parents.¹³⁴ The Holy See reiterates that the family is based on marriage: that “intimate union of life in complementarity between a man and a woman, which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony and is open to the transmission of life.”¹³⁵

The CRC acknowledges that the family, as just explained, is the natural environment for children: “the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”¹³⁶ The CRC also recognizes that special protection and promotion must be given to the natural family when it cites the UDHR, which in turn observes: “The Family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”¹³⁷ It furthermore, promotes the family based on marriage, as an equal partnership between husband and wife, to which the transmission of

130. CRC, *supra* note 8, at preambular para. 6.

131. *Id.* at arts. 2, 3, 5, 7, 8, 9, 10, 14, 16, 18, 20-24, 27, 37, 40.

132. *Id.* at arts. 3(2), 5.

133. See HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, at para. 10(c); See also HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, at para. 10(c); See also HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20(e) (Cf. HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 5; Cf. *Charter on the Rights of the Family*, *supra* note 129, at paras. A, B.).

134. See HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, at para. 10(c); See also HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20(e); (Cf. HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, para. 5; Cf. *Charter on the Rights of the Family*, *supra* note 129, at paras. A, B.).

135. See HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20(e); Cf. *Charter on the Rights of the Family*, *supra* note 129, at paras. A, B.

136. CRC, *supra* note 8, at preambular para. 5.

137. UDHR, *supra* note 128, at preambular para. 3, art. 16(3).

life is entrusted.¹³⁸ All of the above is a reaffirmation of that which is knowable by right reason taking into consideration the UDHR's recognition of the human person as being "endowed with reason and conscience."¹³⁹

4. *The Child's Well-being*

The Holy See contends that a presumption exists that the well-being of the child is most successfully realized in the natural family, based on marriage between one man and one woman.¹⁴⁰ Since parents bring a child into the world or adopt a child, they have fundamental duties and rights in regard to the child's upbringing, formation and supervision including delicate matters pertaining to primary care, religion, education about authentic human love, marriage, family, association with others, access to information, and so forth.¹⁴¹ Parents are presumed to act for the good, for the well-being, or according to the legal standard, for the "best interests of the child." Such a presumption, of course, may be rebutted with proven or substantiated acts, such as child neglect, abuse or violence either committed by parents or while in the care of parents; beyond these types of cases, however, civil authorities should not interfere with the primary duties and rights of parents.¹⁴²

The CRC provides that "in all actions concerning children whether undertaken by public or private social welfare institutions. . .the best interests of the child shall be a primary consideration."¹⁴³ The State must apply the best interest principle; however, "taking into account the rights and duties of his or her parents."¹⁴⁴ In addition, the State shall respect "the responsibilities, rights and duties of parents, . . .to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights. . . ."¹⁴⁵ The fact that the child shall not be separated from his or her parents unless in accordance with due process and

138. *Id.* at art. 16(1), (2).

139. *Id.* at art. 1.

140. See HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10(c); HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, 10(c); HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20(e)l (*Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 2, paras. 5-6).

141. See HOLY SEE'S INITIAL REPORT ON OPSC *supra* note 2, para. 10(d); HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, 10(d); HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20(g), (*Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, paras. 10-11).

142. *Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, paras. 16(b), HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20(g).

143. CRC, *supra* note 8, art. 3(1)..

144. *Id.* at art. 3(2).

145. *Id.* at art. 5.

in grave cases such as abuse or neglect further reinforces the presumption in favour of parents and the family.¹⁴⁶ CRC acknowledges that parents have “common responsibilities” and the “primary responsibility” for the “upbringing and development of the child.”¹⁴⁷ The CRC affirms that the role of the State is subsidiary in that it “shall render appropriate assistance to parents”¹⁴⁸ and may only intervene “to protect the child from all forms of physical or mental violence, injury or abuse, neglect, or negligent treatment, or exploitation including sexual abuse.”¹⁴⁹

5. *The Child’s Right to Life*

The Holy See maintains that every human being has the inherent right to life in every phase of development, from conception until natural death, and in every human condition (e.g. sick, disabled, or poor).¹⁵⁰ In the first instance, parents have the primary and inalienable duty and right to ensure that their child’s right to life is respected, which means that they must protect their developing pre-natal and post-natal child from exploitation and destruction.¹⁵¹

The CRC affirms the right to life of the child “before as well as after birth.”¹⁵² This basic principle is read with the definition of the child as “every human being below the age of eighteen years” and in reference to the child’s right to pre-natal health.¹⁵³ All of which must be read together with the child’s “inherent right to life.”¹⁵⁴

146. *Id.* at art. 9.

147. *Id.* at art. 18(1).

148. *Id.* at art. 18(2).

149. *Id.* at art. 19(1).

150. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 10.e; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 10.e; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20.i (*Cf.* HOLY SEE’S INITIAL REPORT ON CRC, *supra* note 9, paras. 7 and 8).

151. HOLY SEE’S INITIAL REPORT ON OPSC, *supra* note 2, para. 10.e; HOLY SEE’S INITIAL REPORT ON OPAC, *supra* note 14, para. 10.e; HOLY SEE’S SECOND REPORT ON CRC, *supra* note 2, para. 20.i (*Cf.* HOLY SEE’S INITIAL REPORT ON CRC, para. 7; *Cf. Charter on the Rights of the Family*, *supra* note 129, art. 4).

152. CRC, *supra* note 8, preambular para. 9.

153. *Id.* at art. 24 (d).

154. *Id.* at art. 6.

6. *The Child's Right to Education*

The Holy See argues that every child in virtue of his or her inherent dignity as a human person has the inalienable right to education.¹⁵⁵ Moreover, parents have the primary duty and right to educate their children, which includes having a free choice of schools in keeping with parental convictions that are protected by long standing principles of international law.¹⁵⁶ Of particular importance is the integral formation of the whole person (physical, intellectual, emotional, moral, and spiritual) in view of his or her origin, end and social nature.¹⁵⁷ Included within the ambit of education are issues related to primary care, religious education, association of the child with others, the child's access to information, expression of his or her views and matters of privacy including sex education.¹⁵⁸

The CRC incorporates the UDHR in its preamble, which in turn acknowledges that, "Parents have a prior right to choose the kind of education that shall be given their children."¹⁵⁹ As previously noted, the State undertakes "to ensure the child such protection and care as necessary for his or her well-being, taking into account the rights and duties of his or her parents;"¹⁶⁰ to apply the best interests of the child principle with parents in mind,¹⁶¹ and to respect parental rights and duties to provide appropriate direction and guidance to their child.¹⁶² The aforementioned principles are read with other articles dealing with the child's education¹⁶³ as well as the child's qualified civil and political rights.¹⁶⁴

155. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10. *cf.* HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10. *cf.* HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20.k (*cf.* Holy See's Initial Report on CRC, *supra* note 9, para. 9).

156. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10. *Cf.* HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10. *Cf.* HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2 para. 20.k (*Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 9; *Cf. Charter on the Rights of the Family, supra* note 129, art. 5).

157. HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 9.

158. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10. *cf.* HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10. *cf.* HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20. *cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 9. *Cf. Charter on the Rights of the Family, supra* note 129, art. 5.

159. CRC, *supra* note 8, preambular para. 3; UDHR, art. 26(3).

160. *Id.* at art. 3(2).

161. *Id.*

162. *Id.* at art. 5.

163. *Id.* at arts. 28, 29.

164. *Id.* at arts. 12, 17.

7. *The Child's Freedom of Religion*

The Holy See argues that freedom of religion springs from “the very dignity of the human person as known through the revealed word of God and by reason itself,” and parents have the duty and right “to decide in accordance with their own religious beliefs the form of religious upbringing which is to be given to their children.”¹⁶⁵

It contends that the principles of international law referred to above with respect to the right to education are applicable here. In specific regard to the child's right to freedom of thought, conscience and religion, the Holy See makes specific reference to the limitation in art. 14 (2), CRC: “State Parties shall respect the rights and duties of the parents. . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”¹⁶⁶

CONCLUSION

Clearly, the basic premise of each treaty (CRC, OPSC, and OPAC) is that children are vulnerable and in need of special protection. The aforementioned treaties recognize the rights and duties of the child within the context of the family taking into account the duties and rights of parents in the first instance to protect, to teach and to guide the child in the exercise of his or her rights and duties, which, in many instances, are carefully qualified, and limited according to parental duties and rights as well as public policy concerns.

The Committee, however, has developed its own particular approach to the CRC. It has chosen four key principles which it vigorously promotes along with the civil and political rights of the child in a way, that one might contend, betrays the very object and purpose of the CRC.¹⁶⁷ In response, the Holy See, in its recent reports, has fleshed out a faithful interpretation of the CRC's terms and content, highlighting key principles, based on the ordinary meaning of the words in the text taking into consideration its context and in accordance with binding international principles of interpretation. Moreover,

165. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10(g); HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10(g); HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, paras. 20(k), 20(m); *Cf.* HOLY SEE'S INITIAL REPORT ON CRC, *supra* note 9, para. 11; *Cf. Charter on the Rights of the Family* (1983), *supra* note 29, art. 5.

166. HOLY SEE'S INITIAL REPORT ON OPSC, *supra* note 2, para. 10(g); HOLY SEE'S INITIAL REPORT ON OPAC, *supra* note 14, para. 10(g); HOLY SEE'S SECOND REPORT ON CRC, *supra* note 2, para. 20(m).

the Holy See's position reflects the intention and general objectives of the CRC. In this way, the Holy See has entered into a dialogue with the Committee as regards a sound textual reading of the CRC by offering one that situates the rights of the child within the context of the family, and considers the CRC as enabling parents to better nurture, care, educate and protect their children with an exhortation to State Parties to assist parents in this regard. The Holy See is also urging the Committee to recognize the CRC's clear protection of the child's inherent right to life – "before as well as after birth" – a right, which renders all other rights possible. One hopes that the Committee will react to the overt and implicit corrections in a positive manner, and choose to become a beacon, alongside the Holy See, pointing to the whole truth about the child, a human person, with a mother and a father, from the moment of conception.

THE TRUTH UNRAVELED: LOWERING MATERNAL MORTALITY

Elise Kenny[†]

INTRODUCTION

The purpose of this paper is to study the controversy surrounding the maternal mortality issue in the international community. This paper will argue that the United Nations (UN) and the World Health Organization have inflated numbers (evidenced by the *2010 Lancet Report*) in order to encourage donors to fund projects which promote “contraception and abortion” as the key approach to maternal mortality. This strategy promotes an ideology that breaches the fundamental rights of the child and disregards empirical data suggesting that maternal mortality can be reduced by increasing the availability of basic medical care.

The paper will be divided into three parts. Part I will give an overview of how the maternal mortality issue has developed over the years within the UN system and the related questions at stake, namely the rights of the child. Part II will discuss the *Lancet Report* and the scandal that occurred upon its release. Part III will compare and contrast the UN’s abortion-first approach with other responses to the issue including those promoted by the Holy See, the governing organ of Vatican City State and the Catholic Church.

I. THE DEVELOPMENT OF THE MATERNAL MORTALITY ISSUE

The UN body saw improving women’s health as the key to reducing poverty and inequality; therefore, maternal mortality became a major issue to take up.¹ The Millennium Development Goals (MDG) were put in place to encourage growth and advances in developing countries.² These goals were established after the Millennium Summit in 2000.³ In particular, MDG 5 was

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1. World Health Organization [hereinafter WHO], *The World Health Report 2005: Make Every Mother and Child Count* (2005), available at <http://www.who.int/whr/2005/en/index.html>.

2. United Nations Development Programme (UNPD), *Millennium Development Goals*, available at <http://www.undp.org/mdg/basics.shtml>.

3. *Id.*

set in place to improve maternal health.⁴ Specifically, target 5A was to reduce by three quarters, between 1990 and 2015, the maternal mortality ratio and target 5B, which was to achieve universal access to reproductive health by 2015.⁵

A. *What Is Maternal Mortality?*

Although there is no legally binding definition of maternal mortality, the World Health Organization (WHO) has defined it as “the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, not from accidental or incidental causes.”⁶ Obviously, it is important in crafting the solution to first identify the causes of these deaths. While there are a wide variety of direct and indirect causes, WHO lists the main causes as “severe bleeding, hypertensive diseases, and infections.”⁷ Other factors that WHO has identified are the early onset of sexual activity and adolescent pregnancy and lack of education among women.⁸ Again, accurate identification of the causes is key to correctly addressing the problem effectively (this raises the two opposing approaches discussed *infra*).

B. *How Does One Measure Maternal Mortality?*

A major obstacle that those working to reduce maternal deaths have faced is in measuring the actual number of women dying from pregnancy and/or childbirth. The lack of a precise measurement has made it difficult to ascertain and track the numbers and align them with efforts undertaken to lower the number of deaths.⁹ The measurement for maternal deaths becomes difficult for various reasons. For example, there may be no routine recordings of death or the pregnancy may not have been known at the time of

4. *Id.*

5. MDG Monitor: Tracking the Millennium Development Goals, Goal 5, available at <http://www.mdgmonitor.org/goal5.cfm>.

6. WHO, Maternal Mortality Ratio (per 100,000 live births), available at <http://www.who.int/healthinfo/statistics/indmaternalmortality/en/index.html>; WHO, Maternal Mortality in 2005: Estimates Developed by WHO, UNICEF, UNFPA and The World Bank 1 (2005) available at http://www.who.int/whosis/mme_2005.pdf.

7. Khan KS et al., *WHO Systematic Review of Causes of Maternal Deaths*, LANCET (2006); 367: 1066-74.

8. WHO, The World Health Report 2005: Make Every Mother and Child Count (2005), available at http://www.who.int/whr/2005/whr2005_en.pdf.

9. WHO, Maternal Mortality in 2005, Estimates developed by WHO, UNICEF, UNFPA and The World Bank, available at http://www.who.int/whosis/mme_2005.pdf.

the woman's death.¹⁰ Further, maternal deaths may be underreported in developing countries where routine registration of deaths is not in place and the identification of the true number may require additional special investigations into the cause of deaths.¹¹

Although it is unclear how to best measure maternal mortality, WHO presents various approaches that it employs in its research. The first is the civil registration system, which involves routine registration of births and deaths (this is the ideal method).¹² Second, household surveys are employed to provide an alternative to civil registration systems.¹³ Third, the sisterhood method gathers information through interviews of a sample number of respondents about the survival of all of their adult sisters.¹⁴ Fourth, the reproductive-age mortality studies involve identifying and investigating the causes of all deaths of women of reproductive age in a defined area by using multiple sources of data.¹⁵ In this method, multiple sources of information must be used to identify deaths of women of childbearing age.¹⁶ Fifth, verbal autopsy is used to assign cause of death through interviews with family or community members, where medical certification of cause of death is not available.¹⁷ Records of births and deaths are collected periodically among small populations under demographic surveillance systems maintained by research institutions in developing countries;¹⁸ again there are various limitations. Finally, a census, which could produce estimates of maternal mortality; this approach eliminates sampling errors and hence allows trend analysis.¹⁹ All of these methods have their drawbacks; they are expensive, uncertain, and can be inaccurate.²⁰

The most recent study done by the British Scientific Journal, *The Lancet*, reports a new, lower number of maternal deaths, which they attribute to a more precise methodology.²¹ The methods used by *the Lancet* study were the vital registration data, sibling history from household surveys, data from censuses and surveys, and verbal autopsy studies.²² The improvements were

10. *Id.*

11. *Id.*

12. *Id.* at 6, box 3.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Khan, *supra* note 7, at 1.

22. *Id.*

made possible due to a number of factors. First, The Global Burden of Disease study has refined vital registration data that pinpointed deaths that were misclassified as maternal related deaths.²³ Second, improvements in techniques used for sibling history data were made.²⁴ Third, verbal autopsy studies have been done to measure maternal mortality nationally and subnationally.²⁵ Fourth, estimates of maternal deaths have been compiled from 1970 to 2010.²⁶ Finally, *the Lancet* reports, “methodological developments in other areas have provided improved methods for estimation.”²⁷ The Lancet study took advantage of all of the above resources to compile its numbers on maternal mortality.²⁸ The report, discussed *infra* in part II, also raised the issue of how best to eliminate maternal mortality.

C. *How is maternal mortality eliminated?*

There are two prevailing opinions on how to reduce maternal mortality, the abortion-first approach and the access to basic health care approach. The UN bodies promote the abortion-first approach. The idea with this method is that widely available access to abortion will lower the number of maternal deaths.²⁹ WHO, for example, stated that the realization of MDG 5 will require increased attention to improved health care for women, including prevention of unplanned pregnancies and unsafe abortions, and provision of high-quality pregnancy and delivery care, including emergency obstetric care.³⁰ It appears that they have successfully snuck abortion language into the maternal mortality goal. The UN promotes this abortion-first agenda by disguising it through the terms “unsafe” versus “safe” abortion. WHO considers any legal abortion to be a “safe” abortion. Conversely, any abortions (or related complications) performed in a country where abortions are not legal are considered “unsafe” and suggest that legalization would promote safety.³¹ So, for WHO estimation purposes, safe abortions were defined as those that meet legal requirements in countries in which abortion

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See generally C-Fam, Six Problems with “Women Deliver:” *Why the UN Should Not Change MDG 5*, IORG, Nov. 5, 2007 (Susan Yoshihara, Ph.D), available at http://www.c-fam.org/docLib/20080611_Women_Deliver_final.pdf.

30. WHO, *supra* note 9 at 18.

31. Samantha Singson, *Medical Experts Demand UN Action on Maternal Health, Not “Safe” Abortion* in Catholic Family and Human Rights Institute, Vol. 12, No. 41 (September 23, 2010).

is legally permitted under a broad range of criteria.³² As a result, any abortion complication occurring in a country where it is not legally sanctioned is considered a result of an “unsafe abortion,” which suggests the need for legalization.³³

In addition to WHO, International Planned Parenthood Federation (IPPF) is a proponent of the abortion-first strategy. Notably, IPPF had a 2008 income of almost 120 million dollars.³⁴ The number of abortion related services it provided doubled from the previous year and it is pushing to increase these services worldwide.³⁵ Despite evidence to the contrary, Planned Parenthood Federation of America, has emphasized that “[n]o effective maternal health improvements can occur without comprehensive reproductive healthcare, including access to contraception and safe abortion in the initiative.”³⁶ This statement is evidence of its agenda to promote abortion and inflate the organization’s income accordingly.

Those promoting access to basic health care maintain that increased abortions will not solve the problem, but will in fact make it worse.³⁷ Studies show that when abortion is legalized the number of abortions rises, as well as, the number of deaths among women.³⁸ In a country where access to basic health care is lacking, the effects of this could be devastating.³⁹ An abortion is a surgical procedure that requires sanitary medical equipment, emergency facilities and antibiotics; many developing countries are without these things, causing a risk to the woman and child.⁴⁰ Proponents of basic health care argue that what is needed is an improvement in the medical attention that these women receive.⁴¹ For example, Jeanne Head, UN representative for the National Right to Life Education Trust Fund promotes the view that the key to maternal health is in basic medical care improvements.⁴² In an intervention at the Economic and Social Council (ECOSOC) Annual

32. Sedgh, et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, LANCET Oct. 2007.

33. WHO, UNICEF, UNFPA, WORLD BANK, *Trends in Maternal Mortality: 1990-2008*.

34. International Planned Parenthood Federation [hereinafter IPPF], Annual Performance Report for 2008-2009.

35. *Id.*

36. Terrence McKeegan, *G8 Countries Launch Global Initiative on Maternal Health without Reference to Abortion* Catholic Family and Human Rights Institute, Vol. 13, No. 29, 1 July 2010.

37. National Right to Life Educational Trust Fund and Minnesota Citizens Concerned for Life Global Out Reach, *Does Legalizing Abortion Protect Women’s Health?* (2009) available at <http://www.mccl.org/Document.Doc?id=250>.

38. *Id.*

39. *Id.*

40. *Id.*

41. Jeanne Head, R.N., National Right to Life Educational Trust Fund, ECOSOC AMR & High Level Segment delivered (July 1, 2010) (quoting WHO, *Maternal Mortality: A Global Fact Book*, 1991).

42. *Id.*

Ministerial Review, Head quotes WHO as stating, “[t]he majority of maternal mortality occurs in the developing world” and further that “declines from the 1940’s to 1950’s coincided with the development of obstetric techniques, the availability of antibiotics and improvement in the general health status of women.”⁴³ She, along with many others, believes that legalization of abortion is not the answer and the complications from abortions will exist, whether they are legal or illegal.⁴⁴ By simply looking at the main causes of these deaths, i.e., excessive bleeding and infection, it seems apparent that basic health care, a sanitary environment, and skilled birth attendants would be the obvious solution. WHO acknowledged this fact in its 2003 Report entitled, *Unsafe Abortion*, stating, “[i]n some countries, lack of resources and possibly skills may mean that even abortions that meet the legal and medical requirements of the country would not necessarily be considered sufficiently safe in high-resource settings.”⁴⁵ Although WHO must admit this seemingly evident fact, the organization continues to lobby for reproductive rights as the solution.⁴⁶

D. *What Do the Abortion Trends Show Among Various Countries?*

Comparisons between countries with restrictive abortion laws and those with more liberal laws are important to examine and are very revealing of the appropriate solution. In South Africa for example, there has been a “surge” in maternal deaths.⁴⁷ South Africa has some of the most liberal abortion laws in Africa, as well as the world, permitting abortion through the twentieth week for “socio-economic” reasons.⁴⁸ In comparison, Mauritius has the lowest African maternal mortality rate of any African nation, and it also has some of the most conservative laws on abortion.⁴⁹ The country of Chile has the lowest maternal mortality rate in South America, which constitutionally protects its unborn.⁵⁰ On the contrary, Guyana, a country with very loose abortion laws, has a maternal mortality rate that is thirty times higher than

43. *Id.*

44. *Id.*

45. WHO, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2003* (5th ed. 2007).

46. *Id.*

47. IPPF, *South Africa: Huge Surge in Maternal Deaths*, 27 July 2009. See also Aracely Ornelas, UN Health Data Show Liberal Abortion Laws Lead to Greater Maternal Death, Catholic Family and Human Rights Institute, Vol. 12, No. 35, August 2009.

48. www.un.org/esa/population/publications/abortion/doc/southafrica.doc, South Africa, Abortion Policy.

49. Ornelas, *supra* note 43.

50. *Id.*

Chile.⁵¹ Very insightful, is the reasoning used in liberalizing Guyana's law, which was "to enhance the 'attainment of safe motherhood' by eliminating deaths and complications associated with unsafe abortion."⁵² The contradiction in the reasoning used by Guyana is self evident; by "safe motherhood" they must be referring to no motherhood.

The UN Population Division released *The World Mortality Report: 2005*, which shows many more examples of countries showing negative effects of permissive abortion laws.⁵³ For example, two countries that have very liberal abortion laws, but are also highly developed are the United States and Russia. Interestingly, when these two countries are compared with two countries with strict pro-life laws, namely, Ireland and Poland, the number of maternal deaths shows a direct decline with the country's protection of the unborn.⁵⁴ Ireland has the lowest maternal mortality rate of all countries, "a nation that prohibits abortion and whose constitution explicitly protects the rights of the unborn."⁵⁵ The low death rates in Ireland and Poland can be linked with "skilled birth attendants and access to emergency obstetric care."⁵⁶

An example of the striking opposition between the two abortion "sides" occurred when Sweden eliminated its funding, reported to be twenty million dollars in foreign aid, to Nicaragua following the country's amendments to its laws granting full protection to prenatal life.⁵⁷ In addition, the human rights organization, Amnesty International, reported that Nicaragua's maternal death rates had actually increased following the implementation of the new laws.⁵⁸ The statistics, however, show that they have in fact declined.⁵⁹ Yet another example of the correlation between abortion laws and low maternal deaths are the maternal mortality rates of the South East Asia regions of Nepal and Sri Lanka. Nepal has no restrictions on abortions and has "the region's highest rate of maternal mortality".⁶⁰ Sri Lanka, on the

51. *Id.* See also The Christian Medical Fellowship, *The Untold Truth about Abortion in Kenya*, available at <http://www.eaclj.org>.

52. Ornelas, *supra* note 47.

53. Bradford Short, J.D., *U.N. Data Show Banning Abortion Doesn't Increase Maternal Mortality*, Catholic Family and Human Rights Institute, Vol. 9, No. 9, February 17, 2006.

54. *Id.*

55. Ornelas, *supra* note 47.

56. Samantha Singson, *Permissive Abortion Laws May Be Hazardous To Mothers' Health*, Catholic Family and Human Rights Institute, Vol. 12, No. 52, Dec. 10, 2009.

57. Ornelas, *supra* note 47.

58. *Id.*

59. *Id.*

60. *Id.*

other hand, has the lowest rate in the region, “with a rate fourteen times lower than Nepal.”⁶¹

Not only is it important to compare countries, but also, to study more closely those with low mortality rates. Dr. Elard Koch, an epidemiologist and Professor of Medicine at the University of Chile, stated that “from 1960 onwards, there has been a breakthrough in the public health system and primary care . . . highly trained personnel, the construction of many primary health centers and the increase of schooling of the population.”⁶² The data that he produced showed that the most important component in reducing maternal deaths is “accessibility to professional birth attendants in a hospital setting.”⁶³ Dr. Koch pointed to the importance of better education and medical care in improving maternal health and the direct correlation between them.⁶⁴ Even former leading abortionist, Dr. Bernard Nathanson, wrote in 1979 that “the argument that women could die from dangerous, illegal abortions in the United States ‘is . . . obsolete’ because ‘antibiotics and other advances [have] dramatically lowered the abortion death rate.’”⁶⁵ Another important aspect of Koch’s study was the finding that therapeutic abortions⁶⁶ do not decrease maternal mortality rates.⁶⁷ In actuality, Koch found that when Chile banned therapeutic abortion, the number of maternal deaths decreased.⁶⁸

It would also be prudent to look at the historical declines in maternal mortality and study what was happening legally and medically during these declines. Irvine Loudon, writing for the *American Journal of Clinical Nutrition* points out in a comprehensive analysis of the 1937 decline in the maternal death rate, that the main factors leading to this decline were the successive improvements in maternal care.⁶⁹ These improvements took place at a time before abortion laws were liberalized.⁷⁰ There also remains a concern over introducing abortion in a developing world setting without first

61. *Id.*

62. Susan Yoshihara & Piero Tozzi, *Chilean Maternal Mortality Study Undercuts Pro-Abortion Claims*, Catholic Family and Human Rights Institute, Vol. 13, No. 9, Feb. 11, 2010.

63. *Id.*

64. *Id.*

65. National Right to Life Educational Trust Fund and Minnesota Citizens Concerned for Life Global Outreach, *Does Legalizing Abortion Protect Women’s Health?* (2010).

66. Therapeutic abortion is performed to save the life of the mother as opposed to an elective abortion performed for any other reason. Elective Abortion, eMedicine Obstetrics and Gynecology, <http://emedicine.medscape.com/article/252560-overview> (last visited Mar. 12, 2011).

67. Lauren Funk, *Chile and Holy See Call on UN Commission to Protect the Unborn Child*, LIFE SITE NEWS, (Mar. 10, 2011).

68. *Id.*

69. Irvine Loudon, *Maternal Mortality in the Past and its Relevance to Developing Countries Today*, 72 AM. SOC’Y CLINICAL NUTRITION, 241S-246S (2000).

70. *Id.*

improving basic maternal health; doing so could result in an increase in the risk of maternal death due to the inability of health systems to respond to complications from invasive procedures such as abortion.⁷¹

Not only are mothers affected in this battle, but also, of utmost importance is the child, who is in potential harm from either abortion or complications from a birth without adequate medical care. The highly ratified UN Declaration of the Rights of the Child explicitly states, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”⁷² The UN Convention on the Rights of the Child (CRC) is the binding treaty declaring the rights of children⁷³. The treaty holds that every child has the inherent right to life.⁷⁴ Both the born and unborn child has rights that are inherent in his or her dignity as a human person, as declared by the highly cited, Universal Declaration of Human Rights.⁷⁵ The most notable binding international declarations have recognized this inherent dignity.⁷⁶ Taking it one step further, the American Convention on Human Rights declares that the child has these rights from the moment of conception and shall not be deprived of his life.⁷⁷ What these binding documents hold evident is that a child’s right to life is inherent, while the right to abortion appears to be convoluted. The child’s right to life is being pitted against the mother’s “right to life,” meaning her freedom to abort her child and live her life the way she wishes. However, as is apparent from these documents, killing the child is not an acceptable way to deal with the woman’s “dilemma.” One human’s life is not more valuable than another.

71. *Id.*

72. John Keown, *International Human-Rights Law and the Unborn Child*, National Review Online, available at <http://www.nationalreview.com/bench-memos/247662/international-human-rights-law-and-unborn-child-john-keown>.

73. Convention on the Right of the Child, G.A. Res. 44/25, at 167, preamble ¶ 9, U.N. GAOR, U.N. Doc. A/44/49 art. 1 (Nov. 20, 1989) [hereinafter CRC] (a child is defined as “any human being below the age of eighteen”).

74. *Id.* at art. 6.

75. Universal Declaration on Human Rights, G.A. Res. 217, at 71 Preamble ¶ 1, U.N. GAOR, 3d Sess., 183d plen. Mtg., U.N. Doc. A/810 (Dec. 12 1948).

76. *Id.* See also International Declaration on Human Rights, G.A. Res. 217A, at 71, Preamble ¶ 1, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966). See also International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A(XXI), at 46, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (1966).

77. American Convention on Human Rights art. 4 ¶ 1, Nov. 22, 1969, O.A.S.T.S. 36.

II. STATISTICAL MANIPULATION

It seems as though it would be obvious that accurate data records are essential to pinpointing the weak areas in the goal of improving maternal health; however, these numbers have been manipulated. As mentioned in Part I, *C supra*, WHO measures data using categories of “safe” and “unsafe” abortions. These terms provide a smokescreen for abortion-pushing policy makers. WHO defines unsafe abortions as abortions in countries with restrictive abortion laws.⁷⁸ Therefore, in a country where abortions are illegal, the abortion will be determined to be “unsafe” even if in the best possible medical facilities. The same is true for countries where abortion is legal, meaning “regardless of the subsequent morbidity and mortality which follows, (the abortion) is considered ‘safe.’”⁷⁹ Dr. Donna Harrison for the International Organizations Research Group, points out that a spontaneous abortion could not be illegal; therefore, the terms “safe” and “unsafe” are more legal than medical.⁸⁰ Next, Harrison points out that, “statistical manipulation generates further inaccuracy in estimates of morbidity and mortality from elective abortion worldwide.”⁸¹ She quotes the 2004 WHO report, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000* as acknowledging: “[f]or the purpose of these calculations and to circumvent the problem of induced abortion being misreported as spontaneous abortion, it was considered more reliable to use the combined incidence of spontaneous and induced abortion, when available, and to correct for the incidence of spontaneous abortion.”⁸² The problem with this seems to be apparent and the potential impact that could result from the changes to such important and sensitive data is significant. Therefore, the problem is the inflation of the number of maternal deaths. If we do not have an accurate measurement, tracking the success of various approaches to the problem will be impossible.

Dr. Harrison, brings forth a shocking and current example of this statistical manipulation when WHO researchers spoke at the UN sponsored,

78. David A. Grimes et al., *Unsafe abortion: the Preventable Pandemic*, LANCET (Sexual and Reproductive Health Series) October 2006.

79. Donna J. Harrison, M.D., *Removing the Roadblocks from Achieving MDG 5 by Improving the Data on Maternal Mortality: How Faulty Definitions of “Abortion,” “Safe Abortion,” and “Unsafe Abortion” in Reproductive Health Indicators for Global Monitoring Lead to Miscalculating the Causes of Maternal Mortality*, International Organizations Research Group, briefing paper, no. 5, May 1, 2009.

80. *Id.*

81. *Id.*

82. *Id.* (quoting WHO, *Unsafe Abortion, Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000*, available at http://www.who.int/reproductivehealth/publications/unsafe_abortion/9241591803/en/index.html).

Women Deliver Conference. At this conference, in October of 2007, Dr. Cindy Stanton, a WHO researcher, said, “[t]o participate in interpretation of pregnancy-related deaths requires that one be committed to ‘adjust the data.’”⁸³ It was later explained that to “adjust the data” meant, “eyeballing it to see if it makes sense from what we expect.”⁸⁴ She emphasized the importance especially with “pregnancy-related deaths.”⁸⁵ She explained the process by stating, “[w]e adjust the number of births or the number of deaths and we don’t change the number of pregnancy-related mortality.”⁸⁶ She went on to say that sometimes they would make “huge adjustments” to more than 50 percent of the numbers in order to “make them turn out right.”⁸⁷ Awareness of the manipulation of statistics is the first step to gaining control of the number of pregnancy related deaths. We must start with an accurate count before we proceed with a solution.

WHO’s 2006 report on sexual and reproductive health also promotes the abortion-first method of lowering maternal mortality.⁸⁸ The report addresses the issue of maternal health by focusing on specific areas of concern. Programs have been implemented to reduce preeclampsia⁸⁹ in women by administering calcium supplements to pregnant women in developing countries, which they found to be successful.⁹⁰ The report goes on to discuss the importance of skilled birth attendants.⁹¹ While the initial discussion seems promising and logical, eventually it takes a different turn. The prevention of unsafe abortion seems to take center stage of the report. It states, “[a]s a preventable cause of maternal mortality and morbidity, unsafe abortion must be dealt with as part of the MDG on improving maternal health and other international development goals and targets.” The difference between safe and unsafe abortions is that legal abortions are safe abortions.⁹² Studies conducted by the Special Programme of Research, Development and Research Training in Human Reproduction (HRP) found that first-trimester

83. *Id.*

84. *Id.* (words of Dr. Stanton, WHO researcher).

85. *Id.*

86. *Id.*

87. *Id.*

88. WHO, *Sexual and Reproductive Health: Laying the Foundation for a More Just World Through Research and Action*, Biennial Report 2004-2005, 2006.

89. (Preeclampsia is defined by Mayo Clinic as “a condition of pregnancy marked by high blood pressure and excess protein in your urine after 20 weeks of pregnancy . . . [it] often causes only modest increases in blood pressure.”) Preeclampsia, MAYO CLINIC, <http://www.mayoclinic.com/health/preeclampsia/DS00583> (last visited Mar. 12, 2011).

90. WHO, *supra* note 88.

91. *Id.* at 9.

92. *Id.* at 21.

abortions performed by mid-level-health-care providers were equated to those performed by doctors in terms of safety.⁹³ This means that in poorer, developing countries, “safe” abortions could be available even when physicians were not.⁹⁴ It goes on to discuss making medical abortions safer through various means.⁹⁵ Finally, it states, “[s]ince contraception and abortion are two means of regulating fertility, it seems self-evident that increased use of contraception will lead to a decrease in induced abortion. However, in some countries, rising levels of contraceptive prevalence have been accompanied by a rise in the number of abortions.”⁹⁶ A recent study published in the journal *Contraception* proves that very point. The study was done in Spain and was conducted over a period of ten years on about two thousand women.⁹⁷ The researchers found that as the number of women using contraceptives increased (49% to 79%) the abortion rate more than doubled (from 5.52 per 1000 women to 11.49).⁹⁸ This study suggests that when contraception fails, abortion becomes the substitute “contraception” for these women facing motherhood.⁹⁹

IPPF takes a similar approach to the issue of maternal mortality. One of IPPF’s regional directors stated that “[u]niversal access to reproductive health is key to achieving the Millennium Development Goals.”¹⁰⁰ IPPF explains how reproductive health was not originally included in the plan to lower maternal mortality in regard to MDG 5. Further, it was not until 2007 that universal access to reproductive health was included in the plan to increase maternal health.¹⁰¹ In September of 2010, IPPF’s general director made a statement saying, “[t]hese investments . . . will require the need for the provision of safe, legal abortion as a key health intervention in order to prevent the needless deaths of 70,000 women and girls each year”¹⁰²

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 24.

97. Patrick B. Craine, *Contraception Linked to Massive Rise in Abortion Rate*, LIFESITENEWS.COM, <http://www.lifesitenews.com/news/new-study-links-contraception-hike-with-increased-abortions/> (last visited Jan. 5, 2011).

98. *Id.*

99. *Id.*

100. IPPF, *IPPF Launches Initiative on Universal Access to Reproductive Health*, available at <http://www.ippfwhr.org/en/content/ippf-launches-initiative-universal-access-reproductive-health> (last visited Sept. 17, 2011).

101. *Id.*

102. Gill Greer, IPPF, Statement at Roundtable 2 – Health and Education, MDG Summit (Sept. 20, 2010), <http://www.ippfwhr.org/en/speech/statement-roundtable-2---health-and-education-mdg-summit> (last visited Sept. 20, 2010).

From these comments it is evident that IPPF has the agenda of increasing the number of abortions disguised as its solution to maternal deaths.

As mentioned above, Jeanne Head, a representative of the International Right to Life Federation believes that it is a lack of basic medical care that is keeping the number of maternal deaths from decreasing further.¹⁰³ An experienced obstetric nurse, Ms. Head emphasizes that “it is never necessary to directly attack the unborn child to protect the health of the mother”¹⁰⁴ WHO has reported that “the dramatic decline in maternal deaths from 1940 to 1950 coincided with the development of obstetric techniques, the availability of antibiotics and improvement in the general health status of women.”¹⁰⁵ It is very telling when those formerly within the abortion movement reveal facts that they previously worked to conceal. A former medical director for Planned Parenthood, Dr. Mary Calderone in 1960 stated that “it was no longer necessary to be concerned with abortions being dangerous because doctors were performing the abortions both legally and illegally.”¹⁰⁶ Although this seems logical and perhaps obvious when stated, there are still abortion proponents arguing that women are put at risk from illegal abortions because somehow the person performing them will be less skilled; again, it is a game of semantics.

As stated previously, WHO also acknowledged that legalized abortions will lead to more abortions, and this increase in abortions will cause an increase in maternal deaths (due to lack of basic medical care for the mother).¹⁰⁷ Ms. Head points out that whether abortions are legalized or not, without basic health care the woman is at risk during a birth or an abortion.¹⁰⁸ Further, as we have seen in the U.S., when abortion is made legal, the number of abortions performed rises, which would lead to the number of maternal deaths rising as well.¹⁰⁹ Ms. Head uses comparisons among countries with liberal abortion laws with those that have strong abortion restrictions. For example, “in India abortion is broadly legal, but maternal deaths are common due to dangerous medical conditions.”¹¹⁰ According to

103. Head, *supra* note 41. See also National Right to Life Educational Trust fund and Minnesota Citizens Concerned for Life Global Out Reach, Does Legalizing Abortion Protect Women’s Health?

104. Head, *supra* note 41.

105. *Id.*

106. Mary S. Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH (July 1960) (“Abortion, whether therapeutic or illegal, is in the main no longer dangerous, because it is being done well by physicians.”).

107. Head, *supra* note 41.

108. *Id.* See also National Right to Life Educational Trust fund and Minnesota Citizens Concerned for Life Global Out Reach, Does Legalizing Abortion Protect Women’s Health?

109. Head, *supra* note 41.

110. *Id.*

Abortion Policies: A Global Review by the UNPD, “[d]espite the liberalization of the abortion law, unsafe abortions have contributed to the high rates of maternal mortality in India.”¹¹¹ Conversely, the maternal mortality rate in Paraguay is much lower, despite the prohibition of most abortions and the fact that “clandestine abortion is common.”¹¹² Head emphasizes the fact that abortion is never safe for the mother and obviously the defenseless child.¹¹³ Mothers are often harmed emotionally and physically by their abortions.¹¹⁴ A report by the National Right to Life Educational Trust Fund points out that,

[o]ften there is no birth attendant, the medical environment is not fully sanitary, emergency facilities and supplies are absent or inadequate, doctors are not trained or equipped to handle trauma, and basic medical and surgical supplies such as antibiotics and sterile gloves are scarce or unavailable. These dangers to pregnant women are present whether a pregnancy is ended by abortion or live birth.¹¹⁵

On May 8, 2010 the debate came to a head when *The Lancet* published a research report revealing flawed maternal mortality rates by the UN.¹¹⁶ The researchers were able to show a significant decline in maternal deaths, from 526,300 (number reported by WHO) in 1990 to 342,000 in 2008, for the first time in almost two decades.¹¹⁷ This data shows a drastic 35 percent drop in abortions over the course of just under twenty years. The reasons for the decline given in the study are: the declining pregnancy rates in some countries, higher income per capita, higher education rates for women, and increasing availability of basic medical care (including skilled birth attendants).¹¹⁸ Another important finding in the study was that 60,000 maternal deaths were attributed to HIV/AIDS and could be combated with access to antiretroviral drugs.¹¹⁹ Half of the maternal deaths came from the

111. National Right to Life Educational Trust Fund and Minnesota Citizens Concerned for Life Global Outreach, *Does Legalizing Abortion Protect Women's Health?* (2009), available at <http://www.mccl.org/document.doc?id=250> (citing United Nations, *Abortion Policies: A Global Review* (New York: United Nations, 2002), Sales No. E.01.XIII.18, 56-58).

112. Head, *supra* note 41.

113. *Id.*

114. *Id.*

115. National Right to Life Educational Trust Fund and Minnesota Citizens Concerned for Life Global Outreach, *supra* note 111.

116. Margaret C. Hogan et al., *Maternal Mortality for 181 Countries, 1980-2008: A Systematic Analysis towards Millennium Development Goal 5*, 375 LANCET 9726 1609, 1609-1623 (2010).

117. *Id.*

118. *Id.*

119. *Id.*

following countries: India, Nigeria, Pakistan, Afghanistan, Ethiopia and the Democratic Republic of the Congo. The majority of these countries have permissive abortion laws.¹²⁰ The study was revealing in drawing attention to the fact that the developed countries of the United States, Canada, and Norway have seen rises in maternal mortality numbers.¹²¹

The new numbers could mean that maternal mortality is declining and this would hamper the abortion advocates push for legalized abortion on demand.¹²² In fact, a report published on LifeSite News stated that “U.N. staff and abortion advocates told scientists they should ‘harmonize’ their findings or discuss them ‘in a locked room’ so that the press could not report maternal death numbers that conflicted with the ones they use to lobby policy makers and major international donors.”¹²³ They further report that “[w]hen he published the IMHE study, Horton told the press that he withstood significant pressure from activists not to release it until after major global funding conferences concluded this year; these include the G8 summit, UN General Assembly, and next week’s Women Deliver conference.”¹²⁴ It is obvious from these statements that organizations such as WHO and IPPF have been using the maternal mortality issue to push their abortion agenda.¹²⁵ Without the high numbers previously reported, these organizations may no longer have the opportunity to do so.¹²⁶ IPPF reports numbers of around one million dollars worth of abortion services worldwide and donations from various countries as well as groups such as The United Nations Population Fund and WHO.¹²⁷ In 2009, the IPPF had an income of 140 million dollars.¹²⁸ One of IPPF’s top five goals listed in the organization’s report was abortion.¹²⁹ It is obvious that IPPF and the UN have a vested interest in each other and will stop at nothing to reach the organizations’ “goals.”

120. *Id.*

121. *Id.*

122. Susan Yoshihara & Catherine Foster, *Researchers Asked to Hide Scientific Debate Over Maternal Deaths*, LIFE SITE NEWS, (June 3, 2010), <http://www.lifesitenews.com/news/archive/ldn/2010/jun/10060307>.

123. *Id.*

124. *Id.*

125. Steven Ertelt, *UN: Maternal Mortality Declines by One-Third Despite No Abortion Legalization*, Lifenews.com, <http://www.lifenews.com/2010/09/15/int-1645/> (15 Sept. 2010).

126. *Id.*

127. Samantha Singson, *Intl Planned Parenthood Report: 140M Income, More United Nations Money*, Lifenews.com, <http://www.lifenews.com/2010/06/03/int-1566/> (3 June 2010).

128. *Id.*

129. *Id.*

III. COMPARISONS AMONG VARIOUS APPROACHES TO MATERNAL MORTALITY

The UN's position on how to reduce maternal mortality differs from the Holy See and the Catholic Church's position.¹³⁰ There are a handful of non-binding UN documents requiring a reduction in maternal mortality through contraception and abortion. First, the 1994 Cairo Conference on Population and Development resolved to reduce mortality by half of the levels reached in the 1990s by the year 2000 and by half again by 2015.¹³¹ The Cairo document states that abortion should be avoided and should not be promoted as a method of family planning.¹³² The Holy See on the other hand has always promoted life and dignity above all else. The Holy See is a sovereign subject of international law that focuses its mission on morality and the general welfare of mankind.¹³³ In this sense, the Holy See's view is respected among the international community and has the capability to enter into binding agreements with States in the international sense.¹³⁴ In response to the UN, the Holy See supports any efforts to reduce maternal deaths and improve women's health. However, it emphasizes the dignity of the individual in all efforts to lower the rates of maternal deaths. The Holy See also states that while it will support the idea of "reproductive health," there needs to be a focus on holistic health.¹³⁵ By holistic health the Holy See is referring to treating minds and bodies in regard to what is best for them in their sexuality.¹³⁶ The Holy See regards the UN's current focus of reproductive health as too individualistic and states that a greater focus should be placed on irresponsible behavior.¹³⁷ The Holy See goes on

130. *Contra* International Conference on Population and Development, Summary of the Programme of Action, <http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm>.; see Archbishop Renato R. Martino, Statement of Holy See-International Conference on Population and Development, (Sept. 7, 1994), available at <http://www.un.org/popin/icpd/conference/gov/940908193315.html>.

131. International Conference on Population and Development, Summary of the Programme of Action, available at <http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm>.

132. Brian Scarnecchia & Terrance McKeegan, *White Paper on The Millennium Development Goals In Light of Catholic Social Teaching*, International Organizations Group, available at http://www.c-fam.org/docLib/20090904_IORG_W_Paper_Number10.pdf Brian Scarnecchia.

133. Robert John Arujo, S.J., *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291 330-345 (2001).

134. *Id.* at 345.

135. Archbishop Renato R. Martino, Statement of Holy See-International Conference on Population and Development, (Sep. 7, 1994), <http://www.un.org/popin/icpd/conference/gov/940908193315.html>.

136. *Id.*

137. *Id.*

to say that education of “adolescents towards mature and responsible behavior” is key to keeping women from being exploited sexually.¹³⁸ The educators of these young women, the Holy See believes, should be the parents and they should “draw attention to the negative aspects of premature sexual activity . . . and endeavor to foster mature behavior on the part of adolescents.”¹³⁹

Second, the 1995 Beijing Conference for Women also addressed the issue of maternal mortality. The goal of maternal death reductions remained the same from the 1994 Conference discussed above.¹⁴⁰ This conference was followed by Beijing +5, +10, and +15 all addressing maternal mortality. These meetings were focused on women’s health, education, and political needs.¹⁴¹ For example, at the Beijing + 15, IPPF lobbied for universal access to abortion as a human right.¹⁴² The Holy See held a decisive view in regard to chapter IV; section C of the statement from the 1995 Conference. Chapter IV, section C addressed women and health and stated, “[r]eproductive health . . . implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.”¹⁴³ In other words, it becomes about the individual person and his or her interests and not about self-giving and certainly not about the rights of the child. The conference document also discusses “unsafe” abortions and the need to improve this situation through “family planning” methods.¹⁴⁴ The Holy See felt that there was a “totally unbalanced attention to sexual and reproductive health in comparison to women’s other health needs.”¹⁴⁵ The Holy See also stated that it could not accept the ambiguous language used in the statements at the Conference, stating, “it could be interpreted as societal endorsement of abortion or homosexuality.”¹⁴⁶ Holy See representative, Mary Ann Glendon addressed the 49th Session of the Commission on the Status of Women in 2005 at the Beijing + 10. In her address she emphasized “motherhood” to the delegates

138. *Id.*

139. *Id.*

140. The United Nations Fourth World Conference on Women, Platform for Action <http://www.un.org/womenwatch/daw/beijing/platform/health.htm>.

141. Kristin Evans, *UN Conference Battles to Define Vision for Achieving Better World for Women*, NATIONAL CATHOLIC REGISTER, http://www.ncregister.com/daily-news/un_conference_battles_to_define_vision_for_achieving_better_world_for_women/.

142. *Id.*

143. The United Nations Fourth World Conference on Women, Platform for Action, *supra* note 140.

144. *Id.*

145. Mary Ann Glendon, Holy See’s Final Statement at Women’s Conference in Beijing, (Sept. 15, 1995), <http://www.its.caltech.edu/~nmcenter/women-cp/beijing3.html>.

146. *Id.*

and made the point that the UN founders strived to bring about both equality for women and protection of the family, motherhood and childhood.¹⁴⁷

In regard to MDG 5, the Holy See continues to advocate a holistic approach to health for women, which does not exclusively focus on a single aspect of a woman, but on her overall and comprehensive health care needs. Furthermore, women have the right to the highest standard of health care during pregnancy and the right to deliver children in a clean, safe environment, with adequate professional help.¹⁴⁸

There are a group of bodies that oversee the implementation of the international human rights treaties for the UN, these committees include the following: the Committee on the Elimination of Discrimination against Women (CEDAW), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Rights of the Child (CRC), Committee on Economic, Social and Cultural Rights (CESCR), and the Human Rights Council (HRC).¹⁴⁹ All of the aforementioned monitoring bodies promote similar concerns about maternal mortality numbers and call for access to reproductive health services, reproductive health education, prohibition of child marriages, protecting women from discrimination, better access to health care service and safe abortion services, and ensuring access to contraceptives.¹⁵⁰ Because no binding UN treaty contains the language of a “right to an abortion,” CEDAW and HRC have used the phrase “right to life” from the treaties as justification for abortion.¹⁵¹ These groups believe that women’s right to life should be protected through abortions. The issue then becomes the right to life of the baby versus the right to be free from motherhood. The Holy See advocates for “right to life” meaning the mother and child both should be given the opportunity to life.¹⁵² Archbishop Tomasi, Permanent Observer at the UN for the Holy See, says that the mother and child’s right to life would be protected by clean and adequate health care and the babies allowed to be born into this world.¹⁵³

147. Scarnecchia *supra* note 132.

148. Scarnecchia *supra* note 132.

149. United Nations Human Rights: Office of the High Commissioner for Human Rights, Human Rights Bodies, <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.

150. Center for Reproductive Rights, *Maternal Mortality in India: Using International and Constitutional Law to Promote Accountability and Change*, available at, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_br_maternal_mortality_in_india_2009.pdf.

151. Samantha Singson, C-FAM, *CEDAW Committee Abortion Misinterpretations Infect Human Rights Committee*, C-FAM, (Sept. 5, 2008), <http://www.c-fam.org/fridayfax/volume-11/cedaw-committee-abortion-misinterpretations-infect-human-rights-committee.html>.

152. EWTN News, *Holy See says Maternal Deaths Must be Combated while Respecting Rights of Children*, (Jun 18, 2010), <http://www.ewtnnews.com/catholic-news/Vatican.php?id=971>.

153. *Id.*

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has taken the view that “discrimination on grounds of gender, race, ethnicity, and other social factors is a social determinant of health.”¹⁵⁴ Illegal abortions, to them, means discrimination against women, therefore, this is a violation against a fundamental right that they possess.¹⁵⁵ The binding Human Rights Resolution 11/8 also generally endorses the idea that maternal mortality can be eliminated through anti-discrimination treaties and improvements in physical and mental health, including sexual and reproductive health.¹⁵⁶

There are various other initiatives that are promoting the reduction of maternal mortality. For example, the G8 summit launched a new global initiative on maternal and child health, the Muskoka Initiative, “to accelerate progress towards the MDGs dealing with maternal and child health.”¹⁵⁷ The initiative did not explicitly endorse abortion as a means to reduce the numbers. It did however; include the following language, “universal access to reproductive health by 2015.”¹⁵⁸ It is important to note that no binding document came from this initiative, it was just another attempt to push abortion into the women’s health issue. The UN-sponsored Women Deliver Conference 2010 also promoted abortion as a solution to maternal health. This conference had invented the UN’s Safe Motherhood Initiative twenty years earlier and the most recent conference attached abortion to maternal health.¹⁵⁹ The Vatican has replied to the UN by urging them to “honor motherhood.”¹⁶⁰ The Vatican goes on to say that men and women are not the same and “equality is not sameness.”¹⁶¹

A common thread between the UN and the Catholic Church’s position on this issue is the protection of basic human rights.¹⁶² It appears that the UN and the Catholic Church have the same end goal; it is in the means of getting to that goal on which they differ. The UN puts it as the right to survive

154. *Restrictive Regulation of Abortion and the Right to Health*, 18 Oxford J. Med. L. Rev. 2, 185-212 (2010) (“Special Rapporteur” is someone who is representing the United Nations).

155. *Id.*

156. United Nations, General Assembly, Report of the Human Rights Council on its eleventh session, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/167/66/PDF/G0916766.pdf?OpenElement>.

157. McKeegan *supra* note 36.

158. *Id.*

159. Wendy Wright & Susan Yoshihara, *Women Deliver a Ruse: Conference Organizers Push Abortion Cloaked as Health Issue*, WASHINGTON TIMES, June 4, 2010, <http://www.washingtontimes.com/news/2010/jun/4/women-deliver-a-ruse/>.

160. Kathleen Gilbert, *Vatican to UN: to Truly Empower Women, Honor Motherhood*, LIFESITENEWS.COM (8 July 2010), <http://www.lifesitenews.com/news/archive/ldn/2010/jul/10070811>.

161. *Id.*

162. Center for Reproductive Rights *supra* note 150.

pregnancy and childbirth—meaning the woman.¹⁶³ The Holy See on the other hand focuses on both the mother and the child.

CONCLUSION

The UN and the WHO have inflated key numbers regarding maternal deaths in order to encourage donors to fund projects which promote “contraception and abortion” as the key approach to lowering maternal mortality. Accurate scientific research and historical data provide the guide for effectively addressing the problem. Better access to basic health care and not legalization of abortion has been shown to be the best solution by those in the health and science fields. The promotion and implementation of abortion puts the rights of the child in direct conflict with the rights of the parents and specifically, the mother.

With a better understanding of the methodology, *The Lancet* report has produced more accurate numbers that suggest that maternal mortality can be reduced by increasing the availability of basic medical care. The UN and the Holy See are at odds on the best way to address maternal mortality. The UN focuses on “reproductive health,” i.e., access to abortion as the solution to maternal deaths. Whereas the Holy See refers to binding international documents citing a right to life for the unborn and the dignity of all life. The Holy See further encourages the UN to implement better access to basic medical care in developing countries.

163. *Id.*