

**STATE RESPONSIBILITY OF  
VATICAN CITY STATE (HOLY SEE)  
IN INTERNATIONAL LAW**

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**FOR THE SEXUAL ABUSE CASES INVOLVING  
CHILDREN  
(PERPETRATED BY CATHOLIC CLERGYMEN) THAT  
SETTLED WITH CANON LAW**

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## Abstract

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The law of state responsibility is one of the most important principles in international law that has been used to resolve international disputes between states. It is a principle that developed through customary law and jurisprudence. Since the era of the League of Nations, the idea to codify the core norm of the state responsibility principle had been realized. International Law Commission fulfilled this task, making the principle into a written form in 2001. As the secondary rules, the principle describes few conditions for a state to be held responsible because of its conduct towards other states. The case of clergyman who sexually abused children has been increased in number and happened worldwide. This phenomenon has involved the Vatican City State or the Holy See. Canon Law, the law system enforced by the Vatican City State, predicted to be the cause of the developing number of cases. As a law system, Canon Law supposed to prevent or give the deterrent effect to the perpetrator of children sexual abuse. The increasing number of this case doubts the effectiveness of Canon Law as a reliable law system. Holy See which a party to the Convention on the Rights of the Child have the duty to provide an effective law to protect children from sexual abuse. Nevertheless, Holy See seems incapable to fulfill this international obligation due to the fact of the increasing case of children sexual abuse that involves many Catholic priests. Non-compliance of international obligation may raise the issue of state responsibility. The purpose of this research is to describe the state responsibility principle upon the Vatican City State or the Holy See. This research argues that the Vatican City State can be held internationally responsible for the extent number of children sexual abuse cases perpetrated by clergymen.

## **List of Abbrevation**

AD	Annual Digest and Reports of Public International Law Cases
AFDI	Annuaire Française de Droit International
BBC	British Broadcasting Channel
CDF	Congregation for the Doctrine of the Faith
CRC	Covention on the Rights of the Child
ECHR	European Court of Human Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labor Organization
ILR	International Law Reports
OAS	Organization of American States
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
RIAA	United Nations Reports of International Arbitral Awards
UN	United Nations
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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## Introduction

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On 6 January 2002, the *Boston Globe* caused an uproar with its provocative banner headline and lead article:

### CHURCH ALLOWED ABUSE BY PRIEST FOR YEARS

Since the mid 1990s, more than 130 people have come forward with horrific childhood tales about how former priest John Jay Geoghan allegedly fondled or raped them during a three decade spree through half a dozen Boston parishes. Almost always, his victims were grammar school boys. One was just four years old.<sup>1</sup>

This front-page story bluntly stating the scope of the allegations against former priest John Jay Geoghan became the newspaper's spotlight. At the time, cases concerning sexual abuse of children involving the Catholic Church had reached the Church's highest authority, Vatican City State (commonly just called "the Vatican"). Recent news in Milwaukee, Wisconsin reported that Vatican City had allegedly attempted to subvert justice by refusing service of lawsuit against priests who abused children. In this case, according to Vatican's legal representative, refusal was based on the fact that Vatican, as a sovereign state, wished to be served through diplomatic channels; this process for bringing a lawsuit would generally take about two years. Vatican's motion amounted to a type of legal procrastination.<sup>2</sup>

The first sexual abuse case involving the Catholic Church in the United States (US) surfaced in Louisiana in 1985. After that, in 1992 and 1993 it was revealed that the practice of sexual abuse toward children had allegedly started in the 1960s. Children sexual abuse by Catholic's priests has not been confined to the US; it has been a pandemic, occurring in several countries in Europe (Austria, Belgium, Croatia, Germany, France, Ireland, Norway, Poland, United Kingdom, and others), Australia, Canada, Brazil—even in Philippines.<sup>3</sup> According to an astonishing report that was

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<sup>1</sup> 'Church Allowed Abuse by Priest for Years Aware of Geoghan Record, Archdiocese Still Shuttled Him From Parish to Parish', *Boston Globe*, January 6, 2002.

<sup>2</sup> See Annysa Johnson, 'Vatican refuses service of lawsuit on handling of abusive priest Murphy: Move means Milwaukee lawsuit could be delayed, victims' advocates say', *Journal Sentinel Online*, January 31<sup>st</sup> 2011, available at: <http://www.jsonline.com/features/religion/114946074.html> (Access in 8 February 2011).

<sup>3</sup> 'Philippines Church apologises for sex abuse', *BBC News*, July 8, 2002, Available at: <http://news.bbc.co.uk/1/hi/world/asia-pacific/2116154.stm> (access in 17 November 2010); 'Exile for disgraced Austrian cardinal', *BBC News*, April 14, 1998, Available at <http://news.bbc.co.uk/2/hi/europe/78503.stm> (Access in 16 November 2010); See also: <http://www.vjesnik.hr/html/2003/03/12/Clanak.asp?r=crn&c=1>; [http://www.glaskoncila.hr/index.php?option=com\\_php\\_&Itemid=41&news\\_ID=3844](http://www.glaskoncila.hr/index.php?option=com_php_&Itemid=41&news_ID=3844) (access in 16 November 2010); 'Norwegian Bishop Admits Child Sex Abuse', *CNN News*, April 7, 2010, available at <http://edition.cnn.com/2010/WORLD/europe/04/07/norway.bishop.sex.abuse/index.html?hpt=T2> (access in 16 November 2010); 'Black Collar Crime', *Broken Rites Australia*, Nov' 7, 2010, available at <http://brokenrites.alphalink.com.au/nletter/bccrime.html> (access in 16 Nov' 2010); 'Sexual Abuse in Brazil', *CBS*, Dec' 9 2005, available at [http://findarticles.com/p/articles/mi\\_m1141/is\\_7\\_42/ai\\_n15969578/](http://findarticles.com/p/articles/mi_m1141/is_7_42/ai_n15969578/).

run by the British Broadcasting Channel (BBC) in the US in 2007,<sup>4</sup> the number of children sexual abuse cases by priests is increasing and continuing.<sup>5</sup> The worst reported case involved rape and buggery of 200 deaf boys in Wisconsin over a period of twenty years.<sup>6</sup> The serious malfeasance of the Catholic diocese in these cases has attracted many law experts. One of these experts is a High Court Judge in Ireland, Justice Sean Ryan, who concluded after finishing his investigation of several cases: “sexual abuse was endemic in Catholic’s Boys’ Institutions, Reformatories, and Orphanages”.<sup>7</sup>

To date, Canon Law has been used by Vatican City as a form of judicial settlement for this case (as opposed to use of the national penal code for the jurisdiction where the offence took place). Canon Law provides rules for the administration of the church and its spiritual offices and for trials of sins against the faith (heresy) and morals (sex abuses, including sex with minors) which bound the Catholic’s ecclesiastical organs world-wide.<sup>8</sup> Moreover, Canon Law has its own adjudication in reconciling sexual abuse cases perpetrated by clergymen; this differs from the well-known and most-adopted judicial processes, civil law or common law. In Canon Law, settlement of the sexual abuse cases perpetrated by Catholic clergymen is processed in a cloistered way with the parties involved (perpetrators, victims and the authority of the diocese concerned).<sup>9</sup> During the development of these sexual abuse cases, the secrecy or enclosed nature of Canon Law settlement was protested. Canon Law has been criticized because of its secrecy, and the lack of legitimacy and impartiality (especially toward the victims) has come into question. The publication of Congregation for the Doctrine of the Faith (CDF), as a part of Canon Law resources, regarding sexual abuse allegations by the Holy See has been considered inadequate to ensure justice.<sup>10</sup> This

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<sup>4</sup> ‘Timeline: US Church Sex Scandal’, *BBC News*, Sept’ 7, 2007, available at <http://news.bbc.co.uk/2/hi/americas/3872499.stm> (access in 1 November 2010).

<sup>5</sup> See ‘Inside Germany’s Catholic Sexual Abuse Scandal’, *Spiegel International*, 8 Feb’ 2010, available at <http://www.spiegel.de/international/germany/0,1518,676497,00.html> (access in 1 November 2010); The Irish Commission to Inquire into Child Abuse Public Report (‘The Ryan Report’), 20 May 2009, available at <http://www.childabusecommission.ie/rpt/pdfs/> (access in 16 November 2010).

<sup>6</sup> Geoffrey Robertson, *The Case of The Pope: Vatican Accountability for Human Rights Abuse* (London: Penguin Group, 2010), p. 23.

<sup>7</sup> *The Irish Commission to Inquire into Child Abuse Public Report* (‘The Ryan Report’), 20 May 2009, available at <http://www.childabusecommission.ie/rpt/pdfs/> (access in 27 January 2011). It was written as conclusion in report known as ‘Ryan Report’. Ryan report is a public report, written by mandate commission established by Irish Government and published in 5 volumes. The report contained result of Commission’s function to listen to victims of childhood abuse who want to recount their experiences to a sympathetic forum; to fully investigate all allegations of abuse made to it, except where the victim does not wish for an investigation; to consider whether the way institutions were managed, administered, supervised and regulated contributed to the occurrence of abuse and to publish a report on its findings to the general public, with recommendations to address the effects of abuse on those who suffered and to prevent future abuse of children in institutions.

<sup>8</sup> Geoffrey Robertson, *op.cit.*, p. 12.

<sup>9</sup> ‘What the Bishop Knew’, *Guardian*, 3 April 2010, p. 27; See also Laurie Goodstein, ‘Payout is Bittersweet for Victims of Abuse’, *The New York Times*, 17 July 2007, available at <http://www.nytimes.com/2007/07/17/us/17abuse.html> (access in 1 November 2010).

<sup>10</sup> See the Guide of CDF that available at Vatican official website: [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en/html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en/html) (access in 17 November 2010). See also Andrew Cole, ‘The Church’s Penal Law and The Abuse of Children’, *Thinking Faith*, 17 June 2010.

introduce us to the main problem of the research, accordingly, is as follows: “How is the state responsibility principle imposed on the Holy See’s use of Canon Law in the present case, in which children have been sexually abused by Catholic clergymen world-wide?”

Settlement through Canon Law would not be doubted if it had the same effect and achieved the same objectives as criminal law. The five objectives of criminal law can be defined as retribution, deterrence, incapacitation, rehabilitation and restitution. The ongoing revelations concerning further sexual abuse cases among Catholic clergymen provide ample evidence that settlement through Canon Law may not accomplish criminal law objectives, in particular the objective of deterrence—an important, purposeful goal of penal codes. From the point of view of the victims, Canon Law settlement also touches upon the issue of human rights.<sup>11</sup> The absence of legitimate due process of law and settlement that is not originated from the official State’s jurisdiction authority violates victims’ equality before the law. Furthermore, the unwillingness of the Holy See to establish and enforce an effective legal system violates the right of children to be protected from any form of violence. This fact is in flagrant contradiction with the position of Holy See as a state party in the UN Convention on the Rights of the Child (CRC).<sup>12</sup> According to the CRC, the Holy See has an obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation—including sexual abuse—while children are in the care of their parent(s), legal guardian(s) or any others who bear responsibility for care. One practical way in which the Holy See could fulfill this international obligation would be to provide effective procedures and measures for protecting children in all appropriate legislative, administrative, social and educational environments.<sup>13</sup>

Canon Law—and dioceses located all over the world—are both subject to the authority of the Holy See, which is the government of the sovereign Vatican City State. Together with Sacraments, the Apostolic Constitutions and tradition, Canon Law is linked with the universal Catholic Church. The Holy See, as the administrator of Canon Law, has a major role with respect to the perpetration of child abuse by clergymen. Its authority allows it to control the far-flung dioceses of the Catholic Church, which as a whole is bound by Canon Law. As part of the international community, the Holy See signed and ratified several international human rights conventions and is responsible for enforcing the decisions made in all of these conventions. It also has an obligation to comply with the victim’s non-derogable rights during the exercise of the legitimate due process of law.

In spite of these incontrovertible facts, the Holy See has made no attempt to prevent or overcome the ongoing developments of children sexual abuses’ cases. In this situation, the issue of

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<sup>11</sup> Richard Sipe, ‘Paedophiles and Celibacy’, 18 March 2010, [http://www.richardsipe.com/Misc/vatican\\_connection.htm](http://www.richardsipe.com/Misc/vatican_connection.htm) (access in 16 November 2010).

<sup>12</sup> Holy See Ratified the Convention in 20 April 1990 and UN CRC came into force in September 1990. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec).

<sup>13</sup> Article 19 UN CRC.

State responsibility in international law emerges. State responsibility occurs when a state violates an international obligation owed to another state. The obligation may be derived from a treaty or customary law, or may consist of the non-fulfillment of a binding judicial decision. State responsibility comprises two elements: an unlawful act, and it must be imputable to the state (attributability).<sup>14</sup> The currently developing principle of state responsibility has mostly been constructed through customary law. In August 2001, the International Law Commission finished compiling the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Although this draft is not legally binding, it is generally accepted and often referenced by the International Court of Justice in resolving cases. The Draft Articles also will be referred to in order to conduct the present research.

Based on Article 19 UN CRC, Holy See has an obligation to provide an effective procedure in all appropriate measures—legislative, administrative, social and educational—to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation—including sexual abuse. The fact that the Holy See prefers Canon Law as the method of judicial settlement, when Canon Law does not meet the objectives of criminal law, does not effectively protect children, and does not prevent future offences. Accordingly, the Holy See is violating its international obligation under UN CRC when it resorts the Canon Law as the judicial settlement in children sexual abuse cases involving its own clergymen.

The shortcomings of Canon Law in meeting the five objectives of the penal code have been noted;<sup>15</sup> the Holy See's preferences may also violate due process. Canon Law also falls short in addressing other human rights for victims of crime. The rights to a fair trial and legitimate due process are categorised as peremptory norms (*jus cogens*) that adhere to every person, thus creating an obligation that states must respect and protect. Inherently within the name, there is no reason or circumstance under which these peremptory norms should be violated. The Holy See is supposed to actualise this norm, but is currently in violation of its international obligation to respect victims' rights to due process. This breach of international obligation, whether from a treaty or from an obligation categorised as *erga omnes*, engenders the imposition of state responsibility.

The ongoing and increasing number of children sexual abuses cases done by Catholic's clergymen or priests proves that settlement through Canon Law could not fulfilled deterrence principle as one of the aim in criminal law. Holy See as the Episcopal sovereign jurisdiction throughout the whole churches and also a party to UN CRC, has a major roles to protect the victims, especially children, from any kind of harm and to prevent future occurrences of the cases. On the contrary, Vatican City State has not take affirmative action to formulate regulations or bring

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<sup>14</sup> Martin Dixon, *Textbook on International Law*, 6<sup>th</sup> edition (Oxford: Oxford University Press, 2007), p. 244.

<sup>15</sup> See generally Geoffrey Robertson, *op.cit.*, pp. 42 – 62.



the end to the increasing number of the cases. This condition can raise the arguments to impose State responsibility principle on Vatican City State under international law. The purpose of this thesis is to have a further description about State responsibility principle of Vatican City State (Holy See) in international law that emerged because of the ongoing and increasing number of children sexual abuses' cases perpetrated by Catholic's clergymen that occurred outside Vatican City State and were settled with Canon Law.

Before going further, some terminology must be clarified. The term *Vatican City State* is used to define the name of the State, and the term *Holy See* is used to denote the government of the Vatican City State. This distinction will come into play with respect to the inter-related function of the two entities.

This research will discuss several issues concerning the criminal settlement process based on Canon Law and the legal consequences following the process. In explaining the settlement process, legitimate issue of Canon Law will be taken measure of by comparing Canon Law with common features of national penal codes. Afterwards, the consequences of settlement through Canon Law are reviewed from the perspective of the human rights of the victim. Other issues that are also discussed are the link between the Holy See authorities (and the Vatican) with the perpetrator; the criteria or core concept that formed the principle of State responsibility; and reconciliation of these concepts with the Holy See based on the ground of the statehood and position in the international community of the Vatican City State.

## Chapter 1

### Canon Law Judicial Settlement in the Case of Children Sexual Abuse

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#### 1.1 Canon Law: Legal Basis, Principle, Jurisdiction and Procedure

*Canon Law* can be defined as a legal system (and the only one) that contains conduct norms that bind all Catholics—to put it more informally, the precepts that inform Canon Law can be said to unify Catholics under a specific code of behaviour. Similar to any other norms, Canon Law serves to regulate society in order to enable people to live peacefully side by side for the common good. Canon Law comprises not only ‘order’, but also ‘discipline’, which is unrelated to doctrine or dogma. For the purpose of this research, *order* means the rules that govern the public order of the Roman Catholic Church, also known as *ecclesiastical regulations*. These regulations contain the basic structures of the Roman Catholic Church (such as the papal and episcopal offices and the sacramental system) and individual regulations (such as the age for confirmation and the requirements for ordination) that are considered the ‘church discipline’.<sup>16</sup>

The scope of Canon Law is related to the external order of the church—the public life of the faith community. It concerns itself almost exclusively with the ‘external forum’, the arena of the church’s public governance, as opposed to the ‘internal forum’, the arena of conscience. In other words, Canon Law provides norms of conduct and contains guidelines for action, rather than the content of faith that measures personal conscience or moral judgments. Unlike other legal systems, Canon Law’s system of rules concerns the patterns of practise within a community of faith and is based on the theological element known as ‘divine purpose’.<sup>17</sup>

The core and controlling document in the Canon Law legal system is the Code of Canon Law (the Code), which was promulgated in 1983 and at once abrogated the previous Code of Canon Law 1917.<sup>18</sup> The Code is rooted in several sources; the most common sources include the following:<sup>19</sup>

1. The Sacred Scriptures: Both the New Testament and the Old Testament are consulted as the highest authorities in the matter of church discipline.
2. Natural Law: Those structures or values considered to be the very essence of things (e.g.: monogamy in marriage, truth in speech) provide a basis for rules.

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<sup>16</sup> James A. Coriden, *An Introduction to Canon Law* (New York: Paulist Press, 1991), p. 4. See also Ladislav M. Orsy, SJ, ‘Theology and Canon Law’, in J. P. Beal, J. A. Coriden and T. J. Green, *New Commentary on the Code of Canon Law* (Canon Law Society of America, Washington DC, 2000), p. I.

<sup>17</sup> James A. Coriden, *op.cit.*, pp. 4 – 5.

<sup>18</sup> *Ibid.*, and Canon 6 (1.1).

<sup>19</sup> *Ibid.*, pp. 30 – 31.

3. Custom: Long-standing practices within the earliest church communities (e.g.: Sunday observance, the celebration of Easter).
4. Councils: The periodic gatherings of the leaders of local churches, called *synods* or *councils*. Ecumenical councils, such as the Second Vatican Council, are a major source of ecclesiastical regulations.
5. Fathers of the Church: Writings of many authors in the early centuries that were revered and taken to be authoritative.
6. Popes: The letters and responses sent by the Bishop of Rome and recognised as decretals with the force of general regulations.
7. Bishops: Pastoral judgments or rules from the leading bishops that already applied and imitated elsewhere.
8. Rules of Religious Orders: Constitutions or rules that evolved within religious communities and also influenced other religious groups. These rules became the general rules of the church.
9. Civil Law: Enactments of the Roman emperors and of later kings and legislatures on matters that affect religion.
10. Concordats: Formal international agreements between the Holy See and national governments.

Since the Code is a codification of rules and regulations from many important sources in ecclesiastical life and in the practices of Catholics, it is regarded as the basic and the most important legal sources for Canon Law. The Code is the operative center of the church's system of canonical regulations.<sup>20</sup>

Canon Law has been considered a 'different' kind of law because of its theological construction provides the structure that informs its principles.<sup>21</sup> Penal order in Canon Law is regarded as salvific treatment, in line with Christ teachings.<sup>22</sup> This is written in the 1983 revision to the preface of the Code of Canon Law. The 1983 Code also contains the following general prescriptions with regard to how the rules of the church are to be defined and applied:<sup>23</sup>

1. The Code exists to define and protect the rights and obligations of the faithful in relation to one another and to the church. Its norms are to help the faithful, share in whatever assistance toward salvation the church offers them.
2. The external and internal forums should be coordinated and not in conflict with one another.

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<sup>20</sup> *Ibid.*, p. 40.

<sup>21</sup> See the Introduction part of this research.

<sup>22</sup> J. P. Beal, J. A. Corinden and T. J. Green, *op.cit.*, p. 1529.

<sup>23</sup> James A. Coriden, *op.cit.*, p. 36.

3. Pastoral care is to be fostered above all, and to that end both the legislation and its application are to be characterised by charity, moderation, humanity and equity as well as justice. Exhortation and persuasion are to be preferred to an insistence on rights.
4. Bishops have the authority to interpret and apply from the general laws of the church.
5. The principle of subsidiary is to be more effectively applied, especially because the office of bishop is of divine law. Where unity of discipline is not required, decentralisation should prevail, especially in the form of particular legislation and a healthy autonomy of executive authority.
6. The rights of persons are to be defined and safeguarded, since all Catholics are fundamentally equal and their offices and duties are so diverse. Then the exercise of authority will appear more clearly as service, and it will be more effective and free from abuse.
7. Subjective rights are to be protected by suitable procedures.
8. Portions of the People of God are to be determined territorially for purposes of governance, but other criteria may also be used to describe communities of the faithful.
9. Penalties are sometimes necessary, but they are to be imposed in the external forum and after judgment; those imposed by the law itself are to be reduced to a minimum.
10. The new Code is to be restructured to reflect its accommodation to a new mentality and to different needs.

Present Canon Law procedures dealing with cases involving sexual abuse of children are guided by above principles. A few principles must be highlighted in relation with these cases, especially principles related to penalties (point 9) and to preferred legal procedures (points 4 through 8). Regarding penalties, the nature of Canon Law's principle is explained in the leading commentary on Canon Law code below:

“The Church's salvific purpose gives its penal order a unique character which must constantly be remembered... a non-penal pastoral approach may lead an offender to a fuller life in Christ more effectively than penalties. Fullness of life in Christ is the ultimate rationale...”<sup>24</sup>

The salvific character of Canon Law, as confirmed by Canon Law Book VI (Function of the Church), became its fundamental philosophy and principle, and the ideology that set the penalties regulation in Canon Law legal system, as cited from the Canon Law Book: “The salvific character of church law underlines the code's forceful emphasis on penalties only as a last resort when all other legal-pastoral methods have failed to deal with problematic behavior.”

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<sup>24</sup> J. P. Beal, J. A. Corinden and T. J. Green, *op.cit.*, p. 1529. See also Geoffrey Robertson, *op.cit.*, p. 44.

Canon 1, Book I (General Norms) of the Code of Canon Law stipulates that Canon Law jurisdiction is applicable to the Latin (Western) Church, not to Eastern or Oriental Churches in union with Rome. Additionally specific rules or regulations that are not contained in the Code likely exist based on agreement between the Holy See and nations or political societies. The existence of these other rules and regulations prevails and binds all Catholics within its jurisdiction build upon the agreement.

The nature of Canon Law as ecclesiastical law is the universal boundaries for all Catholics that promulgated by the legislator (such as the Pope or an ecumenical council). A specific provision added to Canon Law will be enforced a month after the day of promulgation unless stipulated otherwise by the law. The Code is binding on Catholics who have been baptised in the Catholic Church and are at least seven years of age. With respect to the issue of human rights in Canon Law, the non-retroactive principle is applied; Canon Law applies only for the future, not for the past. Significantly, this means that Canon Law is not taken into account for an act happened in the past before the law enforced. In the context of criminal offence, Canon 1311 Code of Canon Law expresses the legal base for Canon Law's jurisdiction over criminal cases involving their dioceses and adherents: "The Church has the innate and proper right to coerce offending members of the Christian faithful with penal sanction."

For the purpose of this research, it is important to analyze Canon Law's jurisdiction versus criminal law prevailed in a state. Canon Law was formulated to be a legal system (and the only legal system) that had primacy with respect to adherents to the Catholic faith; Canon 6 (1.4.) Book I determines that other disciplinary laws that the Code completely reorders are abrogated. As an ecclesiastical law and for faithful adherents to Catholicism, this provision has a great doctrinal power to deny or dishonor the claim of another legal system.

Penal sanction in Canon Law system, that was constructed based on principles stated above, is imposed only after strict requirements have been met. Penal sanction is, first, imposed as the last resort after exhaustion of legal-pastoral methods and for grave violations involving malice or negligence. In the case of the sexual abuse of children perpetrated by clergymen or priests, *penal sanctions* or *penalties* in Canon Law have usually been defined as requiring extra prayer and meditation on wrongdoing. The worst sanction that a priest may suffer is a reduction in rank to the laity. Priests who are repeat offenders or recidivists (and/or are insufficiently remorseful) may be ordered to perform penance as defined by the Code; this could include the performance of some religious work, piety, or charity (i.e.: prayers, fasting, alms giving, a retreat or community service). The mildness of the penalties and penance imposed, because of the salvific intent of Canon Law, in comparison to penalties that would be imposed by a comparable state law would likely cause most to question whether Canon Law provides consequences for the sexual abuse of children that are in-

line (severity-wise) with the gravity of the offence. In support of this skepticism, an evaluation was written in the New Commentary of the Code of Canon Law, stating that “somewhat surprisingly, the code does not seem to view such *delicts* as seriously as other violations of clerical continence.”<sup>25</sup>

The cases of the sexual abuse of children perpetrated by Catholic clergymen and priests in the Canon Law system are settled under ‘a secret of the Holy Office’.<sup>26</sup> The ‘actual manifestation’ of the procedures is kept secret within the Holy Office. The secrecy procedures were developed first in 1962, and then revised in 2001. Guidance related to the procedures was written, stated and regulated under a Congregation for the Doctrine of Faith (CDF) Letter. This letter is issued by the Offices of the CDF and open to the public. In the letter, also known as an *Apostolic Letter*, the offices of the CDF provided instructions that related to the proceedings during cases involving the sexual abuse of children.<sup>27</sup> The instructions stated clearly that the procedure for hearings involved keeping them secret and under the auspices of the Holy Office.<sup>28</sup> Following these instructions, and with the intent to specifically address cases of child sexual abuse, in July 2010, Pope Benedict XVI issued a promulgation with the title *de gravioribus delictis*. It amended the 2001 Apostolic Letter and became supplementary guidance for these cases. Similar to the previous guidance, it also mentioned that the proceedings are subject to the principle of pontifical secrecy.<sup>29</sup>

Criminal case proceedings as regulated in 1962’s Apostolic Letter, known as the *crimen* procedure, were conducted entirely through the written examination method by a few fellow priests. If the case complaint was not equipped with corroboration as judged by the prosecutorial priest (that is, the promoter of justice), the bishop was required to destroy all traces of the investigation. However, if the evidence was sufficient, the bishop still had the freedom to decide whether to bring the case to trial. He first could provide a first and a second oral warning to the perpetrator. These warnings, depending on the seriousness of the case, are divided into two degrees: paternal (fatherly advice) and grave or most grave (with a threat proceed to a trial if caught offending again). The warnings are provided in total confidence, and copies are to be kept in the

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<sup>25</sup> *Ibid.*, p. 1600.

<sup>26</sup> See Apostolic Letter 1962: Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation (Vatican Polyglot Press, 1962), para. 11. See also Geoffrey Robertson, *op.cit.*, p. 48.

<sup>27</sup> Letter published by Office of the Sacred Congregation in 1962 titled Instruction of The Supreme Sacred Congregation of The Holy Office, available at [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html); and in 2001 titled Congregation for The Doctrine of the Faith Letter regarding The More Serious Offences.

<sup>28</sup> The letters always ended with closing statement “Cases of this kind are subject to the pontifical secret”.

<sup>29</sup> Article 30 (I) Title II: The Procedure to be Followed in the Judicial Trial of the *de gravioribus delictis*. The text is available at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html).

secret archives of the Curia in Rome. No public proceedings take place, and these warnings are entirely inaccessible to local law enforcement authorities.<sup>30</sup>

Under Canon Law, the investigation of cases involving the sexual abuse of children is carried out secretly and involves very few people: two persons, preferably priests, who know the complainant, and two who know the priest being accused (these two persons who know the accused priest will have no shortage of ‘brothers’ and old friends from his seminary). All of these individuals are placed under oath, sworn to secrecy, and then asked to testify about their friend’s character and reputation. The defendant must never be required to take an oath to tell the truth, and if the defendant agrees to questioning, he cannot breach the seal of the confessional, (even when the confession amounts to an admission of guilt). The proceedings still conducted in complete secrecy even if the case reaches the stage of Canonical court. All official participants in Canonical courts (Judge, Promoter and Notary) must be priests.<sup>31</sup>

Canon 1717 (2) added ‘care is to be taken that this investigation does not call into question anyone’s good name’ meaning that the suspect’s friends, neighbours, and children formerly under his care cannot realistically be questioned.<sup>32</sup> Anyone who discloses the case to lawyers or the police will be punished (including the victim).<sup>33</sup> *Crimen* procedure, as stated in 1962’s Apostolic Letter, imposes ‘utmost confidentiality’ and ‘permanent silence’ to all persons involved in the process including the complainants and witnesses. They are bound under the ‘pain of incurring automatic excommunication’.<sup>34</sup> Based on investigative report between 1975 and 2004 by the Irish government regarding the sexual abuse case in Dublin Archdiocese, known as The Murphy Report, such obligation, as part of a Canonical process, “could undoubtedly constitute an inhibition on the reporting of child sexual abuse to the civil authorities or others.”<sup>35</sup>

The Apostolic Letter written in 2001 was widely published by Offices of the CDF after it was discovered that the existence of *crimen* procedures regulated in 1962’s Apostolic Letter was unknown and obscure for several dioceses.<sup>36</sup> In those times when *crimen* procedures were unrecognised, children sexual abuse cases were settled with informal procedures (i.e.: pedophile priests treated or transferred out of the country without any investigation). No significant new development in Canon Law with regard to these ‘trials’ was introduced by the new Apostolic

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<sup>30</sup> See Apostolic Letter 1962: Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation (Vatican Polyglot Press, 1962), para. 11 – 14. See also *Dublin Archdiocese Commission of Investigation Report* (‘The Murphy Report’), 26 November 2009, available at <http://www.dacoi.ie/>, chapter 4, para. 82 (last access in 1 March 2011).

<sup>31</sup> *Ibid.*, para. 52.

<sup>32</sup> Geoffrey Robertson, *op.cit.*, p. 46.

<sup>33</sup> Apostolic Letter 1962, *op.cit.*, para. 11 – 13.

<sup>34</sup> *Ibid.*, para. 11. See also the following procedures in para. 23. *Crimen* requires the accusation to be shrouded in enforced secrecy and emphasizes that communications ‘shall always be made under the secret of the Holy Office’.

<sup>35</sup> *Dublin Archdiocese Commission of Investigation Report* (‘The Murphy Report’), 26 November 2009, available at <http://www.dacoi.ie/>, chapter 4, para. 82 (last access in 1 March 2011).

<sup>36</sup> Geoffrey Robertson, *op.cit.*, p. 53.

Letter. As with the 1962 letter, the 2001 revision also highlighted the importance of pontifical secrecy<sup>37</sup> and did not contain an instruction to report sexual abuse cases to public authorities (the police).

Canon Law procedures consumed plenty of time, as all credible allegations had to be reported to the Offices of the CDF, which generally either ordered a trial in Rome or communicated to the local bishop to proceed with a Canon Law trial himself within a year or so of receipt of the complaint. All documents and reports are sent to the Offices of the CDF, which is immune from court-ordered discovery. Bishops keep any copies of the evidence under lock and key, and these copies can only be obtained by resorting to drastic measure.<sup>38</sup> A decision to hold the trial in Rome further delays the case; in any event, punishment/sanctions ordered by a local bishop are always reviewed in Rome.

The Canon Law penalties for priests found guilty of molesting children are variant. Some penalties include spiritual exercises;<sup>39</sup> special supervision (i.e.: suspension from saying mass or working with children); suspension from taking confession; rehabilitation; transferral to another diocese; and, in more grievous cases, reduction to the laity (*degradatio*). Extreme penalty imposed upon priests whose ministry has caused such “great scandal to the faithful... that there seems to be no hope, humanly speaking, or almost no hope, of his amendment”.<sup>40</sup> Any defrocking decision must be ordered or confirmed by the Pope, even if the guilty priest has asked to be defrocked.<sup>41</sup>

In 2010, the Pope promulgated the latest guidance with a title ‘New Norms of Canon Law (*de gravioribus delictis*)’. It contained *crimen* procedures for the sexual abuse of children that at the same time amended 2001 Apostolic Letter. However, instructions or suggestions to collaborate or cooperate with civil authorities were still not included in the guidance, and the ‘pontifical secret’ in *crimen* procedure was like-wise re-emphasised. Vatican spokesman, Father Lombardi, in talking about ‘reporting requirement to civil authorities’ confessed that “a reporting requirement had been

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<sup>37</sup> Apostolic Letter in 18 May 2001 titled Congregation for The Doctrine of the Faith Letter regarding The More Serious Offences. In Canon Law, related to solicitation cases, pontifical secret is defined in the Instruction of the Congregation of the Holy Office (excerpt from *Codicis Iuris Canonici Fontes*, 20 February 1866, para. 14) with: ‘procedures, inasmuch as they pertain to (matters of) faith, are to be completed in absolute secrecy, and after they have been settled and given over to sentencing, are to be completely suppressed by perpetual silence. All the ecclesiastic ministers of the Curia, and whoever else is summoned to the proceedings, including counsels for the defense, must submit oaths of maintaining secrecy, and even the bishops themselves are obligated to keep the secret... But those who satisfy the burden of denunciation are bound to swear an oath at the beginning to tell the truth, and then, when the dealings are complete, must swear to maintain secrecy even if they are priests.’

<sup>38</sup> Geoffrey Robertson, *op.cit.*, p. 55.

<sup>39</sup> Spiritual exercises to be made for a certain number of days in some religious house, with suspension from the celebration of mass during that period.

<sup>40</sup> Apostolic Letter 1962: *Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation* (Vatican Polyglot Press, 1962), para. 11, 52 and 65.

<sup>41</sup> Geoffrey Robertson, *op.cit.*, p. 55, para. 76.



discussed but rejected”.<sup>42</sup> One important change made by this promulgation concerns the period of time in which children (or, presumably in many cases, adults) can make sexual abuse allegations; it has been extended to twenty years after the victim’s eighteenth birthday.<sup>43</sup>

## 1.2. Comparison with Penal Law: Legitimacy and Objectivity

In the atmosphere of democracy and the rule of law, legitimacy is often discussed. The idea of legitimacy is already embedded in the rule and theory of law. *Legitimacy*, which can be defined as the acceptance of a governing law, must not be mistaken with legality. In fact, legitimacy is more powerful than legality, in the sense that legitimacy without legality is often still acceptable (i.e.: pre-emptive war) but legality without legitimacy is considered abuse of law (i.e.: improper detention by the police authorities). Two crucial elements appertain with the notion of legitimacy—*process* and *outcome*.<sup>44</sup> Process here refers to a mechanism or procedure to achieve sovereign authority to enforce the law or attempt justice; outcome refers to whether the end result of the process would widely be perceived as legitimate by a wide swath of the population. Legitimacy is achieved through both elements under a sovereign constitution.<sup>45</sup> Law or policy becomes legitimate through a healthy process; and outcome becomes legitimate based on the constitution (the controlling factor).

In a system of civil or common law for most states, the legitimacy of penal/criminal code is achieved through a long process of discussion, arguments and agreement between the sovereign authorities (the executive) and representatives of the people (legislative). Both authorities and representatives are granted power through popular elections. In criminal law, legitimacy basically refers to fairness and legality in due process of law or law enforcement. It refers to procedural law with respect to the police authority (detention procedures, evidence’s collection procedures, property seizures, etc). As the body that is granted by the law, police sometimes abuse their status through conduct such as improper detention without warrant and information, improper or treacherous collection of evidences, the gaining of testimony and confessions through the use of violence and excessive force, and so forth. This conduct amounts to illegitimate due process of law. The remedies for illegitimate due process (for balancing the scale of justice for the victim) vary and can include sentence reduction, a mistrial, or commutation of sentences. Likewise, impartiality, judicial independence, and accessibility of a law institution are main factors in establishing a

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<sup>42</sup> Fr. F. Lombardi, ‘The Significance of the Publication of the New Norms Concerning the Most Serious Crimes’, undated, available at [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (access in 5 March 2011).

<sup>43</sup> Promulgation *de gravioribus delictis*: Substantive Norms Concerning The Most Serious Crimes, July 2010, available at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (access in 6 March 2011).

<sup>44</sup> Sophie van Bijsterveld, *The Empty Throne: Democracy and the Rule of Law in Transition* (Utrecht: Lemma, 2002), p. 298. See Thomas M. Franck, *Fairness in International Law and Institution* (Oxford: Clarendon Press, 1995).

<sup>45</sup> *Ibid.*, pp. 298 – 299.

legitimate criminal law apparatus as part of the state. All of these aspects, as a whole, establish fair due process of law as a principle.

Based on the study conducted by Tom R. Tyler, scholar and social psychologist, there is a link between legitimacy and criminal law objectivity. According to Tyler, perceptions of legitimacy influences compliance with the law. Tyler's study uses empirical evidence to support the theory that legitimacy enhances compliance. He proved that the greater the degree to which people perceived legal authorities as exercising power legitimately, the more likely they were to obey the law. This situation improves the deterrence objectives in criminal law.<sup>46</sup> We may conclude from the study that legitimate criminal law enforcement is commensurable with criminal law objectives, and the higher enforcement of legitimate criminal law results more achievement of its objectives.

In the case of the Holy See, which adopts numinous legitimacy and theocracy, its legitimacy derives from the spiritual authority of the Pope. Canon Law, rooted in divine law, has a very different and ambiguous perspective in the framing of legitimacy. On one side, Canon Law only identifies legitimacy with the Pope as a chosen person with absolute authority. However, Canon Law is too abstract to adequately define how the Pope achieved this legitimacy, or to measure the Pope's legitimacy over the Catholic faithful. This issue will not be further explored, as it strays far from topic. From this point onwards, legitimacy will be discussed using the framework of criminal law. To measure Canon Law's legitimacy over cases involving the sexual abuse of children by Catholic clergymen, a few aspects that clearly depart from what would be considered acceptable in a criminal law system will be highlighted, such as criminal law's jurisdiction and procedures and the principles of independency, impartiality, and fairness. These aspects will be accounted for in comparing Canon Law with common or civil law.

As stated before, Canon Law binds the Catholic faithful throughout the world. Canon Law has jurisdiction over all criminal cases related to its adherents.<sup>47</sup> However, in this research case, Canon Law's jurisdiction in applying criminal law jurisdiction is confronted with a state's sovereignty. In international law, the state's sovereignty is denoted as the basic and highest right of a state, and must be respected by other states. It is also related to the non-intervention principle guaranteed by UN Charter.<sup>48</sup> Accordingly, a state's penal law has absolute jurisdiction in its territory, although an exception can be made by a treaty.

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<sup>46</sup> Tom R. Tyler, 'Trust and Law Abidingness: A Proactive Model of Social Regulation', *Boston University Law Review* 81 (2001) Rev. 361, pp. 49 – 96. See also I. Bennett Capers, 'Crime, Legitimacy, and Testilying', *Indiana Law Journal* vol. 83 (2008) nr. 3, p. 838.

<sup>47</sup> Canon 1311 Code of Canon Law. See also p. 4.

<sup>48</sup> The non-intervention principle is based on the principle of state sovereignty. In the case of children sexual abuse happened outside the Vatican City, Holy See is prohibited to intervene the criminal law jurisdiction of the state concerned. Article 2 UN Charter, available at <http://www.un.org/en/documents/charter/index.shtml>.

As with any other criminal case, cases involving the sexual abuse of children are under the jurisdiction of the penal law in the country in which the offence took place, regardless of the nationality of the alleged abuser. In cases in which the perpetrators are Catholic clergymen, Canon Law jurisdiction basically falls under country's sovereign jurisdiction. From the perspective of the related countries, the right to enforce their own criminal law takes utmost primacy, regardless of Canon Law's jurisdiction. The Holy See, as the authorities that made Canon Law and adopt it as their guide, must respect these rights in the eyes of these states. However, this has not happened. On the contrary, many of the sexual abuse cases in which clergymen were accused were processed and settled using Canon Law without handing in or reporting cases to the authorities of the respective states where the abuse took place. The Murphy Report, which was written based on studies that took place over several years, proved this tendency or behaviour in the Catholic Church<sup>49</sup> and linked it with the Church's reputation, confirming that:

“... pre-occupations in dealing with cases of child sexual abuse, at least until the mid 1990s, were the maintenance of secrecy, the avoidance of scandal, the protection of the reputation of the Church, and the preservation of its assets. All other considerations, including the welfare of children and justice for victims, were subordinated to these priorities. The Archdiocese did its best to avoid any application of the law of the State”<sup>50</sup>

The legal reason behind these preferences is clear; Canon Law itself directs and suggests its settlement as the appropriate way to proceed against suspected priests.<sup>51</sup> It was shown in the Apostolic Letter published by Office of the CDF in May 2001 and in the latest guidance published by the Pope in July 2010 (*de gravioribus delictis*).<sup>52</sup> The Apostolic Letter in 2001 confirmed Holy See's control over all sex abuse allegations, further stating that the Holy See would have exclusive jurisdiction to punish crimes perpetrated by its clergymen under its own law in other States.<sup>53</sup> It seems that the “Holy See had come to view the worldwide church as a nation, with its own Canon Law binding on its citizens, priests of the church, in whatever country they might be found.”<sup>54</sup>

In the 2010 guidance, which contained 30 articles that emphasised Canon Law's jurisdiction, the Holy See directed that sex crimes involving priests should be dealt with using Canon Law's secret and priest-friendly procedures in order to avoid scandal in the community or lowering the

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<sup>49</sup> The Murphy Report is published in 26 November 2009 and additional Chapter 19 published in 15 December 2010. Murphy report is available at <http://www.justice.ie/en/JELR/Part%201.pdf/Files/Part%201.pdf>.

<sup>50</sup> ‘The Murphy Report’, 26 November 2009, available at <http://www.dacoi.ie/>, chapter 1, para. 15 (last access in 1 March 2011).

<sup>51</sup> Geoffrey Robertson, *op.cit.*, p. 59.

<sup>52</sup> Look at p. 7.

<sup>53</sup> See Apostolic Letter published in in 2001 titled Congregation for The Doctrine of the Faith Letter regarding The More Serious Offences.

<sup>54</sup> Geoffrey Robertson, *op.cit.*, p. 56.

reputation of the church.<sup>55</sup> Furthermore, the guidance also make an opportunity for priest to avoid police investigation stated that the “bishop could not repeat an allegation of child sex abuse to the police if it were made during the celebration of the sacrament of penance.”<sup>56</sup> This was also guaranteed by Canon Law:

“The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or deed or any other fashion.”<sup>57</sup>

Priest also has ‘The right of silence’ which provides protection for him to keep the secrecy from Police investigation. The priest cannot be questioned unless he waives that right, and no adverse interference can be drawn against him for exercising it. This right is recognised in many countries, except United Kingdom, whom in the record has already abolished it.<sup>58</sup>

Before the guidance officially introduced as the New Norm of Canon Law (*de gravioribus delictus*) in July 2010, unofficial guidance was published on the Vatican City Public Relation website under the title *Guide to Understanding Basic CDF Procedure concerning sexual abuse allegations*. This guidance opens a new way by suggesting that “Civil law concerning reporting of crimes to the appropriate authorities should always be followed.”<sup>59</sup> However, it remains as a hollow suggestion since it is not boldly written in the official guidance, the New Norm of Canon Law (*de gravioribus delictus*).

Returning to the frame of jurisdiction, the principle of state sovereignty and non-intervention reside within every state challenge to Canon Law’s legitimacy over cases involving the sexual abuse of children by clergymen. States have the inherent right to exercise their own criminal law, which ranked as the primacy settlement, in their territory. This does not question whether Canon Law is legitimate in a general theoretical sense. Rather, the questions or doubts regard whether Canon Law maintains that legitimacy over sexual abuse cases in which clergymen stand accused if there are procedures for settling the case where criminal law from the state where the offence occurred applies. Compared to common or civil law’s system, Canon Law’s *crimen* procedures exist in complete secrecy; do not address the issue of victim’s rights; do not allow cross-examinations; do not monitor the subject; do not take forcible efforts to seize the suspect’s property, or inspect private homes and possessions; and impose weak sanctions. Not surprisingly, one scholar stated: “Canon Law does not provide any kind of workable system for investigating or

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<sup>55</sup> *Ibid.*, p. 59.

<sup>56</sup> Andrew Cole, ‘The Church’s Penal Law and the Abuse of Children’, *Thinking Faith*, 17 June 2010, See also Geoffrey Robertson, *op.cit.*, p. 58.

<sup>57</sup> Canon 983 (1), Code of Canon Law.

<sup>58</sup> Geoffrey Robertson, *op.cit.*, pp. 46 – 47.

<sup>59</sup> The Guide is available at Vatican’s official website: [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (accessed in 23 February 2011).

punishing abusive priests.”<sup>60</sup> In the frame of legitimacy, Canon Law does not provide an independent (related to pontifical secrecy) and impartial court (the actors in Canon Law procedures are all priests, including the Judge, the Promoter, and the Notary), also a fairness toward the victim (victim’s right and participation).<sup>61</sup> Canon Law’s legitimacy, compared to another legal system, is rightfully very questionable.

Another important discussion in criminal law theory concerns the objectives of criminal law which derives from the potential to impose sanctions on the perpetrators. Sentences or punishments in the criminal law objectives theory outline the aims and functions of criminal law. Many theories explaining the necessity of punishments have defined the objectives of criminal law. These objectives include retribution, deterrence, incapacitation, rehabilitation, and restitution. As a legal system, Canon Law also has its ‘own version’ in explaining functions and purposes of its *crimen* penalties, though it is not well-structured and relies more on divine law than on the theories of criminal law.<sup>62</sup> In the case of cases involving the sexual abuse of children, sanctions provided by Canon Law (described earlier in the chapter) are rather ‘perpetrator friendly’. Therefore, assessing Canon Law with respect to its conformity with criminal law’s objectives and functions is necessary. Below is the evaluation of Canon Law’s objectives and functions as a criminal legal system:

#### 1. Retribution

Retribution is the classical and primary justification for criminal law and sentencing; offenders deserve punishment for their offences, and it falls to the state to determine the appropriate degree of punishment. The justice of punishment for culpable and criminal wrongdoing is to stem the wrongdoer’s disrespect of the value of the law.<sup>63</sup> The Code of Canon Law says nothing about retribution’s value in its criminal procedures, but if we look at the Canon Law’s principle that states ‘penalties are sometimes necessities and to be reduced to a minimum’, it would be concluded that Canon Law does not meet this objective. Canon Law emphasises that offenders are human beings and basically do not deserve sentences or penalties, because only God is worthy of judging them. In the case of children sexual abuse perpetrated by clergymen, this principle is well described by the conduct of the Holy See, who has often given priest-offenders another chance after receive a warning or

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<sup>60</sup> Geoffrey Robertson, *op.cit.*, p. 48.

<sup>61</sup> *Ibid.*, pp. 50 – 51.

<sup>62</sup> Canonical rules described as a law that fulfilled at least 4 functions of law in any society, that are: To aid a society in the achievement of its goal; To afford stability to the society, that is, provide good order, reliable procedures, and predictable outcomes; To protect personal rights, provide avenues of recourse and redress of grievances, and means for the resolution of conflicts; To assist in the education of the community by reminding everyone of its values and standards. See James A. Coriden, *op.cit.*, p. 5.

<sup>63</sup> Mary Sigler, ‘The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process’, *Law and philosophy vol. 19 (2000) nr. 3*, p. 345 -346. See also Robert Cryer, et al, *An Introduction to International Criminal Law and Procedure*, 2<sup>nd</sup> Edition (New York: Cambridge University Press, 2010), pp. 24 – 26.

after a confession.<sup>64</sup> An admonition regarded as the appropriate punishment within the church for offences that would often (and deservedly) receive prison sentences under criminal law.<sup>65</sup> *Crimen* procedures in Canon Law show that forgiving and correction of wrongdoing by advisement or other soft approaches is more important than labeling clergymen as ‘offenders’ worthy of punishment.

## 2. Deterrence

A study regarding the issue of children sexual abuse cases by Catholic clergymen in United States, known as the John Jay Study, concluded that sexual abuse in the Catholic Church is like an epidemic. The number of the alleged cases increased in the 1960s, peaked in 1970s, declined during the 1980s and increased again in 1990s to the same level it had reached in the 1950s. The study also noted that from 1992 to 2000 the number of substantiated sexual abuse cases in American society as a whole has been between 89,355 and 149,800 annually; the number for one year is eight times the total number of alleged abuses in the Catholic Church over a period of 52 years. Cases involving the sexual abuse of children by priests are spreading and developing in many countries. Some examples include:

- Children sexual abuse case by priests occurred in Kisii town, Kenya;<sup>66</sup>
- About 200 out of 7.000 priests in Philippines may have committed sexual misconduct, including sexual abuse of children, during the past 20 years;<sup>67</sup>
- After an allegation of children sexual abuse that was settled through papal investigation, the Cardinal in Austria was transferred to another monastery in Europe;<sup>68</sup>
- In Belgium, two independent commissions were established to investigate sexual abuse cases by priests in the country. Of the more than 300 complaint received, only 33 were formally dealt with. In about half of the 32 cases, the alleged abusers refused to appear before the commission due to a lack of cooperation from the Belgian episcopate in enforcing hierarchical obedience. The Belgian government investigated further, and in

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<sup>64</sup> Many cases can be referred to this argument. See Father Lawrence C. Murphy case: Laurie Goodstein, ‘Vatican Declined to Defrocked U.S. Priest Who Abused Boys’, *New York Times*, 24 March 2010, available at [http://www.nytimes.com/2010/03/25/world/europe/25vatican.html?\\_r=1](http://www.nytimes.com/2010/03/25/world/europe/25vatican.html?_r=1). See also John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* (2004), available at <http://www.usccb.org/nrb/johnjstudy> (John Jay Study).

<sup>65</sup> Apostolic Letter 1962, *op.cit.*, para. 42. See also Geoffrey Robertson, *op.cit.*, p. 49.

<sup>66</sup> Ouma Wanzala ‘Family cries out for justice over girl raped by Catholic’s Priest’, *Sunday Nation*, 26 June 2010, available at <http://www.nation.co.ke/News/Family%20cries%20out%20for%20justice%20over%20girl%20raped%20by%20Catholic%20priest/-/1056/947142/-/s5j66xz/-/index.html> (access in 6 March 2011).

<sup>67</sup> ‘Philippines Church apologizes for sex abuse’, *BBC News*, 8 July 2002, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2116154.stm> (access in 6 March 2011).

<sup>68</sup> ‘Exile for disgraced Austrian Cardinal’, *BBC News*, 14 April 1998, available at <http://news.bbc.co.uk/2/hi/europe/78503.stm> (access in 6 March 2011).

June 2010 450 internal dossiers were found and confiscated from the former Archbishop;<sup>69</sup>

- Several cases also happened in France and few priests already convicted;<sup>70</sup>
- In February 2010, Germany's *Der Spiegel* reported that more than 94 clerics and laymen have been suspected of sexual abuse since 1995; but only 30 of those suspects had actually been prosecuted because of legal time constraints on pursuing cases;<sup>71</sup>
- In British, priests in several dioceses were involved in the same cases as were happened in Germany;<sup>72</sup>
- It is different story in Italy who signed a treaty with Vatican City State. The issue never made into a commotion even though there were few allegations directed toward priests;<sup>73</sup>
- There are 180 reports regarding sexual abuse scandal with dioceses in the Netherlands. Forty two reports were recognised as official complaints to the Church's authority;<sup>74</sup>
- In Malta, 84 allegations of child abuse have been made to the Church from 1999 to 2010;<sup>75</sup>
- The case also happened in several European countries like Norway, Poland, Spain, Sweden and Slovenia.<sup>76</sup>

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<sup>69</sup> See 'Huiszoeking bij aartsbisdom Mechelen-Brussel', *De Telegraaf*, 24 June 2010, available at [http://www.telegraaf.nl/buitenland/7033376/\\_Huiszoeking\\_bij\\_aartsbisdom\\_.html?sn=binnenland,buitenland](http://www.telegraaf.nl/buitenland/7033376/_Huiszoeking_bij_aartsbisdom_.html?sn=binnenland,buitenland). See also 'Pédophilie chez les prêtres: la loi du silence', *TéléMoustique*, 2 March 2011, available at <http://www.telemoustique.be/tm/magazine/3448/Pedophilie-chez-les-pretres-la-loi-du-silence.html>; 'Belgian bishop resign over pedophile scandal', *Perth Now*, 23 April 2010, available at <http://www.perthnow.com.au/news/breaking-news/belgian-bishop-resigns-over-paedophile-scandal/story-e6frg12u-1225857471599>; 'Priester Borremans veroordeeld wegens seksueel misbruik', *Knack*, 21 April 2010, available at <http://knack.rnews.be/nl/actualiteit/nieuws/belgie/priester-borremans-veroordeeld-wegens-seksueel-misbruik/article-1194718808273.htm>; [http://archives.lesoir.be/breves-societe\\_t-19990429-Z0GPPD.html](http://archives.lesoir.be/breves-societe_t-19990429-Z0GPPD.html); <http://www.spiritualia.be/nieuws/bericht.aspx?id=460>; <http://www.demorgen.be/dm/nl/989/Binnenland/article/detail/1104132/2010/05/10/Dossier-tegen-priester-Jef-V-d-O-wordt-heropend.dhtml> (access in 6 March 2011).

<sup>70</sup> See press review identification available at <http://www.apostasie.org/french/pedo/fait.html>. See also Marc Mazgon – Fernandez, 'French priest convicted on Sex Abuse', *bnet*, 16 June 2006, available at [http://findarticles.com/p/articles/mi\\_m1141/is\\_32\\_42/ai\\_n16546124/](http://findarticles.com/p/articles/mi_m1141/is_32_42/ai_n16546124/) (access in 6 March 2006).

<sup>71</sup> 'Abuse allegations mount at German Catholic church', *DW-World*, 7 February 2010, available at <http://www.dw-world.de/dw/article/0,,5224213,00.html> (access in 6 March 2011).

<sup>72</sup> See <http://www.reuters.com/article/2007/07/15/us-priests-abuse-world-idUSN1528958320070715>; [http://news.bbc.co.uk/2/hi/uk\\_news/england/devon/7085067.stm](http://news.bbc.co.uk/2/hi/uk_news/england/devon/7085067.stm); <http://www.timesonline.co.uk/tol/comment/obituaries/article1577365.ece>; <http://www.guardian.co.uk/news/2007/mar/28/guardianobituaries.religion1>; [http://news.bbc.co.uk/2/hi/uk\\_news/england/hereford/worcs/3590669.stm](http://news.bbc.co.uk/2/hi/uk_news/england/hereford/worcs/3590669.stm) (access in 6 March 2011).

<sup>73</sup> Sylvia Poggioli, 'Critics Press Italy, Church on Clergy Abuse', *NPR*, 24 June 2010, available at <http://www.npr.org/templates/story/story.php?storyId=11336777>. See also Paddy Agnew, 'Italian clerical sex abuse victims allege cover-up', *The Irish Times*, 7 April 2010, available at <http://www.irishtimes.com/newspaper/ireland/2010/0407/1224267827830.html> (access in 6 March 2011).

<sup>74</sup> See [http://www.katholiekederland.nl/actualiteit/2002/detail\\_objectID578442\\_FJaar2002.html](http://www.katholiekederland.nl/actualiteit/2002/detail_objectID578442_FJaar2002.html) (access in 6 March 2011).

<sup>75</sup> See Paddy Agnew, 'Italian clerical sex abuse victims allege cover-up', *The Irish Times*, 7 April 2010, available at <http://www.irishtimes.com/newspaper/ireland/2010/0407/1224267827830.html> (access in 6 March 2011).

<sup>76</sup> See <http://www.swedishwire.com/nordic/4173-priest-abuse-tips-explode-in-norway>; [http://www.catholic.org/international/international\\_story.php?id=23324](http://www.catholic.org/international/international_story.php?id=23324); <http://www.vest.si/2006/12/20/frantar-obsojen/>;

Compared to penal law in civil or common law system, Canon Law procedures in settling children sexual abuse case perpetrated by Catholic's clergymen are light with respect to sanctions. Consequently, priests-offender often feels safe and protected under the Canon Law for conducting these crimes, even to re-offend in the future. Facts about number of cases above and provisions regarding punishments set forth in Canon Law show that in the end, Canon Law procedures as a legal system cannot fulfill the deterrence objective's criteria set forth in criminal law. This argument is also supported by Tyler's study about the link between criminal legal system's legitimacy with deterrence objectives.<sup>77</sup> Since legitimacy of Canon Law is rather in doubt, people has tendency not to trust and comply with its provisions. Lack of law's compliance enhance individuals in conducting criminal offense rather than prevent, therefore it cannot fulfilled the deterrence's objective.

### 3. Incapacitation

The core of this theory is that punishment or sentences are designed to keep criminals away from society and protect the public from their misconduct. This objective is achieved through prison sentences and the death penalty, neither of which is accommodated by Canon Law. Sanctions of Canon Law such as supervision, suspension from taking confession, spiritual exercises, even laicisation (regarded as the gravest sanction), do not comply with this objective. Priest offenders can still keep in direct contact with the society, including with children.<sup>78</sup> This situation provides opportunity for the abuser to re-offend the misconduct.

### 4. Rehabilitation

This theory is probably the most compatible with the Canon Law *crimen* procedures' objective. Based on this theory, the imposition of punishment is to correct the offender's behaviour, and hopefully transform the offender into a valuable member of society by convincing the offender that their conduct was wrong. In the nature of Canon Law's *crimen* procedures, punishment is mainly aimed at correcting the behaviour of the offender, and focuses on offenders by attempting to rehabilitate their desire to do wrong so that they will not relapse into their old, criminal behaviours.<sup>79</sup>

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<http://www.rickcross.com/reference/clergy/clergy732.html>; <http://www.speroforum.com/a/26609/Jesuit-coverup-of-sex-abuse-on-two-continents> (access in 6 March 2011).

<sup>77</sup> Look at p. 9. See also Tom R. Tyler, 'Trust and Law Abidingness: A Proactive Model of Social Regulation', *Boston University Law Review* 81 (2001) Rev. 361, pp. 49 – 96.

<sup>78</sup> John Jay Geoghan case, Father Oliver O'Grady case. See 'What the Bishop Knew', *Guardian*, 3 April 2010, 27; Laurie Goodstein, 'Payout is Bittersweet for Victims of Abuse', *The New York Times*, 17 July 2007, available at <http://www.nytimes.com/2007/07/17/us/17abuse.html> (access in 6 March 2010); 'Bishops Record in Cases of Accused Priests', *Dallas Morning News*, 12 June 2002.

<sup>79</sup> Robert Cryer, et. all, *op.cit.*, pp. 28 – 29.



## 5. Restitution

If rehabilitation is focused on the offender, this theory is focused on the victim. The goal is to repair, through state authority, any hurt that inflicted on the victim by the offender. For example, one who offends will be required to repay the amount properly acquired. Restitution is commonly combined with the other main goals of criminal justice. Canon Law's *crimen* procedures have a dual nature in regard for this theory. There is no provision regarding victim's reparations in the Code of Canon Law or in any written sources of Canon Law. However, in reality sexual abuse cases involving children have often involved financial compensation for the victims on the part of the diocese; the amount and procedures are decided in secrecy by the concerned parties involved—the victim, the offender, and the diocese's authority.<sup>80</sup>

To conclude, Canon Law's *crimen* procedure does not generally achieve the objectives of criminal law, but rather only addresses two of the five objectives: rehabilitation and restitution. As a criminal legal procedure, Canon Law's capacity to be a reliable system in achieving justice is doubted.

### 1.3. Legal Consequences: The Victim's Human Rights

Criminal legal systems, whether international or national, are made to achieve justice for society in general and for the victim specifically. This broader goal of criminal law brought us to the discussion about the role or position of the victim in criminal procedure.<sup>81</sup> The rights of the victim to obtain justice include the right to be heard and give testimony, or to be involved in criminal law proceedings based on legitimate due process of law. The process of testifying and prosecution are believed to guarantee something close to the essence of justice, and closure to the victim.<sup>82</sup> Therefore, punishments must reflect both the calls for justice from all those who have been directly or indirectly affected by the crime.<sup>83</sup> Of great importance, the victim also has the right for reparations in the sense of the victim's rights. While this type of compensation takes many forms, usually the right to reparations is fulfilled by funding compensation for the victim.

Legally speaking, the rights of the victim in cases of sexual abuse of children by clergymen are not properly appreciated in the Canon Law system. As a witness, the victim has the right to be involved and give testimony in *crimen* proceedings, which unfold secretly. Inherent pontifical

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<sup>80</sup> Summary of the case and procedures is based on investigation known as 'The Ryan Report': The Commission to Inquire into Child Abuse, CICA Public Report (The Ryan Report), 20 May 2000, Executive Summary, para. 18 – 30, available at <http://www.childabusecommission.ie/rpt/execsummary.php> (access in 5 March 2011).

<sup>81</sup> See Antonio Casese, 'Reflections on International Criminal Justice', *Modern Law Review* 1 (n.l.: 1998).

<sup>82</sup> Robert Cryer, et al, *op.cit.*, pp. 30 – 31.

<sup>83</sup> It was asserted by Chamber in ICTY in Nikolic case. See the Judgment of Momir Nikolic, ICTY T. Ch. I 2.12.2003, para. 86.

secrecy eliminates Canon Law's fairness with respect to due process of law. Based on Canon Law, the victim is allowed to give testimony without the right for proper treatment, such as a medical check-up or DNA testing.

Having a fair and impartial due process of law is important to serve justice for all. It is not limited to the accused person, whose rights are often abused in criminal law processes, but also applies to the victim in a situation where the court is not transparent or impartial. These rights are inherent and cannot be derogated under any circumstances. The United Nations Human Rights Committee (the Committee) regarded this right similar and complementary with other non-derogable rights, by guarantying: "Non-derogable rights must, in addition, be accompanied by the availability at all times of effective domestic remedies to alleged victims of violations of these rights."<sup>84</sup> In another opinion, the Committee implicitly confirmed that the right of a fair trial is regarded as one of the non-derogable rights by stating: "...the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency."<sup>85</sup>

The term of non-derogable rights has expanded throughout the past decade and in the process has become more strongly regarded as one of peremptory norms (*jus cogens*) in international law. It does not mean that non-derogable rights have the same definition as peremptory norms. But, since most of the rights regarded as *jus cogens* have a non-derogable character—which will be explained further on—the equating of these terminologies can be justified.<sup>86</sup>

Along with the development of non-derogable rights, Rights of the Child under the CRC are also regarded as non-derogable by the Committee, which emphasises particularly the circumstances under article 19 requiring states party to take all appropriate measures to protect the child "from all forms of physical or mental violence", and article 34, which requires states to "take all appropriate national, bilateral and multilateral measures" to prevent the sexual exploitation and abuse of the child.<sup>87</sup> At the regional level, this non-derogable recognition is also stated in the Inter-American convention.<sup>88</sup>

In legal terminology, the definition of '*jus cogens*' as stated in article 53 of the Vienna Convention on the Law of Treaties (VCLT), is: 'a norm accepted and recognized by the

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<sup>84</sup> Human Rights Committee, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Geneva: UN Office, n.d.), p. 847, available at [http://www2.ohchr.org/english/about/publications/docs/CHAPTER\\_16.pdf](http://www2.ohchr.org/english/about/publications/docs/CHAPTER_16.pdf) (access in 7 March 2011).

<sup>85</sup> UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 16.

<sup>86</sup> ILC confirmed this framework in 828<sup>th</sup> meeting when they drafted the Vienna Convention on the Law of Treaties (VCLT), adopting that: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". See the UN document: A/CN.4/L.107, p. 34.

<sup>87</sup> Human Rights Committee, *op.cit.*, p. 845.

<sup>88</sup> See Article 19 Inter-American Convention. See also OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340; Human Rights Committee, *op.cit.*, p. 846.

international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ The notion of *jus cogens* has been experiencing a revolution, led by international lawyers and scholars of law. In the structure and functioning of the international legal system, by postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values, *jus cogens* has made its way into the very heart of the system.<sup>89</sup> *Jus cogens* is contained and structured on the basis of moral value, meaning that moral and humanitarian considerations find a more direct and spontaneous ‘expression in legal form’.<sup>90</sup> The rules of human rights have almost invariably been designated as part of it. This has occurred via the ‘bulk of contemporary human rights prescriptions’ without any further qualification.<sup>91</sup>

As for reparation, provision regarding compensation (such as sympathetic treatment, counseling or support for traumatized victim) for the victim is not contained in the Canon Law.<sup>92</sup> This is contrary to the commonly applied criminal law. Most of the children sexual abuse cases settled through state’s criminal law had successfully charged several dioceses to pay a lot of money for compensation to the victim or their representative.

Having an effective and fair due process of law is a right inherent to every individual. Through its development, this non-derogable right is now regarded as a set of peremptory norms (*jus cogens*) in international society.<sup>93</sup> The Holy See, as a state party of CRC and VCLT, therefore should respect peremptory norms, both in relation to providing an effective due process of law (as opposed to Canon Law), and the protection of children from any form of violation.

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<sup>89</sup> Andrea Bianchi, ‘Human Rights and The Magic of *Jus Cogens*’, *European journal of international law vol. 19 (2008) nr. 3*, p. 494.

<sup>90</sup> Simma and Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles’, *12 Australian Year Book of International Law (1988 – 1989)*, p. 82.

<sup>91</sup> M.S. McDougal, H.D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order: the Basic Policies of an International Law of Human Dignity* (n.l.: 1980), p. 345.

<sup>92</sup> Paul J. Isely and Peter Isely, ‘The sexual abuse of male children by church personnel: Intervention and prevention’, *Pastoral Psychology (1990) Vol. 39, No. 2*, pp. 91 – 93.

<sup>93</sup> See the written 828<sup>th</sup> meeting record of ILC in drafting VCLT, UN document A/CN.4/L.107.

## Chapter 2

### The Role of Vatican City State (Holy See) in the Sexual Abuse Cases Involving Children

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#### 2.1. Function and Authority of the Holy See in International Community: Statehood and Recognition

Vatican City State was established under the Lateran Treaty in 1929. The treaty contained an independence clause, given unilaterally by Italy, to recognize and affirm the jurisdiction of the Holy See over the Vatican. The term Holy See denotes as the Papacy State defining spiritual and pastoral governance or metaphysical emanation—by mean the supreme organ of government of the Church.<sup>94</sup> While the term Vatican City State defined as the vassal or the medium that was created for the mission of the Holy See.<sup>95</sup> Vatican City State and the Holy See have a very close, almost inseparable, interaction in the government function. This relation further explained by Michael J. Walsh:

“Vatican City came into being for no other purpose than to provide a territorial base for the Pope and his Curia. Collectively, the Pope and Curia are known as the Holy See. The Holy See is, and has long been, recognized in international law as itself a sovereign entity... It is perhaps even more interesting to ask about the relationship between the Holy See and the Vatican City. The latter in effect exists solely to serve the purposes of the former. It has no other *raison d’etre*. Since no one is disposed nowadays to deny the sovereignty, whether territorially grounded or not, of the Holy See, the Vatican City would seem to be not itself entity but a vassal state of the Holy See.”<sup>96</sup>

The explanation by Walsh above concludes that the Holy See, having the role as the government, holds the sovereign of Vatican City State which is the medium. However, it is not the purpose of this research to distinguish or separate terminologies between Vatican City State and Holy See. Both are ‘fused’ in a ‘real union’<sup>97</sup> under one sovereign status holder, the Pope.<sup>98</sup> In this

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<sup>94</sup> Hyginus Eugene Cardinale, *The Holy See and The International Order* (England: Colin Smythe Ltd., 1976), p. 85. See also Geoffrey Robertson, *Put the Pope in the Dock*, Guardian, 3 April 2010.

<sup>95</sup> Lateran Treaty was signed with Italy which recognized the state of the Vatican City and 'the sovereignty of the Holy See in the field of international relations as an attribute that pertains to the very nature of the Holy See, in conformity with its traditions and with the demands of its mission in the world'. See *130 British and Foreign State Papers*, p. 791. See also D.P. O'Connell, *International Law vol. I*, 2<sup>nd</sup> ed. (London: 1970), p. 289.

<sup>96</sup> Michael J. Walsh, *World Bibliographical Series Vol. 41: Vatican City State* (Oxford: Clio Press Ltd., 1983), pp. xxi – xxii.

<sup>97</sup> Mario Falco, *The Legal Position of the Holy See Before and After the Lateran Agreements 16* (A.H. Campbell trans., 1935), p. 41.

<sup>98</sup> Vatican City State claimed as an absolute monarchy in which the Head of State is the Pope, who exercises full principal of legislative, executive, and judicial power over the State of Vatican City. See Vatican City State official website at [http://www.vaticanstate.va/EN/State\\_and\\_Government/StateDepartments/index.htm](http://www.vaticanstate.va/EN/State_and_Government/StateDepartments/index.htm) (last access in 16 November 2010).

research, the appellation of Vatican City State defines the name of the state, including Holy See as the government.

The statehood of Vatican City State has been a debatable issue. In September 1995, the status of Holy See in international community was questioned through a petition at the Fourth World Conference on Women to United Nations.<sup>99</sup> In response to the matter, academic scholars and writers are divided into two opposite opinions about the credibility of Vatican City as a state. Some writers who doubt concluded that it cannot be regarded as a state because it does not comply two out of four qualifications stipulated by the Montevideo Convention on Rights and Duties of States 1933 (Montevideo Convention). In international law, Montevideo Convention is regarded as an objective characteristic of a sovereign state, in particular are: a permanent population, a defined territory, a sovereign government and capacity to enter into relations with another states. Scholars who deny the Statehood of Vatican City argued that Vatican City does not meet the first two characteristics.<sup>100</sup> On the contrary, other scholars argue that the legal status of Vatican City in international community is certainly confirmed by the actuality, and questioning its statehood is contrary to international practice.<sup>101</sup> The fact that 170 States recognized the sovereignty of the Holy See—which described in diplomatic relation or inter-governmental relationship—would naturally justify its statehood in international community.<sup>102</sup> Furthermore, these scholars defended that the Vatican City holds peculiar characteristic from any other states in meeting its requirements, as Hyginus Eugene Cardinale implicitly stated:

“A brief survey of the constituent elements of the Vatican City will soon indicate the juridical character of this State, which qualitatively is similar to that any other State even if, by reason of certain structural peculiarities, it must be considered as unique in the political and juridical

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<sup>99</sup> The petition called into question the status of the Holy See, referred also as Vatican City, at the United Nations. It urged the United Nations “to evaluate the appropriateness of allowing the Holy See, a religious entity, to act on a par with States. The petition collected more than a thousand signatures in the first few days of the campaign. See A Call to the United Nations to Consider the UN Status of the Holy See, pp. 1-2; Catholics for a Free Choice, News Release, Campaign on UN Status of Holy See Mounted at Women's Conference: Petition Asking UN to Evaluate Holy See's Role Elicits Broad Support 1 (Sept. 6, 1995).

<sup>100</sup> Doubtful Scholars argued that Vatican City has no permanent population and defined territory. It is a city without nationals or even residents. Related to population, Vatican adopts citizenship system which granted by the Pope because of their rank of service or employment. Citizenship will remain until their status or employment ends and does not mean permanent residents. In the sense of territory, Vatican City cannot be regarded as a territory in common sense. The palace and grounds have one proprietor, the Pope, and third parties are expressly forbidden from owning any of its real estate or lodging there without papal permission. See Geoffrey Robertson QC, *The Case of the Pope: Vatican Accountability for Human Rights Abuse* (London: Penguin Book, 2010), pp. 79 – 86; Ian Brownlie, *Principle of Public International Law*, 6<sup>th</sup> edition (Oxford: Oxford University Press, 2003) pp. 86 -88; Herb Wright, ‘The Status of Vatican City’ *American Journal of International Law* (1994) 38, p. 432; Yasmin Abdullah, ‘The Holy See at United Nation Conferences: Church or State?’, *Columbia Law Review* (1996) 96 (7), p. 1835.

<sup>101</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 104.

<sup>102</sup> Geoffrey Robertson, *op.cit.*, p. 79.

history of the international community. It would be wrong to conclude that it is not a State, only because ‘its activities are totally different from those inherent in national States’.<sup>103</sup>

The subject of the principle of state responsibility is a state—meaning that this principle is imposed by a state and applied on a state. Therefore, for the purpose of this research—to subject the principle of state responsibility on the Holy See—the statehood of Vatican City State is important to clarify. This research is presuming Vatican City as a sovereign state. Based on the Montevideo Convention, the supporting arguments to proof the statehood of Vatican City are given below:

- Defined Territory

Article 4 Lateran Treaty gives the Pope to exercise his temporal power in a sovereign and exclusive manner over 108.7 acres land-lock area within the city of Rome, Italy. This territory is recognized by Italy for Holy See in complete ownership, including its exclusive, absolute power and sovereign jurisdiction.<sup>104</sup> The land is privately possessed by the Holy See under Pope’s administration therefore cannot be owned by citizens or inhabitants. Based on this treaty, the Vatican City established its defined territory and at once filled the first requirement of Montevideo Convention. For Vatican City, this requirement is more legally important than permanent population—it guarantees the Holy See an absolute, visible independence and indisputable sovereignty in international field.<sup>105</sup>

- Permanent Population

Population inside the Vatican City is governed differently from other states. The population inside the Vatican City is consist with people who have at least a permanent legal residence in the city, such as: important dignitaries, officials, lower grade employees who must actually reside there, Cardinals who reside in Vatican City or in Rome, staff of the papal mission abroad who are legally entitled to live there, and so forth.<sup>106</sup> The population is also “consists of a body of citizens subject to a supreme power but without constituting a national community in the generally accepted sense”.<sup>107</sup> In the system of state, a relation between individual and the state is showed with nationality that based on two principles: *jus soli* (bond of the soil) and *jus sanguinis* (bond of blood). Vatican City has an exceptional system in relation with its citizens. The constitution of Vatican City is not recognise Vatican City’s nationality, and only admit Vatican City’s citizenship that granted based on *jus officii* (a bond arising from office holding)—it is a relation of obligation determined by the regular employment and permanent residence which a Vatican citizen is presumed to hold in the

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<sup>103</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 104. See D.P. O’Connell, *International Law, vol. I* (London: 1965), pp. 311 – 312.

<sup>104</sup> Article 3 Lateran Treaty.

<sup>105</sup> Preamble of the Lateran Treaty and articles 2, 3 and 4. See Hyginus Eugene Cardinale, *op.cit.*, p. 106.

<sup>106</sup> Article 1 Law No. III on the Rights of Citizenship and Residence in the Vatican. See article 9 Lateran Treaty.

<sup>107</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 107.

city.<sup>108</sup> This citizenship system applied in Vatican City does not mean that there is no permanent population per se in Vatican City. As Hyginus Eugene Cardinale observes: “legal rules on nationality are not universally coherent, and it was principally motivated by considerations of a social nature”,<sup>109</sup> in this context, permanent population must be seen as functional use of the citizen. Supporting the peculiar term of permanent population in the Vatican City case, DP O’Connell concludes: “citizenship may be indicative of the extent of the rights and privileges of a given category of nationals”.<sup>110</sup>

- Sovereign Government

Lateran Treaty 1929 guarantees the exclusive, absolute power and sovereign jurisdiction of the Holy See over Vatican City State under the sovereignty of supreme Pontiff. The sovereign Pontiff denotes as a ruler of the Vatican City State with full legislative, executive and judicial powers thus bring the Pope to have a supreme authority of both temporal and spiritual ruler over the territory and people of Vatican City. The government system of the Holy See comprises several administrative organs: The Cardinal Secretary of State; The Governor of the State; The General Counselor of the State; The Pontifical Commission for the Administration of the State of the Vatican City; and *Consulta*.<sup>111</sup> Cardinal, the head departments of Roman Curia, governs a daily administration of both the Holy See and the Vatican City. The Roman Curia, which under the Cardinal Secretary of State, are divided into nine congregations (or ministries); three Tribunals; twelve Pontifical Councils and Commissions. The Congregations hold the important governance duties, such as: overseeing church doctrine, appointing bishops, overseeing missionary work and other matters affecting Roman Catholicism. The affairs of Vatican City are regulated by the Pontifical Commission for the Administration of the State of the Vatican City.<sup>112</sup> No clear segregation between the government of Roman Catholic Church and the government of Vatican City, which mutually supports one another.<sup>113</sup> The Vatican City still has a structured system in governing its organs although the system is uncommon than any other state’s system. In the sense of sovereignty, the administration of Vatican City is well-functioned and well-effective towards its population and other states. Therefore, it is evident that the Vatican City can comply with the requirement of sovereign government.

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<sup>108</sup> Yasmin Abdullah, *op.cit.*, pp. 1861 – 1862.

<sup>109</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 109.

<sup>110</sup> D.P. O’Connell, *International Law, vol. II* (London: 1965), p. 729.

<sup>111</sup> Hyginus Eugene Cardinale, *op.cit.*, pp. 110 – 111.

<sup>112</sup> Yasmin Abdullah, *op.cit.*, pp. 1864 – 1865. See Felician A. Foy and Rose M. Avato, *1996 Catholic Almanac 150* (n.l.: 1996).

<sup>113</sup> The Pontifical Commission is not the Vatican City State’ true government per se, since it has main responsibility for technical and other services, and does not maintain relations with foreign affairs, which fall under Holy See’s jurisdiction. See Yasmin Abdullah, *op.cit.*, p. 1865. See also Michael J. Walsh, *Vatican City State* (n.l.: 1983), pp. xxiii – xxv.

- Capacity to Enter into Relations with Other States

In the history and practice of international law, Vatican City State, through Holy See as the sovereign organ, has been have relation with other states in various areas at governmental level (through diplomatic exchange or treaty based relation) and participates in several international organizations (i.e.: United Nations, WTO,<sup>114</sup> ILO,<sup>115</sup> etc), meetings and conventions (i.e.: CRC, Convention on Elimination of All form of Racial Discrimination, Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Convention for the Protection of All Persons from Enforced Disappearance, and so forth) open only to states. Nowadays, the Holy See holds the special entity from United Nations (UN),<sup>116</sup> thus make Vatican City State recognised as a sovereign territory by UN. This is clearly proves the capacity of Vatican City State to enter into relation with other states.<sup>117</sup> Few scholars argues that the real inquiry posed by the forth criterion of the Montevideo Convention is whether the putative state is independent and having relation with another State will follow after as the consequences.<sup>118</sup> In this case, Vatican City State is also capable to meet the inquiry. It is sufficiently independent, proven by the existence of military force (the Swiss Guard), post office, bank, railway, publishing house, radio station, newspaper, Vatican's coin and stamp, and also Vatican's passports.<sup>119</sup>

Going through the debate over the statehood of Vatican City will not change the fact of its remaining status in international community. There is a debate between legal scholars in international law of recognition, deciding upon whether a previously unrecognised entity becomes a state by recognition from other states as such (known as constitutive theory<sup>120</sup>) or capability to

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<sup>114</sup> Its status is still observer government right now. See WTO official website: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last access in 17 November 2010).

<sup>115</sup> See ILO official website: <http://www.ilo.org/public/english/standards/relm/countryb.htm#B> (last access in 17 November 2010).

<sup>116</sup> Holy See received a standing invitation to participate as observer in the sessions and the work of the General Assembly and is maintaining a permanent observer mission at UN Headquarters.

<sup>117</sup> As Hyginus Eugene Cardinale said: "It is obvious that the appropriate theme of Vatican City, intended to support the Holy See in carrying out its mission and not to pursue the normal aim of other States, affects in different ways the capacity of the Vatican City State to enter into relations with other States. Nevertheless the atypical character of this capacity does not destroy the capacity itself." See Hyginus Eugene Cardinale, *op.cit.*, p. 114.

<sup>118</sup> The real inquiry stated by the forth criterion of Montevideo Convention is whether the assumed State is independent. Generally, a State is assumed independent if it is able to engage in foreign relations. See James Crawford, *The Creation of States in International Law* (n.l.: 1979), pp. 47 – 48; Ian Brownlie, *Principles of Public International Law*, 2<sup>nd</sup> ed. (n.l.: 1973), p. 76; Nii Lante Wallace-Bruce, *Claims to Statehood in International Law* (n.l.:1994), p. 57.

<sup>119</sup> See *I Countries of the World and Their Leaders* (n.l.: 1996), p. 645.

<sup>120</sup> "The grant of recognition is an act on the international plane, affecting the mutual rights an obligation of States, and their status or legal capacity in general". See Lassa Oppenheim, *International Law*, 9th ed. (n.l.: 1992), pp. 128 – 129. The most prominent explanation of the constitutive view can be found in Hersch Lauterpacht, *Recognition in International Law* (1947). Some Scholars suggests that membership in the UN is a modern form of recognition. See John Dugard, *Recognition and the United Nations* (1987), p. 43.



attain the factual indicia of statehood (known as declaratory theory<sup>121</sup>).<sup>122</sup> For the Vatican City State case, constitutive theory is applied in describing its statehood in international community which has more political, rather than legal, value. It is not a wrong conclusion to say that Vatican City State has fulfilled the statehood's criteria by recognition from other states despite its entailed shortage in legal frame. Currently, Vatican City enjoys the status and is regarded as a subject of international law comparable to any other states. Therefore, the principle of state responsibility can be laid on the Vatican City State (the Holy See).

## 2.2. The Link: Holy See, Perpetrator and Victim

In constructing the elements of state responsibility principle, the effective link and functional connection between the Holy See as the responsible state and clergyman or priest as the perpetrator is necessary. Real link between the perpetrator and the state play an important role, especially when analyzing the case of sexual abuse of children that will be discussed in the next chapter. Therefore, this section will describe the legal bond between the Holy See and its organs in general, and the legal knot between the Holy See with the perpetrator and the victim in the case of children sexual abuse. Both links will be described based on the issue of immunity, liability and compensation.

### Immunity

Since Middle Ages when the glorious moment of *Repubblica Christiana*, the inseparable link between papacy and the field of politics has been evident.<sup>123</sup> Papacy has divine mission to “defend the eternal values of morals and of religion, related to all aspects of private and public life”.<sup>124</sup> The Pope, as the head of papacy, holds the duty to direct obligated actions for human that they need to obey based on the supreme and unchanging principles of Christian faith and morals. In order to insure the complete welfare of citizens, papacy mission, done through the Church, often inevitably relates with political activities which required cooperation with a state. The Church is a divine institution, visible and organized society that “pursues concrete social aims also in the temporal field in so far as they are ordained to the spiritual objective, such as protection of Church property,

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<sup>121</sup> Ti-Chiang Chen, *The International Law of Recognition* (n.l.: 1951), p. 14.

<sup>122</sup> Significant problem with the doctrine of recognition is that it has many weaknesses in explaining significant issues such as: it fails to indicate how many States must recognize the new State; relativity's problem which State's legal existence is dependent upon its relations with other States; and so forth. Due to the shortcomings of the constitutive theory, the declaratory theory is now predominant and preferred. See Yasmin Abdullah, *op.cit.*, p. 1859. See also Ian Brownlie, *Principles of Public International Law*, 2<sup>nd</sup> ed. (n.l.: 1973), pp. 93 – 94; James Crawford, *The Creation of States in International Law* (n.l.: 1979), pp. 19, 22, 24; Ti-Chiang Chen, *The International Law of Recognition* (n.l.: 1951), p. 16; and John Dugard, *Recognition and the United Nations* (1987), pp. 79 – 80.

<sup>123</sup> During Middle Ages, the Church's position is very strong and the Pope had a universal authority as the supreme judge of Christendom. He entrusted as arbiter to solve questions of conflict between nations, furthermore to decide whether a State had justification in embarking war. See Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge Cambridge University Press, 2008), pp. 45 – 81.

<sup>124</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 29.

freedom of organization, and activity of Catholic associations.”<sup>125</sup> Political means for the Church composed four principles: papal diplomacy; exercise of arbitration among nations; concordats; and participation in intergovernmental organizations. For the purpose of this research, the first principle will be emphasized among others.<sup>126</sup>

According to the rules of both ecclesiastical and international law, papal diplomacy is a system which regulates the relations between Church and a state—purposing to ensure their harmony and cooperation and thus promoting everlasting goodwill, understanding and peace among peoples. Papal diplomacy comprehends two missions: ecclesiastical mission to the local Church and diplomatic mission to the accredited state. In this context, the Holy See bears the duty to organise the whole machinery of the Church’s teaching, action and membership in their respective areas for the good of mankind. The Holy See denotes as the only organisation which authoritatively entrusts its diplomatic agents with a mission that being at once religious, political and social, entirely dedicated to peacemaking at the principal levels of human activity.<sup>127</sup> This is described by Paul VI’s *motu proprio* on the duties of representatives of the Roman Pontiff, *Sollicitudo omnium Ecclesiarum* published on 24 June 1969:

“The primary and specific purpose of the mission of the pontifical representative is to render ever closer and more operative the ties that bind the Apostolic See and the local Churches... Upon the Pontifical Representative also falls the duty of safeguarding the interests of the Church and of the Holy See in his relations with the civil authorities of the country where he exercises his office.”<sup>128</sup>

The juridical consequences of the papal diplomatic system is that the local Churches appear as the administrative departments, with a certain autonomy but under the supervision of a centralized network constituting a parallel hierarchy, as if local churches were subdivisions of the universal Church directed from above.<sup>129</sup> Under Canon 331 and Canon 590, the Pope is gifted with “supreme, full, immediate and universal power in the Church” thus denotes him as the superior and absolute commander of Catholic’s bishops and priests. However this hierarchy is not fully prevailed, a papal representative can intervene at any moment in the name of the higher authority in their internal affairs such as debates, decisions or bishop’s nomination.<sup>130</sup> Traditional concept of centralized hierarchy of universal Church has to be seen and understood in juridical context of its external relations with a state. It implies the Church’s ultimate defense against the interference of a state in

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<sup>125</sup> *Ibid.*, p. 29.

<sup>126</sup> *Ibid.*, p. 34.

<sup>127</sup> *Ibid.*, pp. 37 – 39.

<sup>128</sup> Article IV.1 Apostolic Letter of Paul VI Supreme Pontiff on The Duties of Papal Representatives ‘*Sollicitudo Omnium Ecclesiarum*’.

<sup>129</sup> Jose de Broucker, *The Suenens Dossier* (Indiana: 1970), p. 258.

<sup>130</sup> *Ibid.*, pp. 40, 182 – 184, 191 - 195.

its affairs.<sup>131</sup> Similar to ‘normal’ diplomatic mission, papal diplomatic system also enjoys the extraterritorial privileges such as diplomatic immunity for the ambassador of the Holy See—known as nuncio—and the host state is prohibited to enter the premises of the mission without nuncio’s permission. Vienna Convention on Diplomatic Relations 1961 makes guarantees this right specifically for the Holy See in article 16.<sup>132</sup> To avoid any misconception and abuse of rights, it must be noted that the privileges only applied to the nuncio and its office. Regular priests who accused with children sexual abuse case could not be under the protection of this immunity even if he listed as the citizen of Vatican City.

### **Liability and Compensation**

In the case of children sexual abuse, additional consequences of financial compensation will be imposed on perpetrator. This compensation dedicates for the victim who had a physical or psychological injury. Based on several cases, Catholic’s priests or clergymen, as the perpetrator, who taken a vow of poverty will rarely take the direct responsibility in this financial obligation. Bishops or dioceses can directly liable for their negligent failure to supervise the priest or to take sufficient care of the children in his charge by ignoring their complaints or providing no effective investigation.<sup>133</sup> Since the wrongful conduct happened in the course of his employment, the bishop or diocese for which he works (the employer) will vicariously liable therefore become a ‘joint tortfeasor’. This context is known as the doctrine of *respondeat superior*, which an employer is held responsible for actions of agents and employees, irrespective of any direct authorisation.<sup>134</sup> This doctrine has the policy rationale to encourage greater care in their selection and control of the Holy See for its organs, as Geoffrey Robertson supported:

“There is nothing objectionable, in principle or in justice, about seeking redress from an organisation (or its leader) that is ultimately responsible for the damage: legal actions serve not only to compensate the injured, but to provide the best incentive for the organizations to exert its power of control to prevent similar harm from being done in future to others.”<sup>135</sup>

The role of the Holy See in this case is significant. The Holy See has the capacity to prevent the case and to create a good system for processing the case. The absolute and direct authorities of the Holy See upon all the Churches should be able to make a fluent process to account clergyman for his errors wherever they are based. All the bishops and clergymen are bound by obedience to the

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<sup>131</sup> Hyginus Eugene Cardinale, *op.cit.*, p. 50.

<sup>132</sup> For a further details, see the text of Vienna Convention on Diplomatic Relations 1961, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf) (last access 7 May 2011).

<sup>133</sup> Geoffrey Robertson, *op.cit.*, pp. 151 – 152.

<sup>134</sup> See Ralph Dornfeld Owen, ‘Tort Liability in German School Law’, *Law and Contemporary Problems* (2001), (Duke University School of Law), pp. 72 – 79.

<sup>135</sup> Geoffrey Robertson, *op.cit.*, p. 152.

Holy See and the Pope who has the legal authority over subordinates in Catholic religious orders. Furthermore, the link between Holy See, clergymen (perpetrators) and also the victim, is described by Lucian C. Martinez with:

“Allowing victim to sue the Holy See for clerical sex abuse could have a significant policy effect by encouraging better safeguards and more stringent oversight at the highest level of the church’s administration... and emphasize cooperation with law enforcement, while requiring church leaders to account for their effectiveness in overseeing their personnel and protecting the members of the faithful entrusted to their care.”<sup>136</sup>

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<sup>136</sup> Lucian C. Martinez, ‘Sovereign Impunity: Does the Foreign Sovereign Immunity Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?’, *Texas International Law Journal* (2008) 44, Texas, pp. 123, 144.

## Chapter 3

### State Responsibility: Theory, Development and of Vatican City State (Holy See) in Sexual Abuse Cases Involving Children Perpetrated by Clergymen

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#### 3.1. The Nature of State Responsibility: Concept, Objectives and Development

In international law, the concept of state responsibility constitutes a fundamental principle that encompasses the nature of the international legal system and the doctrines of state sovereignty and equality of states. The concept accommodates a situation where international responsibility is established between two states, in which one state commits an internationally unlawful act against another. Subsequently, a breach of international obligation leads to a requirement for reparation.<sup>137</sup> The scope of state responsibility principle is somewhat limited by the fact as the ‘secondary rules’. State responsibility, in other words, must be preceded by another international law that emphasises general conditions and procedures for a state to be considered responsible for wrongful actions or omissions, and for the pertinent legal consequences. Consequently, the principle does not attempt to define the content of international obligations for which violation gives rise to responsibility. This is the function of the ‘primary rules’ that comprise most substantive international law whether sourced from customary or conventional law.<sup>138</sup>

The scope of state responsibility principle, as the secondary rules, is often difficult to distinguish from other branches of international law, particularly the law of treaties. However, this difficulty was answered by the International Court of Justice in the *Gabcikovo-Nugymaros Project* case, in which the Court reaffirmed the distinction of the two:

“A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the state which proceeded to it, is to be made under the law of state responsibility.”<sup>139</sup>

To put this into practical terms, James Crawford defined several steps that generate the nature of state responsibility principle for particular circumstances:

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<sup>137</sup> Malcolm Shaw, *International Law, 5<sup>th</sup> Edition* (Cambridge: Cambridge University Press, 2004), p. 837. See generally C. Eagleton, *The Responsibility of States in International Law* (New York, 1928); Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I*, (Oxford: Oxford University Press, 1983). See also ‘Symposium: The ILC’s State Responsibility Articles’, *American Journal of International Law* (2002) 96, p. 773; ‘Symposium: Assessing the Work of International Law Commission on State Responsibility’, *European Journal of International Law* (2002) 13, p. 1053.

<sup>138</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), p. 74. See also *Yearbook of the ILC* (1973), vol. 11, pp. 169-70.

<sup>139</sup> ICJ Reports (1997) pp. 7, 38. See also International Law Report 116, p. 1.

1. Distinguishing the role of international law from internal state law concerning what constitutes unlawful conduct;
2. Determining in what circumstances conduct is to be attributed to the State as a subject of international law;
3. Specifying when and for what period of time there is or has been a breach of an international obligation by a State;
4. Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;
5. Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;
6. Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;
7. Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;
8. Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfillment of the obligations of the responsible State under these articles.<sup>140</sup>

From the above explanations, the essential elements of responsibility comprise the following: first, the existence of an international legal obligation is in force as between two particular states; second, actions or omissions that violate that obligation and are imputable to violator's State; and last, loss or damage resulted (or is continuing to result) from the unlawful act or omission.<sup>141</sup> Consequently, responsibility leads to reparation, which is also an important issue in the law of state responsibility. It also denotes an objective of the principle. This has been made clear by the Permanent Court of International Justice (PCIJ) in a number of leading cases. In the *Spanish Zone of Morocco* claims, Judge Huber emphasised:

“[Responsibility] is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make cessation or reparation if the obligation in question is not met.”<sup>142</sup>

Furthermore, in the *Chorzow Factory* case, the PCIJ said that: “it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>143</sup>

<sup>140</sup> James Crawford, *op.cit.*, pp. 74 – 75.

<sup>141</sup> H. Mosler, *The International Society as a Legal Community* (Dordrecht: 1980), p. 157; And E. Jimenez de Arechaga, 'International Responsibility', *Manual of Public International Law* (ed. M. Sarensen), (London: 1968), pp. 531, 534.

<sup>142</sup> *RIAA* 2 (1923), p. 615; *AD* 2, p. 157; *RIAA* 2, p. 641.

<sup>143</sup> PCIJ, *Series A (1928)*, No. 17, p. 29; *AD* 4, p. 258. See also the ‘Corfu Channel’ case, *ICJ Reports*, pp. 4, 23; *AD* 16, p. 155; the ‘Spanish Zone of Morocco’ case, *RIAA* 2, pp. 615, 641 and the ‘Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua’, Inter-American Court of Human Rights, *Judgment of 31 August 2001 (Ser. C) No. 79*, para. 163.

The importance and substantiality of the state responsibility principle in international law has already been considered since it was discussed in 1930 by the League of Nations through its unsuccessful conference.<sup>144</sup> It remains an essential subject over time, mandating its codification to the International Law Commission (ILC). Through a very long process of conferences, debates, reports and researches, a draft encompassing this principle was produced by the ILC in 2001. It was named the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC's Draft Articles). The draft was adopted without a vote and with consensus on virtually all points, accurately reflecting the balance of opinion within the ILC.<sup>145</sup> ILC's Draft Articles evidently showed the general principal of international law, supported by affirmed case law, and commended by General Assembly Resolution No. 56/83. Before in the form of written document in 2001, the rule of state responsibility principle has been existed and developed in customary law and jurisprudence. Without having a convention form, ILC's Draft Articles proved strong in their legal positioning. It is not a legally binding document per se, but is often referred to by the international court as they handle cases.<sup>146</sup> Therefore, in explaining the elements that formed the principle of state responsibility, ILC's Draft Articles will be an important document.

### **3.2. The Elements of State Responsibility Principle**

An internationally wrongful act on the part of a state leads to the attribution of state responsibility for particular actions. It reflects the basic principle of the whole concept as listed in Article 1 ILC's Draft Articles and supported by the International Court of Justice (ICJ or the Court). The act of a state is categorised as internationally wrongful if it consists of one or more actions or omissions (or a combination of both).<sup>147</sup> The Court in its several advisory opinions stated that: "refusal to fulfill a treaty obligation involves international responsibility".<sup>148</sup> Supporting the Court, arbitration tribunals in several cases also have repeatedly affirmed that: "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility."<sup>149</sup>

In defining the legal relations between parties involved in international responsibility, the concept of international responsibility on the part of a state has a broad interpretation that is not

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<sup>144</sup> See S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)* (New York: Oceana, 1972), and *League of Nations Conference for the Codification of International Law (1930)* (New York: Oceana, 1975). See also *Yearbook of International Law Commission 1956, vol. II*, pp. 223-225.

<sup>145</sup> James Crawford, *op.cit.*, p. 60.

<sup>146</sup> See, e.g., *Gabcikovo-Nagymaros Project, ICJ Reports 1997*, pp. 7, 38, 39 – 41, 46, 54 – 56; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999*, pp. 62, 87.

<sup>147</sup> James Crawford, *op.cit.*, p. 77.

<sup>148</sup> *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949*, p. 174; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, ICJ Reports 1950*, p. 221 and p. 228.

<sup>149</sup> *RIAA (1901) vol XV*, pp. 395, 399, 401, 404, 408, 409, 411; *RIAA (1931) vol. IV*, p. 669, 691; *RIAA (1925) vol. II*, p. 615; *RIAA (1953), vol. XIV*, p. 159; *RIAA (1990) vol. XX*, pp. 217, 251.

solely limited to the essential bilateral relationship between the responsible state and the injured state. It has been recognised that some wrongful acts may engage the responsibility of the responsible state toward several injured States, or toward the international community as a whole.<sup>150</sup> The Court affirmed this direction for the first time in the *Barcelona Traction Case* in which the term of obligations *erga omnes* was announced.<sup>151</sup> As part of the international community, every state has a legal interest in the protection of basic rights and the fulfillment of certain essential obligations.<sup>152</sup> This obligation is closely related with certain rights categorised as *jus cogens*, as expressed by the Court: “the outlawing of acts of aggression, and of genocide, as also... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.<sup>153</sup> This significant idea has been reaffirmed by the Court in settling several cases.<sup>154</sup>

Elements constituting the internationally wrongful acts of a state, as described in article 2 of ILC’s Draft Articles, are acts which at the same time are attributable to the state and constitute a breach of an international legal obligation in force for the state. These two elements are also explicitly specified by the Court in a number of cases, which links the establishment of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right(s) of another State”.<sup>155</sup> ILC avoids putting these two elements into a subjective and objective terminology. It affirmed that establishing such terminology is a matter for interpretation and application of the primary rules engaged in the given case.<sup>156</sup> Also important for the whole concept of state responsibility is determination of the wrongful conduct under international law. International law is the law that decides the characterisation of a wrongful act of a state, and is unaffected by internal law.<sup>157</sup> An act of a state cannot be qualified as internationally wrongful unless it breaches an international obligation, even if the state’s law defines otherwise. Furthermore, a state cannot escape international responsibility by pleading that the particular conduct is lawful under its internal law.<sup>158</sup> This principle was affirmed many times by

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<sup>150</sup> James Crawford, *op.cit.*, p. 79.

<sup>151</sup> The International Court noted that “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.” See *Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970*, p. 32.

<sup>152</sup> James Crawford, *op.cit.*, p. 79.

<sup>153</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970*, p. 32.

<sup>154</sup> See *East Timor (Portugal v. Australia)*, *ICJ Reports 1995*, p. 102; *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996*, p. 258.; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Reports 1996*, pp. 615 – 616.

<sup>155</sup> *Phosphates in Morocco, Preliminary Objections, PCIJ, Series A/B (1938)*, No. 74, pp. 10, 28.

<sup>156</sup> *Yearbook of the International Law Commission (1973)*, vol. II, p. 179. See also James Crawford, *op.cit.*, pp. 81 – 82.

<sup>157</sup> See Article 3 ILC’s Draft Articles.

<sup>158</sup> James Crawford, *op.cit.*, p. 86.



the court, stating that: "... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."<sup>159</sup>

### **Internationally Wrongful Acts Attributable to the State**

A state is a genuinely organised entity, a legal subject that can perform legal acts as determined by international law. Any given act of a state is not described in vague terminology; it must involve actions or omissions by a human being or a group. The general rule is that a wrongful act is attributable to the State if it involves actions or omissions through their organs of government, through agents or representatives who have acted under the direction, or the instigation or control of those organs. The *organ of a state* is described as any person or entity (irrespective of whether this person or entity exercises legislative, executive, judicial, or any other functions, with position in the organisation of the State, and whatever its character is as an organ of the central government or as a territorial unit of the State) which has status in accordance with the internal law of the State.<sup>160</sup> The role of internal law is of prime importance here. It decides what constitutes an organ of a State—a definition not governed by international law. Every state has its own liberty to decide the structure of its administration and which functions are to be assumed by government. On the other hand, international law does not recognise the distinction between legal entities subdivided by internal law (for example, autonomous and independent institutions of the executive government). International law still embeds these entities within the organs of a state (the principle of the unity of the State). For the purposes of international responsibility, the acts or omissions of all of a state's given organs should be regarded as acts or omissions of the state.<sup>161</sup>

If internal law is used to define an organ of a State, international law has a different role. Whether a state is responsible for the conduct of its own organ, its ability to act in that capacity is based on international law. This is where difficulties can arise in the application. Determining whether a state organ acts in its given capacity can be complicated. To take one example, responsibility is attributable to the state if its organ acts in an apparently official capacity or under the colour of authority. However, it is difficult to determine if the same organ is acting in a private capacity or, in another situation, acting abusively in an official capacity under governmental

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<sup>159</sup> *Greco-Bulgarian "Communities" (1930) PCIJ, Series B, No. 17*, p. 32. The Court expresses this principle first time in *S. S. Wimbledon Case (1923) PCIJ, Series A, No. 1*, pp. 29 - 30. See also *Free Zones of Upper Savoy and the District of Gex (1930) PCIJ, Series A, No. 24*, p. 12; *Free Zones of Upper Savoy and the District of Gex (1932) PCIJ, Series A/B, No. 46*, p. 167; *Treatment of Polish Nationals (1932) PCIJ, Series A/B, No. 44*, p. 24; *Exchange of Greek and Turkish Populations (1925) PCIJ, Series B, No. 10*, p. 20; *Jurisdiction of the Courts of Danzig (1928) PCIJ, Series B, No. 15*, pp. 26 – 27.

<sup>160</sup> See Article 4 ILC's Draft Articles. See also James Crawford, *op.cit.*, pp. 91 – 94.

<sup>161</sup> James Crawford, *op.cit.*, p. 98. See also *ILR, vol. 65*, p. 193; *Propend Finance Pty. Ltd. v. Sing, ILR 1997, vol. 111*, p. 611 (C.A., England). These were State immunity cases, but the same principles applies in the field of State responsibility.

authority. The latter is regarded as attributable to the state (including in situations where the actions undertaken by the state organ were contrary to the instructions given), while the former is not.<sup>162</sup> Drawing the line between unauthorised but still ‘official’ conduct, on the one hand, and ‘private’ conduct on the other may be hard and depends on circumstances as they are determined case by case. Nonetheless, several cases<sup>163</sup> can be referred to as guidelines, and the problem can be avoided if “the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it”.<sup>164</sup>

General principle of state responsibility determines that the conduct of private persons or entities is not attributable to the state under international law. However, in certain circumstances, the conduct of individuals may be attributable to the state if a factual relationship exists between the person or entity engaging in the conduct and the state. If it is not an organ of a state described above, the act of a person or entity is still attributable as an act of the state in a particular instance— that the person or entity has empowered by the law of the state to exercise elements of the governmental authority.<sup>165</sup> Justification for this attribution rests in the fact that the internal law of the state is permitting the entity to exercise certain elements of government authority. In this context, the conduct of an individual or entity must be related to governmental activity, not private or commercial activity (e.g.: private security firms contracted to act as prison guards or as immigration controllers).<sup>166</sup>

A person or entity still accounts as attributable to the state even without the empowerment by the internal law of the state if the person or group of persons is acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.<sup>167</sup> In these circumstances, it does not matter whether the person involved is neither a private individual nor whether his/her conduct involves ‘governmental activity’. The important role is played by the principle of effectiveness in international law, taking into account the existence of a real link between the person or group performing the act and the state machinery. Determining the scope of instruction,

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<sup>162</sup> See Article 7 ILC’s Draft Articles.

<sup>163</sup> See *Petrolane, Inc. v. Islamic Republic of Iran (1991)* 27 *Iran-USCTR* 64, p. 92; *The Caire case, RIAA (1929) vol. V*, p. 516; *The Mosso case, RIAA (1953) vol. XIII*, p. 494; *Youman’s claim, RIAA (1926), vol. IV*, p. 110; *The Union Bridge Company case, RIAA (1924) vol. VI*, p. 138. See also *Yearbook of the ILC, 1975, vol. II*, p. 67.

<sup>164</sup> James Crawford, *op.cit.*, p. 108. One form of ultra vires conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The Articles are not concerned with questions that would then arise as to the validity of the transaction (cf. Vienna Convention on the Law of Treaties, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present Articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

<sup>165</sup> See Article 5 ILC’s Draft Articles.

<sup>166</sup> James Crawford, *op.cit.*, pp. 100 – 101. See also ILC Commentary 2001, p. 92; and *Yearbook of the ILC, 1974, vol. II*, pp. 281 – 282.

<sup>167</sup> See Article 8 ILC’s Draft Articles.

direction, or control of state in these types of cases where private individuals or entities may be (to use short-hand) engaged in state business, and the effective link of the state with respect to conduct that amounted to being internationally wrongful, is a different matter. Each case will depend on its own facts. Similar to the condition applied for organ of the state, the act of a person can also be attributable to the state if the person or entity received instruction, direction, or initial control from the state, and then in this condition ignores or acts beyond the instruction given by the state.<sup>168</sup>

As for internationally wrongful acts, the ILC takes a dual position in order to achieve impartiality. On one hand, the ILC adopts a broader scope when categorising parties that conduct action attributable to an act of a State. As can be seen from the above explanation, widening this scope opens the possibility that the action of parties can be seen as acts of state even without the existence of legal or official authorisation. In cases where the authorisation exists, contravention or abuse of the authority given could also fall under the doctrine of state responsibility. Justification for this consideration is that the state to a greater or lesser degree always has the capacity to adopt a proper provisional measure that can prevent or oppose the wrongful act.<sup>169</sup> On the other hand, article 11 restricts the attribution element only to circumstances mentioned in the Draft Articles. In cases where the type of conduct is not mentioned or described in the Draft Articles, it is also not accounted as being attributable to the state. However, article 11 also provides the attribution to a state of such conduct if and to the extent that the state acknowledges and adopts<sup>170</sup> the conduct as its own. In this case, ILC broadened the scope in defining what can cause the actions of ostensibly independent actors to be attributed to state responsibility.

### **Breach of an International Obligation**

In general term, breach of international obligation occurs when a state fails to conform to its international obligations. It must be underlined that the law of state responsibility is secondary rules, which denote the general principle determining whether a given conducts attributable to a state constitutes a breach of its international obligations. Specific conduct or circumstances that constitute a breach of international obligation will be found in the primary rules of international law. Principles entailed in this element must be regarded as having ancillary role, regulating general

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<sup>168</sup> James Crawford, *op.cit.*, pp. 110 – 113. See also *The “Zafiro”*, *RIAA (1925)*, vol. VI, p. 160; *Stephens*, *RIAA (1927)*, vol. IV, p. 267; *Lehigh Valley Railroad Company, and others (U.S.A.) v. Germany (Sabotage Cases): “Black Tom” and “Kingsland” incidents*, *RIAA (1930)*, vol. VIII, p. 84; *RIAA (1939)*, vol. VIII, p. 458; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *ICJ Reports 1986*, p. 14.

<sup>169</sup> ICJ confirms this in the case *Diplomatic and Consular Staff*. See *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports 1980*, p. 3.

<sup>170</sup> Acknowledges and adopts must be adopted in cumulative phrase. See James Crawford, *op.cit.*, p. 123.

circumstances of such a breach, the time at which it occurred, the duration of the breach, and so forth.<sup>171</sup>

Article 12 of ILC's Draft Articles defines a breach of an international obligation as an act not in conformity with what is required by that obligation, regardless of its origin or character. There are two important factors in the definition: obligation required based on international law, and the facts of the matter conducted by a state. In a few cases, the Court has expressly taken these factors into account by coupling the phrase 'breach of international obligation' with 'incompatibility with the obligation' of a State,<sup>172</sup> and used terminology related to acts 'contrary to' or 'inconsistent with' a given rule,<sup>173</sup> or to 'failure to comply with treaty obligation'.<sup>174</sup> International obligation can be derived from customary rule of international law, a treaty or by general principle applicable within the international legal order. Even a state may assume international obligation unilaterally.<sup>175</sup>

For the purpose of internationally wrongful act, circumstances that constitute a breach of an international obligation are described in broader terms without placing any restriction on the subject-matter of the obligation breached.<sup>176</sup> The lack of an a priori limit to the matters on which states may assume international obligations has been consistently affirmed by the Court and tribunals.<sup>177</sup> The broad scope defining international obligation inflicts the broad scope of the injured party, as for certain types of international obligations the injured party may not simply be a single other state, or a bilateral obligation, but rather the international community as a whole.

In establishing the international responsibility of a state, the act regarded as a breach of international obligation must occur during the time frame bound by the concerned obligation.<sup>178</sup> This idea reflects a guarantee of non-retroactive principle in international law, which is not only necessary but also sufficient as a basis for responsibility. The important factor here is the time

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<sup>171</sup> James Crawford, *op.cit.*, p. 124.

<sup>172</sup> *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 29.

<sup>173</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 64, para. 115 and p. 98.

<sup>174</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 46.

<sup>175</sup> Thus France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France)*, ICJ Reports 1974, p. 253; *Nuclear Tests (New Zealand v. France)*, ICJ Reports 1974, p. 457. The extent of the obligation thereby undertaken was clarified in Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France) Case*, ICJ Reports 1995, p. 288. The International Court has recognized "the existence of identical rules in international treaty law and customary law" on a number of occasions: see *North Sea Continental Shelf*, ICJ Reports 1969, pp. 38 – 39; and *Military and Paramilitary Activities*, ICJ Reports 1986, p. 95.

<sup>176</sup> See *Factory at Chorzow, Jurisdiction, 1927*, PCIJ, Series A, No. 9, p. 21; *Factory at Chorzow, Jurisdiction, 1928*, PCIJ, Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p. 184. In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, ICJ Reports 1950, p. 228.

<sup>177</sup> Thus the Permanent Court stated in the *S.S. Wimbledon case*, that "the right of entering into international engagements is an attribute of State sovereignty." See *S.S. Wimbledon, Judgments, 1923*, PCIJ, Series A, No. 1, p. 25.

<sup>178</sup> See Article 13 ILC's Draft Articles.

during which a breach of international obligation occurs, even if the relevant treaty had terminated. This has been affirmed by the Court in the *Northern Cameroons* case:

“... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.”<sup>179</sup>

Similarly, in the *Rainbow Warrior* arbitration case, the *France-New Zealand Arbitration Tribunal* held that although the relevant treaty obligation had terminated when New Zealand bought the claim, France’s responsibility for its earlier breach remained.<sup>180</sup>

The ILC made a distinction between breach of international obligation having a continuing character and breach of international obligation not extending in time (not having a continuing character). For the latter, breach of international obligation occurred at the moment when the act was performed, even if its effects continue. Conversely, breach of international obligation has a continuing character when the wrongful conduct occurs over an entire period and remains nonconforming to the international obligation.<sup>181</sup> It is a difficult task to identify which one has a continuing character and which one does not. Apart from the distinction having a relative perspective, many factors and circumstances influence the separation between the two. Examples of continuing wrongful acts include: the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting state, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, and unlawful occupation of part of the territory of another state or stationing armed forces in another state without its consent.<sup>182</sup> References to describe a breach of international obligation as ‘having continuing character’ can be found in several cases such as *Diplomatic and Consular Staff* case, *Rainbow Warrior* arbitration case, *Loizidou v. Turkey* case, and others.<sup>183</sup> In cases where a particular category of obligation is to prevent the occurrence of a given event, breach of international obligation occurred at the time the wrongful act was conducted, signifying the state’s unsuccessful prevention of it. It will have a continuing character if the state is bound by the obligation for the period during which the event continues, yet remains not in conformity with the obligation’s requirements. One example of this would be the *Trail Smelter* arbitration, with which

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<sup>179</sup> *Northern Cameroons, Preliminary Objections, ICJ Reports 1963*, p. 35.

<sup>180</sup> *Rainbow Warrior (New Zealand/France), RIAA (1990), vol. XX*, pp. 265 – 266.

<sup>181</sup> See Article 14 ILC’s Draft Articles.

<sup>182</sup> James Crawford, *op.cit.*, p. 136.

<sup>183</sup> See *United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980*, p. 38, para. 80; *Rainbow Warrior (New Zealand/France), RIAA (1990), vol. XX*, p. 264 and p. 265 – 266; *Loizidou v. Turkey, Merits, European Court of Human Rights Reports (1996)*, VI, p. 2216.

the obligation to prevent trans-boundary damage by air pollution was breached for the entire time the pollution continued to be emitted.<sup>184</sup>

Composite acts through a series of actions or omissions defined in aggregate as internationally wrongful are sufficient to constitute a breach of international obligation. Cases defined by composite acts extend in time from the beginning of the actions or omissions in the series of acts and lasts through the time until the actions and omissions cease.<sup>185</sup> The composite acts are limited to breaches of obligations that concern different acts and omissions as an aggregate or a collective, and not as individual acts. They have their own characteristics and are more likely to lead to continuing breaches in which the cumulative conduct constitutes the essence of the wrongful act.<sup>186</sup> This provision is intended for some of the most serious wrongful acts in international law with a composite character. Examples include obligations concerning genocide, crimes against humanity, ethnic cleansing, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, and so forth.<sup>187</sup>

In practice, classifications of international obligation, such as obligations of conduct and obligations of result, do not determine actual decisions made by the Court.<sup>188</sup> Various possibilities in determining whether and when there has been a breach of an international obligation bring us to the final analysis, as stated by James Crawford: “... breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.”<sup>189</sup>

### **3.3 The State Responsibility Concept in the Case of Vatican City State (Holy See)**

The main question in this research after consideration of the explication of state responsibility is as follows: how is the state responsibility principle imposed on the Holy See in the present case, in which children have been sexually abused by Catholic clergymen world-wide? In order to answer this question, this research will be based upon two elements that establish the state responsibility principle. Arguments based on fact and study will be formulated to show how compliance (or non-compliance) with the elements of state responsibility are relevant for this particular case.

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<sup>184</sup> See *RIAA (1938) vol. III*, p. 1905. See also James Crawford, *op.cit.*, p. 140.

<sup>185</sup> See Article 15 ILC's Draft Articles.

<sup>186</sup> James Crawford, *op.cit.*, p. 142.

<sup>187</sup> *Ibid.*, p. 141. See further J. Salmon, “Le fait etatique complexe: une notion contestable”, *AFDI (1982), vol. XXVIII* p. 709.

<sup>188</sup> See *Islamic Republic of Iran v. United States of America (Cases A15 (IV) and A24)*, 32 *Iran-USCTR* (1996), p. 115.

<sup>189</sup> James Crawford, *op.cit.*, p. 125.

## Attribution of Internationally Wrongful Conduct to the Holy See

Chapter II above has shown the ecclesiastical governing structure of the Holy See and its relation with the dioceses of the Catholic Church all over the world. The Holy See, as a holder of centralised authority, has absolute power to control and rule all bishops and priests categorised as its organs. In the governing hierarchy, Archbishops and Bishops under the administration of the Holy See are responsible for the appointment and supervision of the parish priests. These parish priests would then control all affairs within their diocese. In its duty to proclaim the Gospel everywhere on earth, the Holy See imposes the spread of the Catholic world to every individual bishop. Just like any other sovereign state, these organs also enjoy the diplomatic protection offered by the Holy See. *Lumen Gentium*, denoted as dogmatic constitution of the Holy See, further stated that:

“... With all their energy, therefore, they must supply to the missions both workers for the harvest and also spiritual and material aid, both directly and on their own account, as well as by arousing the ardent cooperation of the faithful. And finally, the bishops, in a universal fellowship of charity, should gladly extend their fraternal aid to other churches, especially to neighboring and more needy dioceses in accordance with the venerable example of antiquity.”<sup>190</sup>

In many cases of children sexual abuse, the act of sexual harassment is undertaken by priests and other clerics in their position to lead, teach and work with children,<sup>191</sup> as ecclesiastical minister, or in their position as a religious priest, persuading children with grooming tactics to comply with the abuser.<sup>192</sup> These conditions indicate that the act of harassment and abuse often occur while these priests carried out their responsibility in achieving Holy See’s great missions stated above.

Based on article 4 of ILC’s Draft Articles, element of attribution is fulfilled if the wrongful conduct is carried out by any state organ, be it legislative, executive, judicial, or holding other functions. It does not matter what position the organ holds in the organisation of the State, nor does it matter what its character is as an organ of the central government or of a territorial unit of the state. It is evident that priests, who exercise the Holy See’s mission as guaranteed by *Lumen Gentium* and located in any dioceses, fulfil the article 4 requirements as organs of Holy See. Therefore, their wrongful conduct can be considered as an act of the Holy See.

The possibility of the injured state to claim accountability on the part of the Holy See is based on the victim’s nationality and circumstances. The victim’s nationality determines which state is

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<sup>190</sup> *Lumen Gentium* no. 23, para. 3, available at [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html) (last access 1 April 2011).

<sup>191</sup> ‘Newspaper: Hundreds of Priests shuffled worldwide, despite abuse allegations’, 20 June 2004, *SNAPnetwork*, available at [http://www.snapnetwork.org/news/international/hundreds\\_priests\\_shuffled.htm](http://www.snapnetwork.org/news/international/hundreds_priests_shuffled.htm) (last access 1 April 2011).

<sup>192</sup> John Jay College of Criminal Justice, *op.cit.*, p. 68.

entitled to the right to invoke the responsibility of the Holy See. Based on the given facts above in Chapter I, most European States (i.e.: Poland, Sweden, The Netherlands, United Kingdom, Austria, Belgium, France, Germany, Italy, and so forth), the United States, the Philippines, Kenya, Australia and some others, reserve the right to invoke responsibility of the Holy See. These injured states are entitled to invoke responsibility in the name of the victim, who is in a vulnerable position in that his (or her) case could take a number of inopportune turns. The victim could suffer from prolonged trauma, or be reluctant to settle the case because the abuser is a priest. Additionally, improper reparation may be provided to the victim through the Canon Law *crimen* procedures, and the settlement of the case may become bogged down in the state's legal procedures due to the lack of willingness on the part of the diocese to cooperate or disclose information (due to the fact that the Holy See prefers to see people go through diplomatic channel procedures to settle the claims of victims). The development of the current endemic sexual abuse case that spread to every continent and the presence of a group of injured states are enough to define an international community. Based on article 43 ILC's Draft Articles, a claim can be made against the Holy See if preceded by notice of the claim specifying the conduct and form of reparation. In this claim, not only may the victim ask for reparations, but they can also ask and encourage the Holy See to establish an effective procedure for prosecuting of clergymen who sexually abuse children, and for protecting children.

### **Breach of International Obligation: Based on the United Nations Convention on the Rights of the Child and *Jus Cogens***

As a part of the international community, the Holy See has ratified several international conventions. This includes CRC, which was signed and ratified in 1990 and is the most important convention ratified with regard to child sexual abuse cases. By becoming a party, the Holy See must perform all of the provisions set forth in the convention. Article 19 of CRC obliges the Holy See to take appropriate and effective procedures (including legislative, administrative, judicial, social, and educational) to protect children from all forms of violence, injury or abuse, including sexual abuse. Canon Law's *crimen* procedures, as judicial procedures, are used and referred to many times by the Holy See to settle sexual abuse cases involving Catholic clergymen. Chapter I of this research has shown how Canon Law does not adequately meet several objectives of criminal law, namely deterrence, retribution, and incapacitation. Canon Law has been ineffective in preventing further abuse, as is evidenced by the persistently high child abuse rates in the Catholic Church. The Holy See in this case ought to take quick and decisive measures by turning over the overall case to law enforcement authorities instead of utilising Canon Law. This obligation has been breached by the Holy See, which does not have an effective judicial process. The absence of



victim's right for reparation provided by Canon Law also identifies the failure of the Holy See to comply with the provision in article 19—namely to take all appropriate legislative measures to protect children from sexual abuse. Article 3 (1) CRC also states that “in all actions concerning children... the best interests of the child shall be a primary consideration...”. Last but not least, article 39 requires state parties to take measures to foster the health, self-respect and dignity of the child after the abuse. The Holy See continues to breach obligations set forth in article 39 in similar cases apart from the ones for which has already been penalised.

In legal term, verbal condemnations or speeches are not constituent law. The Holy See, through the Pope, its spokesman and its representative, often makes speeches prioritising the right of the child and recommends compulsory reporting to state authorities in the case of sexual abuse of children. However, this outward support is not reflected in the documents referring to procedures for trying the perpetrators of child sexual abuse; these can only be found through apostolic letters and norms issued by the Pope in 2010. This fact evidently reveals the Holy See's non-compliance with article 34 of the CRC, which states: “State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For this purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures...”

The Holy See's ratification of CRC was adopted with several reservations. One of these reservations declared that: “the application of the Convention be compatible in practice with the particular nature of the Vatican City state and of the sources of its objective law...”. However, this reservation could not be justified based on article 19 Vienna Convention on the Law of Treaties (VCLT), which the Holy See ratified in 1977. The Holy See could not rely on its reservation based on the reason that it was incompatible with Canon Law, because such reservation was void under the mentioned article.

State responsibility can arise from relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Gravity of the breach and the peremptory character of the obligation breached will determine the consequences that arise for the responsible state and, in certain cases, for other states as well. Deriving from article 53 VCLT, James Crawford concluded:

“...fundamental principles of the international legal order are not based on any special source of law or specific law-making procedures, in contrast with rules of a constitutional character in internal legal system... Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital

interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts.”<sup>193</sup>

The right to have a fair, impartial and transparent due process of law is recognised as a basic right equally applied to every human being without discrimination. It is regarded as inherent non-derogable rights. Previously, Chapter I described that the right for every victim of child sexual abuse to have fair, impartial, and transparent due process of law, as well as all rights in CRC, are regarded by Human Rights Committee as non-derogable rights. With pontifical secrecy and centralised judicial authorities—meaning that all actors in the Canon Law proceedings excluding the victim are bishops or priests—in the Holy See’s *crimen* procedures, it is obvious that the Holy See has not developed fair, impartial, and transparent judicial procedures. In this frame, the Holy See has already violated the victim’s right to a fair, impartial, and transparent due process of law and breached its international obligation to protect those rights under peremptory norms and CRC, all at once.

Article 12 of ILC’s Draft Articles stipulate that a breach of international obligation by a State occurs when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. In this case, the Holy See has violated the treaty obligation, namely CRC, and peremptory norms all at once. The Holy See’s non-compliance with obligations set forth under CRC explained above and with *jus cogens* to adhere to fair, impartial and transparent judicial procedures, qualified the act as breaching international obligation as set forth in the mentioned article.

The allegation that the state or an organ of the state may have performed an internationally wrongful act raises the principle of state responsibility. Article 2 of ILC’s Draft Articles identifies two cumulative elements: attribution and the existence of breach of international obligation. Based on the analysis above, which shows the Holy See’s fulfilment of both elements cumulatively, it can be said that the Holy See has performed or sponsored internationally wrongful acts, and thus established the principle of state responsibility for these acts.

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<sup>193</sup> James Crawford, *op.cit.*, pp. 127 – 128, para. 7.

## Conclusion

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The existence of the Vatican City State (and its government, the Holy See) raises several interesting questions for discussion in international politics and law. Its atypical status as international law's subject—based on the divine purpose of Catholicism—creates a challenging environment for governing. While few scholars still debate the status of Vatican City as a State, the Holy See (as the government of that state) has declined to pursue world-wide sexual abuse cases involving children in a way that appropriately punishes offenders, deters others, and potentially rehabilitates the offenders themselves. Many Catholic clergymen under the jurisdiction of Holy See are alleged to have sexually abused children. This abuse has continued to expand, and the increasing number of sexual abuse cases among clergymen shows that Canon Law has been ineffective as a method of deterrence, retribution or incapacitation, for example, and is therefore incapable of serving justice (as deterrence, retribution and incapacitation are two of the main intents of any successful criminal code).

This research is intended to describe the nature of state responsibility principle in international law for the sexual abuse cases in children involving the Vatican City State. The research does not aim to judge or blame any specific party in seeking answers to the research question: “How is the state responsibility principle imposed on the Holy See's use of Canon Law in the present case, in which children have been sexually abused by Catholic clergymen world-wide?”. To answer the question, few elements establishing State responsibility principle were examined.

The procedure for trying criminal acts under Canon Law is dissimilar from the standard criminal procedure in common or civil law. Canon Law's pontifical secrecy and penal procedures were analysed and linked to the issue of legitimacy and objectives. Since Canon Law derives from Catholicism's divine ideology with the Pope as the authority, its legitimacy is frail under constitutional law. In particular, Canon Law's legitimacy, which encompasses the issue of jurisdiction and processes to judicial independence, impartiality, and fairness, is in doubt. With respect to the sexual abuse of children, the jurisdiction of Canon Law was weighed for merit; this merit collapsed under the State's sovereignty in applying criminal law's jurisdiction. The applying of pontifical secrecy in Canon Law's procedures leads specifically to the issue of Canon Law's lack of independence. Additionally, Canon Law is demonstrably not impartial, in the sense that the legal actors in the proceedings are priests, and fair procedures for the victim are not guaranteed under the code of Canon Law. Based on these arguments, Canon Law criminal procedures are far from constituting a legitimate legal system.

In broader terms, the criminal law system was made to achieve justice for all. Scholars formulated this purpose into a realistic frame by developing a theory of criminal law objectives

(noted earlier). As a criminal legal procedure, Canon Law achieves only two of these aforementioned objectives: rehabilitation and restitution. Its capability as an effective and reliable system is dubious due to lack of compliance with other objectives, especially with the objective of deterrence.

The international status of Vatican City (in union with the Holy See) in international law is clear; it is a legal entity that has the same right as other independent states. This status is achieved mainly through recognition rather than fulfilment of the legal objectives of a state, as defined by the Montevideo Convention. Although the Holy See may not fulfil the traditional definition of a 'state' *per se*, strong influences on its behalf do support its statehood.

The Holy See's position with respect to the Catholic clergymen who are the perpetrators in these cases is significant. It denotes as the highest authority those Catholic's organs, such as dioceses, and their occupants. Churches are the administrative departments in Catholicism, and are granted a certain autonomy. Priests and bishops are under the jurisdiction and protection of the Holy See. Through the papal diplomatic system, the Holy See, which can be illustrated as the employer, can be held liable for the conduct of its priests and bishops, who are the Holy See's employees. In tort law, this context is known as the *respondeat superior* doctrine.

The work of the International Law Commission has been significant in bringing the state responsibility principle to the forefront through the drafting of Articles on the Responsibility of States for Internationally Wrongful Acts, which mention 2 elements establishing the principle: the fact that there is a breach of international obligation, and that this breach is attributable to the state itself rather than to elements that are outside of its control. These elements are placed in the main framework of this research. In this case, both of these elements are clearly applicable. The perpetrators, bishops or priests, who carried the status as extensions of the Holy See, fulfilled the elements of attribution; their wrongful conduct can be considered as an act of the Holy See. For the second element, the Holy See breaches articles 3 (1), 19, 34 and 39 CRC, or the peremptory norms conferring fair, impartial, and transparent due process of law.

The Holy See, with its Canon Law, could not create a good system to protect children from sexually abusive priests. Increasing number of cases prove Canon Law's ineffectiveness. Pontifical secrecy, a weak penal system, and the marginalisation of the victim in Canon Law could not stifle the perpetrators of sexual abuse, and might provide opportunities for repeat offences. The Holy See attempts to keep their priests from being tried through another legal system, since the obligation to report criminal acts to the appropriate state criminal authorities is not included in the Holy See's original written documents. The breaching of both criteria put forth by the International Law Commission with regard to the Articles covering wrongdoing by states—a breaching of criminal law, and realistic attribution—by the Holy See makes the conclusion clear. The Holy See can be

held internationally responsible for the mass number of sexual abuse cases perpetrated by its clergymen. An effective *Crimen* procedure and system for children sexual abuse case should be established either by creating new laws within the context of the Catholic Church, or fully supporting another legal system to take over the case.

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