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Judicabit in Nationibus: The State of Legal Limbo for International Victims of Sex Abuse by Catholic Clergy

Robert Keitamo

Judicabit in Nationibus:[1] The State of Legal Limbo for International Victims of Sex Abuse by Catholic Clergy

Robert Keitamo[2]

1 "He shall judge the nations." Psalm 110.

2 J.D., Santa Clara University School of Law (2014); B.A. English, College of Humanities and Fine Arts at California State University Chico (2008); on motion for admission to the State Bar of California.

Introduction

The problem of sex abuse of minors by Catholic clergymen is not unique to the United States.[3] Although the problem seems to be especially endemic in the United States, where reports of clerical sex abuse are most prominent, accusations against the Church are an international issue.[4] In countries with a strong Catholic tradition, the willingness to hold the Church accountable for sex abuse by priests is greatly diminished.[5] Even within the United States, where separation of church and state is supposed to be a foundational constitutional standard, there are many legal roadblocks to effecting justice for victims of clerical sex abuse. In the international realm, the anomalous, favorable treatment of the Catholic Church in its role as a sovereign state further obscures the answer as to who or what should be responsible for the alleged abuse.

In the United States, these allegations have resulted in a handful of recent notable federal cases, two of which, *O'Bryan v. Holy See*[6] and *Doe v. Holy See*,[7] were hinged on the Foreign Sovereign Immunities Act (FSIA). Until these cases, the Holy See had not been named as a defendant or co-defendant in actions in which clerical abuse was alleged.[8] The FSIA was a major hurdle for plaintiffs hoping to exercise jurisdiction over the Holy See in United States federal courts, and the arguments in *O'Bryan* and *Doe* are as problematic as they are novel. Ultimately, the outcome of these cases might be seen as a defeat for victims of clerical sex abuse, though they have value as test cases inasmuch as they urge us to find a new theory of the Holy See's liability.

Part I of this article examines the structure of the Catholic Church itself and offers a survey of how Canon Law prescribes how the church deals with sex abuse by clergy. Part I.A seeks to highlight the Catholic Church's broken chain of command by outlining how the regulatory structure of the Catholic Church facilitates a power imbalance that allows such abuses to continue, and creates a hierarchy that can color the connection between local priests and the Holy See as too attenuated to make the Holy See in Vatican City amenable to suit in the United States. With regard to the effectiveness of the Church's response to allegations of abuse, Part I.B illustrates how the broken chain of command taken together with the unacknowledged psychological implications of a priest's vow of

3. *See* Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 589 (2004).
4. *Id.* at 551.
5. *Id.*
6. O'Bryan v. Holy See, 556 F.3d 361 (6th Cir. 2009).
7. Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009).
8. Doe v. Holy See, 434 F.Supp.2d 925, 938 (D. Or. 2006) *aff'd in part, rev'd in part,* 557 F.3d 1066 (9th Cir. 2009).

celibacy, imposed on clerics worldwide,[9] render the Church's attempts to protect parishioners from transgressing clerics a failure. Part I.C illustrates how a priest's vow of poverty further creates a loophole by which offending priests are rendered judgment proof, making a cause of action based on *respondeat superior* against the deep pockets of the Holy See appear to be the only viable option for victims.

Part II examines the recognition of the Holy See's sovereignty in international and United States law, as well as the implications of such recognition with regard to clerical sex abuse allegations. Part II.A analyzes the governing structure of the Holy See against traditional notions of what properly constitutes statehood for purposes of sovereign recognition. Part II.B examines the relationship between the United States and the Holy See as a foreign sovereign. Moreover, it contains a broad discussion of the FSIA and its exceptions, giving special attention to the use of *respondeat superior* in the contentious cases of *O'Bryan* and *Doe*. But in asserting an exception to FSIA immunity because of the Holy See's alleged tortious acts, the question of whether local priests are, in fact, employees of the Holy See in Rome produced roadblocks that proved fatal to the interests of victims of clerical abuse.[10]

Part III seeks to advance yet another alternative, completely separate from the FSIA. Given the Catholic Church's unique legal status,[11] litigants may feel inclined to look to reasonable yet novel extensions of well-settled law. The doctrine of superior or command responsibility,—which has previously been applied primarily in the military context, is recognized by the United States Supreme Court,[12] and conforms to the norms of international law[13]—makes command responsibility a possible legal framework not only for victims in the United States, but in international courts. Command responsibility provides an alternative for victims because it evades vicarious liability's legal dead-ends by requiring a lower *scienter* standard,[14] and it is seemingly universal in its applicability. This theory poses problems, however, as courts may feel averse to extending the doctrine past its traditional military scope.

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9. 1983 CODE, c.277, § 1.
10. *Doe*, 557 F.3d at 1087.
11. *See generally* Matthew N. Bathon, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L. L. 597 (2001).
12. In re Yamashita, 327 U.S. 1 (1946).
13. *See generally* Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT'L REV. RED CROSS 531 (1999) *available at* http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm.
14. *See, e.g.*, Beth van Schaack, *Command Responsibility: The Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213, 1217 n.13 (2003).

I. Church as Government

A. A Broken Chain of Command

It is essential to first understand the basic legal structures and chain of command within the Catholic Church. The Church is divided between the clergy and laity.[15] The clergy comprises the ordained men, and is further generally subdivided as follows (in ascending hierarchy): priest, monsignor, bishop, archbishop, cardinal, and the Pope.[16] The laity is comprised of the regular congregation.[17]

Thus, in a legal sense the Catholic Church is a sacerdotal monarchy.[18] Pastors and bishops are chosen by appointment rather than election,[19] and the Pope assumes a position of supreme authority, in which legislative, judicial, and executive powers are vested.[20] As monarch, the Pope is not subject to judicial scrutiny.[21]

A contributing factor to the inherent power imbalance in the Catholic Church is the manner in which decisions are made. Decisions of councils are merely consultative and require the approval of a cleric.[22] Thus, power rests in high-ranking individuals rather than groups.

The Church is also divided and subdivided geographically into units that serve a jurisdictional function. The smallest unit is a parish, headed by one or more priests.[23] Parishes are grouped into dioceses headed by a bishop.[24] Dioceses are then grouped into archdioceses (or "ecclesiastical provinces") headed by an archbishop (or "metropolitan" of an ecclesiastical province).[25] The governmental organ of the Church as a whole is the Holy See in the Vatican, within Rome's city limits.[26] There are other nuances within this structure, but they are outside the

15. Auguste Boudinhon, *Laity*, *in* 8 THE CATHOLIC ENCYCLOPEDIA (1910), *available at* http://www.newadvent.org/cathen/08748a.htm.
16. William Fanning, *Cleric*, *in* 4 THE CATHOLIC ENCYCLOPEDIA (1908), *available at* http://www.newadvent.org/cathen/04049b.htm.
17. Boudinhon, *supra* note 13.
18. *See State Departments*, VATICAN CITY STATE, http://www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html (last visited Apr. 9, 2015) ("Vatican City State is governed as an absolute monarchy. The Head of State is the Pope who holds full legislative, executive and judicial powers.").
19. Doyle & Rubino, *supra* note 1, at 558.
20. *Id.*
21. *Id.*
22. *See, e.g.,* 1983 CODE, c. 338, §1 (giving the pope the right of ultimate authority over all ecumenical councils).
23. *Id.* cc. 515-52.
24. *Id.* c. 374, §1.
25. *Id.* c. 431, §1.
26. *Id.* cc. 1442-45.

scope of this comment.

The connection between a victim of clerical abuse and the Holy See is further attenuated when one considers that a bishop is generally given full legislative, judicial, and executive functions within his diocese without separation of powers.[27] Although a bishop is subject to the Pope's authority, in practice, a bishop's powers are subject to no checks or balances.[28] Thus, the bishop's power is effectively absolute, increasing the possibility of clerical abuse.[29] It is important to keep this gap between the parishioner and the Holy See in mind when analyzing why the doctrine of *respondeat superior* failed.

In 2001, Pope John Paul II promulgated *in motu proprio*[30] the *Sacramentorum Sanctitatis Tutela*, which gives a council of clergymen called the Congregation for the Doctrine of Faith (CDF) the competency to consider a "delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years," and to impose canonical sanctions.[31] In other words, the CDF has the power to investigate allegations of sexual abuse of minors by priests and other clergy, and to punish offending clerics accordingly.

It would appear, then, that the Catholic Church has taken a positive step toward addressing the allegations of victims. Victims, however, view Church leadership to be ineffective on the issue.[32] Stephen C. Rubino highlights the unchanged and problematic hierarchy of the church, especially the inherent clericalism that holds that members of the clergy have a special relationship with God, and therefore possess a greater moral authority than the laity.[33] Rubino points out the alarming trend that both the clergy and laity conform to this view of clericalism, and because of this, victims of clerical abuse cite this perception of a cleric's divine authority as a reason the abuse was not reported to civil authorities, regardless of whether the abuse felt "wrong."[34] Most victims of clerical abuse are

27. *Id.* cc. 331-33; Doyle & Rubino, *supra* note 1, at 605 n.362.
28. Doyle & Rubino, *supra* note 1, at 605 n.362. *See* 1983 CODE, c. 391 (granting bishops broad powers of administration over his diocese, without any real checks or balances from his superiors).
29. Doyle & Rubino, *supra* note 1, at 558.
30. An example of the Pope's unequivocal authority, a written decree designated *in moto proprio* is one handed down by the pope on his own accord, without the consultation of cardinals or others. *See* Andrew MacArlean, *Motu Proprio*, 10 THE CATHOLIC ENCYCLOPEDIA (1911), *available at* http://www.newadvent.org/cathen/10602a.htm.
31. John Paul II, Apostolic Letter, *Sacramentorum Sanctitatis Tutela*, art. IV, §§ 1-2, AAS 93 (2001), *available at* http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm.
32. Doyle & Rubino, *supra* note 1, at 555.
33. Stephen C. Rubino, *A Response to Timothy Lytton: Staunch Resistance to the Inclusion of Laity in Priest Discipline Has Stymied Permanent Change to the Structure of the Roman Catholic Church*, 39 CONN. L. REV. 913, 914-15 (2007).
34. *Id.* at 915.

young adolescent males, and a significant minority is female.[35] Most victims come from devout Catholic families with strong ties to the Church.[36] Because of the close bonds that victims and their families have with their Church, there exists a pattern of unwillingness of parents and other adults to believe allegations of sex abuse by their priest.[37] Allegations, therefore, may not surface until the victim reaches adulthood.[38]

This unwillingness is not felt only at the individual level. Stephen Rubino and Canon lawyer Rev. Thomas P. Doyle point out that while countries with a tradition of separation of Church and State have been at the forefront of exposing clerical abuse in civil courts, countries like Ireland, which have historical ties to the Catholic Church, have shown reluctance to, and even hostility toward, holding Church leaders accountable in cases of sex abuse by Irish clergy.[39] Given the massive Catholic population worldwide, and especially because of missionary work in developing nations, clerical sex abuse is an international issue.[40]

In the United States, when abuse is reported to Church authorities, victims are often told that the abuse will be investigated.[41] When these victims become civil plaintiffs, however, discovery often reveals that victims were never informed of the outcomes of these investigations, if the investigations ever took place at all.[42] Canon Law, therefore, has been ineffective in providing remedies and relief to victims.

The secrecy is not simply a consequence of the Church's inaction or perceived subjugation of victims and their families; it is also explicitly decreed by the Vatican. The papal instruction *Crimen Sollicitationis* is a set of procedural norms for hearing allegations of sexual misconduct by priests.[43] Moreover, it grants the

35. Doyle & Rubino, *supra* note 1, at 559-60. Doyle and Rubino also note that the gender ratio is inverted based on studies showing that most adult victims are female. *See*, *e.g.*, A.W. RICHARD SIPE, A SECRET WORLD: SEXUALITY AND THE SEARCH FOR CELIBACY 265 fig.13.1 (1990).
36. Doyle & Rubino, *supra* note 1, at 560.
37. *Id.*
38. *Id.*
39. *Id.* at 551-52.
40. It is difficult to determine to what extent the problem exists in the Third World, as sex abuse in such countries is generally not talked about. On one hand, priests are held to a higher regard in the Third World, so they may be psychologically healthier. On the other hand, the church is more hierarchical, and therefore may be more difficult to challenge. *See* Michael Paulson, *World doesn't share US view of scandal: Clergy sexual abuse reaches far, receives an uneven focus*, THE BOSTON GLOBE (Apr. 8, 2002), *available at* http://www.boston.com/globe/spotlight/abuse/stories/040802_world.htm.
41. Doyle & Rubino, *supra* note 1, at 559.
42. *Id.*
43. *See generally* Office of the Sacred Congregation, *Instruction on the Manner in Proceeding in Causes involving the Crime of Solicitation*, VATICAN POLYGLOT PRESS (Mar. 16, 1962), *available at* http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (unofficial English translation of the original Latin text of *Instructio de Modo Predendi in Causis Sollicitationis*).

CDF jurisdiction over these cases.[44] This decree also imposes a gag order on all parties involved—victims, their families, and witnesses.[45] The Church's remedy against parties who break this order is excommunication.[46]

When such plaintiffs in the United States do eventually bring their claims to the civil courts, oftentimes their claims are settled.[47] In the rare instances where such cases proceed past the trial level, plaintiffs hit a legal roadblock and their cases are dismissed.[48]

B. The Church's Ineffective Response

A very basic discussion of the psychology of the perpetrators of clerical sex abuse is helpful to understanding the way Church leadership perceives and attempts to deal with the problem and why it is ineffective.

The nature of abuse is a misunderstood aspect of the problem. It is common to label the priests as pedophiles, whereas the more accurate term generally would be ephebophilia. With pedophilia, either regressed or fixated, the perpetrator identifies emotionally and sexually with his victim.[49] On the other hand, an ephebophile's attraction indicates a higher degree of social and sexual development.[50] The ephebophile is attracted to older children in the early stages of sexual maturation, and may even be unaware of the degree of coercion on his part.[51] A priest, then, could be deluded into thinking the victim is a willing partner and deny that he has caused any harm.[52] Pedophilia is listed in the Diagnostic and Statistical Manual of Mental Disorders, but ephebophilia is not, possibly because there are fewer diagnoses of ephebophilia, and patients are more

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44. Thomas Doyle, Commentary, *The 1922 Instruction and the 1962 Instruction "*Crimen Sollicitationis*," Promulgated by the Vatican* ¶ 2 (Oct. 3, 2008) (unpublished paper), *available at* http://www.awrsipe.com/Doyle/2008/2008-10-03-Commentary%20on%201922%20and%201962%20documents.pdf.
45. *Id.* ¶ 18.
46. Since, however, in dealing with these causes, more than usual care and concern must be shown that they be treated with the utmost confidentiality, and that, once decided and the decision executed, they are covered by permanent silence . . . all those persons in any way associated with the tribunal, or knowledgeable of these matters by reason of their office, are bound to observe inviolably the strictest confidentiality, commonly known as the *secret of the Holy Office*, in all things and with all persons, under pain of incurring automatic excommunication.
Id. ¶ 11.
47. Doyle & Rubino, *supra* note 1, at 551.
48. *Id.*
49. *Id.* at 560-61.
50. *Id.* at 561.
51. *Id.*
52. *Id.*

likely to respond to treatment.[53]

Many psychological symptoms, such as underdeveloped sexuality and emotional immaturity, were obvious traits of perpetrators according to studies such as those conducted by Eugene Kennedy[54] and Dr. Conrad Baars.[55]

A contributing factor to the perpetuation of the problem is the method of treatment at centers affiliated with the Church itself. Although treatment centers were established for the primary purpose of rehabilitating offending clerics, bishops repeatedly misconstrued evaluations or ignored recommendations by mental health professionals.[56] Instead, treatment continued to be founded on a medieval view of sexuality—a highly moralistic one, concerned with temptation to sin and the weak human will—rather than one based on current understanding of human sexuality and sexual dysfunctions.[57] Consequently, clerics who underwent treatment at these centers often remained sexually and emotionally immature, and were returned to active ministry.[58]

Another study suggests that bishops seeking psychological help were ignored by the American episcopate.[59] Instead, the Church grew more defensive of clericalism and attempted to shift the attention away from the allegations, to perceived affronts from the secular media or civil processes.[60]

These aspects of treatment highlight not only the ineffectiveness of Church leadership, but also the attenuation between the actions of the priest and the Holy See. While one may deduce from various Church actions, such as the promulgation of the *Sacramentorum Sanctitatis Tutela*, that the Holy See knows or should know of the abuses by lower-level clerics, the power structure facilitates the Holy See's ability to color the problem as an essentially local one. This is the roadblock to plaintiffs attempting to name the Holy See as a defendant under *respondeat superior*.

C. Judgment Proof

Before *Doe* and *O'Bryan*, Michael Sartor proposed applying the doctrine of

53. Doyle & Rubino, *supra* note 1, at 561.
54. EUGENE KENNEDY & VICTOR HECKLER, THE CATHOLIC PRIEST IN THE UNITED STATES: PSYCHOLOGICAL INVESTIGATIONS 80 (Washington D.C., U.S. Catholic Conference 1971).
55. Conrad W. Baars, M.D., *The Role of the Church in the Causation, Treatment and Prevention of the Crisis in the Priesthood* 2, 4 (Nov. 1971), *available at* http://www.bishop-accountability.org/reports/1971-11-Baars-TheRole.pdf.
56. Doyle & Rubino, *supra* note 1, at 573.
57. *Id.* at 570.
58. *Id.* at 573.
59. *Id.* at 569.
60. *Id.* at 563.

respondeat superior to allegations of sexual misconduct by the clergy.[61] Sartor identifies an essential consideration to support this application: courts must consider that the vow of poverty the Church imposes on its clerics renders such clerics judgment proof.[62] Another important consideration is that *respondeat superio*r spreads losses equally to the cheapest cost-bearer.[63] These factors make *respondeat superior* especially attractive to victims wishing to bring a claim against an offending priest; even if the priest has taken a vow of poverty, the Holy See has deep pockets.[64] Religious organizations may also purchase liability insurance in case of adverse judgments.[65]

For vicarious liability under *respondeat superior* to attach, an employee-employer relationship must exist.[66] Sartor offers an in-depth analysis of various cases defining what constitutes the requisite employee-employer relationship, but confines his analysis to claims against dioceses and archdioceses, without considering the effect that this disparity may have when a case of clerical sexual abuse is brought against the Holy See as the employer of priests, as the plaintiffs in *Doe* and *O'Bryan* would soon do.

Sartor was remarkably foresighted in citing the Oregon case *Fearing v. Bucher* to illustrate how a federal court must look to definitions of scope of employment as they apply to each state's law of agency.[67] What was not considered, however, was the potential for inconsistent rules of law when victims in the United States attempt to hold the Catholic Church in the Vatican liable by hailing it into the federal court system. These issues will be discussed more in depth in Part II.

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61. *See generally* Michael J. Sartor, *Respondeat Superior, International Torts, and Clergy Sexual Misconduct: The Implications of* Fearing v. Bucher, 62 WASH. & LEE L. REV. 687 (2005).
62. *Id.* at 724. Sartor also cites *Doe v. Hartz*, 52 F. Supp. 2d 1027, 1077 (N.D. Iowa 1999), where a vow of poverty was a factor in considering imputed liability to a church for its tortfeasor priest. *Id.* at 724 n.206.
63. Sartor, *supra* note 59, at 724.
64. *Id.*
65. *Id.*
66. *Id.* at 700 (citing *Greene v. Amritsar Auto Servs. Co*., 206 F. Supp. 2d 4, 8 (D.D.C. 2002), where an employer-employee relationship was required to hold an employer vicariously liable for an employee's acts).
67. *Id.* at 690, 691. Sartor states that *Bucher* provides "the proper respondeat superior in all cases involving intentional torts, including sexual assault." *Id*. at 691. His scope is limited, however, to claims against dioceses and archdioceses. The plaintiff in *Bucher* filed a tort lawsuit naming as defendants Franciscan priest Melvin Bucher and the Archdiocese of Portland Oregon, alleging that Bucher abused his fiduciary position by sexually assaulting Fearing when Fearing was a minor, and that the Archdiocese was vicariously liable for Bucher's tortious acts because the Archdiocese was his employer. *See generally* Fearing v. Bucher, 977 P.2d 1163 (1999).

II. Church as Foreign Sovereign

A. Defying Convention

It is essential to understand the distinction between the Holy See and the Vatican. The Holy See is a non-territorial entity comprised of the Pope and Roman Curia, and is the "supreme organ of government" of the Roman Catholic Church.[68] The Vatican, on the other hand, is the geographic city-state within the city of Rome ruled by the Pope.[69]

Article 1 of the 1933 Montevideo Convention provides the classic definition of statehood: a qualifying state has (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other States.[70] The Church fails this test.

Because the Holy See is defined as a governing organ, it has no population.[71] The Vatican, although it has about 400 citizens and 1000 inhabitants, has no *permanent* population.[72] Citizenship is granted by the Pope,[73] and is defined by one's regular employment in the Vatican.[74] Once citizenship ends by termination of employment or some other method of revocation, the individual's citizenship returns to the original country of citizenship.[75] Thus, there is no "Vatican nationality."[76]

Although citizenship is extended to the family of the employee, provided they live within the Vatican's city limits, that citizenship ends for children when they reach twenty-five or, for daughters, when they marry.[77] Therefore, without traditional notions of *jus soli* or *jus sanguinis* apparent in this arrangement, there is no population that is permanent, as commonly understood.

Moreover, the Holy See lacks the characteristics one might typically associate with a government. The Holy See is the administrator of the Roman Catholic Church, and has no "people" to oversee within Vatican City limits.[78] Although there is a Pontifical Commission for the Vatican, this Commission oversees

68. HYGINUS EUGENE CARDINALE, HOLY SEE AND THE INTERNATIONAL ORDER 85 (1976).
69. *See Holy See (Vatican City)*, THE CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html (last updated Apr. 9, 2015).
70. Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.
71. Yasmin Abdullah, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1861 (1996).
72. *Id.*
73. Constitutional Laws of the City of the Vatican, Law No. 3, art.1.
74. *Id.* art. 6.
75. Abdullah, *supra* note 69, at 1861.
76. *Id.* at 1862.
77. Constitutional Laws of the City of the Vatican, Law No. 3, arts. 2, 4.
78. Abdullah, *supra* note 69, at 1865.

logistical matters, *e.g.*, the post, central security, the papal villas, and the Vatican's radio station.[79] The entity with the closest semblance to a government is the Roman Curia, headed by the Secretariat of State, which handles foreign affairs. Another division of the Roman Curia consists of nine Congregations, responsible for overseeing church doctrine and missionary work of the Roman Catholic Church.[80] But the Holy See's function is merely administrative, and hardly sufficient to be considered a government.[81]

It has been noted that the fourth criterion—the ability to enter into relations with other states—is not a criterion at all, but a consequence of statehood.[82] As such, the true inquiry is whether the state is independent.[83]

On one hand, the Vatican is completely dependent on Italy.[84] True, there is no size requirement for a state;[85] the Vatican's relatively tiny size, being completely within the limits of Rome, is more of a peculiarity than an exception.[86] Indeed, all of the Vatican's essential resources come from Italy: its police force, food, water, post, and telecommunications.[87] It also has no economy and no domestic or foreign trade.[88] Criminal prosecutions for the Holy See are also handled by Italy.[89] As a practical matter, the Vatican is not independent at all, and theoretically, would not be able to enter into relations with other States under the Montevideo Convention.

On the other hand, the Vatican's independence is effectively by estoppel. Per the 1929 Lateran Treaty, Italy recognized the Holy See's full sovereignty, and in 1984, "reaffirm[ed] that the [Italian Republic] and the Catholic Church are, each in its own order, independent and sovereign and commit themselves to the full respect of this principle . . . ."[90] The Vatican also has its own post office, railway, volunteer military (the Swiss Guard), publishing, and it also issues passports.[91] Independence is also substantiated by the recognition of the Holy See as a Non-Member State Permanent Observer in United Nations Conferences.[92]

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79. *Id.* at 1865.
80. *Id.*
81. *Id.* 1865-66.
82. *Id.*
83. *Id.*
84. Abdullah, *supra* note 69, at 1868 n.267.
85. *Id.* at 1863-64.
86. *Id.*
87. *Id.* at 1867.
88. *Id.*
89. *Id.*
90. Lateran Pacts of 1929 (Lateran Treaty), art. 2, Feb. 11, 1929, *available at* http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/LateranTreaty.pdf; Agreement Between the Italian Republic and the Holy See, art. 1, Feb. 18, 1984, 24 I.L.M. 1589.
91. Abdullah, *supra* note 69, at 1865.
92. *Permanent Observers, Non-member States*, UNITED NATIONS, http://www.un.org/en/members/

Yasmin Abdullah rightly points out the inconsistencies in this arrangement. Although it has often been contended that the Holy See is the secular, political ruler of Vatican City, it is in reality impossible to bifurcate the Church, as the Holy See and the Vatican do not operate independently of one another.[93] Moreover, it is unrealistic to call the interests of the Holy See, and therefore the Vatican, secular.[94] The Vatican is merely the *situs* of administration for the Catholic Church—it furthers the Church's interests rather than the interests of the inhabitants of an independent nation.[95]

Abdullah further points to other anomalies produced by United Nations' recognition of the Holy See. Despite being a Non-Member Permanent Observer, because all "states" have the right to participate in United Nations conferences, the Holy See's "statehood" allows it to participate along with Member States.[96] Moreover, because the United Nations favors consensus over votes, the Holy See may essentially hold the power of a quasi-veto.[97] Another decision by the United Nations was to allow the Pope to address the General Assembly three times, when heads of Non-Member States are not typically able to make such addresses.[98] Thus, the status of the Holy See within the United Nations is exceedingly broad.[99]

B. The United States and the Holy See

1. The Foreign Sovereign Immunity Act (FSIA)

Sovereign immunity has been well established since the earliest years of United States. The United States Supreme Court, as early as 1812, considered the issue of sovereign immunity in *The Schooner Exchange v. McFaddon*.[100] Justice Marshall's opinion is a restatement of customary international law.[101] McFaddon owned the private American ship *Exchange*, which was en route to Spain.[102]

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nonmembers.shtml (last visited May 15, 2015).

93. Abdullah, *supra* note 69, at 1869.
94. For a discussion on the impossibility of a secular Vatican City separate from the Catholic Church, see Abdullah, *supra* note 69, at 1867-71.
95. *Id.* at 1868.
96. *See, e.g.*, United Nations, Rep. of the International Conference on Population and Development, at 121, U.N. Doc. A/CONF.171/13 (1994), *available at* http://www.un.org/popin/icpd/conference/offeng/poa.html.
97. Abdullah, *supra* note 69, at 1844.
98. *Id.* at 1844-45.
99. The main thrust of Yasmin Abdullah's note proposes that the Holy See is more like an NGO than a state, and should be treated as such at future UN conferences. Though this is a Sisyphean task, as realization of statehood is not revoked so easily, it could have implications for how the Holy See may defend itself from claims of child abuse under various imputed liability theories.
100. The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).
101. *Id.* at 146.
102. *Id.* at 117.

France took *Exchange* at the order of Napoleon Bonaparte while sailing on international waters, and it was re-commissioned as the warship *Balaou*.[103] During a time of peace between France and the United States, the ship later sailed into the Philadelphia Harbor due to inclement weather.[104] McFaddon initiated the case, asking the court to seize the *Exchange* because it had been wrongfully taken.[105] The Supreme Court held that it had no jurisdiction over a friendly nation's ship in American waters.[106]

McFaddon is a reflection of the absolute theory of sovereign immunity, which holds that a sovereign state cannot be subject to the courts of another sovereign state.[107] The absolute theory, furthermore, extended to both the sovereign state's private and official activities.[108]

In the first half of the twentieth century, the competency to inquire as to the immunity of a foreign state typically belonged to the Department of State.[109] In keeping with the American system of checks and balances, federal courts abstained from inquiring into the immunity of foreign states.[110] During this era, the Supreme Court generally held that Article III courts would not examine the immunity of a foreign state because doing so would infringe upon the powers of the Executive Branch.[111]

Due to increasing globalization and the outbreak of World War I, however, the Supreme Court required a more nuanced reading of sovereign immunity.[112] The absolute theory began to evolve into a restrictive one,[113] classifying the acts of a sovereign as either *jure imperii* or *jure gestionis*—that is, either a public act, or a

103. *Id.* at 117-18.
104. *Id.* at 118.
105. *Id.*
106. *The Schooner Exchange*, 11 U.S. at 147 ("If the preceding reasoning be correct, the Exchange, being a public armed ship in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.").
107. Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853, 858 (2010).
108. *Id.*
109. Melanie Black, *The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for its Role in the Global Sex Abuse Scandal*, 27 WIS. INT'L L.J. 299, 313 (2009).
110. *Id.*
111. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("[I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.").
112. Black, *supra* note 107, at 313 n.107.
113. *Id.* at 313.

commercial or private one.[114] The importance of this classification is that a sovereign is immune only as to acts *jure imperii*, but not for acts *jure gestionis.*[115] This was problematic for the State Department, as it was now being asked to determine where an act was public or private, a fact question better suited to the courts.[116]

The Foreign Sovereign Immunity Act is a codification of the restrictive theory. The FSIA makes these considerations fall within the purview of Article III courts, rather than the Executive Branch.[117] Further, it provides the courts with workable definitions, rules, and exceptions to apply.

The FSIA applies only when a party sues a foreign state, including a political subdivision, an agency, or instrumentality of a foreign state.[118] Agency or instrumentality means any entity which is a separate legal person, corporate or otherwise, and is either (a) an "organ of a foreign state or political subdivision" or (b) a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision."[119] The Supreme Court, in 2010 in *Samantar v. Yousuf* further held that the FSIA's language does not extend immunity to an individual who is a government official acting on behalf of a state.[120]

Enunciating a rule based heavily on *acta jure gestioni*,[121] the FSIA has a few exceptions to the general rule of immunity. The tortious activity exception is particularly relevant here.

The tortious activity exception contains four elements: a sovereign does not enjoy immunity from a suit brought against it, where an injury is (1) committed in the United States (2) caused by an act or omission (3) by the foreign state or an employee or official of that state (4) when acting within the scope of employment.[122]

There is, however, an exception to this exception,—the discretionary function

114. *Id.*
115. *Id.*; 28 U.S.C. § 1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.").
116. *See* Black, *supra* note 107, at 313-14.
117. 28 U.S.C. § 1602 ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States . . . .").
118. *Id.* § 1603(a).
119. *Id.* §§ 1603(b)(1)-(3).
120. Samantar v. Yousuf, 560 U.S. 305 (2010).
121. Latin, lit.: acts by the law of business. H. VICTOR CONDÉ, A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY 5 (Board of Regents of the Univ. of Neb. 2004).
122. 28 U.S.C. § 1605(a)(5).

exception[123]—which reads as follows:

> The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability - that is, whether the choice or judgment was one involving social, economic or political policy.[124]

The Supreme Court in *Berkovitz* reasoned that this framework of inquiry is to prevent "second-guessing" of legislative and administrative decisions, thereby protecting governmental decisions based on public policy.[125]

2. The Cases

Among the many cases brought against Catholic clergy, the two most notable to apply the FSIA to the issue of sexual abuse of minors by clergy were *O'Bryan v. Holy See* and *Doe v. Holy See*.[126]

Originating in Kentucky, *O'Bryan* proved to be an interesting test case for applying the FSIA to the Church's sex abuse scandal. Whereas previous cases generally sought to hold accountable the diocese or parish in which the alleged misconduct occurred, *O'Bryan* named the Holy See as a defendant.[127] Moreover, *O'Bryan* was a class action, brought against the Holy See on behalf of *all* individuals who were alleged victims of sexual misconduct as minors by Catholic clergy in the United States.[128] It sought to hold the Holy See accountable under *respondeat superior* for its relationship to local bishops and for the bishops' alleged negligent handling of priests accused of sexual misconduct.[129]

The court in *O'Bryan* found that the Holy See was a foreign sovereign under the FSIA,[130] and addressed the tenability of the plaintiff's claim that the Holy See's immunity was limited by the tortious activity exception.[131]

The complaint in *Doe v. Holy See* alleged that while serving as a parish priest in

123. *Id.* § 1605(a)(5)(A).
124. Vickers v. United States, 228 F.3d 944, 949 (9th Cir. 2000) (internal citations omitted) (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).
125. *Id.*
126. *See O'Bryan*, 556 F.3d 361; *Doe*, 557 F.3d 1066.
127. Lucian C. Martinez, *Sovereign Immunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L.J. 123, 124 (2009).
128. Class Action Complaint at 1, O'Bryan v. Holy See, 471 F. Supp. 2d 784 (W.D.Ky. Jan. 10, 2007) (No. 3:04CV338-H).
129. *Id.* at 2.
130. *O'Bryan*, 556 F.3d at 372.
131. *Id.* at 379-83.

Armagh, Ireland, Father Andrew Ronan admitted to molesting a minor.[132] Thereafter, he was removed to a parish in Chicago, Illinois, and employed by the local bishop.[133] While there, he molested at least three minors and admitted to the allegations when confronted.[134] The bishop in Chicago, however, did not discipline or remove Father Ronan "in accordance with the policies, practices, and procedures" of the Holy See.[135] The Holy See then transferred Ronan to a parish in Portland, Oregon, where he met the plaintiff.[136] To the plaintiff, Ronan was a person of authority and spiritual influence.[137] The complaint further alleged that Ronan used his position of trust and authority to engage in sexual contact with the minor Doe, and that such contact occurred on many occasions, including at the monastery and surrounding areas.[138]

Doe brought suit against the Holy See, claiming, *inter alia*, *respondeat superior* liability against the Holy See through Father Ronan.[139] The Holy See moved to dismiss the suit, arguing that it was immune from suit under the FSIA.[140] The District Court found that the tortious activity exception made the Holy See amenable to suit for the *respondeat superior* cause of action.[141]

In both cases, the circuit courts of appeals accepted the sovereignty of the Holy See as a foreign state within the meaning of the FSIA.[142] But given the *sui generis* nature of the Holy See, the tortious activity exception is where courts ended up in a legal quagmire. The power structure obscures the question as to whether the Church in Vatican City truly controls the actions of lower level clerics. Canon Law is explicit that the Pope retains total control of all clerics.[143] But as stated in Part I, in practice, this control is rarely used, and bishops have almost complete control over personnel matters in their dioceses.[144] Therefore, as to the question of whether the act or omission happened in the United States, reasonable minds may differ on whether causation is imputed to the Holy See abroad or to the allegedly

132. *Doe*, 557 F.3d at 1069-70.
133. *Id.* at 1072.
134. *Id.*
135. *Id.* at 1070.
136. *Id.*
137. *Doe*, 557 F.3d at 1070.
138. *Id.*
139. *Id.* at 1069.
140. *Id.* at 1071.
141. *Id.*
142. *Doe*, 434 F.Supp.2d at 933 ("[T]he sovereign status of the Holy See is not in dispute."); *O'Bryan*, 556 F.3d at 372 ("[T]here is no dispute that the United States recognized the Vatican in 1984, and there is no dispute between the parties that the *State of the Vatican* is a foreign state within the meaning of FSIA.").
143. 1983 CODE, c.331.
144. *See supra* note 26.

negligent omissions of bishops in the United States. But even if a bishop in the United States is responsible for the omission, if that bishop is a United States citizen, can he still be considered an "agent or instrumentality" of a foreign state, regardless of whether he takes orders from that foreign state?[145] This murkiness may offend one's sense of justice, in that it appears that it allows a superior to retain his authority on paper and exercise it at will but simultaneously deny such power *ad hoc*, as to evade responsibility for the wrongdoings of his subordinates by relying on the practice of maintaining the attenuation of power in his government's hierarchy.

Another problem is whether the state law considers sexual misconduct to be within the "scope of employment" umbrella. While in Kentucky sexual misconduct is not considered within the scope of employment,[146] other states, such as Oregon, hold to the principle that the test may be satisfied if the intentional tort was sufficiently related to conduct that was within the scope of employment.[147]

Given this messy legal situation, it is unlikely that any stable rule relating to the responsibility of the Catholic Church broadly for the sexual abuse of minors by priests will result from reliance on the tortious activity exception to the FSIA.

III. Church as Commander

William Jacob Neu proposes an alternative test to *respondeat superior* liability. This new test is innovative in that it extends an already existing doctrine within American law, which, because it is based on principles of *jus cogens* in international law, may also be a workable framework in the international context. This expansion of the command responsibility doctrine, however, is not without its own issues.

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145. *See, e.g.*, *O'Bryan*, 471 F.Supp.2d. at 791 n.3 ("[T]he Archdiocese of Louisville is certainly not an 'agency or instrumentality' of a foreign state, because it is clearly a citizen of Kentucky, as it is organized as a Kentucky corporation. Therefore, while this Court concludes that, for instance, the Archbishop of Louisville is an 'employee' of the Holy See for the purposes of Kentucky law, the entity over which he presides-the Archdiocese of Louisville-is not an agency or instrumentality of the Holy See.").

146. *See, e.g.*, Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000) ("A principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment."); *O'Bryan*, 556 F.3d at 383 ("[T]he Kentucky Supreme Court ruled that a priest's adulterous conduct could not be considered within the scope of his employment, even though the underlying conduct was intentional.").

147. *See, e.g.*, *Bucher*, 977 P.2d at 1165-66 ("Under the doctrine of *respondeat superior,* an employer is liable for an employee's torts, *including intentional torts*, if the employee was acting within the scope of employment.") (emphasis added).

A. Liability for Crimes Against Humanity in International Law

The command responsibility doctrine is an old one. Evidence of the principle can be found as far back as biblical texts. Book 1 of Kings, Chapter 21, recounts the story of Queen Jezebel commanding certain inhabitants of the Samaria, including elders and nobles, to frame a man named Naboth of the crime of blasphemy, whereby he would be stoned to death. Though the command was not directly from the King of Samaria, Ahab, he was nonetheless held responsible for the homicide as sovereign ruler over those in Samaria.[148]

The first trial based on the command responsibility doctrine, however, was the trial of Peter von Hagenbach in 1474.[149] At issue was the application of fault considering the accused's compliance with superior orders.[150] The Duke of Burgundy charged Hagenbach, a Germanic military commander, with the administration of the fortified city of Breisach.[151] As governor, Hagenbach acted on the Duke's orders to the extreme, brutally and violently ruling the inhabitants of Breisach into submission through methods such as murder, rape, and illegal seizing of property.[152]

The Archduke of Austria, having captured Breisach, put Hagenbach on trial before an *ad hoc* tribunal.[153] Reflecting the makeup of the Holy Roman Empire of at the time, the tribunal took on an international character, mirroring modern tribunals: it comprised 28 judges representing a coalition of allied states and towns.[154] As a defense, Hagenbach contended that he took orders solely from the Duke of Burgundy, who also confirmed and ratified the atrocious measures taken by Hagenbach.[155]

The concept of command responsibility reached the Executive Branch of the United States government during the American Civil War. The Lieber Instructions, signed by President Abraham Lincoln on April 24, 1863, is arguably the first modern written statement of the law of war, helping to inform the 1907 Hague Convention and 1949 Geneva Conventions.[156] Specifically, the Lieber

148. *1 Kings* 21:1-28 (New Int'l Version).
149. Greppi, *supra* note 11.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Greppi, *supra* note 11.
155. *Id.*
156. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1963), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988), *available at* https://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/A25AA5871A04919BC12563CD002D65C5/FULLTEXT/IHL-L-Code-EN.pdf [hereinafter Lieber Instructions]; *see also Instructions for the Government of*

Instructions imposed criminal liability on commanders who ordered subordinates to kill or wound disabled enemies.[157]

The 1907 Hague Convention codifies the principal that a superior is accountable for the actions of his subordinates in the multinational context.[158] The first explicit codification of command responsibility was the 1977 Additional Protocol 1 (AP1) to the 1949 Geneva Convention.[159] Per AP1, the wrongdoing of a subordinate does not absolve the superior from responsibility.[160] AP1 also provides a workable test for *scienter*, attaching liability to the superior if he had reason to know a prohibited act occurred or was about to occur.[161] Therefore, the superior's knowledge need not be actual; it may be constructive.

The United States Supreme Court in *In re Yamashita* affirmed the Military Commission's decision finding Yamashita, a commanding general in the Japanese army during World War II, guilty of failing to discharge his duty as a military commander by permitting his subordinates to commit war crimes while stationed in the Philippine Islands.[162] Thus, this was the first instance where a superior was held liable under command responsibility for an omission.

Arce v. Garcia[163] and its sister case *Ford* ex rel. *Estate of Ford v. Garcia*[164] considered the liability for two El Salvadorian defense ministers for the torture of Salvadorian civilians. In *Ford*, the district court instructed the jury that in order to find a defendant guilty under command responsibility, a plaintiff must show by a preponderance of the evidence that the defendant: (1) had effective command over persons who committed torture or an extrajudicial killing, (2) knew or had reason to know that his subordinates were committing torture or an extrajudicial killing, and (3) failed to take reasonable and necessary steps to prevent or stop his subordinates.[165] The jury instructions further define "effective command" as requiring the superior to "[have] the legal authority and the practical ability to exert control over his troops."[166]

Armies of the United States in the Field (Lieber Code). 24 April 1863., INT'L COMM. OF THE RED CROSS, https://www.icrc.org/ihl/INTRO/110?OpenDocument (last visited May 15, 2015).

157. Lieber Instructions, art. 71.
158. Hague Convention (IV) Respecting Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land ch.1, art. 1, §1, Oct. 18, 1907, 36 Stat. 2277, U.S.T.S. 539.
159. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.
160. *Id.* art. 86(2).
161. *Id.*
162. *See generally Yamashita*, 327 U.S. 1.
163. Arce v, Garcia, 434 F.3d 1254 (11th Cir. 2006).
164. Ford *ex rel.* Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002).
165. *Id.* at 1287 n.3.
166. *Id.*

It would be beyond the scope of this comment to survey the vast body of World War II case law, but because of the consistency in which the doctrine is applied to crimes against humanity, command responsibility has been established as a norm of customary international law.[167]

B. Command Responsibility and the Church

1. In American Courts

The primary benefit to command responsibility is that it avoids the uncomfortable prospect of hailing a foreign sovereign into an American court and analyzing the controversy through a decidedly American lens; *i.e.*, applying various and sometimes contradictory American interpretations of *respondeat superior* and agency to a sovereign. Because command responsibility arises out of customary international law and peremptory norms from which no derogation is permitted, it puts the United States and the Holy See at a fairly equal legal understanding. The universality of command responsibility means that an American court should be able to apply this doctrine to the Holy See at a lower risk of infringing upon its sovereignty. This doctrine relieves courts of having to navigate the legal quagmires inherent in the *respondeat superior* theory, as it does not matter whether the subordinate falls under the defendant's direct or indirect authority; that the subordinate is merely within the defendant's chain of command is sufficient.[168] Thus, the attenuation of command is less useful to the Holy See.

In advancing the application of command responsibility to the Catholic Church, William Jacob Neu draws interesting parallels between the Church and military.[169] First, they have a similar chain of command.[170] Priests are analogous to privates, and bishops to lieutenants or generals.[171] Like a general, a bishop may have considerable authority over a geographic region, but is nonetheless answerable to individuals overseeing the global operations.[172] Second, both systems have their own tribunals to investigate crimes separate from civilian

167. For a list of cases interpreting the doctrine of command responsibility, see 1 MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 558-62 (2005), *available at* https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf; *see also id.* at 559 ("State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.").

168. *See, e.g.*, People v. Aleksovski, Case. No. IT-95-14/1-T, Judgment, Tr. Chamber, ¶ 106 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).

169. *See* Jacob William Neu, *"Workers of God": The Holy See's Liability for Clerical Sex Abuse,* 63 VAND. L. REV. 1507 (2010).

170. *Id.* at 1538.

171. *Id.*

172. *Id.*

courts.[173]

Focusing on American courts, it is relatively simple to parse the general factual patterns of clerical sex abuse through the elements of command responsibility enunciated in *Ford*, and slightly modified to fit a non-military controversy.

(1) It is clear that the Holy See had "effective control" over the actions of bishops and even priests. The Church's Canon Law is explicit about the Holy See's reservation of absolute authority over clerics. The *Sacramentorum Sanctitatis Tutela*, the *Crimen Solliciationis*, and even the Pope's recent demotions,[174] laicizations,[175] and excommunications[176] of archbishops, bishops, and priests further support a finding of the Holy See's potential for control. Whether the Holy See in fact has used that discretion on lower level clerics should be immaterial. The gap in the chain of command between bishops and their superiors is likewise immaterial. What matters is that the Holy See *may* use this power when it desires. This *effective* control requirement is therefore an easier standard to meet than the scope of employment test.

(2) The Holy See knew or had reason to know its subordinate clerics were committing crimes against humanity. The very existence of the CDF, *Sacramentorum,* and *Crimen* evince the Holy See's knowledge of the problem. Applying this standard to cases like *Doe*, it is rather obvious, assuming the allegations in Doe's complaint to be true, that the Holy See knew of an offending priest's dangerous proclivities, as the Holy See itself was involved in placing Father Ronan in new parishes following complaints of his sexual misconduct with minor boys.[177] Thus, the Holy See does not simply have a reason to know of the abuse, it has met the higher standard for actual knowledge.

(3) The Holy See failed to take reasonable and necessary steps to prevent or stop its subordinate clerics from engaging in sexual misconduct with minors. The various studies of the ineffectiveness of Church-affiliated rehabilitation facilities for offending priests cited above, the relocation of offending priests, unwillingness to notify and cooperate with civil authorities, destruction of evidence, and tendency

173. *Id.*

174. *See, e.g.*, Sara Lin Wilde, *Pope Francis Demotes Cardinal who Denied John Kerry Communion*, PATHEOS (Dec. 18, 2013), http://www.patheos.com/blogs/friendlyatheist/2013/12/18/pope-francis-demotes-cardinal-who-denied-john-kerry-communion.

175. *See, e.g.*, *Teczar Laicized by Pope*, CATHOLIC FREE PRESS (Sept. 9, 2011, 6:00 AM), http://www.catholicfreepress.org/local/2011/09/09/teczar-laicized-by-pope/ (describing Pope Benedict XVI's removal from the priesthood of a Texas man accused of molesting a minor).

176. *See, e.g.*, Hunter Stuart, *Pope Francis Excommunicates Australian Priest Who Advocated for Gay Marriage and Female Clergy*, THE HUFFINGTON POST (Sept. 24, 2013, 4:42 PM), http://www.huffingtonpost.com/2013/09/24/pope-francis-excommunicates-priest-greg-reynolds_n_3983059.html.

177. *Doe*, 557 F.3d at 1070.

to deflect blame onto the victims, civil processes, and secular media, are evidence of the Holy See's failure under this element. This element also provides a stronger foothold in cases like *Doe*, where the causes of action for negligent hiring and retention,[178] and for the Holy See's failure to warn the plaintiff of the priest's harmful sexual proclivities were defeated.[179]

Neu, however, does not consider that the jurisprudence on command responsibility, whether American or not, involves *persons* as defendants, rather than governing organs of sovereign states. The extension of command responsibility to the issue of clerical sex abuse should therefore be tempered; while such a claim might be workable against individual high-level Vatican officials, the practice of naming the entire governing body of a sovereign state probably strays too far from the modern understanding of command responsibility.

Neu relies on *Romagoza v. Garcia* to argue that American courts have expanded command responsibility to cover civil tort cases.[180] But *Garcia* involved torture of civilians by *military* commanders.[181] What Neu leaves to be elaborated upon is whether and to what extent command responsibility may be applied to civilian defendants for their actions when in a role analogous to that of a military superior.

There are at least two international criminal tribunal cases that would square with Neu's thesis, as they involve civilians held liable under command responsibility. In *Prosecutor v. Musema*, Chamber I of the International Criminal Tribunal for Rwanda found Musema, an influential director of a major tea factory, guilty of genocide and rape, among other offenses, under the doctrine of command responsibility through the actions of his employees.[182] The Chamber held that "a civilian superior may be charged with superior (command) responsibility only where he has effective control, be it *de jure* or merely *de facto*, over persons committing violations of international humanitarian law."[183] In *Prosecutor v. Aleksovski*, the Chamber for the International Criminal Tribunal for the Former Yugoslavia considered the defendant Zlatko Aleksovski, a civilian commander of a prison facility in Bosnia during the Bosnian War, to have had effective authority over subordinate prison guards who subjected many detainees to inhumane

178. *Id.* at 1069.
179. *Id.* at 1085 ("[T]he tortious act exception does not provide jurisdiction over Doe's negligent hiring, supervision, and failure to warn claims because they are barred by the discretionary function exclusion.").
180. Neu, *supra* note 167, at 1537 ("An American court has also applied the command responsibility doctrine in a civil case involving international tort claims.").
181. *Id.*
182. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment of the ICTR Chamber, ¶ 880 (Jan. 27, 2000).
183. *Id.* ¶ 141.

treatment.[184]

While expansion of command responsibility to tort and—in the international realm, at least—to civilian defendants has been tried and tested, the fact that these cases name natural persons as defendants is a distinguishing factor that would be a significant obstacle to any American plaintiff hoping to use Neu's approach against the Holy See.

2. Before the International Criminal Court

Focusing now on the international context, command responsibility also seemed a tenable claim against high-level Vatican officials in the International Criminal Court (ICC).[185] The ICC prosecutor's rejection in June 2013 of a request for an investigation on behalf of victims of clerical sex abuse,[186] however, evinces the concern some international courts may have with Neu's proposition to extend command responsibility outside of military contexts.

The ICC has the capacity to prosecute *individuals*,[187] making a claim against the Holy See impossible.[188] The plaintiffs here, therefore, brought their claims against high-ranking Vatican officials, including Pope *emeritus*, Benedict XVI.[189]

The ICC has the competency to hear cases of crimes against humanity.[190] The ICC Statute enumerates some acts triggering inquiry, including rape, sexual slavery, and any other form of sexual violence of comparable gravity.[191] The ICC Statute also outlines the two-part inquiry: (1) the act must be part of a widespread, systemic attack (2) directed against any civilian population.[192]

On September 13, 2011, the Survivors Network of Those Abused by Priests

184. *See Prosecutor v. Aleksovski*, *supra* note 166, ¶ 90-107.

185. Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity, ICC File No. OTP-CR-159/11, at 2-3 (Sept. 13, 2011), *available at* http://s3.documentcloud.org/documents/ 243877/victims-communication.pdf [hereinafter ICC Complaint].

186. Rachel Zoll, *Pope Benedict XVI International Criminal Court Investigation Requested by Clergy Sex Abuse Victims Rejected*, THE HUFFINGTON POST (June 13, 2013, 2:33 PM), http://www.huffingtonpost.com/2013/06/13/pope-benedict-international-criminal-court_n_ 3436720.html.

187. Rome Statute of the International Criminal Court art. 25(1), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter ICC Statute] ("The Court shall have jurisdiction over *natural persons* pursuant to this Statute.") (emphasis added).

188. *Id.* art. 25(4) ("No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.").

189. ICC Complaint, *supra* note 183, at 55-57.

190. ICC Statute, *supra* note 185, art. 5(b).

191. *Id.* art. 7(1)(g).

192. *Id.* art 7(1).

(SNAP) filed a lengthy complaint, supported by expert declarations and exhibits illustrating the worldwide nature of the problem.[193] SNAP asserted that the Church's practices and policies amounted to a crime against humanity within the meaning of the ICC Statute.[194]

The arguments advanced in the complaint are heavily informed by command responsibility's corollary, superior responsibility. The complainants rely on Article 28(b) of the ICC Statute, which, although pertaining to non-military superiors, is analytically identical to the *Ford* test for command responsibility above.[195]

The tribunal, however, rejected the request with a letter to the Center for Constitutional Rights, which represented SNAP, stating, "The matters described in your communication do not appear to fall within the jurisdiction of the court."[196] The letter further clarified that the ICC may only investigate "the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes," and that SNAP and the Center for Constitutional Rights did not meet these requirements.[197]

In response to this development, Jeff Lena, an attorney for the Vatican, stated, in reference to the long line of high-profile cases about clerical sex abuse, that the "common thread" was the "mistaken idea that everything is controlled by Rome."[198] The statement highlights how the attenuation of command has become a windfall to the Holy See, under both *respondeat superior* and command responsibility theories.

3. Before the UN Committee on the Rights of the Child

The SNAP complaint may have at least raised international awareness on the issue, but the institutionalized clericalism and secrecy of the Catholic Church has rendered the latest inquiries against the Church fruitless. Neu advocated the use

193. *See* ICC Complaint, *supra* note 183.
194. *Id.* at 61-69.
195. ICC Statute, *supra* note 185, art. 28(b). Article 28(b) provides that a superior:
> [S]hall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes,
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

196. Zoll, *supra* note 184.
197. *Id.*
198. *Id.*

of the Convention of the Rights of the Child (CRC), to which the Holy See is a signatory, as a basis for holding the Holy See accountable for infringing a child's basic human rights.[199] In July 2013, the UN Committee on the Rights of the Child issued to the Holy See a series of questions regarding its adherence to the CRC.[200] Of particular relevance is Question 11, which inquires in relevant part:

> In the light of the recognition by the Holy See of sexual violence against children committed by members of the clergy, brothers and nuns in numerous countries around the world, and given the scale of the abuses, please provide detailed information on all cases of child sexual abuse committed by members of the clergy, brothers and nuns or brought to the attention of the Holy See over the reporting period.[201]

The document further questions the Holy See on "the type of support and protection provided by the Holy See to child victims," information on the Holy See's cooperation with civil authorities, measures taken to sever contact between children and offending clergy, and other statistical information.[202]

The Holy See's response, however, evinces the Church's clericalism and secrecy. The answers to Question 11 were vague, subjective, conclusory, or deflective. For example, in response the Committee's inquiry about "cooperation provided by the State party proceedings engaged in countries where the abuses were committed," the Holy See responded: "[R]espect should be shown a) for civil laws, such as reporting obligations; b) for the person who reports the delict of clerical sexual abuse of a minor; and c) for the right to request that his or her name not be known to the priest denounced."[203]

It is difficult to see how this answer, the vagueness of which is representative of the accompanying answers, provides the Committee sufficient information as to the Holy See's compliance or non-compliance with the CRC. In keeping with the Holy See's refusal of transparency on the issue of sexual misconduct, Answer 11.4 states in relevant part: "it is not the practice of the Holy See to disclose information on the religious discipline of members of the clergy or religious according to canon law."[204]

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199. Neu, *supra* note 167, at 1539.
200. U.N. Convention on the Rights of the Child, List of Issues to be Taken Up in Connection with the Consideration of the Second Periodic Report of the Holy See, CRC/C/VAT/Q/2 at 2, Question 11 (July 1, 2013), *available at* www2.ohchr.org/english/bodies/crc/docs/CRC_C_VAT_Q_2_AUV.doc.
201. *Id.*
202. *Id.* at Part III.
203. U.N. Convention on the Rights of the Child, Replies of the Holy See to the List of Issues, CRC/C/VAT/Q/2/Add.1, at 16 (Dec. 2, 2013), *available at* http://www.bishop-accountability.org/UN/CRC/2013_12_02_Holy_See_Replies.pdf.
204. *Id.* ¶ 46, at 16.

This latest development reiterates the Holy See's ability to utilize its *sui generis* status in the international arena to justify secrecy and avoid meaningful cooperation, while frustrating victims' sense of justice.

Conclusion

While *Doe* and *O'Bryan* tread on new ground, the attempt to hold the Holy See liable under *respondeat superior* against the Holy See's claim of immunity under the FSIA proved to be a Sisyphean task. Plaintiffs simply could not escape the questions of employment and agency in attempting to overcome the Holy See's claim of immunity.

Because the doctrine of command responsibility, as proposed by Neu, is firmly ensconced in universal *jus cogens* norms of international law, restated in American case law, and codified in international agreements, it may provide a more workable legal framework upon which victims of sex abuse by Catholic clergy can rely. The extension of command responsibility to a non-military defendant, however, can be an obstacle to Neu's proposition if the ICC's recent decision is any indication of how far courts elsewhere are willing to extend command responsibility's reach.