Hard Cases

The Immunity of the Holy See

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Abstract

This article offers a critical assessment of the European Court of Human Rights' judgment in the case *JC and others* v *Belgium*, the first pronouncement of an international court concerning the jurisdictional immunity of the Holy See. Rendered in a case concerning sexual abuse within the Catholic Church, the decision raises a number of relevant questions concerning the application of State immunity to a non-state actor and its impact on the right to have access to a court. The article discusses the legal status of the Holy See and whether it enjoys state immunity under international law, focusing on the distinction between sovereign and private acts, and the possibility to qualify the members of the clergy as agents of the Holy See for the purpose of the territorial tort exception. It also discusses how granting immunity to the Holy See may frustrate the attempts of the victims to make the apical organs of the Church accountable for their handling of sex abuse scandals.

I. Introduction

In multiple countries, allegations of sexual abuse in the Catholic Church have led to lawsuits against dioceses and clergy, and the establishment of investigation and claims commissions. However, because of the relatively muted response of the Holy See to the scandals, in some countries, victims have also filed tort suits in domestic courts against the Holy See directly. This has, for instance, happened in the United States,[1] but also in Belgium. In 2011, a group of victims filed suit in the District Court of Ghent against, among other defendants, the Holy See. The victims asked the court to hold the Holy See liable in tort for its failure to take action against the abuses. The District Court and, subsequently, the Court of Appeal dismissed the claim on the ground that the Holy See enjoys immunity from suit.[2] Claiming that their right of access to a court under Art 6(1) of the European Convention on Human Rights (ECHR) had been violated, the victims went on to file an application against Belgium at

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[1] See *Dale and ors* v *Colagiovanniand ors* 443 F3d 425 (5th Cir 2006), ILDC 714 (US 2006); *O'Bryan* v *Holy See*, 556 F.3d 361, 369 (6th Cir 2009).

[2] See the procedural history of the case as related in Eur Court HR, *JC et autres* v *Belgique*, App no 11625/17, Judgment of 12 October 2021 (available only in French), paras 4-15.

the European Court of Human Rights (ECtHR). In its judgment of 12 October 2021 (*JC and others* v *Belgium*, hereinafter referred to as '*JC*'), the ECtHR held that granting State immunity to the Holy See corresponds 'to the international practice on the matter',[3] and concluded that Belgium had not violated the ECHR based on the principle first stated in *Al-Adsani* v *UK* that

> 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Art 6 § 1'.[4]

JC is the first pronouncement of an international court concerning the jurisdictional immunity of the Holy See, and raises a number of important questions concerning the application of State immunity. The first of them is whether this kind of immunity applies to the Holy See. Both Belgian courts and the ECtHR seem to assume that since the Holy See entertains diplomatic relations with numerous States and can conclude treaties, it should be treated as a State with regard to immunity as well.[5] Such an inference, however, is not unproblematic. As we contend, different international legal persons may hold different rights and obligations, and the Holy See shall be considered a non-State actor insofar as it acts as the head of an ecclesiastical organizations. In other words, it does not go without saying that an international legal person other than a State enjoys the same immunity as States.

A related question concerns the identification of the acts of the Holy See that would be covered by immunity. Belgian courts held that the relationship between the Pope and Belgian bishops is one of public law, ie one in relation to which immunity always applies. The ECtHR endorsed this conclusion.[6] Also this determination, however, appears problematic. Even assuming that criteria of application tailored to the State – such as the distinction between sovereign acts and private acts – may be applied to the Holy See, one may wonder whether managing an ecclesiastical organization should rather be seen as a private activity, that is one not covered by immunity.

A last issue concerns the application of the territorial tort exception to immunity and the possible application of State responsibility criteria to the Catholic Church. In *JC* the ECtHR indirectly endorsed the reasoning of Belgian courts according to which members of the Catholic clergy cannot be considered agents of the Holy See for the purpose of the territorial tort exception.[7] This

[3] ibid para 63.

[4] ibid; see also Eur Court HR, *Al-Adsani* v *United Kingdom* App no 35763/97, Judgment of 21 November 2001, para 56.

[5] *JC et autres* v *Belgique* n 2 above, paras 8 and 56.

[6] ibid para 9.

[7] ibid para 10.

determination removed the last obstacle to the application of immunity. Nevertheless, this conclusion – which was harshly criticized by the Albanian judge in a separate opinion – seems to ignore the authority and control that the Pope exerts on bishops under Canon Law. As we discuss in the article, moreover, granting immunity to the Holy See without also acknowledging its responsibility for the acts of the clergy may be seen as contradicting the principle that rights always come with corresponding responsibilities.

Since broadening the scope of application of immunity always implies restricting access to court, and given the global dimension of the sexual abuses within the Catholic Church, these technical questions also have a significant human rights dimension. In an *obiter dictum* on the access to alternative remedies, the ECtHR acknowledged the 'gravity of the sexual abuse' the applicants had allegedly suffered.[8] One may speculate, however, that extending the application of State immunity to the Holy See will make it more difficult for the victims to obtain redress and make the Church's apical organs accountable for the way in which they managed sex abuse scandals.

This article offers a critical analysis of *JC and others* v *Belgium*. Section II discusses the legal status of the Holy See in international law, focusing on the question of whether it enjoys State immunity. Section III addresses the question of whether managing an ecclesiastical organization can be considered a sovereign activity covered by immunity. Section IV analyses the arguments that Belgian courts raised (and the ECtHR endorsed) for disapplying the territorial tort exception. Section V addresses the question of whether it is fair that the Holy See invokes jurisdictional immunity without also taking responsibility for the human rights violations that members of the Catholic clergy committed outside Vatican territory. Section VI discusses the ECtHR's *obiter dictum* on alternative remedies and its implication in the context of sexual abuses within the Catholic Church. Finally, section VII offers some conclusions.

II. The Holy See: A State or a Non-State Actor?

The case of *JC* has drawn attention to the vexed question of the Holy See's international legal status: is the Holy See a State, or rather another legal entity? The Belgian Court of Appeal was of the view that the Holy See qualifies as a State, and the ECtHR applied the international rules of *State* immunity to the Holy See, thereby at the very least equating the Holy See to a State for State immunity purposes. These courts are certainly not alone in considering the Holy See as a State or State-like. Even the United Nations treats the Holy See as it if were a State: since 1964, the Holy See has observer status as a non-member

[8] ibid para 71.

State.[9]Also certain scholars have observed that the Holy See resembles a State.[10] This is understandable, as the Holy See has entered into multiple treaties,[11] and sends and receives diplomats, a practice that is recognized by the 1961 Vienna Convention on Diplomatic Relations.[12] Both are attributes of international legal personality which the Holy See shares with States.

Determining the Holy See's legal status is made more complex by its relationship with the Vatican City. The Holy See hints at this complexity in its correspondence to the Committee on the Rights of the Child in 2013 (the Holy See is a party to the Convention on the Rights of the Child):

> 'the Holy See, intended as the Roman Pontiff, in the narrow sense, and the Roman Pontiff with his dicasteries [administrative units], in the broader sense [...] is related but separate and distinct from the territory of Vatican City State (VCS) over which the Holy See exercises sovereignty [...], is related, but separate and distinct from the Catholic Church, which is also a non-territorial entity and may be defined as a spiritual community of faith'.[13]

In our view, the Vatican City, which is the territorial base of the Holy See, is a State. This means that the Vatican enjoys State immunity, and that Vatican high officials – the Pope and the Secretary of State – probably enjoy personal immunity.[14] The Holy See, however, is *not* a State. It is an entity that governs a State (Vatican), but, more importantly, that governs an ecclesiastical organization, namely the Catholic Church. Legally speaking, the Holy See is a universal religious organization with a *sui generis* international legal personality.[15]

That the Holy See has international legal personality, does not mean that it has the same rights and obligations of States, or that it is entitled to immunity to the same extent as States. After all, in the *Reparation for Injuries* case, the International Court of Justice held that

[9] See for the website of the Holy See's permanent observer mission at the UN: https://tinyurl.com/r5km466e (last visited 31 December 2022).

[10] See for instance I. Cismas, *Religious Actors and International Law* (Oxford: OUP, 2014), Chapter 4.

[11] C. Ryngaert, 'The Legal Status of the Holy See' 3 *Goettingen Journal of International Law* 829, 835-836 (2011).

[12] Vienna Convention on Diplomatic Relations, 18 April 1961, Art 14(1) (equating papal nuncios with ambassadors). Id, Art 16(3) (on the 'practice accepted by the receiving State regarding the precedence of the representative of the Holy See').

[13] List of issues in relation to the second periodic report of the Holy See, Addendum, Replies of the Holy See to the list of issues, UN Doc CRC/C/VAT/Q/2/Add 1, 9 January 2014, 4, paras 7-8.

[14] D. Akande, 'Can the Pope Be Arrested in Connection with the Sexual Abuse Scandal?' available at https://tinyurl.com/mwu4nm2s 14 April 2020 (last visited 31 december 2022).

[15] C. Ryngaert, n 11 above, 837. See for such criticism of the Court of Appeal's reasoning in this regard also S. Duquet and J. Wouters, 'Het mysterie van de Heilige Stoel' 79 *Rechtskundig Weekblad*, 1602 (2016).

> '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.[16]

International (intergovernmental) organizations, for instance, are subjects of international law, but – although positions on the matter differ –[17] they do not enjoy immunity unless this is provided for by a treaty law, national law, or perhaps customary international law.[18] In any case, international organizations do not enjoy the same immunities as States.

Likewise, the Holy See may not enjoy the same immunities as States. In fact, there is not much State practice which addresses the international immunities of the Holy See.[19]Italy has traditionally regulated the exercise of its jurisdiction over the Holy See based on Art 11 of the Lateran Treaty.[20] According to the Italian Court of Cassation, this provision does not provide for a jurisdictional immunity, but rather prohibits Italian authorities to interfere with the 'patrimonial activity' of the Church's 'central organs'.[21] That being said, in a number of recent decisions, while denying immunity because the relevant acts would have been private in nature, the Court of Cassation did not rule out the application of State immunity in relation to sovereign acts.[22] According to the Court, the Holy See's would enjoy immunity in reason of its international legal personality, considered 'equivalent' to that of States.[23] Similarly, in a few cases concerning children abuse, US courts considered the Holy See to be a State for the purposes of applying the Foreign Sovereign Immunity Act (FSIA).[24] However, US courts have so far confined their reasoning to the application of a domestic legislative act (the FSIA) and never ruled on the conditions for the application of immunity in international law.

[16] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, 174, 178.

[17] See M. Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' 10 *International Organizations Law Review*, 287-318 (2014).

[18] On the customary international law status of the immunity of international organizations, see Dutch Supreme Court (*Hoge Raad*), 20 December 1985 (*Spaans* v *Iran US Claims Tribunal*), ECLI:NL:PHR:1985:AC9158.

[19] C. Ryngaert, n 11 above, 857.

[20] Trattato tra la Santa Sede e l'Italia (Patti Lateranensi), 1929.

[21] Corte di Cassazione 21 May 2003 no 22516, available at www.dejure.it; see also J. Pasquali Cerioli, 'Giurisdizione italiana ed "enti centrali" della Chiesa Cattolica: tra immunità della Santa Sede e (intatta) sovranità dello Stato in re temporali', available at *www.statoechiese.it*, 1-36 (2017).

[22] Corte di Cassazione-Sezioni Unite 11 April 2016 no 7022, available at www.dejure.it; Corte di Cassazione-Sezioni Unite 18 September 2017 no 2154, available at www.dejure.it.

[23] In its pronouncement of 2016, ibid, the Court of Cassation specifies that the Holy See is entitled to immunity 'in quanto titolare di personalità giuridica di diritto internazionale equiparabile a quella degli Stati sovrani […]' (as an entity enjoying a legal personality equivalent to that of sovereign states).

[24] See *O'Bryan* v *Holy See* n 1 above.

In such an uncertain situation, and given the impact of jurisdictional exemptions on the right to access to justice, the Holy See's right to immunity should not be presumed. As one of us earlier noted,

> 'in light of the increasing importance of individuals' right to access to a court, immunities ought to be interpreted restrictively, all the more so if the beneficiary of the immunity is not a State but a non-State actor'.[25]

Belgian courts, however, took a different approach. Instead of examining international practice, they resorted to analogical reasoning: like States, the Holy See has the capacity to conclude treaties and enter into diplomatic relations, *ergo* it also enjoys the same immunity as States. In so doing, they joined the US federal courts in considering the Holy See as indistinguishable from the Vatican State. The ECtHR endorsed this reasoning without questioning its premises. While we concede that the Holy See may well be indistinguishable from the Vatican City State when it acts as the Government of the latter, it remains no less true that, insofar as the Holy See deals with the organization of the Church in the United States or in Belgium, it acts as the head of a non-territorial ecclesiastical entity, and not on behalf of the 0.44 square kilometer State. Therefore, one needs to distinguish the acts that the Holy See performs as the Government of the Vatican City State and those it performs as the head of the Roman Catholic Church. For the former acts, it enjoys immunity, for the latter not (as suggested by the plaintiffs in *O'Bryan* v *Holy See*).[26] Confusing the two levels could instead have repercussions in terms of accountability and access to justice, insofar as it would allow the main bodies of an ecclesiastical organization to shield themselves behind institutions and concepts designed for States. In the same vein, as John Morss has argued, it is difficult to understand how the Holy See can legitimately invoke immunities that go with statehood if it does not embrace the responsibilities that go with it, such as its international responsibility in respect of sexual abuse scandals.[27]

Nevertheless, especially in countries with a long-standing relationship with the Holy See, and with a significant presence of Catholics, such as Belgium, an institutional practice may have developed of functionally equating the Holy See with a State for purposes of the application of sovereign immunities.[28] Possibly, there is a rule of regional or special customary international law according to which the Holy See enjoys immunity in particular countries.

[25] C. Ryngaert, n 11 above, 857.

[26] See the plaintiffs' arguments in *O'Bryan* v *Holy See* n 1 above, 373.

[27] J.R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' 26 *European Journal of International Law*, 927–946, 928-929 (2015).

[28] N. Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' 62 *Journal of Church and State*, 26-58, 48 (2020).

III. Is Managing a Church a Sovereign Activity?

Even if immunity were to accrue to the Holy See on the basis of the customary norms of State immunity, such immunity is not absolute. Indeed, the immunity of the State can be invoked only in relation to sovereign acts (*acta jure imperii*), and not in relation to private acts (*acta jure gestionis*). One of the objections raised by the claimants before Belgian courts was precisely that the relationship between the Holy See and Catholic bishops was of a private, or at least non-sovereign nature, insofar as it related to the management of a religious organization. However, the Ghent Court of Appeal held that 'the relationship between the Pope and the bishops' was one 'of public law, characterised by the autonomous power of the bishops'.[29] The Court reasoned not only that 'the faults of the Belgian bishops could not be attributed to the Pope [...], but also that they concerned acts iure imperii'.[30] In other words, the relationship between the Pope and the bishops was held to be one of public law, but at the same time the autonomy enjoyed by bishops was construed as an obstacle to the attribution of the relevant conduct to the Holy See. The ECtHR endorsed this reasoning.[31]

This interpretation is problematic in more than one respect. To start with, one may wonder whether it is logical and fair that the same relationship – between the Holy See and Catholic bishops – is qualified as *jure imperii*, that is, one involving the exercise of sovereign power, but also as one that does not involve enough control to allow for the attribution of the bishops' acts to the Holy See. Belgian courts, and indirectly the ECtHR, seem to characterize this relationship in different ways depending on a shifting standpoint. In a top-down perspective, there appears to be a strong link between the Holy See and the lower organs of the Church, while in a bottom-up one, the bishops seem able to escape the control of the Pope.

Moreover, the argument by which the administrative tasks of a non-state actor and its power to issue directives are sovereign in nature seems far-fetched. The problem with it is that *public law* is hard to conceive in isolation from the State. Scholars of international organizations have traditionally opposed applying the notion of *acta jure imperii* to international institutions because, they claim, these entities 'are definitively not states'.[32] It is therefore surprising that such a notion is applied to an ecclesiastical organization. While international organizations are usually considered public entities, today, in Europe, following a process of separation between churches and State that began at least in the eighteenth century, churches are often associated with private law entities. By

[29] *JC* v *Belgique* n 2 above, para 9.
[30] ibid
[31] ibid
[32] See A. Pellet, 'International Organizations Are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in M. Ragazzi ed, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013), 41.

way of illustration, Catholic dioceses in Belgium have the legal status of non-profit private associations.[33] Also, in the United States, dioceses are considered as 'corporations soles', ie, 'a legitimate corporate form that may be used by a religious leader to hold property and conduct business for the benefit of the religious entity'.[34] As of late 2021, 31 Catholic dioceses had sought bankruptcy protection under Chapter 11 of the US Bankruptcy Code.[35] These are strong indications that dioceses are not public law entities.[36]

If administering an organization and issuing directives are the decisive criteria for the qualification of an activity as sovereign, this may lead to the absurd result that any juridical person could invoke *sovereign* immunity. For example, the relationship between the Holy See and Catholic bishops seems entirely analogous to that between the legislative and executive bodies of various Christian churches and their respective bishops or other territorial bodies. Thus, one can wonder whether the relationship between the President of a Lutheran Church and the bishops of her Church should also be considered sovereign in nature, or whether the analogy applies only to the Roman Catholic Church, and if so, why. One can also ask whether this reconstruction implies that the acts related to the administration of associations, foundations, and other private entities is sovereign in nature (again, after all Belgian dioceses are private associations). If one removes the State from the equation, the distinction between sovereign and private acts loses all meaning.

In order to distinguish between the activity of the Holy See as the Government of a State and the acts it performs as head of an ecclesiastical organization, one may want to consider the acts related to the administration of local churches outside the territory of the Vatican State as *private acts*, that is acts not covered by immunity. It is indeed very difficult to see how the activity that the Holy See performs in this capacity is different from that of the director or board of an non-governmental organization. One should also note that, in international practice, for instance when it comes to the participation in the activities of international organizations, all other religious or humanitarian organizations are considered 'civil society', or NGOs. It is really hard to explain then why the Catholic Church should enjoy special treatment.[37] Of course, one could justify this special treatment based on the history of the Holy See, but one should be aware that such a line of argument is likely to be seen as Eurocentric.

[33] JC v Belgique, para 32.

[34] US Internal Revenue Service (IRS), Rev Rul 2004-27.

[35] See for an overview: Penn State Law, 'Catholic Dioceses in Bankruptcy', available at https://tinyurl.com/muufujmy (last visited 31 December 2022).

[36] Note that a US municipality, ie, a political subdivision or public agency or instrumentality of a State, may file for relief under Chapter 9 of the US Bankruptcy Code (11 U.S.C. § 101(40)). However, municipalities, as public law entities, are not subject to Chapter 11 on reorganization/ bankruptcy protection.

[37] See Y. Abdullah, 'The Holy See at United Nations Conferences: State or Church?' 96 *Columbia Law Review*, 1835-1875 (1996).

The idea that contemporary international law should recognize the universal value of a religious institution which developed in the European Middle Ages by granting special privileges to it may arguably reflect the sense of cultural superiority which characterized European colonialism. Finally, someone may argue that the special treatment of the Holy See derives from the fact that the Catholic Church is the only religious community possessing its own territory. We contend, however, that such a reconstruction would be inaccurate. As argued above, the Vatican City State has a territory, but the Catholic Church is a non-territorial 'community of faith' rather than the emanation of a State.

IV. The Territorial Tort Exception

There is not only an exception to State immunity for private acts, but also for 'territorial torts'. The territorial tort exception is provided for in some treaties and national legislation, and may have acquired the status of customary norm.[38] Pursuant to the exception, immunity cannot be invoked in proceedings which relate to compensation for death or injury to persons caused by acts (or omissions) committed at least in part within the territory of the forum state, 'if the author of the act or omission was present in that territory at the time of the act or omission'.[39]

In *JC*, the applicants invoked the territorial tort exception, by pointing out that the damage they had suffered had been caused in Belgium as a result of a 'policy of silence' promoted by the Holy See about the Catholic clergy's behaviour. In a line of reasoning subsequently considered 'reasonable' by the ECtHR, the Ghent Court of Appeal rejected the application of the exception on three grounds: (1) this exception would not apply to *acta iure imperii* such as those performed by the Holy See; (2) the acts of the bishops could not be attributed to the Holy See under Art 1384 of the Belgian Civil Code; (3) the acts directly attributable to the Holy See ('*la politique générale fondée sur des documents pontificaux et l'omission de prendre des mesures ayant un impact en Belgique*') would have been committed in Rome, which for the Court meant that 'neither the Pope nor the Holy See' were in Belgium at the time of the events'.[40]

These arguments fail to persuade, however. To begin with, the exclusion of sovereign acts from the scope of application of the territorial tort exception is not mentioned in the two main reference treaties, the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States.[41]

[38] See H. Fox and P. Web, *The Law of State Immunity* (Oxford: OUP, 2015, 3rd ed), 468.

[39] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Art 12.

[40] *JC* v *Belgique* n 2 above, para 10.

[41] European Convention on State Immunity, 16 May 1972, Art 11; United Nations Convention on Jurisdictional Immunities of States and Their Property n 39 above, Art 12.

To be sure, it would be difficult to explain it on logical grounds: since State immunity can only be invoked in relation to sovereign acts, this exclusion would render the territorial tort exception practically useless. Moreover, the Belgian courts and the ECtHR ignored the Commentary of the UN Commission on International Law to the Draft Articles on Jurisdictional Immunities of States and Their Property, according to which the territorial tort exception must be applied 'irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*'.[42] As Judge Pavli observed in a dissent to the ECtHR's judgment,[43] the Belgian courts have probably confused the unavailability of the exception in relation to acts performed in armed conflicts with a general unavailability in relation to sovereign acts.[44]

As for the second argument - the acts of the bishops could not be attributed to the Holy See - immunity is a preliminary question pertaining to the jurisdiction of national courts, which precedes the examination of the merits of the case, and the ascertainment of responsibility.[45] Hence, the application of the rules on immunity cannot depend on whether the Holy See is responsible for the acts of the bishops. The two main international instruments on the matter do not construe the attribution of the act to the State as a condition for the application of the territorial tort exception. The European Convention on State Immunity makes no mention of it, while the UN Convention refers to an act or omission 'which is alleged to be attributable to the State'.[46] One should also note that, in his dissenting opinion, ECtHR Judge Pavli found the conclusion of Belgian courts on the non-attributability of bishops' acts to the Holy See insufficiently motivated.[47] Although the parties had not disputed that the Pope had considerable powers over the bishops, and although the claimants had

> 'submitted evidence purportedly showing that the Holy See had sent a letter to all Catholic bishops worldwide in 1962 that mandated a *code of silence* regarding cases of sexual abuse within the Church, on pain of excommunication; and that this direction [...] was reaffirmed in a letter sent by the Holy See in 2001, none of these arguments were addressed by the Belgian courts',

Pavli wrote.[48]

[42] International Law Commission, Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, commentary to Art 12, para 8.

[43] *JC et autres* v *Belgique* n 2 above, dissenting opinion of Judge Pavli, paras 7-9.

[44] Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports 2012, 99, para 78.

[45] ibid para 82;H. Fox and P. Webb, *The Law of State Immunity* n 38 above, 12.

[46] United Nations Convention on Jurisdictional Immunities of States and Their Property n 39 above, Art 12.

[47] *JC et autres* v *Belgique* n 2 above, dissenting opinion of Judge Pavli, paras 12-16.

[48] ibid

The question of which conduct is attributable to the Holy See also impacts the third argument, concerning the presence of the author of the act in the territory of the forum State. As Judge Pavli pointed out,[49]

> 'the reference [...] to the 'author' of the act or omission is to the individual representative of the State who actually does or does not do the relevant thing, as distinct from *the State itself as a legal person'*.

It is therefore not necessary that the Pope or the Secretary of State were in Belgium at the time of the events. It suffices that one of their agents was. It is therefore decisive to establish whether bishops or other representatives of the Catholic Church can be considered agents of the Holy See. Judge Pavli writes in this regard that

> 'the domestic courts should have considered the key question whether the individuals on Belgian soil – the bishops and priests who committed the abuse and who allegedly followed orders issued directly from the Holy See on the handling of such abuse – could trigger the Holy See's tort liability under the circumstances [...]. In the case before us, the Belgian courts dismissed the applicants' arguments, in my view, in an exceedingly summary fashion'.[50]

This discussion, highly technical in appearance, touches on a more general and fundamental aspect of the relationship between the Holy See and international law, to which we now turn.

V. Bishops as Agents of the Holy See

Our impression is that the Belgian courts and the ECtHR used the ambiguities inherent in the Holy See's status to grant the latter as much immunity (and exemption from responsibility) as possible. On the one hand, the relationship between the bishops and the Pope are construed as *jure imperii* activities in order to assimilate the Holy See to a State and allow it to enjoy immunity. On the other hand, the Catholic Church's special features, particularly the autonomy of the bishops as 'local legislators' under Canon law, are used to prevent the clergy from being considered as agents of the Holy See. This allows for the breaking of the chain of attribution, which in turn vitiates the territorial tort exception to the Holy See's immunity.

It appears that the Holy See enjoys the privileges of States without also assuming the responsibilities that correspond to them. This may not be entirely fair. As Morss writes,

[49] ibid para 18.
[50] ibid

> 'with the advantageous incidents of statehood go the responsibilities, such as (…) the responsibility for extraterritorial violations of human rights standards by persons and other legal entities *closely connected* with such a state-like entity'.[51]

Along the same lines, Worster argues that the Holy See exercises sufficiently control over persons for them to fall within the Holy See's jurisdiction, which grounds its extraterritorial human rights obligations, and is in turn the 'price of international legal personality and participation in international law'.[52]

It is of note that, in 2014, the Committee on the Rights of the Child, in its Concluding observations on the second periodic report of the Holy See, addressed the issue of agency as follows:

> 'While fully aware that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee notes that subordinates in Catholic religious orders *are bound by obedience to the Pope*'.[53]

Canon law indeed contains more than one indication of a close connection between the Holy See and the bishops. By way of illustration, the Pope has 'supreme, full, immediate, and universal ordinary power in the Church' and particular churches (including dioceses), which 'he is always able to exercise freely' (Can. 331; Can. 333).[54] Furthermore, bishops, who are appointed and can be removed by the Holy See (Can. 192), swear allegiance to the Apostolic See (Can. 380) and are required to report to the Pope (Can. 400).[55] Canon 590 provides that

> '[i]nasmuch as institutes of consecrated life [whether clerical or lay] are dedicated in a special way to the service of God and of the whole Church, they are subject to the supreme authority of the Church in a special way',

and that

> '[i]ndividual members are also bound to obey the Supreme Pontiff as their highest superior by reason of the sacred bond of obedience'.[56]

This agency relationship has recently been brought in stark relief in the context

[51] J.R. Morss, 'The International Legal Status' n 27 above, 928-929.

[52] W.T. Worster, 'The Human Rights Obligations of the Holy See under the Convention of the Rights of the Child' 31 *Duke Journal of Comparative and International Law*, 351, 432 (2021).

[53] Committee on the Rights of the Child, Concluding observations on the second periodic report of the Holy See, 25 February 2014, UN Doc. CRC/C/VAT/CO/2 (emphasis added).

[54] See the Code of Canon Law, available on the Vatican's webpage, https://tinyurl.com/mrwkzadt (last visited 31 December 2022).

[55] ibid

[56] ibid

of the sexual abuse scandals in the Church, when it was reported that the Holy See had issued an instruction (which was not made public) that prevented Polish bishops from transferring records of canon law proceedings to Polish authorities.[57] According to the instruction, files of canonical proceedings can only be transferred by the Vatican/Holy See.[58] This indicates that bishops are supposed to obey to the Pope's orders.

Accordingly, it has been submitted that Catholic bishops and clergy act as agents of the Holy See, and that their acts are attributable to the Holy See on the basis of a *mutatis mutandis* application of Art 8 of the ILC Articles on State Responsibility, which provides that

> 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[59]

Admittedly, applying the Articles on State Responsibility to a non-State actor, specifically a church, is a complex exercise that requires the adaptation of a corpus of norms to a context that differs from that for which it was conceived. However, should one decide to use this analogy for the purpose of granting immunity, as the Belgian courts and the ECtHR did, then one should perhaps stick to the analogy when it comes to attribution of conduct. This would imply that, if Catholic clergy duly qualify as Holy See agents, the territorial tort exception applies, and immunity does not accrue to the Holy See. It would also mean that, regardless of the immunity issue, the acts of Catholic clergy can engage the international responsibility of the Holy See for violations of international human rights law, in particular the rights of the child, committed by the clergy.[60]

VI. Holy See Immunity and Alternative Remedies

In the international law of State immunity, a State's immunity is not contingent on the State making available alternative remedies to the claimant. This means that State immunity is not denied if the claimant has no other means of redress. In the *Jurisdictional Immunities* case (Germany v Italy), the ICJ emphatically rejected Italy's 'last resort' argument that Germany's immunity should be denied because other attempts to secure compensation for the victims had failed, even if the Court was aware that immunity from jurisdiction

[57] 'The Vatican is Gagging Bishops' *Rzeczpospolita*, 17 January 2022.

[58] ibid

[59] K. Ważyńska-Finckand F. Finck, 'The Holy See, Human Rights Obligations and the Question of Jurisdiction', *Opinio Juris*, 31 March 2022.

[60] W.T. Worster, 'The Human Rights Obligations of the Holy See' n 52 above.

in accordance with international law may thus preclude judicial redress.[61] Insofar as the Holy See is equated with a State for purposes of the application of State immunity, one would thus expect that the Holy See's immunity is not contingent on the availability of alternative remedies or forms of judicial redress. In *JC*, however, somewhat surprisingly, the ECtHR ascertained whether any alternative remedies were at the disposal of the applicants. Admittedly, it did so only in an *obiter dictum* ('*à titre surabondant*'), after duly recalling that a grant of State immunity does not depend on the existence of alternative remedies.[62] It is nonetheless striking that the Court considered it desirable ('*souhaitable*') that the Holy See's immunity be contingent on the provision of alternative remedies.[63]

In so doing, it imported a test which is normally applied only to the immunity of intergovernmental organizations (even if the ECtHR does not explicitly own up to this). In the seminal *Waite and Kennedy* case, indeed, the ECtHR famously laid down the principle that

> '[f]or the Court, a material factor in determining whether granting [an international organization] immunity from [a Contracting Party's] jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[64]

This test is commonly applied by domestic courts in the ECHR area.[65] Some courts even take the view that the availability of alternative remedies is not just 'a material factor' in determining the permissibility of immunity, but that international organizations can under no circumstances avail themselves of immunity if no reasonable available alternative means are placed at the disposal of the claimant.[66] Notably, in a judgement of December 2021, the Dutch Supreme Court held that only if such means have been made available to the claimants, will the essence of their right of access to justice be safeguarded.[67] This implies that courts cannot just 'balance the interests' of the organization and the

[61] Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) n 44 above, paras 98-104.

[62] JC et autres v Belgique, para 71.

[63] ibid

[64] Eur. Court H.R., *Waite and Kennedy* v *Germany*, App no 26083/94, Judgment of 18 February 1999,para. 68.

[65] C. Ryngaert (2010), 'The Immunity of International Organizations Before Domestic Courts: Recent trends', 7 *International Organizations Law Review*, 121-148 (2010).

[66] See for instance: Belgium, Court of Cassation, *Western European Union* v *Siedler*, Judgment of 21 December 2009, Cass no S 04 0129 F, ILDC 1625 (BE 2009); France, Court of Cassation, *X* v *Organisation for Economic Co-operation and Development*, Judgment of 29 September 2010, no 09-41030, ILDC 1749 (FR 2010); Italy, Corte di Cassazione 19 February 2007 no 3718, *Giustizia Civile Massimario*, 2 (2007), ILDC 827 (2007).

[67] Dutch Supreme Court (*Hoge Raad*), Judgment of 24 December 2021, *Supreme* v *SHAPE en JFCB (NATO)*, ECLI:NL:HR:2021:1956, para 3.2.3 (only available in Dutch).

claimants: if there is no alternative remedy, there will be no immunity.[68]

While the ECtHR in *JC* appeared to apply the *Waite and Kennedy* test, it did not do so unreservedly. It is recalled in this respect that *Waite and Kennedy* aims at safeguarding the integrity of a claimant's access to a court under Art 6 ECHR, regardless of the underlying substantive issues at play. This means that it does not matter whether the claimant alleges a bread-and-butter violation of domestic law (eg, unfair dismissal in the employment relation) or whether s/he alleges a serious human rights violation (eg, torture). What matters is that, in all circumstances, they can avail themselves of their procedural right to a remedy. In *JC*, however, the ECtHR based the application of the contingent immunity test to the Holy See on 'the serious interests at play' and 'the gravity of the sexual abuse'.[69] The subtext of this consideration is that immunity may well apply in case of lighter infringements, even if no alternative remedy is available. There is a faint echo here of Italy's – ultimately dismissed – arguments in the *Jurisdictional Immunities* Case before the ICJ, according to which immunity would be abrogated in case of grave crimes, in that case international crimes and violations of *jus cogens*. To be sure, in *JC*, the ECtHR, citing *Jurisdictional Immunities* as well as its own case-law (notably *Al Adsani* and *Jones*), confirmed the inexistence of an immunity exception for international crimes, in response to the claimants' arguments that the alleged sexual abuse rose to the level of the international crime of torture or inhumane and degrading treatment.[70] Still, it is striking that the ECtHR allows considerations of gravity to sneak in via the backdoor, and to inform the scope of the Holy See's immunity.

It is not entirely clear why the ECtHR applied a version of *Waite and Kennedy* in *JC*. Possibly, as a *human rights* court after all, by drawing attention to the desirability of alternative remedies, it wanted to show a humane face and to acknowledge the victims' suffering and legitimate thirst for justice. Alternatively, the ECtHR may have had second thoughts regarding its application of the international law of *State* immunity to an entity – the Holy See - which is not a State after all, but a non-State actor. It may have been influenced in this respect by the applicants' arguments that the Holy See is an international public service or an international organization, rather than a State. In any event, in case an international entity's statehood is in doubt, such as the Holy See's, it seems defensible to apply a contingent immunity test, at least insofar as it enjoys international legal personality. Perhaps unwittingly, the ECtHR may have pushed the boundaries of the immunities accruing to non-State actors. While the relevant passage is only *obiter dictum* (remarking in passing), it is still authoritative.

While the ECtHR's principled application of the contingent immunity test

[68] ibid, para 3.2.4. On this point, the Supreme Court overruled the Court of Appeal.

[69] *J.C. et autres* v *Belgique* n 2 above, para 71.

[70] ibid, para 64 (citing *inter aliaAl-Adsani* v *United-Kingdom* n 4 above, paras 57-66, and Eur. Court H.R., *Jones et autres* v *Royaume-Uni*, App no 34356/06, Judgment of 14 Juanuary 2014, paras 196-198).

deserves cautious praise, its actual application to the case is more problematic. The ECtHR did not inquire whether the claimants had alternative remedies at their disposal to obtain redress from the Holy See itself. Instead, it found that applicants had had the possibility to sue *officials* of the Catholic Church before Belgian courts, namely a bishop, two of his predecessors, other leading figures of the Belgian Catholic Church, and that they could act as civil parties in a future criminal trial.[71] The ECtHR considered this potential remedy as sufficient; hence, the Holy See could avail itself of its immunity.[72] It added that applicants' actions had failed to produce results because of ill-advised procedural choices they made themselves.[73] We will not comment on whether applicants could have successfully sued officials of the Church had they made other procedural choices - which is a question of Belgian procedural law. However, it is remarkable that the Court considered a suit against Church officials as an acceptable alternative remedy to a suit again the Holy See itself.

Such an approach, which considers a remedy against *another person* to be a sufficient alternative remedy, is unfortunately not novel. For instance, in the *Mothers of Srebrenica* litigation, which concerned the immunity of the UN in the context of wrongful acts committed in UN peacekeeping operations, the UN's immunity was, at least in part, upheld on the ground that applicants could always sue the troop-contributing Member State, ie, another person.[74] This substitution approach interprets the notion of alternative remedy very broadly. It includes, over and above the remedies available against the actor enjoying immunity, also those theoretically available against other subjects which may have contributed to the damage. This approach has attracted criticism for two reasons. The first is that two or more subjects may have caused the damage to different extents, or may not have the same financial capacity. This may affect the right of the claimants to obtain an effective remedy. The second relates to the concept of *accountability*: if the person enjoying immunity is exempted from responsibility for human rights violations, there would be much less incentive for it to address the systemic reasons for such violations.[75] Also from a

[71] *JC et autres* v *Belgique* n 2 above, paras 71-74.

[72] ibid para 75.

[73] ibid para 74.

[74] Court of Appeal of The Hague, *Mothers of Srebrenica* v *State of the Netherlands and UN*, Judgment of 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, para. 5.12; Eur. Court H.R, *Stichting Mothers of Srebrenica and Others v the Netherlands,* App no 65542/12, Judgment of 11 June 2013, para 167 ('The Court cannot at present find it established that the applicants' claims against the Netherlands State will necessarily fail. The Court of Appeal of The Hague at least has shown itself willing, […] to entertain claims against the State arising from the actions of the Netherlands Government, and of Dutchbat itself, in connection with the deaths of individuals in the Srebrenica massacre [...] The Court notes moreover that the appeals on points of law lodged by the State in both cases are currently still pending').

[75] See for a discussion of these objections: L. Pasquet, 'Litigating the Immunities of International Organizations in Europe: The "Alternative- Remedy" Approach and its "Humanizing" Function' 36 *Utrecht Journal of International and European Law*, 192–205 (2021).

victim's perspective, even if the other person – who cannot invoke immunity - is eventually held accountable, the remedy can only be incomplete.

The problem, especially its accountability dimension, also exists regarding the Holy See. How can one shed light on the actual existence of a 'policy of silence' if not by suing the Holy See, and more generally, those having the power to tackle the systemic causes of pedophilia within the Catholic Church? Clearly, for applicants, holding the Holy See – which sits at the apex of the Catholic Church – to account, has much more symbolic value than holding a simple clergyman accountable. It is of note in this respect that the Sauvé Report (2021), which recently analyzed sexual violence against minors within the French Catholic Church from 1950 to 2020, devotes an entire chapter to the 'root causes of the problem'.[76] These include a generalized fear of scandal, 'which favoured concealment, secrecy and silence',[77] the absence of a culture of internal control,[78] which together with a culture of obedience, fosters abuses of power,[79] the identification of the power of the sacrament with institutional power,[80] and the 'overvaluation of celibacy'.[81] The report also calls for a 'a strong action plan in the areas of governance, sanction and prevention'.[82] These are fundamental issues that cannot be addressed solely at local level. Moreover, whether or not one agrees with Sauvé, it is apparent that the problem of sexual violence against minors within the Catholic Church acquired global proportions.[83] It is not a matter of single dioceses. It is likely that granting immunity to the Holy See will hinder attempts at shedding light on the responsibilities of the Catholic Church's highest authorities and will not encourage the Holy See to address the systemic causes of sexual abuse.

VII. Concluding Observations

The practice that we have analysed does not allow to provide a univocal answer to the question of whether the Holy See enjoys immunity under

[76] Rapport de la Commission indépendante sur les abus sexuels dans l'Église, *Les violences sexuelles dans l'Église catholique*, France 1950-2020, October 2021, 311-346.

[77] ibid 313 (in French: 'qui a favorisé la dissimulation, le secret et le silence').

[78] ibid 433-434.

[79] ibid 326.

[80] ibid 433, recommendation 44.

[81] ibid 323-325.

[82] ibid 427 (in French : 'un plan d'action vigoureux dans les domaines de la gouvernance, de la sanction et de la prévention').

[83] See C. Méténier, 'Sexual Abuse in the Church: Map of Justice Worldwide' *Justiceinfo.net*, available at https://tinyurl.com/2dum8bxp (last visited 31 December 2022); N. Winfield, 'A global look at the Catholic Church's sex abuse problem' *APNews.com*, available at https://tinyurl.com/53u8hneu (last visited 31 December 2022); 'The global scale of child sexual abuse in the Catholic Church' *Aljazeera.com*, available at https://tinyurl.com/2a6j65hs (last visited 31 December 2022); 'Catholic Church child sexual abuse scandal' *BBC News*, available at https://tinyurl.com/32cxzzz7 (last visited 31 December 2022).

international law. Although one cannot exclude that a regional or special custom may have emerged by virtue of which the Holy See enjoys such a right, one must note that the practice pointing in that direction is limited to a few cases, in a small number of countries. Moreover, in certain instances – such as the case-law of US federal courts - domestic courts grant immunity based on national law, which makes it difficult to identify a clear *opinio juris*. Given this uncertainty, we argue, a right to jurisdictional immunity cannot be derived from the mere fact that the Holy See participates in international law by entertaining diplomatic relations and concluding treaties *like a State*. Rather, it seems reasonable to presume that non-State actors such as the Holy See do not enjoy State immunity, unless the contrary can be proved through an examination of the relevant practice.

Even if the Holy See enjoyed jurisdictional immunity under international law, such an exemption would only apply to sovereign acts. It is admittedly difficult to imagine how such a notion should apply in relation to a subject other than a State. However, it can be argued that whereas governing the Vatican City State may be considered a *jure imperii* activity, administering the Catholic Church should rather be qualified as *jure gestionis*. The Holy See may well be indistinguishable from the Vatican State insofar as it acts as the Government of the latter, but when it administers the Catholic Church outside Vatican territory, it acts as the highest organ of an ecclesiastical organization and should not be treated differently from any other religious non-governmental organization. Consequently, the Holy See should not be able to invoke immunity in relation to the latter activity.

In the case of sexual abuses committed in the territory of the forum State, should the national courts equate the Holy See to a State for the purpose of immunity, it would seem appropriate to apply the territorial tort exception to allow the victims of sexual violence to invoke the responsibility of the highest organs of the Catholic Church. Canon law seems to establish a strong connection between the Holy See and bishops, which can hardly be ignored. If national courts intend to treat the Holy See like a State, they should also apply the Articles on State Responsibility to determine if local bodies of the Catholic Church act as agents of the Holy See on the territory of the forum State.

Making the application of State immunity contingent on the availability of alternative remedies for the claimants, at least with regard to non-State actors enjoying immunity, would be a positive development from the standpoint of human rights. It is not entirely clear, however, whether this is the direction that the ECtHR intends to indicate in *JC*. At any rate, the interpretation underlying the *obiter dictum* on alternative remedies, according to which the existence of a remedy against a person *other* than the subject enjoying immunity would justify the grant of immunity, seems to confirm the Court's intention – already made clear in the case-law on international organizations' immunities – to limit the

practical consequences of the 'alternative remedy' standard as much as possible.

Finally, it is regrettable that the ECtHR endorsed a new restriction on the right of access to a court based on an analogical reasoning, that is without discussing whether a non-State actor can enjoy State immunity. Even if an analysis of relevant practice and norms of general international law is almost absent from the Court's reasoning, its decision will likely constitute a precedent easing up the grant of immunity to the Holy See in sex abuse cases. This may make it more difficult for the victims to hold the apical organs of the Catholic Church accountable for the handling of sex abuse scandals.