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# The International Responsibility of the Holy See for Human Rights Violations

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**Abstract:** In recent years, the Holy See has been accused of violating its human rights obligations because of acts of sex abuse by the Catholic clergy. Such accusations are based, in various ways, on the authority of the Holy See over the clergy. The Holy See is often referred to as a state and its obligations as state obligations. UN treaty bodies understand that the human rights obligations of the Holy See, as a treaty party, are of a legal—-not moral—-nature and apply extraterritorially, i.e., beyond the territory of the Vatican City State. The notion of state jurisdiction is, therefore, applied to the Holy See in the same way as to any other state. UN treaty bodies implicitly conclude that, for the purpose of human rights responsibility, the crimes of the clergy must be attributed to the Holy See and that anyone under the religious authority of the Holy See is under its state jurisdiction. However, a closer examination of the nature of the Holy See and its authority under international law, church doctrine, and church law paints a more complex and nuanced picture, where it is hard to describe the clergy as state organs or religious authority as state jurisdiction. Still, there are reasons to understand that certain acts and omissions of the Holy See in the context of the sex abuse crisis can be characterized as violations of its positive obligations of conduct.

**Keywords:** Holy See; Vatican City State; sex abuse; human rights; international responsibility



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## 1. Introduction: Religious Authority and Accountability for Sex Abuse by the Clergy

The perception of religious authority has been essential in findings of civil liability against religious organizations for acts of sex abuse committed by their ministers. Manifestations of such authority can be the appointing, training, and supervisory functions of bishops or superiors of religious orders or the alleged authority of the clergy over laypersons.

One underlying rationale for the attribution of liability is that religious organizations could have avoided sex abuse with better use of their appointing or supervisory authority or simply by not vesting clergy with an authority over the lay faithful that could facilitate or be a precursor to acts of sex abuse.

In the case of most religious groups, municipal courts have only had to deal with two levels of religious authority: clergy-laity and clergy-organization. However, some see a third level of authority in Catholicism, i.e., the Pope or the Holy See, to be held accountable. Claims that the Holy See is directly responsible for the acts or omissions of the Pope and/or Vatican officials are accompanied by claims that it is also indirectly responsible for the wrongful acts of Catholic clergy, given its alleged control over them. The fact that the Holy See is a sovereign subject of international law, recognized as a state, and is a party to several human rights treaties, expands the discussion about its liability under municipal law to its responsibility under the international law of human rights.

A cursory reading of those canon law norms describing the authority of the Pope has given claimants in civil lawsuits, as well as international institutions, arguments to accuse the Pope of being the appointer of appointers and the supervisor of supervisors. However, the history and doctrine of Papal authority are much more complex and nuanced. The Holy See is actually not a state, and its responsibilities under international law depend on its specific nature and capacity, in the same way that the responsibilities of international

organizations, non-state actors, transnational corporations, or individual persons also take account of their own specific nature and capacity.

This article will examine certain aspects of the responsibility of the Holy See under the international law of human rights, focusing on the notions of jurisdiction, state organs, extraterritorial obligations, and obligations of conduct. To this end, Section 2 will summarize the process of determining the existence and attribution of violations of human rights. Section 3 will present the recent occasions where the responsibility of the Holy See for clerical sex abuse has been examined by international organizations and tribunals. Section 4 will present the antagonistic way in which representatives of the Holy See have consistently defended that, although it can participate in international relations in much the same way as states, its nature and position within the Catholic Church make it a special case, as far as its human rights obligations are concerned. Section 5 will examine the nature, scope, and limits of the religious authority of the Holy See. To this end, the existing literature on the topic will be analyzed, and the theoretical as well as real "power" of the Holy See within the Catholic Church will be discussed. A preliminary conclusion is that the nature and goals of the religious authority of the Holy See are different from state jurisdiction and that the autonomy of Catholics—-clergy or laity—-within the church is such that they cannot be considered state organs for the purpose of the attribution of their wrongful acts to the Holy See. Moreover, references to church history and doctrine will serve to point out how the authority of the Holy See, its scope, and manners of exercising it have evolved and how the view that UN treaty bodies seem to have of such authority may not correspond with the current exercise of Papal authority. Section 6 will briefly discuss the progressive changes made to church norms in recent decades, showing the extent to which the Holy See has or has not complied with its positive obligations of conduct.

## 2. Human Rights Obligations, State Jurisdiction, and Attribution of Conduct

States have interrelated obligations to respect, protect, and fulfill human rights, i.e., negative obligations not to deliberately violate human rights through state organs or agents, as well as positive obligations to ensure that rights are not violated and adopt concrete measures to prevent violations and remedy them (UN 1966a, ICCPR art. 2; UN 1966b, ICESR arts. 2–5; Mégret 2018, pp. 97–99).

The term state organ encompasses persons and entities belonging to the structure of the state—-including provinces and other territories—-and which exercise governmental authority or public powers, i.e., those that pertain to the essence of statehood, even when those persons act beyond their authority, provided that they are ostensibly acting in an official capacity. The acts of private actors may also be attributed to the state if the latter authorizes them to exercise public authority or where the state makes the actions of those private actors its own. Exceptionally, if there is proof of complete dependence or of a particularly great degree of state control, a person or entity may be characterized as a "*de facto*" state organ (ILC 2001, arts. 4–11; Momtaz 2010, pp. 237–46).

State obligations to respect, protect, and fulfill human rights contain elements of obligations of conduct/means and obligations of result. The first obliges a state to do its best to achieve the enjoyment of specific human rights. The means are usually left to its discretion. The second requires that the state guarantee the enjoyment of rights. Obligations of conduct/means can be found in treaty language requiring signatories to "take all measures", "all appropriate measures", "necessary measures", "effective measures", "do everything possible", "do everything in its power", or "exercise due diligence" (UN 1989, UNCRC, art. 2.2; UN 1984, UNCAT, art. 2.1; UN 1965, UNCERD, art. 2.1; Economides 2010, pp. 372, 378).

The human rights obligations of states apply primarily in their own territory. A state may also be responsible for actions taken in its territory but with consequences abroad. Under certain treaties and treaty provisions, states may have broader or narrower obligations to "secure to everyone within their jurisdiction the rights and freedoms" of those provisions (COE 1950, ECHR, art.1). Such obligations can be properly described as

extraterritorial, where the state "exercises effective control of an area outside that national territory" or "at the very least decisive influence" on that territory or where a state "through its agents exercises control and authority over an individual" (ECtHR 2011, *Al-Skeini v. UK*, pp. 136–38; ECtHR 2004, *Ilascu v. Moldova and Russia*, p. 392). Therefore, a state may violate its human rights obligations in situations of military occupation of a foreign country or where its armed or police forces exercise "effective control" over a person, provided those acts can be attributed to the state under the abovementioned principles (ECtHR 1996, *Loizidou v. Turkey*, p. 52; ECtHR 2001, *Cyprus v. Turkey*, p. 76).

The concept of jurisdiction, for the purposes of the extraterritorial human rights obligations of states, always involves the exercise of the abovementioned "public powers" or "governmental authority". Most importantly, jurisdiction implies the use of sufficient "physical power and control". Moreover, for the existence of positive state obligations to act, a higher degree of control seems to be necessary than for negative obligations to refrain from violating human rights (Joseph and Dipnall 2018, pp. 120–30; Clapham 2018, p. 577; EWCA 2016, *Al-Sadoon v. Secretary of State*, pp. 58–73).

In 1969, the Holy See ratified the Convention on the Elimination of all sorts of Racial Discrimination of 1966, without any reservations or declarations. In 1990, it ratified the Convention on the Rights of the Child of 1989, including its two optional protocols. It included a reservation providing "that the application of the Convention be compatible in practice with the particular nature of Vatican City State and of the sources of its objective law (art. 1, Law of 7 June 1929, n. 11) and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence". It also included a declaration manifesting that "[i]n consideration of its singular nature and position, the Holy See, in acceding to this Convention, does not intend to prescind in any way from its specific mission which is of a religious and moral character". In 2002, it ratified the Convention against Torture of 1984, including the following declaration: "The Holy See, in becoming a party to the Convention on behalf of the Vatican City State, undertakes to apply it insofar as it is compatible, in practice, with the peculiar nature of that State".

Concerning the nature and scope of obligations under the Convention on the Rights of the Child (art. 2), Convention against Torture (arts. 2, 5, 7, 11, 12, 13, 16, and 22) and the Convention on the Elimination of All Forms of Racial Discrimination (arts. 6 and 7), it can be said that their obligations are of different types (of conduct and/or result) and that at least some of them apply extraterritorially (UN 2015). The UN Committee on the Rights of the Child, for instance, insists that human rights must be progressively realized by states "to the maximum extent of their available resources" (CRC 2003).

## 3. The Holy See before International Organizations and Tribunals

### *3.1. The UN General Assembly (UNGA) and the Parliamentary Assembly of the Council of Europe (COE)*

In 2004, a UNGA resolution granted several new rights to the Holy See as a "permanent observer" on the basis of its active membership in UN subsidiary bodies and agencies and the treaties that the Holy See was already a party to. However, the resolution made no reference to any specific differences between ordinary states and the Holy See concerning the obligations arising out of those treaties and participation (UN 2014).

Years later, a 2008 working document of the Parliamentary Assembly of the COE, referring to the Holy See as an observer state, indicated that "the Vatican's atypical institutional structure makes it a special case" (COE 2008a, p. 30). A resolution of the same year on the status of observer states mentioned that the Holy See "participates [at the COE] according to its specific nature and mission" (COE 2008b, p. 10).

A 2010 report of the Parliamentary Assembly of the COE on sex abuse within institutions did not refer to any specific kind of obligations under municipal or international law of dioceses, religious orders, or the Holy See. The report did mention that "[v]arious reactions at different hierarchical levels have come from the Catholic Church" but did not distinguish between disciplinary proceedings against priests at the diocesan and Holy See

level, simply mentioning the instances where the Pope had taken the disciplining into his own hands (COE 2010, pp. 18, 26).

As it can be seen, the issue of the international human rights obligations of the Holy See as an observer state has not been squarely put before the UNGA or the COE. However, the attitudes of these organs towards the Holy See range from not perceiving any essential differences between the Holy See and other member states to highlighting that it is actually a "special case" whose position within international organizations depends on its "specific nature and mission" as a religious entity.

### *3.2. The International Criminal Court (ICC) and the European Court of Human Rights (ECtHR)*

In 2011, the Center for Constitutional Rights (CCR) filed a "Victims' Communication" pursuant to article 15 of the Rome Statute, requesting the Office of the Prosecutor of the ICC to investigate "high-level Vatican officials" for the commission of international crimes by "priests and others associated with the Catholic church". The CCR claimed that the Holy See was the "seat of power or governance of the church", "a highly centralized and hierarchical institution with all authority leading to and ultimately residing in the Pope in Rome" (CCR 2011, pp. 1, 11). The attached Expert Opinion also claimed that "[t]he pope's power is absolute and all inclusive. The pope has authority over every Catholic, cleric and law" (Doyle 2011, p. 35).

The ICC exercises jurisdiction over crimes included in the Rome Statute, e.g., genocide or war crimes, and only if they are committed on the territory of a state party or by one of its nationals (UN 1998 Rome Statute, arts. 5 and 12). The Holy See is not a party to the Rome Statute, but, moreover, the Office of the Prosecutor signaled that the alleged crimes fell outside the temporal and subject-matter jurisdiction of the court (ICC 2013). Therefore, no analysis of the different layers of authority and responsibility within the church could be made. Finally, responsibility in international criminal law is personal, so the Pope or other Holy See officials could theoretically be judged by the ICC, but not the Hoy See itself.

More relevant for the purpose of this study, in 2021, the ECtHR decided a case which originated in a lawsuit filed by a group of victims of sex abuse before the Ghent Court of First Instance, against several bishops, religious orders, and the Holy See, as their "principal". In 2013, the Belgian court had declined jurisdiction over the Holy See on grounds of sovereign immunity, and, in 2016, the Court of Appeal of Ghent upheld that decision. In 2021, the ECtHR found that these rulings were not a violation, by Belgium, of article 6.1 of the European Convention on Human Rights (right of access to court) (Court of Appeals of Ghent 2016; ECtHR 2021, *J.C. et autres c. Belgique*; Vanneste 2015, pp. 54–55).

For a grant of immunity from jurisdiction, the Holy See had to be considered a state and the acts attributed to it could not fall within any of the exceptions to the principle that a sovereign entity cannot be brought before the courts of another state. The Court of Appeal of Ghent and the ECtHR agreed that the Holy See was recognized internationally as having the same attributes as a foreign sovereign, including the same rights and obligations of states. It also engaged in diplomatic relations and was a party to major treaties. Moreover, the ECtHR reminded that it had characterized concordats as international treaties in its own jurisprudence. The ruling of the Court of Appeal added that it was not possible to make a distinction between the Holy See as a "religious" entity—-which in the claimants' view would not enjoy sovereign immunity—-and as a "secular" entity because that distinction was artificial.

The Court of Appeal and the ECtHR agreed that the wrongful acts attributed to the Holy See derived from the exercise of administrative powers and public authority and should, therefore, be characterized as *acta iure imperii* and not as conduct carried out as a private individual for the defense of private interests, i.e., *acta iure gestionis*, for which there is no immunity in international law.

Most importantly, the relationship between the Holy See and Belgian bishops was of a public law nature, and the Holy See could, therefore, not be characterized as the bishops' principal for the purpose of liability in tort under Belgian law on vicarious liability.

Moreover, local bishops had their own autonomous decision making power concerning the repression of ecclesiastical offenses in their dioceses.

Next, the claim did not fall under the article 12 exception of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, whereby "a State cannot invoke immunity from jurisdiction [. . . ] in a proceeding which relates to pecuniary compensation for death or injury to the person, [. . . ] caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission". This exception did not apply to *acta iure imperii*, even if the acts of sex abuse were to be characterized as acts of torture or as serious violations of human rights (ICJ 2012, *Jurisdictional Immunities, Germany v. Italy*, pp. 60–61). Moreover, the acts attributed to the Holy See were not acts of torture but omissions to undertake measures to prevent or redress such acts. Furthermore, since the Pope was not the principal of the bishops, any acts of the bishops could not be attributed to the Pope. Finally, any mishandling of sex abuse by the Holy See itself must have taken place in Rome, i.e., not on Belgian territory.

The ECtHR's recognition that the Holy See has the same obligations as other states seems to agree with the conclusions of the UN treaty bodies and various scholars (see below). The characterization of the acts of the Holy See as acts of a "public authority" may reinforce this conclusion. However, such characterization seems more like a way to exclude the presence of "*acta iure gestionis*" than an attempt to evaluate Papal authority. Anyway, the ECtHR seems well aware of the religious nature, functions, and goals of the Holy See, as well as of the autonomy of bishops in their dioceses, so any "public authority" of the Holy See must be seen in this light and not as an equivalent of the public authority of ordinary states (ECtHR 2021, *J.C. et autres c. Belgique*, p. 9).

### *3.3. The UN Committee on the Rights of the Child (CRC)*

With respect to the nature of the obligations of the Holy See and the manner to discharge them, the Concluding Observations of the CRC in 1995 mentioned "the moral influence wielded by the Holy See and the national Catholic Churches", urged the Holy See to disseminate the Convention and train voluntary workers, and called for the best interests of the child to "be fully taken into account in the conduct of all the activities of the Holy See and of the various Church institutions and organizations dealing with the rights of the child" (CRC 1995, pp. 8–14). The CRC, therefore, highlighted the Holy See's "moral influence" and mentioned in passing its relationship with local churches, without saying that local churches were part of the Holy See or under any kind of actual state-like control.

In 2014, the CRC severely reprimanded the Holy See for the avalanche of cases of sex abuse by clergy. The CRC indicated that the Holy See had a "dual nature" and had ratified the Convention in its capacity as sovereign of the Vatican City State, as well as a "sovereign subject of international law", which had obligations to implement the treaty within the territory of the Vatican but also "worldwide through individuals and institutions under its authority" (CRC 2014a, p. 8).

The CRC conceded that it was "fully aware that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, [but] that subordinates in Catholic religious orders are bound by obedience to the Pope, in accordance with Canons 331 and 590 of the Code of Canon law". However, apart from these references to canon law, no attempt was made to explain if and to what extent the Holy See has power or authority over church members or institutions. The committee did refer to "church-related organizations and institutions in States parties where the Holy See has influence and impact" and to "children attending or involved in schools, services and institutions provided by the Catholic Church". The language of the CRC turned drastic when it referred to the Holy See as "the supreme power of the Church, which is legally responsible for its subordinates in Catholic religious orders under its authority". As regards the means with which the Holy See allegedly counts to discharge its obligations,

the committee mentioned "legislation and policy" or "guidance to all Catholic churches, organizations and institutions worldwide". The CRC also made reference to the Holy See's "moral authority to condemn all forms of harassment" (CRC 2014a, pp. 8, 16, 17, 20, 26, 30, 32, 38, 43, and 63).

The simultaneously issued Concluding Observations of the CRC on the Optional Protocol to the Convention on the sale of children, child prostitution, and child pornography, to which the Holy See is also a party, basically replicate the language and criticisms (CRC 2014b). There are no fewer than sixteen references to the Holy See's "supreme", "worldwide", "legal" "authority", but also to its "moral" "leadership". The CRC's Concluding Observations concerning the Optional Protocol to the Convention on the Involvement of Children in Armed Conflicts also made reference to what the Holy See is supposed to do with respect to "individuals and institutions working under its authority", as well as to the Holy See's potential to "support", "transmit", "appeal", "take all appropriate measures", and "play a key role" (CRC 2014c, pp. 7, 13, 14, 17, 18).

### *3.4. The UN Committee against Torture (CAT)*

The CAT, in its Concluding Observations of 2014, is even more explicit in the assimilation of the religious authority of the Holy See to state jurisdiction and in the way it considers that its human rights obligations are extraterritorial in scope. The UN committee, for instance, requested that "officials and other public officials of the Holy See take effective measures to monitor the conduct of individuals under their effective control" (CAT 2014a, p. 11). Although the CAT tries to define "public officials of the Holy See" as both officials of the Roman Curia and Holy See diplomats serving abroad, it also uses the expression "other public officials of the Holy See", which may or may not include clergy in general or even laypersons performing some sort of religious task. The language recently used by another UN special rapporteur is very similar (Rapporteur Spécial 2021, p. 9).

The CAT does not explain what "effective control" means, as far as religious organizations are concerned, but the Country Rapporteur "was persuaded that the Holy See exercised such significant control and was in a position to, among other things, compel perpetrators of acts of sexual abuse to cease committing them; order bishops to monitor the conduct of clerics reporting to them; and transfer, or prevent the transfer of, accused persons outside the jurisdictions in which the acts had occurred". Elsewhere, she mentioned that the Holy See's "obligation to prevent torture" applied "to all person who act, de jure or de facto, in the name of, in conjunction with . . . the State party", adding that "[t]he Convention should apply to the Holy See as a whole and to all the bodies placed under its authority, not only to the Vatican City State", wondering if the Holy See's own interpretation of the Convention "was conducive to preventing acts of torture from being committed in all jurisdictions under the authority of the Sovereign Pontiff" (CAT 2014b).

### *3.5. The UN Committee on the Elimination of Racial Discrimination (CERD)*

In its Concluding Observations of 2001, the CERD had acknowledged that "the unique structure and nature of the State party may limit the directness of the measures that can be taken to fully implement" it. It also recommended "that the State party implement, as appropriate, the Convention". The CERD distinguished between acts of racism by Catholics, the efforts against racism of Catholic establishments and Catholic ecclesiastics, and those same efforts carried out by the Holy See itself. However, the committee also requested the Holy See to cooperate with national and international judicial authorities regarding the involvement of some ecclesiastics in the Rwandan genocide, without delving into whether the Holy See would be responsible for such involvement or whether the Holy See could effectively force local church authorities to surrender those ecclesiastics to the police (CERD 2001, pp. 3–13).

In its Concluding Observations of 2016, the CERD seems persuaded that the obligations of the Holy See are legal—-not just moral—-and extend beyond the borders of Vatican City State (CERD 2016, pp. 8–21). With respect to the personal scope of the Holy

See's obligations, the Country Rapporteur had acknowledged that the criminal laws of the Vatican City State are applicable within Vatican territory, as well as to "public officials of the State acting abroad" (e.g., apostolic nuncios and legates) but, therefore, not to all clergy or laymen. However, the CERD showed concern that the Holy See itself had not clarified how the "civil and criminal prohibition of acts of racial discrimination [applied], respectively, to citizens and officials of Vatican City State, officials of the Holy See and officials of the Catholic Church".

Moreover, the Country Rapporteur seemed convinced that the Holy See itself "did not consider the territorial scope of the Convention to be limited to the Vatican City State [because] [n]o interpretative declaration had been attached to the State party's ratification". This acknowledgment is significant because the reservations and interpretative declarations of the Holy See with respect to the Convention on the Rights of the Child and the Convention against Torture did show the Holy See's understanding that its international obligations, under those conventions, were indeed limited to Vatican territory and, within that territory, were also subject to the peculiarities of the Vatican as a state and of the Holy See as a religious organization.

Furthermore, for the purposes of proving that the Holy See itself accepted that it had extraterritorial obligations, the Country Rapporteur highlighted the activities of "promotion" of "the Pope and various Church bodies outside the territory of the Vatican City State with a view to eliminating racial discrimination throughout the world".

Similarly, the Country Rapporteur manifested that "[t]he Committee recognized that the Holy See was not responsible for racist acts by Catholic priests acting in other countries. At the same time, a State party's responsibility could be engaged if it failed to take appropriate measures to redress the conduct of its citizens or others under its authority or control. As previously mentioned, the State party had ratified the Convention in part to manifest its moral authority" (CERD 2015a, pp. 11, 13, 22).

The CERD also indicated that it was "mindful of the need to avoid interference in the domestic affairs of the States in which the Church operates", although it requested the Holy See to "use its moral authority to promote the aims of the Convention". It should, therefore, "employ the mechanisms at its disposal to promote sensitivity among the Catholic clergy [. . . ] through its Pontifical Council [ . . . ] providing guidance to Catholic clergy and the Catholic faithful" (CERD 2016, p. 20).

Despite the more accurate and balanced approach of the CERD, some of its members showed the same kind of belief in the immense power of the signatory party as when one of them mentioned that, "in her view, the Holy See was the most powerful of all the world powers, given its extraordinary moral authority" (CERD 2015b, p. 49).

### *3.6. Perception of the Authority and Obligations of the Holy See by International Tribunals and Institutions*

(a) The understanding of UN treaty bodies concerning the obligations of the Holy See, as a signatory of three human rights treaties, has evolved from a certain acceptance of the specific religious nature of the Holy See to considering it much like any other state, whose obligations are of a legal and not just of a moral nature. This is especially the case with the CRC and CAT. Besides, there is an almost complete identification between the Holy See and the Catholic Church worldwide, so that the territorial extent of the jurisdiction of the former is viewed as universal and so should be its obligations.

Such obligations arise from the treaties themselves and not just from an ethical or religious commitment. Any treaty reservations or declarations in the sense that the Vatican City State is the real subject of international obligations, as well as with respect to its religious mission and the religious nature of Vatican laws, including the capacity to enforce them, cannot lead to a situation where the Holy See is released of any real or state-like obligations under the conventions.

The Holy See would thus have state power, not despite being a religious entity but precisely because its religious authority is as effective or even more effective than the

coercive means ordinary states can employ. An example of this view of religious authority is the passing references of the CRC to vows of obedience (CRC 2014a, p. 8) as if the committee assumed that anybody who receives a vow of obedience has no difficulties in making a person do his bidding. Occasionally, the use by the CRC of terms such as "influence" or "considerable influence" and "impact", rather than "power", in reference to the Holy See, would show that the CRC is aware of the autonomy of local church entities and that the Holy See cannot exercise coercive measures. On the other hand, when this UN committee makes broad references to the "services and institutions provided by the Catholic Church", it sounds convinced that the role of the Holy See is to micro-manage every aspect of those services worldwide.

The CERD also subscribes to a state-like understanding of the obligations of the Holy See, but it also accepts, in a more conciliatory tone, that the Holy See did enter into these human rights treaties as a religious entity. It also accepts that the Holy See has a peculiar nature and is devoid of any coercive power. Its position is that of the highest organ within the church but not one of absolute power. As the COE does, the CERD says that the Holy See should implement its human rights obligations "as appropriate". The CERD also seems to blame the Holy See for any confusion concerning the correct allocation of responsibilities between the different organizational structures of the church and for not clarifying the degree of autonomy of local churches.

(b) The CRC, the CAT, and, to a lesser extent, the CERD seem to say that the Holy See has two sets of capacities and corresponding treaty obligations: one as territorial sovereign of the Vatican City State and another as the highest governing entity in the Church. The Holy See must therefore implement its human rights obligations in accordance with those two distinct capacities. This implies that, on the one hand, the Holy See has territorial jurisdiction over the territory of the Vatican City State, which it must exercise in the same way and with the same means as any other temporal sovereign. On the other hand, as the territorial sovereign of the Vatican City State, the Holy See also has extraterritorial human rights obligations to protect the human rights of all those who live outside the territory of the Vatican but who are nevertheless under the Holy See's "jurisdiction" or "effective control". On the other hand, the CERD's references to the activities of "promotion" of the Pope outside Vatican territory, may be more in line with how the church understands its teaching and pastoral authority, as opposed to actual state jurisdiction.

(c) No real effort is made by the UN treaty bodies to understand the different layers of authority within the Catholic Church and the relationships between them, including the relative autonomy they enjoy with respect to each other. Despite the CRC assuring that it knows that bishops are not delegates of the Pope, the degree of responsibility that it attributes to the Holy See cannot be understood unless this UN committee actually thinks that Catholic clergy are state officials at the orders of the Holy See. This is in line with the consideration of the Holy See as a regular state, whose international obligations do not depend on the specific distribution of competences or functions among the different organs or territorial units which make up that state (ILC 2001, art. 4). If the Holy See is a state—-the UN treaty bodies seem to say—-then all church "organs", e.g., dioceses, parishes, religious orders, and Catholic schools, must necessarily be part of that state. The consequence is that violations of human rights committed by or within those organs are violations of the Holy See itself.

## 4. The Position of the Holy See Regarding Its International Human Rights Obligations

The position of the Holy See in international law can be exemplified by statements made by various Popes in their speeches at the UN. Paul VI manifested that the Pope "possesses . . . only a tiny and practically symbolic temporal sovereignty: the minimum needed in order to be free to exercise his spiritual mission and to assure those who deal with him that he is independent of any sovereignty of this world. He has no temporal power . . . you know that our mission is to bring a message for all mankind" (Pope Paul VI

1965a). John Paul II said that "[t]he territorial extent of that sovereignty is limited to the small State of Vatican City, but the sovereignty itself is warranted by the need of the papacy to exercise its mission in full freedom, and to be able to deal with any interlocutor, whether a government or an international organization, without dependence on other sovereignties. Of course, the nature and aims of the spiritual mission of the Apostolic See and the Church make their participation in the tasks and activities of the United Nations Organization very different from that of the States, which are communities in the political and temporal sense." (Pope John Paul II 1979). Finally, Benedict XVI also indicated that "the Church also works for the realization of these [moral] goals through the international activity of the Holy See. Indeed, the Holy See has always had a place at the assemblies of the Nations, thereby manifesting its specific character as a subject in the international domain. As the United Nations recently confirmed, the Holy See thereby makes its contribution according to the dispositions of international law, helps to define that law, and makes appeal to it." (Pope Benedict XVI 2008).

The Pope is, properly speaking, the Holy See itself as the personal ministry of the bishop of Rome, assisted by the Roman Curia (CIC can. 361). In this position, he has consistently manifested that he is a sovereign but without temporal power or state jurisdiction. Apparently, not even within the Vatican City State. He has also expressed that the Vatican is only a state to the extent that it is necessary to defend the Pope's ministry from interference from other governments. Finally, for him, the mission of the Holy See at the UN—-and by extension, as a signatory of UN-sponsored human rights treaties—-is mainly to disseminate and promote the moral message contained in those conventions (Pontifical Council 2004, n. 444).

Before the CRC and CAT, the Holy See's delegates insisted that its non-territorial sovereignty as a central organ of the church, as well as its territorial sovereignty within the Vatican City State, are internationally recognized and have never been confused. Besides, they held that the effect of the reservations and declarations included in the Conventions is that the entity bound by the conventions is the Vatican City State and that the fulfillment of those obligations is qualified by the religious nature of this entity. By implication, the Holy See does not have the same effective physical control over the citizens of the Vatican City State that other states have, and it would be even more difficult to extend such inexistent control beyond its borders.

In its 1994 report to the CRC, for instance, the Holy See referred to itself as "the highest organ of government of the Catholic Church", which has a "singular nature within the international community". Its "full territorial jurisdiction" over the territory and citizens of Vatican City State "serves solely to provide a basis for its autonomy and to guarantee the free exercise of its spiritual mission" (Holy See 1994, p. 1).

Again, for the Holy See, its obligations under the Convention of the Rights of the Child were "*prima facie* territorial" and "fulfilled first and foremost through the implementation of the aforementioned duties within the territory of the Vatican City State, over which the Holy See exercises full territorial sovereignty" (Holy See 2014a, p. 3). However, the Holy See qualifies in several ways its territorial power, as when it explains that the law applicable within the Vatican City State is canon law, which is very different from state law, is not enforced by force, and is much more lenient in its application than state law.

Similarly relevant for the territorial as well as the personal scope of its obligations under the Convention, the Holy See insists that it "does not ratify a treaty on behalf of every Catholic in the world and that, therefore, does not have obligations to implement the Convention within the territories of other States Parties on behalf of Catholics, no matter how they are organized". More importantly, the Holy See "does not have the capacity or legal obligation to impose [the Convention] upon the local Catholic churches and institutions present on the territory of other states".

Therefore, the Holy See justifies these extensive limitations of its human rights obligations for several reasons: the convention would only be territorially applicable within the Vatican City State; local churches and ecclesiastics enjoy autonomy; the Holy See lacks

coercive power; and exercising any real state jurisdiction in the territory of other countries would "constitute a violation of the principle of non-interference in the internal affairs of States" (Holy See 2014a, pp. 3, 10). In the same sense, "[p]enal canon law specifically acknowledges the State's concurrent legislative jurisdiction" (Holy See 2011, p. 98).

With respect to the Convention against Torture, the Holy See accuses the CAT of imposing new obligations on signatories of the convention, among them the obligation "to prevent purely private acts of violence" and introducing a "new definition of public official" (Holy See 2015, pp. 9, 16, 22).

The Holy See's 2014 report under the Convention on the Elimination of Racial Discrimination makes the same qualifications concerning its international obligations adding that "[t]he Church as such cannot be held responsible for the transgressions of its members" and that in this regard, local bishops and religious superiors have jurisdiction to apply religious sanctions with their own authority under canon law (Holy See 2014b, pp. 33–34).

Moreover, with respect to violations of this convention, the Holy See repeated that it "did not have civil jurisdiction over each and every member of the Catholic Church". "Although the Holy See had religious authority over the members of the Catholic Church across the world", it "could only invoke its moral authority to urge local communities to open their doors. It was for bishops to ensure that the clergy under their charge acted in accordance with that spirit of solidarity". However, '[o]utside the territory of the Vatican City State, it was the responsibility of local bishops to apply penal Canon law within the territory of their jurisdiction"; "local institutions were under the diocesan bishops" responsibility. The Holy See "did not intervene directly in management". Finally, the Holy See made a minor concession, admitting that its obligations under the Convention were not "strictly limited to the territory" of the Vatican City State because it promotes the Convention worldwide, as "a moral entity with a wider impact" (CERD 2015b, pp. 3, 9, 18, 21, 39).

The Holy See does accept the role of encouragement or coordination of the work of local churches and Catholic associations and of combined action with them, in addition to directly managing certain charity works in different parts of the world. Its role of coordination may consist in issuing guidelines for local action, which, for the most part, are just the framework for subsequent local guidelines or local canon law legislation, autonomously issued by local church authorities under their own authority and always "in accordance with the laws of the respective States" in which they operate (Holy See 2012, p. 75). The Holy See would only exceptionally assume for itself the canonical jurisdiction over canonical crimes taking place outside Vatican City State and committed by individuals who are, in principle, under the ecclesiastical jurisdiction of local church authorities.

Furthermore, the Holy See disagrees with the interpretation made by the CRC of the few canon law provisions it mentions. For the Holy See, "religious obedience" does not allow it to "control the daily activities of clerics, religious and laypersons, living in the territories of sovereign states". Religious obedience "concerns the unity of the doctrine of the Catholic faith", so Catholics have to give assent to any doctrinal texts and norms coming from Rome, but Rome is not concerned with the day-to-day management of a diocese or religious order.

The Holy See adds that it is the only one which can provide the authentic interpretation of the abovementioned canon law provisions, not UN treaty bodies. This interpretative right, in accordance with freedom of religion and international law, would derive from "the exclusive power of faith communities to organize and govern their internal affairs". Such autonomy would necessarily imply a relative obligation for states and the UN to respect the organizational structure of religious groups.

Furthermore, a proper understanding of the relationship between the Holy See and local churches should "respect the principles of collegiality and primacy and the duties and rights in Canon law of all members of Christ's faithful" (Holy See 2014a, pp. 7–9). This is another reference to the limits of Papal authority, who can neither violate the autonomy of local churches and religious orders nor forget that it does not govern the "universal church"

alone but together with the College of Bishops. However, the Holy See does not really attempt to clarify concepts such as "collegiality" and "primacy".

Concerning the Convention against Torture, the Holy See understands that it "globally encourages basic principles and authentic human rights recognized in the" convention and "adds a crucial moral voice in its support through its teaching", asserting that with its "various media services [. . . ] reaches a truly international audience that makes it arguably one of the most crucial moral voices in the world for human rights" (Holy See 2014c).

The language used by the Holy See to refer to the way that it promotes human rights in general and with respect to the activities of local churches is usually the same: the Holy See "urges", "teaches", "exhorts", "advocates", "makes proposals", "promotes", "assists", "supports", "condemns", "encourages", "has formulated guidelines" and "delineated policies and procedures", "encourage States to ratify the treaty", and "disseminates teachings about moral principles" (Holy See 2011).

It is nevertheless fair to say that the Holy See does not see its religious, teaching, and moral mission as being without significance in the implementation of the conventions. It would otherwise be difficult to understand why the Holy See takes so much trouble to describe and praise the pastoral activities of the Pope and the Curia, its encouragement of the activities of clergy and laypersons in local churches, sometimes coordinating or providing guidelines, and, exceptionally, intervening directly in their governance.

In this regard, a representative of the Holy See admitted before the CRC that "the Holy See's competence extended beyond national borders and that efforts were being made to encourage the community of believers". Still, that same representative added that "the Holy See's jurisdiction was spiritual and did not take precedence over the jurisdiction of States" (CRC 2014d, para. 36). Thus, the jurisdiction of the Holy See would be, in fact, extraterritorial—-or rather, non-territorial—-but not of the kind which involves the exercise of governmental functions nor effective physical control over territory or persons.

## 5. The Nature, Scope, and Limits of the Authority of the Holy See

### *5.1. The International Responsibility of the Holy See in Academic Literature*

Most scholars characterize the Holy See and the Vatican City State as two distinct international legal persons on the basis of the constitutive theory of recognition (Portmann 2010, pp. 115–8; Crawford 2006, pp. 221–33). Others insist that the Holy See is the only recognized sovereign subject of international law (Schouppe 2018, p. 70). Some affirm that the Holy See is a non-state actor or deny that the Holy See has any claim to statehood because it lacks a permanent population, defined territory, government, and/or capacity to enter into relations with other states (Worster 2016, pp. 256–57; Abdullah 1996, pp. 1860–67).

There is also disagreement regarding the nature of the relationship between the Holy See and the Vatican City State. Some conclude that the Holy See is the sovereign of the Vatican, which exists to guarantee its independence and give it logistical support in an "organic and subordinated relationship". Others contest that the Holy See can be called the government of the Vatican City State, refer to the Holy See-Vatican City as a single state "construct", or understand that both are "fused in a real union under one sovereign status holder, the Pope" (Crawford 2006, p. 230; Worster 2021, p. 374; Duursma 1996, pp. 386–87; Cismas 2014, p. 155; Wahyuni 2011, p. 24).

The relevance of these various opinions is that if the Holy See is truly a state and a party to treaties only open to ratification by states, it allegedly has the same obligations as any state. If it has territory—-either territory of its own or territory over which it exercises sovereignty—-it allegedly has territorial and extraterritorial obligations. However, even if the Holy See is not a state, non-state actors also have human rights obligations, and, for some, the obligations of the Holy See as a non-state actor would be equivalent to those of states (Cismas 2014, pp. 218, 238; Worster 2021, p. 352). There is even the view that the reason why statehood should not be accorded to either the Holy See or the Vatican City State is their alleged rejection of the corresponding international responsibilities that go with statehood (Morss 2015, p. 946).

Concerning the subject of treaty obligations, some insist that, although the treaty practice of the Holy See and the Vatican City State is confusing, the Holy See presented itself as the actual treaty party to the abovementioned human rights conventions and other states undoubtedly considered it as such. Regarding the nature of the obligations, the reservations and declarations introduced by the Holy See, as well as references to its "specific mission", would be incompatible with the object and purpose of the treaties and could not have the effect of qualifying or reducing treaty obligations. Some add, though, that the special religious characteristics of the Holy See may have an incidence on the type of means it may use to discharge its obligations (Worster 2021, p. 422; Cismas 2014, pp. 218, 224).

The scope of the obligations and responsibilities of the Holy See is usually linked to the kind of "control" that the Pope has within the church. Sometimes this "control" is described as absolute and universal, and the Pope as the employer of bishops and priests, characterized as organs or *de facto* organs of the Holy See. Local churches would be nothing but "administrative departments", even if they are granted certain autonomy (Wahyuni 2011, pp. 24, 43, 48). References to the religious authority of the Holy See sometimes employ military and international crime-related language. For instance: "the chain of command of the Holy See begins with the Pope and ends with every individual clergy of the world . . . A vertical line of authority runs from the Priest, the Bishop to the Pope, who can bypass all intermediate levels of authority" (McManus 2019, pp. 2–6, 14). Moreover, the language used before the ICC and before the Belgian courts (ICC 2013; ECtHR 2021) is very similar to that used by claimants in various US lawsuits to describe the "absolute and unqualified power and control . . . over each and every priest, bishops, brother, sister, parish, diocese, archdiocese and instrumentality of the Church" (O'Bryan v. Holy See 2007).

The Holy See would therefore exercise actual state jurisdiction, understood as effective control, primarily over territory—-such as Catholic schools—-but also over clergy because they "give an oath of full obedience to the Pope" and because "[a]t a minimum, a priest who refuses to obey the Holy See loses his appointment and career". Besides, "clergy must report to the Holy See, and the Holy See retains control over the clergy through supervision, including punishment for offences and maladministration". Similarly, the Holy See "holds all legislative, executive and juridical authority" and the Pope "has ultimate power over all churches and groups of churches, and forms the legitimate basis for the authority of bishops to whom authority is delegated". The "precise nature of the obedience as religious or otherwise is not relevant". (Worster 2021, pp. 354, 366, 384–85, 407–21).

Opposing views highlight the "spiritual, rather than legal" relationship between the Holy See and its members and the fact that the Holy See just has influence "through its teachings rather than through the imposition of laws". Therefore, Catholics are "free to accept and apply or reject any aspects of the teachings of the Church", and any punishments the church or the Holy See can impose are spiritual in nature. It is true that, in the case of clergy, such punishments may include "dismissal from office", but any deterrent effects of ecclesiastical sanctions depend on the spiritual significance that each individual attaches to them. All of this necessarily prevents the Holy See from policing compliance with its treaty obligations in the same way as ordinary states (Hailu 2017, pp. 788–89, 806). Similarly, strong critics of the church's human rights record have also expressed their opinion that the law of the church is not real law because it is devoid of any real temporal enforcing power (Robertson 2010, p. 43).

In assessing these views about the responsibility of the Holy See, it is necessary to refer to church doctrine and church law. UN treaty bodies and scholars have directly and indirectly done so, finding there evidence of the allegedly immense power of the Holy See over Catholics. Besides, to understand properly the provisions on papal authority in the Code of Canon Law, they need to be read in light of church doctrine and theological elaborations of that doctrine.

*5.2. Catholics as State Organs and Religious Authority as State Jurisdiction*

Wrongful acts of Catholic priests and laypersons, as well as negligent acts and omissions of local bishops, cannot be attributed to the Holy See because neither of them is a state organ or agent of the Holy See: (a) neither clergy nor laypersons exercise any kind of public or sovereign state powers within the church, (b) they are integrated into the organizational structure of the church, but not in the Holy See, as one entity of that structure, and (c) their conduct as members of the church is carried out in their own name, under their own authority, and enjoying, in theory and practice, a degree of autonomy that excludes a relationship of complete dependence from the Holy See, so as to be its "*de facto*" organs.

Concerning (a) above, religious or ecclesiastical authority is unlike the public powers of states. The governance of a religious organization is different from governing a state. Moreover, such governance and governance structures vary from religion to religion. Even if being Catholic implied an obligation to blindly follow the mandates of the Pope, such mandates are just too different from the orders states give to their civil servants or citizens because the goals and means of the church and any of its organs and entities are very different from those of any other human community. Church teaching and charity activities, its attempt to shape societies in accordance with its own ethical ideals, and even its role as mediator in conflicts are just means to the primordial goals of salvation and evangelization (Mark 16:15; Pope Paul VI 1965c, pp. 40–45; Pontifical Council 2004, pp. 444–45). Concerning (b) above, clergy, monks, and the laity are integrated into ecclesiastical organizational structures, such as dioceses, parishes, or religious orders, but not the Holy See.

Understanding that authority in the church and the authority of the Holy See are different from state power should be enough to realize that nobody who exercises ecclesiastical authority can be properly called a state organ or agent. This holds true for those clergy and laypersons who work for or at the Holy See and Vatican City State, carrying out the functions the Holy See has as the central organizational entity of the church. Concerning (c) above, this is even truer for bishops, priests, and laypersons all over the world. All Catholics carry out their various religious missions under their own authority, conferred by baptism or ordination and not by delegation of the Holy See (CIC, can. 204 and 208; Pope Paul VI 1964, pp. 9–17; D'Onorio 1992, p. 159).

The Pope has religious authority over clergy and monks (CIC can. 273 and 590), but he also has authority over laypersons (CIC can. 754), and few would affirm that the Holy See is responsible for the crimes of lay Catholics worldwide. All the faithful—-not just priests—-are asked to live in accordance with the magisterium of the church and the Pope, although his teachings are hardly orders to execute but a project for one's life. Moreover, "all the faithful" must observe canonical laws. Any layperson can commit canonical crimes and be punished for them (Pope John Paul II 1983a).

Thinking of clergy as organs of the Holy See and as the only holders of authority in the church downplays the protagonism that the lay faithful are meant to have in Catholicism nowadays. Laymen and women are increasingly called to occupy positions of responsibility in ecclesiastical governance in dioceses and in the Roman Curia (Pope John Paul II 1983b, CIC, can. 129 §2, 1421 §2; Pope Francis 2022, p. 10, art. 14 §3).

However, it would also be wrong to think that positions of power in ecclesiastical organizations are more valuable or effective for the mission of the church. Any layman or woman at his or her workplace—-proselytizing or giving silent testimony of their faith—-is carrying out that mission as much as a priest or a bishop does (Pope Paul VI 1964, p. 33; Pope Paul VI 1965b, pp. 2, 3, 24; Pope Paul VI 1965c, p. 43; Pope John Paul II 1988, p. 2; Congregation for Bishops 2004, p. 108). Those who think otherwise reveal the same kind of clericalism that sees clergy as the only truly relevant members of the church and, allegedly, clericalism has been one of the main causes of sex abuse and its cover-up (Pope Benedict XVI 2010; Pope Francis 2018a, 2018b).

Therefore, characterizing clergy as state organs of the Holy See is mistaken; there are as many reasons to characterize Catholics in general in the same way, and this is simply absurd. Clergy and Catholics, without distinction, are citizens of their own nations, not

agents of a foreign power, despite historical opinions to the contrary, in countries where anti-Catholic bias was rampant (Von Bismarck 1872; Newman 1875, p. 30; Locke 1689, p. 52).

The Holy See has indeed religious authority to issue norms, coordinate, and supervise, but bishops have that same authority, locally and "[t]he pastoral office or the habitual and daily care of their sheep is entrusted to them completely" (Pope Paul VI 1964, p. 27). They have enough legislative, judicial, and executive authority to fulfill their mission as pastors of their diocese (CIC can. 381 §1, 391, 392). Priests are not employees of the bishop, but the latter appoints them (CIC can. 523), must ensure their suitability (CIC can. 521 §3 and 524), and they remain under his ecclesiastical authority (CIC can. 515 §1). Bishops can remove parish priests when they neglect their duties or their ministry becomes harmful (CIC can. 538 §1, 1740, 1741). Actually, it has been on the basis of local bishops' primary appointing, supervisory, and disciplinary authority that courts around the world have commonly found dioceses liable in tort for the acts of sexual abuse by priests incardinated in those dioceses (Zambrana-Tévar 2020, pp. 182–83).

The role of the Pope "strengthens and protects the proper, ordinary, and immediate power which bishops possess in the particular churches entrusted to their care" (CIC can. 333 §1). The Pope must protect the autonomy of local churches, not replace it. The "supreme, full, immediate, and universal ordinary power" of the Pope (CIC can. 331) does not allow him to alter the basic structure, means, and goals of the church. Part of that structure and means are the existence of the episcopate and their autonomous role as pastors in their own churches (Grigorita 2011, pp. 383–473; Arrieta 1997, pp. 225–26). The Pope can intervene directly in the organization of local churches, but this authority is to be exercised under exceptional circumstances, where local churches are having difficulties carrying out their own functions and always with a view to strengthening their own autonomy (CIC can. 333 §1; Pope Francis 2022, art. 107; D'Onorio 1992, pp. 205–18).

Any monarchical elements in the governance of the church must not only take account of the autonomy of bishops but of the fact that the College of Bishops, together with its head, the Pope, "is also the subject of supreme and full power over the universal Church" (CIC can. 336; Pope Paul VI 1964, p. 22; Granfield 1987, p. 114).

The recent reform of the Roman Curia also underscores that, far from being a mere papal instrument of ecclesiastical governance, it is at the service of both the Pope and the bishops (Pope Francis 2022, p. 8).

The authentically evangelical meaning of Papal primacy may have been misinterpreted at times because the legalistic way it was expressed obscured the fact that the authority of the Papacy is at the service of the universal church and local churches; it is neither absolute nor an end in itself. In fact, "Servant of the servants of God" is one of the most common titles Popes have used (Congregation for the Doctrine of the Faith 1998, pp. 4, 6, 10).

Therefore, the official understanding that the church now has of itself underscores the role of bishops and of all the faithful. It has also led to a new process of decentralization and subsidiarity, where higher organizational structures should only assume those tasks that lower levels cannot carry out by themselves (D'Onorio 1992, pp. 128, 204, 223–28; Congregation for Bishops 2004, pp. 5, 12). For an impartial observer, the church is "remarkably decentralized", and most decisions are made "on the regional, national and local levels" (Allen 2004, pp. 65–67).

It must also be considered that past efforts of some canon lawyers to assimilate the church to purely human societies and governments, in an attempt to ensure its independence, led to descriptions of ecclesiastical structures which relied heavily on apparently similar temporal power structures. Such assimilations were confusing and flawed, but they were never the only way to think about the church. Nowadays, they are just anachronistic and hardly ever used. Regretfully, though, there is a recurring tendency among canon lawyers and ecclesiastical legislators to use the same categories and terminology of state legal systems to draft canon law norms and theorize about them, which inevitably blurs their actually different meanings (Carnì 2019, p. 283).

Understanding the Holy See as an omnipotent authority in church matters is also unrealistic. The Holy See not only does not try to repress all kinds of non-Christian behavior among Catholics but simply does not have the capacity to do so. The few commonly cited examples of sanctioned theologians actually evidence that the Holy See seldom intervenes at the local level and that Catholics who openly disagree with the Pope or who live their lives in open disagreement with him are the rule rather than the exception (Reese 1996, pp. 247, 250).

Not only is it wrong to see Catholics as state officials or as organs of the Holy See, but any religious authority that the Holy See has can never be characterized as state jurisdiction either, for the purpose of the scope of application of human rights treaties, because the Holy See lacks "physical power and control" over territory or persons. Moreover, the jurisprudence most commonly cited in the international law of human rights deals with situations involving the use of lethal force and armed conflicts. Physical coerciveness is absent from religious authority. Clergy authority can be best compared to the authority of a doctor or an academic, which is based on their knowledge and expertise (Gifford 2009, p. 397). Weber did define authority as legitimate, imperative control, but he was more interested in the different modes of legitimizing power than in describing the ways it operates. However, Weber's reference to "psychic coercion" as an element of authority in "hierocratic organizations" presents many problems (Chaves 1994, pp. 755–56).

Even if "soft power" is increasingly relevant, not having and not claiming to have any "hard power" is a basic difference between states and the Holy See or the church, which does have a legal system but whose norms must be applied with church goals in mind. "Pastoral governance" and the *munus regendi* of bishops—-including the Pope, who is not a super-bishop—-are very different from the exercise of power in any temporal organization (Congregation for Bishops 2004, Chap. VII). Besides its pastoral nature, institutions such as dispensations, privileges, and equity make canon law much more elastic and less severe in its application than secular legal systems (CIC, can. 76 §1, 85 and 221 §2).

A proper understanding of the non-coercive nature of religious authority also helps to dispel the notion that clergy or laypersons are part of a military or state-like "chain of command", with the Holy See at the top. In *Prosecutor v Fofana and Kondewa*, one of the accused was characterized as *de jure* a "High Priest", but, for the application of the doctrine of superior responsibility in international criminal law, the court found that this "status as High Priest did not amount to effective control". However, in this case, there was additional "evidence of his actual exercise of effective control over Kamajors who committed crimes in Bonthe District" (ICC 2008, pp. 178–79). In light of this doctrine, even if a distorted reading of Catholic doctrine and canon law concerning Papal authority suggested that he has control over the whole church, it would still be necessary to prove it with factual evidence of the effective exercise of such control.

### *5.3. The Historical Evolution of the Religious Authority of the Holy See*

Besides the above, any authority the Holy See possesses has evolved in various ways throughout history, sometimes emphasizing centralization and others decentralization (Congregation for the Doctrine of the Faith 1998, p. 12; Tierney 1975). The supposedly unlimited authority of the Pope is definitely not part of Catholic doctrine at the present time. However, there was always the belief that the Bishop of Rome is Peter's successor and that Jesus had given Peter a particular and preeminent role among the apostles and, therefore, among bishops, as successors of the apostles (Matthew 16:18; Orlandis 1996, pp. 13–19).

There are numerous examples of the changing roles and importance of Popes throughout history. For instance, the significance of Pope Silver is minimal, for the church of the 4th century, in comparison to that of Emperor Constantine. At the time many of the Popes from the 10th to the 12th century were trapped in the sordid intrigues of Roman families, the abbots of Cluny were the ones mobilizing Christians across Europe. The centralizing reforms of Gregory VII in the 11th century were indeed a Papal triumph, but their purpose

was to liberate local churches from their subservience to feudal lords. The crucial Council of Trent (1545–1563) was convoked by Paul III—-at the instance of Emperor Charles V—-but, meanwhile, the church was expanding like never before thanks to missionaries, whose efforts were mostly sponsored and directed by kings and religious orders.

Before the fall of the Roman Empire, the church of Rome was the center of the "communion" of churches, although its relevance was already apparent in the way that church authorities everywhere appealed to it for a final decision in doctrinal and disciplinary controversies. Disperse diocesan, metropolitan, and patriarchal structures of the ecclesiastical organization were the rule in the early centuries, but their progressive disappearance in the West did not necessarily respond to claims of supremacy by Rome but to the interference of secular rulers amidst the void left by the fall of the Roman Empire. That interference was effectively fought by the centralizing Gregorian reform but, centuries later, Rome had again little control over national churches, due to the increasing powers of ecclesiastical governance of the new absolutist kings of the *Ancien Régime* (O'Malley 2009, pp. 325–29; Schatz 1996, pp. 111, 235–45; Orlandis 1996, pp. 279–83).

The organization of the church has at times been described as a monarchy and the Pope as its monarch, especially after Vatican Council I (1869–1870). This, coupled with the fact that such a comparison was made during the restoration of monarchies that followed the Napoleonic wars, where republican forms of government were often criticized due to the bloody excesses of the French Revolution, naturally led many Catholics to believe that the Pope was actually an absolute monarch (Pope Pius IX 1870; Schouppe 2020, pp. 78–79). Luckily, the seemingly absolutist and centralist approaches of certain readings of Vatican Council I have long been completed by the ecclesiology of Vatican Council II (1963–1965), whose texts have been discussed in the previous section.

### *5.4. A Functional Approach to the Personality and Responsibilities of the Holy See*

One may ask if it is fair to qualify the human rights obligations of the Holy See on the basis of the specific nature and scope of its religious goals, means, and authority. After all, the internal law of ordinary states cannot qualify their international obligations (ILC 2001, art. 32). However, the Holy See is admitted among other sovereigns because it is and not despite being a religious actor or because it resembles a state, which it does not or only minimally.

Arguably, the true reason for the presence of the Holy See among states as a sovereign non-state actor is that relations of states with Catholicism, an influential religion which boasts a billion members worldwide, are greatly facilitated by the fact that its central organizational body is an entity capable of entering into diplomatic relations, which is actually the only element of statehood the Holy See really possesses and which the Holy See has made ample use of, even when the Papal States or the Vatican City State did not exist. This pragmatic and functional approach also lies behind the international subjectivity and international capacity of international organizations or of private law entities such as the International Committee of the Red Cross. Paraphrasing the International Court of Justice, the subjectivity and obligations of the Holy See depend upon the needs of the international community (ICJ 1949, *Reparation for Injuries*, p. 8).

The Holy See does not need statehood to achieve its mission. It probably only needs sovereignty, i.e., to be truly independent from temporal powers and operate freely on the international plane. The fact that, as a rule, only states are sovereign is the most pressing reason why the Holy See defends its complex international status so passionately, while at the same time insisting on the peculiarities of such status. No other religion has aspirations to occupy the same or an equivalent position under international law. No other religion has a comparable organizational structure allowing it to participate in international relations the way the Holy See does either.

The peculiar characteristics of the Holy See as a religious actor are recognized by states and international organizations alike. They are no obstacle to the acceptance of its atypical position. Instead, they are the reason why the Holy See is recognized as a

state. Therefore, such characteristics cannot be overlooked when determining its capacity, rights, and obligations or at least the means with which states may expect the Holy See to fulfill such obligations, in much the same way that examining the capacity, rights, and obligations of international organizations or other religious entities "with partial and functional, international personality" must take into account their nature, role, and functions (Amerasinghe 2005, pp. 90–91; Klabbers 2002, p. 36; Worster 2016, p. 257).

Furthermore, the argument that, since the human rights treaties ratified by the Holy See were only open to states, the Holy See must have the same responsibilities as a state can be turned on its head: if UN members allowed the Holy See to ratify those treaties, being aware of its *sui generis* status as an international legal person, they must have agreed or at least were aware that such status would necessarily affect the fulfillment of its obligations under those treaties.

## 6. Changes in Canon Law as Evidence of Compliance with or Violations of Human Rights

Much of this article has been devoted to the allegations that the Holy See is responsible for the crimes of Catholic clergy on the basis of its authority over them. However, the acts and omissions of the Holy See itself must be properly considered. In this regard, canon law norms, protocols, and papal documents on sex abuse may not only show what the church is doing to solve the problem of sex abuse but may also be evidence of what the Holy See should have done much sooner.

Citing the judgment in *Bosnia v. Serbia* (ICJ 2007, p. 43) concerning the obligation to prevent genocide, Cismas believes that the "obligation to prevent" harm to children of articles 19 and 34 of the Convention of the Rights of the Child is an obligation of conduct. The Holy See does not have an obligation to succeed in preventing sexual abuse of children allegedly under its jurisdiction but its responsibility would be engaged if it "manifestly failed to take all measures to prevent child sexual abuse which were within its power, and which might have contributed to preventing sexual abuse" (Cismas 2014, p. 233). Therefore, this author seems to say that the Holy See had the obligation to do no less—-but also no more—-than what it could do as the highest and central organ of the church. This must necessarily take account of the fact that any authority the Holy See has is not coercive and must respect the autonomy of local churches and of all the faithful, as previously discussed.

Bearing this in mind, about the time that cases of sex abuse in the US began to come to light (the 1980s), a new Code of Canon Law (Pope John Paul II 1983b, CIC) was enacted whose punitive provisions were, in the eyes of many, less strict and effective than in the previous code of 1917 and which, anyway, were hardly ever applied, partly because of lack of legal training and for the mistaken understanding that in a merciful church there was no room for penal canon law (Coughlin 2021, pp. 20–30; Marzoa 1997, pp. 222–25). Those bishops who wanted to tackle the problem were left with the possibility of removing priests from their parish, but the definitive solution of expulsion from the priesthood for the canonical crime of sex abuse of minors (CIC can. 1395 §2) required that the bishop commenced a penal judicial process whose procedural guarantees for the accused, as well as the possibility of appeal, made it lengthy and unsuitable.

One step in the right direction taken by the Holy See was the *Motu Proprio Sacramentorum Sanctitatis Tutelae* (Pope John Paul II 2001), which required local bishops to report all credible cases of clerical abuse of minors to Rome, where priests could be summarily expelled from the priesthood. In the course of the years, other norms were enacted, which, for instance, progressively changed the definition of "minor" to anyone under eighteen and extended or derogated the statute of limitations. National churches had also begun to take action. In 1996, an advisory committee of the Irish bishops had elaborated a "Framework for a Church Response", which included mandatory reporting to state authorities. The Irish document and its proposal for a reporting policy were frowned upon by the Vatican. In 2002, the US Episcopal Conference passed the so-called "Essential Norms", which included the possibility that bishops summarily expelled priests accused of sex abuse without having

to undergo the lengthy penal judicial process. The Holy See declined to approve the norms in their original form, and they had to be redrafted.

In 2011, the Holy See issued guidelines providing that "the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed" (Congregation for the Doctrine of the Faith 2011). In 2016, Pope Francis issued the *Motu Proprio Come una Madre Amorevole,* providing for another, easier procedure at the Vatican to remove bishops and religious superiors for grave causes, including negligence in the exercise of their functions (Pope Francis 2016). In 2019, Pope Francis issued the *Motu Proprio* "*Vos estis lux mundi*," ordering again to report to civil authorities where local state laws so provided and making it a canonical offence to "interfere with or avoid civil investigations" (Pope Francis 2019, arts. 3, 8, 9§1, and 19). Finally, in 2020, the Holy See published the "*Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics" (Congregation for the Doctrine of the Faith 2020, pp. 17, 26, 50). This set of guidelines reiterates that local churches must collaborate with state authorities and report allegations of sex abuse, even if state law does not establish an obligation to do so, as well as comply with subpoenas and requests for documents issued by state authorities. The recent reform of the Code of Canon Law tries to give more teeth to the penal canon law of the church but leaves untouched the obligation of local bishops to refer cases of sex abuse to the Vatican where, as previously mentioned, accused priests can be punished more quickly (Pope Francis 2021). Parallel or subsequent reforms of the criminal laws of the Vatican City State are applicable to the conduct of diplomats of the Holy See working "abroad". At the request of or in collaboration with the Holy See, dioceses and episcopal conferences around the world are also putting in place protocols for the appropriate interaction between ministers and minors.

## 7. Conclusions

The initial response of local churches and the Holy See to the sex abuse crisis was very inadequate. If universal canonical norms on collaboration with and mandatory reporting to state authorities had already been in place, if bishops had not been shy in exercising their own supervisory authority and in applying existing canonical norms, and if those norms and procedures had been less cumbersome, fewer people may have been harmed.

To the extent that the ecclesiastical norms and protocols discussed in the previous section could have prevented sex abuse and the Holy See and local churches could have enacted and applied them sooner, it may be said that the Holy See arguably infringed its international obligation to prevent sex abuse, i.e., an obligation of conduct arising from the treaties to which it is a party.

Besides, this article has also tried to demonstrate that the human rights obligations of the Holy See, as well as the attribution of wrongful conduct to the Holy See, must take into account what the Holy See is: the highest and central organ of governance of a religious organization. The obligation of treaty parties to implement rights "to the maximum extent of their available resources" (UN 1989, art. 4) must not only take into account the different resources of different states but also the different nature and capacities of different international legal persons. This applies to the acts and omissions of the Pope and Vatican officials in the exercise of their own ecclesiastical functions of coordination, teaching, legislating, or disciplining, but it also applies to whether the acts and omissions of others, e.g., Catholic bishops and priests, can be attributed to the Holy See. This article has tried to show how, for the purposes of attribution of wrongful acts under the international law of human rights, Catholics cannot be characterized as organs of the Holy See because they do not exercise public powers and because, to a large extent, they are autonomous in their religious activities. The fundamental equality of all Catholics and their autonomy are developments of Vatican Council II, which does not permit equating the relationship between Catholics and the Pope to the relationship that exists between citizens or state officials and their state. Moreover, the presence of the church worldwide and the increasing secularization of church members and of societies which were once Christian make it quite

obvious that the Holy See cannot effectively impose its doctrine and norms, if it was ever able to do so.

Certain human rights treaties also provide that state parties have extraterritorial obligations, i.e., obligations to comply with the treaty beyond the territory of that state. In this regard, the obligations of the Holy See can more appropriately be characterized as non-territorial because its lack of territory and coercive means of enforcing its religious authority do not permit to say that the Holy See exercises any kind of state jurisdiction over territory or persons.

The manner in which the Holy See can and must fulfill its human rights obligations depends on the kind of authority it has. The Holy See can coordinate the efforts of local churches but not replace those efforts. The Holy See can enact new universal canonical legislation, which is usually done in a process that involves local churches in a number of ways. In the case of the new universal norms for the repression of sex abuse, such norms were partly based on previous legislative work of local churches themselves. Finally, the Holy See can also, in extraordinary circumstances, intervene directly in the governance of local churches. In a way, this is what the Holy See did when, in 2001, it was decided that cases of sex abuse by clergy were to be judged in Rome. Eventually, those competences will go back to local bishops.

The Holy See could have done more and should have done more. It is responsible to that extent. The international community is entitled to demand that the Holy See fulfill its mission. It is because of that mission that the Holy See was admitted into the concert of nations, but it is not for the international community to decide what that mission is.

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