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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.CIssue>.

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 to 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.

fideliy to it,⁷⁰ they are the juridical, legislative, and executive authorities within their respective dioceses. In this regard, each bishop enjoys the cooperation of the priests who assist the bishop in his pastoral care of the diocese which each bishop heads.⁷¹ Moreover, each diocese, which is headed by a bishop, is a separate legal person—it is not a wholly owned “subsidiary” or subdivision of the Holy See—by reason of the CCL.⁷²

Again, while a candidate for bishop is nominated and appointed to a diocese by the pope,⁷³ he, the bishop, possesses the sole authority of pastoral care of, teaching in, and ruling of the diocese.⁷⁴ This means that while he is in communion with the pope and the other bishops, he is entrusted to lead his diocese in accordance with the Church’s teachings and law, which includes provisions regarding the abstinence from any and all sexual activities with anyone else as is addressed elsewhere in this article. In short, it is the bishop—not the pope and not the Holy See—who heads the Church in a particular diocese. In this context, each bishop does not follow detailed instructions from the pope or any Roman official in executing his ecclesial and other responsibilities. While it is not specifically stated that a bishop receives support from the diocese of which he is in charge, he is also a priest, and all priests who work in their dioceses are supported, i.e., paid, by their diocese.⁷⁵ It is clear that when a bishop submits his resignation at the age of

69. 1983 CODE C.377, § 1, “The Supreme Pontiff freely appoints bishops or confirms those legitimately elected.”

70. 1983 CODE C.380, “Before he takes canonical possession of his office, the one promoted is to make the profession of faith and take the oath of fidelity to the Apostolic See according to the formula approved by the Apostolic See.”

71. *See id.* at c.369.

72. *Id.* at c.373 (“It is only for the supreme authority to erect particular churches; those legitimately erected possess juridic personality by the law itself.”).

73. *See id.* at c.377, § 1.

74. *See id.* at c.375, § 2 (“Through episcopal consecration itself, bishops receive with the function of sanctifying also the functions of teaching and governing; by their nature, however, these can only be exercised in hierarchical communion with the head and members of the college.”).

75. *See id.* at c.222, § 1 (“The Christian faithful are obliged to assist with the needs of the Church so that the Church has what is necessary for divine worship, for the works of the apostolate and of charity, and for the decent support of ministers.”), 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.”); A diocesan bishop is not to allow the incardination of a cleric unless: 1. the necessity or advantage of his own particular church demands it, and without prejudice to the prescripts of the law concerning the decent support of clerics; 2. he knows by a lawful document that excardination has been granted, and has also obtained from the excardinating bishop, under secrecy if need be, appropriate testimonials concerning the cleric’s life, behavior and studies; 3. the cleric has declared in writing to the same diocesan bishop that he wishes to be dedicated to the service of the new particular church according to the norm of law.

c.269, §1.

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 precepts 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 precepts 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.