FACULTY OF LAW AND CRIMINOLOGY

HOLY SEE, HOLY SPIRIT ?

Unveiling (the powers behind) the immunity of the Holy See within the child sexual abuse scandal, departing from the European Court of Human Rights' judgment *J.C. and others* v. Belgium

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'The world of order and justice for which we are striving will never be ours unless we are willing to give it the broadest possible and the firmest possible foundation in law.'[1]

'*La religion en tant que source de consolation est un obstacle à la véritable foi, et en ce sens l'athéisme est une purification*'[2]

[1] D. Hammarskjöld, de Universiteit van Californië, 25 juni 1955 in Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136
[2] Simone Weil.

Dees de Bruyne- De Kindervrienden

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This master's thesis embodies all that drives me and runs as a red thread through my life. From a strong sense of justice, my greatest passion is to contribute from my position to a more 'just world', where our basic human rights are guaranteed. During my law studies at Ghent University, I decided to focus mainly on human rights law and criminal law because of the strong 'human' aspect. Throughout my studies, this passion only grew, and I was confronted to the same extent with the greatest enemy of human rights: silence and (undisputed) positions of power. 'The bumping on closed doors' because of embedded power structures and inequalities is sometimes hard but shows all the more how necessary that fight for a better world is. In my view, the law and our rule of law are the pillars of our democracies, but it should be remembered that they do not operate in a vacuum. Interaction with other disciplines and broader social awareness goes hand in hand with real change. This is more apparent than ever in this research.

First of all, I would like to thank my family, especially my parents, for giving me the freedom to pursue my passion and supporting me in it unconditionally. More so, for having me look at the world with a critical and open mind from an early age and having enjoyed a broad social and cultural education. The (meaningless, in comparison to the underlying facts in this research) confrontations with undisputed positions of power, including the Church, have fueled the choice to research this human rights scandal more in depth.

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Finally, I would like to dedicate this master's thesis to all the victims of sexual abuse within the Roman Catholic Church. This master's thesis was chosen and written departing from the motive to in some way trigger something within society and rise social awareness about the undisputed position of power of the Church. To bring the Church down from its moral higher ivory tower. Because as long as the Church has social backing, it has power: power that goes directly against our rule of law and fundamental human rights.

Candice Dalino,

15 August 2024.

Abstract (Nederlandstalige samenvatting)

In 2010 deed een ongezien mensenrechtenschandaal de grondvesten van de Rooms Katholieke Kerk en breder, onze gehele samenleving in België daveren. Decennialang zouden kinderen in de schoot van de Rooms Katholieke Kerk seksueel misbruikt zijn. De Heilige Stoel, als het hoofd van de Rooms Katholieke Kerk, heeft dit misbruik mogelijk gemaakt door systematisch en structureel haar eigen belangen voorop te stellen en een doofpot beleid te voeren. De realiteit is echter schrijnender: seksueel kindermisbruik binnen de Rooms Katholieke Kerk is even oud als dit middeleeuws instituut zelf. Wat dit mensenrechtenschandaal onderscheidt van andere die onze maatschappij kwellen? De onaantastbare superieure machtspositie van de Heilig Stoel. *Het doel heiligt de middelen*? Met als enige doel het beschermen van het (schijn)heilige imago en machtspositie van de Rooms-Katholieke Kerk als instituut.

De weg om het geleden onrecht juridisch vertaald te zien in België was du *jamais vu* in onze Belgische rechtsgeschiedenis. Na een 14 jaar durende procedureslag vorderde het federaal parket op 1 juli 2024 haar eindvordering in het gerechtelijk onderzoek van Operatie Kelk: ze wenst niemand te vervolgen. De civiele procedure die de aansprakelijkheid van de Heilige Stoel vorderde, kon nooit ten gronde beoordeeld worden omdat het Hof van Beroep te Gent zich zonder jurisdictie verklaarde en de Heilige Stoel statelijke immuniteit verleende. Het recht van toegang tot de rechter onder artikel 6 EVRM, als een fundamenteel element van de rechtsstaat, was hier duidelijk geschonden.12 oktober 2021 gaat als een zwarte dag voor de mensenrechten de geschiedenis in: het Europees Hof voor de Rechten van de Mens bevestigt de uitspraak de Belgische rechtbanken. Ongezien: de Heilige Stoel, als het hoofd van een universele religieuze organisatie van de Rooms Katholieke Kerk kan privileges, die louter toebehoren aan Statelijke actoren inroepen om zich niet voor een statelijke rechter te verantwoorden. Dit onderzoek wou de sturende krachten achter de toekenning van de Statelijke immuniteit aan de Heilige Stoel in het arrest *J.C. and others v. Belgium* blootleggen. Dit werd geanalyseerd door eerst de besproken, relevante concepten van internationaal recht en mensenrechten vanuit een beschrijvend perspectief te ontleden. De concepten inzake de Heilige Stoel en haar (niet-)statelijke kwalificatie, het principe van statelijke immuniteit, het recht van toegang tot de rechter onder art. 6 §1 EVRM en het concept van seksueel kindermisbruik werden eerst beschreven.

In een volgende stap werd de uitspraak van het EHRM in de zaak *J.C. and others v. Belgium* getoetst aan deze uiteengezette principes van internationaal recht en mensenrechten. Deze evaluatie bracht naar voor hoe de vier kernredeneringen van het EHRM de principes inzake statelijke immuniteit en het recht van toegang tot de rechter naast zich leggen:

1. De Heilige Stoel is geen Staat en derhalve is de kwestie van statelijke immuniteit niet aan de orde.
2. Als statelijke immuniteit toepasbaar is, geldt deze enkel voor *acta jure imperii*. De *acta jure gestionis* van de Heilige Stoel in haar beleid van de Kerk vallen buiten het toepassingsgebied.
3. Als statelijke immuniteit toepasbaar is, gelden in diezelfde mate de uitzonderingen. In casu is zowel het *materieel* als het *territoriaal* toepassingsgebied van de *territorial tort exception* voldaan en vervalt het recht op statelijke immuniteit.
4. Er zijn geen effectieve alternatieve middelen ter beschikking voor de slachtoffers.

Het EHRM, legde deze principes van internationaal recht naast zich en verleende statelijke immuniteit aan een niet statelijke, religieuze entiteit en schond hiermee het recht van toegang tot de rechter van de slachtoffers onder art. 6 §1 EVRM.

List of abbreviations

CRC: Convention on the Rights of the Child

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

ECSI: European Convention on State Immunity

GA: General Assembly at the United Nations

ICJ: International Court of Justice

ILA: International Law Association

ILC: International Law Commission

KIB: Chamber of Indictments (Kamer van Inbeschuldigingstelling)

UN: United Nations

UNCAT: United Nations Convention Against Torture

UNCSI: UN Convention on the Jurisdictional Immunities of States and their Property

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1. Introduction

The Roman Catholic Church has stood, over the centuries, as a moral compass and a cornerstone of Western society. As the oldest institution on earth, the Roman Catholic Church, maintains a widespread flock, with more than a billion adherents representing almost a sixth of the world's population. From an ivory tower, the Church and its clergy, as God's emissaries on earth, flaunt its moral authority over good and evil. Celibacy is the holy superior summit, same-sex marriage still taboo, abortion 'the greatest evil of mankind', 'gender ideology the ugliest danger of our time' and women are still not accepted into the higher clerical posts. However, the 'greatest evil of mankind' soon appeared to turn from cart. Indeed, in recent decades, this moral compass has guided the Church into one of the most structural and widespread human rights scandals our society has ever endured. Thousands of children were not only sexually abused for years, but worse, the Church enabled this abuse by systematically and structurally putting its own interests first and pursuing a policy of cover-up. The victims were therefore not only victims of the sexual abuse itself, but also of the guilty omission due to the Church structures that undertook actions to cover up the abuse.

What turned out? This 'moral' compass, embodied in the absolute power of the Pope, has only one ultimate, divine mission: to uphold the Church's superior position of power at all costs. When the most intimate personal rights of those most vulnerable in our society are systematically and structurally violated, this should, in a state founded on the rule of law with the fundamental human rights as the guiding thread, be the kick-off for a hell of a journey towards justice and truth. However, this road to justice stumbled when the institution of judiciary faced an unseen power: the institution of the Roman Catholic Church.

Our temporal, worldly order came face to face with the spiritual order. Worse, our temporal order was trampled to its foundations and brought to kneel before religion. Judicial action was undertaken through two tracks: civil and criminal. Civil proceedings form the basis of this research. By suing the Holy See, which stands at the apex of the Roman Catholic Church, the applicants claimed the accountability of the institute under whose auspices not only the sexual abuse took place but moreover, was facilitated and made possible by the systematic and worldwide culpable actions and omissions on the part of church authorities. For the structurally deficient way in which the Holy See has acted within this sexual abuse scandal, the legal actions for accountability were equally oriented *vis-à-vis* the underlying structures. Nevertheless, while the judicial enquiry in Operation Kelk was played by higher powers, the civil claim encountered another obstacle: the Court of First Instance and successively Ghent Court of Appeal declared themselves without jurisdiction and granted State Immunity to the Holy See. In other words: the highest administration of the Roman Catholic Church would never have to answer to a secular judge and the victims would never see their complaint adjudicated on the merits: a procedural wall. Unseen: a universal religious organization would simply be granted the privileges that belong exclusively to State actors in the secular order? It was clear that the victims' right of access to justice had been denied. The victims complained this violation under article 6 §1 of the European Convention of Human Rights (hereinafter: ECHR) to the European Court of Human Rights (hereinafter ECtHR). Indeed, the ECtHR is entrusted to ensure that human rights in the Convention, such as the right of access to justice under art; 6 §1 ECHR, are applied in accordance with the Convention. If not, the Court may call into question the findings of the domestic authorities on alleged errors of law if such findings are 'arbitrary or manifestly unreasonable' and if effects of interpretations of both provisions of domestic law and provisions of general international law or international agreements are compatible with the Convention.

In *J.C. and others* v. Belgium, the ECtHR, instead of considering the arbitrary and manifestly unreasonable elements in the Ghent Court of Appeal ruling, confirmed those errors of law. 12 October 2021 has entered history as a pitch-black day for human rights: the ECtHR in Strasbourg ruled that the grant of State immunity to the Holy See pursued a legitimate aim and was proportionate and therefore could not be seen as an unjustifiable restriction on the right of access to justice. In *J.C. and* others v. Belgium, the principle of state immunity came into direct conflict with the right of access to justice under article 6 6 §1 ECHR. A claim to immunity, consists in an unwarranted refusal to satisfy what would otherwise be a valid and enforceable legal claim. It amounts, in fact, to a denial of justice. In that sense, this investigation will, in some respects, be able to be seen as 'developing a case against immunity'.

The judgment *J.C. and others v. Belgium* constituted the first international court ruling on the immunity of the Holy See and could have represented a radical break with the Holy See's placing itself above the law. Instead, the *human* rights court upheld the sanctity of the Holy See and thus, instead of protecting the fundamental right of access to a court of the victims, granted the Holy See an extra tool to hide behind a masquerade of immunity to place itself above the (rule of) law and deny victims of an infringed right access to justice. This judgment has a great (and dangerous) precedent value for the victims of sexual abuse in the Catholic Church throughout the whole territory of the Member States of the Council of Europe. As a result, no victim will we able to seek compensation before a civil court for the structurally deficient way in which the Church has dealt with the allegations of sexual abuse by their clergy. The Holy See succeeded in its spiritual mission and thousands of victims are left with their suffering without any legal recognition.

Does this, *anno* 2024, constitute the epitome of a democratic rule of law? Justice, let alone proceedings on the merits is denied in order to protect a medieval Holy Institute? Can one speak of justice here? Let alone an effective right of access to court at all? Does it not constitute the essence of a *human* rights court to protect citizens and their basic human rights? It seems that the ECtHR, rather than the principles of public international law and human rights, has been guided by the universal value of a religious institution which developed in the European Middle Ages by granting special privileges and treatments, reserved for State actors. Indeed, it seems as if the Holy See drawing on its moral authority, can easily manipulate the at first sight inflexible features of the State-centred international legal system to its own advantage.' The Holy See does seem to have imposed its Christian version of justice at the expense of genuine judicial recognition. The Christian concept of justice is based on charity and forgiveness: '*Do unto others as you would have them unto you'*. Justice, in this sense, should be accompanied by compassion and mercy. This stands in direct opposition to the principles of a democratic rule of law. Within a rule of law, 'justice' requires judges to act on legal principles rather than faith and intuition. On the other hand, a judge's duty is not only to apply the law correctly, but also to find a just solution to the case. The logical consequence of this premise is that a fair judicial decision can be objectively defined as such if it was reached through a fair trial. Indeed, a judge cannot make a materially fair decision if the right to a fair trial has been grossly violated.

This research seeks to uncover how the applicants' right of access to a court as an essential notion of the rule of law in *J.C. and others* was violated by the grant of State immunity to the Holy See. This research seeks to uncover what were the driving forces behind the grant of State immunity to the Holy See in *J.C. and others* v. Belgium for the structural mismanagement and cover-up policy regarding sexual abuse of thousands of minors. In other words: to what extent did general principles of international law on state immunity and the right of access to justice guide the court in *J.C. and others*? Specifically, the judgment of J*.C. and others* will be tested against the principles of public international law and human rights.

However, in order to test the reasoning of the ECtHR in *J.C. and others*, the applied concepts of public international law and human rights will first be described from a descriptive objective. The Holy See and its non-state qualification will first be described. Next, the concept of State immunity itself will be described. Subsequently, article 6 §1 ECHR will be reflected upon as the legal entrenchment of the right of access to justice and an essential notion of the democratic rule of law. The concept of child sexual abuse will also be briefly outlined. (4. Framework of concepts)

The author then attempts to evaluate the four main reasoning of the *J.C. and others* judgment against the evaluation criteria set out. This evaluation will lead to a positive or negative result, depending on the extent to which the ECtHR has or has not applied the outlined concepts of public international law and human rights.

'*Holy See, Holy Spirit*?' Or as Italian theological philosopher Thomas of Aquino once wrote, '*Everything that goes against the conscience is a sin*.' This research will unveil that the Holy See, not only acted contrary to her self-praised high *conscience*, but worse, in violation of fundamental human rights and international law.

2. Research objectives, research questions and methodology

2.1 Research objectives and research questions

The general objective of this research is to evaluate the legal recognition/access to justice of victims of the sexual abuse scandal within the Roman Catholic Church, departing from the *J.C. and others* judgment of the European Court of Human Rights. This main evaluative objective aims to evaluate the *J.C and others* judgment in view of the right of access to a court under art. 6 ECHR and the principle of State immunity. In order to achieve this broader (evaluative research) objective[3], the relevant legal concepts addressed within the *J.C. and others* judgment of state immunity and the right of access to a court under art. 6 ECHR will be analyzed from a descriptive research objective.[4] The result of this evaluative research objective, through the formulated descriptive research objectives, will be used to (in a limited extent) formulate recommendations.[5] Nevertheless, the main research objective remains the evaluation of the *J.C. and others* judgment and in a lesser extent a recommendatory research objective by recommending how the judgment should be.

However, the true (and personal) objective for this research departs from a need to expose (on the basis of a legal research) the Holy See's structural violations of human rights and public international law and to create (social and legal) awareness around the Holy See's historical, undisputed position of power in the international legal order and wider, society as a whole. Above all, this research wishes (and hopes) to contribute in some way to justice and a recognition of the injustice done to the victims of sexual abuse within the Roman Catholic Church.

To achieve these research objectives, the present research aims to answer the following research questions:

The central research question reads as follows: '*To what extent violates the attribution of State immunity to the Holy See, for the sexual abuse that took place during decades within this institution, the right to access to court under article 6 ECHR of the victims?'*

In order to answer this research question in a clear manner, the following sub-questions have been formulated:

> Sub question 1: 'To what extent does the (ECtHR in) *J.C. and others V. Belgium* judgment not comply with various principles of (public) international law and human rights law?'
>
> Sub question 2: To what extent does the Holy See uses its moral, spiritual authority in the (contemporary) international legal order to maintain its position of power (of rights and privileges), at the expense of fundamental human rights?
>
> *Sub question 3:* To what extent does art play a (decisive) role in the recognition of the injustice done within the sexual abuse scandal in the Catholic Church, viewed within the broader process of transitional justice?

[3] Lina Kestemont, *Handbook on legal methodology. From objective to method* (Intersentia, Antwerp 2018) 17.
[4] *Ibid.*, 9.
[5] *Ibid.*, 17-18.

2.2. Research methodology

2.2.1. Research design: methodologic features of the research objectives

In order to achieve the formulated research objectives and answer the research questions, the following research methodology will be applied. The basis of the research is the *J.C. and others* judgment of the European Court of Human Rights.

Methodological features of the evaluative research objective: evaluate J.C. and others judgment

This evaluative research objective aims to evaluate this judgment in view of certain norms. These norms will be reflected in a set of evaluation criteria. Within this research, *internal* evaluation criteria will be used, derived from the legal system itself and therefore result in an assessment by reference to a standard set by the law itself.[6] The concrete selection of these evaluation criteria departs from the two main conflicting principles of international law in the judgment: the right to access to court under article 6 ECHR and the principle of State immunity in (public) international law. Hence, this research departs from two main evaluation criteria: the right of access to court under art. 6 ECHR and the principle of State immunity.

However, in order to carry out the evaluation of the *J.C. and others* judgment against these two evaluation criteria need to be operationalized. This operationalization will result in an assessment framework. Specifically, the evaluation criteria are principles of law and their exact scope and meaning have to be clarified. [7] The clarification of these evaluation criteria will be elaborated in the concept of framework: before assessing the judgment against the criteria, their concrete meaning and scope within the research will be elaborated. In this sense, the clarification of the evaluation criteria *an sich* frame themselves within a *descriptive* research objective. Nevertheless, within these evaluation criteria, other sub criteria, or relevant concepts needed for the evaluation will also be clarified.

The assessment of the *J.C. and others* judgment will therefore be evaluated after the framework of concepts, where the relevant concepts and evaluation criteria will first be described.

The methodological features of the descriptive research objective: describe the evaluation criteria and used concepts

This descriptive research objective will systematically analyse the used legal constructs in all their components in order to present them in an accurate, significant and orderly manner. This descriptive objective is the preliminary step to the benefit of the evaluative research objective. Within this framework of concepts, both the evaluation criteria and (other) relevant concepts used within the research will be described. The structure of the description is structured

[6] Lina Kestemont, *Handbook on legal methodology. From objective to method* (Intersentia, Antwerp 2018), 60-61.
[7] *Ibid.*, 62.

according to the readability of the research for the reader.[8] The description structure of the concepts (and criteria) themselves depart from the existing legal framework.[9]

Different types of interpretation will be used to describe the used concepts. In the main order, interpretation of the concepts will happen based on legal doctrine, by interpreting legal provisions in view of national, European and international literature. Legal doctrine operates here to clarify existent legislation and case-law and to reflect the current developments in the discussed areas of law.[10] Secondly, a teleological interpretation will be applied by interpreting legal provisions in view of the legislator's original objectives. In this regard, interpretation will depart from, where present, the main objectives referred to in legislations itself, namely in the preambles. Preparatory works will also be consulted.[11] Thirdly, an interpretation based on jurisprudence will be used: national, European and international case-law are extensively analysed to interpret the general legal concepts.[12] Last but not least, the author will use a sociological interpretation. This is primordial in view of the wide societal nature and consideration of the research topic. Therefore, the concepts will be interpreted in light of the original social context that led to the creation or alteration of the legal constructs and furthermore, focus will be laid on to the present-day social context, evolving over time.[13]

The following concepts (including evaluation criteria) will thus be described departing from the elaborated methodology under the chapter '*Framework of concepts':* The Holy See and its non-statehood qualification, State immunity, The Right to a Fair Trial under article 6 ECHR and the concept of Child Sexual abuse

After the relevant concepts (including the evaluation criteria) have been described, the evaluation of the *J.C. and others* judgment against these criteria can take place. Concretely, the reasoning of the ECtHR in the *J.C. and others* judgment will be assessed against the elaborated concepts.

The methodological features of the recommendatory research objective: formulate recommendations on how the judgment have should been

After the description of the legal concepts and the evaluation of the judgment of *J.C. and others* against these described concepts (criteria), recommendations will be (in a limited extent) formulated on how the legal situation have *should* been. The result of the evaluative research objective is the basis of this recommendatory research objective. In the author's view, this is only the logical sequence after the result of the applied evaluation as it will reflect on the evaluation of the judgment and recommend according to the concrete result of this test. This recommendation is based on selected normative criteria and will be of an internal nature

[8] Lina Kestemont, *Handbook on legal methodology. From objective to method* (Intersentia, Antwerp 2018) 19-20.
[9] It should be noted that within this descriptive research objective and methodology, the concept of the 'Holy See' also has characteristics of an evaluative research objective and methodology. The international persona of the Holy See will namely be tested against the criteria of a State in international law. This evaluation was needed in order to deliver a clear and complete description of the Holy See as a non-state actor that could be used as a criterion for the evaluation of the judgment *J.C. and others*.
[10] *Ibid*., 30.
[11] *Ibid*., 28.
[12] *Ibid*., 29.
[13] *Ibid*., 31.

(derived from the legal system itself).[14] In this line, these selected normative criteria correspond largely to the evaluation criteria.[15] The evaluation of the *J.C. judgment* against the two evaluation criteria (principle of State immunity and right to access to a court under art. 6 ECHR (and the related concepts therein)) will lead to a certain result: positive or negative, dependent to what extent the judgment is in line with the evaluation criteria. After the positive or negative result, the recommendation will indicate which changes or adjustments should be made in order to improve the judgment: in order to bring the judgment in line with the elaborated evaluation criteria of art. 6 ECHR and the principle of state immunity. In other words: the recommendation aims to formulate the necessary steps that should be taken to come to a judgment, a legal situation where the relevant principles of international law and human rights law are complied with. In this sense, the recommendation comes down to bring the judgment of *J.C. and others* in line with the described criteria and thus bridge the gaps (between the actual situation of the judgment *J.C. and others* and the situation in line with the principles of international law and human rights law).

The meaning of the methodology (from the evaluative to the descriptive, to the result of the evaluative to the recommendatory) is to unveil the true driving forces/power behind the judgment *J.C. and others*: not the compliance with human rights law and public international law, but other underlying forces. Seen the delineated (legal) scope of the research, the present author tried to unveil these (indirectly) by mapping out the different concepts and present the result of the evaluation of the *J.C. and others* judgment to these concepts. This unveiled that the compliance with international law and human rights law were not the driving forces behind the judgment, leaving a gap for the (possible) real forces. However, the author has tried to explore these implicitly within the framework of this study, but this is situated within another field of research (political, sociological and/or spiritual). To that extent, the author makes assumptions or hypotheses about the real forces behind the *J.C. judgment* but, for the transparency of the research, it should be noted that an additional research would be at place.

The researcher's frame of reference[16] departs in the first place from a worldly, temporal order and democratic rule of law, with a hierarchy of legal norms and where principles of human rights law form the cornerstone. In addition, an atheistic, secular point of view lies at the basis.

Seen the negative outcome of the evaluation of the *J.C. and others* judgment and the overall objective to contribute to a recognition of the injustice done for the victims, this research will departing from a descriptive research objective moreover describe the power of art within the broader process of transitional justice in order to raise more social awareness.

[14] Lina Kestemont, *Handbook on legal methodology. From objective to method* (Intersentia, Antwerp 2018) 19-20.
[15] *Ibid*., 63-65.
[16] *Ibid*., 78-81.

2.2.2. Data collection and analysis

The research is qualitative and involves data collection from a variety of sources. The majority of used data stems from legislation, case-law and legal doctrine. Seen the present convergence of different areas of law, the specific data collection varies depending on the specific area of law the concept in question belongs. In terms of the framework of concepts, the data collection and interpretation of data collection varied per concept. Each concept demanded its specific data collection and analysis, isolated from the other concepts. The data collected for each concept came together in the assessment of the *J.C. and others* judgment.

The legal doctrine was obtained primarily through library resources and online academic databases, and includes books, (legal) journals, research articles and dissertations.

Attention should be paid to the fact that apart from legal sources situated within the worldly, temporal order, sources situated within the spiritual order were also consulted. The use of spiritual (and canonical) sources is necessary in order to gain a comprehensive and accurate perspective, analysing the research topic from within rather than solely from an external, temporal viewpoint.

Regarding the data analysis, thematic coding is employed as the primary data analysis method. Thematic coding involves systematically identifying, categorizing, and analysing patterns and themes within the data.[17] The result of the thematic coding serves as the basis for the descriptive research objective and subsequent, the evaluative.

2.2.3. Delineation of the research scope

The scope of this research is delineated from different perspectives. First of all, this study is territorially limited to the proceedings related to sexual abuse scandal within the Roman Catholic Church in Belgium. However, seen the scale of the scandal and the precedent value of the chamber judgment in the whole European territory, this cannot be analysed without considering the broader, European context and continent. From this angle, the human rights standard is the European Convention of Human Rights Moreover, this research concentrates merely on the 'civil' proceedings relating to the sexual abuse of minors within the Roman Catholic Church. The criminal proceedings will shortly be elaborated for the clarity of the broader context but are not part of the conducted research. The author further wishes to point out that the starting point is the legal perspective, but sociological and political considerations inextricably come across. However, as mentioned above, further research from these angles is welcomed.

[17] Glenn A. Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) Qualitative Research Journal <https://www.researchgate.net/publication/240807798_Document_Analysis_as_a_Qualitative_Research_Method> accessed 20 July 2024.

3. Sexual abuse scandal within the Roman Catholic Church

3.1. Situation of the problem

3.1.1. Centuries-old and global human rights scandal

How did it come to this? The Roman Catholic Church, once the central pillar of society and the driving force behind Western civilization's greatest achievements in political, social, economic, intellectual, and cultural life, has seen its role drastically change over the centuries. Once revered as a moral and spiritual leader, the Church today is overshadowed by a sexual abuse scandal that has devastated our society and severely tarnished its image. This shift reflects not only a loss of the Church's former status but also a profound crisis within the institution and society as a whole, as it grapples with the consequences of systemic failures in protecting the most vulnerable members of society.

The Roman Catholic Church stands at the apex of one of the most serious human rights scandals in recent decades. Thousands of children have been the victims of sexual abuse by authority figures within the Church. The structural mismanagement of the Holy See made this abuse possible and systematically placed their self-interest above the protection and prevention of victims of sexual abuse. The (justified) public attention and shock wave that swept our societies gives the impression that this is a phenomenon of recent decades. The lack of structural solutions furthermore fuels the perception that it is a purely local or Europe-centric problem. However, child sexual abuse by clergy[18] is not a contemporary phenomenon, nor a local occurrence. Rather the contrary, history reveals that the crime of child sexual abuse has been committed by Church clergy since the very inception of the Roman Catholic Church. Indeed, history of clerical child sexual abuse is not an issue limited to the twentieth century history of the Roman Catholic Church, but unfortunately rather as old as the Church itself. Closer examination moreover reveals that it is not limited to national borders, but stretches across several countries, even globally. Therefore, the child sexual abuse by clergy within the Roman Catholic Church can be described departing from two characteristics (that only aggravate her very nature): the child sexual by clergy is both a *centuries-old* and *global* human rights scandal.

3.1.1.1. Centuries-old horror

The sexual abuse of minors by clerics, is first of all, *a centuries-old horror*. Going back to the early Church, the problem not only existed but warranted a written condemnation.[19] A review of the Roman Catholic Church's legal system reveal that the Church has in fact a well-documented history of clerical child sexual abuse since ancient times.[20] The long-standing and structural nature of the problem is reflected by the continuity of the development of various organizational laws and management policies regarding deviant sexual behavior of clergy and

[18] The term 'clergy' includes priests, deacons, and bishops.
[19] Patrick M. O'Brien, 'Transparency as a means to rebuild trust within the Church: a case study in how Catholic dioceses and eparchies in the United States have responded to the clergy sex abuse crisis.' (2020) Church, Communication and Culture <https://www.tandfonline.com/doi/full/10.1080/23753234.2020.1827962> accessed 20 March 2024.
[20] Faisal Rashid and Ian Barron, 'The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)' (2020) Journal of Child Sexual Abuse 778<https://www.tandfonline.com/doi/epdf/10.1080/10538712.2018.1491916?needAccess=true > accessed 12 March 2024.

child sexual abuse in the early documents of church history.[21] Since the Council of Elvira in 309, as the earliest acknowledged church legislation, there was a consistent pattern of legislation in every century till now denouncing clerical sexual deviant behaviours including child sexual abuse.[22] Canon 71 of the Council of Elvira strictly condemned sex between adult men and young boys: '*Men who sexually abuse shall not be given communion, even at death*.'[23] Human sexual behaviour has, as a matter, long been a major focus of Catholic Church Law.[24] Church legislation regulating (criminal) sexual behaviour by clergy went one-on-one with rules imposing clerical celibacy since the fourth century.[25] However, attempts to enforce them met with little consistent success and is reflected in an evolving pattern of sanctioning legislation. The church's legal documents and authoritative statements from past to present clearly demonstrate a consistent pattern of non-celibate behaviour among a significant number 'of priests. Notable, P. Doyle[26], Sipe[27] and Wall[28] observed that:

> '*The church's leadership has been consistent in two areas: the adamant defence of the celibacy ideal and inability to enforce it*.'[29]

The most dramatic and explicit outcry against forbidden clergy sexual activity is found in the *Book of Gomorrah*, written by St. Peter Damian about 1051.[30] The book condemned all forms of homosexual activity, particularly sexual contact with young boys and included an appeal to the reigning pope (Leo IX) to take action. The Pope's response, nevertheless, was characterized by inaction or inadequate action against abusing clerics and appears to be a prophetic indicator of contemporary responses.[31] In the High Middle Ages, clergy sexual abuse was furthermore well-known by the public, the clergy, and secular law enforcement authorities. There was a constant stream of disciplinary legislation from the church but none of it was successful in changing clergy behaviour.[32] The *Corpus Iuris Canonici* is the most extensive and important source of Canon Law history, published in 1234, and contains several references to legislation on the sexual abuse of minors in general and sexual abuse by clerics

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[21] *Ibid*., 779.
[22] Kathryn A. Dale Judith L. Alpert, 'Hiding Behind the Cloth: Child Sexual Abuse and the Catholic Church' (2007) Journal of Child Sexual Abuse 61 <https://www.tandfonline.com/toc/wcsa20/16/3?nav=tocList> accessed 10 March 2024.
[23] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 13.
[24] *Ibid*.
[25] *Ibid*., 61.
[26] Thomas Patrick Doyle is a former Dominican priest with a doctorate in canon law and five separate master's degrees. He sacrificed a rising career at the Vatican Embassy to become an outspoken advocate for church abuse victims.
[27] Richard Sipe was an American Benedictine priest for 18 years (1952–1970 at Saint John's Abbey, Collegeville, Minnesota), a psychotherapist and the author of six books about Catholicism, clerical sexual abuse in the Catholic Church, and clerical celibacy.
[28] Patrick Wall is a world-renowned expert on the Catholic Clergy Abuse Crisis, has been working on behalf of victims of clergy sexual abuse since 2002. He is a former Roman Catholic Priest and Benedictine Monk.
[29] *Ibid*., 63.
[30] Thomas P. Doyle, 'Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse' (2003) Pastoral Psychology <https://link.springer.com/article/10.1023/A:1021301407104 > accessed 13 March 2024.
[31] *Ibid*., 195.
[32] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 23-28.

in particular. [33] The Church, being a dominant social force in a society where the separation of church and state was an unknown concept, closely collaborated with civil powers to enforce its own laws.[34] However, in the late fifteenth and sixteenth century the Protestant Reformation shook the Catholic Church to its political and religious roots.[35] The reformers rejected the celibacy, motivated by the widespread everyday evidence that clerics of all ranks commonly violated their vows with women, men, and young boys. They moreover attacked the theological basis of the discipline, arguing that it had no foundation in Scripture or ancient tradition.[36] For the first time in history, the institutional Church faced a significant threat to its power and monolithic control. From that point onward, a pattern of secrecy can be observed in the church's response to clerical sexual issues.[37]

The Catholic Church reacted to the reforming attempts with the Council of Trent (1545-1563). The council legislation was hardly innovative or adequate compared to the prior laws because it reaffirmed the clerical celibacy. The establishment of seminary education for prospective priests was the sole 'innovation'. However, while the seminaries were responsible for a reduction in the widespread violations of clerical celibacy, they had a long-lasting downside. Prospective clerics were isolated from an early age in an all-male environment and convinced of the spiritual superiority of celibacy. Rather than internal metamorphosis, this indoctrination, conversely, only enabled more celibacy violations with women, men, and young boys, with the only difference that the abuse became less visible.[38] An additional remarkable factor in the unfolding of sexual abuse forms the sacrament of penance[39], or 'confession': since the Council of Trent the confessional was inaugurated in most churches.[40] Distressing, instead of a sin being forgiven, a new sin (*read*: crime) occurred. The act of sacramental confession became the occasion for the most heinous form of clergy sexual abuse, namely the solicitation by the priest-confessor of sex with the penitent. Solicitation is especially repugnant because of the present and inherent unequal relation of power: the victim who seeks forgiveness and comfort is at his or her most vulnerable *vis-à-vis* the priest's power to grant or withhold absolution, to assign and control penances, and his superior education and exalted social status.[41] On top of that, the clergy perpetrator was 'protected' under the obligation of discretion of the confession. The penitent or victim, on the other hand, ran the risk of being accused of false denunciation or excommunication when denouncing the soliciting priest. In fact, false denunciation became a more severely punished and enforced crime than solicitation itself. The present Code of Canon Law forms a reflection of that imbalance: where Canon 982 regulates the denunciation, no such provisions can be found for priests guilty of sex solicitation. From

[33] Thomas P. Doyle, 'Roman Catholic Clericalism, Religious Duress, and Clergy Sexual Abuse' (2003) Pastoral Psychology 196 <https://link.springer.com/article/10.1023/A:1021301407104> accessed 13 March 2024.
[34] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 23-28.
[35] *Ibid*., 62.
[36] *Ibid*., 33-35.
[37] *Ibid*., 34.
[38] *Ibid*., 62.
[39] The sacrament of penance is one of the seven basic rituals of the Catholic Church. It is the means whereby church members are reconciled to the community after sinning. In the earliest centuries the confession was public and generally once in a lifetime but through the centuries the sacrament became private and individual. The essential elements of the sacrament are: the confession of sins by the penitent to the priest coupled with an expression of a firm intention not to repeat the same sins; the imposition by the priest of a penance such as prayer or fasting; and the recitation by the priest of the formula of absolution. Catholics believe that when absolution is pronounced, their sins are forgiven by God and their guilt is cancelled.
[40] *Ibid*., 37-38.
[41] *Ibid*., 40.

the sixteenth to the nineteenth century a body of legislation was promulgated that condemned the practice of solicitation of sex, but the problem nevertheless continued.[42]

The reformation and renaissance era lead to the separation of Church and State, resulting in a loss of the social status, political authority, and power, the clergy had enjoyed for centuries.[43] Notably, the secrecy of the Church laws and policies on sexual abuse surfaced after it had lost significant of its power after the Reformation, and increasingly became the preferred approach as its influence continued to regress.

The secret approach on child sexual abuse became apparent in 1922 and 1962 when the Vatican issued legislation about solicitation and other forms of clergy sexual abuse but, unlike previous papal legislation, these documents were buried in the deepest secrecy. They were never publicised in the Vatican legal bulletin, *the Acta Apostolicae Sedes.*[44] The document was sent to every bishop and major religious superiors in the world. The dispositive section of the document is preceded by an order whereby the document is to be kept in the diocesan secret archives and not published nor commented upon by anyone.[45] Concretely, it is a procedural law text providing detailed steps for the process to be followed when prosecuting accusations of solicitation and introduced several elements imposing secrecy, including an exceptional degree of confidentiality or oath of secrecy imposed on the document itself and the people (both accuser and witnesses) involved in processing cases.[46] The 1962 legislation[47] is paramount because it forms proof of the Church's culture of silence by maintaining the highest degree of secrecy regarding the worst sexual crimes perpetrated by clerics. This code of silence on handling cases of child sexual abuse internally was reaffirmed by a letter sent by the Holy See in 2001.[48]

3.1.1.2. Global phenomenon

Sexual abuse by Catholic clergy has persisted uninterrupted from the post-Apostolic era to the present day. Contrary to Church leaders' assertations that the recent surge in abuse allegations is unprecedented, there is thus ample evidence to suggest that the only new element is the exposure by the secular media. Although it is apparent that these cases occurred consistently throughout history, it was not until 1980 that cases become publicized globally.[49] This attention brought to the fore that the child sexual abuse within the Roman Catholic Church was not only spread over time, but, in line with the Church's global presence, in addition, spread territorially.

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[42] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 43-46.
[43] Faisal Rashid and Ian Barron, 'The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)' (2020) Journal of Child Sexual Abuse 788<https://www.tandfonline.com/doi/epdf/10.1080/10538712.2018.1491916?needAccess=true > accessed 12 March 2024.
[44] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 47.
[45] *Ibid*.
[46] *Ibid*., 48.
[47] See: 1962 Letter from the Holy Office, https://image.guardian.co.uk/sys-files/Observer/documents/2003/08/16/Criminales.pdf.
[48] See: 2001 Letter from Congregation on the Doctrine of the Faith, https://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm.
[49] Kathryn A. Dale Judith L. Alpert, 'Hiding Behind the Cloth: Child Sexual Abuse and the Catholic Church' (2007) Journal of Child Sexual Abuse 62 <https://www.tandfonline.com/toc/wcsa20/16/3?nav=tocList> accessed 10 March 2024.

Sexual abuse by Catholic clergy has been reported in various countries over the five continents and can be said to be a global issue. It appears no country was spared.[50] In any event, some national cases brought the structural mismanagement into sharp focus. In 1985, the case of *Gauthe*, a bishop that had convicted more than 100 children in his diocese under the conscious eye of church superiors, marked the beginning of the national media attention on clergy-abuse scandals.[51] Prior to this case, the Church had a strong track record of silencing victims and their families, but this time the conviction of the bishop marked a significant turning point.[52]However, it wasn't until January 2002, nearly 1800 years after the first clergy were excommunicated, that a major institutional crisis emerged. On 6 January 2002 the *Boston Globe* headline read: '*Church Allowed Abuse by Priest for Years.*'[53] The Globe succeeded in getting courts to release sealed church documents, and by the end of their investigation, they had identified over 150 cases of priest abuse and published 1200 stories. The cover-up and silence culture by church officials was exposed, revealing the patterns of abuse, the conspiracy to conceal it, and the failure to inform and protect the victims. It soon became clear that clergy sexual abuse was not confined to Boston alone, but rather, Boston had uncovered a widespread pattern that extended across the entire Roman Catholic Church.[54]

The reports of abuse proliferated in the United States in 2002 gave the appearance that it was an American phenomenon. However, by 2010, reports of child sexual abuse by clergy began to emerge in Europe and other western countries. In response to the emerging reports of abuse in their countries, commissions began evaluating the scale and impact of child sexual abuse by Catholic clergy.[55] Cases of sexual abuse emerged in several countries, from Australia to Ireland, Canada, Chile, and France, and have led to (a limited number of) convictions of clergy perpetrators, provoking a shift in public debate, changing the course of justice, or prompted the church to reform and acknowledge the harm done.[56] According to *BishopAccountability*, which records cases of sexual abuse by Catholic Church officials, US bishops alone reported receiving allegations of abuse of 20052 children including 7002 clerics priests for proven or alleged facts over the period 1950 until 2016, or 5,8 percent of the 118 184 US priests between 1950 and 2018.[57] As regards Catholic bishops, the site has identified 78 Catholic bishops worldwide publicly accused of sexual crimes against children and 35 publicly accused of sexual misconduct against adults.[58] Nevertheless, the judicial convictions of Church clergy forms only the tip of the iceberg in relation to the real 'toll' of victims, considering the secrecy of Church handling, the phenomena of underreporting and the fact that numerous cases are time-barred. These cases concern the individual civil or criminal liability of the clergy perpetrator for the act

[50] Marie Keenan, *Child sexual abuse and the Catholic Church: Gender, power, and organizational culture* (Oxford University Press, 2011) 3.
[51] Kathryn A. Dale Judith L. Alpert, 'Hiding Behind the Cloth: Child Sexual Abuse and the Catholic Church' (2007) Journal of Child Sexual Abuse 63 <https://www.tandfonline.com/toc/wcsa20/16/3?nav=tocList> accessed 10 March 2024.
[52] *Ibid*.
[53] *Ibid*.
[54] Thomas P. Doyle, Richard Sipe, Patrick J. Wall, S*ex, priests and secret codes: The Catholic Church's 2000 year of paper trail of sexual abuse* (Volt Press Los Angeles, California 2006) 53.
[55] Karen J. Terry, 'Child sexual abuse within the Catholic Church: a review of global perspectives' (2015) International Journal of Comparative and Applied Criminal Justice 139 < https://www.researchgate.net/publication/276398781_Child_sexual_abuse_within_the_Catholic_Church_a_review_of_global_perspectives> accessed 10 March 2024.
[56] *Ibid*.
[57] BishopAccountability, Collated USCCB Data On the Number of U.S. Priests Accused of Sexually Abusing Children and the Numbers of Persons Alleging Abuse 1950–2018 <https://www.bishop-accountability.org/AtAGlance/USCCB_Yearly_Data_on_Accused_Priests.htm>
[58] *Ibid*.

and damage of sexual abuse of an individual victim. They alleged liability on the part of the local diocese and/or the religious order to which the alleged perpetrator of abuse belonged. From a procedural point of view, notwithstanding, another possible track includes proceedings claiming liability of the Holy See, as the head of the Roman Catholic Church, for the culture of silence and the structurally deficient way in which the Church had dealt with the known problem of sexual abuse within the institution. *O'Bryan v. Holy See* is in that sense unique among the cases brought against Catholic clergy in the United States and their superiors in that it seeks to hold the Holy See responsible for all of the instances of sexual abuse of minors committed in the United States.[59] *O'Bryan* is the first case to contend that the Holy See itself is responsible for the clergy sexual abuse. (*See infra*: 4.1.2.3 State actor? Vatican vs. Holy See)

Until the present day, the structural clerical mismanagement and culture of silence within the Roman Catholic Church still consistently emerges in reports from national investigation committees. On 5 October 2021 a report by 'La commission indépendente sur les abus sexuels dans l'église (*CIASE*)' was published.[60] In this report the Commission revealed that more than 200 000 children had been sexually abused by French clergy over the past 70 years and acknowledged the structural failures of the Catholic Church. In the aftermath of the publication of this report, many victims went to the competent authorities seeking justice. In Portugal, a report in February 2023 by a (Church-funded) Portuguese commission found that at least 4815 minors had been sexually abused by clergy over seven decades.[61] Reports unveiling the sexual abuse within the Church and proof thereof was not limited to the above-mentioned countries. In many other European countries such as, Spain[62], Germany[63], Austria[64], United

[59] *O'Bryan v. Holy See* [2005] 490 F. Supp. 2d 826.

[60] Independent Commission on Sexual Abuse in the Catholic Church (CIASE), Sexual Violence in the Catholic Church France 1950 – 2020, Summary of the Final Report, 12 October 2021 <https://www.ciase.fr/medias/Ciase-Summary-of-the-Final-Report-5-october-2021.pdf> accessed 10 August 2024.

[61] Catarina Demony and Miguel Pereira, 'Child abuse found in Portugal Catholic Church is 'tip of iceberg', commission says' (*Reuters*, 13 February 2023) <https://www.reuters.com/world/europe/thousands-abused-by-members-portuguese-church-past-70-years-2023-02-13/> accessed 10 August 2024.

[62] Kathryn Armstrong, 'Spanish Church sexual abuse affected 200,000 children, commission finds' (BBC News, 27 October 2023) <https://www.bbc.com/news/world-europe-67238572> accessed 10 August 2024.

[63] X., 'Germany: Survey reveals scope of abuse in religious orders' *Deutsche Welle* (Germany, 26 August 2020) <https://www.dw.com/en/germany-over-1400-youths-accuse-catholic-religious-orders-of-sexual-abuse/a-54710049> accessed 11 August 2024.

[64] X., 'Defrocked priest guilty of sexually abusing boys' (*USA Today*, 3 July 2013) < https://eu.usatoday.com/story/news/world/2013/07/03/priest-child-sex-abuse/2486261/> accessed 10 August 2024.

Kingdom[65], the Netherlands[66], Ireland [67], Norway[68], Poland[69], … there is proof of sexual abuse cases by the Catholic Church clergy.

3.1.2. The Roman Catholic Church: *societas perfecta*?

'*Only those who learned nothing from history should repeat it*.'[70]

For centuries, the Roman Catholic Church has claimed to be a 'perfect society': a self-sufficient and autonomous institution capable of maintaining its complete welfare in its own order and, by right, disposing of all the means to achieve that aim. A perfect society in ecclesiastical law is a society endowed with all powers, rights and other means necessary to achieve its aim: it is therefore self-sufficient and autonomous in its own order.[71] It is precisely this premise of '*societas perfecta'* that has enabled the occurrence of the sexual abuse within the institution of the Roman Catholic Church, both over time, going back to its very inception, and across borders.

This exposition showed that the Roman Catholic Church was not only aware of the systematic sexual abuse by clergy since its inception, but that fighting it forms a major part of its legislation. It became moreover apparent that the Church's legal documents and authoritative pronouncements reveal a consistent pattern of trying to impose celibacy on the one hand, while reality constantly revealed the continuous non-celibate behaviour. Up to and including the Protestant Reformation, the fight against sexual abuse was done quite openly and sometimes even in cooperation with the state authorities. However, as soon as the Church saw its prominent role in society diminish, the approach to sexual abuse was switched to a secretive nature that has remained until the present day. What this historical context brings out above all is the structural and constant, repeated malfunctioning of the Roman Catholic Church: all through its history of existence, with the first laws in 309, until anno 2024, the Church thinks it can considers systematic and institutionalised abuse with spiritual, repressive approaches without even studying the viability of mandatory celibacy, as well as the self-serving manner with which the church has handled violations of the canons, resulting in grave harm to thousands of victims of clerical sexual abuse. In other words: from its inception until the present day we witnessed a constant stream of new legislation, but without effective implementation. On the contrary, its internal structures and strict, 'moral' regulations around sexuality only encouraged abuse. In this sense, in the present author's view, the Roman Catholic Church can not be seen as a '*societas perfecta'*, but rather the contrary: without

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[65]Independent Inquiry Child Sexual abuse, The Roman Catholic Church Investigation Report, November 2020 < https://www.iicsa.org.uk/reports-recommendations/publications/investigation/roman-catholic-church.html> accessed 10 August 2024.

[66] Report of the Deetman Commission, 26 December 2011 <https://www.bishop-accountability.org/news2011/11_12/2011_12_26_DeetmanCommission_DeetmanCommission.pdf> accessed 10 August 2024.

[67] Minister for Justice and Equality, Report by Commission of Investigation into Catholic Archdiocese of Dublin, Department of Justice, 29 November 2009.

[68] X., 'Church: Norway bishop quit in '09 over abuse' (*NBC NEWS*, 7 April 2010) < https://www.nbcnews.com/id/wbna36227334> accessed 10 August 2024.

[69] Joanna Berendt, 'Catholic Church in Poland Releases Study on Sexual Abuse by Priests' (*The New York Times*, 14 March 2019) <https://www.nytimes.com/2019/03/14/world/europe/catholic-church-abuse-poland.html> accessed 10 August 2024.

[70] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 7.

[71] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 85.

considering secular disciplines (such as psychology, sociology,...), it forms here the aversion of.

Exactly because of the idea that the institute was 'perfect', it upheld its outdated views on sexuality and non-celibate behaviour, without effective implementation in the clergy's behaviour and only enabling more celibacy violations. It can be said that Rik Devillé's above-mentioned citation on the abuse within the Roman Catholic Church is more than appropriate at this point.

3.2. National outlook: Belgium

3.2.1. Introduction: the institute of the judiciary vs. the institute of the Roman Catholic Church

There have been few human rights scandals in Belgium that have exposed in such a flagrant and structural way the judiciary's failure to guarantee the principles of the rule of law and the fundamental human rights of its citizens. Whereas in previous decades this malfunctioning was highlighted in the persistent organizational flaws and the failing repressive nature of the system, this scandal revealed another force, threatening the foundations of the rule of law and fundamental rights: (the power of) the institution of the Roman Catholic Church.

Two decades ago, the church in our country shook to its foundations when the first files of child abuse in the Church surfaced in the wake of grown attention on the international scene. The conversation between Danneels and Mark Vangheluwe sent shock waves through our entire society. The words : '*You can also ask for forgiveness ,confess your guilt*...'[72] from Cardinal Danneels to Mark Vangheluwe who had been sexually abused for years by his uncle, Bishop Vangheluwe form a concise *aperçu* of the reaction on behalf of the Church. Or how Bishop Vangheluwe himself laughed off the abuse in an interview: '*The abuse with my cousin happened out of a kind of habit. It was not brutal sex, more like a little relationshi*p'. A stream of reports emerged. Victims began to speak out about how, as the most vulnerable within society, they had been victims of severe acts within church contexts for decades.

However, the reality was even more horrifying: the abuse went far beyond one bishop alone, local congregations were aware of the systematic abuse committed and, under the authority of the Pope, blindly facilitated the abuse. Senior representatives of the Church, who considered themselves to be envoys of God on earth did all they could to keep the abuse in their own circles away from the figurative spotlight. It was often a case of moving the abuser from place to place, as if at that time the place was viewed as the key factor, not the actual person or broader Church structures. Two inner-church commissions were set up to act alongside the

[72] Mark Eeckhaut, ' En als we nu eens vergiffenis zouden schenken. LETTERLIJK. Gesprek deel 1.'(*De Standaard*, 28 augustus 2010) <https://www.standaard.be/cnt/e62uj9mv?&articlehash=JFB%2BIIfbp%2BU6%2B4uCny%2FE2zJ7ItxZfb9i%2BKPt%2BwJ1nY7UFj1gP%2Bg4%2FIolmN%2B%2F%2BcxYmoC7SgZVDxb9W4308b6gQY%2BIVl57E0vnq23qFCTmzQgQe1kehIDYs8%2B3KIAS8AGVL%2FghqFDlwOfhweUo8ZvNMLdTq68EsDhbjyZGwQR8%2F1zuMy2OFtTSp6bWERiVAaO5IPA2fgl0q1IAKTe418Aot38bSO0lMpwBRlJswyStECrdyJYHL9lnDNFsXpJV0y48%2FsLqqH4H42Ipvr5e12u3L4xrAZW%2FWWZgxOGAqfc7oYqTO4lHQ00xfwCAtDrxVMoxhOaHdI2uAz8uPSn5k0Bafg%3D%3D> accessed 1 March 2024.

judiciary in handling complaints of sexual abuse. However, as will be revealed later, these acted not *alongside* but *instead* or even *against* the judiciary.

The process that succeeded was du *jamais vu*: an unprecedented quest for justice and recognition of the injustice inflicted on thousands of warless children. Against the seriousness of the facts of the abuse and the evidence of structural mismanagement and cover-up politics within the church stood, in vain, the absence of real legal recognition.

In 2010, the media were flooded with the first investigation acts within 'Operation Kelk'. The images of archive boxes (as many as 931) thrown out of windows by investigators went around the world and caused social uproar, certainly in Belgium. However, the images of this judicial seizure would later become a metaphor for the effective 'throwing out of evidence'. Operation Kelk is unfortunately engraved in the collective memory of Belgian legal history. The gravity of the facts, where the most intimate personality rights of victims were compromised versus the failure to translate this injustice legally through a functioning legal system, ensured that this case gained a certain notoriety over the years. After more than 14 years since its inception, it is one of the longest-running judicial investigations ever in our country. On 1 July 2024, the federal prosecutor's office finished its final claim: the prosecutor's office does not want to prosecute anyone in the Operation Kelk case.

As it became clear from the beginning of Operation Kelk that the investigation case file was being played on by higher powers, the victims initiated a civil claim. The civil procedure concerns the proceedings under consideration within this research, where legal remedies have been exhausted to the highest degree, namely up to and including a request for referral before the Grand Chamber of the ECtHR in accordance with article 43 ECHR. Victims of sexual violence are once again victims of a judicial war of attrition.

The following chapter will chronologically portray all factual events in the roll-out of the sexual abuse scandal in the womb of the Roman Catholic Church in Belgium.

3.2.2. Three key figures

Against the culture of silence of the Roman Catholic Church, there have been three key figures who have never laid down their fight for justice. As white knights, they each seek from their position to break the law of silence and have therefore played a crucial role in publicly unfolding the scandal towards recognition.

a. Mensenrechten in de Kerk (Rik Devillé)

Rik Devillé, himself a priest within the Catholic Church, established the working group *Mensenrechten in de Kerk'* in 1992 out of a dissatisfaction with the institution of which he was a part.[73]

In his book *De laatste dictatuur*, he already addressed the various forms of abuse of power that had crept into the Roman Catholic Church and were not being heard within the Vatican.[74] The book constitutes an analysis of the emerging *malaise* in the Catholic Church that can be

[73] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p.105.
[74] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 224.

blamed and attributed to Rome's medieval form of government, the papacy.[75] In the aftermath of the book's interest and banning, many victims of the Roman Catholic Church found their way to Devillé. The working group was subsequently founded in 1992 and aimed to give a voice to those who have personally been harmed or discriminated against in any way by the Church, its ideology, actions, institutions and those in charge.[76]

In Belgium, this association was the first to actually address the problem of sexual abuse in the Church and therefore lived up to its name by addressing and identifying violations of human rights within the Church to the widest extent possible. The lack of an adequate response within the Catholic Church furthermore led the association itself to take the step towards a structural approach of testimonies.[77]Rik Devillé and his working group became, for many victims, both the listening ear and the voice that could represent them. The assistance of the working group consisted mainly in listening to the testimonies of victims in order to create files.[78] These files were subsequently transmitted to the hierarchical superiors of priests or clergy suspected of sexual abuse and, above all, to the Vatican. By this communication from the start of the creation of *Mensenrechten in de Kerk*, any defense on behalf of the Church authorities claiming ignorance of the facts lapses *a posteriori*.[79] Desired démarches to the law enforcement, judicial and church institutions were additionally supported from the working group but never imposed. The registration of human rights violations in church relations continued to rise to the current disastrous number of 1,725 reports. Hereby necessarily taking into account the phenomenon of underreporting. (See *infra:* 4.4. Child sexual abuse)

In contrast to the working group's eagerness for justice and victim support, however, was the Holy See's inertia: "*We can do nothing for you but pray*."[80] Forgiveness and prayer, in turn, was insufficient when it concerned the image of the institution itself. The judiciary system was invoked with a claim for slander and defamation against the founders of *Mensenrechten in de Kerk*.[81] Paradoxical, how justice and any cooperation therewith is circumvented in the interest of the victims, but in the interest of the image of the Roman Catholic Church forms the tool of preference. Or does this fit perfectly with the Church's balancing of interests?

b. Mark Vangheluwe

The victim who got the ball rolling and from a (vainly) necessary pressure, made the Roman Catholic Church take off their masks, was Mark Vangheluwe. Mark Vangeheluwe had been abused for years by his uncle, Roger Vangeluwe, Belgian Bishop who had his territory in Bruges, West Flanders.[82]

On 8 April 2010, a conversation took place that will later be known as the 'Danneels tapes'.[83] His 'weapon' to reaction: a tape recorder, which would finally expose the Church's hypocrisy and culture of silence. Mark wanted an admission of guilt and the resignation of his perpetrator, Roger Vangeheluwe for the years of sexual abuse. During that conversation, however, it

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[75] Rik Devillé, 'Geschiedenis-Mensenrechten in de Kerk' <https://www.mensenrechtenindekerk.be/geschiedenis> accessed 12 March 2024.
[76] *Ibid*.
[77] *Ibid.*
[78] *Ibid.*
[79] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p.107.
[80] *Ibid*.,106.
[81] *Ibid.*
[82] Walter Van Steenbrugge, *Operatie Kerk*, (Pelckmans Uitgeverij, Antwerpen 2023).
[83] *Ibid.*

became clear that while the sexual abuse may have been there, it was a matter of asking each other's forgiveness. There would be no resignation of 'uncle Roger' at all. Public opinion first and foremost: own people first.[84]

Not considering that this condoning policy was now on tape and because of this exact inertia Mark threatened to go public with it. As a result, on 23 April 2010, at a press conference, the resignation of Bishop Vangheluwe was announced and Monsignor Léonard, as president of the Bishops' Conference, called upon the victims to come forward and report the facts.[85] In a following pastoral letter of 19 May 2010, the bishops and diocesan administrators of Belgium struck a *mea culpa*: they acknowledged, at least verbally, the responsibility for the years of abuse and the consequences of placing the good name of the ecclesiastical institution higher than the dignity of the child as victim. [86] That the release of the contents of that recording would later serve to bury false reporting, which suspected Mark Vangheluwe of having benefited financially from the years of sexual abuse, confirms the emphasis on 'verbal' responsibility on behalf of the Church.[87]

The content[88] of that conversation was clear: forgiveness was the only solution. The victims should already have been pleased with God's forgiveness. What Mark Vangheluwe did have reason to be pleased with: the recordings, both as evidence of the repeated crime of sexual abuse and of the Church's structural policy of condoning it.

Mark Vangheluwe's narrative caused a shock. The ball got rolling within the general public, the Roman Catholic Church and, above all, among the victims who had suddenly found mental strength to take legal action.

c. Van Steenbrugge law firm

The foundation stones were constructed by the testimonies at 'Mensenrechten in de Kerk' and by Mark Vangheluwe, now remained the judicial (legal) instrument to achieve judicial recognition.

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[84] Mark Eeckhaut, ' En als we nu eens vergiffenis zouden schenken. LETTERLIJK. Gesprek deel 1.'(*De Standaard*, 28 augustus 2010) < https://www.standaard.be/cnt/e62uj9mv?&articlehash=JFB%2BIIfbp%2BU6%2B4uCny%2FE2zJ7ItxZfb9i%2BKPt%2BwJ1nY7UFj1gP%2Bg4%2FIolmN%2B%2F%2BcxYmoC7SgZVDxb9W4308b6gQY%2BIVl57E0vnq23qFCTmzQgQe1kehIDYs8%2B3KIAS8AGVL%2FghqFDlwOfhweUo8ZvNMLdTq68EsDhbjyZGwQR8%2F1zuMy2OFtTSp6bWERiVAaO5IPA2fgl0q1IAKTe418Aot38bSO0lMpwBRlJswyStECrdyJYHL9lnDNFsXpJV0y48%2FsLqqH4H42Ipvr5e12u3L4xrAZW%2FWWZgxOGAqfc7oYqTO4lHQ00xfwCAtDrxVMoxhOaHdI2uAz8uPSn5k0Bafg%3D%3D> accessed 1 March 2024.

[85] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 106-107.

[86] Bjorn Ketels, 'Kerk kan verantwoordelijkheid voor pedofilie niet zomaar ontlopen' (2010) Juristenkrant < https://biblio.ugent.be/publication/977714> accessed 10 March 2024.

[87] Walter Van Steenbrugge, *Operatie Kerk*, (Pelckmans Uitgeverij, Antwerpen, 2023)

[88] Mark Eeckhaut, ' En als we nu eens vergiffenis zouden schenken. LETTERLIJK. Gesprek deel 1.'(*De Standaard*, 28 augustus 2010) < https://www.standaard.be/cnt/e62uj9mv?&articlehash=JFB%2BIIfbp%2BU6%2B4uCny%2FE2zJ7ItxZfb9i%2BKPt%2BwJ1nY7UFj1gP%2Bg4%2FIolmN%2B%2F%2BcxYmoC7SgZVDxb9W4308b6gQY%2BIVl57E0vnq23qFCTmzQgQe1kehIDYs8%2B3KIAS8AGVL%2FghqFDlwOfhweUo8ZvNMLdTq68EsDhbjyZGwQR8%2F1zuMy2OFtTSp6bWERiVAaO5IPA2fgl0q1IAKTe418Aot38bSO0lMpwBRlJswyStECrdyJYHL9lnDNFsXpJV0y48%2FsLqqH4H42Ipvr5e12u3L4xrAZW%2FWWZgxOGAqfc7oYqTO4lHQ00xfwCAtDrxVMoxhOaHdI2uAz8uPSn5k0Bafg%3D%3D> accessed 1 March 2024.

'Van Steenbrugge advocaten' is the law firm that committed itself from the emergence of the first testimonies to legally translate the decades of sexual abuse by clergy. From the civil action within Operation Kelk (*See infra*: 3.2.5. National legal action), to the suing of the Holy See to the highest possible appeal at the ECtHR. (See infra: 5. The *J.C. and others* v. Belgium judgment)

3.2.3. Commission Halsberghe

After the inadequate functioning of two telephone contact points in 1997[89] , the installation of an Interdiocesan Commission for dealing with complaints of sexual abuse in pastoral relationships, also called the Halsberghe Commission, was undertaken in January 200.[90]

It is important to note the internal clerical nature of the commission: it was founded by Belgian bishops and religious superiors themselves.[91] The nature which at the same time explains the malfunctioning and blocking of its operation towards real recognition.

The task of the commission was, on the one hand, to recognize material facts by receiving complaints from victims, hearing them, and issuing opinions on possible measures.[92] On the other hand and yet remarkably, the commission also ensured that unfounded allegations were prevented and contributed to the restoration of the reputation of unjustly suspected priests or religious. [93] This two-track policy was also highlighted in a working document of the Bishops' Conference[94] : ".... *They also intend to act firmly against all forms of abuse in pastoral relationships..., They hope thus to contribute to a climate, in which what is evil is recognized as evil, but in which unnecessary and grievous suspicions are also avoided*."[95]

According to the statutes, the Commission's task involved the recognition of the damage suffered by the victims through various forms of reparation, more specifically through compensation.[96] But as soon as reparations were pronounced within the commission, the

[89] Bisschoppenconferentie, 'Wat doet de kerk voor voor de slachtoffers van het seksueel misbruik (1997-2023)?' (*Kerknet*, 28 november 2023) <https://www.kerknet.be/sites/default/files/20231128_Wat%20doet%20de%20Kerk%20voor%20slachtoffers%20seksueel%20misbruik%201997-2023.pdf> accessed 18 March 2024; Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 143-150.

[90] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 143-145.

[91] Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005.

[92] Ivo Aertsen, Martien Schotmans, 'Institutioneel misbruik en geweld uit het verleden-Een vergelijking van twee herstelgerichte responsmodellen in België' (2020) Tijdschrift voor Herstelrecht < https://www.researchgate.net/publication/346903896_Institutioneel_misbruik_en_geweld_uit_het_verleden_Een_vergelijking_van_twee_herstelgerichte_responsmodellen_in_Belgie> accessed 10 March 2024.

[93] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 145.

[94] Bisschoppenconferentie, brochure Seksueel misbruik van kinderen in een pastorale relatie in de katholieke Kerk in Belgie, naar een ce t beleid.; Walter Van Steenbrugge, *Operatie Kerk*, (Pelckmans Uitgeverij, Antwerpen, 2023)

[95] *Ibid*.

[96] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 145-149.;

Church authorities withdrew all cooperation, even worse: a strong opposition surfaced. According to them, it was not the competence of chairwoman Halsberghe to pronounce indemnities and she had to limit herself to pronouncing opinions, advising bishops, checking preventive measures and whether there were procedures for canonical sanctions. [97] A document on behalf of the Diocese of Mechelen addressed to chairwoman Halsberghe frames this opposition:

> *'...Support in the form of a voluntary monetary intervention, I would exclude, both for legal and practical reasons. Legally, such an intervention, ..., would be invoked as an acknowledgement of responsibility. Practically, it would give rise to a multiplying of claims....'* [98]

In addition, according to certain Church authorities, by taking the vow of obedience, chastity and poverty, '*un homme d'église*' came to stand above those who did not take this oath. As a result, those who took this oath owed neither material nor moral compensation to their victims. This perspective of the Church authorities was in direct opposition to the statutes and needs of the commission and more strongly, to the principles of the rule of law. As Chairwoman Halsberghe rightly pointed out, every person, a legal subject in the full sense of the word, remains a carrier of right and duties, regardless of any ecclesiastical vows.[99] In doing so, the Church superiors accused. Halsberghe of being too legal. [100] As soon as the commission worked towards some form of (state) recognition of the injustice done, any form of response from the Church authorities was consequently refused to the commission. *'An instruction appeared to be circulating within the Church that the letters signed by Halsberghe should be thrown in the wastepaper basket',* causing the entire functioning of the commission to come to a standstill.[101]

From the preceding arguments and *manœuvres* on behalf of the Church authorities to contest any form of compensation to the victims, it is clear that the Catholic authorities accept neither civil nor moral responsibility for the crimes committed by incardinated persons. They, for that matter, express concern that the compensation could constitute an admission of guilt.[102] This opposition to any form of legal recognition was, moreover, explicitly confirmed in a working

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Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005, p.3.

[97] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 145-149.; Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005, p.3.

[98] *Ibid.,* 50.

[99] *Ibid.*

[100] *Ibid.*

[101] Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005, p.12-13. Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p.147.

[102] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p.149.; Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005, p.4.

document of the Bishops' Conference.[103] Following a threat directed at her person in her role as chairwoman and in view of the aforementioned opposition, Halsberghe submitted her resignation.[104] After eight years and having dealt with (only) 33 files[105], the work of the commission officially came to an end and led to the creation of the Adriaenssens Commission.

The Church authorities appeared to have the idea that by establishing an inner church commission, as God's emissaries on earth, they could keep everything internal and away from any legal form of indemnification or liability through clerical norms in the dark. Consequently, this 'two-track policy' quickly grew into two several desirable approaches: on the one hand, chairwoman Halsberghe, who effectively wanted to pursue the task in the statutes of indemnification, and the church, on the other hand, which, in opposition to this particular task, wanted to stay as far as possible from court's reach and as close as possible within the clutches of the institution Church.

3.2.4. Commission Adriaenssens

After the dismissal of the Halsberghe Commission, Professor Peter Adriaenssens[106] and a working group[107] took the initiative to establish a new inner-church commission in March 2010 with a conciliatory, mediating character.[108] The task of the multidisciplinary commission was four-fold: receiving complaints from victims and mediating between perpetrator and victim with a view to reconciliation, a truth-seeking function, providing assistance and, finally, giving advice to church authorities.[109]

Noteworthy constitutes the nature of this second inner-church commission as a truth commission, not an investigation commission. The approach departed from *a methodology of realism*, in which it is considered unrealistic to think that all perpetrators of sexual abuse in the

[103] Bisschoppenconferentie, brochure Seksueel misbruik van kinderen in een pastorale relatie in de katholieke Kerk in Belgie, naar een coherent beleid.; Walter Van Steenbrugge, *Operatie Kerk*, (Pelckmans Uitgeverij, Antwerpen, 2023)

[104] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 150.

[105]Godelieve Halsberghe has handled 33 files during the commission's eight years of operation. She indicated that she received only one dossier from the bishops. Monsignor Danneels, on the other hand, stated that in his opinion all the files received by the bishops should have been delivered to the Halsberghe commission. This can be strongly disputed given that a large number of files had indeed been delivered to the bishop or superior of the diocese or order concerned by Human Rights in the Church or, in some cases, by the victim himself.

[106]Peter Adriaenssens is a Belgian child and adolescent psychiatrist, senior lecturer at the Catholic University of Leuven, director of the Confidential Center for Child Maltreatment in Flemish Brabant and clinic head of child psychiatry UZ Leuven.

[107] Following the resignation of the Halsberghe Commission, by decision of the Bishops' Conference of May 14, 2009, a working group was created to modify its internal structure. Professor P. Adriaenssens, , was invited to join this working group and he examined the reform of the Halsberghe Commission.

[108] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010.; Verslag inzake De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 151-153.

[109] Els Dumortier, Kevin Goris, Serge Gutwirth, 'De wegen van de Commisise Adriaenssens waren ondoorgrondelijk' (2012) *Panopticon* < https://www.maklu-online.eu/fr/tijdschrift/panopticon/jaargang-volume-33/1-januari-februari-january-february-2012/de-wegen-van-de-commissie-adriaenssens-waren-ondoo//pdf> accesed 20 March 2024.

Church will be brought to justice.[110] Contrary to the theory that everyone should be punished, stands the truth that the concrete circumstances are such that the majority can escape. This methodology links the individual story of the victim to the social responsibility and to those responsible.[111] Questionable forms moreover that the choice of such truth commission is mainly based on creating an environment where the perpetrators are encouraged to cooperate in the process of recognition. [112] More precisely: '*which in any case will not happen if there is only a prospect of punishment if they admit*.' The commission additionally never aimed to compensate victims for damages and should therefore be seen as an ethics commission.[113]

In its final report, the Adriaenssens Commission emphasizes at several points its endeavour to act 'not in the place of the judiciary, but 'next to the task of judiciary.[114] This expressly 'complementary' task to criminal law was implemented by dealing only with cases that were time-barred under criminal law. According to Adriaenssens, charges were filed if *'it concerned a current case or a situation in which the priest was still in office and could still have contact with children and young people'*.[115] In doing so, however, '*the pace of the victim" was always respected.[116] From the "Internal Code of Ethics for Commission Staff*' it can also be deduced that the Commission does not regard its task as criminal but rather as remedial and helping. If such mediation cannot be achieved or the designated perpetrator denies, the Commission can '*help the victim find the way to justice or take it up for the victim*.'[117]

The same code of ethics demonstrates that in addition to working '*alongside'* justice, cooperation '*with'* justice was also established. More specifically, a framework was created in consultation with the judicial authorities, also referred to as a protocol in the final report.[118] To make this possible, the (then) Minister of Justice, S. De Clerck, deemed it necessary to establish agreements between the Public Prosecutor's Office and the Adriaenssens Commission by working out two aspects: on the one hand, a structure to coordinate the actions of the Adriaenssens Commission and the Public Prosecutor's Office, and on the other hand, a scheme to regulate the flow of information between the Adriaenssens Commission and the Public Prosecutor's Office.[119] The designation of this agreement is controversial and varies by

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[110] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010, p.132-133.
[111] *Ibid*.
[112] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 151-153.
[113] Els Dumortier, Kevin Goris, Serge Gutwirth, 'De wegen van de Commisise Adriaenssens waren ondoorgrondelijk' (2012) *Panopticon* < https://www.maklu-online.eu/fr/tijdschrift/panopticon/jaargang-volume-33/1-januari-februari-january-february-2012/de-wegen-van-de-commissie-adriaenssens-waren-ondoo//pdf> accesed 20 March 2024.
[114] *Ibid*.
[115] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010, p.4.
[116] Bijzonder Kamercommissie, Hoorzitting Peter Adriaenssens., *Hand*. Kamer Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de kerk 2010-11, 1, nr. 53 D007.
[117] Hoorzitting Godelieve Halsberghe, Bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, 1 december 2010, *Parl. St. Kamer*, 2010-11, nr. CRIV 53 D005, p.135.
[118] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010.
[119] *Ibid*.

document from a written protocol to a deontological code.[120] In legal theory, it would rather be qualified as a gentlemen's agreement[121] or - as a note[122] , and above all not an agreement that would lead to a parallel judiciary.[123]

The activities of the Adriaenssens committee gained momentum with the tape recording of Mark Vangheluwe prompting the church to hold the public press conference and with the explicit call to victims to come forward. These factors led to an unprecedented flood of complaints.[124]

Despite this 'success', however, distrust also began to grow. The perception that the Adriaenssens Commission could (also) be part of an (ecclesiastical) cover-up, grew. After all, due to its internal and clandestine[125] church handling, away from any independent, judicial handling, any form of legal control was impossible.[126] Therefore doubts arose as to whether the institution Church, through its own internal committee, was nonetheless trying to obstruct justice by influencing the judicial path by avoiding any referral to criminal responsibility or, still, making agreements related to prosecution policy. For example, the "Justice contract" states that:

> *'The "Commission ..." itself bears responsibility for deciding whether or not to bring facts that may constitute a criminal offence to the attention of Justice."*[127]

With this clause, the commission explicitly upholds the right to keep crimes *in house*. That the central ratio of the commission as a truth commission is furthermore put forward to 'induce the perpetrators to cooperate'[128] or rather make it as comfortable as possible also raises questions.

The objective of the truth commission is thus only expressed verbally and anything but by deeds. In fact, finding the truth does not seem to be a priority objective for the Church in Rome. On the contrary, the question arises, based on the final report of the Adriaenssens

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[120] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010.

[121] Els Dumortier, Kevin Goris, Serge Gutwirth, 'De wegen van de Commisise Adriaenssens waren ondoorgrondelijk' (2012) *Panopticon* < https://www.maklu-online.eu/fr/tijdschrift/panopticon/jaargang-volume-33/1-januari-februari-january-february-2012/de-wegen-van-de-commissie-adriaenssens-waren-ondoo//pdf> accesed 20 March 2024.

[122] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010, p.208.

[123] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 205.

[124]Els Dumortier, Kevin Goris, Serge Gutwirth, 'De wegen van de Commisise Adriaenssens waren ondoorgrondelijk' (2012) *Panopticon* < https://www.maklu-online.eu/fr/tijdschrift/panopticon/jaargang-volume-33/1-januari-februari-january-february-2012/de-wegen-van-de-commissie-adriaenssens-waren-ondoo//pdf> accesed 20 March 2024.

[125]All the work was done behind closed doors and therefore the committee cannot substantiate that it always acted independently of the Church and in good faith.

[126] *Ibid*.

[127] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, *Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010, p.261-262.

[128] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, p. 151-153.

Commission[129], whether that priority objective of the church does not lie in protecting its 'own family':

> *'There exists no culture to question this organization of power. Above all, a great weight rests on their shoulders to ensure that the Church is not damaged. They are responsible that things run smoothly in their congregation, diocese or parish. [...] It is expected of each of its members that their behavior will emanate what the Church stands for, will help maintain and protect the family of faith. Those who want to name, acknowledge and address sexual abuse threaten the family.'*[130]

Besides, in its end report, the Commission itself also seems to indicate that the search for truth was not its core business and '*Commission'* was not a good name because it evokes associations with investigative or parliamentary commissions, when *in se* it is rather 'a Centre seeking recognition, healing and reparation'.[131] Or rather a centre for (empty, wordy) forgiveness without real (legal) recognition for the victims?

The growing distrust finally culminated on 24 June 2010 in the seizure of the files by instruction of investigation judge Wim De troy (the so-called 'Operation Kelk').[132] (*see infra*: 2.2.1. Criminal procedure) The Adriaenssens Commission resigned a few days later.[133]

It is regrettable that the Adriaenssens Commission, which seemed to want to provide an answer to the growing scandal both to the victims and more broadly to society as a whole, seemed to be an extension of the stalling of the Commise Halsberghe: the institutionalized grip of the Catholic Church away from any legal recognition or transparency. The Adriaenssens Commission therefore seems to be (in the present author's view) yet another (cover-up) instrument of the institution Church that operated not 'alongside', but 'instead of' or even, 'against' the judicial system by prioritizing its own ecclesiastical principles over the principles of the rule of law, democracy and human rights. As a result, only a verbal recognition (*read*: forgiveness)[134] occurred here for the victims, far from any real legal recognition.

3.2.5. National legal action

The national legal action in Belgium is characterized by a two-track process: a civil claim and a criminal investigation. The civil procedure concerns the proceedings under consideration within this research, where legal remedies have been exhausted to the highest degree, namely up to and including a request for referral before the Grand Chamber of the European Court of Human Rights in accordance with article 43 ECHR.[135] The criminal judicial investigation, on

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[129] Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie*, Verslag activiteiten Commissie voor de behandeling van klachten wegens seksueel misbruik in een pastorale relatie, 19-24 juni 2010,* Leuven, 10 september 2010, p.232-235.
[130] *Ibid.*, 132.
[131] *Ibid.*, 135.
[132]Els Dumortier, Kevin Goris, Serge Gutwirth, 'De wegen van de Commisise Adriaenssens waren ondoorgrondelijk' (2012) *Panopticon* < https://www.maklu-online.eu/fr/tijdschrift/panopticon/jaargang-volume-33/1-januari-februari-january-february-2012/de-wegen-van-de-commissie-adriaenssens-waren-ondoo//pdf> accesed 20 March 2024.
[133] *Ibid.*
[134] Bjorn Ketels, 'Kerk kan verantwoordelijkheid voor pedofilie niet zomaar ontlopen' (2010) Juristenkrant < https://biblio.ugent.be/publication/977714> accessed 10 March 2024.; Walter Van Steenbrugge, *Operatie Kerk*, (Pelckmans Uitgeverij, Antwerpen, 2023.
[135] Van Steenbrugge Advocaten, Request for referral to the Grand Chamber on the basis of article 43 ECHR, 12 January 2022.

the other hand, also called '*operation Kelk'* is at present (after more than ten years since its inception) still not concluded. The case is still at the pre-trial stage of the criminal investigation[136] and therefore there has been no ruling on the merits of the case by a judge on the merits.[137] On 1 July 2024 the federal prosecutor's office has completed its final claim: according to the federal prosecutor the facts are time-barred, other facts cannot be proved or have been previously adjudicated by a court.[138]

The following is, as Walter Van Steenbrugge would call it, '*unique in the Belgian legal history*'.[139] Not unique in the sense that our Belgian legal system has demonstrated a capacity exceedingly high to lead to justice, but how it was crippled by another institution: the institution of the Roman Catholic Church.

3.2.5.1. Operation Kelk (criminal procedure)

Operatie Kelk - Operation Chalice[140] is, unfortunately, engraved in the collective memory of the Belgian legal history.[141] The seriousness of the facts involved, where the most intimate personality rights of victims were affected versus the failure to see this injustice legally translated by means of a properly functioning judicial system, caused this case to gain a certain amount of notoriety over the years. On 21 June 2010, a judicial investigation was initiated with the symbolic code name, '*Operation Kelk*', referring to the chalice ('kelk') as Catholic symbol of holiness, purification and the suffering and sacrifice of Christ.[142]After the Brussels public prosecutor was informed of the hearings[143] that exposed the large-scale child abuse within the Catholic Church, he ordered, on 21 June 2010, a judicial investigation against unknown persons, X, for indecent assault by force or threat on the person of minors under 16, and with

[136] Vooronderzoek in strafzaken.
[137] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 5 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 20 April 2024
[138] Louis Van de Vyver, 'Federaal parket wil niemand vervolgen in Operatie Kelk' De Tijd <https://www.tijd.be/politiek-economie/belgie/federaal/federaal-parket-wil-niemand-vervolgen-in-operatie-kelk/10553712.html> accessed 10 August 2024.
[139] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 64
[140] *Operatie Kelk* can be translated to *Operation Chalice* in English. For the clarity of the research the national term of Operatie Kelk will be used.
[141] For a timeline of the various proceedings conducted in this voluminous case: *see* Van Steenbrugge Advocaten, 'Sexual abuse in the church' (VSA, 2024) <https://vsadvocaten.be/misbruik-in-de-kerk/> accessed 26 May 2024 *and* Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 67-68 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 26 May 2024.
[142] The name of the operation 'Kelk' was chosen symbolically and refers to the chalice (kelk) used during the Eucharist in the Catholic liturgy. The chalice is a symbol of holiness and virtue in Catholic rituals, highlighting the contrast between the holiness represented by the Church and the sexual abuse scandal within the institution. The chalice symbolizes the suffering and sacrifice of Christ. During the Last Supper, Jesus spoke of the chalice as the 'blood of the covenant, which is shed for many for the forgiveness of sins' (Matthew 26:28). Drinking from the chalice at the mass reminds believers of Christ's sacrifice and the salvation that comes from it. The chalice can also be seen as a symbol of purification and spiritual rebirth.
[143] On 4 June 2010, Rik Devillé contacted the federal judicial police in Brussels. He indicated that he wanted to hand over his files containing more than 1,000 reports of sexual abuse to the prosecutor's office for further investigation. On 9 June 2010, Godelieve Halsberghe was further invited by the federal judicial police for questioning. She indicated that she had deposited 33 files from her committee at the State Archives, after which the police decided to confiscate them there. On 18 June, Halsberghe was questioned again. She also mentioned that she had learned that secret documents on large-scale child abuse were hidden in the Sint-Rombouts cathedral in Mechelen.

aggravating circumstance that the abuse took place in a relationship of authority.[144] The preliminary claim also included the request 'to have the files of Halsberghe seized and all other more serious crimes detected and investigated and all necessary acts of investigation carried out.'[145] The criminal investigation by the public prosecutor thus becomes a judicial investigation, codenamed 'Chalice', and falls into the hands of investigating judge[146] Wim De Troy.[147] Investigating judge De Troy proceeds to conduct and order several house searches on 24 June 2010, including at the archbishop's palace in Mechelen, the home and offices of the then Cardinal Danneels and the seat of the Adriaenssens Commission.[148] This imposing judicial action of a set of house searches taking place in a coordinated manner on 21 June 2010 attracted a lot of media attention.[149] The images[150] of the archive boxes (as many as 931) thrown out of windows by detectives went around the world and caused great social commotion, especially in Belgium.[151]The victims further filed a complaint with civil action in the pending judicial investigation on 3 August 2010. The complaint was filed not only against the perpetrator for the sexual abuse itself, but also for the offence of guilty default (against unknown persons).[152] What appeared to be the start of an incisive investigation into the involvement of the church in a cover-up of massive child abuse by clergy, soon turned out to be the start of an unprecedented procedural battle in Belgium.

The first brick in the wall occurred when Mr. Keuleneer, lawyer of Cardinal Danneels and of the archdiocese Mechelen-Brussels on behalf of his clients asked the investigating judge to lift the seizure and return all the documents seized from his clients. Already on 7 July 2010 (and thus before the seized documents could be examined), the attorney general launched an investigation into the investigation.[153] Subsequently, on 30 July 2010, he filed an application before the Chamber of Indictments[154] (hereinafter: KIB) claiming that a number of investigative acts should be nullified.[155]After a (clandestine) hearing on 6 August 2010 to which the victims were not invited (*See infra*: 3.2.10. Investigation 'Hoge Raad Voor de Justitie')the KIB, chaired by J.V.D.E., decided by judgment of 13 August 2010 to uphold this claim in its entirety.[156] Moreover, the KIB, again under the chairmanship of J.V.D.E. and without summoning the victim, ruled by judgment of 9 September 2010 to lift the seizures and immediately nullify all searches of 24 June.[157] In other words, two very short-notice judgments by the KIB, each time under the chairmanship of the same magistrate and without summoning the victims, ruled that almost all investigative actions taken up to that point were null and void and that all seized

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[144] Dirk Tieleman, *Operatie Kelk: Hoe Het Pedofilieschandaal in De Belgische Kerk Losbarstte (*1e Leuven: Van Halewyck 2011) 167; Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 64.
[145] *Ibid*.
[146] This was done by means of a written claim on 21 June 2010, according to article 47 Wetboek van Strafvordering. The judicial investigation can only start as soon as the investigating judge is seized, i.e. as soon as the case is brought before him. The judicial investigation, embodied in article 55 Wetboek van Strafvordering, was thus opened.
[147] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 7 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 20 April 2024.
[148] *Ibid*.
[149] *Ibid*.
[150] https://www.vrt.be/vrtmax/a-z/godvergeten/1/godvergeten-s1a3/ (18:04).
[151] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 66.
[152] *Ibid*. 67.
[153] *Ibid*. 75
[154] Kamer van inbeschuldigingstelling.
[155] *Ibid*. 76.
[156] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 76.
[157] *Ibid.* 77.

documents (including the 931 boxes) had to be removed from the case file.[158] The decisions of the Brussels KIB were contested by the victims at the Court of Cassation where the Court ruled on 12 October 2010 that the victims had been wrongfully denied a hearing.[159]

This was followed by an infernal procedural battle: no less than three times the Court of Cassation had to render a judgment, with the last one on 3 April 2012 after which the KIB was able to reach a final judgment on 18 December 2012.[160] The final judgment pronounced the annulment after all and therefore led to the annulment by the KI of the searches and seizures in the archiepiscopal palace in Mechelen and the residence and offices of Cardinal Danneels.[161]The KI moreover ordered the removal of the seized documents from the judicial file and their deposit at the registry of the court of first instance for preservation (thus allowing all new civil parties to inspect and use the documents in the exercise of their rights).[162] The claims of the archdiocese and Cardinal Danneels to return the documents to the Church were rejected as unfounded.[163]

The federal public prosecutor decided to take charge of the investigation and, consequently, the Kelk case was federalized on 8 March 2011.[164] Both the public prosecutor's office and the attorney general's office, are thus *de facto* no longer a party to the criminal investigation. Their tasks are taken over with immediate effect by the federal prosecutor and his federal magistrates.[165] On 2 April 2012, investigating judge Colette Calewaert was appointed to continue the investigation.[166]

Remarkably, in a judgment dated 20 March 2024, the KIB had ruled the return of the seized documents (the 931 boxes), contradictory to the KIB's final judgment on 18 December 2012. The KIB had reconvened, without summoning the civil parties, under the same chairman J.V.D.E. who had annulled the entire investigation in 2010. This led to the 931 file boxes, which the 18 December 2012 judgment explicitly ordered to be kept at the registry, being returned (clandestinely) to the church representatives.[167] The same period, the federal prosecutor considers that the judicial investigation is complete and requests the investigating judge to communicate the investigation for the preparation of the final claim. The investigating judge complies.[168] (*See infra*: 3.2.10. Investigation 'Hoge Raad voor de Justitie')

In October 2015, the federal prosecutor's office transferred its first final claim along with the case file back to the investigating judge. The final claim listed 68 identified suspects ('suspects under arrest') and 83 civil parties. In summary, the federal prosecutor's office asks the council

[158] *Ibid*. 77
[159] *Ibid*. 78.
[160] *Ibid*. 78.
[161] In essence, the annulment of the searches was ordered because, on 24 June 2010, investigating judge De Troy had not yet been seized for an investigation into culpable negligence and his scope of authority at that time was not broad enough to seize all records. (Only 1 day later, on 25 June 2010, the public prosecutor also requested an investigation into facts of guilty default).
[162] *Ibid*. 79.
[163] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 8 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 20 April 2024.
[164] *Ibid*.
[165] *Ibid*.
[166] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 84.
[167] *Ibid*. 91-96.
[168] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 9 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 20 April 2024.

chamber[169] to find that the criminal proceedings have expired with regard to the majority of those under arrest. This is either because they have already been convicted for the same offences (which is the case for 4 arrestees), or because they have already died (which is the case for 37 arrestees), or because the offences are lapsed.[170]At the hearing of the council chamber in April 2016 , where the first final claim of the federal prosecutor's office was to be heard, the case was postponed indefinitely as, prior to this hearing, several parties filed requests for additional investigations. This implies that these parties consider - unlike the federal public prosecutor - that the judicial investigation is incomplete. Some requests are declared partially well-founded by the investigating judge, which means that additional investigations must be carried out and thus the investigation must continue.[171]

In 2017, four new victims applied for civil action and new requests were filed for additional investigations directly to the investigating judge. One more civil action follows in 2018.[172] In September 2019, the investigating judge (Patrick Gaudius and thus the third investigating judge in this case) transfers the file to the federal public prosecutor's office for the second time to prepare the final claim.[173] More than a year later, on 14 October 2020, the federal prosecutor's office rendered a second claim that maintained the substance of its first final claim. The five posterior civil parties were not included in this final claim. For these, the federal public prosecutor claimed that the investigating judge still would continue the investigation. However, a number of civil parties and suspects disagreed with the federal prosecutor's claim and argued that a separation of the file would violate their rights of defense.[174] In February 2021, the council chamber rejected this and ruled that the proceedings could continue. Some civil parties filed an appeal, which led to the case being brought before the KI, which in turn overruled the council chamber's decision in April 2021 because, in its view, there was coherence between the facts that the federal prosecutor's office wanted to split up. The KI thus opposed splitting the facts that are the subject of the investigation. The investigation is once again transferred back to the investigating judge.[175] The KIB asked the Federal Prosecutor's Office to draw up a new final claim. [176] On 1 July 2024 the federal prosecutor's office has completed its final claim: the claim shows that the public prosecutor's office does not want to prosecute anyone in the case, neither for the sexual abuse, nor the guilty omission, including ex-bishop Roger Vangheluwe. According to the federal prosecutor the facts are time-barred, other facts cannot be proved or have been previously adjudicated by a court. The criminal claim thus has been transferred to the investigating judge. It is now waiting for a date for the pre-trial chamber, where the parties can express their views.[177]

The name of the investigation later turned out to be an omen: the chalice ('kelk') symbolized not the suffering and sacrifice of Christ, but the enduring suffering of the victims. Or as Walter Van Steenbrugge concluded: '*The chalice (Kelk) was emptied, to the bottom*.'

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[169] De Raadkamer.
[170] *Ibid*.
[171] *Ibid*.
[172] *Ibid*.
[173] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 91.
[174] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de Algemene Vergadering van de Hoge Raad voor de Justitie op april' (2024) 9 <https://hrj.be/admin/storage/hrj/verslag-bo-kelk.pdf> accessed 20 April 2024.
[175] *Ibid*.
[176]Van Steenbrugge Advocaten, 'Sexual abuse in the church' (VSA, 2024) < https://vsadvocaten.be/misbruik-in-de-kerk/> accessed 26 May 2024.
[177] Louis Van de Vyver, 'Federaal parket wil niemand vervolgen in Operatie Kelk' De Tijd <https://www.tijd.be/politiek-economie/belgie/federaal/federaal-parket-wil-niemand-vervolgen-in-operatie-kelk/10553712.html> accessed 10 August 2024.

3.2.5.2. Class action (civil procedure)

'*As it became clear from the beginning of Operation Kelk that the investigation case file was being played on by higher powers - with tentacles all the way up to the public prosecutor's office and to the chairman of the KIB - who had staked on boycotting the investigation from the outset, the idea of filing a civil subpoena began to emerge among the victims*.'[178]

Court of first instance Ghent

It seemed quite evident to the victims' lawyers that the policymakers within the Roman Catholic Church had pursued a negligent and therefore erroneous policy by systematically covering up the facts of sexual abuse within the clerical sphere reported to them, and therefore filed a civil action on this ground. On 12 July 2011 four claimants brought a civil liability action before the Ghent Court of First Instance, complaining of the structurally deficient way in which the Church had dealt with the known problem of sexual abuse within the institution.[179] The first of the plaintiffs, R.V., declared that he was acting in his own name and additionally in the name and on behalf of thirty-five other victims.[180] The original class action claim sought to state for justice that the Holy See and the Belgian Bishops and Superiors are jointly and severally liable, at least in solidum, for the (additional) damage suffered by the applicants as a result of the Church's attitude to the sexual abuses committed by clergy of the Church on the basis of art. 1382 Civil Code and art. 1384, paragraph 3 Civil Code.[181] The plaintiffs considered the Pope to be the central figure in the cover-up surrounding these abuses, but as he enjoyed personal immunity as head of state of Vatican City, they named the Holy See.[182]

Specifically, the claim was brought on the basis of art. 1382 of the Civil Code[183], against the Holy See, an archbishop of the Catholic Church in Belgium and his two predecessors, several bishops and two associations of Catholic religious orders.[184] The appeal was based on three different grounds[185]:

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[178] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 91.
[179] European Court of Human Rights, 'Press release: Dismissal of civil action on grounds of Holy See's jurisdictional immunity did not violate Convention' (2021) <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D003-7149712-9693294%26filename%3DJudgment%2520J.C.%2520and%2520Others%2520v.%2520Belgium%2520-%2520dismissal%2520of%2520civil%2520action%2520on%2520grounds%2520of%2520Vatican%25u2019s%2520jurisdictional%2520immunity%2520.pdf&ved=2ahUKEwjagYWvnq6GAxXZ9AIHHUdEBfMQFnoECBYQAQ&usg=AOvVaw0ojbpNfmoGSkZOcrPgorzX > accessed 27 May 2024.
[180] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §4.
[181] Van Steenbrugge Advocaten, Opmerkingen op de observaties tegenpartijen (finale versie).
[182] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §4.
[183] Article 1382 Civil Code (oud Burgerlijk Wetboek): '*Any act of man, which causes damage to another, obliges the person through whose fault the damage was caused to compensate him*.'
[184] *Ibid*.
[185] *Ibid*.; Giorgia Alemanno, 'The "Statehood" of the Holy See and the civil jurisdictional immunity: the judgment of the European Court of Human Rights' (2022) *Revista da Faculdade de Direito do Sul de Minas, Pouso Alegre* 339 <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://revista.fdsm.edu.br/index.php/revistafdsm/article/download/487/495/2289&ved=2ahUKEwjpuZCTtK6GAxVN0wIHHWZCBpoQFnoECB4QAQ&usg=AOvVaw0IpCx-igy6oX6oubAHaeLg> accessed 23 April 2024.

i. Joint and several liability for all defendants, including the Holy See, for faults and omissions related to the general policy adopted relating to sexual abuse.
ii. Liability for all defendants, except for the Holy See, for faults and omissions in the management of individual cases.
iii. Liability of the Holy See for not having acted internally against the bishops.[186]

The last ground of liability of the Holy See was, subsidiary in nature, additionally based on article 1384, paragraph 3 of the Civil Code[187], and based on the indirect liability of the Holy See as principal of the bishops and superiors of religious orders.[188] The victims' request consisted of 2 phases. The applicants requested, in the first phase[189], that the defendants were jointly and severally liable for the damage suffered by the applicants and be ordered to pay provisional compensation of 10,000 euros to each of the applicants on account of the culpable omission and the policy of silence maintained by the Catholic Church in relation to the issue of sexual abuse.[190] In a second phase the victims further requested a declaration that the case would be split into different cases, with separate roll numbers in order that the claimants would pursue their claims for compensation individually on the basis of the details of each case.[191]

By judgment of 1 October 2013 the Ghent Court of First Instance declined jurisdiction in respect of the Holy See, limited itself to examining the claim of the first plaintiff, R.V., declared the summons null and void insofar as it emanated from R.V., and suspended the examination of the 38 other claims.[192]The court declared its lack of jurisdiction on two reasons: firstly, it equated the Holy See with a sovereign state, thus recognizing it as a beneficiary of rights and a bearer of obligations under international law. Secondly, it acknowledged the Holy See's civil jurisdictional immunity based on the customary rule that grants such immunity to states when they perform acts *iure imperii*, which were deemed to prevail in this case.[193]

[186]Giorgia Alemanno, 'The "Statehood" of the Holy See and the civil jurisdictional immunity: the judgment of the European Court of Human Rights' (2022) *Revista da Faculdade de Direito do Sul de Minas, Pouso Alegre* 339 <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://revista.fdsm.edu.br/index.php/revistafdsm/article/download/487/495/2289&ved=2ahUKEwjpuZCTtK6GAxVN0wIHHWZCBpoQFnoECB4QAQ&usg=AOvVaw0IpCx-igy6oX6oubAHaeLg> accessed 23 April 2024.
[187] Article 1384 Civil Code (oud Burgerlijk Wetboek): '*One is liable not only for the damage caused by one's own act but also for that caused by the act of persons for whom one must vouch, or of things in one's custody….Masters and those who appoint others, for damage caused by their servants and appointees in the ministry to which they have employed them….*'
[188] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §4.
[189] This first phase would not address the question of the identity of the victims or the details of each case
[190] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §4.
[191] *Ibid.*
[192] *Ibid*., § 6.
[193]Giorgia Alemanno, 'The "Statehood" of the Holy See and the civil jurisdictional immunity: the judgment of the European Court of Human Rights' (2022) *Revista da Faculdade de Direito do Sul de Minas, Pouso Alegre* 339 <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://revista.fdsm.edu.br/index.php/revistafdsm/article/download/487/495/2289&ved=2ahUKEwjpuZCTtK6GAxVN0wIHHWZCBpoQFnoECB4QAQ&usg=AOvVaw0IpCx-igy6oX6oubAHaeLg> accessed 23 April 2024.

Court of Appeal Ghent

In February 2016, thirty-six of the thirty-nine initial applicants lodged an appeal before the Court of Appeal of Ghent but the Court upheld the contested judgment.[194] The Court of appeal, in line with the contested judgement, treated the Holy See as a sovereign state under international law, basing its entire judgment on this interpretive approach. Upholding the first-instance judgment, the Court considered that Belgium's recognition of the Holy See as a foreign sovereign with the same rights and obligations as a State was irrefutably established. This recognition resulted from a set of elements recognized under customary international law, foremost among which were the conclusion of treaties and diplomatic representation.[195]According to the court, this made it comparable *quod effectum* to a sovereign power and, as such, beneficiary of rights and recipient of obligations of international law, including jurisdictional immunity.[196] Moreover the Court of Appeal held that the Holy See's immunity from jurisdiction *ratione personae* also met the conditions *ratione materiae* for immunity from jurisdiction because of the public authority nature of the acts relied on as the basis for the liability action.[197]

The appeal was based on two main themes: opposing the recognition of immunity for the Holy See's direct liability (on the basis of art. 1382 Code Civil) and identifying the vicarious indirect liability of the Holy See (on the basis of art. 1384, paragraph 3 Code Civil).[198] Relating to the first ground, the Court concluded that the acts fell within the exercise of administrative powers and public authority and should therefore be considered as *acta iure imperii,* rather as acts performed in a private capacity for the defense of private interests (*acta jure gestionis*).[199] On the second ground, with regard to the indirect liability of the Holy See for the failings of the Belgian bishops, the Court of Appeal considered that the relationship between the Pope and the bishops was one of 'horizontal' public law, characterized by the bishop's autonomous power, excluding the existence of a hierarchical relationship in a strict sense. A principal and agent relationship within the meaning of art. 1384 paragraph 3 of the Civil Code was therefore excluded and so the vicarious liability of the Holy See.[200] In this regard, the Ghent Court of Appeal pointed out how the bishop was considered kind of a local legislator which has decision-making powers with regard to the assessment, the treatment and the repression of crimes committed in his diocese.[201] This circumstance meant not only that the failings of which the Belgian bishops were accused could not be attributed to the Pope, as principal, but also that these failings concerned *acts iure imperii*.[202] The Belgian courts focused on the nature of the act and not its purpose to determine whether there was an act of authority or an act of administration.

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[194] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §7.
[195] *Ibid*, §8.
[196] *Ibid*, §8.
[197] *Ibid*, §9.
[198]Giorgia Alemanno, 'The "Statehood" of the Holy See and the civil jurisdictional immunity: the judgment of the European Court of Human Rights' (2022) *Revista da Faculdade de Direito do Sul de Minas, Pouso Alegre* 339 <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://revista.fdsm.edu.br/index.php/revistafdsm/article/download/487/495/2289&ved=2ahUKEwjpuZCTtK6GAxVN0wIHHWZCBpoQFnoECB4QAQ&usg=AOvVaw0IpCx-igy6oX6oubAHaeLg> accessed 23 April 2024.
[199] *J.C. and others V. Belgium* App No 11625/17,(ECtHR, 12 October 2021) §9.
[200] *Ibid*.
[201] *Ibid*.
[202] *Ibid*.

The Court of Appeal furthermore did not consider the nature of the dispute to fell within one of the in the exceptions to the principle of State immunity from jurisdiction of Article 12 of the United Nations Convention nor in Article 11 of the European Convention of 1972, which provide for exceptions to State immunity from jurisdiction in proceedings relating to pecuniary compensation for 'personal injury' or 'bodily harm'.[203] According to the Court of Appeal this exception could firstly not apply to *acta iure imperii*, secondly the faults attributed to the Belgian bishops could not be attributed to the Holy See on the basis of article 1384, paragraph 3, of the Civil Code, and finally, the faults and omissions directly attributed to the Holy See (general policy) had not been committed on Belgian territory but in Rome and neither the Pope nor the Holy See were present on Belgian territory when the faults attributed to the leaders of the Church in Belgium were allegedly committed.[204]

Lastly, from the angle of the right of access to a court within the meaning of Article 6 § 1 of the ECHR, the Court of Appeal considered that the Court's case-law recognized State immunity from jurisdiction as an implicitly accepted limitation on the right of access.[205]The court highlighted that the complaint raised by the applicants against the first instance's judgement was unfounded by virtue of the existence of alternative remedies[206] that, according to the Court, the applicants could have used in order to satisfy their claims.

The Court of Appeal found no connection between the claims against defendants other than the Holy See and limited its examination to R.V.'s claim. It determined it lacked sufficient jurisdiction to hear R.V.'s civil liability action against all defendants, including the Holy See, as the action sought a general declaratory judgment on the wrongfulness of the defendants' policy. Consideration of the claims of the other 35 appellants was suspended until they were individually listed and the listing fees were paid.[207]On 3 August 2016, a lawyer at the Court of Cassation expressed a negative opinion on the chances of success of a possible appeal in cassation.[208] He considered that the Ghent Court of Appeal had rightly determined that the Holy See enjoyed both immunity *personae* and *materiae* from jurisdiction and that there had been no violation of Article 6 § 1 of the ECHR, neither with regard to immunity from jurisdiction nor with regard to questions of Belgian procedural law.[209]

The Belgian legal system unfortunately proved unable to serve justice in this case and to provide an effective and accessible forum for the victims to have the explicitly recognized responsibility of the Church as an institution legally translated. The victims and their lawyers did not stop there and stepped to the European Court of Human Rights in Strasbourg and denounced a violation of their right to a fair trial, as provided by Article 6 of the European Convention on Human Rights.

3.2.6. Parliamentary investigation commission 2011

From the political angle, there was not much action until then. In line with their fight for justice, *Mensenrechten in de Kerk* called on the political parties to establish a parliamentary investigation commission to investigate whether or not there was a culture of tolerance of

[203] *Ibid., §10.*
[204] *Ibid*.
[205] *Ibid*. para 11
[206] Specifically: an action for damages against the bishops or their superiors, a request before an arbitration panel specialized in sexual abuses set up inside the Catholic Church or an appeal before an ecclesiastic Tribunal established within the Belgian Catholic Church
[207] *Ibid*. para 12-14
[208] *Ibid*. para 15.
[209] *Ibid*. para 15.

clerical sexual abuse. [210] In order to break the words '*personne ne te croira*' and respond to the numerous victims, the Chamber of Representatives voted to establish a special commission. [211] Contrary to the needs, a Special Commission was created in accordance with art. 21, second paragraph of the Rules of the House of Representatives and not a Parliamentary Commission of Inquiry.[212] Because of this nuance, the committee does not have the right of investigation[213] and therefore investigative measures are beyond its competence, unlike the competence of the Parliamentary Investigation Committee.

In general terms, the Special Committee was given the task based on 5 assignments. First of all, the commission had to examine how the State, in particular the judiciary and related services, dealt with the sexual abuse, including the modalities of cooperation between the judiciary and the Catholic Church. Secondly, it was to examine victim support and the preventive component. Furthermore, the commission examined how sexual abuse within an authority relationship and especially within a pastoral relationship could be better prevented, traced and dealt with. Furthermore, it also examined on a legislative level what solutions could be provided for the obstacles that the commission will have uncovered regarding the counselling of victims by the judiciary and by partner services for victims of sexual abuse within a custodial relationship.[214] In practice, the recommendations of the commission amounted to on an independent commission paying victims compensation with funds from the Church and a longer time bar for sexual abuse.

3.2.7. The procedure before the ECtHR: the *J.C. and others* v. Belgium judgment

Twenty-four victims applied to the European Court of Human Rights, alleging a violation of art. 6, §1 of the ECHR, arguing that they were denied jurisdictional protection in Belgium as they were not allowed to present their civil claims before the Belgian tribunals of first and second instance. The ECtHR, after declaring the appeal admissible, assessed the validity of the grounds by examining the reasonableness of the State status attributed to the Holy See by national tribunals and the applicability of civil jurisdictional immunity to it. The Court considered the nature of the alleged acts and their relationship with *ius cogens* violations, as well as the existence of alternative remedies available to the applicants, all in light of the right of access to justice as explained in the relevant Convention provision.[215]

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[210] https://www.mensenrechtenindekerk.be/geschiedenis

[211] Instelling van een bijzondere commissie betreffende de behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St.* Kamer, 2010-2011, nr. 53 0520/001.

[212] Artikel 21, tweede lid Reglement van de Kamer van Volksvertegenwoordigers; Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002.

[213] Artikel 145 Reglement van de Kamer van Volksvertegenwoordigers; artikel 4 Wet van 3 mei 1880 op het parlementaire onderzoek, BS 8 mei 1880.

[214] Verslag inzake de De behandeling van seksueel misbruik en feiten van pedofilie binnen een gezagsrelatie, inzonderheid binnen de Kerk, *Parl. St*. Kamer, 2010-2011, nr. 53 0520/002, 16-17.

[215] Giorgia Alemanno, 'The "Statehood" of the Holy See and the civil jurisdictional immunity: the judgment of the European Court of Human Rights' (2022) *Revista da Faculdade de Direito do Sul de Minas, Pouso Alegre* 342 <https://www.google.be/url?sa=t&source=web&rct=j&opi=89978449&url=https://revista.fdsm.edu.br/index.php/revistafdsm/article/download/487/495/2289&ved=2ahUKEwjpuZCTtK6GAxVN0wIHHWZCBpoQFnoECB4QAQ&usg=AOvVaw0IpCx-igy6oX6oubAHaeLg> accessed 23 April 2024.

On 12 October 2021 the long-awaited verdict in the case of sexual abuse by Church clergy fell: the ECtHR ruled that the right to access to a court under art. 6 § ECHR had not been violated. The court's ruling was based on the following four reasonings:

1) The Holy See is entitled to state immunity, because it is a sovereign state

2) The relationship between the bishops and the Pope is of public law and thus the acts must be qualified *acta jure imperii*

3) The alleged torts of the Holy See do not fall within the exceptions to State immunity: no territorial tort exception is applicable

4) The Holy See's immunity is dependent (or should be dependent) on the presence of alternative remedies

The *J.C. and others* judgment will be assessed in the fifth chapter (*See infra*: 5. The Judgment of J.C and others v. Belgium) departing from these four main reasonings. However, in order to be able to evaluate the judgment, the relevant concepts and principles of international law and human rights law will first be described in the fourth chapter. (*See infra*: 4. Framework of concepts)

3.2.8. Godvergeten

Despite the fact that justice (though both civil and criminal procedure) had not yet been administered for the victims, nor the Church's structures fundamentally had been reformed, social attention to the sexual abuse scandal had stagnated after 'Operation Kelk'. Both within wider society and within political circles in Belgium, incomprehensibly, it no longer really seemed to constitute a 'hot topic'. Operation Chalice continued to proceed, subject to all its malfunctions, and civil proceedings were crippled by the immunity granted to the Holy See. Even worse, the present author had the impression that many people had no knowledge, or at least no awareness, of the pervasiveness and seriousness of the scandal. In other words: the Church's foundations shook around 2010 in Belgium, but afterwards it seemed to have quickly stabilized back within society.

When the four-part documentary 'Godvergeten' aired on VRT Canvas in September 2023, this societal silence and inaction was shattered.[216] An unseen movement was set in motion in all strata of society. Visual images representing a scandal that has been tormenting our society for decades, but nevertheless only through the powerful medium of the image triggered a movement within our society. In a very captivating way, victims and family members of victims once again broke the silence and testify not only about the devastating abuse, but also about the vengeful way in which the abuse stayed under the radar. The impact of the serene but highly confrontational documentary could not be underestimated.

The impact of the serene but highly confrontational documentary could not be underestimated. A lot of people felt empowered by the courageous testimonies from the documentary and wanted equally to share their story. 1712, the Flemish government's hotline for victims of violence, recorded 31% more calls after the series. Faithful Christians suddenly had doubts about whether or not to baptize or even de-baptise, members of parliament suddenly took an outspoken stance on the scandal, even a Flemish and Federal parliamentary investigation

[216] *See* documentary: https://www.vrt.be/vrtmax/a-z/godvergeten/ .

committee,…[217] Necessary reactions that should have erupted decades ago because of the seriousness of this scandal. Yet: a television programme decades after the facts only seems to bring about real movement. While the present author encourages these social and political reactions and considers it the essence of a public broadcaster to air documentaries that provoke society to reflect and trigger movement on issues affecting our society, the belated nature of these reactions still raises questions.

Do we, as society -read: the common citizen as well as our policymakers- really need a television program to acknowledge the seriousness of this scandal and finally react? In what unreal bubble did these people live over the last decades when the news was flooded with shocking headlines such as 'The Church's Dutroux case., One congregation, one paedophile cleric., The Church's incestuous silence.,...' and images of boxes of evidence literally ending up in the cover-up. While I find it hard to understand these hypocritically late reactions, the force to social reflection and formation emanating from this program cannot be discarded. It is not the existence of the scandal itself that affects people, but rather the emotional power of the medium. If so, we should have seen these social movements from the very beginning of this human rights scandal. Why, for decades, was it easier for a good Christian follower to turn a blind eye rather than self-reflect and not blindly follow years of tradition? Can one not rather speak of a social and political recovery *a posteriori* here?

In the hope that after 'Godvergeten', the history of *forgetting* will not prevail again.

3.2.9. Parliamentary investigation commissions 2024

'Godvergeten' clearly raised a lot of dust in Belgium. From political corners, all Flemish parties called for the creation of parliamentary commissions of investigation.

At the federal level, a parliamentary commission of investigation was established, which, unlike the 2010 commission, now had explicit powers to interrogate individual victims.[218] (*See supra*: 3.2.6. Parliamentary investigation commission 2011) In its report of 3 May 2024, the commission of investigation made a total of 137 recommendations to the judiciary and the church to strengthen the fight against child abuse and sexual violence. A few of the recommendations to the state authorities can be noted. The commission calls for the creation of a Commissioner for Sexual Transgressive Behaviour and Sexual Violence on Minors and Vulnerable Persons.[219] This person will take charge of the Sexual Violence Expertise Centre, an independent body that will also be established, and formulate policy recommendations. Moreover, the establishment of a new, independent Arbitration Commission with a focus on victims of non-acute sexual violence and legally time-barred offences. A new compensation system should also be developed.[220] In addition, a legal-academic study on the possibility of a retroactive abolition of the time-barring period for child sexual abuse must be undertaken.[221] An additional stronger focus on care for victims through, among other things, the extension of the general telephone and chat line with 24/7 accessibility, better access to psycho-traumatic

[217] Peter Decroubele, Ontdopen na "Godvergeten", wat is het effect voor de Kerk?, VRT NWS <https://www.vrt.be/vrtnws/nl/2023/09/14/ontdopen-effect/> accessed 10 July 2024.
[218] Belgische Kamer van Volksvertegenwoordigers, Verlsag Parlementaire Onderzoekscommissie belast met het onderzoek naar de aanpak van seksueel misbruik, in de Kerk en daarbuiten, met inbegrip van de gerechtelijke behandeling, en de gevolgen op vandaag voor slachtoffers en samenleving, 3 mei 2024 <https://www.dekamer.be/FLWB/PDF/55/3617/55K3617005.pdf> accessed 15 May 204.
[219] *Ibid*., 107.
[220] *Ibid*., 98-102.
[221] *Ibid*., 91-98.

care, better legal support through, for example, 'permanence' of specialised lawyers, the creation of a reparation fund, financed by the perpetrator and/or the institution in the context of which the sexual violence took place, and research into a more appropriate way of calculating the amount of compensation.[222]The recommendations *vis-à-vis* the church, on the other hand, mainly focus on acknowledging responsibility, taking proactive action by tracking down perpetrators themselves through up-to-date evidence or information available to them in their archives and other documents, and cooperating with state authorities.[223] Finally, it was also recommended to optimise the Care Centres after Sexual Violence as multidisciplinary centres where victims are cared for in a low-threshold manner and with a holistic approach.[224]

On the Flemish level, a 'particular' commission was additionally established with a focus on abuse in educational and welfare institutions. 101 recommendations were formulated ranging from the establishment of a new expertise centre, a central reception point for victims, a mental health fund for victims of sexual violence to the installation of a monument or a permanent exhibition in institutions where abuse took place to acknowledge the suffering of victims.[225]

3.2.10 Investigation 'Hoge Raad voor de Justitie'

In both the documentary *Godvergeten* and its side-lines, the lawyers of civil parties heavily criticized the course of the investigation in Operation Chalice. It was clear that the trust of a large part of the population in the judiciary had been severely shaken. In accordance with art. 259bis-16 of the Judicial Code, the High Judicial Council[226] therefore decided to set up a special investigation into the 'Kelk' judicial investigation.[227]

What did the HRJ's investigation reveal? One irregularity succeeded the other on the judicial trail of Operation Chalice. Following dysfunctions were identified:

As regards the start of the investigation, the Minister of Justice was in telephone contact (late June-early July 2010) with the public prosecutor's office in Brussels about the searches of 24 June 2010 that 'could cause problems'.The Minister of Justice was also in contact with the Vatican, which apparently complained about the various searches in Catholic centers, possibly resulting in a diplomatic conflict.[228]

As for the disappearance of evidence, the HRJ confirmed the disappearance of documents (mainly trial transcripts) from the file.[229]The session of the KI Brussels of 18 March 2014 , which gave rise to the judgment of 20 March 2014 was chaired by magistrate J.V.D.E (See supra:

[222] *Ibid*., 77-80
[223] *Ibid*., 115-120.
[224] *Ibid*., 184.
[225]Vlaams Parlement, Verslag plenaire vergadering 8 mei 2024 <*https://www.vlaamsparlement.be/nl/parlementair-werk/plenaire-vergaderingen/1825213/verslag/1827373*> *accessed 25 May 2024.*
[226] The High Judicial Council is an independent institution. Composed of Dutch-speaking and French-speaking magistrates and non-magistrates, the HRJ is authorized to exercise external control over the functioning of the judiciary through audits and special investigations.
[227] Hoge Raad voor de Justitie, 'Bijzonder onderzoek "Kelk"- Verslag goedgekeurd door de algemene vergadering van de Hoge Raad voor de Justitie op 15 April 2024' <https://vsadvocaten.be/wp-content/uploads/2024/04/Volledig-verslag-Hoge-Raad-voor-de-Justitie-Operatie-Kelk-.pdf> accessed 25 May 2024.
[228] *Ibid*., 20.
[229] *Ibid*., 39-42.

3.2.5.1. Operation Kelk: criminal procedure) However, this magistrate had previously withdrawn from the case, in a different proceeding but in the same case, following a motion to challenge filed against him by a number of civil parties. Magistrate J.V.D.E. should therefore not have been permitted to preside in this case. The federal public prosecutor, who should have known that J.V.D.E. had already been challenged earlier in this case, did not raise this during the KI hearing in March. The federal prosecution should have done so because no other party was able to do so since they had not been summoned.[230]

Given the earlier judgments of the Court of Cassation of 12 October 2010, the civil parties should have been summoned to the sessions of the KI of 18 and 20 March 2014 , which gave rise to the judgment of 20 March 2014 (which led to the return of the seized documents (the 931 boxes) to the Church).[231] (*See supra*: 3.2.5.1. Operation Kelk: criminal procedure)

The HRJ also noted the long duration of the investigation of 14 years since the start of the investigation, which did not mean that the case was consequently thoroughly investigated in terms of its content, but rather quite the contrary.[232]

From these observations, it can be said that one irregularity succeeded the other one in the trial of Operation Chalice. It can rightly be concluded that :'*Blaming all this on coincidence or dismissing it as some dysfunctions that can happen within the judiciary is not plausible*.'[233]

3.3. Too little, too late?

More than two decades since the large-scale sexual abuse in the bosom of the Roman Catholic Church broke out in Belgium, the victims find themselves to this day without any real legal recognition of the injustice done to them during their childhood.

In the criminal investigation, the public prosecutor's office has made its final claim and does not wish to prosecute anyone. The civil proceedings, on the other hand, could never be judged on their merits because of the immunity granted to the Holy See. At the procedural level, the resources have been exhausted. However, the scars of the inflicted injustice remain, but will never be legally translated. This is a bitter reality: after 20 years of litigation, and worse after all those devastated human lives, the Church does not have to justify itself before the State courts. That the Roman Catholic Church does not take responsibility for human rights violations is 1 thing. That state structures bend to this, on the contrary, is above comprehension in a State which upholds the rule of law.

Depending on the social and political attention the scandal received, the injustice came back into the public eye and commissions were established. Nevertheless, the two inner-church commissions quickly proved to be a tool of church authorities to draw it to themselves and escape any legal scrutiny. Moreover, the 2011 parliamentary committee was limited in its competences as a special committee as the committee did not have the right of investigation.

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[230] *Ibid*., 43-47.
[231] *Ibid*., 65.
[232] *Ibid*.
[233] Walter Van Steenbrugge, 'Rapport Hoge Raad Justitie 16 april 2024: de doorlichting' Van Steenbrugge Advocaten < https://vsadvocaten.be/wp-content/uploads/2024/04/Doorlichting-Rapport-Hoge-Raad-voor-de-Justitie.pdf> accessed 10 August 2024.

For a decade, the broader society and the political world seemed to have little concern for the fate of the victims. Until in September 2023 'Godvergeten' broke the silence and an unseen movement was set in motion in all strata of society. Visual images representing a scandal that has been tormenting our society for decades, but nonetheless only through the powerful medium of the image triggered a movement within our society. Given the late nature of these reactions, this rather gives the impression of a political recovery. Two commissions were established, one in the lap of the federal parliament and one in the lap of the Flemish Parliament. Recommendations such as the establishment of a fund for the victims to which the Church should contribute and calls for the Church to proactively track down perpetrators themselves through up-to-date evidence or information available to them in their archives and other documents are warmly encouraged. Given the trust of a large part of the population in the judiciary had been severely shaken, the High Judicial Council therefore decided to set up a special investigation into the 'Chalice' judicial investigation. One thing became clear: one irregularity succeeded the other in the trial of Operation Chalice. How can a proceeding that was full of procedural defects and where evidence did not even see the light of the investigation be seen as an effective remedy?

Consequently, the victims never even had the chance to present their case to a judge, and became victims for a second time, this time of the Belgian justice system. This factual context brings out how the Belgian judicial system was systematically and structurally obstructed by the Roman Catholic Church. In the present author's view, the Church's interventions can be seen as a *deus ex machina*: God out of the machine.

Our Belgian legal system could not bring justice to the victims; in chapter five we will examine to what extent the ECHR was able to uphold the principles of human rights and the rule of law against this *deus ex machina*. (*See infra*: 5. The judgment of J.C. and others v. Belgium)

3.4. Serious issue of general importance

It is without doubt that this scandal raises an important issue at the European and even global level. The sexual abuse scandal within the Church and the accountability of Church clergy for this abuse, has been part of the European and global political, legal and social debate.

At the level of the United Nations, first and foremost, the topic has been addressed several times by different bodies. In January 2014 the Committee of the Rights of the Child condemned in very strong terms the Holy See's failure to protect children. This report strongly denounces the abuse and mismanagement within the Catholic Church.[234] According to the Committee, the Holy See's mismanagement made it possible for priests to abuse thousands of children and, at the same time, the wrong approach afterwards made victims of child abuse and their families re-victimized. The Committee believes that the Holy See, as supreme authority of the Catholic Church, must respect the rights of the child in every situation involving individuals and institutions under its authority. This is a clear reference to the known strategy of the Holy See in the civil procedure in Ghent: pointing out the immunity as head of state of the Vatican City State. Above that, in June 2014, the Holy See was for the first time reviewed by the Committee Against Torture. The Committee issued a condemning report finding that the widespread sexual abuse within its institute amounts to torture and cruel, inhuman and degrading

[234] Committee on the Rights of the Child, Concluding observations on the second periodic report of the Holy See, Distr.: General 25 February 2014.

treatment.[235] Lastly, a team of UN Special Rapporteurs for the Office of the High Commissioner for Human Rights sent in April 2021 a letter to the Holy See to urge the Holy See to take all necessary measures to stop and prevent the recurrence of violence and sexual abuse against children in Catholic institutions, and to ensure those responsible are held to account and reparations are paid to victims.[236] A press release in June 2021 further stated that:

> *"In a letter to the Holy see in April 2021 the experts expressed utmost concern about the numerous allegations around the world of sexual abuse and violence committed by members of the Catholic Church against children, and about the measures adopted by the Catholic Church to protect alleged abusers, cover up crimes, obstruct accountability of alleged abusers, and evade reparations due to victims…*
>
> *The experts noted the persistent allegations of obstruction and lack of cooperation by the Catholic Church with domestic legal proceedings to prevent accountability of perpetrators and reparations to victims. They also noted the* concordats *and other agreements negotiated by the Holy See with States that limit the ability of civil authorities to question, compel the production of documents, or prosecute people associated with the Catholic Church….*
>
> *Given that these violations, and their cover-up, have allegedly been committed for decades in a large number of countries around the world, as well as the tens of thousands of alleged victims, we note with great concern the apparent pervasiveness of child sexual abuse cases and the apparent systematic practice of covering up and obstructing the accountability of alleged abusers belonging to the Catholic Church."*[237]

Additionally, other human rights organizations have expressed their concerns about the sexual abuse scandal in the Catholic Church. Amnesty International has repeatedly raised a voice to end the impossibility for sexual abuse victims to seek justice and to get reparations. For instance, Sir Claudio Cordone, the then Senior Director at Amnesty International stated:

> *" We welcome the acknowledgement by Pope Benedict of the gravity of such abuse, but we expect the Pope to ensure that no more children suffer from sexual abuse at the hands of priests and that those who have already suffered are able to seek justice and receive reparations."* [238]

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[235] Committee against Torture, Concluding observations on the initial report of the Holy See, 17 June 2014, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/054/05/PDF/G1405405.pdf?OpenElement .

[236] UN Special Rapporteurs for the Office of the High Commissioner for Human Rights, Mandats du Rapporteur spécial sur la promotion de la vérité, de la justice, de la réparation et des garanties de non-répétition; du Rapporteur spéciale sur les droits des personnes handicapées; de la Rapporteuse spéciale sur la vente et l'exploitation sexuelle d'enfants, y compris la prostitution des enfants et la pornographie mettant en scène des enfants et autres contenus montrant des violences sexuelles sur enfant; et du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants, 7 April 2021, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26316.

[237] United Nations, Press release: UN experts urge Catholic Church to act against sexual abuse, provide reparations, 21 Juni 2021, https://www.ohchr.org/en/press-releases/2021/06/un-experts-urge-catholic-church-act-against-sexual-abuse-provide-reparations.

[238] Amnesty International, Pope must take decisive action against child abuse by clergy, 15 September 2010, https://www.amnesty.org/en/latest/news/2010/09/papa-actuar-contra-abusos-menores-clero/.

Furthermore, one sees several non-governmental organizations that have been speaking up on behalf of thousands of victims of sexual abuse by Church clergy. The mere existence of these NGO's already proves that the issue of child sexual abuse by clergy and the related issues of state immunity is harrowing. The leading NGO is the Survivors Network of those Abused by Priests ("SNAP")[239], located in the United States and in Europe we have the non-profit association Eckiger-Tish[240].

4. Framework of concepts

Before evaluating the judgment of *J.C. and others* v. Belgium the following concepts that will operate as evaluation criteria will be described: 4.1. The Holy See (including its non-state qualification under 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity), 4.2. The principle of immunity, 4.3. Article 6 ECHR: The right to a fair trial, 4.4. Child sexual abuse.

4.1. The Holy See

4.1.1. The Holy See: a multi-layered actor

'*The most special - the most other, so to speak - among the so- called international persons other than State.*'[241]

'*The Holy See is an 'anomaly', an 'atypical organism.*'[242]

The Holy See holds an atypical status in international law and has been the subject of debate for centuries.[243] Few subjects of international law have such a far-reaching and widespread impact. The Holy See nevertheless shares few common features with other global players, as it has a small standing army, no nuclear weapons, no natural resources, and a population of about 1,000 people.[244] However, the Holy See does have a unique attribute: it's historical

[239] https://www.snapnetwork.org.
[240] https://www.eckiger-tisch.de.
[241] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024
[242] Robert John Araujo, 'The Holy See- International person and sovereign' (2011) Vol. 1 Ave Maria International Law Journal 22 <https://deliverypdf.ssrn.com/delivery.php?ID=044090101066109126068071082003084088034056090036079024023025126111067002108031095075060056032028047044115026098028007081097123112075028080092082021115096025015098110026011016025029123096086089081029028066004086029093108100078007123006003019070101008084&EXT=pdf&INDEX=TRUE> accessed 24 April 2024
[243] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 598 < https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 2024
[244] Jace Bartz, 'The Holy See: An Institution Like No Other' (2022) Claremont–UC Undergraduate Research Conference on the European Union 2 < https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1190&context=urceu> accessed 6 April 2024

multi-layered actorness.[245] Abovementioned citations are just a few designations used to denote the unique multi-layered character of the Holy See. Some think that this uniqueness is that of a monster who has hopelessly fallen out of time…[246]

The constantly broadening and evolving scope of the (international) role played by the Holy See makes the Holy See a unique actor and therefore demands an analysis of the particular nature of it's international status.[247] This chapter will attempt to deconstruct and clarify that unique nature of the Holy See.

The 'Holy See' covers several layers. Before unveiling these from a perspective of international law: what's in a name?[248] The Holy or Apostolic See (*Sancta Sedes*)[249] is the seat of the bishops of Rome and the governmental centre of the Catholic Church. The Holy See is headed by the Supreme Pontiff or the Pope, who, in his administration of the Church, is assisted by the Roman *Curia*.[250]

Departing from within the institution itself, the Code of Canon Law defines the Holy See as follows: *'In this Code, the term Apostolic See or Holy See refers not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words.*'[251] It moreover stipulates that the Supreme Pontiff usually conducts the affairs of the universal Church through the Roman Curia which performs its function in his name and by his authority for the good and service of the churches. The Roman Curia consists of the Secretariat of State or the Papal Secretariat, the Council for the Public Affairs of the Church, congregations, tribunals, and other institutes; the constitution and competence of all these are defined in special law.[252] The Dogmatic Constitution of the Church additionally states that the pope's power of primacy over both pastors and faithful remains whole and intact. In virtue of his office, that is as Vicar of Christ[253] and pastor of the whole Church, the Roman Pontiff has full, supreme and universal power over the Church, and he is always free to exercise this power.[254] By virtue of his office, the Roman Pontiff not only has power over the

[245] Mariano Barbato, 'A State, a Diplomat, and a Transnational Church: The Multi-layered Actorness of the Holy See' (2013) CEEOL 27 < https://www.ceeol.com/search/viewpdf?id=236720> Accessed 3 April 2024

[246]

[247] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 < http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[248] When playwright William Shakespeare asked the question, 'What's in a name?' in Romeo and Juliet, he was referring to the idea that names themselves are a convention to distinguish things or people, but themselves do not have any worth or meaning. In other words: in what terms something or someone is defined, is arbitrary compared to their intrinsic values.

[249] The word "See" is derived from the Latin *sedes*, generally used to refer to the seat or residence of a Bishop.

[250] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Mariano Barbato, 'A State, a Diplomat, and a Transnational Church: The Multi-layered Actorness of the Holy See' (2013) CEEOL 27 <https://www.ceeol.com/search/viewpdf?id=236720> Accessed 3 April 2024

[251] Can. 361 Code of Canon Law

[252] Can. 360 Code of Canon Law.

[253] The Pope is often referred to as the 'Vicar of Christ', meaning he acts as a representative of Christ on Earth. This title underscores the belief that the Pope's authority is not self-derived but granted by God to lead the Church in Christ's stead.

[254] Art. 22 Dogmatic Constitution of the Church

universal Church, but also has pre-eminent ordinary power over all particular Churches and their groupings, including dioceses. He is always joined in full communion with the other Bishops, and indeed with the whole Church.[255]

4.1.2. The international legal personality of the Holy See

The Holy See has a unique[256] (read: privileged) and one-way position in international law as it enjoys a wide range of rights in international law, with few to no obligations.[257] It has engaged in various intergovernmental organizations, it is party to a substantial number of bilateral and multilateral agreements, it sends and receives diplomatic representatives, it reputedly benefits from immunity from legal jurisdiction, and has been granted a permanent observer status at the United Nations.[258] However, these are rights that (primarily) belong to state actors.[259] '*Although in recent decades a proliferation of non- state actors has changed the landscape of the international community, the state itself remains the critical component of international law and international relations'* [260] International law, after all, mainly deals with the rights, duties and responsibilities of states.[261] Therefore, it is essential to identify which entity qualifies as a state and which falls outside the scope of this qualification.

The international legal personality of the Holy See has been the subject of much debate and controversy.[262] Given the far-reaching rights and obligations that come with the qualification of state actors, it is crucial to examine the concrete legal personality of the Holy See. This assessment is conducted to comprehend the actual legal nature and status of that entity in comparison to similar ones, as well as to determine whether it, along with its officials, holds rights, responsibilities, and obligations under international law.[263] Ambiguities namely persist about the precise relationship under international law between the Roman Catholic Church, the Holy See and the Vatican City State.[264] The starting point for determining these concepts

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[255] Can. 331-33 Code of Canon Law. (Attention should be paid to paragraph 3: '*There is neither appeal nor recourse against a judgement or a decree of the Roman Pontiff*')

[256] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415

[257] John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26 EJIL 928 <https://academic.oup.com/ejil/article/26/4/927/2599610?login=true> accessed 8 April 2024

[258] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[259] *Ibid*.

[260] Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) Columbia Journal of Transnational Law 403 <https://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/cjtl37&id=411> accessed 17 April 2024

[261] Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024; Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[262] Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024

[263] *Ibid*.

[264] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 <http://www.gaetanoarangioruiz.it/wp-

is the very definition of the nature of the international legal personality of the entities concerned.[265] However, this definition is based on existing theories within international law and the concept of international personality.[266] The question of international personality and recognition has been characterized by a doctrinal debate between the *constitutive theory* and the *declaratory theory* of international law.[267] Given the pivotal role of states in international law, one might assume that the definition of a state has been clearly and thoroughly established.[268] Nevertheless attempts to set out a standard definition of 'state' have either not achieved broad consensus or have unsatisfactory described the concept.[269] The classical and commonly referenced definition of the criteria for statehood is set forth in the 1933 Montevideo Convention.[270]

The starting point for understanding the status of the Holy See in international law is the broader concept of international legal personality in international law itself. Within this framework, the doctrinal dispute between the declaratory and the constitutive view on recognition of states will be set out. The Montevideo Convention of 1933 will subsequently be outlined, as the source most often cited as an authority on the definition of the state. Based on this overview, the interrelated concepts of the Holy See, Vatican and the Roman Catholic Church and their status in international law will be further explained. Given the importance of the qualification of state for this research, the question of whether the Holy See can be seen as a state actor will then be specifically addressed. Because of the connection between the Holy See and the Vatican in this test, the (importance of) distinctions between the two will be elaborated and their distinctive status in international law.

4.1.2.1 Legal personality in international law

The international legal system has its own entities (subjects of international law) to which it applies, and which possesses a greater or lesser degree of international legal personality.[271]

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content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[265] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024; Tiyanjana Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections'(1986) 19, 1, The Comparative and International Law Journal of Southern Africa 3 <https://www.jstor.org/stable/23905611?read-now=1&seq=3#page_scan_tab_contents> accessed 30 April 2024

[266] *Ibid.*

[267] Stefan Talmon, 'The constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?' (2005) 75(1) The British Year Book of International Law 101-181 <https://www.proquest.com/docview/1563998195?pq-origsite=gscholar&fromopenview=true> accessed 19 April 2024

[268] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[269] Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) Columbia Journal of Transnational Law 403 < https://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/cjtl37&id=411> accessed 17 April 2024

[270]

[271] Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United

Subjects of international law are entities or persons that are recognized by customary law as being capable of possessing rights and duties under international law.[272] The '*International law- A European perspective*' book touches the substantive core of this concept:

> *'The capacity to possess certain rights and obligations under international law' is accompanied by a set of more formal corollaries, mainly: (i) the capacity to contribute to the formation of international law (in particular through the conclusion of treaties or by contributing to evolutions in customary international law); (ii) the enjoyment of certain privileges and immunities; and (iii) access to international dispute settlement mechanisms.'*[273]

The primacy of state actors in international law remains as is reflected by the fact that states are the only subjects that have full legal capacity[274].[275] However, as the International Court of Justice (hereinafter: ICJ) observed in the *Reparation for Injuries Advisory Opinion*[276]: 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.'[277] In this regard, a distinction should be made between subjects with full legal personality[278] (states and state-like entities) and subjects with partial legal personality[279](subjects of international law other than states and state-like entities).[280] The (exclusivist) approach that states are the only subjects of international law is consequently outdated and international organisations and various non-state actors enjoy some form of international legal personality.[281]

Kingdom: Cambridge University Press, 2022) 35; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 211

[272]James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 115; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 166; Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law* (Cambridge, United Kingdom: Cambridge University Press, 2022) 35; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 211

[273] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 211

[274]Their full legal capacity means that they have all rights, duties, and competences under international law. All other subjects of international law possess partial legal capacity, meaning that they only have some international rights, duties, and competences.

[275]Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 35; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 166

[276] *Ibid*.

[277]*Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178

[278] Full legal capacity means that they have all rights, duties, and competences under international law

[279]Partial legal capacity means that they only have some international rights, duties, and competences.

[280]Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 35; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 166

[281] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 212

The declaratory vs. the constitutional theory on the recognition of states

'*There is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven. As the result, there has grown up a tendency to maintain that the crucial question of granting or refusing recognition is not one of international law.*'[282]

Before delving deeper into the elements of statehood, the two competing theories as to the recognition of a state, the *declaratory* and the *constitutive* theory, are elaborated.[283] The declarative perspective confirms (*declares*) an existing (state) actor in the international legal order, where the constitutive view, on the other hand, creates (*constitutes*) a new (state) actor in the international legal order. In that sense, Talmon characterizes the declaratory view as *status-confirming* and the constitutive view as *status-creating*.[284]

According to the constitutive theory, formal recognition is necessary for the existence of a state.[285] A state may have all the attributes and qualifications of statehood, but unless recognition is granted by other states, it will not acquire the status of a state.[286] Therefore, the juridical act of recognition itself creates a new state with rights and obligations in international law, a new member of the international community.[287] From this constitutive position, recognition is of a purely political nature.[288] Currently the constitutive theory is no longer widely embraced because of its shortcomings[289] and most scholars view recognition as declaratory in nature.[290]

Pursuant to the declaratory approach, a state exists as a subject of international law as soon as it 'exists' as a fact; as soon as it fulfills the conditions of statehood as laid down in

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[282] Hersch Lauterpacht, *Recognition In International Law* (Paperback reissue of the edition 1947 Cheltenham: Cambridge university press, 2012)

[283] Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 46; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214

[284]Stefan Talmon, *The constitutive Versus the Declaratory Theory of Recognition:* Tertium Non Datur*?(*British Yearbook of International Law, Volume 75, Issue 1, 2004) 101

[285]Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 46; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214

[286] *Ibid*.

[287] *Ibid*.

[288] Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214

[289]It grants states broad discretion to decide whether or not to recognize and, hence, whether or not a state has emerged. Difficulties moreover occur when an entity is recognized by some, but not by others. As Lauterpacht states, "the constitutive act creative of statehood is an act of unfettered political will divorced from binding considerations of legal principle." Consequently, recognition as a legal norm becomes susceptible to misuse as a political tool, enabling states to advance their own interests and deny rights to entities with strong claims to statehood that are not yet members of the international community. Furthermore, strict adherence to a constitutive approach may result in situations where a state lacks universal recognition, possessing international personality only *vis-à-vis* certain states rather than other.

[290]Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 46; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214; Hersch Lauterpacht, *Recognition In International Law* (Paperback reissue of the edition 1947 Cheltenham: Cambridge university press, 2012)

international law.[291] Recognition operates here merely as a formality by acknowledging the existence of that fact and declaring that the criteria of statehood are fulfilled.[292] According to this '*status conforming'* approach, the legal consequences of recognition are limited: it represents a declaration or acknowledgment of an established legal and factual state, with legal personality having been granted previously through the operation of law.[293] The legal rights and responsibilities are inherently accorded, in line with the natural law view of international law. According to this view, recognition serves the purpose of entering into political relations with another state, without imposing any concrete legal obligations.[294] The declaratory theory is supported by treaties, declarations of states and by jurisprudence.[295] The Montevideo Convention forms an endorsement of this declaratory approach.[296]The declaratory theory holds the upper hand in legal doctrine and State practice in recent times[297], but a strict application of this approach should be avoided due to the inherent deficiencies.[298]

Elements of statehood (Montevideo convention)

The entitlement to statehood is a matter regulated by a set of (mostly) objective criteria that form part of customary international law.[299] The most widely accepted source as an authority

[291]Hersch Lauterpacht, *Recognition In International Law* (Paperback reissue of the edition 1947 Cheltenham: Cambridge university press, 2012) 41

[292] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 233; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214

[293] James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 134

[294] Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 AJIL 610 < https://www.jstor.org/stable/2192561?seq=3> accessed 22 April 2024

[295] Stefan Talmon, 'The constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?' (2005) 75(1) The British Year Book of International Law 101-181 https://www.proquest.com/docview/1563998195?pq-origsite=gscholar&fromopenview=true accessed 19 April 2024

[296] Art. 3 Montevideo Convention on the Rights and Duties of States 1933

[297] *Deutsche Continental Gas-Gesellschaft v. Polish State* [1929] 5 ILR 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595; Institut de droit international (n 58) providing the following definition in article 1: 'La reconnaissance d'un État nouveau est l'acte libre par lequel un ou plusieurs États constatent l'existence sur un territoire déterminé d'une société humaine politiquement organisée, indépendante de tout autre État existant, capable d'observer les prescriptions du droit international, et manifestent en conséquence leur volonté de la considérer comme membre de la Communauté international.'; Montevideo Convention on the Rights and Duties of States 1933.

[298] The declaratory view that the act of recognition does not have any legal consequences cannot be upheld. It is only workable if international law and State practice agree as to the criteria for statehood. It does not work in a situation where States are required under international law to withhold recognition (customary international law and *erga omnes* obligation to withhold when in breach with *jus cogens*). States are not under any obligation to engage in international relations with one another to the fullest extent. States can, if so desired, establish alternative relations with other unrecognised entities in light of functional needs. It is moreover clear that the degree of recognition has repercussions for the 'capacity to enter into international relations with other States', which is interwoven with the independence requirement of statehood.'

[299]Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 214

of the criteria for statehood forms the Montevideo Convention of 1933.[300] According to article 1 of the Montevideo Convention, a State as a person of international law should possess the following qualifications:

> *'a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States'. The first three criteria are discussed succinctly below. The fourth requirement can be framed somewhat differently as a requirement of 'independence', which is ultimately the decisive criterion of statehood, and is discussed at some length below.'* [301]

The list of criteria offers a concise and accessible standard for evaluating whether an actor of international law qualifies as a state. Nevertheless, it remains uncertain whether the Montevideo criteria offer a comprehensive definition of statehood.[302] Despite this ambiguity, the four criteria have played a significant role in attempts to delineate statehood and citation to the Convention is almost a reflex in contemporary discussions of statehood.[303] The four distinct criteria will be discussed below within the specific chapter where the statehood of the Holy See will be examined. (*See infra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity)

4.1.2.2. Interrelated concepts: the Roman Catholic Church, Holy See and Vatican City

To have an accurate understanding of the Holy See, a necessary distinction will be made between the interrelated concepts of the Holy See, the state of Vatican City and the Roman Catholic Church departing from a historical background. Analyzing these actors from a historical perspective is necessary to have a proper notion of these loaded concepts and, above all, to understand the development of the Holy See as a person under international law.[304] The Holy See, the state of Vatican City and the Roman Catholic Church are so interrelated that they must be defined in terms of each other.[305] When the Lateran Treaty established the State of Vatican City in 1929, it was intended to be clearly distinct from both the Holy See and the Roman Catholic Church.[306] The Holy See acts as the supreme organ of

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[300] Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934);Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) Columbia Journal of Transnational Law 414 <https://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/cjtl37&id=411> accessed 17 April 2024

[301] Article 1 Montevideo Convention on Rights and Duties of States

[302] Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) Columbia Journal of Transnational Law 414 <https://heinonline.org/HOL/Print?collection=journals&handle=hein.journals/cjtl37&id=411> accessed 17 April 2024

[303] *Ibid*.

[304] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[305] *Ibid.*

[306] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

government of the Catholic Church. In other words, the Holy See is to the Catholic Church what the government is to the State, with the difference that the monarchical constitution of the Church (of divine origin) is not subject to change. The Holy See must not be confused with the Roman Catholic Church itself.[307] The Roman Catholic Church is composed of the faithful around the world, whereas the Holy See is the governing body of the Church.[308] The Church forms the universal religious organization of the faithful, founded by Christ as a hierarchically organized entity in its own right pursuing its own spiritual aims.[309]

The Pope is simultaneously the head of the Holy See and the absolute leader of the Church.[310] The Pope is moreover the temporal ruler[311] of the state of Vatican City. In both the Church and the Holy See, the Pope is the absolute leader in religious, administrative, diplomatic and political matters.[312] The pope is the last absolute monarch (read: dictator) as he exercises unlimited power in all matters regarding the Church and the Vatican City.[313]

i. The Roman Catholic Church

The oldest institution on earth, the Roman Catholic Church, maintains a widespread flock[314], with more than a billion adherents representing almost a sixth of the world's population.[315] The Catholic Church and the Holy See constitute two distinct entities which must not be confused.[316] As Cardinale Hyginus Eugene stipulates: '*By Church we hereby intend the universal society of the faithful, founded by Christ as an hierarchically organised entity in its own right pursing its own spiritual aims with its own means, independent of any other entity or authority*.'[317] Hence, the Roman Catholic Church is the entirety of group of people formed on purely spiritual arguments around Jesus Christ, which has formed its own organization and

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[307] *Ibid.*

[308] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1837 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024

[309] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 85

[310] Can. 331 Code of Canon Law.

[311] Temporality refers to civil or political authority, as distinguished from spiritual or ecclesiastical power.

[312] Art. 22 Dogmatic Constitution of the Church.

[313] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[314] The 2024 *Pontifical Yearbook* and the 2022 *Statistical Yearbook* of the Church show a rise of one per cent globally in the number of baptised Roman Catholics, from 1.376 billion in 2021 to 1.390 billion in 2022

[315] Allen D. Hertzke, 'The Catholic Church and Catholicism in global politics' in Jeffrey Haynes, *Routledge Handbook of Religion and Politics* (2016); L'Osservatore Romano, 'New Church statistics reveal more Catholics, fewer vocations' (2024) Vatican News <https://www.vaticannews.va/en/vatican-city/news/2024-04/vatican-central-statistical-office-church-pontifical-yearbook.html> accessed 28 April 2024

[316] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[317] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 85

runs an autonomous course. [318] The Roman Catholic Church is composed of its members around the world, whereas the Holy See is the supreme organ of government of the Church.[319]

The Church's aims and activities are spiritual.[320] The true foundation of the international legal personality of the Roman Catholic Church lies in its spiritual sovereignty. Through the centuries this spiritual sovereignty was the origin and legal basis of a growing temporal power.[321] Although not always clearly maintained, and moreover a convenient tool for international recognition, even before the loss of the Papal States, the temporal power of the Pope was an accessory of the clergy to the canonical doctrine.[322] Consequently, the Holy See enjoys international personality on the basis of a very particular, spiritual, title.[323] (*See infra*: 4.1.2.3. State actor? Vatican vs. Holy See, B. Spiritual sovereignty)

This spiritual sovereignty finds its basis in enduring legal and sociological arguments in a centuries-old ongoing reality.[324] The grounds of this spiritual sovereignty are therefore *legio*. The Roman Catholic Church can be regarded as a century- old, if not the oldest, group of people formed on purely spiritual arguments. And above all, one of the most important and universal institutions in the world. A supranational, or better; transnational organization[325] to the extent that its jurisdiction extends over the countries and its purpose is in the moral field.[326] In fact, the Church can be conceived as an 'organisme atypique'.[327] Precisely because of its nature as a multi-layered actor, it cannot be captured by the mere qualification as a state or

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[318] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 290 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[319] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1837 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024; Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 85

[320] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 289 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[321] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[322] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 291 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[323] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[324] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 291 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[325] The assertion of 'supranational' character of the Holy See is not infrequent today. According to Cardinale Huginus Eugene: 'This needs to be understood in an entirely different sense from the meaning of the word used in a political context, …. For this reason such an attribute should be applied sparingly and cautiously to religious bodies. When applied, the sense is that the Catholic Church and the Holy See, because of their origin and their ultimate aims, occupy a distinct and pre-eminent position in relation to the other members of the international community which belong to the temporal order. … The Catholic Church and Holy See are often referred to as supra-national rather than international entities in the sense that by their very nature they are not tied to any particular people, nation or form of political government but carry out a spiritual mission that is universal, i.e. directed to all mankind without distinction.

[326] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 291 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[327] Igino Cardinale *Le Saint-Siège et la diplomatie: apercu historique, juridique et pratique de la diplomatie pontificale (*Desclée, University of Michigan 1962)

other subject of international law, but nevertheless has analogous characteristics to it.[328] Nevertheless, the Church gathers people (the faithful), bound by laws and customs (sacraments, canon law, apostolic constitutions and customs), and guided by a body (the Holy See).[329] The absence of territorial basis (and temporal sovereignty) in 1870-1929 sufficiently demonstrated that this spiritual sovereignty was sufficient to sustain the Catholic Church as an international object of law.[330]

ii. The Holy See

'*The international and transnational role of the Holy See, which serves the adherents of the Roman Catholic faith spread over the entire world, complicates the quest for a precise legal characterization of the Holy See. What is clear is that the Holy See is not simply the government of the territorially delimited Vatican City, but the governance center of the Roman Catholic Church, …. "The Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. …The Holy See is the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church*".'[331]

The Holy See has been considered enjoying international personality without interruption from the time of the inception of the rules governing international relations up to the present time and has never been seriously contested.[332] Since mediaeval times, the Holy See acquired its legal status.[333] From the 8th century until 1870 in the pontificate of Pius IX, the Pope was the temporal sovereign of the Pontifical (or Papal) States in Central Italy, including Rome.[334] Consequently the Pope had rights as a head of state of the territory of the Papal States[335] in addition to the Pope's authority as the head of the Roman Catholic Church.[336] Because of this

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[328] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 291 < https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[329] *Ibid.*

[330] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[331] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; *Doe v. Holy See*, CV-02-00430 MWM, United States Court of Appeals for the Ninth Circuit, 3 March 2009, 2551

[332] Alina Kaczorowska, *Public International Law (*Abingdon, Oxon: Routledge, 2015) 184; Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 360 < http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[333] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415;Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[334]Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 291 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024

[335]Whose origins can be traced back to the reign of Emperor Constantine the Great Ruler of the Roman Empire from AD 306 to 337.

[336] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 2024; Tiyanjana Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections'(1986) 19, 1, The Comparative and International Law Journal of Southern Africa 3

double characterization (of both head of a spiritual organization and temporal ruler), the legal status of the Holy See as a non-State international religious organization was not significantly considered.[337] Only after the Holy See lost its territorial base in 1870 as a result of the political annexation of the Papal States to the Italian Empire, the question of international legal personality arose.[338] The answer to this 'Roman question'[339] was delivered in 1929 when Italy, by virtue of the Lateran Treaties, provided the Holy See a tiny territorial basis in Rome, an enclave of 110 acres called the 'Vatican City'.[340] By ceding the Pope a small amount of territory, the Lateran Treaties re-established the Holy See as a temporal sovereign in the world and created the Vatican City to ensure its independence.[341] During the period from 1870 to 1929, the Holy See stood as the sole international person associated with the Roman Catholic Church. Starting from 1929, two distinct international entities emerged: the Holy See, representing the spiritual, and the Vatican City State, serving as a miniature state entity for the temporal.[342]

The Lateran Treaties[343] signed between the Holy See and Italy were threefold.[344] First, the Treaty of Conciliation[345] established Vatican City as an independent state and restored the sovereignty of the Pope as a monarch.[346] In article 2 of this agreement, Italy recognizes the sovereignty of the Holy See in the international sphere '*as an inherent attribute in conformity with its traditions and the requirements of its mission to the world*.'[347] As such, the Treaty was

<https://www.jstor.org/stable/23905611?read-now=1&seq=3#page_scan_tab_contents> accessed 30 April 2024

[337] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 < https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[338] *Ibid*.

[339] On September 20, 1870, an Italian army occupied Rome and annexed the Papal States as part of the political unification of the Italian States. Since the Pope could no longer be seen as a territorial sovereign, the status of the Pope became known as the '*Roman Question'*. When the Papal States were taken over, Pius IX moved from a palace in Rome to one in the Vatican. Pope Pius IX refused to accept the new status quo, declaring himself the '*prisoner of the Vatican'*. From his new home he excommunicated all who had been involved in the capture of Rome, refused to recognise the Italian state, forbade Catholics to vote in Italian elections and rejected the subsidy offered by the Italian government. The papal boycott finally ended when Mussolini signed the Lateran Pacts which created Vatican City to ensure its independence.

[340] *Ibid*.

[341] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 599 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024; Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 < http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[342] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[343] Lateran Conciliation Treaty, 11 February 1929

[344] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 292 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 833 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[345]Lateran Conciliation Treaty, 11 February 1929

[346] Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136

[347] Article 2 Lateran Conciliation Treaty

expressly founded upon the presumption that the Holy See possessed international personality.[348] The full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the independent Vatican City State is furthermore recognized.[349]The Lateran Conciliation Treaty moreover stipulates explicitly that the sovereignty and exclusive jurisdiction over the Vatican City forbid any intervention therein on the part of the Italian Government, or that any authority other than that of the Holy See shall be there acknowledged.[350] Remarkable (given its present, moral voice in international affairs on right and wrong)[351] forms article 24 of the Treaty that declares that the Holy See would not involve itself in the affairs of the temporal world and therefore, be invariably and in every event considered as neutral and inviolable territory.[352] '*The immunity granted by international law*'[353] is in addition attributed to the property of the Holy See.[354] Article 22 furthermore regulates the transfer of persons who may have taken refuge in the Vatican City State or buildings enjoying immunity, when accused of offences committed on Italian territory considered to be criminal by the law of both States.[355] The explicit application of international law is provided for the execution of sentences in Italy pronounced by the Courts of the Vatican City.[356] Secondly, the Lateran Treaties included a Concordat[357], that regulates the (ecclesiastical) relations between the Catholic Church and the Italian state. The treaty features a few questionable articles. Article 7 ensures that: '*Ecclesiastics cannot be required by magistrates or other authorities to give information concerning persons or matters which have come to their knowledge by reason of their sacred ministry*'.[358] In case of an arrest of an Ecclesiastic or religious, privileged treatment is provided by treating him in accordance with the regard due to his hierarchical grade.[359] On

[348] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 604 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[349] Article 3 Lateran Conciliation Treaty

[350] Article 4 Lateran Conciliation Treaty

[351] Robert John Araujo, 'The Holy See- International person and sovereign' (2011) Vol. 1 Ave Maria International Law Journal 22 <https://deliverypdf.ssrn.com/delivery.php?ID=044090101066109126068071082003084088034056090036079024023025126111067002108031095075060056032028047044115026098028007081097123112075028080092082021115096025015098110026011016025029123096086089081029028066004086029093108100078007123006003019070101008084&EXT=pdf&INDEX=TRUE> accessed 24 April 2024; Moonray Grunewald, 'Vaticaan noemt geslachtsverandering en draagmoederschap ernstige bedreiging voor menselijke waardigheid' (2024) VRT NWS <https://www.vrt.be/vrtnws/nl/2024/04/08/vaticaan-genderideologie-draagmoederschap-bedreiging-menselijke/> accessed 8 April 2024

[352]Article 24 Lateran Conciliation Treaty

[353] Article 15 Lateran Conciliation Treaty: 'The property indicated in Article 13 hereof and in paragraphs (1) and (2) of Article 14, as well as the Palaces of the Dataria, of the Cancelleria, of the Sacred Congregation of Propaganda Fide in the Piazza di Spagna of the S. Offizio with its annexes, and those of the Convertendi (now the Congregation of the Eastern Church) in Piazza Scossacavelli, the Vicariato, and all other edifices in which the Holy See shall subsequently desire to establish other offices and departments although such edifices form part of the territory belonging to the Italian State, shall enjoy the immunity granted by International Law to the headquarters of the diplomatic agents of foreign States. Similar immunity shall also apply with regard to any other churches (even if situated outside Rome) during such time as, without such churches being open to the public, the Supreme Pontiff shall take part in religious ceremonies celebrated therein.'

[354]Article 15 Lateran Conciliation Treaty

[355]Article 22 Lateran Conciliation Treaty

[356] Article 23 Lateran Conciliation Treaty

[357] The Concordat, 11 February 1929

[358] Article 7 Concordat Treaty

[359] Article 8 Concordat Treaty

top of that, in the case of a condemnation, the punishment shall be performed in a place separate from that for lay people.[360] Notable in this research constitutes the oath, in which bishops hold that there shall be no participation in any agreement or advice that may harm the Italian state and the public order and shall not allow such participation to other clergy.[361]Finally, a Financial Convention[362] is annexed to the Lateran Treaty under which Italy financially assisted[363] the new state as reparation for the 'immense damage sustained by the Apostolic See through the loss of the patrimony of S. Peter constituted by the ancient Pontifical States, and of the Ecclesiastical property'.[364]

The Lateran Treaty raises questions in some regards. On the one hand, the validity of the agreement is contested because of its 2-in-1[365] nature.[366] On the other hand, the content of the agreement indicates a (mainly) unilateral, one-way nature. The undertaken commitments are situated in main order along the contracting party of the Italian State and in lesser order along the Holy See.[367] Besides, the principles of the rule of law and of equal treatment do not

[360] *Ibid.*
[361] Article 20 Concordat Treaty
[362] Preamble Financial Convention annexed to the Lateran Treaty 1929
[363] It is noted that this financial settlement could be seen as an indication of the Holy See's international legal personality in two ways: the treaty-making capacity of the Holy See as well as the right to bring a claim against another international legal person.
[364] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 833 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[365]It has been argued that the Lateran Treaty cannot truly be considered an international treaty because it was concluded by one sovereign state, Italy, and the Holy See, who became a subject of international law only by virtue of the agreement. The Holy See and Italy, each international subjects, agreed to create the State of the Vatican City, with the Holy See immediately identifying itself with that new state.
[366] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 604 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[367]E.g.: The person of the Pope is considered sacred and inviolable and equated with the King (art. 8 Lateran Conciliation Treaty); The dignitaries of the Church and those who are part of the Papal Court are always exempt from military service of jury duty and from any other service of a personal nature (art. 10 Lateran Conciliation Treaty); All foreigners holding official ecclesiastical office in Rome enjoy the personal guarantees enjoyed by Italian citizens (art. 10 Lateran Conciliation Treaty); All central organs of the Catholic Church are exempt from any interference on the part of the Italian state (art. 11 Lateran Conciliation Treaty); Italy recognises the right of the Holy See to passive and active legation (art.12 Lateran Conciliation Treaty);The property of the Holy See shall enjoy the immunity granted by International Law to the headquarters of the diplomatic agents of foreign States (art. 15 Lateran Conciliation Treaty); The Holy See may use all buildings mentioned above or referred to in the previous three articles at its own discretion (art. 16 Lateran Conciliation Treaty); Salaries of any kind paid by the Holy See are exempt from any contribution or tax (art. 17 Lateran Conciliation Treaty); The Holy See is free to regulate public access to the artistic and scientific treasures in Vatican City and the Lateran Palace (art. 18 Lateran Conciliation Treaty); Goods from abroad destined for destinations within the Vatican City State or beyond its borders for institutions or offices of the Holy See are always exempt from customs or patent duties for transit through Italian territory (art. 20 Lateran Conciliation Treaty); All cardinals enjoy in Italy the honour due to blood sovereigns (art. 21 Lateran Conciliation Treaty); Financial Convention annexed to the Lateran Treaty 1929; Ecclesiastics cannot be required by magistrates or other authorities to give information concerning persons or matters which have come to their knowledge by reason of their sacred ministry (article 7 Concordat Treaty); In case of the arrest of an Ecclesiastic or religious he shall be treated with the regard due to his hierarchical grade and in the case of the condemnation the punishment shall be performed in a place separate from that for lay people (article 8 Concordat Treaty); The extraordinary tax of 30 percent is abolished and neither shall there be applied to ministers of worship in the exercise of their sacerdotal ministry any professional tax or licensing tax or any other tax of that nature.(art. 30, (h) Concordat Treaty); Religious instruction is instructed in the

seem to be paramount.[368] This reflects a strong imbalance between the importance of spiritual order and state order and its prominence during the 1929 negotiations and consequently to the present day. For these reasons, this research cannot endorse the view that labels the Roman Catholic Church (with the Holy See as its government and Vatican City as its territorial base) as 'a *societas perfecta*'[369].[370]

The Holy See's international personality continued *erga omnes* (after the bellatio) as it existed until 1870, representing the universal character of the Church, which transcended the territorial boundaries of any individual state.[371] A legislation by the Italian State[372] was enacted in order to guarantee the Holy See's independence, despite its seat in the heart of the Italian territory.[373]The continuing status of the Holy See as an international person is reflected by the fact that, even after 1870, the Holy See maintained its longstanding level of international personality, determined by its existing legal rights and obligations, as well as its ability to enter into treaties and to send and accept diplomatic representatives.[374] Gaetano Arangio Ruiz rightly states that: '*A fortiori, no relevant change occurred in the international personality of the Church following the Lateran Agreements with Italy of 11 February 1929 and the creation of the State of the Vatican City*.'[375] This historical perspective demonstrates that, even in the

public elementary schools and the secondary schools according to a programme to be established by an accord between the Holy See and the State. Such teaching shall be given by means of masters and professors, priests and religious approved by the Ecclesiastical Authority and there shall only be used in the public schools the textbooks approved by the Ecclesiastical Authority (art. 36 Concordat Treaty)

[368] *Ibid*.

[369] Defined as a self-sufficient and autonomous institution capable of maintaining its complete welfare in its own order and, by right, disposing of all the means to achieve that aim. *A perfect society* in ecclesiastical law is a society endowed with all powers, rights and other means necessary to achieve its aim: it is therefore self-sufficient and autonomous in its own order.

[370]Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 79; Francis X. Murphy, 'Vatican Politics: structure and function' (1974) World Politics, Cambridge Journals 544 < https://www.nietnaarsantiago.nl/wp-content/uploads/2016/03/160223-vatican-politics-structure-and-funtion-by-francis-murphy-1974.pdf> accessed 28 April 2024

[371] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 603 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 2024

[372]During the 1870-1929 period, the supreme organ of the Church had its seat within Italian territory in a situation comparable - *mutatis mutandis* - to that of a government in exile. That international status was not legally affected in any direct sense by the legislation *(Legge delle Guarentigie)* passed by the Italian State, obviously within the framework of Italian law, in order to ensure that the Holy See's independence would be fully respected despite the fact that it had its seat in the heart of the Kingdom's territory.

[373] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[374]Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 146 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024

[375] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

absence of any control over territory, the Holy See had a recognized status as a sovereign entity in international law.[376]

The Holy See has used[377] its international status to project the core activities of the Catholic Church, related to its spiritual and value driven mission.[378] In comparison to the Vatican City state, the Holy See has the upper hand in conducting international relations.[379]The autonomous character of the Holy See's international role was on the one hand already reflected in the 1929 Lateran Conciliation Treaty[380] and on the other hand reflected by the fact that in the period of the territorial interregnum (1870-1929), the Holy See did not stop sending diplomatic representatives to a number of States (active legation) and States continued to be represented at the Holy See (passive legation).[381]Consequently, diplomatic relations are normally conducted[382] on behalf of the Holy See and predates the diplomatic activity of the Vatican by many centuries.[383] Indeed, the Pontiff's legations were among the first diplomatic missions in the world.[384] To actually and correctly portray, the diplomatic representatives of the Holy See represent both the Vatican City State and the Holy See, but they formally maintain diplomatic relations in the name of the Holy See and not in the name of the Vatican State.[385]

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[376] Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 145 < https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024

[377] The Holy See rather than the Vatican has thus joined the OSCE, the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, and the Organization for the Prohibition of Chemical Weapons. However, the Holy See is not a member of the United Nations, although it has been accredited as a permanent observer with the UN since 1964, as well as other intergovernmental organisations. As far as treaties are concerned, it has ratified the Geneva Conventions on the Law of War (1949), the Convention relating to the Status of Refugees (1951), the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989) and its Optional Protocols, and the Convention on Cluster Munitions. To give effect to its spiritual mission, the Holy See has not only joined some classic international organisations and multilateral treaties, but it has also negotiated a special kind of treaties with a limited number of third States, the so-called 'concordats', bilateral treaties which govern the religious affairs and activities of the Catholic Church in third States. Such treaties are governed by the customary law of treaties.

[378] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 839 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 416

[379] *Ibid*.

[380] Article 12 Lateran Conciliation Treaty

[381]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 836 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 416

[381]*Ibid*.

[382] The Holy See's particular status has led to the inclusion of its legation practice in the Vienna Convention on Diplomatic Relations.

[383]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 836 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[384]*Ibid*.

[385]*Ibid*.

iii. Vatican City

The Vatican City was created in 1929 by the Lateran Treaty to provide a territorial basis for the Holy See, which predates the Vatican City by many centuries, to guarantee its independence.[386] Article 3 of the Conciliation Treaty covers the foundation of Vatican City:

> *'Italy recognizes the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the Vatican as at present constituted, together with all its appurtenances and endowments, thus creating the Vatican City, for the special purposes and under the conditions hereinafter referred to. The boundaries of the said City are set forth in the map called Annex I of the present Treaty, of which it is forms an integral part.*[387]

The raison d'être of the Vatican City can be well captured by the expression of Sint Franciscus[388]: 'tout juste assez de corps pour soutenir mon âme'.[389] The territorial substratum, the population, and the exercise of temporal power must guarantee the independence of the Holy See as the supreme organ of government of the Catholic Church.[390] Vatican City was namely created, not to act itself, but to guarantee the independence of the Holy See in the spiritual administration of the diocese of Rome and of the Catholic Church in all parts of the world.[391] The spiritual sovereignty of the Church is the sole reason for its international action, and above all the reason for the existence of the Vatican State. Only she provides the genesis of this temporal power.[392] The preamble to the Lateran Treaty implies the same idea:

> '*And whereas it was obligatory, for the purpose of assuring the absolute and visible independence of the Holy See, likewise to guarantee its indisputable sovereignty in international matters, it has been found necessary to create under special conditions the Vatican City, recognizing the full ownership, exclusive and absolute dominion and sovereign jurisdiction of the Holy See over that City.*'[393]

The Vatican City State operates as a separate entity distinct from the Holy See. The legislation concerning the State of Vatican City reflects a clear intent to establish an independent legal system with (well-)defined competences.[394] The government of the Vatican is regulated by the

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[386]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[387]Art. 3 Conciliation Treaty, 11 February 1929.
[388]Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 297 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024
[389] 'Just enough body to support my soul.'
[390] *Ibid*. 137
[391]*Ibid*.
[392]Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 297 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[393]Preamble Lateran Conciliation Treaty, 11 February 1929.
[394] Horace F. Cumbo, 'The Holy See and international law' (1948) 9 International Law Quarterly 613 <http://uniset.ca/microstates2/va_2IntLQ603.pdf> accessed 28 April 2024

Fundamental Law of Vatican City State[395].[396]The absolute monarch of the Pope is also bound by this principle, obtaining his authority not from canon law, but from Article 1 of the Fundamental Law of the Vatican City State[397].[398] By virtue of his primordial position as the bishop of the diocese of Rome, the Pope is 'the ex officio head of State and head of the government of the Vatican.'[399] The Fundamental Law can be considered as a constitution[400] that, according to the preamble, was enacted *'to give a systematic and organic form to the changes introduced in successive phases in the juridical structure of Vatican City State and wishing to make it correspond always better to the institutional purposes of the State'.*[401] The full legislative, executive and judicial powers are further established within the Supreme Pontiff[402], Sovereign of Vatican City State.[403] Article 2[404] reserves the participation in international relations of the Vatican to the Supreme Pontiff, who exercises it by means of the Secretariat of State (to a lesser extent, or at least in a different fashion, than the Holy See).[405] (*See infra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity)This Vatican 'constitution' and its 3 'separate' powers give, within this human rights research, rise to certain considerations. The extent to which articles 16 and 17 of the Fundamental Law of Vatican City State comply with the right of access to court could be questioned. The (decision-making) power of the absolute monarch, the Pope appears to be held in higher regard than the right to a fair trial. In any civil or penal case and in any stage, the Supreme Pontiff can namely '*defer the instruction and the decision to a particular subject (istanza), even with the faculty of pronouncing a decision according to equity and with the exclusion of any further recourse (gravamen).*'[406] Beyond that, only the Supreme Pontiff can authorize judicial action in individual cases, after hierarchical recourse precludes a judicial action[407] in the same

[395] The Fundamental Law of Vatican City State, promulgated by Pope John Paul II on 26 November 2000 entered into force on 22 February 2001, and replaced the Fundamental Law of Vatican City of 7 June 1929.

[396] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 < https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[397] Article 1 Fundamental Law of Vatican City state

[398]Horace F. Cumbo, 'The Holy See and international law' (1948) 9 International Law Quarterly 613 <http://uniset.ca/microstates2/va_2IntLQ603.pdf> accessed 28 April 2024

[399] Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024

[400]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 834 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[401] Preamble Fundamental Law of Vatican City state

[402] It vests all power exercised in the Vatican City State institutions, such as the College of Cardinals, in the Pontiff, and reaffirms or establishes a number of governmental Institutions, such as the College of Cardinals, the Secretariat of State, the Pontifical Commission and its President, the Secretary General, the Council of Directors, the Councilor General and the Councilors of the State, a number of judicial institutions, and a Labor Office.

[403] Article 1, para. 1 Fundamental Law of the Vatican City State

[404] Article 2 Fundamental Law of the Vatican City State: The representation of the State in relations with foreign states and with other subjects of international law, for the purpose of diplomatic relations and the conclusion of treaties, is reserved to the Supreme Pontiff, who exercises it by means of the Secretariat of State.

[405]Article 2 Fundamental Law of the Vatican City State; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 834 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[406] Article 16 Fundamental Law of the Vatican City State

[407] Article 17, para. 1 Fundamental Law of the Vatican City State: Without prejudice to what is determined in the following article, whoever claims that a proper right or legitimate interest has been damaged by an administrative act can propose hierarchical recourse or approach the competent judicial authority.

matter.[408] The non-conformity of this law with the principles of the rule of law and human rights constitutes an issue as an actor of the international legal order.

The Vatican engages in the international order in the area of more technical matters closely linked to the practical requirements of the Vatican City State.[409] In this regard, the Vatican City State has used its international status to join[410] various international organisations.[411]

4.1.2.3. State actor? Vatican vs. Holy See

The Vatican City and the Holy See are distinct entities, both recognized internationally as such and subjects of international law.[412] Being headed by the same (absolute) monarch, these entities are united in an intertwined manner in the person of the Pope, who is at once ruler of Vatican City and head of the Roman Catholic Church.[413] Still, for international legal purposes, they can be said to remain two separate international legal persons.[414]

There is a considerable amount of discussion in legal doctrine[415] as to the exact legal characterization and the applicability of the definition of a 'state' to the Holy See and the Vatican and their intertwined relationship.[416] On one side of the theoretical debate are those

[408] Article 17, para. 2 Fundamental Law of the Vatican City State
[409] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 416; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 835 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[410] This explains why the Vatican State rather than the Holy See is a member of the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Telecommunications Satellite Organization (INTELSAT), EUTELSAT, UNIDROIT, the World Intellectual Property Organization (WIPO) and the International Grain Council, whereas the Holy See rather than the Vatican is a member of the Organization for Security and Co–operation in Europe (OSCE), the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, the Organization for the Prohibition of Chemical Weapons and – also – the WIPO.
[411] *Ibid*. 156
[412] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 600 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[413] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[414] *Ibid*.
[415] Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 145 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024; Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 297 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 < https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 600 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024; Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 354 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024
[416] *Ibid*.

who place the Holy See and the Vatican on equal footing and position them, as it were, within the same personal union.[417] In the United States in particular, courts have broadly treated the Vatican and the Holy See as one legal person and have even considered both of them as 'States'.[418] However, this characterization[419] is based on domestic law[420] (the Foreign Sovereign Immunities Act[421]) rather than international law.[422] Along the other side, one sees great agreement within legal doctrine that places both entities in distinct international characterizations.[423] Some authors have even observed that the international legal status of the Vatican City is subordinate *vis-à-vis* to that of the Holy See.[424] Kunz and Maluwa stress that[425] the Vatican City is distinct as an international person from the Holy See but not a sovereign state and that instead 'it is a vassal state[426] of the Holy See'.[427] While others even go as far as to state that the Vatican is an entity dependent from the Holy See as part of its

[417] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 832 < https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[418] *Ibid*.
[419] The Holy See and the Vatican themselves have influenced this identification with a view to having the Holy See fall within the scope of application of the FSIA.
[420] The Foreign Sovereign Immunities Act 1976.
[421] Under the Foreign Sovereign Immunities Act the foreign states and governments, including their political subdivisions, agencies, and instrumentalities, are immune from suit (in both state and federal courts) unless one of the statute's specific exceptions applies. Thus, jurisdiction exists only when one of the exceptions to foreign sovereign immunity applies.
[422] Cedric Ryngaert, 'The Immunity of the Holy See in Sexual Abuse Cases: Reflections on the Judgment of the European Court of Human Rights in J.C. v Belgium' (*Völkerrechtsblog,* 24 November 2021) <https://voelkerrechtsblog.org/the-immunity-of-the-holy-see-in-sexual-abuse-cases/> accessed 29 July 2022; David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (Second edition, Federal Judicial Center International Litigation Guide 2008)
[423]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 832 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024
[424]Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?' (2008) 44 Texas International Law Journal 145 < https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024
[425] Kunz states that Vatican City State is not a sovereign state: 'its activities are totally different from those inherent in national States.' Its constitution is not autonomous but derived from the Holy See. The State of the Vatican City, in its relation to the Holy See, belongs to the category of vassal states. Its fundamental laws are not original laws as are those of sovereign States, but are laws issued by the Pope in his position of head of the Church, and emanating exclusively from the State of the Vatican City derives its constitution from the system of the Catholic Church and from her superior body.
[426]A vassal state is a state with varying degrees of independence in its internal affairs but dominated by another state in its foreign affairs and potentially wholly subject to the dominating state. An arrangement may be entered into whereby one state, while retaining to some extent its separate identity as a state, is subject to a kind of guardianship by another state. The circumstances in which this occurs and the consequences which result vary from case to case and depend upon the particular provisions of the arrangement between the two states concerned. Formerly one category of such states were the so-called 'vassal' 'states', being states under the suzerainty of another state.
[427] Josef L. Kunz, 'The Status of the Holy See in International Law' (1952) 46 AJIL 313 <http://uniset.ca/microstates2/va_46AmJIntL308.pdf> accessed 28 April 2024;Tiyanjana Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections'(1986) 19, 1, The Comparative and International Law Journal of Southern Africa 3 <https://www.jstor.org/stable/23905611?read-now=1&seq=3#page_scan_tab_contents> accessed 30 April 2024

effective organisation.[428] On the one hand, the Vatican City namely is not an international person and on the other hand, any internationally relevant conduct of the Vatican City is a conduct of the Holy See (and/or the Roman Church).[429] From this perspective, the Vatican *de facto* qualifies, for international legal purposes, not as a separate person and the status of the Vatican City does not differ from the status of a province or any other subdivision of a State.[430]

In the following, the distinctive legal personality of the Holy See and the Vatican City in international law and the applicability of the qualification as a State to these actors will be elaborated.

i. The Holy See: a sui generis entity

'*Should the Roman Catholic Church continue to be treated as a state*?' demanded a petition circulated at the Fourth World Conference on Women held in Beijing in September 1995.The petition called into question the status of the Holy See at the United Nations and urged '*to evaluate the appropriateness of allowing the Holy See, a religious entity, to act on a par with states*.'[431] When seeking to answer this question, one should start from the essence: can the Holy See be qualified as a state actor in international law? When one looks up the Holy See as an international person the international personality of the Holy See in legal doctrine regarding the branch of law that governs it, public international law, one always finds it within 'non-state actors', 'special types of personality', 'special cases' and never among the expounding concerning 'State (actors)'.[432] The transnational and decades-long multi-layered actorness (See supra: 4.1.1. The Holy See: a multi-layered actor) complicates the delineation

[428] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 366 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[429] *Ibid*.

[430] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 832 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 367 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[431] Petition circulated at the Fourth World Conference on Women held in Beijing in September 1995 (A Call to the United Nations to Consider the UN Status of the Holy See)

[432] Robert Jennings and Arthur Watts, *Oppenheim's International Law (9th edition): volume 1 Peace* (Oxford Scholarly Authorities on International Law, OSAIL, 2008) 325; James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 221; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415; James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 124; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 184; Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law* (Cambridge, United Kingdom: Cambridge University Press, 2022) 35; Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136; Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024; Tiyanjana Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections'(1986) 19, 1, The Comparative and International Law Journal of Southern Africa 3 <https://www.jstor.org/stable/23905611?read-now=1&seq=3#page_scan_tab_contents> accessed 30 April 2024

of a precise legal characterization of the Holy See. Previous analysis revealed that the Holy See not merely possesses the full, exclusive and absolute power and sovereign jurisdiction over the Vatican but is also the government centre of the world-wide Roman Catholic Church, with the Pope possessing the combined (absolute) authority, jurisdiction, and sovereignty.[433] Ryngaert aptly outlines: '*While the Holy See has been characterized as a State, although perhaps an unusual or anomalous one (e.g., in an immunities context), better view is that it is a sui generis entity that enjoys far-reaching international legal personality, but that falls short of statehood.*'[434] The Holy See is a *sui generis* subject of international law: it can best be described as a universal religious organization with a *sui generis* international legal personality, recognized in customary international law.[435] Nevertheless, the Holy See does constitute a unique non-state actor since it has international rights (and duties[436]) analogous to those of a State.[437] Consequently, the Holy See possesses a degree of international legal status granting it capabilities surpassing those of other non-State entities, potentially rivalling the standing of States in international law.[438] The qualification of the Holy See as a *sui generis* entity, rather than as a State actor, relies on prevailing[439] doctrine[440] which holds that firstly, the Holy See

[433]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; *Doe v. Holy See*, CV-02-00430 MWM, United States Court of Appeals for the Ninth Circuit, 3 March 2009, 251

[434]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[435]Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136

[436] As mentioned above and in chapter 5 will become apparent, there is a strong imbalance between on the one hand the rights and on the other hand obligations of the Holy See (in international law)

[437] Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415

[438] *Ibid*.

[439] Widespread and decades old expert analyses in the field of Public international law, jurisdictions, and immunities.

[440] Robert Jennings and Arthur Watts, *Oppenheim's International Law (9th edition): volume 1 Peace* (Oxford Scholarly Authorities on International Law, OSAIL, 2008) 325; James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 221; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415; James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 124; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 184; Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law* (Cambridge, United Kingdom: Cambridge University Press, 2022) 35; Jan Wouters, *Internationaal Recht In Kort Bestek: Van Coëxistentie, Coöperatie En Integratie Van Staten Tot Global Governance* (3e editie Antwerpen: Intersentia, 2020) 136; Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024; Tiyanjana Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections'(1986) 19, 1, The Comparative and International Law Journal of Southern Africa 3 <https://www.jstor.org/stable/23905611?read-now=1&seq=3#page_scan_tab_contents> accessed 30 April 2024; John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26 EJIL 928 <https://academic.oup.com/ejil/article/26/4/927/2599610?login=true> accessed 8 April 2024; Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 145 < https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024; Robert John Araujo, 'The Holy See- International person and sovereign' (2011) Vol. 1 Ave Maria International Law Journal <https://deliverypdf.ssrn.com/delivery.php?ID=044090101066109126068071082003084088034056 09

lacks the criteria inherent to State actors and secondly the authority of the Holy See is not grounded in territorial sovereignty over the Vatican City premises, but rather in its spiritual sovereignty over the 1.3 billion adherents to the Catholic faith.[441]

A *sui generis* subject[442] of international law essentially refers to entities 'other than States'.[443] *Sui generis* is a Latin expression that translates to 'of its own kind or 'in a class by itself', 'unique'. It refers to anything that is peculiar to itself and thus denotes an independent legal classification.[444] The qualification of the Holy See as 'anomaly', 'a unique actor', 'atypical organism', 'multi-layered actor',…(*See supra 4.1.1. The Holy See: a multi-layered actor)* therefore passes one-to-one through its legal qualification in international public law as a *sui generis* entity. The reasoning behind this differentiation of personality suggests that the Holy See stands out as the most unique, or "other," among the non-State international persons. The distinctive qualification of the Holy See as a *sui generis* entity under international law will be elaborated first based on the non-conformity[445] with the traditional statehood criteria (A. Montevideo statehood criteria) and secondly based on its spiritual and religious roles (B. Spiritual sovereignty).[446]

00360790240230251261110670021080310950750600560320280470441150260980280070810971231120750280800920820211150960250150981100260110160250291230960860890810290280660040860290931081000780071230060030190701010080 84&EXT=pdf&INDEX=TRUE> accessed 24 April 2024; Luca Pasquet and Cedric Ryngaert, 'Hard case- The Immunity of the Holy See' (2022) 8 Italian Law Journal 840 <https://dspace.library.uu.nl/handle/1874/427986> accessed 1 May 2024; Luca Pasquet, 'The Holy See as seen from Strasbourg: immune like a state but exempt from rules on state responsibility' (*SIDIBlog*, 16 December 2021) <http://www.sidiblog.org/2021/12/16/the-holy-see-as-seen-from-strasbourg-immune-like-a-state-but-exempt-from-rules-on-state-responsibility/> accessed 5 August 2022; Cedric Ryngaert, 'The Immunity of the Holy See in Sexual Abuse Cases: Reflections on the Judgment of the European Court of Human Rights in J.C. v Belgium' (*Völkerrechtsblog,* 24 November 2021) <https://voelkerrechtsblog.org/the-immunity-of-the-holy-see-in-sexual-abuse-cases/> accessed 29 July 2022; Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024; Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 386

[441] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[442] The term "sui generis" originates from two Latin words - "sui" meaning "of its own" and "generis" meaning "kind or species". The Latin term "sui generis" translates to "of its own kind" in English. In legal contexts, it refers to something that is unique and does not fit into any existing legal classifications or categories.

[443]Luca Pasquet, 'The Holy See as seen from Strasbourg: immune like a state but exempt from rules on state responsibility' (*SIDIBlog*, 16 December 2021) <http://www.sidiblog.org/2021/12/16/the-holy-see-as-seen-from-strasbourg-immune-like-a-state-but-exempt-from-rules-on-state-responsibility/> accessed 5 August 2022

[444]X., Sui Generis: Legal Concept Explained (*Legal Buddies*, 27 December 2023) <https://getlegalbuddies.com/blog/sui-generis-legal-concept-explained/> accessed 1 May 2024

[445] Own emphasis.

[446] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

A. Montevideo statehood criteria

Considering the Montevideo criteria as the most widely accepted definition of statehood, application of these requirements to the Holy See may be problematic and therefore erroneous to maintain that the Holy See is a State.[447] Hereafter, the four criteria for Statehood as laid down in article 1 of the Montevideo Convention will be applied on the international persona of the Holy See. (*See supra*: Elements of statehood (Montevideo convention))

1) *Permanent population*

The first Montevideo Convention requirement of a permanent population[448] could difficultly be satisfied met when applied to the Holy See. This criterion normally provides[449] States with its *raison d'être*, as States primarily exist to promote the well-being of its population and, the legitimacy of State authority is grounded in an implicit social contract between the government and the governed.[450] Contradictory, it appears this does not apply to the Holy See's justification for existence. A population is linked to a State through the bond of nationality, which in turn is a matter within the discretion of the State concerned[451] and belongs to its *domaine réservé*.[452] The Holy See, as the governmental centre of the Roman Catholic Church, lacks internal legislation that addresses nationality (and ancillary population). If the traditional notions of nationality for a population of either *jus soli*[453] or *jus sanguinis*[454] were further to be applied, its application to the Holy See would be problematic.[455] The Holy See itself is namely only analogically 'populated' [456] through the 'population' of its territorial base, the Vatican City State or through the 'population', the faithful of the Roman Catholic Church[457]. (Both grounds, however, hardly seem to fulfil the criterion of a population of permanent nature.)

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[447] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 609 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 202

[448] Article 1 a) Montevideo Convention on the Rights and Duties of States 1933

[449] At least in Western liberal thinking.

[450]Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215

[451] The grant of nationality is a matter that only States by their municipal law (or by way of treaty) can perform.

[452] Alfred M. Boll, *Multiple Nationality and International Law (*BRILL, *ProQuest Ebook Central*, 2006) 22;Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215; James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 52

[453] Bond of the soil.

[454] Bond of blood.

[455] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 610 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 2024; Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 79

[456]Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 146 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024

[457]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

First of all, it is arguable that the nationals of Vatican City State could be considered the population of the Holy See.[458] International law does not forbid dual nationality (Vatican State and Holy See) but it seems unusual for citizenship in two states to be entirely identical.[459] Remarkably, the Vatican Law[460] does not speak of nationality, but rather of citizenship[461], which in turn is based on *jus officii*, where the status rises from the persons office.[462] The 'population' of the Vatican City is consequently composed almost exclusively of persons residing therein by virtue of their office[463] and immediate family[464].[465] As Cardinale Hyginus Eugene observes: '*The concession of Vatican citizenship …..is relative to a specific function which is wholly intended to serve the spiritual interests of the Catholic Church and not in the material interest of a temporal state*.'[466] The juridical bond of Vatican citizenship ceases when residence is voluntarily surrendered, authorization is revoked, or when the citizen's employment comes to an end.[467] Besides that, every inhabitant of the Vatican City can be expelled from the Vatican territory at any time.[468] It should moreover be noted that bishops can, at any time, be removed

[458] *Ibid*.
[459] *Ibid.*
[460] According to article 9 of the Lateran Treaty, which is fulfilled in the regulations of Law No. III on the rights of citizenship and residence in the Vatican, the population of the Vatican City is made up of all those persons who have at least a permanent legal residence in the City.
[461] Citizenship and nationality are commonly treated as synonymous, or at least, as two sides of the same political coin but should still be distinguished. *Nationality* has at least two accepted denotations: (1) the status of belonging to a state (legal concept) and (2) the quality of membership in an ethnological group. In its legal sense, the term 'national' is often used as a general designation irrespective of whether the status of belonging to a state is examined with a view to certain rights and/or duties under international law or is looked upon as the basis of rights and duties, effective within the domestic sphere of a state. *Citizenship* on the other hand means specifically the possession by the person under consideration, of the highest or at least of a certain higher category of political rights and/or duties, established by the nation's or state's constitution. The trend is to reserve the term '*national* for the designation of that status by virtue of which a person, internationally, belongs to a certain state, and to speak of '*citizenship'* when the local status referred to is one of domestic rather than international law.; Maximilian Koessler, ' "Subject", "Citizen", "National" and "Permanent allegiance" '(1946) 56:58 The Yale Law Journal 63 <https://core.ac.uk/download/pdf/157778329.pdf> accessed 5 May 2024
[462]Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 107; Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 610 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[463]Such as dignitaries, officials, support staff, other employees and the staff of papal missions.
[464] Vatican citizenship is extended to "the wife, children, parents, brothers, and sisters Vatican citizen, on the condition that they live with him and are authorized to reside in the City of the Vatican. The authorization for children ceases automatically when the children reach the age of twenty-five and for daughters when they marry. The provision regarding family residence, however, does not apply to the majority of Vatican citizens and inhabitants who, by virtue of their office, are celibate clergy and nuns.
[465] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1862 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024; Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 610 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[466] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 109
[467] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1837 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[468]Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 412

by the Holy See.[469]This factor impedes the growth of a permanent population and indicates that the Vatican Government does not consider the residents of the Vatican City as a fixed population.[470] Bathon states in this regard that '*Perhaps the only true member of the Vatican's 'permanent' population is the Pope himself*.'[471] Because of the functional[472] and temporary[473] nature of the 'population' of Vatican City, the latter cannot, by analogy, be considered as the permanent population of the Holy See.

Secondly, considering that the Holy See is the pinnacle of an international religious faith, the 'population' served by the Holy See may, by analogy, amount to a significant percentage of the world's population and it could even be said to 'share its population' with the world nations.[474] Indeed, Catholics worldwide constitute 'a population' of nearly 1.3 billion[475] individuals. Accepting this reasoning, would imply a notion of nationality or citizenship of the Holy See based upon a *jus spirituale*[476]*.The Oxford Handbook on Citizenship* defines *ecclesial or religious citizenship* as religious membership of a Church in terms of the rituals, especially the sacraments such as baptism or the Eucharist that create and sustain religious communities, giving them both a theological rationalism and an emotional sense of membership.[477] The real connection between the individual and the Holy See would rise from the rite of Christian initiation.[478] A person is said to be fully initiated in the Roman Catholic Church when received the three sacraments of Christian initiation, Baptism, Confirmation and Eucharist.[479] As with secular citizenship, the person under consideration is entitled to rights (such as access to religious privileges, sacraments) and bound to obligations (such as the

[469] Can. 192 Code of Canon Law.
[470] *Ibid*.
[471]Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 611 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[472] Citizenship and accordingly population of the Vatican City is in nature *functional* because it is always linked to the *jus officii*; it is relative to a specific function entirely intended to serve the Roman Catholic Church.
[473]Citizenship and accordingly population of the Vatican City is in nature *temporary* because of the temporary nature of a person's office (they will only be citizens during the course of their office) and the possibility to expel an inhabitant of the Vatican City from the Vatican territory at any time.
[474]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?'(2008) 44 Texas International Law Journal 149 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024
[475]The 2024 *Pontifical Yearbook* and the 2022 *Statistical Yearbook* of the Church show a rise of one per cent globally in the number of baptised Roman Catholics, from 1.376 billion in 2021 to 1.390 billion in 2022
[476] Bond of the spiritual.
[477]Bryan S. Turner, 'Secular and Religious Citizenship' in Shachar Ayelet, Rainer Bauböck, Irene Bloemraad and Maarten Peter Vink (eds) *The Oxford Handbook of Citizenship (*First edition, New York, NY: Oxford University Press, 2017)
[478] *Ibid*.
[479] International Council for Catechesis, 'Adult Catechesis in the Christian Community- Some principles and guidelines' (*Iberia Editrice Vatican*, St. Paul Publications, 1990) <https://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_cclergy_doc_14041990_acat_en.html> accessed 5 May 2024; 1275 of article 1 of the Sacrament of Baptism, Chapter One The Sacraments Of Christian Initiation

payment of church taxes or keeping the faith).[480] Within the current state order, or at least in Belgium, this nexus of rights and duties between (religious) citizens and a religious institution operates (largely) from within the State itself. Noteworthy, such ecclesial or religious citizenship and accordingly 'population' would position, if all criteria for statehood were fulfilled, the Holy See as the second most populous nation globally, following China[481] through a relatively simple procedure of the rite of Christian initiation. In other words: *a jus spirituale* would place the Holy See as a stately world power by virtue of a spiritual title, rather than a temporal title to serve the spiritual interest of the Catholic Church, rather than the (temporal) interests (of the citizens) of a State. This title to strength rests, contradictorily, on a very loose, weak affiliation. Indeed, the legitimacy of this religious bond (citizenship) through the rite of the Christian initiation can be questioned, on the one hand, from (the lack of) valid, voluntary consent in the case of minors and, on the other hand, from the lack of control regarding enduring conviction.

Both analogic nationality (citizenship of Vatican City State through *jus offiicii* and religious citizenship of the Roman Catholic Church) and consequently population of the Holy See have quite a different character from that of ordinary nationality because they are combined per se with another nationality or even super-imposed upon it.[482] For this reason, it is necessary to consider which constitutes the dominant citizenship. According to the general principle in dual citizenship, the active, effective citizenship (the one that is used effectively) takes precedence. Religious citizenship can therefore be interpreted as a parallel or alternative form of membership that is often in conflict with the secular, worldly citizenship, depending on its standing towards it.[483]

2) Defined territory

The existence of a State under the Montevideo convention requires a defined territory.[484] After all, State actors in international law are territorial entities and '*territorial sovereignty … involves the exclusive right to display the activities of a State*'.[485] The existence of a territorial base is constitutive for the international persona of States.

Anno 2024 the Pope exercises his power in a sovereign and exclusive manner over the territory of the independent Vatican City.[486] The Lateran Conciliation Treaty recognizes the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the smallest political entity of the world of approximately 108.7 acres[487], the Vatican City State.[488] As mentioned above, the Vatican City was only created by the Lateran Treaty to

[480]Bryan S. Turner, 'Secular and Religious Citizenship' in Shachar Ayelet, Rainer Bauböck, Irene Bloemraad and Maarten Peter Vink (eds) *The Oxford Handbook of Citizenship (*First edition, New York, NY: Oxford University Press, 2017)
[481]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[482] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 111
[483] *Ibid*. 250.
[484] Article 1 b) Montevideo Convention on the Rights and Duties of States 1933
[485]James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 47
[486] Article 4 Lateran Conciliation Treaty, 11 February 1929
[487]Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 410
[488]Article 3 Lateran Conciliation Treaty, 11 February 1929

provide a territorial basis for the Holy See in order to guarantee its independence [489]and as such, the Treaty was expressly founded upon the presumption that the Holy See possessed international personality.[490] (*See supra*: 4.1.2.2. Interrelated concepts: the Roman Catholic Church, Holy See and Vatican City, ii. Holy See) In fact, the right of the Pope to territorial sovereignty is the result of the recognized international status of the Holy See *prior* to the Lateran Treaty of 1929.[491] As became clear in the (historical) exposition, the Holy See's international personality continued *erga omnes* during the territorial interregnum between 1870 and 1929, as it existed before, representing the universal character of the Church, which transcended the territorial boundaries of any individual State.[492] Therefore, the recognized international personality of the Holy See, and its claim to sovereignty, are independent of any territorial control.[493] Hence, the very opposite of Statehood is at issue here: the international personality and sovereignty of the Holy See is not based on territorial considerations or a defined territory, but rather the converse; the right of the Pope to territorial sovereignty is the result of a pre-established recognised international status of the Holy See. Ryngaert reviewed this independence of territory of the Holy See by applying an *a contrario* reasoning:

> '*If one were to affirm that the Vatican City State is the Holy See's territory, then a contrario the disappearance of this territory would imply the loss of statehood and thus a transformation of its international legal personality. However, as became clear after the Pontiff's loss of the Papal States, during the territorial interregnum between 1870 and 1929, the Holy See continued to exercise the powers it had, but without a territorial base. This suggests the existence of an international legal personality that is independent of territory*.'[494]

The existence of a territorial base is not constitutive of the Holy See's international legal personality, but it safeguarded the independence of the Holy See *vis-à-vis* existing States as an extension of the Lateran Treaties in 1929.[495] This historical nuance proves that the international legal personality of the Holy See is a personality distinct from States because Statehood is inherently, inextricably linked to territory.

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[489]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024; Art. 3 Conciliation Treaty, 11 February 1929.

[490]Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 604 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[491]Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?' (2008) 44 Texas International Law Journal 146 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024

[492] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 603 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl > accessed 7 April 2024

[493]Lucian C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?' (2008) 44 Texas International Law Journal 146 <https://www.corteidh.or.cr/tablas/R22413.pdf> accessed 9 April 2024

[494]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 837 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[495] Ibid.

3) (Effective) government

The requirement of a government[496] is considered to be the central criterion on which all other criteria depend and thereby constitutes the basis of the claim to Statehood.[497] The organisation of a (permanent) population within a (defined) territory has, after all, its *raison d'être* in the exercise of authority to bring order and stability.[498] The Montevideo convention requires a 'government'[499] but legal doctrine commonly refers to an 'effective government'[500] The degree of effective control of a government forms the very essence for the purpose of determining Statehood.[501]

An effective government refers to the existence of public authorities capable of expressing the will of the State[502], exercising a certain degree of effective control over the territory concerned and providing for internal order and stability.[503] This requirement thus necessitates two components: on the one hand a government must exercise control over a certain territory and on the other hand it must enjoy this without any outside interference. Although the governmental institutions of the Holy See exercise a certain degree of effective control, it is not delineated to a particular territory and, secondly, it is not free from interference by other entities. An examination of the governmental organs of the Holy See, and their relationship *inter se* demonstrate to what extent they (do not) fulfill the 'effective government' requirement.

First and foremost, it is important to note that the Holy See forms the center of administration (the government) of both the Vatican City and the Roman Catholic Church.[504] The Pope is the last dictator as he is both the absolute monarch of the Vatican City and the supreme head of the Roman Catholic Church. As sovereign of the Vatican City, the Pope exercises all three arms of power (full legislative, executive, and judicial power).[505] As head or 'the Authority'[506] of the Church, the Pope enjoys '*supreme and power of jurisdiction ... in matters of faith and*

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[496]Article 1 (c Montevideo Convention on the Rights and Duties of States 1933

[497]Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 118; James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 56

[498] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 118

[499]Article 1 (c Montevideo Convention on the Rights and Duties of States 1933

[500] James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 47; Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215

[501]Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 612 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024; Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 118

[502]It is best illustrated by the existence of centralised administrative and legislative organs and an enforcement branch that enjoys the monopoly over the exercise of legitimate violence within the State's territory.

[503]Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215

[504] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 109

[505] Article 1 Fundamental Law of Vatican City state

[506] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 109

morals, and in every pertaining to the government and discipline of the Church'.[507] In his capacity as Sovereign of both the Roman Catholic and Vatican City State, the Pope uses the Holy See as the common supreme organ through which he exercises his sovereignty with regard to both these international bodies.[508] For that reason, the Holy See holds a particular position as governing entity because it embodies both (the supreme head of) the (spiritual) Roman Catholic Church as well as (the absolute monarch of) the (temporal) Vatican City.

Before this bipartite body will be tested against the criterion of an effective government, the two underlying bodies and their internal functioning must be clarified.

'In exercising supreme, full, and immediate power in the universal (Roman Catholic) Church, the Roman pontiff makes use of the departments of the Roman Curia which, therefore, perform their duties in his name and with his authority for the good of the churches and in the service of the sacred pastors.'[509]The central administration of the Roman Catholic Church is conducted by the Roman Curia.[510] As became apparent above (*see supra*: 2.1.1. The Holy See: a multi-layered actor), the definition of the Holy See denotes the Supreme Pontiff or the Pope, who, in his administration of the Church, is assisted by the Roman Curia.[511] According to Canon 360 the Roman Curia consists of the Secretariat of State or the Papal Secretariat, the Council for the Public Affairs of the Church, congregations[512], tribunals, and other institutes.[513] As the head of Roman Curia, the Secretariat of State[514] is responsible for, among other things, relations with international organizations.[515]

The structure of the Vatican City (State), on the other hand, is not based on checks and balancesas introduced by Montesquieu[516] in his De l'esprit des lois.[517]According to the

[507] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1864 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[508] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1864 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[509] *Christus Dominus, 9*
[510] Can. 360 and 361 Code of Canon Law
[510] Ibid.
[511]Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1864 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[512] *The Congregations* are concerned with overseeing church doctrine, ap pointing bishops, overseeing missionary work and other matters affecting Roman Catholic
[513] Can. 360 Code of Canon Law
[514] *The Secretariat of State* consists of the Section for General Affairs, which conducts the daily business of the Holy See and the Section for Relations with States, which handles foreign affairs.
[515]Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1865 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[516] Charles Louis de Secondat, baron de La Brède et de Montesquieu, was a French Enlightenment political thinker, precursor of sociology, philosopher and writer. He was born on 18 January 1689 in La Brède and died on 10 February 1755 in Paris. He is best known for his works 'De l'esprit des lois' (1748) and 'Lettres persanes' (1721). Montesquieu's ideas profoundly shaped modern political theory, particularly his advocacy for the separation of powers and the concept of checks and balances in government. The current political organisation of Western countries are largely based on his theory of the separation of powers, also known today as the Trias Politica.
[517] In 'De l'esprit des lois' Montesquieu outlines the concept of checks and balances. The topic of separation of power appears only indirectly in a few pages where Montesquieu discusses the constitutional law of England. Nevertheless, the idea of the separation of powers has penetrated deeply

fundamental law of the Vatican City the legislative, executive, and judicial power all unite in the person of the Sovereign Pontiff.[518] The Pope has delegated his legislative and executive powers, except for the reserved domains[519], to the Pontifical Commission[520], whose members are appointed by the Pope and serve in that capacity for a period of five years.[521] The powers of the Pontifical Commission can furthermore be restricted by the legislative and executive tasks[522] of the Secretary of State[523].[524] The implementation[525] of the decisions of the Pope and the Pontifical Commission is additionally carried out through the Secretary of State.[526] It is moreover through this organ that the Pope exercises his right to representation of Vatican City with foreign powers.[527] The Vatican City State does not have its own military force but relies on two specialized units for security. The Pontifical Swiss Guard is tasked with safeguarding the Pope himself, while the Gendarmerie Corps ensures law enforcement and public order within Vatican City.[528] The third arm of power, the judicial power is characterized (since the law on the judicial organisation of the Vatican City of 1987) by a strict separation of ecclesiastic and temporal courts.[529] However, the judges of the temporal courts are not only appointed by the Pope himself[530], but are also hierarchically dependent on his persona.[531] The general judicial power is enshrined in four different courts: The Sole Judge, the Tribunal, the Court of Appeal and the Court of Cassation, which administer justice in the name of the Sovereign Pontiff.[532] Noteworthy forms the fact that all the delegated (legislative, executive and judicial)

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into the constitutional law of many democracies. Montesquieu argues that freedom presupposes three state powers: a legislative, an executive and a judicial one. *Il faut que le gouvernement soit tel, qu'un citoyen ne puisse pas craindre un autre citoyen'*. The purpose of this separation is to prevent any one branch from becoming too powerful or abusing its authority. The key idea behind Montesquieu's concept of checks and balances is that each branch should have some measure of influence over the others, thereby preventing any branch from accumulating too much power.

[518] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 377

[519] The legislative domains which fall under the exclusive competence of the Pope are the full powers he exercises with regard to the various organs and tribunals of the Apostolic See according to the Code of Canon law, all that concerns his court, the administration of the property of the Holy See, the Vatican Library and Archives, the printing press, book shops, the conclusion of treaties and diplomatic relations by means of the State Secretariat and the approval of budgets.

[520]To have force and effect, these laws have to be published in the *Acta Apostolicae Sedes.*

[521] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 377

[522] In the field of residence permits and judicial organization.

[523] The Secretary of State is a cardinal appointed by the Pope who has both external and internal functions.

[524] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 378

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[526]Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals 580 <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024

[527] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 378

[528] Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals 580 <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024; Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 114

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[530] Every (temporal) judge of the judicial power of the Vatican City State has to swear an oath that he shall be true and obedient to the Sovereign Pontiff.

[531] Article 2 Law No. CCCLI on the Judiciary of the Vatican City State

[532] Article 1 Law No. CCCLI on the Judiciary of the Vatican City State

powers can at any time be withdrawn by the Pope by a subsequent law and put right back into his own hands.[533]

At first sight, the presented governmental institutions of the Roman Catholic Church and the Vatican City seem to operate clearly distinct from each other and only intersect in the common supreme organ of the Pope. Nevertheless, there is no true delineation between the government of the Roman Catholic Church and the government of the Vatican City State.[534] This intermingling of authority is clearly reflected in the fact that the governing body for international affairs is installed within the Roman Curia, rather than the Pontifical Commission.[535] Indeed, the governmental organs of the Vatican City entrusted with temporal authority do not have the competence to conduct foreign affairs and relations with international organizations. Instead, the Holy See conducts these affairs through the Roman Curia, the governing body of the Roman Catholic Church. [536]In this manner, foreign affairs and relations with international organisations, as a temporal matter, fall within a government which main activities lie in overseeing a religion and other services of a spiritual nature, rather than within a government of a temporal nature. Hhence, in line with what Abdullah and Bathon argue in this regard, if the government of a State must be a body that conducts the foreign affairs on behalf of the State, that government would be the Roman Curia (spiritual body of the Roman Catholic Church), rather than the Pontifical Commission[537] (temporal body of the Vatican City).[538] Because of the intermingling of the authority of Holy See as the supreme governing body of both the Roman Catholic Church in spiritual matters and the Vatican City in temporal matters, the 'effective government' requirement can hardly be met.[539]Previous authors are namely of opinion that the Holy See directs a religion, rather than a nation and therefore does not constitute a 'government' in the traditional sense.[540]

In the following, it will be tested if the Holy See's two governing arms (government of the Roman Catholic Church and government of the Vatican City State) withstand the test against the two necessities of a government with effective control over, firstly; a defined territory and secondly; without any outside interference. These criteria will first be tested separately against the Holy See in its capacity as government of the Roman Catholic Church, on the one hand, and in its capacity as government of the Vatican, on the other. However, the abovementioned intermingling of the two capacities of the Holy See implies that when 1 capacity fails the test against these criteria, the other capacity falls inextricably with it.

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[533] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 378

[534]Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1862 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024

[535] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1865 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024; Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 613 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

[536] Ibid.

[537] Abdullah moreover states that the Pontifical Commission is not, strictly the 'government' of the Vatican City, since it is mainly responsible for technical and other services, and does not maintain relations with foreign states or the United Nations.

[538]*Ibid*.

[539]*Ibid*.

[540]*Ibid*.

The Holy See in its capacity of the highest governing body of the Roman Catholic Church does not constitute an 'effective government' in the sense of article 1 of the Montevideo convention for the determination of Statehood.[541] First of all, the 'effective' control of the governmental institutions of the Holy See is not limited to a certain territory but instead extends across territorial borders.[542] The Holy See in its administration of a religion does not administer the territorially delimited entity of Vatican City, but it rather oversees the religious/spiritual matters of the Roman Catholic Church members worldwide, regardless of their residency or nationality in foreign countries.[543] This is closely linked to the criterion of population (*see supra*: 1. Permanent population). The fact that the Holy See's control is not territorially bound but rather extends globally, implies inextricably that it is never exercised solely but always alongside other (State) leaders worldwide. The Holy See namely controls the religious/spiritual matters of the Roman Catholic Church in the respective foreign countries of its worldwide members and therefore never without outside interference.

The Holy See in its capacity of the highest governing body of the Vatican City comes closer to the criterion of an effective government but fails to satisfy it fully. After all, the authority exercised by the Holy See on temporal matters (through the Pontifical Commission) is territorially delimited to the territory of the Vatican City.[544] The government of the Vatican City possesses effective temporal power over its residents (by virtue of office and family) (*see supra*: 1. Permanent population) within their own legal framework and structures.[545] Given that the Holy See commands effective control within its own delimited area of the Vatican City, one could assume that it is free from any outside interference. '*However, how much as the Vatican may wish to punch above its weight, it does not have the wherewithal to do it*.'[546] Indeed, despite the Vatican's aspirations to exert influence beyond its reach, it lacks the necessary resources to achieve such ambitions. The Lateran Treaty provisions unequivocally establish Italy's ongoing military responsibility for safeguarding and defending the Vatican's territory.[547] Moreover, crimes of a serious nature, like robbery and murder, occurring within and in the vicinity of the Vatican, are adjudicated by the courts in Rome within the Italian State.[548] Not only is there interference on the part of the Italian State, other entities are also implicated. The Pontifical Swiss Guard is tasked with safeguarding the Pope himself, while the Italian Gendarmerie Corps ensures law enforcement and public order within Vatican City. [549] For that

[541] Article 1 c) Montevideo Convention on the Rights and Duties of States 1933
[542] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 832 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[543] *Ibid*.
[544] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 412
[545] *Ibid*.
[546] Article 1 c) Montevideo Convention on the Rights and Duties of States 1933
[547] Article 22 Lateran Conciliation Treaty. The article includes a 'one-way extradition' clause, requiring only the Vatican to surrender individuals who have sought refuge within Vatican City to the Italian State. There's no corresponding obligation on the Vatican's part to reciprocate. This stems from its incapacity to fulfil certain vital governmental functions. This falls completely in line with the above mentioned 'unilateral, one-way nature' of the Lateran Conciliation Treaty and the imbalance of commitments between the Italian State and the Holy See.
[548] *Ibid*.
[549] Article 3 Lateran Conciliation Treaty; Sipho Nkosi, 'The status and position of the Vatican and the Pope at international law: trying to fit a religious square peg into a legal circle?' (2011) Sabinet African Journals 580 <https://journals.co.za/doi/pdf/10.10520/EJC122561> accessed 10 April 2024; Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 114

reason, it cannot be claimed that the Holy See (as the government of Vatican City) has effective control over the delimited Vatican City without outside interference.

The application of the cumulative criteria of an 'effective government' under the Montevideo convention show that, despite the fact that the governmental institutions of the Holy See can be said to exercise a certain degree of effective control, they fail to fulfil the cumulation to exercise it both within a defined territory and without outside interference. If some would uphold a different reasoning whereby the 'effective government' criterion would be fulfilled, this reasoning would nevertheless clash inevitably with the above-mentioned intermingling of the capacities of the Holy See as both the government of the Roman Catholic Church and the government of the Vatican City. In such manner that as soon as one of both capacities fails the test against one of the two criteria of an effective government, the other capacity falls inextricably with it.

In conclusion, one more central question needs to be asked, in line with what Crawford states: '*In whose interest and for what legal purposes is the government 'effective'?*'[550] After all, the Holy See performs its governmental functions, both within the Roman Catholic Church and the Vatican, with one central goal: the overseeing of the religion of the Roman Catholic Church and the spiritual interests of this faith. This research already repeatedly revealed the veritable *raison d'être* of the Vatican: the independence of the Holy See in the spiritual administration of the diocese of Rome and of the Catholic Church in all parts of the world. The spiritual sovereignty of the Roman Catholic Church is the sole reason for the governmental action of the Holy See.

4) *Capacity to conduct international relations*

The Montevideo Convention positions the fourth requirement as 'the 'capacity to enter into international relations with other States[551]' but is usually referred to as the criterion of independence in legal doctrine.[552] Several authors have argued that relations with other states is a consequence of Statehood, rather than a precondition of Statehood.[553] The analysis of the capacity to conduct international relations usually depends upon the determination of independence of a State.[554] International relations could namely merely be seen as an indication of a State's independence, thereby emphasizing independence as the fundamental

[550] James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 129
[551] Article 1 d) Montevideo Convention on the Rights and Duties of States 1933
[552] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215; James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 129; Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1866 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[553] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 614 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024; Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1865 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024; Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 120
[554] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 614 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024

requirement.[555] Therefore the capacity of the Holy See will first be examined on its independence and secondly on the basis of its relations with other states.

Independence

'*Independence presupposes that a State is capable of taking part in international relations in its own right, without being subordinate to another State*.'[556] The independence of a State is necessary in order to prove that the entity can lead a separate existence.[557] Specifically, it is not so much the independence of States itself but of the governments of States that is required.[558] The 'effective government' as a pillar of the other criteria is apparent here. (*see supra:* 3. Effective government) However, what degree of independence is necessary in order to be qualified as an independent State? As Judge Huber declared in the *Island of Palmas* arbitration:

> *'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.'*[559]

Within this context it is important to note that sovereignty and independence are often used as identical concepts in legal doctrine.[560] For the conceptual clarity of this research, a differentiation will be made. In its most common modern usage, sovereignty refers to '*the 'totality of international rights and duties recognized by international law'* vested in an independent territorial unit - the State.[561] It is considered to be a consequence of Statehood, not a precondition.[562] Independence, on other hand, applies to the rights which an entity enjoys to the exclusion of other States.[563] Nevertheless, both concepts are clearly interrelated.[564]

The (absolute and visible) independence of the Holy See and its indisputable sovereignty in international matters was guaranteed in the Lateran Conciliation Treaty of 1929 by the creation

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[555] *Ibid*.
[556] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 215
[557] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 121
[558] *Ibid.*
[559] James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 26;
[560] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 121
[561] James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 26; Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 121
[562] *Ibid*.
[563] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 121
[564] A substantial limitation of sovereignty in favor of a third State leads to the loss of independence and therefore loss of Statehood.

of the Vatican City.[565] It is worth noting here that the Vatican City was founded for the sole purpose of ensuring the independence of the Holy See in the spiritual administration of the diocese of Rome and of the Catholic Church in all parts of the world.In other words: the independence of the Holy See as supreme head of a spiritual/religious institution was guaranteed *vis-à-vis* the Italian State. As mentioned above, the independence should be assessed against the specific body of the government of a State, rather than the State itself.

Within this examination of independence (of the government) of the Holy See, the exposition of the third criterion of 'Effective government' of the Holy See as both the government of the Roman Catholic Church and the government of the Vatican City State can be applied here (by analogy). *(See supra*: 3. Effective government) This clearly revealed that the Holy See both as head of the Roman Catholic Church and head of the Vatican City State was not a government with effective control over a given territory on the one hand and without outside interference on the other. This shortcoming of the third criterion can therefore be extended to the fourth criterion of independence. After all, independence is inextricably linked to the lack of outside interference and the fact that an entity can lead a separate existence without being dependent on other States. (*See supra*) The test against the third criterion revealed that the Holy See does not lead a separate existence without interference from other entities. Any significant restriction of a government's sovereignty to another State results in a loss of independence and, consequently, Statehood.[566] It has been argued before that the Holy See fails the independence requirement of Statehood because of its dependence and interference on behalf of other States. (*See supra*: 3. Effective government) This was highlighted by the intermingling of capacities of the Holy See (as head of the Roman Catholic Church and head of Vatican City State)[567], the interference of other entities and its reliance to the Italian State. (*See supra*: 3. Effective government) Indeed, the survival of the Holy See is heavily dependent on the Italian State, which entirely surrounds it. The Lateran Treaty foresees Italy's ongoing military responsibility for safeguarding and defending the Vatican's territory.[568] Moreover, it depends on Italy for all its essential services, including water, railroad services, telephone, radio, postal, and telegraphic connections, all provided at Italy's expense. [569] Despite having its own currency, Italian money is recognized as legal tender. It lacks an independent economy, engaging in neither domestic nor foreign trade, and relies entirely on Italy for essential commodities, including food.[570] Additionally, Italy is responsible for handling criminal prosecutions on behalf of the Holy See.[571] As stipulated in the Lateran Treaty, Italy ensures that diplomats can traverse its territory.[572] Consequently, Vatican City, as a mini-entity, lacks the capacity for self-policing or providing for its residents, existing solely within and dependent upon another sovereign state. Its very existence depends on Italy, putting the Holy See's independence in question.

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[565] Preamble and article 2 Lateran Conciliation Treaty
[566] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 616 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024
[567] E.g.: the Holy See conducts foreign affairs on behalf of the Vatican City. Historically, there have been instances where a state delegates control of its foreign relations to another state,but one must position this within the meeting of the other (3) statehood criteria.
[568] Article 22 Lateran Conciliation Treaty.
[569] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1866 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[570] *Ibid*.
[571] Article 22 Lateran Conciliation Treaty
[572] Article 12 Lateran Conciliation Treaty

For this reason, it cannot be endorsed that the independence of Holy See (both as the government of the Roman Catholic Church and the government of the Vatican) is guaranteed and therefore fails to meet the fourth criterion of independence.

Relations with other States

The capacity to enter in international relations for the purpose of determining Statehood is embedded in the determination of the independence of a potential State.[573] While its independence can be strongly questioned on the basis of foregoing, the Holy See has repeatedly demonstrated both the desire and capacity to enter into international relations.[574] The capacity to conduct international relations manifests itself (among others) through the initiation of diplomatic relations and the exchange of ambassadors with other States, the conclusion of bilateral and multilateral treaties, membership of international organisations and submitting claims at the international level.[575] Although the capacity to enter into relations with other states usually accrues to State actors, it is not their exclusive prerogative.[576]At present and throughout history the Holy See carries several of these relations and abilities. The previous sections demonstrated that the Holy See (with the Roman Curia) has the upper hand in conducting international relations (compared to the Vatican City State). (*See supra*: Holy See and 3. Effective Government)

The Holy See engages in international relations through three key capacities: its membership in numerous international organizations, its ability to send and receive diplomatic legations, and its treaty-making authority.[577] This treaty-making capacity is demonstrated by the Holy See's practice of concluding 'concordats'[578] with various states, the signing of the Lateran

[573] Matthew N. Bathon, 'The Atypical International Status of the Holy See' (2001) 34:597 Vanderbilt Journal of Transnational Law 616 <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1698&context=vjtl> accessed 7 April 2024.
[574] *Ibid*.
[575] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 218
[576] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1866 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[577] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 839 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[578] A concordat is a specific bilateral treaty entered into between the Holy See and a State, which regulates the religious affairs and activities of the Catholic Church in that State. Typically it governs individuals' rights to exercise in the Catholic religion, financial and property matters, confessional teaching, the civil effects of marriages under canonical law, State subsidies to the Church, and the Pontiff's right to appoint bishops.

Treaties with Italy in 1929, and its accession to multiple multilateral conventions[579].[580] One of those multilateral conventions, the Vienna Convention on Diplomatic Relations, regulates the exercise of diplomatic relations, by two special references to the Holy See's legation practice, equating apostolic nuncios (the Holy See's diplomatic representatives) with ambassadors, i.e., the first class of heads of mission and ensuring the continued adherence to established customary practices between the Holy See and the receiving state.[581]

The Holy See holds accreditation as a permanent observer at the United Nations (hereinafter: UN), many of its specialized agencies, and several regional intergovernmental organizations.[582] The Holy See also enjoys rights of participation at other principal UN organs.[583] The Holy See was granted non-member state Permanent Observer status at the UN in 1964 and has used this position since then (as a religious entity), unlike any other world religion or non-governmental organization, to advance the theological agenda and thus, the position of the Roman Catholic Church.[584]As it stands, the Holy See is the only religious body which is accorded statehood status at the UN, whereby it enjoys greater privileges than any other world religion or non-governmental organization and, notwithstanding, uses the UN system as a religious body, not a State when participating in UN activities.[585] A petition[586] in 1995 called into question the status of the Holy See at the UN and urged the UN '*to evaluate the appropriateness of allowing the Holy See, a religious entity, to a par with states'*.[587]

The 'Non- Member state' status implies that while the Holy See is not one of the Member states of the General Assembly at the United Nations (hereinafter: GA), it is still considered a State. The Holy See's status as a non-member State grants it the same privileges enjoyed by nations

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[579] Such as the Convention on the Rights of the Child (1951) the Geneva Conventions on the Law of War (1949), the Convention relating to the Status of Refugees (1951), the Vienna Convention on Relations (1961), the Vienna Convention on Consular Relations (1963), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention against Torture and Other Cruel, Inhuman of Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989) and its Optional Protocols, and the Convention on Cluster Munitions. It should be noted that with respect to the Convention on the Rights of the Child, the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman of Degrading Treatment or Punishment the Holy See made a declaration that the application of the Convention must be compatible in practice with the special nature of the Vatican City State and do not prejudice its legislation on citizenship, entry and residence. This may suggest that where the Holy See becomes a party to a treaty, the Vatican will also be bound by that treaty, even though it is technically a separate legal person.

[580]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 839 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[581] Article 14 and 16 Vienna Convention on Diplomatic Relations

[581] Article 16 the Vienna Convention on Diplomatic Relations

[582]See for an overview the fourth preambular paragraph of UN Doc A/58/314 (16 July 2004) on the Participation of the Holy See in the work of the United Nations (listing the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Industrial Development Organization, the International Fund for Agricultural Development and the World Tourism Organization, as well as the World Trade Organization, the Council of Europe, the Organization of American States and the African Union).

[583] E.g. : at the UN ECOSOC it has the right to attend meetings, make proposals and policy statements.

[584] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1835 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024

[585] *Ibid*.

[586] Petition circulated at the Fourth World Conference on Women held in Beijing in September 1995 (A Call to the United Nations to Consider the UN Status of the Holy See)

[587] *Ibid.*

at international conferences sponsored by the United Nations.[588] Its designation as a "Permanent Observer" provides the Holy See with specific privileges within the United Nations and its subsidiary bodies.[589] Attention should be paid to the characterization of the Holy See as an observer *State* instead of a non-State actor by the UN GA.[590] Ryngaert states in this regard that even if the UN considered the Holy See to be a state actor, this merely underscores the UN's inability to adequately address 'irregular' entities like the Holy See.[591]

'*The Holy See's Non-Member State Permanent Observer status permits it to participate in the work of the United Nations on the same level as if it were a member state'*.[592] Although the Holy See is not permitted to vote at the GA, it may participate in all the GA meetings.[593]In particular, the existing rights and privileges of participation of the Holy See in the GA are the right to participate in the general debate of the UN GA, the right of inscription on the list of speakers under agenda times at any plenary meeting of the GA, the right to make interventions, the right of reply, the right to have its communications circulated as official documents relating to the sessions and work of the GA or international conferences issued and circulated directly as official documents of the GA or those conferences, the right to raise points of order relating to any proceedings involving the Holy See, the right to co-sponsor draft resolutions and decisions that make reference to the Holy See and seating arranged immediately after Member States.[594] Remarkably, while heads of Non-Member states are normally not permitted to address the GA in plenary, one exception has been made: the Pope.[595]The Holy See's participation at the UN is, unlike that of states and its state like position, fundamentally religious and spiritual in nature.[596] This is reflected by the decision to designate the Holy See, rather than Vatican City, as the permanent observer. This expanded the Papacy's focus at the UN beyond the temporal affairs of Vatican City and allowed the Holy See to address broader social and moral concerns[597] of the Catholic Church in UN activities.[598]

[588] The rights stemming from this status were enhanced by the UN General Assembly Resolution 58/314 (2004).
[589]UNGA Res 58/314 (16 July 2004) UN Doc A/RES/58/314
[590] This characterization may be confirmed by the Holy See's rate of assessment for its financial contribution to the general administration of the UN: this is the rate of assessment for a non-member *State*. The fact that the financial contribution of the Holy See is parallel to that of other (non-member) states does not necessarily leads to the qualification of the Holy See as a state by the UN.
[591]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 841 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[592] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1844 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[593] *Ibid.*
[594] UNGA Res 58/314 (16 July 2004) UN Doc A/RES/58/314, paras. 1-10
[595] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1843 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[596] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1843 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024
[597]This is reflected for example by the fact that the Holy See was advancing the prevention of the adoption of a proposed resolution on sexual orientation and gender identity. (UNGA Official records 71st plenary meeting, A/63/PV.71 (18 December 2008), 2)
[598] *Ibid.*

The Holy See has also actively used its moral and spiritual voice at conferences. At the International Conference on Population and Development in Cairo[599] in 1994 the Holy See manoeuvred at different stages[600] a 'campaign' to bring (*read*: mislead) States along under moral premises in their position against the programme, claiming that it encouraged abortions on demand, approved of adolescent sexual activity and condoned homosexuality.[601] With the moral pointing finger the Pope declared that '*the United Nations wants to destroy the family'* or that '*the conference would lead to the most disastrous massacre in history'* if it did not ban abortion, the '*future of humanity*' was at stake and '*abortion ... is a heinous evil'*.[602] At the Fourth World Conference on Women held in Beijing in 1995 the Holy See further displayed its moral pressure in the same three stage pattern. It attempted to influence the document in a binary and heteronormative manner by objecting the inclusion of references to 'gender', 'gender equality', 'abortion' and questioning the meaning of 'gender', 'sexual orientation' and 'lifestyle'[603].[604] At the bilateral level, the Holy See maintains diplomatic relations with a total of 183 States and in addition the European Union and the Sovereign Military Order of Malta. [605]

The reviewed three capacities through which the Holy See engages in international relations (regardless of the objectionable goals) evidence both the will and the Holy See's capacity to enter into international relations. However, it should be borne in mind that the capacity to enter into relations with other States at the international level is not an exclusive State prerogative.[606] Therefore does the capacity to engage in international relations not necessarily implicate a state qualification.. Seen as a requirement within the determination of a State, the capacity to enter into international relations relies partly on the internal authority of a government (over a territory), which is essential for fulfilling international obligations, and partly on the entity concerned being distinct for international relations purposes, ensuring that no entity both executes and accepts responsibility for those obligations.[607] Hence, the capacity to engage in

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[599] The core of the Cairo document recognizes 'the realities of women's lives in terms of lack of power, economic insecurity, abuse, violence and coercion, unrecognized and unmet health needs, and poor-quality or no services.' The preamble recognizes the need to empower women and support the 'new concept of reproductive health'.

[600] The Holy See exploited its status as a state to significant advantage in three stages First, pressure in the international sphere: months before the conference began, the Holy See attempted to persuade national leaders to support its stance on contraception and abortion. Second, involvement with the preparatory meetings. Thirdly, the Holy See used political influence as a "state" at the conference to shape the draft Programme of Action and to block consensus in order to force other states to accede to its demands.

[601] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1843 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024

[602] UN Report of the International Conference on Population and Development, 5-13 September 1994, Cairo, UN Doc. A/CONF.171113/Rev.1 Sales No. 95.XIII.18 (1995)

[603] The Holy See understands the term 'gender' 'as grounded in biological sexual identity, male or female' and thus excludes 'dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.

[604]Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, *Addendum*, Annex IV, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No. 96.IV.13 (1996), 164

[605] X., 'Informative Note on the diplomatic relations of the Holy See' (*Holy See Press Office Summary Bulletin*, 10 January 2022) <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2022/01/10/220110d.html> accessed 21 April 2024

[606] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1866 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024; James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 64

[607] *Ibid*.

relations with other states, as requirement for statehood, combines both the requirements of governance and independence and should not be seen separated from these two.[608] Whereas the Holy See clearly has the capacity to enter into international relations, it fails to fulfil this capacity as the conflation of the requirements of government and independence.[609] This broader context brings to the fore that the proper conduct of the Holy See's capacity to enter into international relations with States is not self-sufficient and does not operate as part of State attributes. For this reason, it is difficult to maintain that the fourth Montevideo criterion of the capacity to enter into international relations with other States as partial criterion of the fundamental requirement of independence is fulfilled.

5) Preliminary conclusion

The application of the four formal criteria of statehood as laid down in the Montevideo Convention to the Holy See revealed that the Holy See's international personality falls short on these requirements. First of all, the Holy See lacks the fundamental attribute of a permanent population. The analysis of the first criterion revealed that the Holy See is only analogically populated through the population of its territorial base, the Vatican City State or through the population, the faithful of the Roman Catholic Church. However, both grounds hardly seem to fulfil the criterion of a population of permanent nature given that the citizenship of the Vatican is of a functional and temporary nature and the 'population' of the Roman Catholic Church of a spiritual/ecclesial and loose nature. Both analogic population moreover have a different character from that of ordinary nationality and are combined *per se* with another nationality or even super-imposed upon it. The analysis of the second requirement further revealed that the existence of a territorial base is not constitutive of the Holy See's international legal personality and therefore the international legal personality of the Holy See is a personality distinct from States because Statehood is inherently linked to territory. Thirdly, the application of the cumulative criteria of an 'effective government' under the Montevideo convention showed that, despite the fact that the governmental institutions of the Holy See can be said to exercise a certain degree of effective control, they fail to fulfil the cumulation to exercise it both within a defined territory and without outside interference. Therefore, the Holy See in its capacity of both the government of the Roman Catholic Church and the government of the Vatican City fails to fulfil the third requirement of an effective government. Fourthly, it was outlined that the independence of the (government) of the Holy See cannot be guaranteed since its existence is dependent on other entities and thus not free from interference. Although the Holy See has the capacity (and will) to conduct international relations, it should be noted that the capacity to enter into relations with other states is not the exclusive prerogative of State actors and that the Holy See fails to fulfil this capacity as the conflation of the requirements of government and independence.

Following this analysis, it is untenable to maintain that the Holy See meets the 4 constitutive requirements of statehood according to the most widely accepted definition of statehood, the Montevideo Convention, and therefore is a State actor. The Holy See fails to fulfil any of the four criteria in its totality as an international person on its own or by analogy through its capacity of the highest governing body of either the Roman Catholic Church or the Vatican City. This four-part shortcoming highlights that the Holy See's international personality is a personality distinct from States because statehood is inherently linked to those four criteria. The Holy See has an international personality that cuts across all four criteria of population, territory, effective government, and independence: indeed, its international status transcends them.

[608] *Ibid*.
[609] *Ibid*.

B. Spiritual sovereignty

The qualification of the Holy See's personality in international law as '*the most other*', '*unique*' (-*sui generis*) non-State actor is not only grounded on the non-conformity with the four Statehood criteria under the Montevideo Convention but derives contiguously from the spiritual nature of its sovereignty. Previous section clearly revealed that the Holy See's international status is not based on territorial sovereignty but rather on spiritual sovereignty (over the 1.3 billion adherents to the Catholic faith).[610] Conspicuous, the dominant conception of Statehood does not have such articulation of sovereignty.[611] Given its global spiritual remit and international impact regardless of territory, the Holy See is not to be characterized as a State, but as a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the centre of the Catholic Church.[612]Gaetano Arangio-Ruiz aptly depicts this spiritual sovereignty as the basis for the Holy See's international personality:

> '*The religious activities carried out by the Roman Church and the spiritual ends that it pursues are at the basis of the international legal status of the Holy See. It is because of those activities and purposes that the Roman Church enjoys throughout the world a following the size of which has no equal among other churches and has for centuries occupied a unique position of prestige. The Holy See's historical condition of independence and sovereignty rests upon these factors and upon the respect that the Roman Church commands nowadays from all governments*.'[613]

This spiritual mandate, that transcends territorial boundaries, lies at the basis of the international legal personality of the Holy See.[614] The Holy See's spiritual mission and power, with God's will at the bottom-line of the Church's conception of itself and its service to the people, forms its constitutive force.[615]This spiritual nature of the Holy See power base should not be underestimated: the Pope's spiritual authority remains prominent, untainted by temporal matters. This research will later show that, as the spiritual head of the Church, the Pope still wields a great and present influence in the temporal world order.[616] Being bound by no borders, the Holy See as head of the Roman Catholic Church has spiritual power everywhere, whereas territorial entities are striving, each from their territory to exercise control, but keenly realize the limits to their power, as their influence barely or effectively extends beyond their own

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[610] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 415; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 838 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[611]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 838 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[612] *Ibid*.

[613]Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 363 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[614]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 838 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[615]Mariano Barbato, 'A State, a Diplomat, and a Transnational Church: The Multi-layered Actorness of the Holy See' (2013) CEEOL 37 <https://www.ceeol.com/search/viewpdf?id=236720> Accessed 3 April 2024

[616]Allen D. Hertzke, 'The Catholic Church and Catholicism in global politics' in Jeffrey Haynes, *Routledge Handbook of Religion and Politics* (2009);

realm.[617] By its very universal nature, it is not tied to any particular people, territory or form of government but instead, carries out a spiritual mission that is universal *an sich*, directed to all mankind without distinction.[618] The Holy See's spiritual sovereignty therefore transcends the territorial sovereignty of state actors as their strength derives from a diversion of being 'supra', i.e. above all cultural and political forms and open to all people and nations.[619] One should keep in mind, however, that notwithstanding that the Holy See considers the spiritual sovereignty superior to territorial sovereignty[620], its actions do situate themselves within a temporal order. The Holy See's focus on religious or spiritual matters does not change the fundamentally legal and in that sense, temporal nature of its international rights and obligations, any more than the subject matter of a treaty affects the essential nature of an inter-state agreement.[621]

Notwithstanding, through the centuries the spiritual sovereignty was at the origin and legal basis of a growing temporal power[622] : until 1870 under the Papal States and from 1929 to the present within the Vatican City State. (See supra: 4.1.2.2. Interrelated concepts: the Roman Catholic Church, Holy See and Vatican City) As head of both the Roman Catholic Church and Vatican City, the Holy See combines the spiritual sovereignty and temporal sovereignty to achieve its spiritual mission. The Holy See thus has it both ways: the joint power of the spiritual and the temporal. Both, however, are installed for the same aspiration: the pursuit of the spiritual mission. The spiritual sword is wielded *for* the Church, while the temporal sword is wielded *by* the Church.[623] The temporal power only operates as an accessory for the spiritual. The spiritual sovereignty of the Church is the sole reason for the existence of the Vatican State as the temporal power was not created to act on itself but to guarantee the independence of the Holy See in the spiritual administration of the diocese of Rome and of the Catholic Church in all parts of the world. Only she provides the genesis of this temporal power.[624]

The Holy See's authority at the pinnacle of the Roman Catholic Church relies on the unique authority of the Pope, in whom the spiritual and the temporal converges.[625] All authority/power is thus vested in the person of the Pope by virtue of his office as the successor of the apostle

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[617] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 93

[618] *Ibid*.

[619] Ibid.

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[621] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 365 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[622] Gaetano Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See' (1996) 29 Revue Belge de droit international 361 <http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/on-the-nature-of-the-international-personality-of-the-holy-see.pdf> accessed 7 April 2024

[623] Pope Leo XIII, 'Immortale Dei, Encyclical Letter on the Christian Constitution of States' *(Vatican,* 1885*)* 33-34 <*https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html*> accessed 25 May 2024

[624] Guy Van den Brande, 'De Kerk en haar international optreden' (1979) 16 Jura Falconis 297 <https://www.law.kuleuven.be/apps/jura/public/art/16n2/vandenbrande.pdf> accessed 7 April 2024; Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 830 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[625] Both powers are vested in the person of the Supreme Pontiff. The spiritual power: as the spiritual leader of the Roman Catholic Church, the Pope is the Supreme Pontiff. The temporal power: as head of the Vatican City State the Pope holds temporal power. Both powers come back to its essential spiritual mission.

Peter[626] and as Vicar of Christ[627] in order to pursue the spiritual mission of the Holy See at the apex of the Roman Catholic Church.[628] In a letter Pope Leo XIII's addressed the relationship between the spiritual and the temporal power, all retracing to God*:*

> *'Everything, without exception, must be subject to Him, and must serve him, so that whosoever holds the right to govern holds it from one sole and single source, namely, God, the sovereign Ruler of all…The Almighty, therefore, has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things…. therefore God, who foresees all things, and who is the author of these two powers, has marked out the course of each in right correlation to the other. 'For the powers that are, are ordained of God'… All power, of every kind, has its origin from God, who is its chief and most august source…*
>
> *…To wish the Church to be subject to the civil power in the exercise of her duty is a great folly and a sheer injustice…'* [629]

In other words: '*there is no power but from and for God'*.[630] This vocation and mission is vested in the (spiritual and temporal) authority of the person of the Pope, as the representative of Christ on earth, granted by God to lead the Church in Christ's lead with God's will at the bottom-line. A (divine) dictator disguised in a spiritual mission?[631]

C. Conclusion: The Holy See: '*Ceci n'est pas un état'*

Previous analysis revealed that the Holy See is not to be characterized as a state because (1) the Holy See lacks the four criteria inherent to State actors and (2) the authority of the Holy See is not grounded in territorial sovereignty over the Vatican City premises, but rather in its spiritual sovereignty over the 1.3 billion adherents to the Catholic faith. Instead, it is a *sui*

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[626] Canon 331 Code of Canon Law. As the Vicar of Christ, the Pope is the representative of Christ on Earth. This title underscores the belief that the Pope's authority is not self-derived but granted by God to lead the Church in Christ's stead. The Pope is considered the successor to Saint Peter, who, according to Catholic tradition, was appointed by Jesus Christ as the leader of His disciples and the head of the early Church. This doctrine is based on the belief that Saint Peter was given a special role by Jesus Christ. Scriptural foundations for this can be found in passages such as Matthew 16:18-19, where Jesus says to Peter, "You are Peter, and on this rock I will build my Church... I will give you the keys of the kingdom of heaven..." There is an unbroken line of succession from Saint Peter to the current Pope. This apostolic succession is viewed as divinely guided, ensuring that the Pope inherits the spiritual authority given by Christ to Peter.

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[628] Matthew: 28:16-20 (New International Version): "Then the eleven disciples went to Galilee, to the mountain where Jesus had told them to go. When they saw him, they worshiped him; but some doubted. *Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations*, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.'" (emphasis added); Pope Leo XIII, 'Immortale Dei, Encyclical Letter on the Christian Constitution of States' *(Vatican,* 1885*)* 13 <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html> accessed 25 May 2024

[629] Pope Leo XIII, 'Immortale Dei, Encyclical Letter on the Christian Constitution of States' *(Vatican,* 1885*)* 3, 13, 33, <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html> accessed 25 May 2024

[630] *Ibid*, 3. (own emphasis added)

[631] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 224.

generis non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the center of the Catholic Church.

Or, to phrase it in René Magritte's terms: *Ceci n'est pas un état*.[632]The Holy See has characteristics analogous to a State actor and therefore resembles a State, but that does not imply that it is a State actor. Simply because its international personality resembles that of a State actor, does not mean that this subject of international law is *ipso facto* a State actor. Like René Magritte confronts the viewer with the convention of naming and associating things within a certain framework of thought, this research wishes to invite the reader to reflect on how the relationship between language and image makes one qualify and (mis)lead reality. Indeed, associating a particular concept within a fixed convention forces to narrow down entities within those particular fixed conventions. A non-state actor bears similarities to a state actor, but does not implicitly imply that it can be narrowed down to a 'state'. A closer analysis of the international persona of the Holy See based on the Montevideo Convention and widespread legal doctrine has exposed this convention and points to its real nature as a *sui generis entity*.

ii. The Vatican City State: mini-state actor

The Vatican City as created in 1929 comes closer to qualifying as a State, as it satisfies the Montevideo criteria for statehood to some extent. However, as Crawford stresses: '*it cannot be denied that the position of the Vatican City is peculiar and that the criteria for statehood in its case can only marginally-if at all-complied with.*'[633] The Vatican has a fixed *territory* (however small it may be) with fixed boundaries, a small *population* of clerics (that may however not have the capacity for self-perpetuation and is not permanent) and a *government* (with outside interference nevertheless).[634] Since the Vatican's statehood qualification does not form part of the main research within this master's thesis, reference can be made to the statehood qualification of the Holy See for the more detailed test of the Vatican against the Montevideo criteria, at least in terms of population, territory, and government, where it was applied by analogy for the Holy See.(*See supra*: A. Montevideo statehood criteria) The Fundamental Law of the Vatican City State also provides for the representation of the Vatican City State in *relations with foreign nations and other subjects of international law*, for the purpose of diplomatic relations and the conclusion of treaties.[635] According to Article 2, this representation is exclusively reserved for the Supreme Pontiff, who exercises this authority through the Secretariat of State. As a result, the Vatican engages in international relations, albeit to a lesser extent or in a different manner compared to the Holy See.[636]

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[632] With the work *La Trahison des Images*, René Magritte challenges the viewer to think about how the relationship between language and image describes reality and can mislead. The painting's paradox lies in apparent contradiction between what is represented and the interpretation of what is represented. Magritte confronts the viewer how the naming of things is linked to a certain framework of thought, and wants to make us aware of the habits of thought that guide a perception/analysis. Magritte's paintings violate the conventions by which we place things and thus narrow them down. After all, a painted pipe is not a pipe. The painted pipe bears resemblance to a pipe, but that therefore does not implicitly imply that it can be narrowed down to a pipe. (René Magritte, *La trahision des images*, 1929, oil on canvas, 60 x 80 cm, Centre Pompidou, Paris. https://www.artsy.net/artwork/rene-magritte-la-trahison-des-images-ceci-nest-pas-une-pipe)

[633] James Crawford, *The creation of states in international law (2nd edition)* (Oxford Scholarly Authorities on International Law, OSAIL, 2007) 223.

[634] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 411-419.

[635]Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 835 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024.

[636] Article 2 Fundamental Law of Vatican City state.

The constituent elements of statehood are, in the case of the Vatican, highly abnormal or reduced to a bare minimum.[637] However, Vatican City is a (Micro-)State which has been created, not for the convenience of a human society united in its territory, but in order to guarantee the independence of another international legal person, the Holy See. Nevertheless, it forms an entity which has been recognized by the international community as a State for special purposes (the presence of the Holy See in its territory) and it is in this capacity submitted to international law.[638] This international recognition of the Vatican City State as such has a constitutive effect, given that the Vatican has no permanent population and therefore no people with self-determination.[639] As set out higher, it should be noted that, within this constitutive position, recognition is of a purely political nature and this approach is no longer widely embraced because of its shortcomings.[640] (see supra: *The declaratory vs. the constitutional theory on the recognition of states)*

4.1.3. Conclusion: the Holy See: a multi-layered actor or a multi-layered dictator?

Designating the Holy See as a 'multi-layered actor' covers its unique nature: a subject (of international law) with several layers (to power). Or one could also say a hydra: a multi-headed monster with several tentacles to power. This chapter has sought to dissect this multi-layered actorness and expound its various actors (to power) from the perspective of international law. In as much as it explored these different actors separately, it also foregrounded their inseparable interconnectedness. The reference to *What's in a name* in the introduction became increasingly apparent in this chapter: the (canonical) definition of the Holy See, the Apostolic See (Sancta Sedes) as the seat of the bishops of Rome and the governmental centre of the Catholic Church, being headed by the Supreme Pontiff or the Pope, assisted by the Roman Curia, does not cover its full, intrinsic character.

The starting point for understanding the status of the Holy See in international law was the broader concept of international legal personality in international law itself. Within this framework attention was paid to the doctrinal dispute between the declaratory and the constitutive view on recognition of states. The Montevideo Convention as the source most often cited on the definition of the state was set as the standard in this research for evaluating whether an actor of international law qualifies as a state. Based on this overview, the interrelated concepts of the Holy See, Vatican and the Roman Catholic Church and their status in international law were further analysed departing from a historical background. Analysing these actors from a historical perspective revealed the development of the Holy See as a person under international law and its intertwining with both the Roman Catholic Church and the Vatican City. It became furthermore apparent that the Roman Catholic Church is the universal society of the faithful, founded by Christ as an hierarchically organised entity in its own right pursing its own spiritual aims. The definition of the Holy See, on the other hand,

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[637] Robert Jennings and Arthur Watts, *Oppenheim's International Law (9th edition): volume 1 Peace* (Oxford Scholarly Authorities on International Law, OSAIL, 2008).
[638] Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (Cambridge, Cambridge university press, 1996) 418; Preamble Lateran Conciliation Treaty, 11 February 1929.
[639] *Ibid.*, 419.
[640] Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 46; Alina Kaczorowska, *Public International Law* (Abingdon, Oxon: Routledge, 2015) 214; Hersch Lauterpacht, *Recognition In International Law* (Paperback reissue of the edition 1947 Cheltenham: Cambridge university press, 2012)

denotes the Supreme Pontiff or the Pope, who, in his administration of the Church, is assisted by the Roman Curia. The Holy See acts as the supreme organ of government of the Catholic Church. Regarding the international persona of the Holy See it is important to distinguish the Holy See *post* and *prior* 1870. The Vatican City was created in 1929 by the Lateran Treaty to solve the Roman Question and provided a territorial basis for the Holy See, which predates the Vatican City by many centuries, to guarantee its independence. Remarkably, the three entities converge in the person of the Pope: the Pope is simultaneously the head of the Holy See, the absolute leader of the Church and is moreover the temporal ruler of the state of Vatican City. In his capacity as Sovereign of both the Roman Catholic and Vatican City State, the Pope uses the Holy See as the common supreme organ through which he exercises his sovereignty with regard to both these international bodies. For that reason, the Holy See holds a particular position as governing entity because it embodies both (the supreme head of) the (spiritual) Roman Catholic Church as well as (the absolute monarch of) the (temporal) Vatican City.

Given the pivotal position of statehood qualification within this research, the distinctive legal personality of the Holy See and the Vatican City in international law and the applicability of the statehood qualification to these actors was elaborated. This research revealed that while the Holy See has been characterized as a State, better view is that it is a *sui generis* entity that enjoys far-reaching international legal personality, but that falls short of statehood. The qualification of the Holy See as a *sui generis* entity, rather than as a State actor, was expounded on two grounds: (1) its non-conformity with the four traditional Montevideo statehood criteria and (2) its spiritual sovereignty. In this sense, the Holy See has an international personality that transcends all four criteria of population, territory, effective government, and independence. Given its global spiritual remit and international impact regardless of territory, as was made clear in the period between 1870 and 1929, the Holy See is a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the centre of the Catholic Church.

By its very universal nature, it is not tied to any particular people, territory or form of government but instead, carries out a spiritual mission that is universal *an sich*, directed to all mankind without distinction. The Holy See's spiritual sovereignty therefore transcends the territorial sovereignty of state actors as their strength derives from a diversion of being 'supra', i.e. above all cultural and political forms and open to all people and nations. In this sense, the term supra-national has often been used as an attribute of the Holy See.

This chapter has not only discussed the legal personality of a non-State actor – the Holy See – but also the *statehood* of another, closely related, actor, the Vatican. This mini-State, however, has a *status aparte* in international law, as in fact it merely exists as a territorial basis guaranteeing the independence of a *non-State* actor: the Holy See. Nevertheless, it was highlighted that the recognition of Vatican City as a State is of constitutive nature, which is no longer embraced because in this sense, recognition as a legal norm becomes susceptible to misuse as a political tool, enabling states to advance their own interests.

After having deconstructed the various actors of its layered actorness, all its guises to power are now exposed. However, it is essential to keep in mind the Holy See uses (*read*: exhausts) and has historically used this multi-layered actorness to the fullest to pursue its spiritual mission within the international realm to raise its universal voice of moral authority in the global forum, acting as mouth-piece of the divine. A statement made by MEP Sophie In 't Veld during a political debate in April 2024 stuck with me because it confirmed exactly the foregoing: '*Their mission is presented as a moral and spiritual issue, but there is actually a whole agenda behind it of pure power structures.'*

Hence, the Holy See wears two hats: a spiritual hat and a temporal hat with one central ambition: its spiritual mission. The Holy See embodies both (the supreme head of) the (spiritual) Roman Catholic Church as well as (the absolute monarch of) the (temporal) Vatican City. The spiritual hat is wielded *for* the Church, while the temporal hat is wielded *by* the Church. The authority of the Holy See rests on the unique authority of the Pope, in whom the spiritual and secular meet. All power is thus vested in the person of the Pope by virtue of his office as successor of the apostle Peter and as Vicar of Christ to carry on the Holy See's spiritual mission at the top of the Roman Catholic Church. This research would, in line with what Rik Devillé analysed, present the Sovereign Pontiff, the Pope as a dictator, disguised in a spiritual, moral robe and mission. As mentioned above, as a *sui generis* non-state actor, the Holy See nevertheless operates within a temporal order, but manages to combine both hats (spiritual and temporal) to carry out its spiritual mission as far-reaching as possible.... Or as Ryngaert aptly puts it:

> '*The Holy See has demonstrated that it is a master at navigating the waters of the international legal order, which has in turn accommodated its rights and interests remarkably well. If anything, this account of the Holy See's participation in international law shows that a non-State actor, drawing on its moral authority, can easily manipulate the at first sight inflexible features of the State-centered international legal system to its own advantage*.'[641]

4.2. The principle of State immunity

'International law walks a tightrope between the rights of sovereign States and the rights of those who comprise them. Tip too far to either side and the system breaks – sovereignty either becomes unbridled power or becomes meaningless. This delicate balancing is most evident when sovereign power and human rights directly collide.'[642] This field of tension reaches its zenith in the conflict between the principle of State immunity on the one hand and the right of access to a court under article 6 ECHR on the other. Where *State immunity* forms a procedural impediment to the exercise of jurisdiction, leading to legal proceedings being barred, *the right of access to a court* constitutes the anchoring of the fundamental right to have a civil claim heard of access to legal proceedings. Or simply put: where the first leads to a denial of justice, the latter guarantees the access to justice.

The law on jurisdictional immunities constitutes an important subfield of international law, safeguarding the sovereign equality of States, which harks back to the 1648 Peace of Westphalia.[643]As a rule of international law, State immunity serves to limit the exercise of jurisdiction of the forum State over acts performed by, or attributed to, a foreign State.[644] Nevertheless, rules concerning jurisdictional immunities of States do not exist in a vacuum. Immunities coexist with and (inevitably) conflict or compete with other norms of international law, which calls for balancing of State sovereignty with those other norms. Accordingly, State

[641] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 859 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024
[642] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 224.
[643] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 501
[644] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 224.

immunities are far from absolute and their scope is not unlimited.[645] When conflicting with other fundamental rights such as the right to a fair trial, a well-considered balance needs to be carried out where both norms are granted a certain weight. However, this balancing of conflicting norms takes place within the broader existing international legal order and developments within this order must be considered.

An important development in international law over the past century has affected the principle of jurisdictional state immunities and its foundation. International law is no longer limited to the regulation of the behaviour of States *vis-à-vis* other states but extends to the regulation of behaviour of States *vis-à-vis* their own citizens. This reflects a paradigm shift from a purely State-centric system with a Westphalian origin[646] towards an international community recognizing the citizen (and its well-being) as legitimate subjects of international law.[647] This development from an 'international law of co-existence to an 'international law of cooperation' has been accompanied by a globalizing expansion of the (State) activities and possible infringements resulting from the disregard of these in relation to individuals' rights.[648] Foremost, the primordial position of human rights and violations of jus cogens norms has changed the outlook of the international legal order. In this context, the principle of rule of law has grown to be the cornerstone of modern (legal) society. The access to justice, anchored in the right to a fair trial under article 6 ECHR, forms a vital prerequisite for the rule of law. However, the guarantee of this fundamental right depends largely on whether victims are able to establish jurisdiction *vis-à-vis* a feasible judicial forum.[649] Immunities, *au contraire*, act as a procedural bar to establishing such jurisdiction. A claim to immunity, consists in an unwarranted refusal to satisfy what would otherwise be a valid and enforceable legal claim. It amounts, in fact, to a denial of justice.[650] Lauterpacht addressed this incompatibility of the doctrine of jurisdictional immunity with the principle of the subjection of the sovereign state to the rule of law as follows:

> *'At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state…screens itself behind the shield of immunity in order to defeat a legitimate claim."* [651]

Immunities should not be regarded as an immutable principle of international law. Although the principle of State immunity has been treated as a default rule, there is no justification it should take precedence over equally important principles of international law. Principles which place states above the law are no longer tenable and desirable in the current human right- and citizen centred shift within the international legal order over the past century. This has equally been translated in the doctrine on State immunity. The following chapter will show how the all-encompassing, absolute doctrine has been largely abandoned and made place for a (more) restrictive, distinctive doctrine on State immunity. Exceptions have furthermore carved out the grant of state immunity in cases such as tortious acts, human rights violations (and jus cogens violations) Some authors (including within this research) even argue that the principle of State

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[645] *Ibid*.
[646] Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 5.
[647] *Ibid*.
[648] *Ibid*.
[649] *Ibid*.
[650] *Ibid*.
[651] Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 Brit YB Int'l L 226.

immunity has no foundation in the principles of international law and therefore no legal obligation weighs on States to grant jurisdictional State immunity.

States should not be able to, under premises of sovereignty, hide behind a masquerade of immunity to place itself above the (rule of) law and deny victims of an infringed right access to justice.

The following chapters will delve deeper into the tension field between the principle of state immunity in international law and the right of access to a court under article 6 ECHR. Before the field of tension between the two norms within the case of *J.C. and others v. Belgium* is elaborated below, the two principles of international law are first set out separately in order to evaluate them against the ECtHR's reasoning in the chapter five of this research.

4.2.1. The general principle of immunity

When States establish jurisdiction on lawful grounds, the exercise of that jurisdiction may nonetheless be impeded by an immunity. In international law, immunities are granted to states and international organizations, as well as their officials, due to their unique status as subjects of international law.[652] Immunity is derived from the Latin '*immunitas'*, meaning '*exempt'* and is a procedural impediment (not a substantive defence) to the exercise of jurisdiction. It does not imply that the beneficiary is exempt from the law, but merely that legal proceedings are either barred or suspended.[653] A clear distinction must be drawn between *immunity from jurisdiction* (which bars a court before which a protected person is sued from establishing its adjudicatory jurisdiction) and *immunity from execution or enforcement* (which bars the taking of measures of constraint such as attachment or arrest, whether pre- or post-judgment).[654] Given the scope of this research, only the first will be addressed. It is further essential to keep in mind that the extent of immunity varies depending on the nature of the protected person. Therefore, it is important to ascertain the distinct regimes applicable (and their specific scope). Within this research, attention will be paid to the immunity regime applicable to State actors.

4.2.2. State Immunity

Reflected in the Latin adage *par in parem non habet imperium*[655], state immunity is grounded in the fundamental principle of sovereign equality, which holds that States are not allowed to exercise jurisdiction over their peers.[656] States enjoy immunity in order to perform '*functions and activities in their mutual interests and in the interests of the international community'*.[657] As a rule of international law, State immunity serves to limit the exercise of jurisdiction of the forum

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[652] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 500.
[653] *Ibid*.; James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 487.
[654] *Ibid*.
[655] An equal has no authority over an equal.
[656] Rose Cecily, Niels Blokker, Daniëlla Dam-de Jong, Simone F. van den Driest, Robert Heinsch, Erik Vincent Koppe, and Nico Schrijver, *An Introduction to Public International Law (*Cambridge, United Kingdom: Cambridge University Press, 2022) 120.
[657] Italy, Supreme Court of Cassation, *Germany v. Prefecture of Voiotia, representing 118 persons from Distomo village and Presidency of the Council of Ministers of Italy*, Case No. 11163/2011, 20 May 2011, ILDC 1815 (IT 2011), para. 45.

State over acts performed by, or attributed to, a foreign State.[658] The immunities covered by this regime presuppose the existence of juridically equal States whose interactions are governed by international law.[659] It is now well established that State immunity is a principle of customary international law[660], supplemented by treaties and national legislation.[661] Two conventions addressing the immunities of States have been concluded, but have not achieved great success. The European Convention on State Immunity (1972)[662] (hereinafter: ECSI) counts only eight States Parties[663], whereas the UN Convention on the Jurisdictional Immunities of States and their Property (2004) (hereinafter: UNCSI) has not yet entered into force.[664] Nevertheless, the provisions of these treaties are frequently cited by domestic courts, as they represent codifications of customary international law. Or, as noted by judge Crawford: '*Although not yet in force, the UN Convention has been understood by several courts to reflect an international consensus on State immunity*.' [665]

Attention should be paid to the fact that the regime of State immunities must be distinguished from the immunities regime applicable for international organisations. Contrary to States, international organizations as subjects of international law, do not enjoy immunity unless this is provided for by a treaty law, national law, or perhaps customary international law. In any case, international organizations do not enjoy the same immunities as States.[666]

4.2.2.1. The restrictive immunity doctrine: acta jure imperii vs. acta jure gestionis

During the eighteenth and for most of the nineteenth century, the doctrine of sovereign immunity was an absolute one.[667] The absolute immunity doctrine pertains to the identity of the defendant in litigation and proposes to grant all-encompassing immunity to the State, its departments, its property and its officials.[668] However, the doctrine of restrictive immunity gradually evolved in line with an increased attention for human rights. The latter proposes to look at the precise nature of the act or transaction impleaded, on which factor the immunity of

[658] Wenhua Shan, Peng Wang, 'Divergent Views on State Immunity in the International Community' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 61.
[659] Lori Fisler, 'The Sources of Immunity Law – Between International and Domestic Law' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 40.
[660]Customary law is comprised of two elements: an objective element, general practice and a subjective element that entails the recognition that such practice is required, prohibited or allowed as a matter of law, generally described as *opinio juris*. (Article 38 (1) ICJ Statute)
[661] *Ibid*., 63.
[662] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) CETS No 74.
[663] Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom.
[664] United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet entered into force), UN Doc A/59/508, 3.
[665] James Crawford, *Brownlie's Principles of Public International Law* (8th ed. New York, NY: Oxford University Press, 2012) 490.
[666] Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 231.
[667]Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 22.
[668]Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 107.

the State or its officials should turn[669].[670] The distinction between *acta jure imperii* and *acta jure gestionis* is the raison d'être of the doctrine of restrictive State immunity.[671] The basic premise of the modern law of State immunity is currently that States do not enjoy such absolute immunity, with some exceptions[672].[673] There is a relative consensus that immunity from jurisdiction exclusively applies to a*cta jure imperii* (sovereign, public or governmental acts of the State) and not to *acta jure gestionis* (non-sovereign, private, managerial or commercial acts), with Belgian and Italian courts at the vanguard of this distinction in the late nineteenth century.[674] As States carry out the latter activities as if they were private persons, it is not considered fair to award States preferential treatment as grantees of immunity.[675] It is now broadly acknowledged that, in a considerable amount of disputes involving a State's non-sovereign activities, immunity cannot be invoked, allowing the forum State to exercise its jurisdiction.[676] This restrictive approach distinguishing between *acta jure imperii* and *acta jure gestionis* for the grant of State immunity is also reflected in the UNCSI[677] and ECSI.[678]

The application of the restrictive theory (and its differentiating between sovereign and non-sovereign acts) is generally seen to give rise to two distinct problems: first, the theoretical problem of identification of relevant aspects of an act and secondly, the state discretion in classifying the relevant aspects.[679] The absence of uniform State practice only adds up to the complexity upon application of the (restrictive) State immunity.

'*The fact that it is difficult to draw the line between sovereign and non-sovereign State activities is no reason for abandoning the distinction*.'.[680] There can be various ways to differentiate between acts, for instance by focusing on their purpose, motive, context or nature.[681] It should be noted that there is a strong divergence or inconsistency in what exactly constitutes the determining factor in assessing the (sovereign or non-sovereign) character of an act and thus no general applicable approach prevails. The test most commonly used by courts to differentiate between *acta jure imperii* and *acta jure gestionis* is the '*Nature, Purpose or Context Test'.*[682]For instance, the Federal Constitutional Court of (then) Federal Republic of Germany focuses on the nature of the state transaction or the resulting legal relationship as a

[669] In this sense the *absolute immunity doctrine* is self-operating and formulates a simple rule not to subject a foreign sovereign to national jurisdiction. The *restrictive immunity doctrine*, on the other hand, is not self-operating, as it provides a court only with a method and (open-ended) criteria for characterization.
[670] *Ibid*.
[671]Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 99
[672]A more conservative approach was still upheld by countries such as China and the former Soviet Union.
[673] *Ibid*.
[674] *Ibid*.
[675] *Ibid*.
[676] *Ibid*.
[677] Article 10-17 UN Convention on Jurisdictional Immunities of States and Their Property.
[678] Article 27, 2 European Convention on State Immunity.
[679] Rosanne van Alebeek, *The Immunity of States and Their Officials In International Criminal Law and International Human Rights Law.* (Oxford University Press 2008) 53.
[680]*Claim against the Empire of Iran Case* [1963] 45 ILR 57, 79.
[681] Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 110.
[682]Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 102.

means for determining the distinction.[683] The nature-test asks whether private individuals can undertake the same activity. If the answer is affirmative, the activity is deemed private and falls outside the scope of immunity protection.[684]Other courts, such as a court in the United Kingdom ruled that it '*has to look at all the circumstances in relation to the nature of the activity and its context and decide whether those factors together (no one factor being in itself determinative) characterize the activity as sovereign or non-sovereign*.'[685] The French position, on the other hand, asks the question whether the act which is giving rise to the dispute is by its nature or purpose an exercise of the sovereign of such States and therefore not merely a normal act of administrative management.[686]For Italian courts furthermore it is essential to determine whether the acts were intended to achieve public, institutional ends to receive a *acta jure imperii* qualification.[687] Generally, in the distinction between *acta jure imperii* and *acta jure gestionis*, most courts give regard solely to the nature of the act, a few apply only the purpose and others increasingly consider the broader context as relevant, looking at both the nature and context.[688]The United Nations Convention favors the context approach by referring to both the nature and the purpose of the act.[689]

It is widely accepted that the assessment of whether an act qualifies as either *acta jure imperii* or *acta jure gestionis* should not be determined by the opinion of the State claiming immunity. If this were the case, States might be biased in their favor, thereby compromising the theory of restrictive immunity.[690] The distinction between these two categories is, due to the absence of sufficiently precise and consistent international law criteria, left to the *lex fori*, which must, however, recognize the outer bounds of international law.[691] National law could well perform the initial role in this context, because the rights and obligations litigated are in the bulk of cases derived from national law.[692] The idea of forum state discretion has for example been that acts should be classified as private law acts and public law acts.[693] Noteworthy, given the fact that state immunity is primarily applied in domestic courts, unlike other fields of international law, the policies and practices of States on this matter are influenced by multiple actors based on both political and legal considerations.[694]

The above analysis shows that the State practice on State immunity is not uniform, but rather partial, fragmented and inconsistent. This lack of consistency gives rise to a related and central question, which could equally have been addressed at the beginning of this chapter: is there,

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[683] *Claim against the Empire of Iran Case* [1963] 45 ILR 57, 79-80.
[684]Jürgen Bröhmer, *State Immunity and the Violation of Human Rights.* (Nijhoff, The Hague 1997) 1
[685] *Littrell v. United States of America (No 2)* [1994] 4 All ER 203, [1995] 1 WLR 82.
[686] X. *v. Saudi School in Paris and Kingdom of Saudi Arabia* [2003] 127 I.L.R. 163, 166.
[687] *Libya v. Imprese Marittime Frassinetti* [1979] 78 I.L.R. 90, 92.
[688] Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 106.
[689] Art. 2.2. United Nations Convention on Jurisdictional Immunities of States and Their Property
[690]Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 23.
[691] Jürgen Bröhmer, *State Immunity and the Violation of Human Rights.* (Nijhoff, The Hague 1997) 1
[692]Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 111.
[693] Rosanne van Alebeek, *The Immunity of States and Their Officials In International Criminal Law and International Human Rights Law.* (Oxford University Press 2008) 54
[694] Wenhua Shan, Peng Wang, 'Divergent Views on State Immunity in the International Community' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 63.

under general international law, a legal obligation for States to grant immunity to foreign States? In legal doctrine, this question tends to be answered in the negative.[695]

4.2.2.2. A legal obligation to State immunity?

Despite repeated endorsements in practice, further (critical) analysis of the two components of (settled) State practice and *opinio juris* reveal that the general rule of State immunity does not form part of customary international law. As has been pointed out by Garnett:

> *'it is now almost impossible to speak of a 'customary international law' of foreign state immunity given the divergences in state practice. Immunity has, in fact, become little more than a sub-branch of each state's domestic law. In particular, there is disagreement among states subscribing to the restrictive theory as to the circumstances in which immunity should be excluded. Second, it may be argued that, given the diminishing role of the state both as a national and international actor, at least relative to the transnational corporation and the individual, a serious question arises as to a state's continued entitlement to any special protection from the domestic jurisdiction of other states*.'[696]

Already in 1951, Lauterpacht advocated a serious reappraisal of the doctrine of foreign State immunity. He took a strong stance by concluding that international law did not oblige States to grant jurisdictional immunity. Foreign States, he argued, should be made '*accountable before otherwise competent courts in respect of claims put forward against in the matter both of contract and tort in the same way in which the domestic state is subject to the law administered by the courts*.'[697] Lauterpacht elaborates his reasoning by first rejecting the absolute immunity doctrine stating that it has been abandoned in most countries and is moreover productive of inconvenience and injustice.[698] He further advances how the inconsistent and uncertain nature of the restrictive doctrine should not necessarily lead to an application of the absolute doctrine, but instead another alternative prevails. An alternative, which is, above all, in line with more recent developments under the rule of law and which does away with a principle that places the sovereign state above the law: the abolition of the rule of immunity of foreign states.[699] He raises the question to what extent the development of State immunity departs from any fundamental requirement of international law and if there is in fact, a clear and categorical principle of international law which forbids the courts of a state to assume jurisdiction over another state.[700]

The view that there is at present no rule of international law which obliges states to grant jurisdictional immunity to other states is at variance with the almost uniformly view expressed by legal experts that the immunity of foreign states from jurisdiction follows from the clear principle of equality and independence of States in international law.[701] Lauterpacht, however,

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[695] Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 124.
[696] Richard Garnett, 'Should the Sovereign Immunity Be Abolished?' (1999) 20 *Australian Yearbook of International Law* <http://classic.austlii.edu.au/au/journals/AUYrBkIntLaw/1999/10.html> accessed 28 June 2024.
[697] Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 Brit YB Int'l L 226.
[698] *Ibid*.
[699] *Ibid*.
[700] *Ibid*., 227.
[701] *Ibid*., 228.

considers that this adopted view needs re-examination as it finds no support in classical international law.[702] It is namely difficult to maintain that the principles of independence, equality and sovereignty of States would be violated if the State exercising jurisdiction is applying national and international law and recognizes as valid the legislative acts of another recognized state (so far as these are not contrary to international law). On the contrary, a State's sovereignty, independence, and equality are undermined if a foreign state claims to be above the law where it has engaged in transactions or committed acts with legal consequences.[703] A closer examination of the origin and development of the doctrine of foreign state immunity reveals that it is perhaps not the principles of independence and equality that have fostered its growth, but rather: (a) considerations of the dignity of the sovereign state, and (b) the traditional claim of sovereign states to be above the law and to hold a privileged position before their own courts compared to that of their subjects.[704]Subjecting a state to the normal operation of the law, on equal footing with the forum state, does not diminish its dignity. In fact, the dignity of foreign states may suffer more from invoking immunity than from being denied it. The notion that jurisdictional immunity of foreign states is based on their dignity is outdated and should be reconsidered in light of the rule of law and the true position of the State in modern society. [705]

Additionally, the fact that the grant of immunity has been made dependent upon reciprocity' indicates, indirectly, that there is, no binding rule of international law. States do not typically base adherence to established international law on reciprocity, which usually applies to concessions and privileges not required by ordinary international law.[706]

Nevertheless, it has often been remarked that Lauterpacht's vision did not in fact amount to a total abolition of the rule of State immunity, but rather an abolition with specified exceptions and safeguards.[707] Crawford pointed out that this may suggest that the category of acts protected by the restrictive theory is outside the jurisdiction of foreign courts on grounds unrelated to the classical immunity from jurisdiction concept.[708]

Lauterpacht's view on State immunity as an '*essentially insignificant problem which had tended to infuse an element of artificiality into international law'* and his plea to *'free … international law of the shackles of an archaic and cumbersome doctrine of controversial validity and usefulness*', appears still valid even today. After the absolute understanding of immunity has been replaced by restrictive immunity, it seems that international law has 'not prescribed an alternative rule' and, as a consequence, States are no longer under a legal duty under general international law to accord immunity to each other. The practice that claims to be guided by customary international law on State immunity is, in fact, only a small portion of what could constitute 'general practice accepted as law' under the ICJ's Statute.[709] If the general rule on State immunity were indeed to be of customary nature, the criteria of custom-creation of both settled State practice and *opinio juris* would be tested and fulfilled. Remarkably, this test does

[702] *Ibid*, 228.
[703] *Ibid*., 229.
[704] *Ibid*., 230.
[705] *Ibid*., 231.
[706] *Ibid*., 228.
[707] *Ibid*., 237-238. (Four exceptions are formulated where immunity must remain: 1. The legislative acts of a foreign State and of measures taken in pursuance thereof, 2. The executive and administrative acts of a foreign State within its territory, 3. Contracts that are outside the jurisdiction of the forum State, 4. Matters to which the law of diplomatic immunity applies.)
[708] Rosanne van Alebeek, *The Immunity of States and Their Officials In International Criminal Law and International Human Rights Law.* (Oxford University Press 2008) 64.
[709] Article 38 ICJ Statute.

not always happen in practice.[710] It appears that, at present only a strict eye is kept on whether the components of customary law (of state practice and *opinio juris*) are met with regard to formulated exceptions to the general principle of State immunity, without, however, subjecting this general principle itself to scrutiny. *(See infra*: Human rights violations)

Overall, courts do not significantly focus on the customary aspect of the general immunity rule. State practice is not considerably examined and there is additionally no allusion to proof the customary law status of the general immunity rule.[711] In fact, state practice is far from uniform and the application of the (restrictive) principle of State immunity exposes the underdevelopment theorization of its foundations.[712] As mentioned above, treaties on State immunity have a low ratification status. Orakhelashvili pointed out that: '*The number of States upholding it is not high enough, and some States still adhere to absolute immunity. Lack of generality and uniformity of State practice is a factor that prevents the emergence of customary law regarding restrictive doctrine of State immunity.*'[713]

It seems that once it was pretended that a general rule of immunity was part of customary law, it was not significantly considered anymore if there was truly and continuously a settled and general accepted practice at its foundation.[714] Where, on the one hand, the belief by States that the practice of granting State immunity is obligatory as a matter of law is present, a uniform, consistent and well-delineated state practice, on the other, clearly lacks. At this point it should be reminded that in the absence of consistent state practice one way or another, and of *opinio juris* as to the binding effect of a state practice, no rule of customary international law is established.[715] The principle of State immunity appears to be accompanied by a clear subjective element of *opinio juris*, without, however, the objective element of a consistent and settled general practice. In this context, Lauterpacht's proposal for abolition of the rule of State immunity seems to be the only acceptable (and legitimate) alternative. Not only in view of the rule of law, but in equal manner in view of the general principles of international law on customary law and sovereignty.

4.2.2.3.. Exceptions: limitations to the principle of (jurisdictional) State immunity

The principle of State immunity has long ceased to be a blanket rule exempting States from jurisdiction of courts. The edifice of absolute immunity of jurisdiction began to crumble at the end of the nineteenth century.[716] Pursuant to the restrictive doctrine on State immunity and the paradigm shift towards a more human rights centered approach, the scope of State immunity from jurisdiction has been limited in certain areas. In this line, it is recognized that State immunity is subject to an increasing body of exceptions. The following exceptions are

[710] Hersch Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 Brit YB Int'l L.
[711] Alexander Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the Jus Gestionis v. Jus Imperii Divide' in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 122.
[712] *Ibid*.
[713] *Ibid*., 123.
[714] *Ibid*.
[715] Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 142.
[716] Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 106.

commonly provided: commercial activity[717], employment contract[718], immovable property[719] and territorial tort.[720] Questions moreover rise whether there is an additional exception to State immunity from jurisdiction in relation to gross human rights violations or international crimes, including violations of *jus cogens*.[721] Given the scope of this research, the territorial tort exception and the dubious exception regime on human rights violations will be discussed.

i. Territorial tort exception

'The territorial tort exception', commonly referred to as the 'non-commercial tort exception' allows a forum State to exercise jurisdiction for torts allegedly committed within the territory of the forum State, without allowing it to exercise extraterritorial jurisdiction.[722] It encompasses a panoply of acts and omissions by a foreign State in the territory of the forum State that causes death or personal injury, or damage or loss of tangible property. [723] The non-commercial tort exception is reflected in national legislation and case law, as well as in article 11 of the ECSI and article 12 of the UNCSI. As indicated by the International Law Commission, (hereinafter: ILC) in its draft article on article 12 UNCSI '*The exception...is designed to provide relief or possibility of recourse to justice for individuals…*'.[724] (Also implying that the invocation of immunity would otherwise lead to a denial of justice….) The common characteristics of the territorial tort exception arise from State practice and indicate a defined material and territorial scope.

It is traditionally understood that *the material scope* of the territorial tort exception only applies to civil proceedings giving rise to pecuniary[725] compensation.[726] The targeted torts are personal injury, death or physical damage to or loss of property caused by an act or omission in the forum State, which might be intentional, accidental or caused by negligence attributable to a foreign State, and which is actionable under the *lex locus delicti commissi*.[727] The traditional distinction between *acta jure imperii* and *acta jure gestionis* is irrelevant for the non-commercial tort exception. All the current legal instrument and accordingly state practice imply that the application of the territorial tort exception is not dependent upon whether the act is *jure imperii*

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[717] Article 15 UN Convention on Jurisdictional Immunities of States and Their Property.; Article 7 European Convention on State Immunity.
[718] Article 11 UN Convention on Jurisdictional Immunities of States and Their Property.; Article 5 European Convention on State Immunity.
[719] Article 13 UN Convention on Jurisdictional Immunities of States and Their Property.; Article 9 European Convention on State Immunity.
[720] Article 12 UN Convention on Jurisdictional Immunities of States and Their Property.; Article 11 European Convention on State Immunity.
[721] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 506.
[722] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 144.
[723] *Ibid*.
[724] International Law Commission, *Report Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries* (Yearbook of the International Law Commission*, 1991*, vol. II, Part Two) 44.
[725] The ILC has added on second reading the word 'pecuniary' before 'compensation' to clarify that the word compensation did not include any non- pecuniary forms of compensation.
[726] *Ibid*.
[727]Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 122.

or *jure gestionis* in nature.[728] As noted by the ILC Rapporteur on State immunity, jurisdiction over tortious liability is:

> '*Based on the locus delicti commissi and the eventual and justifiable exercise of such jurisdiction, even in respect of damage resulting from activities normally categorized as acta jure imperii, and also, in any event, from activities of a non- commercial character, whether or not classified as acta jure gestionis. The distinction between jus imperii and jus gestionis, …, appears to have little or no bearing in regard to this exception ... Whatever the activities of a State giving rise to personal injuries or damage to property within the territory of another State, whether in connection with acta jure imperii or acta jure gestionis, the fact remains that injuries have been inflicted upon and suffered by innocent persons* ... '[729]

Noteworthy forms the fact that the tortious jurisdiction as such is irrespective of the nature or purpose of the act of omission, representing a strong shift compared to the general immunity regime and thus authorizing to proceed directly to the merits of the case.[730]

The territorial scope of the territorial tort exception, on the other hand, is generally affirmed to be limited to acts that have taken place within the territory of the forum State.[731] It is noted that the territorial requirement has a dual character in both the UNCSI and the ECSI. This dual nexus requires not only the committing of the impugned act in the forum State but also the presence of the author of the act in the forum State when the act was perpetrated. Article 12 of the UNCSI prescribes a two-fold territorial nexus:

> *'Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.'*[732]

This is no more than the offshoot of territorial jurisdiction, although differences exist as to how and to what extent this cumulative requirement (of presence of both the act and the author of the act) should be satisfied.[733] The first part of the requirement, regarding the presence of the act in the forum State is being formulated in various manners: jurisdiction can be established when either the tortious act/omission only occurs or when the injury/damage only occurs or if both the tortious act/omission and the injury/damage occurs or when a direct effect occurs in

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[728] Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 207.
[729] *Ibid*. (See: International Law Commission, *Report Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries* (Yearbook of the International Law Commission*, 1991*, vol. II, Part Two) 45.
[730] *Ibid*., 208.
[731] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 145.
[732] Article 12 UN Convention on Jurisdictional Immunities of States and Their Property.
[733] Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 215.

the forum State.[734] The UNCSI and ECSI seem to adhere to the approach that looks if (only) the tortious act or omission took place in the forum State.[735] However, this approach can be construed in different ways. Article 2(2)(e) of the 1991 *Institut de Droit International* Draft, for example, affirms jurisdiction if the damage is '*attributable to activities of a foreign State and its agents within the national jurisdiction of the forum State'*.[736] This provision expands the jurisdiction of the forum State by first, emphasizing the attribution of damage to the activities of a foreign State and its agents, thus shifting the focus from the immediate act causing injury to any related activity and secondly it broadens the concept of jurisdiction from mere 'territory' to 'national jurisdiction.[737]Other courts adopt an approach which only tends to look if the damage or injury occurs in the forum State. From this point of view, no matter where the tortious act/omission occurs, the court has jurisdiction so long as the injurious consequences are suffered in the territory of the forum State.[738]The criterion of both the tortious act/omission and injury/damage on the territory of the forum State is a third formulation of this territorial criterion.[739]The International Law Association (hereinafter: ILA) furthermore grants jurisdiction if '*the act or omission which caused the death, injury or damage occurred wholly or partly in the forum State…or if that act or omission had a direct effect in the forum State*', thereby putting forward a more liberal pattern in which a direct effect in the territory of the forum State is sufficient to justify a denial of immunity, regardless of where the tortious act/omission or the injury/damage itself has occurred.[740]

The second part of the territorial nexus, regarding the presence of the author of the act in the forum State '*should be understood to refer to agents or officials of a State exercising their official functions and not necessarily the State itself as a legal person'.*[741]

It is important to note that the exception to immunity based on the territorial tort only covers torts sustained by individuals as a result of conduct attributable to foreign States or their agents.[742]Article 12 UNCSI also refers to this as an act or omission '*which is alleged to be attributable to the State*'.[743] As to the determination of the attribution it is worth recalling that the question whether the conduct of an individual can be attributed to a State, is governed by international law and must be addressed in light of the relevant rules on international responsibility.[744] In its articles on State responsibility the ILC stresses that:

> '*1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any*

[734] Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 216.
[735] Article 12 UN Convention on Jurisdictional Immunities of States and Their Property.; Article 11 European Convention on State Immunity.
[736] Institut De Droit International, *Resolution on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement* (Basel, 1991) 2.
[737] Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 216-217.
[738] *Ibid*., p. 219. (For example: Canadian Courts)
[739] *Ibid*. 222.
[740] *Ibid*., 223
[741] International Law Commission, *Report Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries* (Yearbook of the International Law Commission*, 1991*, vol. II, Part Two) 44.
[742]Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 224.
[743] Article 12 UN Convention on Jurisdictional Immunities of States and Their Property.
[744] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001 (Yearbook of the International Law Commission, 2001, vol. II (Part Two)).

other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'[745]

In addition, even for persons that do not qualify as its 'organs', the law on international responsibility makes it clear that their conduct will nonetheless be attributable inasmuch as they are empowered to exercise elements of the 'governmental' authority of the State, or act under its control or instructions.[746] The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[747]In this sense, it will be sufficient that the tortious acts are committed by 'agents' or persons 'empowered to exercise elements of the governmental authority' of the foreign State to fall under the scope of the territorial tort exception.

The above material and territorial requirements are said to tailor the general scope of the non-commercial tort exception and define its legal framework. However, it is widely acknowledged that there is a 'grey zone' with respect to claims arising from the violation of human rights. Victims of human rights abuse have tried to sue foreign States by squeezing their cases in the terms of the territorial tort exception to find a way to get around the State immunity of defense, but do immunity rules überhaupt apply in respect of gross human right violations or violations of *jus cogens* norms?

ii. Human rights violations

The rules on State immunity exist within a broader international legal order and (must inevitably) undergo the evolutions within that international legal order. In the 20th century it became clear that the absolute doctrine had to give way to the restrictive one under a growing recognized role of human rights. Today the latter constitutes an equal player to the principle of State immunity within the international legal order. The development of the principle of State immunity cannot go further without looking at (and taking into account) the development of the status of human rights in the international legal order. The increasing significance of the individual and his fundamental human rights should be translated to the regimes within this international legal order. The shift towards a more restrictive approach on State immunity, which still upholds the State and its sovereignty as sacred values, cannot be the final stage of the evolution in this field. Under this rationale the questions arises in recent decades to what extent the principle of State immunity can be upheld in cases of (severe) human rights violations. In general, human rights are part of customary international law but some human rights (such as the prohibition of torture) have reached the status of *jus cogens*[748] norm.[749] Embedded in *jus cogens*, these norms are peremptory norms of general international law accepted and recognized by the international community of States as a whole, from which no derogation is permitted and which can only be modified by a subsequent norm with an

[745] *Ibid*., article 4.
[746] *Ibid*., article 5.
[747] *Ibid*., article 8.
[748] Article 53 of the Vienna Convention on the Law of Treaties.
[749]Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 676.

attributed *jus cogens* character.[750]In this sense, if a conflict arises between a rule of customary international law (such as the principle of State immunity) and such *jus cogens* norm, the *jus cogens* norm takes precedence and the other rule becomes invalid.[751] The relationship between State immunity and *jus cogens* norms is one of the most contentious areas of contemporary international law. In other words: is there a human rights or *jus cogens* exception to State immunity? Relying on the peremptory norm of violated norms, different theories have been developed to set aside the principle of State immunity.

Since core human rights norms qualify as *jus cogens* while the immunity rule is only a non-peremptory norm of international law it would be self-apparent that the first trumps out the latter. This reflects a straightforward reliance on and application of the concept that hierarchical higher rules of international law invalidate rules that are in conflict with it.[752] This reasoning comes to the fore in the so called 'normative hierarchy theory'. Considering that *jus cogens* norms are '*norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'*,[753] they stand at the highest position in the international normative hierarchy and prevail over any conflicting suppletive norm, including immunity rules.[754] In the *Al-Adsani* case the ECtHR had to consider the question if State immunity was void of legal effect when in conflict with the *jus cogens* norm of prohibition of torture.[755]Notwithstanding the special nature of torture, the court stressed that it was unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[756] Even though the court noted developments in support of the argument that a State may not plead immunity in respect of human rights violations by the ILC working group, the court didn't find that either of these developments provides it with a firm basis.[757]In particular, it pointed out that the case should be distinguished from the *Pinochet case*[758], as it concerned not criminal but civil liability.[759]In *Al-Adsani* the Court did not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to

[750]Edward Okeke Chukwuemeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, New York 2018) 179.
[751] Jan Wouters, Cedric Ryngaert, Geert de Baere, Tom Ruys, Thomas Van Poecke and Evelien Wauters. *International Law: A European Perspective* (Oxford, UK: Hart Publishing, an imprint of Bloomsbury, 2019) 167.
[752] Rosanne van Alebeek, *The Immunity of States and Their Officials In International Criminal Law and International Human Rights Law.* (Oxford University Press 2008) 64.
[753] Article 53 of the Vienna Convention on the Law of Treaties.
[754] Pierre d'Argent and Pauline Lesaffre, 'Immunities and Jus Cogens Violations', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 617.
[755]*Al-Adsani V. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §61.
[756] *Ibid*.
[757] *Ibid*., §63.
[758] In its *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3)*, judgment of 24 March 1999 Appeal Cases 147, the House of Lords held that the former President of Chile, Senator Pinochet, could be extradited to Spain in respect of charges which concerned conduct that was criminal in the United Kingdom at the time when it was allegedly committed. The majority considered that although under Part II of the State Immunity Act 1978 a former head of State enjoyed immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity, torture was an international crime and prohibited by *jus cogens* (peremptory norms of international law).
[759] *Ibid*., §65.

immunity in respect of civil claims for damages for alleged torture committed outside the forum State.[760]

In general, courts remain reluctant *vis-à-vis* the normative hierarchy theory[761], while others seem to endorse it.[762] Italian national courts have convincingly advanced this theory. The Italian Supreme Court of Cassation ruled in the *Ferrini* judgment that:

> '*This recognition [of immunity from jurisdiction for States] obstructs rather than protects ... values ... essential for the entire international community, so that in the most serious cases it should justify mandatory forms of response. Moreover, there can be no doubt that this antinomy must be resolved by giving precedence to the higher-ranking norms ... This therefore rules out the possibility that in such hypotheses the State could enjoy immunity from foreign jurisdiction*.'[763]

The *Ferrini* judgment, nevertheless, was referred by Germany to the ICJ against Italy for allegedly violating its obligation under international law by failing to respect Germany's jurisdictional immunity under international law and allowing civil claims against Germany in Italian Courts based on violation of international humanitarian law during World War II. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* the ICJ found Italy in breach of its immunity obligations owed to Germany and stressed that '*the judgements of the Italian courts ... [were] the only decisions of national courts to have accepted [this] reasoning*' before affirming that '*even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected*.'[764] In the Court's view the normative hierarchy theory was premised on a conflict of norms that did not exist, as both rules address different matters: the immunity rules only concerned the scope, extent and exercise of jurisdiction and did not, in any way, impair or derogate from the obligation to respect peremptory norms, nor condone their violation.[765] In other words: no conflict could arise between *procedural* immunity rules and *substantive jus cogens* rules. The Italian courts accepted the ICJ's judgment, albeit with some reluctance.[766]

As far as the adherence to the normative hierarchy theory, legal experts commonly assert that the ICJ's judgment is authoritative. In addition to national courts, the ECtHR referred to the ICJ's judgment in its case-law as being the more recent assessment of customary international

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[760] *Ibid*., §66.
[761] In *Winicjusz N v. Federal Republic of Germany* (2010)45 and in *Natoniewski v. Germany* (2010),46 the Polish Supreme Court considered that there was no exception to State immunity for acts undertaken by a State's armed forces on the *forum* State territory, even if those acts breached human rights norms.
[762]In *La Réunion Aérienne and others v. Libya* (2011), the French Court of Cassation seemed to accept the theory without, however, applying it.
[763] Italy, Supreme Court of Cassation, *Germany v. Mantelli and others*, Case No. 14201/2008, 29 May 2008, ILDC 1037 (IT 2008), para. 11. (The *Ferrini* decision was later confirmed in different Italian cases, notably in *Germany v. Mantelli* (2008), *Germany v. Milde* (2009) and in 11 other decisions.
[764] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) [2012] I.C.J. Reports 2012, §96-97.
[765] *Ibid*., §93 and 95.
[766] Italy, Court of Appeal (Turin), *Germany v. De Guglielmi and De Guglielmi and Italy (joining)*, Case No. 941/2012, 14 May 2012, ILDC 1905 (IT 2012), §19 and 22.;Italy, Supreme Court of Cassation, *Military Prosecutor v. Albers and others and Germany (joining)*, Case No. 32139/ 2012, 9 August 2012, ILDC 1921 (IT 2012), § 6.

law and thus appraising the state of international law on this matter.[767]From this perspective, the normative hierarchy theory has not sufficiently been adopted by courts. The prevailing view, in line with the ICJ's judgment *Jurisdictional Immunities of the State,* does therefore not recognize the theory that hierarchical higher *jus cogens* norms override non-peremptory State immunity due to an absence of State practice supporting this *jus cogens* exception and the '*procedural-substantive no-conflict'* argument.

In the author's view, however, the argument that immunity rules of *procedural* character and *jus cogens* rules of *material* character do not operate on the same level and thus cannot conflict, does not consider the fact that the *procedural* constitutes a medium to the actual enforcement of that *material* right before a court. In other words: the effective application and guarantee of a substantive right is inextricably linked to the ability to invoke that right before a court in order to obtain real protection. Otherwise, that substantive right is in essence void of legal effect. Therefore, as long as the actual enforcement of a substantive right depends on the ability to invoke it procedurally in order to obtain protection, the two are inextricably linked and cannot be considered separately. Indeed, it is hard to uphold that, according to the ICJ and the ECtHR, immunity only affects the procedural right to challenge the impugned act and only precludes the courts from examining their claims and deciding on their substantive rights, but, at the same time leaves their substantive rights entirely intact.[768] As the Italian Court of Cassation rightly accented:

> *'Although they belong to different fields, the substantial and the procedural, the two provisions share a common relevance in matters of constitutional compatibility of the norm of immunity of States from the civil jurisdiction of other States. It would indeed be difficult to identify how much is left of a right if it cannot be invoked before a judge in order to obtain effective protection ... With an eye to the effectiveness of judicial protection of fundamental rights, this Court also noted that 'the recognition of rights goes hand in hand with the recognition of the power to invoke them before a judge in judicial proceedings'. Therefore, 'the recourse to a legal remedy in defense of one's right is a right in itself, protected by Articles 24 and 113 of the Constitution. [This right is] inviolable in character and distinctive of a democratic State based on the rule of law' ... Further, there is little doubt that the right to a judge and to an effective judicial protection of inviolable rights is one of the greatest principles of legal culture in democratic systems of our times.'*[769]

In this line, Italian courts stated that the counter-argument of absence of conflict between immunity and *jus cogens* norms was not well-founded.[770] The case was referred to the Constitutional Court, asking whether the customary immunity rule was compatible with the right to a judge as protected under the Italian Constitution. After recalling it had no authority to review the ICJ's interpretation of the state of customary international law, it established that

[767] Pierre d'Argent and Pauline Lesaffre, 'Immunities and Jus Cogens Violations', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 620.
[768] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 161.
[769] Italy, Constitutional Court, Case No. 238/2014, 22 October 2014
[770] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 161.

the customary rule of State immunity for illicit acts *jure imperii* could not enter the Italian legal order because it was indeed in contradiction with the constitutional right to a judge.

At this point it is clear that the normative hierarchy theory is clearly interlinked with the right to access to court. The right to access to court (or to a remedy) has been used to set aside the grant of immunity and has given rise to an extensive body of case-law. The tension field between the right to access to court and the principle of State immunity and the case-law of the ECtHR on this regard will be addressed in more detail below. (See infra: 5. The Judgment of J.C. and others v. Belgium)

In addition to the hierarchical higher position of *jus cogens* and the right to access to a court, other approaches have been undertaken to circumvent the principle of State immunity *vis-à-vis* jus cogens violations. The 'changing nature theory' departs from the idea that grossly violating human rights norms cannot qualify as sovereign acts (under the restrictive immunity rule).When a certain State act is not recognized as sovereign, the State is no longer entitled to invoke the defence of sovereign immunity.[771]Violations of peremptory norms cannot be regarded as *acta jure imperii*, because a sovereign State cannot legitimately command such reprehensible actions in the normal exercise of its authority. Instead, they should be qualified as *acta jure gestionis* or non-sovereign acts falling outside the scope of immunity rules.[772]

Another way of denying State Immunity in respect of *jus cogens* violations is by referring to the actual functional *rationale* for State immunity. By reminding the underlying goal pursued by the principle of State immunity, it becomes apparent that violating human rights is not part of that. As indicated above States enjoy immunity in order to perform 'functions and activities in their mutual interests and in the interests of the international community'. Therefore, taking into account the 'new international and European public order' and the fact that human rights protection is no longer a purely internal matter of any individual state but a fundamental concern of the community of all nations, the exercise of jurisdiction over foreign states that have allegedly violated human rights norms do not violate their sovereignty.[773]

In general, theories limiting the principle of State immunity on the basis of human rights violations are not upheld on the basis of a lack of established body of state practice. However, reliance on the absence of State practice supporting a human rights exception does not convincingly dispose the question. As was noted above (*see supra*: A legal obligation to State immunity?*)* the principle of State immunity is itself not based on consistent State practice so if this argument were to be upheld, the whole standing of the general principle and its application should be questioned in equal manner.

[771] Pierre d'Argent and Pauline Lesaffre, 'Immunities and Jus Cogens Violations', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 623.
[772] *Ibid*. (This argument has been recognized by US courts in *Siderman de Blake v. Republic of Argentina*, agreeing that '*international law does not recognize an act that violates jus cogens as a sovereign act.'*)
[773] Rosanne van Alebeek, *The Immunity of States and Their Officials In International Criminal Law and International Human Rights Law.* (Oxford University Press 2008) 327.

4.2.3 Conclusion

'*State immunity is not a right but rather a prerogative or privilege: it cannot be upheld in a way that leads to manifest injustice*.'[774]

State immunity is widely acknowledged as a general principle of international law based on the premise of sovereignty of States in order to perform functions and activities in their mutual interests and in the interests of the international community. However, the development in the field of immunity cannot be understood without looking at the developments within the broader international legal order. Until the end of the nineteenth century, with only states as protagonists on the international playing field, State immunity was an absolute one. The State and its sovereignty were hold high in esteem. All the different reasons and justifications for State immunity could be traced back to the principal concept of sovereignty. '*No other concept of international law has been instrumentalized enough 'sovereignty' – in the guise of non-interference- was and is used by States to ward off criticism against human rights abuses at home.*'[775] It is, rightly, questioned whether any other word has ever caused so much intellectual confusion and international lawfulness.[776]

This focus changed with a paradigm shift in international law from a state-centric system towards an international community recognizing the individual citizen and his fundamental human rights. With a considerable number of States having shifted away from the absolute doctrine, the restrictive doctrine of State immunity has become the general trend. It was argued that under this doctrine, there is a relative consensus that immunity from jurisdiction solely applies to a*cta jure imperii* (sovereign, public or governmental acts of the State) and not to *acta jure gestionis* (non-sovereign, private, managerial or commercial acts). Nevertheless, it became apparent that the State practice on the concrete scope and application of this doctrine is not uniform, but rather partial, fragmented and inconsistent. This divergence in State practice gave rise to the conclusion that at present, under general international law, there is no legal obligation for States to grant immunity to foreign States as the latter does not form part of customary international law. A body of recognized exceptions further carved out the general principle of State immunity. In this line, the territorial tort exception must ensure to provide relief or possibility of recourse to justice for victims of tortious acts allegedly committed within the territory of the forum State that causes death or personal injury, or damage or loss of tangible property. Gross human rights violations, however, remain unprotected *vis-à-vis* the immunity invocation, as the ICJ *Jurisdictional Immunities of the State* judgment is authoritative and rejects the existence of an established body of state practice in this regard.

The shift towards a more restrictive approach on State immunity, which still upholds the State and its sovereignty as sacred values, cannot be the final stage of the evolution in this field. It is harrowing that the plea to see the increased role for human rights (violations) translated in international law regimes has to be formulated like developing a case against immunity. No, it should not be seen as developing a case against immunity, but seen as bringing international law regimes in line with the current developments within the international legal order and community. In the twentieth century, awareness increased of the need to safeguard minimal rights of individuals and human rights bodies emerged. At present, human rights should not be

[774] Dissenting Opinion of Judge Trindade – the case of the Jurisdictional Immunities of the State between Germany and Italy

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seen as an 'increasing' trend, limiting the State absolute power, but an equal level player. In the international legal order States do not longer stand on an isolated pedestal, away from their citizens and developments within that community. These developments must inevitably be reflected in the development of the international law regimes. Whenever different norms of international law coexist and conflict, a balancing between these norms should take place. This balancing, however, cannot happen without considering this broader international legal order and the attribution of weights to these norms must depart from that context. Whereas the state used to take precedence and thus be given heavier weight, now the citizen and his human rights prevail and thus a heavier weight must be accorded to him, at the expense of state immunity

International law is a legal order traditionally based on consent as it emanates from the free will of states. Treaty law and customary international law are therefore norms known as *jus dispositivum.* This can partly explain why State immunity is widely acknowledged as a general principle of international law necessary for facilitating international relations. In the author's view, political considerations should not lead the international legal order and obstruct victim's redress to justice. It is tragic and ironic that the guarantee of human rights, such as access to justice, hinges on the goodwill of national courts at a certain time within the international legal order. Being a rule of customary law, the evolution of State immunity is largely dependent on state practice and whether courts will limit State immunity. Remarkable, when courts (see supra: Italian Courts in the *Ferrini* case) consider the recent developments within the international legal order and limit State immunity in the light of human rights, they are recalled to align with the 'established' state practice. This State-centric approach is outdated and should equally be translated in State practice. As long as the international community does not radically break from this outdated approach the state is continued to be placed above the law. The international community as a whole needs to recognize this mutual and collective engagement. Political pressure is needed but change, evolution is hard to be realized when the ones in charge to change the system are the ones benefitting from it. Of course, States and their national courts will remain faithful to the outdated State-centric approach, when the developing theories are all about limiting the privileges of States to stand above the law.

The way State immunity is granted under premises of sovereignty and its costume nature gives the appearance that it is possible to opt out on the rule of law. States should not be able to, under premises of sovereignty, hide behind a masquerade of immunity to place themselves above the (rule of) law and deny victims of an infringed right access to justice. The rule of law forms the cornerstone of modern international legal order, not state sovereignty. The state and its sovereignty do not stand above the rule of law and it is high time to bring the regime on (State) immunities in line with it.

If the principle of State immunity is indeed in a '*state of flux*[777]', let it then evolve with the underlying evolutions within the wider international legal order and community and not lag behind or even oppose to it.

[777] Pierre d'Argent and Pauline Lesaffre, 'Immunities and Jus Cogens Violations', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019).

4.3. Article 6 ECHR: the right to a fair trial

4.3.1. Introduction: Justice and the right to fair trial

The right to a fair trial occupies a central place in the ECHR system and is a basic element of the notion of the rule of law. When defining the 'right to a fair trial', the concept of justice almost inextricably comes into consideration. The concept of justice as personified in the goddess Themis or lady justice[778], is intuitively understandable, but concretely defining it presents significant challenges. [779]The search for a common definition is complicated by the fact that it can be understood from different disciplines. Within this research, justice is approached from a legal perspective, insofar as it is actually isolatable from the political, ethical and sociological sense.

Starting from the meaning of the symbol of justice, Themis is seen standing on a pedestal, blindfolded, with a scale in one hand and a sword in the other. The scale symbolizes the careful weighing of evidence and arguments. The sword symbolizes the power of the judiciary to judge and the right to pass sentence.[780] Figuratively, a judge or jury cuts the knot at the end of a trial. At the same time, the government carries the sword because of its monopoly on violence. The blindfold denotes objectivity and impartiality (without distinction of persons).[781] Together, these elements form the contemporary symbol of justice today.

As Plato observed over 2000 years ago, a just society can only exist if its citizens are born and live in a fair and just manner.[782] John Rawls emphasized, many centuries later, that the stability of a society hinges on whether its members perceive they are being treated justly or not.[783] However, applying the law in the exercise of judicial powers is a distinct challenge. In the administration of justice, while the sense of justice may often be intuitive, relying on 'intuition' in judicial decisions is questionable. A sound model requires judges to act based on legal principles rather than faith and intuition. On the other hand, the judge's duty is not only to correctly apply the law but also to find a just solution to the case. The logical corollary of this premise is that a fair judicial decision can be objectively defined as such if it was reached through a fair trial. Indeed, a judge cannot reach a substantively fair decision if there has been a gross violation of the right to a fair trial.[784]

The right to a fair trial can be seen as the legal enshrinement of that concept and traces of it can already be found in the *Magna Charta* of 1215 or in the *Déclaration des droits de l'homme et du citoyen* of 1789.[785] It is not only explicitly mentioned in article 6 ECHR, but equally in

[778] Cathleen Burnett, 'Justice: Myth and Symbol' (1987) 11 Legal Studies Forum 79
[779] Piero Leanza, and Pridal Ondrej, *The Right to a Fair Trial: Article 6 of the European Convention On Human Rights* (Wolters Kluwer Law & Business: Kluwer Law International 2014) 3.
[780] In Greek methodology, a blindfold represented the power of the inner eye: a sharper vision or view of the future: Themis did not need to be blindfolded; she looked clear. Nor was the sword present in original personification of justice: no violence was needed: it represented the power of general consent.
[781] Cathleen Burnett, 'Justice: Myth and Symbol' (1987) 11 Legal Studies Forum 79.
[782] Plato, *Republic* (360 B.C.).
[783] John Rawls, *A Theory of Justice* (Harvard University Press 1971) (The author's idea of justice starts from the concept that all persons are free and equal.)
[784] Piero Leanza, and Pridal Ondrej, *The Right to a Fair Trial: Article 6 of the European Convention On Human Rights* (Wolters Kluwer Law & Business: Kluwer Law International 2014) 4.
[785] *Bart De Smet, Jan Lathouwers and Karel Rimanque, 'Artikel 6: Recht op een eerlijk proces' in Johan Vande Lanotte and Yves Haeck (eds), Handboek EVRM: Artikelsgewijze commentaar- Volume 1 (Intersentia, Antwepen 2004) 380.*

article 10 (and 11) of the Universal Declaration of Human Rights, in article 14 §1-3 of the International Covenant on Civil and Political Rights and many other international conventions as well as in national legislations.[786]

What concretely entails '*un procès équitable'*, a 'fair trial? The right to a fair trial, in accordance with the interpretation given by the Court of Strasbourg, is a basic principle of the Rule of Law in a democratic society and aims to secure the right to a proper administration of justice.[787]It encompasses the right to an effective access to justice, to the equality of arms, to a fair composition of an independent court, to a public hearing, to a judgment pronounced within a 'reasonable time',….[788]As pointed out by the ECtHR, '*the right to fair trial holds so prominent place in a democratic society that there can be no justification for interpreting article 6 §1 of the convention restrictively*'.[789] The Court moreover notes that it has always referred to the 'living' nature of the Convention, which must be interpreted in light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of the norms of the Convention.[790]

According to the prevailing interpretation, the right to a fair trial compromises two components: the right of access to court, and the right to a fair process, which is secured by a certain number of procedural safeguards.[791]The right to fair trial covers the entire proceedings. As already emphasized, it embodies all the basic principles of the Rule of Law in a democratic society. Consequently, it has to be recognized as a structured right, compromising several subjective fundamental rights. Its content shall therefore include not only all the guarantees specified in article 6 ECHR, but also the principles, while not explicitly mentioned, that can be identified by the Court based on the circumstances in exercising its decision-making function.[792]

This chapter seeks to expound on this cornerstone of the rule of law and its true scope of application. The starting point will be the civil limb of the right to a fair trial under article 6§1 ECHR and relevant case-law of the ECtHR. First, a closer look is given at the general requirements for applicability of article 6 § 1 ECHR. The applicability of article 6 § 1 in civil matters depends on the existence of a 'dispute' that must relate to 'civil' 'rights and obligations' which, can be said to be recognized under domestic law. Secondly, the right of access to a court as an integral part of art. 6 §1 ECHR, departing from the *Golder* case, will be expounded. It will become clear that this right as guaranteed by article 6 §1 ECHR must, according to the court, be 'practical and effective'. Notwithstanding its central role in a democratic rule of law, it will be elaborated that this right is not absolute. Despite the (wide) application of the principles laid down in the *Golder* and subsequent judgments, the ECtHR advanced a caveat limiting the right of access to a court: The test used by the ECtHR is a threefold one: the limitation must have a *legitimate aim* (1), be *proportionate* (2) and the *very* essence of the right of access to court must not be impaired (3).

4.3.2. The scope of article 6 ECHR

[786] Article 13 Gecoördineerde Grondwet.
[787] Piero Leanza, and Pridal Ondrej, The Right to a Fair Trial: Article 6 of the European Convention On Human Rights (Wolters Kluwer Law & Business: Kluwer Law International 2014) 7.
[788] *Ibid*.
[789] *Moreira de Azevedo v. Portugal* App No 11296/84 (ECtHR, 23 October 1990) §66.
[790] *Demir and Baykara v. Turkey* App No 34503/97 (ECtHR, 12 November 2008) §65-68.
[791] Piero Leanza, and Pridal Ondrej, The Right to a Fair Trial: Article 6 of the European Convention On Human Rights (Wolters Kluwer Law & Business: Kluwer Law International 2014) 8-9.
[792] *Ibid*.

The objective of article 6 ECHR is to guarantee everyone the right to a fair trial. The scope of article 6 nevertheless remains an important issue in the interpretation and application of the ECHR. The distinction between the 'civil' and 'penal' gateway is paramount. Paragraph 1 of this article applies to civil disputes. Whereas the entire article is applicable to the determination of the merits of a criminal prosecution.[793] It should be noted that within this research only the civil limb will be elaborated. Article 6 §1 ECHR is applicable in the following hypotheses:

> *'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...'* [794]

Article 6 §1 ECHR has a number of general requirements for its applicability.[795]

4.3.2.1. General requirements for applicability of article 6 §1 ECHR

The treaty notions of '*determination of civil rights and obligations'* and '*contestations sur (des) droits et obligations de caractère civil*' have an autonomous meaning. They do not refer to the systematics of the legal order of the contracting states and therefore cannot be interpreted solely by reference to the respondent State's domestic law; it is an 'autonomous' concept deriving from the Convention.[796] Article 6 § 1 of the Convention applies irrespective of the parties' status, the character of the legislation which governs how the 'dispute' is to be determined, and the character of the authority which has jurisdiction in the matter.[797]

The applicability of Article 6 § 1 in civil matters firstly depends on the existence of a 'dispute'. Secondly, the dispute must relate to 'rights and obligations' which, can be said to be recognized under domestic law. Lastly these 'rights and obligations' must be of a 'civil' nature within the meaning of the Convention.

A. The existence of a 'dispute'

Article 6 ECHR enters into force only from the moment there is a dispute (*contestation*). The term 'contestation', present in the French text of the provision under examination ('*soit des contestations sur ses droits et obligations de caractère civil'*) does not have an equivalent in the English text ('in the determinatuion of his civil rights and obligations'). However, the ECtHR has provided an interpretation in its case-law of what falls under a 'dispute' in the autonomous meaning of the Convention. This concept should not be understood in a limited procedural

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[793] *Bart De Smet and Karel Rimanque, Het Recht Op Behoorlijke Rechtsbedeling: Een Overzicht Op Basis Van Artikel 6 EVRM (Maklu, Antwerpen 2000) 21.*
[794] Article 6 ECHR.
[795] Registry European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 31 December 2021, https://www.echr.coe.int/documents/guide_art_6_eng.pdf;. Bart De Smet and Karel Rimanque, *Het Recht Op Behoorlijke Rechtsbedeling: Een Overzicht Op Basis Van Artikel 6 EVRM* (Maklu, Antwerpen 2000) 21.
[796] *Ibid*.
[797] *Ibid*.

sense.[798] It should be interpreted in a substantive meaning, rather than in a formal sense.[799] The 'dispute' must moreover be genuine and of a serious nature. [800] The '*contestation'* may relate not only to the actual existence of a right but also to its scope or the manner in which it is to be exercised.[801] It covers all proceedings the result of which is decisive for such rights and obligations: a tenuous connection or remote consequences do not suffice for the application of art. 6 ECHR.[802] The court furthermore clarified that in order to verify whether there is a dispute concerning civil rights and obligations at national level, not only the substantive content of the contested civil right, but also the possible existence of procedural limitations on the applicant's ability to undertake legal proceedings must be taken into consideration.[803]

B. Existence of an arguable right in domestic law

Secondly, it must be noted that art. 6 does not create any new substantive right which does not already exist within the national law: it rather grants an individual the procedural guarantees listed in the provision. The ECtHR recalled this by stating that:

> *'Article 6 § 1 extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law; it does not in itself guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States.'*[804]

Thus, the substantive right relied on by the applicant in the national courts, or the 'obligation' must have a legal basis in the State concerned.[805] In order to decide whether the 'right' or 'obligation' in question really has a basis in domestic law, the starting point must be the provisions of the relevant domestic law and their interpretation by the domestic courts[806] and the Court may refer to sources of international law or common values of the Council of Europe when ruling on the interpretation of the existence of a 'right'.[807] It should be noted that it is the right as asserted by the claimant in the domestic proceedings that must be taken into account in order to assess whether art. 6 § 1 is applicable.[808] There is a 'right' within the meaning of

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[798] Registry European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 31 December 2021, https://www.echr.coe.int/documents/guide_art_6_eng.pdf; Bart De Smet and Karel Rimanque, *Het Recht Op Behoorlijke Rechtsbedeling: Een Overzicht Op Basis Van Artikel 6 EVRM* (Maklu, Antwerpen 2000) 21.
[799] *Le Compte, Van Leuven and De Meyere v. Belgium App No* 6878/75 and 7238/75 (ECtHR 23 June 1981) §45; *Moreira De Azevedo v. Portugal App No* 11296/84 (ECtHR 23 October 1990) §66.
[800] Sporrong and Lönnroth v. Sweden App No 7151/75 and 7152/75 (ECtHR, 23 September 1982) §81; *Cipoletta v. Italy* App No 38259/09 (ECtHR, 1 January 2018) §31.
[801] *Benthem v. The Netherlands* App No 8848/80 (ECtHR, 23 October 1985) §32.
[802] *Pudas v. Sweden* App No 10426/83 (ECtHR, 27 October 1987) §31.
[803] *Fayed v. The United Kingdom* App No 17101/90 (ECtHR 21 September 1990) §68.
[804] *H. v. Belgium* App No 8950/80 (ECtHR 30 November 1987) §40.
[805] *Roche v. United Kingdom* App No 32555/96 (ECtHR, 19 October 2005) §119; *Boulois v. Luxemburg* App No 37575/04 (ECtHR, 3 April 2012) §91.
[806] Al-Dulimi and Montana Management Inc. v. Switzerland App No 5809/08 (ECtHR, 21 June 2016) §97; Evers v. Germany App No 17895/14 (ECtHR, 28 August 2020) §66.
[807] Registry European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 31 December 2021, https://www.echr.coe.int/documents/guide_art_6_eng.pdf ; *Boulois v. Luxemburg* App No 37575/04 (ECtHR, 3 April 2012) §101-102.
[808] *Stichting Mothers of Srebrenica and others v. The Netherlands* App No 65542/12 (ECtHR, 11 June 2013) §120.

Article 6 § 1 where a substantive right recognised in domestic law is accompanied by a procedural right to have it enforced through the courts.[809]

In addition, the Court has pointed out that whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined in national law but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court.[810] It should moreover be noted that the Court emphasised the importance of maintaining a distinction between procedural and substantive elements: fine though that distinction may be in a particular set of national legal provisions, it remains determinative of the applicability and, as appropriate, the scope of the guarantees of art. 6.[811]Applying the distinction between substantive limitations and procedural bars in the light of these criteria, the ECtHR has recognised that immunity is to be seen here not as qualifying a substantive right but as a procedural bar to the national courts' power to determine that right.[812]

C. The 'civil' nature

Lastly, the result of the proceedings must be directly decisive for a right of a *civil* nature.[813] Whether or not a right is to be regarded as civil in the light of the Convention must be determined by reference to its substantial content and effects and not its internal, legal classification under the domestic law of the State concerned.[814]Hence, what is conclusive to be of *civil* nature is that from the proceedings a 'private' right or obligations arises (read: that the *outcome* of the proceedings are decisive for 'private' rights and obligations), and not whether the State has categorized it as civil or not.[815]In the exercise of its supervisory functions, the Court must also take into account the Convention's object and purpose and the national legal systems of the other Contracting States.[816]

4.3.2.2. The Right of Access to Court

The language of art. 6 § 1 appears to be ambiguous, as it does not mention the right of access to court explicitly. Consequently, one might conclude from the wording that the right to a fair trial is guaranteed only for pending legal cases, but not for individuals seeking to initiate legal action. The question whether the right of access to court is implied within the wording of article 6 §1 arose in the case of *Golder v. the United Kingdom*.[817] In a judgment which was considered as one of the most significant and innovative steps taken by the Court, the ECtHR came to the

[809] *Regner v. The Czech Republic* App No 35289/11 (ECtHR, 19 September 2017) §99.
[810] *Fayed v. The United Kingdom* App No 17101/90 (ECtHR, 21 September 1990) §65.
[811] *Karoly Nagy v. Hungary* App No 56665/09 (ECtHR, 14 September 2017) §60-61.
[812] *Al-Adsani V. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §48.; *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §57.
[813] Registry European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 31 December 2021, https://www.echr.coe.int/documents/guide_art_6_eng.pdf;
. Bart De Smet and Karel Rimanque, *Het Recht Op Behoorlijke Rechtsbedeling: Een Overzicht Op Basis Van Artikel 6 EVRM* (Maklu, Antwerpen 2000) 24.
[814] Registry European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*, 31 December 2021, https://www.echr.coe.int/documents/guide_art_6_eng.pdf;
[815] *H. v. France* App No 10073/82 (ECtHR, 24 October 1989) §46-47.
[816] *König v. Germany* App No 6232/73 (ECtHR, 28 June 1978) §89.
[817] *Golder v. the United Kingdom* App No 4451/70 (ECtHR 21 February 1975).

conclusion that the ECHR does not permit any meaningful interpretation other than confirming that the right of access to a court is an integral part of the right to a fair trial under art. 6 §1.[818]

In interpreting Article 6 (1), the Court considered that it should be guided by articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969 which contain the guiding principles of interpretation of a treaty of international law.[819] Article 31 (1) lists the general means which have to be considered for interpretation: text, context as well as object and purpose. The Court noted that art. 6 ECHR, taken into its context, provides grounds to think it is included in its scope.[820] Specifically, the ECtHR noted indications in the French text: '*à ce que sa cause soit entendue… par un tribunal'.* Again, a similar wording is not to be found in the English version, but the Court rightly noted that in French 'cause' may mean '*procès qui se plaide*' or even '*l'ensemble des intérêts à soutenir, à faire prévaloir'*.[821]

Considering (in accordance with the Vienna Convention) the ECHR's preamble as integral part of the convention and of significant importance, the court emphasized the member states' profound belief in the rule of law.[822] Therefore, when interpreting art. 6, the devotion to the rule of law should be considered in the light of the object and purpose of the Convention. In this line, the court found that the principle of the rule of law was hardly conceivable without there being a possibility of having access to the courts.[823] In light of art. 31 §3 (c) of the Vienna Convention, the Court further reasoned that art. 6 (1) ECHR had to be read in the light of two universally recognized fundamental principles of international law: the principle regarding the capability to submit a civil claim to a judge and the principle of prohibition of the denial of justice. The most compelling section of the judgment further states that:

> '*Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. … It would be inconceivable, in the opinion of the Court, that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings*.'[824]

The *Golder* judgment forms the foundation of the explicit enshrinement of the right of access to a court under art. 6 ECHR and, as such, has ever since been referred to as a landmark decision.[825]The defining of the right of access to a court as in *Golder* has subsequently been confirmed by the court. By referring to the principles of the rule of law and the avoidance of arbitrary power which underlie the Convention, the Court holds that the right of access to a

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[818] Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 3.
[819] *Golder v. the United Kingdom* App No 4451/70 (ECtHR 21 February 1975) §29-30.
[820] *Ibid*., §31.
[821] *Ibid*., §32.
[822] *Ibid*., §34.
[823] *Ibid*.
[824] *Ibid*., §35.
[825]Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 5.

court is an inherent aspect of the safeguards enshrined in Article 6. [826]Where there is no access to an independent and impartial court, the question of compliance with the rule of law will always arise.[827]

Concretely, the right to a fair trial, as guaranteed by art. 6 § 1, requires that litigants should have an effective judicial remedy enabling them to assert their civil rights.[828]Everyone has the right to have any claim relating to his 'civil rights and obligations' brought before a court or tribunal. In this sense, art. 6 § 1 embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before courts in civil matters, represents one aspect.[829] Therefore, art. 6 § 1 can be invoked by anyone who holds that an interference with the exercise of one of his or her civil rights is unlawful and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of art. 6 § 1. Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or to the scope of the asserted civil right, art. 6 § 1 entitles the individual concerned '*to have this question of domestic law determined by a tribunal*'.[830]

It is important to note that although the right to bring a civil claim before a court forms one of the '*universally recognised fundamental principles of law*' (*see supra*: Case *Golder*), the Court nevertheless does not consider these guarantees to be among the norms of *jus cogens* in the current state of international law.[831]

The right as guaranteed by article 6 §1 ECHR must, according to the court, be 'practical and effective'. Notwithstanding its central role in a democratic rule of law, it should be noted that this right is not absolute. Despite the (wide) application of the principles laid down in the *Golder* and subsequent judgments, the ECtHR advanced a caveat limiting the right of access to a court.

A. A right that is practical and effective

The right of access to a court must be 'practical and effective'[832] in view of the prominent place held in a democratic society by the right to a fair trial.[833]For the right of access to be effective, an individual must 'have a clear, practical opportunity to challenge an act that is an interference with his rights'.[834]The court noted that this right must be distinguished from the right guaranteed by Article 13 of the Convention.[835]

The ECtHR defined that the right of access to a court is impaired when the rules cease to serve the aims of 'legal certainty' and the 'proper administration of justice' and form a sort of barrier

[826]*Grzeda v. Poland* App No 43572/18 (ECtHR, 15 March 2022) §298.; *Zubac v. Croatia* App No 40160/12 (ECtHR, 11 October 2016) §76.
[827] *Ibid*.
[828] *Naït-Liman v. Switzerland* App No 51357/07 (ECtHR, 15 March 2018) §112.; *Beles and others v. The Czech Republic* App No 47273/99 (ECtHR, 12 November 2002) §49.
[829] *Golder v. the United Kingdom* App No 4451/70 (ECtHR 21 February 1975) §36.
[830] *Z. and others v. United Kingdom* App No 29392/95 (ECtHR, 10 Mei 2001) §92.; *Markovic and others v. Italy* App No 1398/03 (ECtHR, 14 December 2006) §98.
[831]*Al-Dulimi and Montana Management Inc. v. Switzerland* App No 5809/09 (ECtHR, 21 June 2016) §136.
[832] *Zubac v. Croatia* App No 40160/12 (ECtHR, 5 April 2018) §76-79; *Bellet v. France* App No 23805/94 (ECtHR, 4 December 1995) §38.
[833] *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §45.
[834] *Bellet v. France* App No 23805/94 (ECtHR, 4 December 1995) §38.
[835] *X. and others v. Russia* App No 78402/16 and 66158/14 (ECtHR, 14 January 2020) §50.

preventing the litigant from having his or her case determined on the merits by the competent court.[836] In the specific circumstances of a case, the practical and effective nature of the right of access to a court may be impaired by the existence of procedural bars preventing or limiting the possibilities of applying to a court. For instance, a particularly strict interpretation by the domestic courts of a procedural rule (excessive formalism) may deprive applicants of their right of access to a court.[837]

B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'

Notwithstanding its central role in a democratic society which upholds the Rule of Law, the right of access to a court is not absolute. The Strasbourg case-law recognizes that it may be subject to limitations. Ever since its *Ashingdane* judgment, the Court states the following towards limitations of the right of access to courts:

> *'Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" …In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field….*
>
> *Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired … Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'*[838]

The test used by the ECtHR is thus a threefold one: the limitation must have a *legitimate aim* (1), and it must be *proportionate* (2). Moreover, the *very essence of the right of access to court* must not be impaired (3). Given the aim of the research, the three criteria will be examined in the following section departing from the ECtHR's reasoning outlined in cases where the question arose to what extent the principle of (State) immunity constituted a breach of article 6 §1 ECHR.

The author wishes to point out to the reader that this chapter first sets out the court's reasoning on the limitation of article 6 *vis-à-vis* (State) immunities in general terms. The critical analysis of this reasoning, departing from the *J.C and Others v. Belgium* judgment and reviewed against the elaborated principles on State immunity and article 6 ECHR is set out in more detail in the next chapter. *(See infra: 5. The Judgment of J.C. and others v. Belgium)*

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[836] *Zubac v. Croatia* App No 40160/12 (ECtHR, 5 April 2018) §76-79; *Bellet v. France* App No 23805/94 (ECtHR, 4 December 1995) §98.
[837] *Zubac v. Croatia* App No 40160/12 (ECtHR, 5 April 2018) §97.
[838] *Ashingdane v. United Kingdom* App No 8225/78 (ECtHR, 28 May 1985) §57. (Own emphasis added) (This test was later confirmed by the ECtHR in a.o. *Waite and Kennedy v. Germany §59, Tinnelly & Sons Ltd and Others and McElduff and Others v. United Kingdom §72, T.P. and K.M. v. the United Kingdom §98 and Z and Others v. the United Kingdom §93.)*

i. Legitimate aim

It is a general rule under the Convention that any interference with its provisions must serve a legitimate aim. Several articles, including Articles 8 to 11, explicitly state legitimate aims. Notably, the Convention does not specify a particular legitimate aim when it comes to inherent rights like the right of access to court.[839]

The question whether the grant of (State) immunity in civil procedures pursues a legitimate aim has been considered on multiple occasions by the court in its case-law. On this point, the court has repeatedly taken the same stance:

> *'The Court has previously explained that sovereign immunity is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.'*[840]

The illegitimacy of the aim pursued with the granting of immunity was only invoked on two occasions by applicants. In the case of *Al-Adsani v. the United Kingdom*, the applicant submitted that the granting of claims for compensation for torture.[841] In *McElhinney v. United Kingdom*, furthermore, the applicant argued that the grant of State immunity in a situation where international practice was suggesting an exemption from immunity could not be considered as pursuing a legitimate aim.[842] The Court did not address these submissions directly in its judgments. Instead, it considered the matter when evaluating whether the restriction on the applicant's right of access to court by the grant of State immunity, was proportionate. The Court's approach is therefore to consider whether the immunity in question *generally* serves a legitimate aim.[843]

In this sense, the ECtHR considers only *generally* if the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim (of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty). Without, however, in concreto taking into account the specific context to decide on the 'legitimate aim'. The particular facts of the applications (e.g. whether the proceedings in question concerned claims for serious human rights violations) are brought into play when assessing whether the application of the general rules of State immunity was proportionate.[844] Nevertheless, there are cases conceivable in which only a specific situation will justify a

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[839] Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 13.

[840] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §188. (Own emphasis added.) Previously confirmed in: *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §35.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §54.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §34.; *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §60.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §52.

[841] *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §51.

[842] *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §31.

[843] Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 13.

[844] *Ibid*.

restriction on the right of access to court. In those cases the Court will look at the specific context to decide on the "legitimate aim". [845]

The 'legitimate aim' component of the test is thus satisfied, according to the court, when it generally pursues a legitimate aim. In its *McElhinney v. Ireland* judgment, the court determined that granting state immunity pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[846] Once this legitimate aim was confirmed by the Court, it was reaffirmed in all its subsequent judgments dealing with the compatibility of state immunity with the right of access to a court.[847] However, one might question whether this aim always remains *legitimate* over time (*McElhinney* dates from 2001) and whether the unique circumstances of a case do (and must) not inevitably determine this assessment.

ii. Proportionality

Although the principle of proportionality is not explicitly stated in the text of the Convention, it has become a dominant theme in the case-law under the Convention. The Court has elevated it to the level of a general principle of Convention law, holding that '*inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'*.[848]Broadly speaking, the principle of proportionality or fair balance can be seen as a decision-making process and an analytical framework used by courts to address conflicts between two or more legally protected rights or interests. Balancing as applied by the ECtHR involves a process of comparing the strength of reasons in favor of the different competing rights and interests in order to determine whether the right invoked should prevail over the countervailing rights and interests.[849] Proportionality, in the traditional sense, is the method by which the Court assesses whether interference with one of the qualified rights (Articles 8 to 11) is necessary in a democratic society or if there is a reasonable justification for differential treatment under article 14 ECHR. [850]

For the purpose of determining the scope of limitations on implied rights such as the right of access to court, the principle has occasionally been referred to as '*the Court's principal yardstick*'.[851] Concretely, proportionality demands a fair balance between the general interests of the community and the individual's fundamental rights. Moreover, the extent of a deviation

[845] *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §59.
[846] *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §35
[847] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §188.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §54.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §34.; *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §60.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §52.
[848] *N. v. the United Kingdom* App No 26565/05 (ECtHR, 27 May 2008) §44.
[849] Laurens Lavrysen, 'Chapter 4- System of restriction' in in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds) *Theory and Practice of the European Convention on Human Rights (fifth edition)* (Intersentia, Brussels 2018) 316.
[850] Tom Barkhuysen, Michiel van Emmerik, Oswald Jansen and Masha Fedorova, 'Chapter 10 - Right to a Fair Trial' in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds) *Theory and Practice of the European Convention on Human Rights (fifth edition)* (Intersentia, Brussels 2018) 556.
[851] Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 15.

from a right must not be excessive in relation to the legitimate aim it seeks to achieve.[852] A limitation is not compatible with Article 6(1) if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Regarding state immunities, for the principle of proportionality, the court considers the general recognized rules under public international law. In its case-law on state immunities conflicting with art. 6 ECHR, the ECtHR elaborates the following reasoning:

> *'The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (see, mutatis mutandis, the Loizidou v. Turkey judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.'*
>
> *It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1. Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.*[853]

Hence, the Court holds that measures which reflect generally recognised rules of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court.

A margin of appreciation?

When determining the proportionality of an interference with the right of access to court, the Court allows states a certain margin of appreciation, but subject to its supervision. The margin of appreciation has been defined as the label used by the Court 'to indicate the measure of discretion allowed to the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national conditions and circumstances.[854] The doctrine of margin of appreciation embodies the principle of subsidiarity,

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[852] *Ibid.*

[853] *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §56-57. (Own emphasis added.) This reasoning was also upheld in: *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §189.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §36-37.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §55-56.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §35-36.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §48-49:; *Kalogeropoulou and others v. Greece and Germany* App No 59021/00 (ECtHR, 12 December 2002) §35-36.

[854] Laurens Lavrysen, 'Chapter 4- System of restriction' in in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds) *Theory and Practice of the European Convention on Human Rights (fifth edition)* (Intersentia, Brussels 2018) 327.

asserting that a central authority should not undertake functions that can be more appropriately and effectively performed at a lower, local level. While the concept of margin of appreciation has been applied by the Court in various areas[855] of its case-law, it is most frequently used to determine whether a fair balance was achieved between a Convention right and other rights or the public interest.[856]This is particularly the case regarding issues of moral, social or economic policy on which there is no clear European consensus.[857] The scope (between 'wide', 'certain' and 'narrow'), corresponding with a lighter or stricter level of scrutiny applied by the Court (or a lax standard of proportionality or more strict standard of proportionality is applied) varies between the different aims that legitimize interference in the exercise of a right.[858] Thus, notions which are "more objective" than the concept of morals leave less room for a broad margin of appreciation.[859]

In view of the principle of state immunity, it is however, notable that that the Court grants the Contracting States a margin of appreciation in determining what is ultimately a legal question (e.g. "Is there an obligation under public international law to grant State immunity in a particular situation?").[860]One might question that the grant of a margin of appreciation is desirable where issues are involved which may vary per state and thus the domestic authorities are better placed, but not as far as questions of interpretation of public international law are concerned.

iii. The very essence of the right

In addition to pursuing a legitimate aim and being proportionate, the limitations applied by the courts must not restrict or reduce the access to court in such a way or to such an extent that the very essence of the right is impaired.[861]In this context, it should be recalled that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.[862] Accordingly the Court's scrutiny should be based thereupon. The ECtHR finds the essence of a right to be impaired when it has been effectively destroyed by the restriction. Contracting Parties thus have to ensure that an acceptable scope of the right remains. Given the destructive effect that the operation of immunity has on jurisdiction and consequently the right of access to court, it is surprising (*read*: distressing) that the criterion has so far not played a crucial role in the case-law on the conflict between immunities and art. 6 (1) ECHR.

When analysing the ECtHR's case-law, the absence of an assessment of the third criterion of 'the very essence of the right' by the court comes, regrettably, to the fore. Indeed, the Court's approach with regard to immunities and the 'very essence of the right' is a 'relative one'. The ECtHR first considers the requirements of 'legitimate aim' and 'proportionality' and, after having found that these two criteria have been satisfied, concludes that *therefore* the 'very essence

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855 *Ibid*.
856 *Ibid*.
857 Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 15.
858 *Ibid*., 16.
859 *Ibid*.
860 *Ibid*.
861 Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 18.
862 *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §45.

of the right to access to court' was not impaired by the immunity.[863] According to the Court, the assessment of the third criterion thereby depends on the assessment of the first two criteria. It is clear that this approach is not legally correct, nor desirable in view of the rule of law. If the outcome of the third criterion entirely depends on the assessment of the other two, its requirement is void in effect as it adds nothing to the test. In a concurring opinion, judge Costa rightly criticized this approach as being 'unorthodox and illogical'. He argued that this reasoning mixes up two approaches which the court had always carefully distinguished as two distinct alternatives: '*limitations on the right to a court are compatible with Article 6 only if they do not restrict or reduce the access left to the litigant in such a way or to such an extent that the very essence of the right is impaired… furthermore, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*.'[864] According to judge Costa, the question of proportionality arises only as a subsidiary issue, in the event that the very essence of the right to a court has not been affected. [865]

Even more, the fulfilment of this third criterion is problematic, when placing the nature of the principle of *(State) immunity* (a procedural impediment to the exercise of jurisdiction, leading to legal proceedings being barred) *vis-à-vis the nature of the right of access to a court* (the fundamental right of having an effective judicial remedy enabling individuals to assert their civil rights). Harrowing, it is the very essence of the attribution of (State) immunity to paralyze the very essence of the right to access to courts. At this point, the Convention's aim to guarantee not rights that are theoretical or illusory but rights that are practical and effective clearly does not stand. Rather the opposite, immunities render the right to access to court pure theoretical and illusory, void of legal effect. In other words: immunities totally eliminate the right of access to court, not leaving any scope for its exercise.[866]

This very essence of the right to access to a court being impeded by immunities was aptly observed by judge Loucaides in a dissenting opinion in the case of *McElhinney v. Ireland*:

> '*It is correct that Article 6 may be subject to inherent limitations, but these limitations should not affect the core of the right. Procedural conditions such as time-limits, the need for leave to appeal etc. do not affect the substance of the right. But completely preventing somebody from having his case determined by a court, without any fault on his part and regardless of the nature of the case, contravenes, in my opinion, Article 6 § 1 of the Convention*.'[867]

Indeed, the principle of (State) immunity is at odds with the right of access to justice: when the former is granted, the latter is left without any effect since the procedural recourse to invoke its rights is reduced to non-existent. If this criterion were thus to be assessed within the aforementioned context, one would come to the conclusion that the limitations applied do restrict or reduce the access to court in such a way or to such an extent that the very essence of the right is impaired, and in this sense the third criterion of the *Ashingdane* test could not be fulfilled. The whole practice of invoking (state) immunities would thus have to be seen as an unjustified limitation of the right of access to court under art. 6 §1 ECHR. However, the reality

[863] *Ibid*., §69.
[864] *Ibid*., Concurring opinion of Judge Costa.
[865] *Ibid*.
[866] This was pointed out in the concurring opinion of Judge Ress joined by Judge Zupancic in *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §45.
[867] Dissenting opinion of Judge Loucaides in *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001).

is more dire: the judicial body that, as a watchdog, should ensure the correct application of the convention, circumvents the third criterion of the *Ashingdane* test in its assessment regarding the justifiable nature of a limitation of art. 6 ECHR.

In its numerous judgments on immunities, the Court typically enumerates the three criteria of the *Ashingdane* test, just to subsequently extensively focus on the first two criteria. After determining whether the 'legitimate aim' and 'proportionality' criteria are met, the Court usually circumvents the discussion of the 'very essence' criterion, which leaves it simply to be omitted further from discussion. Therefore, once the 'proportionality' criterion is addressed, the Court proceeds, by skipping the third requirement, directly to its conclusion on whether or not art. 6 (1) was violated. [868] In fact, there are only three judgments in which the 'very essence' criterion was considered by the Court at all. Regarding State immunity, the Court took the above-mentioned 'relative' approach in *Prince Hans-Adam II von Liechtenstein v. Germany*.[869] The other judgments are the cases of *Waite and Kennedy v. Germany*[870] and *Beer and Regan v. Germany*[871], in which the Court had to rule on the immunity of an international organization. However, it should be noted that regarding the immunity of international organisations the ECtHR generally places the grant of immunity contingent on the availability of alternative remedies or forms of judicial redress to effectively protect their rights under the Convention (contrary to the grant of State immunity).[872] In cases concerning State immunity and art. 6 §1 ECHR the availability of alternative means is not considered and therefore forms no factor in the reasoning of the court. Hence, the existence of alternative means being a non-factor, the hold whether or not a claim is barred by State immunity therefore amounts to an 'all or nothing' situation for claimants before the ECtHR.

In the present author's view, the court bypasses the 'very essence' criteria because significantly approaching it would lead to the end of a justifiable application of State immunities in light of the right of access to justice under Article 6 ECHR. Once having imposed this criterion in the *Ashingdane case*, the court appears to have disregarded this third criterion precisely because of the impossibility of the claim of state immunity to satisfy it. Where other authors propose to resolve this anomaly by abandoning the 'very essence' criterion from the test and thus merely apply a twofold test when considering complaints of an alleged immunity-related violation of the right of access to court, the present author advocates for a strict application of it by the court. Considering otherwise, would lead to upholding a principle of international law which inextricably restricts the right of a fair trial under art. 6 ECHR in such a way that the very essence of the right is impaired, leaving only a pure theoretic, illusory and void of legal effect right (of access to a court).

Let us reframe the issue: is it desirable (let alone legal) to continue to apply a principle in a democratic society when this principle inherently limits, even more, reduces one of the most fundamental human rights within a rule of law to such an extent that the very essence of that fundamental right is impaired. In present democratic society the grant of State immunity from judicial proceedings to the detriment of the fundamental right to access to a court appears to be an anachronistic doctrine incompatible with the demands of justice and the rule of law.

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[868] Matthias Kloth, *Immunities, and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (International Studies in Human Rights, Martinus Nijhoff Publishers 2010) 19.
[869] *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §69.
[870] *Waite and Kennedy v. Germany* App No 26083/94 (ECtHR, 18 February 1999).
[871] Beer and Regan v. Germany App No 28934/95 (ECtHR, 18 February 1999).
[872] *Ibid*., §58.

4.3.3. Conclusion

The right to fair trial under article 6 ECHR occupies a prominent place in the ECHR convention and is the cornerstone of the notion of the rule of law. The court saw this in equal measure and confirmed this prominent role of Article 6 in its case law. As rightly stressed by the ECtHR, '*the right to fair trial holds so prominent place in a democratic society that there can be no justification for interpreting article 6 §1 of the convention restrictively*'.[873] In this line, the Court noted that it has always referred to the 'living' nature of the Convention, which must be interpreted in light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of the norms of the Convention.[874] In the beginning of this chapter this reasoning was clearly present in the ECtHR's case-law. In the *Golder* judgment, which could be called a landmark judgment, the ECtHR came to the conclusion that the ECHR does not permit any meaningful interpretation other than confirming that the right of access to a court is an integral part of the right to a fair trial under art. 6 §1. By referring to the principles of the rule of law and the avoidance of arbitrary power which underlie the Convention, the Court hold that the right of access to a court is an inherent aspect of the safeguards enshrined in Article 6. Where there is no access to an independent and impartial court, the question of compliance with the rule of law will always arise.

However, notwithstanding this centrale role in a democratic society which upholds the rule of law, the Court recognized that the right to access to a court is not of an absolute nature and may be subject to limitations. Ever since its *Ashingdane* judgment, the ECtHR subjects limitations of the right of access to courts under art. 6 ECHR to a threefold test: the limitation must firstly have a *legitimate aim,* secondly must be *proportionate* and lastly the *very essence* of the right of access to court must not be impaired. A closer look at the case-law of the court regarding immunities and art. 6 §1 ECHR, brought forward how the court, nevertheless, shapes this self-created tripartite test to its own liking (or at least to that of states invoking immunity). Regarding the *legitimate aim*, the ECtHR considered *generally* that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. As for the *proportionality*, the Court holds that measures which reflect generally recognized rules of public international law on state immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court. Without, however, according to the author, searching for a real, fair balance between the conflicting rights by comparing and attributing a certain weight in favour of both norms. At this point, the grant of a (certain) margin of appreciation to states when determining the proportionality of an interference with the right of access to court could be questioned because it is ultimately a legal question. As regard the third criterion of *the very essence*, the ECtHR circumvents to soundly address this criterion. This is of serious concern, as previous analysis has shown how examining this criterion in the light of state immunities would mean the end of a justifiable invocation of state immunities in the light of Article 6 ECHR. Indeed, immunities totally eliminate the very essence of the right of access to court, not leaving any scope for its exercise. A claim to immunity, consists in an unwarranted refusal to satisfy what would otherwise be a valid and enforceable legal claim. It amounts, in fact, to a denial of justice. The Strasbourg Court, instead of acting as a human rights watchdog, evades to properly address it, in order not to embed this denial of justice in black and white in its jurisprudence. The court's avoidance of the 'very essence' criterion in immunity cases fundamentally undermines the right of access to justice under Article 6 ECHR. This evasion results in a continued endorsement of State immunities that severely restrict the right to a fair trial, reducing it to a theoretical and

[873] *Moreira de Azevedo v. Portugal App No 11296/84 (ECtHR, 23 October 1990) §66.*
[874] *Demir and Baykara v. Turkey App No 34503/97 (ECtHR, 12 November 2008) §65-68.*

ineffective guarantee. Upholding such an outdated principle in modern democratic society contradicts the core demands of justice and the rule of law. Put the principle of state immunity to scrutiny under the full, tripartite *Ashingdane* test and let its atrocious non-compliance thereby end the upholding of an unjustifiable restriction of the right of access to court under Article 6 ECHR.

4.4. Child sexual abuse

4.4.1. Introduction

'*If anyone causes one of these little ones—those who believe in me—to stumble, it would be better for them to have a large millstone hung around their neck and to be drowned in the depths of the sea*.'[875]

Children: perhaps one of the most vulnerable groups within our society. It has been these fragile, defenceless individuals who have been sexually abused by the clergy of the Catholic Church for decades. This chapter will briefly describe the crime of child sexual abuse under the European and international legal framework and focus on the institutional character of the abuse under research and its inherent manifestations. The applicability of the Convention on the Rights of the Child (hereinafter: CRC) to the Holy See as a contracting party will furthermore be observed. It will moreover be outlined how child sexual abuse has been recognized as a form of torture under art. 3 ECHR.

4.4.2. The Concept of Child Sexual Abuse

Child sexual abuse can be defined as an adult using a minor[876] for sexual stimulation, including rape, indecent exposure and child pornography, and can be distinguished from non-sexual, institutional abuse within religious institutions. 'Child sexual abuse' encompasses several violent sexual offences familiar to international criminal law and is recognized as a serious human rights violation.[877] The CRC provides that States Parties should undertake to protect the child from all forms of sexual exploitation and sexual abuse[878] and acts of torture or cruel, inhuman or degrading treatment or punishment.[879] The Council of Europe also has a specific Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.'[880]It prescribes the criminalization of all types of sexual crimes against children. It stipulates that states in Europe and beyond must adopt specific legislation and take measures to prevent sexual violence, protect child victims and prosecute offenders.[881]

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[875] Jesus Christ, Gospel of Matthew 18:6, New International Version.
[876] Within this research a minor is an individual who has not reached the legal age of majority of 18 years old.
[877] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) International Journal of Transitional Justice <https://academic.oup.com/ijtj/article-abstract/10/2/332/2356890?redirectedFrom=fulltext&login=false> accessed 13 May 2024.
[878] Art. 19 and 34 Convention on the Rights of the Child.
[879] Art. 37 Convention on the Rights of the Child.
[880] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25 October 2007.
[881] *Ibid*.

This offence frames itself within the broader condition of paedophilia. Child sexual abuse is in effect an externalization of a mental disorder in which the perpetrator has a sexual preference for children. Paedophilia is defined as a persistent sexual interest in prepubescent children, as reflected by one's sexual fantasies, urges, thoughts, arousal patterns, or behaviour.[882]It should be noted that while terms that denote sex with minors are criminal actions, paedophilia is the sexual attraction to children and is a psychiatric disorder.

i. Institutional abuse

Specifically, the sexual abuse under research should be characterized as institutional child sexual abuse. Institutional child sexual abuse is distinguished from other forms of child sexual abuse by the situations and settings in which perpetrators come into contact with their victims.[883] Therein child sexual abuse happens in an institutional context if it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution. It moreover occurs if engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk. Or it happens in any other circumstances where it can be consider that an institution is, or should be treated as being, responsible for adults having contact with children.[884]

Institutional abuse is widely interlinked with abuse of power. Under chapter 3, it was observed how the scale of the child sexual abuse increased with the sacrament of penance, or 'confession', especially since the Council of Trent the confessional was inaugurated in most churches. The act of sacramental confession became the occasion for the most heinous form of clergy sexual abuse, namely the solicitation by the priest-confessor of sex with the penitent. Solicitation is especially repugnant because of the present and inherent unequal relation of power: the victim who seeks forgiveness and comfort is at his or her most vulnerable *vis-à-vis* the priest's power to grant or withhold absolution, to assign and control penances, and his superior education and exalted social status. (*See supra*: 3.1.1.1. Centuries-old horror)The hierarchical structure of the Church, combined with its moral authority and influence, creates an environment where perpetrators can exploit their positions of power without fear of accountability. This dynamic allows abuse to be perpetuated and covered up, as the institution prioritizes its reputation over the protection of vulnerable individuals. The abuse of power not only facilitates the initial acts of abuse but also contributes to the systemic failure to address and prevent such atrocities, leaving survivors off-hand.

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[882] Peter J. Fagan, Thomas N. Wise, Chester Schmidt, Fred Berlin, 'Pedophilia' (2002) American Medical Association <https://jamanetwork.com/journals/jama/article-abstract/195539> accessed 10 August 2024.

[883] Tamara Blakemore, James Leslie Herbert, Fiona Arney and Samantha Parkinson, 'The impacts of institutional child sexual abuse: A rapid review of the evidence' (2017) Child Abuse & Neglect <https://www.sciencedirect.com/science/article/pii/S0145213417302843?casa_token=GX_7otH6b9IAAAAA:nbrk7Wf4Wx2bhOlUth2DQ2OMZmdw3FbSGIw2IEMkSAYQ1uFxIMGWqGJQwW_0wxNCaW9gOXADGA0> accessed 10 August 2024.

[884] *Ibid*., 36.

4.4.3. The Holy See's obligations under the CRC

In 1990, the Holy See ratified the CRC, including its two optional protocols. Nevertheless, it included a reservation providing 'that the application of the Convention be compatible in practice with the particular nature of Vatican City State and of the sources of its objective law and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence'. It also included a declaration manifesting that 'in consideration of its singular nature and position, the Holy See, in acceding to this Convention, does not intend to prescind in any way from its specific mission which is of a religious and moral character'.[885]

This declaration, by its non-binding nature, does not attempt to alter the legal scope of the CRC. These actions mean that all of the Holy See's worldwide activities are subject to compliance with the CRC. For those worldwide activities regarding the governance of the Vatican City, the CRC does not impose obligations concerning "citizenship, access and residence" practice of law. [886]The CRC applies to the Holy See's global activities wherever it exerts sufficient control over individuals and locations, including but not limited to its governance of Vatican City. While it might seem unusual for a religious entity to adhere to international law, freedom of religion does not exempt the Holy See from its international legal responsibilities when it acts in a political capacity. As a body with international legal personality, the Holy See must fulfil its binding obligations under international law and cannot solely rely on religious freedom to avoid compliance. This compliance is inherent to its status and participation in international law. By accepting these obligations, the Holy See reaffirms its international legal personality.[887]

The Committee of the Rights of the Child condemned in very strong terms the Holy See's failure to protect children. This report strongly denounces the abuse and mismanagement within the Catholic Church.[888] According to the Committee, the Holy See's mismanagement made it possible for priests to abuse thousands of children and, at the same time, the wrong approach afterwards made victims of child abuse and their families re-victimized. The Committee believes that the Holy See, as supreme authority of the Catholic Church, must respect the rights of the child in every situation involving individuals and institutions under its authority.

4.4.4. Child sexual abuse as torture

The applicants in *J.C. and others* were deprived of one of their most fundamental human rights as minors because of the sexual abuse they suffered, committed by a clergyman within the context of a power relationship. Such victimisation facilitated and made possible by the systematic and worldwide culpable acts and omissions on behalf of the Church's authority constitutes torture or inhuman treatment within the meaning of Art 3 ECHR.

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[885] Nicolás Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' (2020) Religion <https://www.mdpi.com/2077-1444/13/6/520> accessed 10 August 2024.
[886] William Thomas Worster, 'The Human Rights Obligations of the Holy See under the Convention of the Rights of the Child' (2021) Duke Journal of Comparative & International Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1576&context=djcil> accessed 10 August 2024.
[887] *Ibid*., 423.
[888] Committee on the Rights of the Child, Concluding observations on the second periodic report of the Holy See, Distr.: General 25 February 2014.

In June 2014 the Holy See was for the first time reviewed by the Committee Against Torture. The Committee issued a condemning report finding that the widespread sexual abuse within its institute amounts to torture and cruel, inhuman and degrading treatment.[889]

Indeed, child sexual abuse can be understood as a form of torture when considering both the physical and psychological harm inflicted on the victim. Torture is defined under international law, particularly in the United Nations Convention Against Torture (hereinafter: UNCAT), as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. The intent, severity, and purpose behind the abuse are key factors in determining whether an act qualifies as torture.

The ECtHR has increasingly recognized that certain severe forms of child sexual abuse can constitute torture under article 3 ECHR. The Court has acknowledged that the long-term physical and psychological trauma inflicted on victims, particularly children, by sexual abuse can be so severe that it meets the threshold of torture. In *O' Keeffe v. Ireland* the ECtHR delivered a groundbreaking judgment which established beyond doubt that the state has a positive duty to take steps to protect children from abuse under art. 3 ECHR.[890]

4.4.5. Consequences of sexual abuse

While awareness of institutional child sexual abuse has grown in recent years, there remains limited understanding of its occurrence and outcomes as a distinct form of abuse. The impact of institutional child sexual abuse in the Catholic Church has been researched and revealed multiple consequences on psychological, physical, social, educative or economic, spiritual impacts on survivors, as well as vicarious impacts on their families and the broader community. In addition to the harm victims suffer as a result of the sexual abuse itself, the following separate, collateral harms are seen to occur to victims: institutional betrayal, secondary victimisation, re-traumatisation and the inability to provide appropriate disclosure.[891]

4.4.6. Conclusion

It can be concluded that the systematic sexual abuse of children within the Roman Catholic Church is a profound violation of human rights that extends beyond individual acts of violence to encompass institutional failures. The Church's abuse of power, rooted in its hierarchical structure and moral authority, has facilitated these atrocities and shielded perpetrators from accountability. The international legal framework, including the CRC and the case-law of the ECtHR, recognizes such abuse as a severe human rights violation, with some cases meeting the threshold for torture. Despite growing awareness, the devastating consequences of institutional child sexual abuse continue to profoundly affect survivors, their families, and the broader community on psychological, physical, social, and spiritual levels.

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[889] Committee against Torture, Concluding observations on the initial report of the Holy See, 17 June 2014,https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/054/05/PDF/G1405405.pdf?OpenElement .

[890] Tamara Blakemore, James Leslie Herbert, Fiona Arney and Samantha Parkinson, 'The impacts of institutional child sexual abuse: A rapid review of the evidence' (2017) Child Abuse & Neglect <https://www.sciencedirect.com/science/article/pii/S0145213417302843?casa_token=GX_7otH6b9IAAAAA:nbrk7Wf4Wx2bhOlUth2DQ2OMZmdw3FbSGIw2IEMkSAYQ1uFxIMGWqGJQwW_0wxNCaW9gOXADGA0> accessed 10 August 2024.

[891] *O' Keeffe v. Ireland* App No 35810/09 (ECtHR, 28 January 2014) §144.

5. The *J.C. and others* v. Belgium judgment

5.1. Introduction

On 12 October 2021[892], the long-awaited verdict in the case of sexual abuse by Church clergy fell. This verdict was the culmination of a life-long struggle by various victims for recognition of the suffering inflicted on them during their childhood. After having attempted to redeem their right to have access to a judge in all sorts of ways in Belgium and after being confronted repeatedly and in an incomprehensible manner with decisions of the Belgian courts (*see supra*: 3.2. National legal action) deciding that these victims could not make a claim for damages for their suffering anywhere in the world, the victims put all their hope in the ECtHR by filing an application in 2017. Four years later, however, this hope was abruptly shattered when they were confronted with a very short, ambiguous and on certain points internally contradictory judgment.[893]

The ECtHR held the victim's right to access to a court under article 6 §1 ECHR had not been violated. The Court held that the attribution of jurisdictional State immunity to the Holy See was not arbitrary or manifestly unreasonable. The Court reaffirmed its outdated and state-centric jurisprudence on restrictions to art. 6 §1 ECHR, ruling that measures taken by a State reflecting generally recognized principles of international law of State immunity cannot, in principle, be regarded as a disproportionate restriction on the right of access to a court.

J.C. and others is the first pronouncement of an international court concerning the jurisdictional immunity of the Holy See, and raises a number of important questions concerning the (correct) application of principles of international law and human rights law.[894] As mentioned above (*see supra*: 3.3. The procedure before the ECtHR: the *J.C. and others* v. Belgium judgment) the Court's judgment departs from four main reasonings:

1) The Holy See is entitled to state immunity because it is a sovereign State.

2) The relationship between the bishops and the Pope is of public law and thus the acts must be qualified *acta jure imperii.*

3) The alleged torts of the Holy See do not fall within the exceptions to State immunity: no territorial tort exception is applicable.

4) The Holy See's immunity is dependent (or should be dependent) on the presence of alternative remedies.

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[892] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021).
[893] The national legal action preceding the *J.C. and others* judgment and the specific civil claims of the victims were described under the third chapter. *See supra*: 3.2. National legal action and 3.3. The procedure before the ECtHR: the J.C. and others v. Belgium judgment
[894] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 837 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

The relevant applied (legal) concepts were thoroughly described and analysed under chapter four, Framework of concepts. It is now the aim of this research to critically assess the *J.C. and others judgment* against the described concepts. Specifically, the four main reasonings of the court will be evaluated against the described principles of international law: namely, the described concept of State immunity (and the related (non-)state qualification of the Holy see) and the right to access to a court under art. 6 §1 ECHR. It should be recalled that the court's reasoning on the limitation of article 6 *vis-à-vis* (State) immunities has been described above and is considered within the below assessment. (*See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test')

This judgment immediately gave rise to a very strong and convincing Dissenting Opinion of Judge Pavli, which can be said to be more widely and unanimously followed by legal doctrine then the court's judgment itself.

5.2. Assessment of the judgment

5.2.1. The parties' submissions

Before assessing the court's reasoning, it is important to get the broader picture by briefly stating the parties' submissions.

The *applicants* argued that their situation as victims, which was the result of a structural failure on the part of the ecclesiastical authorities, constituted torture or inhuman treatment in breach of Article 3.[895] Insofar as their civil liability action before the Belgian courts was directed against the Holy See, the applicants maintain that the Ghent Court of Appeal cannot be followed when it considers that the Holy See is a State enjoying immunity from jurisdiction. At best, it can be regarded as an 'international public service' or an international organization that does not enjoy immunity from jurisdiction. In any event, the facts underlying the applicants' action were not acts of public authority but acts of private management, in that those acts were intended to provide support for the Catholic Church, not to safeguard the interests of Vatican City. Lastly, the facts underlying the applicants' action were so serious that they constituted inhuman treatment falling within the scope of Article 3 of the Convention. The grant of immunity in such circumstances is disproportionate.[896] The applicants moreover claim that there is no alternative way of obtaining compensation for this damage.[897]The criminal proceedings concern the offence of culpable abstention, which cannot be equated with the wrongful structural acts or non-acts in question. In addition, is it difficult to consider that the criminal proceedings constitute an effective remedy when we know that the investigation is still ongoing.[898]As for the arbitration procedure, it did not concern the structural failure of the ecclesiastical authorities but was aimed at the damage suffered as a result of sexual abuse that had become time-barred or whose perpetrator had died. In addition, the compensation awarded was very limited.[899]

In its submitted observations, the Belgian Government stated that it:

> '*Tient de souligner qu'il condamne de la manière la plus sévère possible, les faits d'abus sexuel commis au sein de l'Eglise catholique en Belgique ainsi que l'absence*

[895] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §43.
[896] *Ibid*., §44.
[897] *Ibid*., §46.
[898] *Ibid*., §47.
[899] *Ibid*., §48.

> *de réaction sérieuse des autorités de l'Eglise catholique et, d'autre part, à rappeler sa préoccupation que les victimes de tels agissements puissent effectivement se plaindre des responsables et de l'absence de réaction sérieuse des autorités de l'Eglise catholique.*'[900]

But, contradictorily, stresses at the same time that the restriction on the applicants' access to justice, as guaranteed under art. 6 § ECHR, had not been disproportionate limited and it entirely agreed with the judgment of the Ghent Court of Appeal.[901] The detailed reasons given by the Ghent Court of Appeal, holding that the Holy See enjoyed immunity *ratione personae* from jurisdiction were namely in accordance with generally recognized international law and Belgian practice.[902] The Holy See must be seen as a State, enjoying the same rights (and obligations) as States in the international legal order.[903]According to the government, the Holy See is not an international public service, nor an international organization as it is entirely linked to the Pope, in its capacity '*de haut representant*'.[904] The Holy See has moreover been appealed in its capacity of the government of the Roman Catholic Church and the facts underlying the claim should be seen to fall under the public capacity and thus as *acta jure imperii.*[905] The structure of the Holy See is furthermore not hierarchical. Given the fact that Holy See is not a contracting party to the UNCSI and the facts, the exception provided in article 12 is not applicable according to the government.[906] Granting immunity from jurisdiction to the Holy See did not deprive the applicants of their right of access to a court because they had their case heard by two levels of court in compliance with the right to a fair trial.[907]Lastly, the Government emphasized that the claimants had access, through the arbitration procedure, and still have access, through the criminal complaint with civil action, to alternative means of redress to obtain compensation for their loss.[908]

The Holy See as third party intervenient, supports the approach of the Belgian courts and Government.[909]With the following statement it reminds the Court to keep a distance from the spiritual and canonical order :

> '*Il attire l'attention de la Cour sur l'importance qu'il y a à ne pas indûment interférer,directement ou par le prisme du contrôle de la procédure judiciaire nationale, dans les relations complexes entre le Pape et les évêques, lesquelles sont régies par le droit canon et participent du pluralisme dans une société démocratique*.'[910]

The Holy See moreover notes that the relationship between the pope and the local bishops is founded on theology and religious doctrine, as reflected in canon law. A re-examination of the relationship by civil courts could improperly embroil the court in sensitive matters of ecclesiastical polity and religious doctrine.[911]

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[900]Observations soumises par le Gouvernement Belge, Affaire J.C. Et Autres c. Belgique, 8 juin 2018, 30.
[901] Ibid.
[902] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §49.
[903] Observations soumises par le Gouvernement Belge, Affaire J.C. Et Autres c. Belgique, 8 juin 2018, 31-33.
[904] *Ibid*., 34.
[905] *Ibid*., 35.
[906] *Ibid*., 36.
[907]*J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §50.
[908]*J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §51.
[909] *Ibid*., §52.
[910] *Ibid*.
[911] Observations submitted on behalf of the Holy See, 6-8.

5.2.2. Evaluation of the ECtHR's reasoning

The Court first of all notes that the present case differs from the aforementioned cases in which it examined access to a court on the basis of State immunity in that it raises for the first time the question of the immunity of the Holy See.[912]

5.2.2.1. State and State immunity

i. The Court's reasoning

The court begins by stating that it sees nothing unreasonable or arbitrary in the detailed reasoning which led the Court of Appeal to grant State immunity to the Holy See.[913] The Court of Appeal noted that the Holy See was recognized on the international scene as having the common attributes of a foreign sovereign with the same rights and obligations. In particular, it noted that the Holy See was party to international treaties, signed concordats with sovereigns, maintained diplomatic relations with 185 states, including with Belgium since 1832.[914]

This leaded the ECtHR to recognize that the Holy See has characteristics comparable to those of a State. The Court further held that the Court of Appeal could infer from these characteristics that the Holy See was a foreign sovereign, with the same rights and obligations as a State.[915] After recognizing that the Court of Appeal rightly qualified the Holy See as a State, it moved to the question of (State) immunity. The ECtHR noted that the Ghent Court of Appeal deduced that the Holy See in principle enjoyed jurisdictional immunity, enshrined in customary international law and codified in art. 5 of UNCSI and art. 15 of ECSI.[916]As a result, the Government did not dispute that the applicants' right of access to a court had been restricted.[917]

As regard the limitation of art. 6 ECHR, the court further stressed, in line with its preceding case-law[918], that the grant of immunity must not be regarded as a limitation of a substantive right but as a procedural obstacle to the jurisdiction of national courts and tribunals to rule on that right.[919] It further emphasized that when the application of the principle of State immunity from jurisdiction impedes the exercise of the right of access to a court, the Court must determine whether the circumstances of the case justified that limitation.[920] Applying the general principles on the restriction of art. 6 § ECHR, the Court noted it must first determine whether the limitation pursued a legitimate aim.[921] As for the determination of the legitimate aim, the ECtHR recalled that State immunity is a concept of international law, derived from the principle *par in parem non habet imperium*, by virtue of which a State cannot be subject to the jurisdiction of another State. The Court recognized that the grant of State immunity in civil proceedings pursued the legitimate aim of observing international law in order to promote comity and good relations between States through respect for the sovereignty of another

[912] *Ibid*., §56.
[913] *Ibid*., §57.
[914] *Ibid*., §56.
[915] *Ibid*., §57.
[916] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §58.
[917] *Ibid*.
[918] *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §25.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §48.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §26.
[919] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §59.
[920] *Ibid*.
[921] *Ibid*., 60.

State.[922] Regarding the proportionate nature of the restriction on the applicants' right of access to a court, the ECtHR held that the need to interpret the Convention in the most harmonious way possible with the other rules of international law led the Court to conclude that measures taken by a State which reflected generally recognized principles of international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court.[923] It explained that, just as the right of access to a court is inherent in the guarantee of a fair trial granted by that Article, so certain restrictions on access must be regarded as inherent in it.[924]

ii. Critical evaluation

The court's reasoning relating to the State qualification of the Holy See and subsequent, the grant of State immunity raises a number of concerns regarding the correct application of the principles of international law on States and State immunities.

First of all, it is notable that the ECtHR, like the Ghent Court of Appeal, applied the legal regime of state immunity to the Holy See, even though the latter is not actually a state, but rather a universal religious organization with a *sui generis* international legal personality. While the Holy See has been characterized as a State, better view is that it is a *sui generis* entity that enjoys far-reaching international legal personality, but that falls short of statehood. It has never been disputed, however, that the Holy See has enjoyed international personality[925] without interruption from the time of the inception of the rules governing international relations up to the present time and has never been seriously contested. (*See supra*: 4.1.2.2. Interrelated concepts: The Roman Catholic Church, Holy See and Vatican City- ii. Holy See) The qualification of the Holy See as *sui generis* entity was extensively described under chapter 4.1. The Holy See and argued that firstly, it fails to fulfill the four criteria inherent to State actors under the Montevideo convention and secondly, the authority of the Holy See is not grounded in territorial sovereignty over the Vatican City premises, but rather in its spiritual sovereignty over the 1.3 billion adherents to the Catholic faith. (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity) Additionally, this research revealed in chapter 4.1., that the Pope, in his capacity as Supreme Pontiff of both the Roman Catholic and Vatican City State, uses the Holy See as the common supreme organ through which he exercises his sovereignty with regard to both these international bodies. For that reason, the Holy See holds a particular position as entity because it embodies both (the supreme head of) the (spiritual) Roman Catholic Church as well as (the absolute monarch of) the (temporal) Vatican City. (*See supra*: A. Montevideo statehood criteria, 4. Capacity to conduct international relations) Nevertheless, while the Holy See, as the head of the Roman Catholic Church with the Pope and the Roman Curia, is a religious universal *sui generis* organization, the Vatican City with the Pope as absolute monarch, on the other hand, does qualify as a State actor. (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See, ii. Vatican City) The Holy See, however, is *not* a State. It is an entity that governs a State (Vatican), but more importantly, which is the highest governing body of a spiritual organization, the universal Roman Catholic Church. (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity) In this manner, the acts performed by the Holy See as head of the *spiritual Roman Catholic Church*

[922] *Ibid*.
[923] *Ibid*., 61.
[924] *Ibid*.
[925] The ECtHR has recognized the international legal personality of the Holy See in two preceding cases: *Fernandez Martinez v. Spain* App No 56030/07 (ECtHR, 12 June 2014) §118.; *Travas v. Croatia* App No 75581/13 (ECtHR, 4 October 2016) §79.

on the one hand and the acts performed as governing body of the *temporal Vatican City* on the other, should clearly be distinguished. For the latter, State immunity *could* be invoked, for the former, not. For the sake of clarity: the alleged acts *in casu* were performed by the Holy See as head of the Roman Catholic Church, not the temporal Vatican City and consequently it is *not* entitled to State immunity. As rightly stressed by Ryngaert and Pasquet:

> '*Confusing the two levels could instead have repercussions in terms of accountability and access to justice, insofar as it would allow the main bodies of an ecclesiastical organization to shield themselves behind institutions and concepts designed for States*.'[926]

That the Holy See has international legal personality, does not mean that it has the same rights and obligations as States, or that it is entitled to immunity to the same extent as States.[927] Non-State actors are not entitled to State immunity as it is a state prerogative, grounded in the fundamental principle of sovereign equality. As mentioned under chapter four the immunities covered by this state immunity regime presuppose the existence of juridically equal States whose interactions are governed by international law. *Ergo*: where there is no State actor, the question of state immunity does not arise.

In the present author's view, (the validity of) the entire judgment of the court is fundamentally undermined by this reasoning and further builds up a judgment based on an erroneous assessment. The Holy See is not a State actor; hence, the question of the applicability of State immunity is not at stake as it solely pertains to State actors. Instead, the ECtHR confirms the erroneous reasoning of the Ghent Court of Appeal and develops a whole judgment on a foundation which is at variance with the qualification under international law of the Holy See as *sui generis* entity and the principles of international law on State immunity. While this critical assessment thus rejects the following reasonings of the court, which builds further on this erroneous foundation, it will nevertheless proceed to evaluate from this basis, without, however, confirming its legitimacy.

Instead of thoroughly examining international practice, the Ghent Court of Appeal (and subsequent the ECtHR) resorted to analogical reasoning: like States, the Holy See has the capacity to conclude treaties and enter into diplomatic relations, *ergo* it also enjoys the same immunity as States. However, it is not because the Holy See has characteristics analogous to a State actor and therefore resembles a State, that it is a State actor. Simply because its international personality resembles that of a State actor, does not mean that this subject of international law is *ipso facto* a State actor and is entitled to the rights and privileges that go with it. (See supra: C. Conclusion: The Holy See: '*Ceci n'est pas un état'*) At this point, the Belgian and Strasbourg courts seem to have overlooked an important evolution within the international legal order: the capacity to conclude treaties and to enter into diplomatic relations, or more broadly; to enter into international relations, is not the exclusive prerogative of State actors. (*See supra*: A. Montevideo statehood criteria, 4. Capacity to conduct international relations) It is true that the Holy See possesses a degree of international legal status granting it capabilities surpassing those of other non-State entities, as it has engaged in various intergovernmental organizations, it is party to a substantial number of bilateral and multilateral agreements, it sends and receives diplomatic representatives and has permanent observer

[926] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 842 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.
[927] *Ibid*., 840.

status at the United Nations.(*See supra*: A. Montevideo statehood criteria, 4. Capacity to conduct international relations) In this sense, the Holy See does constitute a unique non-state actor since it has international rights (and duties) analogous to those of a State, potentially rivaling the standing of States in international law. (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity) However, although the capacity to conduct international relations through these engagements, usually accrues to State actors, it is not their exclusive prerogative and therefore non-state actors can equally conduct these. (*See supra*: A. Montevideo statehood criteria, 4. Capacity to conduct international relations)

This research drew attention to the *Reparation for Injuries Case* where the ICJ observed that: '*the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community*.'[928] (see supra: 4.1. Holy See, 4.1.2.1 Legal personality in international law) Non state-actors such as international organizations, for example, are subjects of international law, but they do not enjoy immunity unless explicitly provided for by a particular treaty.[929] (see supra: 4.2.2. State immunity) This can (and should) be extended to the immunity regime applicable to the Holy See: as a *sui generis* religious universal organization, its entitlement to immunity must explicitly be provided for in the law. In any case, international organizations do not enjoy the same immunities as States. Likewise, the Holy See may not enjoy the same immunities as States.[930]

In fact, State practice addressing the international immunities of the Holy See as in the case covered, is limited, not to say; inexistent. While there is some relevant case-law, it is based on domestic law rather than international law. As mentioned under chapter 4.1., Italy's jurisdiction over the Holy See is traditionally regulated by the Lateran Treaty.[931] (*See supra*: 4.1.2.2. Interrelated concepts: The Roman Catholic Church, Holy See and Vatican City- ii. Holy See) According to the Italian Court of Cassation, this non-interference provision does not provide for a jurisdictional immunity, but rather prohibits Italian authorities to interfere with the 'patrimonial activity' of the Church's central organs.[932] Furthermore, as it was argued before, some place the Holy See and the Vatican on equal footing and position them, as it were, within the same personal union. United States courts in particular, have broadly treated the Vatican and the Holy See as one legal person and have even considered both of them as 'States'.[933] However, this characterization[934] is based on domestic law[935] (the Foreign Sovereign

[928] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178

[929] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 857 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[930] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 841 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[931] Article 11 Lateran Conciliation Treaty. (All central bodies of the Catholic Church shall be exempt from any interference on the part of the Italian State (save and except as provided by Italian law in regard to the acquisition of property made by *corpi morali,* (recognized public bodies) and with regard to the conversion of real estate.) (*See supra*: 4.1.2.2. Interrelated concepts: The Roman Catholic Church, Holy See and Vatican City- ii. Holy See)

[932] Corte di Cassazione, 21 May 2003, no. 22516.; Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 841 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[933] *Ibid*.

[934] The Holy See and the Vatican themselves have influenced this identification with a view to having the Holy See fall within the scope of application of the FSIA.

[935] The Foreign Sovereign Immunities Act 1976.

Immunities Act[936]) rather than international law.[937] (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See) The Holy See cannot rely on treaty law either, as it is not a contracting party to neither the UNCSI nor ECSI.[938]Therefore, the present author wishes to draw attention to the (present) lack of consistent State practice in favour of granting immunity to the Holy See. As mentioned under the exposé on State immunities, as a rule of international customary law, state immunity requires the presence of both consistent state practice and *opinio juris*. In the case of the Holy See, both seem to be absent. If anything is recognized within the international community, it is the Holy See's qualification as '*anomaly*', '*a unique actor*', '*atypical organism*', '*multi-layered actor*' which passes one-to-one through its legal qualification in international public law as a *sui generis* entity. (*See supra*: 4.1.2.3. State actor? Vatican vs. Holy See, i. The Holy See: a sui generis entity)

At this point, the author wishes to formulate a caveat: because this research aims to evaluate the entire *J.C. judgment* on its reasoning, from this point onwards, the Holy See will be equated with a State. Although this research still upholds the qualification of the Holy See as *sui generis* entity and thus firmly rejects the applicability of the regime of State immunity *in casu*; from that perspective, the assessment of the J.C. judgment would already be finalized. No State, namely means no State immunity and thus no applicability of the concrete regime and exceptions of State immunity. However, because this research aims to evaluate the subsequent reasoning of the Court, that builds on that (erroneous) foundation of State immunity, the regime of States and their claims to immunity will now be the basis.

Secondly, after recognizing the qualification of the Holy See as a State in terms of immunity attribute, the court went on to consider if the Holy See's immunity, as a procedural limitation on the right to access to a court, could be justified by the circumstances of the present case.[939] As examined under chapter 4.3., the ECtHR recognizes that the right to access to a court under article 6 §1 ECHR is not absolute and puts, ever since its *Ashingdane* judgment, limitations of art. 6 §1 ECHR under scrutiny to a threefold test: the limitation must have a *legitimate aim* (1), must be *proportionate* (2) and the *very essence of the right of access to court* must not be impaired (3).[940] (*See supra*: B. Limitations of the Right to Access to a Court: the 'Ashingdane Test'). The court has applied this test repeatedly in its case-law regarding the tension field between immunities and the right to access to a court.[941] Where in chapter 4.3.,

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[936] Under the Foreign Sovereign Immunities Act the foreign states and governments, including their political subdivisions, agencies, and instrumentalities, are immune from suit (in both state and federal courts) unless one of the statute's specific exceptions applies. Thus, jurisdiction exists only when one of the exceptions to foreign sovereign immunity applies.

[937] Cedric Ryngaert, 'The Immunity of the Holy See in Sexual Abuse Cases: Reflections on the Judgment of the European Court of Human Rights in J.C. v Belgium' (*Völkerrechtsblog,* 24 November 2021) <https://voelkerrechtsblog.org/the-immunity-of-the-holy-see-in-sexual-abuse-cases/> accessed 29 July 2022; David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (Second edition, Federal Judicial Center International Litigation Guide 2008)

[938] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §20.

[939] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §59.

[940] *Ashingdane v. United Kingdom* App No 8225/78 (ECtHR, 28 May 1985) §57.

[941] *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §56-57.;*Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §189.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §36-37.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §55-56.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §35-36.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §48-49:; *Kalogeropoulou and others v. Greece and Germany* App No 59021/00 (ECtHR, 12 December 2002) §35-36.

this case-law was described per criteria of the tripartite *Ashingdane* test,[942] the court's specific reasoning in *J.C. and others,* which is in line with its established case-law in this regard will be assessed. At this point of the evaluation of the *J.C. and others* judgment, focus will only be paid to the legitimate aim criterion and the proportionality. After the evaluation of the entire ECtHR's reasoning, under chapter 5.2.3, the *Ashingdane* test will be applied in its entirety. (*See infra*: 5.2.3. Justifiable limitation of the right to access to a court under article 6 §1 ECHR?)

Regarding the *legitimate aim*, the ECtHR, in line with its precedent case-law[943], stressed that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty. As noted above, since *McElhinney v. Ireland* the Court *generally* considers this to be a legitimate aim. (*See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'-i. Legitimate aim) As was clear above, it is the Court's traditional practice to be rather succinct during the legitimacy stage, easily accepting that a restriction pursues a legitimate aim.[944] Instead, the Court places the main focus of its enquiry on the *proportionality* stage, where the weight of the invoked aim will be an important factor in the proportionality analysis.[945] (see supra: *See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'-ii. Proportionality) The ECtHR upheld a conservative view as in its preceding cases on this matter[946], and concluded that measures taken by a State which reflected generally recognized principles of international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court. This reasoning raises questions as to the concrete scope of state immunity under general international law.

Notable, this research revealed that there is at present *no* obligation to grant immunity to foreign States under customary international law. The shift from the absolute to the restrictive doctrine on state immunity has been characterized by a strong divergence in state practice and a diminishing role of the state in the international legal order and therefore; States are *no* longer under a legal duty under general international law to accord immunity to each other. *(See supra: 4.2.2.2. A legal obligation to State immunity?)* Hence, if the ECtHR indeed, wishes to '*comply with international law'* and '*interpret the convention in the most harmonious way possible with the other rules of international law*' it should adhere to the evolving nature of this

[942] For an evaluation of the ECtHR's reasoning regarding the three criteria of the *Ashingdane* test in cases regarding the limitation of the right to access to a court under art. 6 ECHR and (state) immunities: *See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'-i. Legitimate aim - ii. Proportionality – iii. The very essence of the right.)

[943] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §188.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §35.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §54.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §34.; *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §60.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §52.

[944] Arguably, this practice may be undergoing change, as in a number of more recent cases, the Court has put more emphasis on the legitimacy stage.

[945] Laurens Lavrysen, 'Chapter 4- System of restriction' in in Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn and Leo Zwaak (eds) *Theory and Practice of the European Convention on Human Rights (fifth edition)* (Intersentia, Brussels 2018) 314.

[946] *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §56-57. (Own emphasis added.) This reasoning was also upheld in: *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §189.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §36-37.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §55-56.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §35-36.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §48-49:; *Kalogeropoulou and others v. Greece and Germany* App No 59021/00 (ECtHR, 12 December 2002) §35-36.

international law body. Instead of copy-pasting its conservative case-law on immunities and art. 6 §1 ECHR, the court should re-examine its reasoning by focusing on the (recent evolutions of the) customary aspect of the general immunity rule. As argued above, in line with Lauterpacht's plea, it is moreover difficult to maintain that the principles of independence, equality and sovereignty of States would be violated if the State exercising jurisdiction is applying national and international law and recognizes as valid the legislative acts of another recognized state. On the contrary, a State's sovereignty, independence, and equality are undermined if a foreign state claims to be above the law. The notion that jurisdictional immunity of foreign states is based on state's sovereignty is outdated and the ECtHR should reconsider its reasoning in light of the rule of law and the true position of the State in modern society. (*See supra: 4.2.2.2. A legal obligation to State immunity?)*

On the subject of 'sovereignty', 'independence' 'equality' of States, from a normative perspective, it is furthermore difficult to understand how the Holy See could legitimately invoke immunities that go with statehood if it does not embrace the responsibilities that go with it, such as its international responsibility in respect of the underlying sexual abuse scandal. In the same vein, Morss aptly emphasizes that '*It could be argued that this selectivity in the deployment of the Vatican's international personality itself undermines the legitimacy of any claims to statehood, which involves correlative rights and obligations.*'[947]
In such an uncertain situation and given the impact of jurisdictional exemption on the right to access to justice, the Holy See's right to immunity should not be presumed.[948] As Ryngaert rightly noted:

> *'Furthermore, in light of the increasing importance of individuals' right to access to a court, immunities ought to be interpreted restrictively, all the more so if the beneficiary of the immunity is not a State but a non-State actor.'* [949]

5.2.2.2. Acta jure imperii

i. The Court's reasoning

The ECtHR noted that, following an analysis of the principles of public international law, canon law and Belgian practice, the Court of Appeal considered that the faults and omissions of which the Holy See was accused, directly or indirectly, related to the exercise of administrative powers and public authority, and that they therefore concerned '*acta iure imperii*'.[950]

According to the court, the Ghent Court of Appeal's approach that immunity from jurisdiction applied ratione materiae to all of these acts and omissions, is consistent with international practice in this area. It therefore it found nothing arbitrary or unreasonable in the interpretation

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[947] John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26 EJIL 929 <https://academic.oup.com/ejil/article/26/4/927/2599610?login=true> accessed 8 April 2024. (This absence of correlative rights and duties and the selectivity in respect of the international legal persona of the Holy See appeared strongly above. (*See supra*: 4.1.2.2. Interrelated concepts: The Roman Catholic Church, Holy See and Vatican City- ii. Holy See and A. Montevideo statehood criteria, 4. Capacity to conduct international relations)

[948] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 842 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[949] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 857 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024.

[950] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §63.

given by the Court of Appeal to the applicable principles of law or in the manner in which it applied them to the present case.[951]

In so far as the applicants alleged that the immunity of States from jurisdiction could not be maintained in cases involving inhuman or degrading treatment, the Court recalled that it had already examined similar arguments on several occasions. On each occasion, however, it has concluded that, within the current state of international law, it could not be said that States no longer enjoyed jurisdictional immunity in cases involving serious violations of human rights law or international humanitarian law, or violations of a rule of *jus cogens*.[952] The court recalled its case-law on this matter[953] and referred to *Jones and Others*[954], where mention was made of the ICJ *Jurisdictional Immunities of the State (Germany v. Italy*) judgment, which had clearly established that 'no *jus cogens* exception to State immunity had yet been crystallized'.[955]

ii. Critical evaluation

Even if immunity were to accrue to the Holy See based on customary norms of State immunity, such immunity is not absolute. Indeed, as mentioned under chapter 4.2., there is a consensus that immunity from jurisdiction exclusively applies to a*cta jure imperii* (sovereign, public or governmental acts of the State) and not to *acta jure gestionis* (non-sovereign, private, managerial or commercial acts). (*See supra*: 4.2.2.1. The restrictive immunity doctrine: *acta jure imperii* vs. *acta jure gestionis*) One of the objections raised by the claimants was precisely that the underlying facts were not acts of public authority but acts of private management and that the relationship between the Holy See and Catholic bishops therefore was of a private, or at least non-sovereign nature. The acts were intended to provide support for the Catholic Church, not to safeguard the interests of Vatican City and thus related to the management of a religious organization.

However, the Ghent Court of Appeal held that '*the relationship between the Pope and the bishops*' was one '*of public law, characterised by the autonomous power of the bishops'*.[956] The Court reasoned not only that '*the faults of the Belgian bishops could not be attributed to the Pope…, but also that they concerned acts iure imperii'*.In other words, the relationship between the Pope and the bishops was held to be one of public law, but at the same time the autonomy enjoyed by bishops was construed as an obstacle to the attribution of the relevant conduct to the Holy See.[957] The ECtHR endorsed this erroneous reasoning.

This interpretation is problematic in more than one respect. The present author is of opinion that the underlying acts, *managing a religious organization*, cannot be qualified otherwise than as non-sovereign, private or as the word itself says, managerial acts. Simply articulated: how can a non-state actor commit acts that belong purely to states; how can a non-sovereign, commit sovereign acts? It should be recalled that the underlying acts were performed by the *spiritual* Holy See, as head of the religious universal Roman Catholic Church and not as highest governing body of the *temporal* Vatican City State. When applying the nature, purpose

[951] *Ibid*.
[952] *Ibid*., §64.
[953] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §196-198.;*Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §57-66.
[954] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §196-198.
[955] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) [2012] I.C.J. Reports 2012, §96-97.
[956] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §9.
[957] *Ibid*.

or context test for the identification of the present acts, it is apparent that from all three perspectives the underlying acts qualify as private, non-sovereign acts. It is clear that the torts and omissions of the Holy See gave rise to a dispute which is by its nature or purpose not an exercise of the sovereign of such State and therefore merely a private act.(*See supra*: 4.2.2.1. The restrictive immunity doctrine: *acta jure imperii* vs. *acta jure gestionis*) In this view, managing a Church are not *acta jure imperii* or sovereign acts, but *acta jure gestionis.*

First of all, one might question the logic and fairness of categorizing the same relationship between the Holy See and Catholic bishops as *jure imperii*, involving the exercise of sovereign power, and at the same time, as one that is lacking sufficient control to attribute the bishops' acts to the Holy See. Belgian courts, and indirectly the ECtHR, seem to characterize this relationship inconsistently based on different perspectives. From a top-down viewpoint, there is a strong link between the Holy See and the Church's lower organs, whereas, from a bottom-up perspective, the bishops seem able to escape the Pope's control.[958]

On top of that, the notion that the administrative tasks of a non-state actor and its power to issue directives could be seen as *sovereign* in nature, is quite implausible. *Ryngaert and Pasquet* noted in this regard that:

> *'The problem with it is that public law is hard to conceive in isolation from the State. Scholars of international organizations have traditionally opposed applying the notion of acta jure imperii to international institutions because, they claim, these entities 'are definitively not states'.It is therefore surprising that such a notion is applied to an ecclesiastical organization. While international organizations are usually considered public entities, today, in Europe, following a process of separation between churches and State that began at least in the eighteenth century, churches are often associated with private law entities. By way of illustration, Catholic dioceses in Belgium have the legal status of non- profit private associations. Also, in the United States, dioceses are considered as 'corporations soles', ie, 'a legitimate corporate form that may be used by a religious leader to hold property and conduct business for the benefit of the religious entity.'As of late 2021, 31 Catholic dioceses had sought bankruptcy protection under Chapter 11 of the US Bankruptcy Code. These are strong indications that dioceses are not public law entities.'* [959]

Indeed, if managing an organization and issuing directives is seen as the decisive criteria for the qualification of *sovereign*, this could absurdly result in a reality where any legal entity could claim *sovereign* immunity. One could ask the question whether this reconstruction extends to the acts of administration of all associations, foundations, and other private entities, (again, after all Belgian dioceses are private associations), blurring the line between sovereign and private acts. '*If one removes the State from the equation, the distinction between sovereign and private acts loses all meaning*.'[960]

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[958] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 843 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[959] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 844 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[960] *Ibid*.

The special treatment of privileges granted to the Holy See at the international playing field, such as its permanent observer status at the UN, (which it uses to advance a theological agenda and whereby it is the only religious body accorded statehood status at the UN and enjoys greater privileges than any other world religion or non-governmental organization) should not be extended to a general regime of granting special treatment of privileges to the Holy See, rivalling (as a non-state actor), the legal status of states, without nevertheless the corresponding accountability. (*See supra*: A. Montevideo statehood criteria, 4. Capacity to conduct international relations)

Apart from qualifying the underlying acts as *acta jure imperii,* the ECtHR subsequently rejected a *jus cogens* exception for torture. While this reasoning is in line with its preceding case-law, the conservative and standardized manner in which the ECtHR addresses the underlying acts, that can be qualified as torture, is worrisome. As elaborated under chapter 4.2., in the *Al-Adsani* case the ECtHR stressed that it was unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[961] In *Jones and others* the court referred to the ICJ's *Jurisdictional Immunities of the State* judgment as being the more recent assessment of customary international law and thus appraising the state of international law on this matter.[962]

In the present author's view, jus *cogens* norms trump out the principle of State immunity as a non-peremptory norm in line with the normative hierarchy theory. (*See supra*: 4.2.1.3. Exceptions: limitations to the principle of (jurisdictional) State immunity, ii. Human Rights Violations) It was furthermore observed that theories limiting the principle of State immunity on the basis of human rights violations are not upheld on the basis of a lack of established body of state practice. However, reliance on the absence of State practice supporting a human rights exception does not convincingly dispose the question given that the principle of State immunity is itself not based on consistent State practice. *(See supra: 4.2.2.2. A legal obligation to State immunity?)* It should also be noted that as a *human* rights court the ECtHR should examine whether indeed there is no evolution in the current state of international law in favor of granting an exception for core human rights *or jus cogens* violations. Instead, it upholds a state-centric, outdated and standardized approach. (*See infra:* 5.6. Outdated state-centric approach of the ECtHR) How can violating *jus cogens* norms, in fact, be qualified as sovereign acts at all? In the author's view violating core human rights cannot be regarded as *acta jure imperii* and therefore it falls not under the scope of state immunity. In addition, the ECtHR recognized the grant of state immunity as a justifiable restriction on art. 6 §1 ECHR because it pursed the legitimate aim of complying with international law in view of respecting the sovereignty of States. It is hard to conceive how *jus cogens* violations can be captured in that line of rationale.

5.2.2.3. Exceptions to State immunity: territorial tort

iii. The Court's reasoning

The ECtHR states that it considered the existence of the exception to the principle of State immunity from jurisdiction regarding claims for pecuniary compensation in the event of the death or bodily injury of a person, or in the event of damage to or loss of tangible property, as provided by art. 12 UNCSI and art. 15 ECSI. It noted, however, this only applies if the act or

[961] *Al-Adsani V. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §61.
[962] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §196-198.

omission allegedly attributable to the foreign State occurred, in whole or in part, in the territory of the forum State and the author of the act or omission was present in that territory at the time of the act or omission.[963]

The Court saw further nothing arbitrary or manifestly unreasonable in the rejection by the Ghent Court of Appeal of the applicability of this exception on the grounds that the misconduct of which the Belgian bishops were accused could not be attributed to the Holy See, since the Pope was not the principal of the bishops; that the misconduct of which the Holy See was directly accused had not been committed on Belgian territory but in Rome; and that neither the Pope nor the Holy See was present on Belgian territory when the misconduct of which the leaders of the Church in Belgium were accused had allegedly been committed.[964]

iv. Critical evaluation

If the international law of State immunity applies to the Holy See, this equally means that claimants can invoke accepted exceptions to sovereign immunity. 'The territorial tort exception' allows a forum State to exercise jurisdiction in proceedings which relate to compensation for death or injury to persons caused by acts (or omissions) committed at least in part within the territory of the forum state, 'if the author of the act or omission was present in that territory at the time of the act or omission'. [965] (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, Territorial tort exception) As observed above, this exception is reflected in national legislation and case law, as well as in article 11 of the ECSI and article 12 of the UNCSI and can be said to be part of customary international law.

Seen the circumstances and facts of the case, both *material* and *territorial* scope of the territorial tort exception are, in the author's view, fulfilled, leading to a legitimate invocation of this regime. The applicants invoked the territorial tort exception, by pointing out that the damage they had suffered had been caused in Belgium as a result of a 'policy of silence' promoted by the Holy See about the Catholic clergy's behavior. However, the Ghent Court of appeal, herein subsequent followed by the ECtHR, took a different stance: (1) this exception would not apply to *acta iure imperii* such as those performed by the Holy See; (2) the acts of the bishops could not be attributed to the Holy See under Art 1384 of the Belgian Civil Code; (3) the acts directly attributable to the Holy See ('la politique générale fondée sur des documents pontificaux et l'omission de prendre des mesures ayant un impact en Belgique') would have been committed in Rome, which for the Court meant that 'neither the Pope nor the Holy See' were in Belgium at the time of the events'.(*See supra*: 3.2.2. Class action (civil procedure), ii. Court of Apeal Ghent)

This reasoning is problematic as it is at variance with the (correct) application of the *material* and *territorial* scope of the territorial tort exception under treaty law and more broadly, under customary international law.

First of all, the exclusion of sovereign acts from the scope of the application of the territorial tort stands at variance with its established *material* scope and therefore completely incorrect.

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[963] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §68.
[964] *Ibid*., §69.
[965] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 144.

As mentioned above, the traditional distinction between *acta jure imperii* and *acta jure gestionis* is *irrelevant* for the territorial tort exception. All the current legal instrument and accordingly state practice imply that the application of the territorial tort exception is not dependent upon whether the act is *jure imperii* or *jure gestionis* in nature.[966] Moreover, it would be difficult to explain it on logical grounds since state immunity can only be invoked in relation to sovereign acts; in this sense, this exclusion would make this exception practically useless.[967] Besides, both courts ignored the ILC Commentary, according to which the territorial tort exception is applicable irrespective of the nature of the activities involved, whether jure imperii or jure gestionis.[968] The tort exception does not turn on whether the tortious acts can be characterized as *acta jure imperii* or *acta jure gestionis*, but rather on whether actual harm has been caused. (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, Territorial tort exception)

Regarding the second argument, that the acts of the bishops cannot be attributed to the Holy See: immunity is a preliminary issue related to the jurisdiction of national courts, which comes before examining the merits of the case or determining responsibility. Therefore, the application of immunity rules does not depend on whether the Holy See is responsible for the bishops' actions.[969] The two main international instruments on this issue do not require the act to be attributed to the State for the territorial tort exception to apply. The ECSI does not mention it, and the UNCSI refers only to acts or omissions '*alleged* to be attributable to the State.' (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, Territorial tort exception)

It should moreover be noted that, in his dissenting opinion, Judge Pavli found the conclusion of Belgian courts on the non-attributability of bishops' acts to the Holy See insufficiently motivated. He argued that:

> '*the applicants submitted evidence purportedly showing that the Holy See had sent a letter to all Catholic bishops worldwide in 1962 that mandated a "code of silence" regarding cases of sexual abuse within the Church, on pain of excommunication; and that this direction on handling cases internally, without notifying law enforcement or other civilian authorities, was reaffirmed in a letter sent by the Holy See in 2001.*[970] *Pope Francis himself has in recent years acknowledged a "culture of abuse and cover-up" within the Catholic Church.*[971]

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[966] Xiaodong Yang, *State Immunity in International Law- Cambridge Studies in International and Comparative Law* (Cambridge University Press 2012) 207.
[967] Luca Pasquet, 'The Holy See as seen from Strasbourg: immune like a state but exempt from rules on state responsibility' (*SIDIBlog*, 16 December 2021) <http://www.sidiblog.org/2021/12/16/the-holy-see-as-seen-from-strasbourg-immune-like-a-state-but-exempt-from-rules-on-state-responsibility/> accessed 5 August 2022
[968] International Law Commission, *Report Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries* (Yearbook of the International Law Commission*, 1991*, vol. II, Part Two) 45.
[969] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 846 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.
[970] Dissenting Opinion of judge Pavli in *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021).
[971] *Ibid*.

Neither the national court, nor the Strasbourg court, nevertheless, addressed these arguments. Instead, they accepted wholesale the contention of the Holy See's expert that, despite the Pope's central position within the Catholic Church hierarchy and the indications of specific directions issued by the Holy See to Belgian bishops, there was no principal/agent relationship between the Holy See and the bishops.[972]

As for the notion of attribution, the outline under chapter 4.2. recalled that that the question whether the conduct of an individual can be attributed to a State, is governed by international law and must be addressed in light of the relevant rules on international responsibility.[973] (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, Territorial tort exception) Following these rules, the conduct of an 'organ' of the Holy See is in principle attributable to the latter.[974] In addition, it was made clear that, even for persons that do not qualify as its 'organs', the law on international responsibility makes it clear that their conduct will nonetheless be attributable inasmuch as they are empowered to exercise elements of the 'governmental' authority of the Holy See, or act under its control or instructions.[975] In line of this, under article 8 of the ILC articles on State responsibility the conduct of a person or group of persons shall be considered an act of the Holy See under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, the Holy See in carrying out the conduct.[976]

The question of which acts are attributable to the Holy See also impacts the third argument, relating to territorial scope of the exception, namely the presence of the author of the act in the territory of the forum State. As to the question whether the acts occurred on the Belgian territory, Judge Pavli, rightly argued the following:

> *'…the reference … to the "author" of the act or omission is to the individual representative of the State who actually does or does not do the relevant thing, as distinct from "the State itself as a legal person".*[977]
>
> *Under this analysis, the Holy See's hierarchy did not need to be present in Belgium for this requirement to be fulfilled. It was sufficient for "agents" of that State, or individuals whose acts or omissions could be "attributed" to that entity as a matter of vicarious liability under Belgian law, to be present in and to operate on Belgian territory. The domestic courts should have considered the key question whether the individuals on Belgian soil – the bishops and priests who committed the abuse and who allegedly followed orders issued directly from the Holy See on the handling of such abuse – could trigger the Holy See's tort liability under the circumstances.'*[978]

It is striking (read: distressing) how the relationship between the bishops and the pope is twisted in all directions in order to obtain both as many benefits of statehood as possible, and on the other hand as few obligations as possible that come with it. The Belgian courts and the

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[973] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001 (Yearbook of the International Law Commission, 2001, vol. II (Part Two)).

[974] *Ibid*., article 4.

[975] *Ibid*., article 5.

[976] *Ibid*., article 8.

[977]

[978] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 846 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

ECtHR exploited the ambiguities in the Holy See's status to maximize its immunity and avoid holding it accountable. Ryngaert and Pasquet also observed this incoherence and noted how on the one hand, the relationship between the bishops and the Pope are construed *as jure imperii* activities in order to assimilate the Holy See to a State and allow it to enjoy immunity. On the other hand, the Catholic Church's features, particularly the autonomy of the bishops as 'local legislators' under Canon law, are used to prevent the clergy from being considered as agents of the Holy See. As noted above by Morss:

> '*With the advantageous incidents of statehood go the responsibilities, such as, in this case, the responsibility for extraterritorial violations of human rights standards by persons and other legal entities closely connected with such a state-like entity*.'[979]

To expose this inconsistency and selectivity: let's turn to the fundamental nature of the relationship between the Pope, as head of the Holy See, and the bishops. This research evidenced under chapter 4.1., that the Pope could be seen as a divine dictator as all the authority and power is vested in his person by virtue of his office as the successor of the apostle Peter[980] and as Vicar of Christ[981] in order to pursue the spiritual mission of the Holy See at the apex of the Roman Catholic Church.[982]He is both the absolute monarch of the Vatican City and the supreme head of the Roman Catholic Church.[983] As sovereign of the Vatican City, the Pope exercises all three arms of power (full legislative, executive, and judicial power).[984] As head or 'the Authority'[985] of the Church, the Pope enjoys '*supreme and power of jurisdiction ... in matters of faith and morals, and in every pertaining to the government and discipline of the Church'*.[986]The Dogmatic Constitution of the Church additionally states that the pope's power of primacy over both pastors and faithful remains whole and intact. In virtue of his office, the Roman Pontiff has full, supreme and universal power over the Church, and he is always free

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[979] John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26 EJIL 929 <https://academic.oup.com/ejil/article/26/4/927/2599610?login=true> accessed 8 April 2024.

[980] Canon 331 Code of Canon Law. As the Vicar of Christ, the Pope is the representative of Christ on Earth. This title underscores the belief that the Pope's authority is not self-derived but granted by God to lead the Church in Christ's stead. The Pope is considered the successor to Saint Peter, who, according to Catholic tradition, was appointed by Jesus Christ as the leader of His disciples and the head of the early Church. This doctrine is based on the belief that Saint Peter was given a special role by Jesus Christ. Scriptural foundations for this can be found in passages such as Matthew 16:18-19, where Jesus says to Peter, "You are Peter, and on this rock I will build my Church... I will give you the keys of the kingdom of heaven..." There is an unbroken line of succession from Saint Peter to the current Pope. This apostolic succession is viewed as divinely guided, ensuring that the Pope inherits the spiritual authority given by Christ to Peter.

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[982] Matthew: 28:16-20 (New International Version): "Then the eleven disciples went to Galilee, to the mountain where Jesus had told them to go. When they saw him, they worshiped him; but some doubted. *Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations*, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.'" (emphasis added); Pope Leo XIII, 'Immortale Dei, Encyclical Letter on the Christian Constitution of States' *(Vatican,* 1885*)* 13 <*https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html*> accessed 25 May 2024

[983] Rik Devillé, *De laatste dictatuur, pleidooi voor een parochie zonder paus* (Kritak, Leuven, 1992) 224.

[984] Article 1 Fundamental Law of Vatican City state

[985] Cardinale Hyginus Eugene, *The Holy See and the International* Order (Macmillan Canada, Maclean-Hunter press 1976) 109

[986] Yasmina Abdullah, 'The Holy See at United Nations Conferences: State or Church?' (1996) Vol. 96, No. 7 Colombia Law Review 1864 <http://uniset.ca/microstates2/va_96ColumLRev1835.pdf> Accessed 1 April 2024

to exercise this power.[987] It should be noted that this power extends to all particular Churches and their groupings, including dioceses.[988] (*See supra*: 4.1.1. The Holy See: a multi layered actor)

Bishops, before taking canonical possession of their office, have to take the oath of fidelity to the Apostolic See[989] and are required to report to the Pope.[990] In addition, it was observed that the position of bishops is not permanent as they can be removed at any moment by the Holy See.[991] On top of that, Canon 590 provides the following evidence of a clear hierarchical relationship between the Pope and the bishops:

> *'Institutes of consecrated life, since they are dedicated in a special way to the service of God and of the whole Church, are in a particular manner subject to its supreme authority.*
>
> *§2 The individual members are bound to obey the Supreme Pontiff as their highest Superior, by reason also of their sacred bond of obedience.'*[992]

In light of these provisions, it is impossible to conclude anything other than that Catholic bishops and clergy serve as agents of the Holy See, and that consequently their actions can be attributed to the Holy See under the international law rules on international responsibility.[993]

The reasoning of the Ghent Court of Appeal, subsequently considered 'reasonable' by the ECtHR, based on aforementioned arguments fail to convince as they are opposed to the general rules of international law in this regard. Instead, both *material* and *territorial* scope of the territorial tort exception are present. (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, Territorial tort exception) Indeed, the underlying proceedings, a civil claim (giving rise to pecuniary compensation) for harm (abuse of hundreds of children facilitated by the Holy See's failure to intervene and various cover-up efforts) falls within the *material* scope of the territorial tort exception. As well as the (dual) *territorial* scope, because both the author of the act as the act itself were present on Belgian territory and are attributable to the Holy See under the international law on responsibility.

Therefore, if the regime of State immunity applies on the legal persona of the Holy See (which the present author's firmly rejects), then in equal manner, the exceptions that go with this regime are applicable, leading to the extinction of the immunity (of the Holy See) in the present case as both the material as territorial scope of the territorial tort exception are fulfilled.

5.2.2.4. The availability of alternative remedies

i. The Court's reasoning

[987] Art. 22 Dogmatic Constitution of the Church
[988] Can. 331-331 Code of Canon Law.
[989] Can. 380 Code of Canon Law.
[990] Can. 400 Code of Canon Law.
[991] Can. 192 Code of Canon Law.
[992] Can. 590 Code of Canon Law.
[993] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001 (Yearbook of the International Law Commission, 2001, vol. II (Part Two)).

The Court recalled[994] in this regard that the compatibility of the grant of immunity from jurisdiction to a State with Article 6 § 1 of the Convention does not depend on the existence of reasonable alternatives for the resolution of the dispute.[995]

However, it is also aware that the interests at stake for the applicants are very serious and concern, in an underlying manner, serious acts of sexual abuse falling within the scope of Article 3 of the Convention and that the existence of an alternative is at the very least desirable. In that regard, the Court notes that the applicants did not find themselves in a situation in which there was no remedy at all.[996]

ii. Critical evaluation

In cases concerning State immunity and art. 6 §1 ECHR the availability of alternative means is not considered and therefore forms no factor in the reasoning of the court. As was observed under chapter 4.3, this means that State immunity is not denied if the claimant has no other means of redress.[997] Hence, the existence of alternative means being a non-factor, the hold whether or not a claim is barred by State immunity therefore amounts to an 'all or nothing' situation for claimants before the ECtHR. As regards the immunity of international organisations, on the other hand, it was noted above that the ECtHR does place the grant of immunity contingent on the availability of alternative remedies or forms of judicial redress to effectively protect their rights under the Convention. (*See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'-iii.The very essence of the right)

In *J.C. and others*, the ECtHR considers this practice by recalling that a grant of State immunity is not dependent on the existence of alternative remedies, but then, nevertheless, returns on her feet and ascertains whether any alternative remedies were at the disposal of the applicants. In other words: an indisputable error of reasoning seems to have slipped into the judgment of the court. This makes a very ambiguous and inconsistent legal reasoning.

Admittedly, it did so only in an obiter dictum ('*à titre surabondant*'). However, it is notable that the Court considered it desirable ('souhaitable') that the Holy See's immunity be contingent on the provision of alternative remedies. In doing so, the court imported a test which is normally reserved to the immunity of international organizations.[998] The Court thus stretched the alternative remedies test to State immunities, but nevertheless in a deviant manner: it adopted it with another *rationale*. In its *Waite and Kennedy* case, the court, indeed, laid down the principle that a material factor in determining whether granting an international organization immunity is the availability of alternative means to protect effectively their Convention rights.[999]In this context, it is important to be aware of the nuance that the *Waite and Kennedy* judgment aims at safeguarding the integrity of a claimant's access to a court under Art 6 ECHR, regardless of the underlying substantive issues at play.[1000] While the ECtHR in *J.C. and others*

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[994] *Ndayegamiye-Mporamazina V Switzerland App No 1687/12 (*ECtHR, 5 February 2019) §64.
[995] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §71.
[996] *Ibid*.
[997] *Waite and Kennedy v. Germany* App No 26083/94 (ECtHR, 18 February 1999) §68; Beer and Regan v. Germany App No 28934/95 (ECtHR, 18 February 1999) §58.
[998] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 846 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.
[999] *Waite and Kennedy v. Germany* App No 26083/94 (ECtHR, 18 February 1999) §68
[1000] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 850

thus applied the *Waite and Kennedy* test, it based the application of the contingent immunity test the Holy See on another *rationale*: 'the serious interests at play' and 'the gravity of the sexual abuse'.[1001] However, under international law, such considerations do not normally trigger a restriction of sovereign immunities. Perhaps, the ECtHR may have had second thoughts regarding the application of the international law on State immunities to an entity which is not a State after all, but a non-State *sui generis* entity. Or as Ryngaert and Pasquet accurately portray:

> '*Possibly, as a human rights court after all, by drawing attention to the desirability of alternative remedies, it wanted to show a humane face and to acknowledge the victims' suffering and legitimate thirst for justice*.'[1002]

While the *rationale* behind the conceptual application of the conditional immunity test raises serious questions, the actual application by the court in *J.C. and others* is even more problematic.

The ECtHR namely did not inquire whether the claimants had alternative remedies at their disposal to obtain redress from the Holy See itself. Instead, it found that applicants had had the possibility to sue officials of the Catholic Church before Belgian courts, namely a bishop, two of his predecessors, other leading figures of the Belgian Catholic Church, and that they could act as civil parties in a future criminal trial.[1003] The court considered this potential remedy as sufficient; hence, the Holy See could avail itself of its immunity. It is remarkable (read: distressing) that the Court considers a suit against Church officials as an acceptable alternative remedy to a suit again the Holy See itself. In the author's view this approach is hard to accept in line with the right of access to a court which must be both 'practical' and 'effective'[1004] in view of the prominent place held in a democratic society by the right to a fair trial.[1005] (*See supra*: 4.3.2.2. The Right of Access to Court, A. A right that is practical and effective) Such an approach, which considers a remedy against another person to be sufficient, interprets the notion of alternative remedy very broadly.[1006] It encompasses not only the remedies available against the actor granted immunity but also those that may theoretically be pursued against other parties that may potentially be responsible for the harm. Again, in light of the right to an 'effective' remedy, it is hard to uphold that this right is guaranteed considering that two or more subjects may have caused the damage to different extents, or may not have the same financial capacity. From a victim's perspective furthermore, even if the other person, who cannot invoke immunity, is eventually held accountable, the remedy can only be incomplete.[1007]

<https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[1001] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §71.

[1002] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 851 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[1003] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §73.

[1004] *Zubac v. Croatia* App No 40160/12 (ECtHR, 5 April 2018) §76-79; *Bellet v. France* App No 23805/94 (ECtHR, 4 December 1995) §38.

[1005] *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §45.

[1006] This approach was also adhered by the ECtHR in *Mothers of Srebrenica*. (*Stichting Mothers of Srebrenica and others v. The Netherlands* App No 65542/12 (ECtHR, 11 June 2013) §167.)

[1007] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 853

But most importantly, this reasoning overlooks the whole meaning of the claim in terms of accountability for the real underlying, structural and systematic cause of the sexual abuse: the clerical mismanagement and cover-up culture in the womb of the Holy See, at the apex of the Roman Catholic Church. How can one expose the actual existence of a 'cover-up culture' if not by suing the Holy See, and more generally, those having the power to tackle the systemic causes of the sexual abuse within the Catholic Church? By suing the Holy See, the applicants rightly wanted to tackle the sexual abuse they suffered from the root cause: the structural mismanagement of the Holy See. In other words: they envisaged the accountability of the institute under whose auspices not only the sexual abuse took place but moreover, was facilitated and made possible by the systematic and worldwide culpable actions and omissions on the part of church authorities. For the structurally deficient way in which the Holy See has acted within this sexual abuse scandal, legal actions for accountability need to be structurally oriented in the same manner. Simply put: structural problems need structural solutions. By suing (as an alternative remedy) an individual church clergy instead of the institute (Holy See) that stands at the apex of this human rights scandal, only one symptom of the wider disease is treated, not the disease itself. The whole structure, chain must be touched to arrive at a true accountability for the committed human rights violations, not just 1 branch of the whole chain.

Nevertheless, by ascertaining whether any alternative remedies were at the disposal of the applicants, it did not truly *show a humane face, but only a glimpse of a humane face.* Not to say, an unreal human face. Indeed, if the court would have significantly considered the applicants submissions, it would have come to the conclusion that there was no effective alternative remedy at the disposal of the applicants to obtain compensation. Both the criminal and arbitration proceedings cannot be seen as an effective remedy. Regarding the criminal proceedings, the underlying facts are distinct: the criminal offence of culpable omission is not equivalent to the alleged structurally incorrect act or omission to act (the cover-up). On top of that, as noted above, at the time of the *J.C. and others* judgment, the judicial investigation was still ongoing. In such circumstances, one cannot speak of an effective, sufficient or accessible remedy. A remedy can only be effective if it can guarantee a reasonable expectation of success within a reasonable period of time. (*See supra*: 3.2.1. Operation Kelk (criminal procedure) How can a proceeding where the High Council of the Judiciary found that it was full of procedural defects and where evidence did not even see the light of the investigation, be seen as an effective remedy? (*See supra*: 3.2.10. Investigation Hoge Raad voor de Justitie) In addition, the minimal amounts paid out by the Belgian Church are only minor symbolic compensation that do not cover the effectively charged damages, through which the church has always tried to discourage victims from taking legal action. This is decisively not an alternative for the applicants to achieve compensation in Belgian civil courts. Moreover, it should be noted that, as pointed out by the applicants[1008], redress before the courts of the Roman Catholic Church is not possible.

The (non-)conformity with the rule of law and more specific, the right to a fair trial of the judiciary of the Vatican has previously been questioned within research. To rephrase, in particular, the extent to which articles 16 and 17 of the Fundamental Law of Vatican City State comply with the right to access to court could be questioned. The (decision-making) power of the absolute monarch, the Pope appears to be held in higher regard than the right to a fair trial. In any civil or penal case and in any stage of the same, the Supreme Pontiff can namely '*defer the instruction and the decision to a particular subject (istanza), even with the faculty of pronouncing a decision according to equity and with the exclusion of any further recourse*

<https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[1008] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §70.

(gravamen).'[1009] Beyond that, only the Supreme Pontiff can authorize judicial action in individual cases, after hierarchical recourse precludes a judicial action[1010] in the same matter.[1011] (*See supra*: 4.1.2.2. Interrelated concepts: The Roman Catholic Church, Holy See and Vatican City- iii. Vatican City)

To conclude, the reasoning of the ECtHR on the alternative remedies falls short in two respects: firstly, by erroneously importing a test precluded for the immunity of international organisations and secondly, once imported by improperly applying it. This leads the author to assert that the judges were inconsistent in their reasoning and let slip an error into the judgment or more serious, were aware of their erroneous analysis with far-reaching consequences for the path to justice for the victims and thus, after all, mitigate it somewhat *post factum*.

5.2.3. Justifiable limitation of the right to access to a court under article 6 §1 ECHR?

'Eu égard à l'ensemble des éléments qui précèdent, la Cour estime que le rejet par les tribunaux belges de leur juridiction pour connaître de l'action en responsabilité civile introduite par les requérants contre le Saint-Siège ne s'est pas écarté des principes de droit international généralement reconnus en matière d'immunité des États et que l'on ne saurait dès lors considérer la restriction au droit d'accès à un tribunal comme disproportionnée par rapport aux buts légitimes poursuivis.

Partant, il n'y a pas eu violation de l'article 6 § 1 de la Convention à cet égard.'[1012]

With this unfounded and brief reasoning, the court motivates its judgment to no violation of article 6, paragraph 1 of the Convention in this widespread human rights scandal. As mentioned above the ECtHR applied two criteria of the *Ashingdane* test (legitimate aim and proportionality) on the present case and concluded both were fulfilled and therefore, the limitation to the right to access to court in the present case could not be seen as disproportionate to the legitimate aim and, there was no violation of art. 6§1 ECHR.

In the present author's view, however, the Belgian courts and subsequent the ECtHR did not depart from the generally recognized principles of international law on State immunity and the restriction on the right of access to a court must be regarded as disproportionate to the legitimate aims pursued and therefore, article 6§1 ECHR was violated. While in the conclusion of this chapter it will be elaborated how the reasoning of the Belgian courts and the ECtHR did not depart from the principles of international law on (state) immunities, but instead stand at variance with it[1013], this part will evaluate and show how the right to access to a court under art. 6 §1 ECHR was violated by the (State) immunity attribution to the Holy See.

[1009] Article 16 Fundamental Law of the Vatican City State

[1010] Article 17, para. 1 Fundamental Law of the Vatican City State: Without prejudice to what is determined in the following article, whoever claims that a proper right or legitimate interest has been damaged by an administrative act can propose hierarchical recourse or approach the competent judicial authority.

[1011] Article 17, para. 2 Fundamental Law of the Vatican City State

[1012] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §75-76.

[1013] From this perspective (State) immunity, in accordance with international law, should not have been granted in the present case. Nevertheless, Belgian courts and the ECtHR did grant state immunity to the Holy See, leading to a limitation of art. 6 §1 ECHR. Within this part it will be evaluated how the grant of immunity to the Holy See cannot be seen as a justifiable restriction of the right to access to a court of the applicants.

By granting the Holy See State immunity, the national courts and the ECtHR did not contest the right to access to a court of the applicants was restricted. However, in view of the circumstances they saw it as a *justifiable* restriction of art. 6§ 1 ECHR and thus no violation occurred. As elaborated under chapter 4.3., a limitation of art. 6 §1 ECHR is justifiable if the limitation has a *legitimate aim* (1), is *proportionate* (2) and if the *very essence of the right of access to court* is not impaired (3). The present author is of opinion that the grant of State immunity in *J.C. and others* did not pass the threefold *Ashingdane* test, leading to an unjustifiable limitation. (*See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test')

Firstly, as to whether the limitation pursued *a* ***legitimate aim***, reference can be made to the outline under the critical evaluation above. (*See supra*: 5.2.2.1. State and State immunity, ii. Critical evaluation) For the readability of this research and to reinforce that this criterion is not met, what has already been elaborated above will briefly be repeated. Since its *McElhinney v. Ireland* judgment, the Court *generally* considers that the grant of sovereign immunity to a State in civil proceedings to pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.[1014] However, this research revealed that there is at present *no* obligation to grant immunity to foreign States under customary international law. The shift from the absolute to the restrictive doctrine on state immunity has been characterized by a strong divergence in state practice and a diminishing role of the state in the international legal order and therefore; States are *no* longer under a legal duty under general international law to accord immunity to each other. *(See supra: 4.2.2.2. A legal obligation to State immunity?)* Hence, if the ECtHR indeed, wishes to '*comply with international law'* and '*interpret the convention in the most harmonious way possible with the other rules of international law*' it should adhere to the evolving nature of this international law body. Instead of copy-pasting its conservative case-law on immunities and art. 6 §1 ECHR, the court should re-examine its reasoning by focusing on the (recent evolutions of the) customary aspect of the general immunity rule. As argued above, in line with Lauterpacht's plea, it is moreover difficult to maintain that the principles of independence, equality and sovereignty of States would be violated if the State exercising jurisdiction is applying national and international law and recognizes as valid the legislative acts of another recognized state. On the contrary, a State's sovereignty, independence, and equality are undermined if a foreign state claims to be above the law. The notion that jurisdictional immunity of foreign states is based on state's sovereignty is outdated and the ECtHR should reconsider its reasoning in light of the rule of law and the true position of the State in modern society. (*See supra: 4.2.2.2. A legal obligation to State immunity?)* Therefore, in view of the present author, the grant of State immunity can, in the present international legal order, not be seen as a legitimate aim.

However, this rejection of the *legitimate* aim departs from *State* immunity as granted for *State* actors. If (in the author's view) the grant of State immunity to States cannot be seen as a legitimate aim in the current international legal order, how can the grant of *State* immunity to a *non-state* actor then possibly be? As evidenced above, the Holy See, as head of the Roman Catholic Church is a non-state *sui generis* entity. Non-State actors are not entitled to State immunity as it is a state prerogative, grounded in the fundamental principle of sovereign equality. *Ergo*: where there is no State actor, the question of state immunity is a non-issue. Non-state actors such as international organizations (i.e. the Holy See) are subjects of

[1014] *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §188.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §35.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §54.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §34.; *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §60.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §52.

international law, but they do not enjoy immunity unless explicitly provided for by a particular treaty.[1015] (see supra: 4.2.2. State immunity) State practice granting such immunity to the Holy See is lacking. The Holy See cannot rely on treaty law either, as it is not a contracting party to neither the UNCSI nor ECSI.[1016]In any case, international organizations do not enjoy the same immunities as States. Likewise, the Holy See may not enjoy the same immunities as States.[1017] (See supra: 5.2.2.1. State and state immunity, ii. Critical evaluation) The grant of State immunity in a situation where international practice suggests such immunity does not exist, cannot be considered as pursuing a legitimate aim. Therefore, the aim pursued by granting State immunity to the Holy See in *J.C. and others* is illegitimate.

Secondly, as for the *proportionality*, the ECtHR upheld the same conservative view as in its preceding cases on this matter[1018], and concluded that measures taken by a State which reflected generally recognized principles of international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court. In this sense, it can be said that, in the ECtHR's reasoning, the proportionality of the restriction is entirely absorbed by the legitimacy of the aim of the restriction. Anyway, this research upholds that the limitation of art. 6 §1 ECHR pursues and illegitimate aim and for this reason, the proportionality of the restriction is in equal manner absorbed by the illegitimacy of the pursued aim. The underlying limitation does not reflect the general recognized principles of international law. The restriction of the right to access to a court, as a procedural impediment to the exercise of jurisdiction leads to the legal proceedings totally being barred, not leaving any proportion of the applicants' right. No balance at all is present here.

At this point, it should be recalled that proportionality demands a fair balance between the general interests of the community and the individual's fundamental rights. Moreover, the extent of a deviation from a right must not be excessive in relation to the legitimate aim it seeks to achieve. *See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test'- ii. Proportionality) In *J.C. and others*, the ECtHR, recalled its established view on the proportionality of immunities as limitations of art. 6§1 ECHR, without however actually examining whether the grant of State immunity disproportionally restricts the applicants' access to court .Therefore, this reasoning which was adopted in a cut-and-paste manner in all its judgements on state immunity as a limitation on art. 6 §1 ECHR, does not, according to the author, present any real balancing of conflicting interests. The principle of proportionality should involve a search for a fair balance between conflicting rights by comparing and attributing a certain weight in favour of the different norms. Instead, the Court deems (generally) that State immunity because of its nature as a recognized rule of public international law cannot be regarded as imposing a disproportionate restriction on the right of access to court. If the Court were truly to examine whether the grant of State immunity disproportionally restricts the applicants' right of access to a court, it would see that the means to pursue the

[1015] Cedric Ryngaert, 'The Legal Status of the Holy See' (2011) 3 GoJIL 857 <https://www.gojil.eu/issues/33/33_article_ryngaert.pdf> accessed 2 April 2024

[1016] *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §20.

[1017] Luca Pasquet and Cedric Ryngaert, 'Hard Cases-The Immunity of the Holy See' (2022) The Italian Law Journal 841 <https://dspace.library.uu.nl/bitstream/handle/1874/427986/837_pasquet_et_al.pdf?sequence=1&isAllowed=y> accessed 3 April 2024.

[1018] *Cudak v. Lithuania* App No 15869/02 (ECtHR, 23 March 2010) §56-57. (Own emphasis added.) This reasoning was also upheld in: *Jones and others v. United Kingdom* App No 34356/06 and 40528/06 (ECtHR, 14 January 2014) §189.; *McElhinney v. Ireland* App No 31253/96 (ECtHR, 21 November 2001) §36-37.; *Al-Adsani v. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §55-56.; *Fogarty v. United Kingdom* App No 37112/97 (ECtHR, 1 March 2000) §35-36.; *Sabeh El Leil v. France* App No 34869/05 (ECtHR, 29 June 2011) §48-49; *Kalogeropoulou and others v. Greece and Germany* App No 59021/00 (ECtHR, 12 December 2002) §35-36.

(il)legitimate aim, namely barring the procedure in its entirety, are not proportionate because the restriction leaves the right being void.

Apart from pursuing a *legitimate aim* and being *proportionate*, to be justifiable, a restriction of art. 6 §1 ECHR must furthermore not restrict or reduce the access left to the individual in such a way or to such an extent that the *very essence* of the right is impaired.[1019] This tripartite test was clearly imposed by the ECtHR in *Ashingdane*. Nevertheless, as was observed above, the Court circumvents to approach this third criterion. In *J.C. and others* no mention was made of this criterion, leading it to be omitted further from discussion. Therefore, once the 'proportionality' criterion is addressed, the Court proceeds, by skipping the third requirement, directly to its conclusion on whether or not art. 6 (1) was violated. Given the destructive effect that the operation of immunity has on jurisdiction and consequently the right of access to court, it is distressing that the criterion has not played a crucial role in the reasoning of the court. Indeed, when the limitation in the present case would be tested against the *very essence* criterion, it would become apparent that it is the very essence of the attribution of (State) immunity to paralyze the very essence of the right to access to courts. In other words: immunities totally eliminate the right of access to court, not leaving any scope for its exercise. The grant of (State) immunity to the Holy See is at odds with the essence of the applicants' right of access to a court: when the former is granted, the latter is left without any effect since the procedural recourse to invoke its rights is reduced to non-existent. When assessing the limitation of art. 6 §1 ECHR in *J.C. and others,* one thus would have to come to the conclusion that the applied limitation does restrict or even reduces the applicants' access to court in such a way or to such an extent that the very essence of the right is impaired, and in this sense the third criterion of the *Ashingdane* test could not be fulfilled.

Under chapter 4.3., the present author argued that the ECtHR bypasses the 'very essence' criteria because significantly approaching it would lead to the end of a justifiable application of State immunities in light of the right of access to justice under art. 6 §1 ECHR. In line of this, this research advocated for a strict application of the tripartite *Ashingdane* test by the court. Considering otherwise, would lead to (case-law of the ECtHR) that upholds a principle of international law which inextricably restricts the right of a fair trial under art. 6 ECHR in such a way that the very essence of the right is impaired, leaving only a pure theoretic, illusory and void of legal effect right. (*See supra*: B. Limitations of the Right to Access to a Court: the '*Ashingdane* Test', iii. The very essence of the right)

In light of the above, it is untenable to hold that the right to access to court under art. 6 §1 ECHR of the applicants in *J.C. and others* was not violated. Where the Belgian and Strasbourg courts acknowledged the limitation of art. 6 §1 ECHR, it was justified by the circumstances of the case. However, a restriction of art. 6§1 ECHR can only be justified when it passes the tripartite *Ashingdane* test. A closer look at the *J.C. and others* judgment, brought forward how the court, in line with its preceding case-law on immunities and art. 6 § ECHR, nevertheless shapes this self-created tripartite test to its own liking (or at least to that of states invoking immunity). Granting State immunity to a non-state actor in a situation where international practice suggests such immunity does not exist, can namely not be considered as pursuing a legitimate aim. In addition, the *very essence* of art. 6 §1 ECHR is impaired by the exercise of immunity, not leaving any scope for its exercise. A claim to immunity consists in an unwarranted refusal to satisfy what would otherwise be a valid and enforceable legal claim. Even more, it amounts, in fact, to a denial of justice. Proportionality *in se* only arises as a subsidiary issue to the present legitimate aim and in the event that the very essence of the

[1019] *Ashingdane v. United Kingdom* App No 8225/78 (ECtHR, 28 May 1985) §57.

right to a court has not been affected.[1020] This research nevertheless revealed that the ECtHR does not undertake a search for a real, fair balance between the conflicting rights by comparing and attributing a certain weight in favour of both norms. By pursuing an illegitimate aim, by impairing the very essence of the applicants' right to access to court and accordingly, being disproportionate, the grant of State immunity violated the right of access to a court under art. 6 § 1 ECHR. The ECtHR, instead of properly applying the *Ashingdane* test in its threefold nature and actually examining whether it was fulfilled in the present case, circumvented it and in a cut-and-paste manner applied its standard reasoning. This gives the impression that the court does not actually consider the underlying facts and circumstances, but rather generally praises the State and its 'sovereignty' high, if not highest, in regard at the expense of the fundamental rights of the citizens of a State. It is distressing that the ECtHR, instead of acting as a human rights watchdog, evades to properly examine and apply the general principles of international law, in order not to embed this denial of justice in black and white in its jurisprudence. This evasion results in case-law that continues to endorse State immunities that severely restrict the right to a fair trial, reducing it to a theoretical and ineffective guarantee. Upholding such an outdated principle in modern democratic society contradicts the core demands of justice and the rule of law. In the *J.C. and others* the ECtHR should have put the grant of state immunity as a limitation to the right of access to a court under the full, tripartite test and thereby would have seen that the atrocious non-compliance with the test amounted in an unjustifiable restriction of the right of access to court under Article 6 ECHR. More broadly, the ECtHR should put the principle of state immunity to scrutiny under the full, tripartite *Ashingdane* test in its case-law and in that way end the upholding of an unjustifiable restriction of the right of access to court under Article 6 ECHR.

The court's reasoning can be framed within a formalistic, outdated State centric approach, which upholds the State's sovereignty in all instances, even at the expense of the deprivation of fundamental human rights and will be elaborated below. (*See infra*: 5.6. Outdated state-centric approach of the ECtHR)

5.3. Dissenting opinion judge Pavli

Judge Pavli issued a strong and convincing dissenting opinion under this Chamber judgment, where he disagreed with the majority in relation to the Belgian courts' dismissal. It can be said that his dissenting opinion is more widely adhered in legal doctrine, then the court's judgment itself (instead being widely criticized).

His disagreement comes from a lack of proper reasoning and certain questionable interpretations of international law in the domestic courts' responses to the applicants' arguments, particularly *vis-à-vis* the applicants' claims regarding the territorial tort exception to State immunity.[1021]He points out the importance that the Court may, and should, consider whether the domestic courts adequately stated the reasons on which their decisions were based and may also call into question the findings of the domestic authorities on alleged errors of law if such findings are arbitrary or manifestly unreasonable. In Judge Pavli's view, there are three key areas in which the Belgian courts failed to adequately address the arguments set forth by the applicants, all concerning the application of the territorial tort exception.[1022]

[1020] *Ibid*.
[1021] Dissenting Opinion of judge Pavli in *J.C. and others V. Belgium* App No 11625/17, (ECtHR, 12 October 2021) §2.
[1022] *Ibid*., §5.

As to the *acta jure imperii- acta jure gestionis* scope of the territorial tort exception, he rightly argues that the national courts overlooked recent analysis the ILC and did not sufficiently examine this issue, leading to an unjustifiable cursory review that do not meet the minimum level of exposition required by art. 6 ECHR.[1023]In addition, as was mentioned above, judge Pavli criticized the Belgian courts did not address any of the arguments of the applicants regarding the principal/agent relationship between the Holy See and the bishops. Thirdly, he corrects the approach as regard the dual territorial nexus, by pointing out that the decisive element is whether the author of the act or omission was present on Belgian territory. In this sense, it was thus sufficient for 'agents' of the Holy See to be present or individuals whose acts or omissions could be attributed to the Holy See.[1024]

Judge Pavli rightly argued that the applicants were entitled to have their arguments duly examined by the courts, a right that they were denied in this case. On the basis that the domestic courts were 'exceedingly summary' and that the restriction of the applicants' right of access to a court was not proportionate to any legitimate aims pursued or in compliance with article 6 §1 of the Convention, Judge Pavli would have found a violation of art. 6§1 ECHR.[1025]

5.4. Significant repercussions of this judgment

On 12 October 2021 the long-awaited verdict thus fell. The ECtHR ruled that victims of sexual abuse by Catholic clergy cannot seek compensation in civil courts because the Holy See and its representatives can invoke state immunity. What is the result? The victims still have found no justice or real legal recognition for the structurally deficient way the Roman Catholic Church has dealt with the allegations of sexual abuse by their clergy. The Holy See's structural and systematic mismanagement and culture of silence remains untouched, or worse: untouchable. Not only are the victims unable to have their civil claims heard and enforced in court, the Holy See, as non-state religious universal organization receives the privilege of immunity, as a State prerogative. The ECtHR, instead of protecting the fundamental right of access to a court of the victims, granted the Holy See an extra tool to hide behind a masquerade of immunity to place itself above the (rule of) law and deny victims of an infringed right access to justice.

The outcome of this case comes with serious implications surpassing the individual applicants in this case. This ruling namely applies not only to the victims in this case but touches every victim of sexual abuse by clergy on the European continent.[1026] This chamber judgment has after all a great (and dangerous) precedent value for the victims of sexual abuse in the Catholic Church throughout the territory of the Member States of the Council of Europe. No victim will we able to seek compensation before a civil court for the structural deficient way in which the Church has dealt with the allegations of sexual abuse by their clergy.

Therefore, this is even more a dark day for human rights, because not only are the victims left out in the cold in this individual case, but the Court has also already closed the door to justice for future victims. This seriousness is only reinforced and made clear by the emerging recent reports and denunciations of sexual abuse within the Church in the European territory. In France, for example, one sees what is called an outburst of reports. On 5 October 2021 a report by 'La commission indépendente sur les abus sexuels dans l'église (*CIASE*)' was

[1023] *Ibid*., §10-11.
[1024] *Ibid*., §18-19.
[1025] *Ibid*., 19-20.
[1026] Van Steenbrugge Advocaten, 'Persbericht: Stop Vatican Immunity for Sexual Abuse' (*VSA*, 13 January 2022 <https://vsadvocaten.be/aanpak/stop-vatican-immunity-for-sexual-abuse/>.

published.[1027] In this report the Commission revealed that more than 200 000 children had been sexually abused by French clergy over the past 70 years and acknowledged the structural failures of the Catholic Church. In the aftermath of the publication of this report, many victims went to the competent authorities seeking justice. However, for these victims, the *J.C. and others V. Belgium* judgment makes it not even an option to think about justice. In Portugal, on the other hand, a national committee has been set up to look into cases of child sex abuse by members of the Catholic Church. Even if the suffering of these victims is eventually recognized, seeking justice and reparations for the structurally deficient way in which the Holy See has acted within this sexual abuse scandal (the clerical mismanagement and cover-up culture) before a civil court will be impossible due to the delivered *J.C. and others V. Belgium* judgment.

The rise of victims of sexual abuse within the Church and proof thereof was not limited to the above-mentioned countries. In many other European countries such as, Austria[1028], United Kingdom[1029], the Netherlands[1030], Germany[1031], Ireland [1032], Norway[1033], Poland[1034], … there is proof of sexual abuse cases by the Catholic Church clergy. All these victims lose, because of the ECtHR's judgment, the possibility to seek justice and reparations before a civil court. The fact that the Court is ruling in this way on one of society's most heinous crimes against what we hold most dear is, as well on this ground, beyond comprehension.

5.5. Referral to Grand Chamber on the basis of art. 43 ECHR

In light of the extremely unjust consequences and great precedential value of the judgment, an application was filed on 12 January 2022 on behalf of the victims for a referral to the Grand Chamber. Thousands of people worldwide, several national and international professors and various human rights organisations supported the request.[1035] On top of that, a list of signatures had been collected in the aftermath of the ECtHR judgment of 12 October 2021 that actively supported the request to referral to the Grand Chamber.

[1027] Independent Commission on Sexual Abuse in the Catholic Church (CIASE), Sexual Violence in the Catholic Church France 1950 – 2020, Summary of the Final Report, 12 October 2021 <https://www.ciase.fr/medias/Ciase-Summary-of-the-Final-Report-5-october-2021.pdf> accessed 10 August 2024.

[1028] X., 'Defrocked priest guilty of sexually abusing boys' (*USA Today*, 3 July 2013) < https://eu.usatoday.com/story/news/world/2013/07/03/priest-child-sex-abuse/2486261/> accessed 10 August 2024.

[1029]Independent Inquiry Child Sexual abuse, The Roman Catholic Church Investigation Report, November 2020 < https://www.iicsa.org.uk/reports-recommendations/publications/investigation/roman-catholic-church.html> accessed 10 August 2024.

[1030] Report of the Deetman Commission, 26 December 2011 <https://www.bishop-accountability.org/news2011/11_12/2011_12_26_DeetmanCommission_DeetmanCommission.pdf>

[1031] X., 'Germany: Survey reveals scope of abuse in religious orders' *Deutsche Welle* (Germany, 26 August 2020) <https://www.dw.com/en/germany-over-1400-youths-accuse-catholic-religious-orders-of-sexual-abuse/a-54710049> accessed 10 August 2024.

[1032] Minister for Justice and Equality, Report by Commission of Investigation into Catholic Archdiocese of Dublin, Department of Justice, 29 November 2009.

[1033] X., 'Church: Norway bishop quit in '09 over abuse' (*NBC NEWS*, 7 April 2010) < https://www.nbcnews.com/id/wbna36227334> accessed 10 August 2024.

[1034] Joanna Berendt, 'Catholic Church in Poland Releases Study on Sexual Abuse by Priests' (*The New York Times*, 14 March 2019) <https://www.nytimes.com/2019/03/14/world/europe/catholic-church-abuse-poland.html> accessed 10 August 2024.

[1035] Van Steenbrugge Advocaten, 'Persbericht: Stop Vatican Immunity for Sexual Abuse' (*VSA*, 13 January 2022 <https://vsadvocaten.be/aanpak/stop-vatican-immunity-for-sexual-abuse/>

In accordance with art. 43 of the Convention, within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.[1036] In an explanatory note of June 2021 the registry of the ECtHR listed different categories of cases justifying a referral to the Grand Chamber. The applicants believed, rightly, that the *J.C. and others* case fell under three of these categories since it concerns a new issue[1037], a serious issue of general importance[1038] and it comes with significant repercussions[1039]. Despite the well-founded request for referral, the Grand Chamber of five panel judges nevertheless decided to reject the request.[1040]

5.6. Outdated state-centric approach of the ECtHR

In interpreting art. 6 ECHR the ECtHR has always referred to the 'living' nature of the Convention, which must be interpreted in light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of the norms of the Convention.[1041] The court moreover emphasized that '*the right to fair trial holds so prominent place in a democratic society that there can be no justification for interpreting article 6 §1 of the convention restrictively*'.[1042] However, little of these two premises seem to emerge in the discussed *J.C. and others* judgment, and even more broadly, in the Court's overall case-law regarding the limitations of article 6 §1 in light of immunities. Instead, the ECtHR seems to apply a formalistic and outdated State-centric approach, that upholds the State's sovereignty in all instances, even at the expense of the deprivation of fundamental human rights. From the above analysis, it can be said that the ECtHR undoubtedly gives primacy to State immunity over human rights and peremptory norms. '*Volens nolens, the court adopted a formalistic and standardised reasoning with an outdated perception of international law and the international legal order*.'[1043]

Indeed, the court formulates its reasoning on a standardized and conservative manner without actually examining the (recent evolutions within) the international legal order. Regarding the general principle of State immunity, the ECtHR declared that the principle of State immunity is a customary international rule. As was argued before, this is difficult to maintain given that the practice that claims to be guided by customary international law on State immunity is, in fact, only a small portion of what could constitute 'general practice accepted as law' under the ICJ's Statute.[1044]Indeed, neither the material nor subjective elements of a customary international rule could be said to be present. (*See supra: 4.2.2.2. A legal obligation to State immunity?*) *A*

[1036] Art. 43 ECHR.
[1037] Grand Chamber Registry European Court of Human Rights, Practice followed by the Panel of the Grand Chamber when deciding on requests for referral under Article 43 of the Convention, 2 June 2021, 15.
[1038] *Ibid*., 17.
[1039] *Ibid*., 18.
[1040] Registrar European Court of Human Rights, Press Release Grand Chamber Panel's Decisions 28 February 2022.
[1041] *Demir and Baykara v. Turkey* App No 34503/97 (ECtHR, 12 November 2008) §65-68.
[1042] *Moreira de Azevedo v. Portugal* App No 11296/84 (ECtHR, 23 October 1990) §66.
[1043] Sally El Sawah, 'Jurisdictional Immunity of States and Non-Commercial Torts', in Tom Ruys Nicolas Angelet, Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 161.
[1044] Article 38 ICJ Statute.

contrario, the ECtHR rejected the existence of a customary international rule granting State immunity in cases of violations of peremptory norms, notwithstanding the gravity of the impugned act or the absence of redress. One of the main characteristics (*read*: shortcomings) of the Court's reasoning is how the grant of State immunity as a customary rule of international is based on sparse state-practice, but at the same time exceptions on that principle are rejected on that 'sparse' basis. (*See supra:* 4.2.2.1.2. Exceptions: limitations to the principle of (jurisdictional) State immunity, ii. Human rights violations) By doing, so the ECtHR adopted an outdated State-centric approach, consolidating the Westphalian model of State sovereignty.

It is distressing how the court's ruling completely disregards the developments within the broader international legal order. A true paradigm shift has occurred from a purely State-centric system with a Westphalian origin towards an international community recognizing the citizen (and its well-being) as legitimate subjects of international law. The primordial position of citizens and their fundamental human rights have changed the outlook of the international legal order at the expense of the State and his sovereignty as sacred values. The ECtHR seems to overlook that the rules on State immunity exist within a broader international legal order and (must inevitably) undergo the evolutions within that international legal order. The *acta jure imperii – acta jure gestionis* division as the result of the restrictive doctrine has made its way into the court's ruling, but since then, the translation of the evolutions within the international legal order into the court's reasoning has stagnated. The rule of law, anchored in the preamble of the ECHR and even more, the explicit enshrinement of the right of access to a court under art. 6 §1 ECHR is a cornerstone of modern society and the international legal order.

In the present author's view, this 'paradigm' shift shouldn't be described here while assessing a judgment of the ECtHR, because does the ECtHR and the convention not embody that whole shift? Should the ECtHR, as a *human* rights court not represent and safeguard that those values are guaranteed?[1045] On the contrary, *anno 2024* we are evaluating a judgment of the court of *human* rights that upholds the State and its sovereignty as sacred values the highest in regard, instead of the convention of human rights that stands at the essence of the court's whole existence. Of course, a balancing between conflicting norms does not exist in vacuum and must 'be interpreted 'in *light of present-day conditions and take into account the evolving norms of national and international law in its interpretation of the norms of the Convention'*.[1046]However, those seem void words when assessing the court's case-law. In the first place, the present author is of opinion that the court's *J.C. and others* ruling does not show any sign of a real balancing or examining the underlying facts and circumstances at all. Rather, in a cut-and-paste manner it upholds its previous conservative case-law. On top of that, it not only disregards the evolutions within the international law, but moreover disregards the essence of its whole existence and duty to safeguard the Convention rights of the citizens of the Member States of the Council of Europe. It can be said that in *J.C. and others* the human right of access to court does not form the central thread in the court's assessment, but apparently other considerations prevail. According to *El Sawah*, practical considerations[1047] are definitely of material relevance to the Court in the consolidation of State immunity in its case-law. For instance, the considerations for refusing to see an exception to State immunity in torture or other violations of *jus cogens* norms were summarized the opinion of the

[1045] Art. 19 ECHR.
[1046] *Demir and Baykara v. Turkey* App No 34503/97 (ECtHR, 12 November 2008) §65-68.
[1047] In *Al-Adsani* the following 'practical' considerations were considered: the courts of asylum States would face a flood of claims of torture for which they 'would have no means of testing the claim or making a just determination'; the ability to negotiate global claim settlements; the right to effective implementation of judicial decisions would entail the prevalence of *jus cogens* norms on torture over State immunity from execution, which would deprive forum States which were blocking assets of State sponsors of terrorism of an important source of leverage.

concurring judges in *Al-Adsani*.[1048] It was furthermore observed above that the policies and practices in the field of state immunities, unlike other fields of international law, are influenced by multiple actors based on both political and legal considerations. (*See supra*: 4.2.2.1. The restrictive immunity doctrine: *acta jure imperii* vs. *acta jure gestionis*) Political considerations should not lead the ECtHR's rulings and obstruct victim's redress to justice. Some may agree that these considerations ought not to be disregarded. Nevertheless, fundamental considerations such as the right of access to a court, accountability and the primordial role of the Rule of Law in modern society should remain the guiding principles when determining the contours of State immunity.

After all, the court did acknowledge and recognize the prominent role of the rule of law in modern society and confirmed that the principle of the rule of law is hardly conceivable without there being a possibility of having access to the courts.[1049]In *Golder* the ECtHR explicitly enshrined the right of access to court in art. 6 §1 ECHR. Even more, the ECtHR emphasized that *the right to fair trial holds so prominent place in a democratic society that there can be no justification for interpreting article 6 §1 of the convention restrictively*'.[1050] Notwithstanding, in its present case-law on art. 6 §1 ECHR and state immunities it is not only interpreted restrictively but *de facto* non-existent. Instead of letting its rulings be guided by conservative and state-centric considerations, the court should stay true to the very values she supposedly holds so high in regard. In *Ashingdane* it accepted that the right of access to a court is subject to limitations, which *may vary in time and in place according to the needs and resources of the community and of individuals.*[1051] Therefore, taking into account the new international order and the fact that human rights protection is no longer a purely internal matter of any individual state but a fundamental concern of the community of all nations, the citizen and his human rights should be placed central. The citizen is now also entirely part of that community. The notion of the rule of law and article 6 ECHR as the enshrinement of that notion in the convention as fundamental human rights of *citizens* should be the court's guiding principles, not *States* and their sovereignty.

The paradox or sadness of this all is that the Holy See is not even a State, but a non-State actor that is not entitled to this outdated regime of international law. If anything, the Holy See has showed that it is able navigate the waters of the regimes of the international legal order which allow it to place itself above the law and which has in turn accommodated its rights and interests remarkably well. The Holy See succeeded in manipulating the inconsistent and sparse features of the international legal system of State immunities to its own advantage.

5.7. Conclusion

It should be noted that this research considers the well-established rule that the ECtHR should not substitute its own assessment for that of the domestic courts. However, the Court may be called upon to consider the decisions of national courts in so far as any shortcomings therein infringe rights protected by the convention, including the right of access to a court.[1052] The Court may, and should, consider whether the domestic courts adequately stated the reasons on which their decisions were based, including as to whether they provided a specific and

[1048] *Al-Adsani V. The United Kingdom* App No 35763/97 (ECtHR, 21 November 2001) §18.
[1049] *Golder v. the United Kingdom* App No 4451/70 (ECtHR 21 February 1975) §29-34.
[1050] *Moreira de Azevedo v. Portugal* App No 11296/84 (ECtHR, 23 October 1990) §66.
[1051] *Ashingdane v. United Kingdom* App No 8225/78 (ECtHR, 28 May 1985) §57
[1052] *Garcia Ruiz v. Spain* App No 30544/96 (ECtHR, 21 January 1999) §28.; *Avotins v. Latvia* App No 17502/07 (ECtHR, 23 May 2016) §28.

express reply to those submissions by parties that are decisive for the outcome of the proceedings.[1053]Moreover, the Court may also call into question the findings of the domestic authorities on alleged errors of law if such findings are 'arbitrary or manifestly unreasonable'.[1054] The Court's role is to ascertain whether the effects of interpretations of both provisions of domestic law and provisions of general international law or international agreements are compatible with the Convention.[1055] In light of these general principles of review, the present author considers that the Court should have addressed several shortcomings in the Ghent Court of Appeal judgment that infringed the right of access to court under art. 6 §1 ECHR of the applicants. The ECtHR, instead of considering the arbitrary and manifestly unreasonable elements in the Ghent Court of Appeal ruling, confirmed those errors of law. In that way, the Court upheld a reasoning which stands at variance with both the general principles of international law on States and State immunities and the right of access to court under art. 6 § 1 ECHR. In the above critical assessment, the four main reasonings of the ECtHR in *J.C. and others* were evaluated against the evaluation criteria as set out under framework of concepts.[1056] All four reasonings failed the evaluation as they do not comply with the principles of international law and human rights law embodied in the evaluation criteria. This conclusion will reframe to what extent the four-part reasoning of the ECtHR does or does not pass the evaluation to the evaluation criteria and will subsequently indicate how the judgment should have been. In other words: departing from the negative outcome of the previous assessment of the Court's reasoning to the principle of State immunity (and the non-State qualification of the Holy See) and the right of access to court under art. 6 § ECHR, this conclusion will also formulate how the judgment should have been.

The foregoing evaluation made it univocal: the Holy See is not entitled to State immunity under international law. This became apparent not just once, but at four occasions in *J.C. and others*. At each stage of applying the regime of State immunity, the Court had the opportunity to reconsider and recognize that the Holy See falls outside the scope of State immunity. Instead, the Court relapsed four times into the same erroneous reasoning.

First of all, the whole regime of State immunity should not have made its way to the court's reasoning because the Holy See is not a State, but rather a universal religious organization with a *sui generis* international legal personality. Non-State actors are not entitled to State immunity as it is a state prerogative, grounded in the fundamental principle of sovereign equality. *Ergo*: where there is no State actor, the question of state immunity does not arise. As a *sui generis* religious universal organization, the Holy See's entitlement to immunity must explicitly be provided for in the law. In any case, international organizations do not enjoy the same immunities as States. As was observed, consistent State practice in favour of granting immunity to the Holy See is lacking. Given this uncertainty, a right to jurisdictional immunity cannot be derived from the mere fact that the Holy See participates in the international legal order. Rather, it seems reasonable to presume that non-State actors such as the Holy See do not enjoy State immunity, unless the contrary can be proved through an examination of the relevant practice. If anything is recognized within the international community, it is the Holy See's qualification as '*anomaly*', '*a unique actor*', '*atypical organism*', '*multi-layered actor*'

[1053] *Ramos Nunes de Carvalho e Sa* v. Portugal App No 55391/13, 57728/13 and 74041/13 (ECtHR, 6 November 2018) §185.
[1054] *Naït-Liman v. Switzerland* App No 51357/07 (ECtHR, 15 March 2018) §116.
[1055] *Markovic and others v. Italy* App No 1398/03 (ECtHR, 14 December 2006) §107-108; *Prince Hans-Adam II of Liechtenstein v. Germany* App No 42527/98 (ECtHR, 12 July 2001) §49-50.; *Waite and Kennedy v. Germany* App No 26083/94 (ECtHR, 18 February 1999) §54.
[1056] The evaluation criteria were the principles of State immunity (and accordingly the non-State qualification of the Holy See) and the right of access to court under art. 6 ECHR as elaborated under the framework of concepts.

which passes one-to-one through its legal qualification in international public law as a *sui generis* entity.

> In this sense, the *first negative outcome* of the evaluation can be identified: since the Holy See is not a State actor, but a *sui generis* entity, the ECtHR should, in line with the established international law in this regard, not have applied the regime of State immunity.

Secondly, after erroneously applying the regime of State immunity to the Holy See, the Court let the Holy See's non-sovereign *jure gestionis* acts fall within the scope of State immunity that exclusively applies to *acta jure imperii.* It was recalled that the underlying acts were performed by the *spiritual* Holy See, as head of the religious universal Roman Catholic Church and not as highest governing body of the *temporal* Vatican City State. Acts of the latter could be qualified as sovereign, the first not, as they relate to the management of a religious organization. The notion that the administrative tasks of a non-state actor and its power to issue directives could be seen as sovereign in nature, is quite implausible. Such reasoning could absurdly result in a reality where any legal entity could claim sovereign immunity. Indeed, if one removes the State from the equation, the distinction between sovereign and private acts loses all meaning.

> By letting the Holy See's *acta jure gestionis* in the administration of the Roman Catholic Church fall within the *acta jure imperii* scope of the principle State immunity, the ECtHR erroneously categorized the underlying acts and eroded the scope of the principle of State immunity in international law. Therefore, *the second negative outcome of the evaluation can be identified*: the Holy See's *acta jure gestionis* fall outside the *acta jure imperii* scope of the principle of State immunity in international law and therefore the ECtHR should have not let the principle of State immunity be applicable.

Thirdly, if the principle State immunity is applicable (which the present author firmly rejects), the accepted exceptions to sovereign immunity are equally applicable. Seen the sexual abuses committed in the territory of the forum State, both *material* and *territorial* scope of the territorial tort exception are fulfilled, leading to a legitimate invocation of this exception and the extinction of State immunity in the present case. It was recalled that the question whether the conduct of an individual can be attributed to a State, is governed by international law and must be addressed in light of the relevant rules on international responsibility.[1057]Canon Law itself clearly established that Catholic bishops and clergy serve as agents of the Holy See and the bishops strictly act on the instructions of, or under the direction or control of, the Pope as head of the Holy See in carrying out any conduct. In this sense, it was sufficient for agents of the Holy See, or bishops whose acts or omissions could be attributed to the Holy See as a matter of vicarious liability to be present in and to operate on Belgian territory.

> The ECtHR did not consider the international law on state responsibility and erroneously addressed the territorial scope of the territorial tort exception. Instead of looking if the Holy See's hierarchy was present in Belgium, the Court should have considered if the bishops who act as agents under the instructions of the Holy See were present in and committed the torts on Belgian territory. By not correctly applying the rules on international state responsibility and not significantly considering the agent-principal relation of the bishops *vis-à-vis* the Pope in Canon Law, the ECtHR let slip a

[1057] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001 (Yearbook of the International Law Commission, 2001, vol. II (Part Two)).

third negative outcome to the evaluation: both *material* and *territorial* scope of the territorial tort exception are applicable, leading to the extinction of State immunity.

Fourthly, it is well established that in cases concerning State immunity and art. 6 §1 ECHR the availability of alternative means is not considered and therefore forms no factor in the reasoning of the court. In *J.C. and others* the ECtHR made an indisputable error of reasoning by importing a test which is normally reserved to the immunity of international organizations. Making the application of State immunity contingent on the availability of alternative remedies for the claimants would be a positive development from the standpoint of human rights. However, the court shattered this by problematically applying the alternative remedies test in the present case. In the Court's view the existence of a remedy against a person *other* than the subject enjoying immunity would justify the grant of immunity. From a victim's perspective this remedy can only be incomplete and raises issues in view of the right of access to court that must be both effective and practical. But most importantly, this reasoning overlooks the whole meaning of the claim in terms of accountability for the real underlying, structural and systematic cause of the sexual abuse: clerical mismanagement and cover-up culture in the womb of the Holy See, at the apex of the Roman Catholic Church. Moreover, if significantly examined, the ECtHR would have come to the conclusion that neither the criminal procedure, nor the arbitration procedure, nor the (inexistent) redress at the Vatican judiciary can be seen as an effective remedy.

The fourth negative outcome to the evaluation criteria can be identified: by importing a test reserved to international organizations, the ECtHR made an error of reasoning. However, this would have been a positive evolution if the Court addressed it properly and would have come to the conclusion that no alternative, effective remedy was at the disposal of the applicants, leading to the denial of State immunity.

To conclude: the question is not *whether* the ECtHR applied the principles of international law on States and State immunity and the right of access to court under art. 6 §1 ECHR, the question, distressingly, is *on how many occasions* the ECtHR disregarded the general principles of international law in favor of granting the Holy See State immunity. After this overview of the *J.C. and others* evaluation and its four-part negative outcome to the evaluation criteria, it is clear that on four stages of applying the regime of State immunity, the ECtHR had the opportunity to reconsider and recognize that the Holy See falls outside the scope of State immunity. Instead, the Court relapsed four times into the same erroneous reasoning. No, the Holy See is not entitled to State immunity because it is a non-State actor, its acta jure gestionis fall outside the scope of acta jure imperri scope, the underlying acts fall within both material and territorial scope of the territorial tort exception and no alternative remedies are at the disposal of the applicants.

6. Reparation for human right violations

6.1. Transitional justice

This chapter considers the range of issues involved in pursuing justice for the sexual and institutional abuse of children by the Roman Catholic Church.

The previous chapters made apparent that the judiciary, both at the Belgian level as at the European level, was not capable of serving legal recognition and in that sense justice for the victims of the child sexual abuse. It was observed how not the general principles of international law and the right of access to court under art. 6 §1 ECHR were the guiding thread of the ECtHR, but apparently other forces prevailed. If this research made anything clear, it is how the Holy See, over the centuries to the present day, uses its moral, spiritual authority to shape and manipulate the international legal order to its advantage. Noteworthy: the Roman Catholic Church, as the oldest institution in the world, maintains a widespread flock of 1,3 billion adherents. Indeed, Catholics worldwide constitute 'a population' of nearly 1.3 billion[1058] individuals.

This chapter will examine whether the framework of transitional justice discourse and practice should be used to analyze how individuals, communities, states and the global Roman Catholic Church can and should respond to the church's legacy of widespread child sexual abuse committed by priests and religious individuals.

In recent years, the application of transitional justice discourse and practice has extended beyond its paradigmatic context of post conflict or post authoritarian societies to consider other large-scale or systematic human rights abuses in historical, colonial-era contexts or in modern peaceful consolidated democracies.[1059]It will be considered how the issue of clerical child sexual abuse could fit within this expansionary trend and interrogate how distinctive challenges may emerge in applying transitional justice norms and practices to this context. [1060] In particular, the potential role of the arts will be explored on how art can form a tool to trigger change and contribute to justice within this human rights scandal: both for the victims, society as a whole or even the perpetrators.

The examination of this section within this research starts from a collaboration with the Museum of Fine Arts in Ghent. In September 2024, art visitors will be confronted with the reprehensible power position of the Roman Catholic Church. The motivation for including an artwork on the Roman Catholic Church in the Alternative-Narrative exhibition stems from the strong belief in the power of art to induce a higher consciousness among the spectator. Artworks like the ones who will be discussed below are carriers of an intrinsic force that release a motion in the viewer. Specifically, with the inclusion of Fred Deltor's work *La Religion*, the author wishes to confront the art-visitor with the real, reprehensible nature of the Church's position of power. In this way, the author hopes to provoke a broader reflection around the role of the Church in contemporary society and thus break down its 'sacred', moral authority.

[1058]The 2024 *Pontifical Yearbook* and the 2022 *Statistical Yearbook* of the Church show a rise of one per cent globally in the number of baptised Roman Catholics, from 1.376 billion in 2021 to 1.390 billion in 2022

[1059] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) International Journal of Transitional Justice 336 <https://academic.oup.com/ijtj/article-abstract/10/2/332/2356890?redirectedFrom=fulltext&login=false> accessed 13 May 2024.

[1060] *Ibid*., 338.

6.1.1. General

The concept of transitional justice involves the full range of processes relating to attempts by a society to come to terms with a legacy of large-scale human rights violations from the past, to guarantee accountability and acknowledgement for the violations and justice. Transitional Justice is a field on an upward trajectory. [1061] The field of transitional justice has often been described as one that has rapidly evolved. Indeed, whether we look at the kind of transition being considered, the kind of justice being pursued or the strategies used to achieve it, transitional justice is certainly an area of research and practice in which new concepts, approaches and paradigms have changed rapidly over the past three decades.[1062]

The application of transitional justice within the child sexual abuse by clergy has been studied before and its extension to the to the Church's legacy of widespread child sexual abuse committed by priests and religious individuals can be considered departing from three perspectives. First of all, alternative, broader conceptions of transitional justice allow its application beyond traditional contexts like armed conflict or post-authoritarian regimes. By employing an analytical framework that assesses the breakdown of fundamental norms, such as the rule of law, civic trust, and human dignity, transitional justice can be expanded to address a wider array of issues. This harm-centric approach justifies the implementation of various justice strategies in new contexts, such as the incorporation of child sexual abuse within its scope.[1063] Second of all, transitional justice can serve a unifying function by bridging the gap between different discourses on child sexual abuse across various jurisdictions, academic disciplines, and fields of practice. This cohesion can foster a more integrated and comprehensive response to the issue.[1064] Third, Daly proposes that transitional justice can provide a sociopolitical analysis of the potential for change in state–citizen or state–church–citizen relations. The processes necessary to address child sexual abuse within the Church mirror those required in state–citizen relationships, emphasizing the need to reevaluate the separation and oversight between the Church and the state.[1065] This transformation calls for a re-founding of the Church, reflecting a profound internal restructuring to ensure accountability and justice.

6.1.2. Art-based approach to transitional justice

In recent years, there has been increased focus on the potential intersection of art and transitional justice. With growing acknowledgment of the constraints of international courts and the difficulties in reaching affected communities, both scholars and practitioners have started exploring alternative approaches to engage those most impacted by large scale human rights violations.[1066] Within this framework, the question emerges: What impact can art have? More

[1061] Fionnuala Ni Aolain, *Transitional Justice and the European Convention on Human Rights*, Geneva Academy (2017) < https://www.geneva-academy.ch/joomlatools-files/docman-files/Transitional%20Justice%20and%20the%20European%20Convention%20on%20Human%20Rights.pdf> accessed 10 July 2024.
[1062] Tine Destrooper, 'Transformative justice & the need for a multi-dimensional understanding of impact' (2023) Transitional Justice and Impact < https://biblio.ugent.be/publication/8762992 > accessed 20 July 2024.
[1063] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) International Journal of Transitional Justice 338 <https://academic.oup.com/ijtj/article-abstract/10/2/332/2356890?redirectedFrom=fulltext&login=false> accessed 13 May 2024.
[1064] *Ibid*., 339.
[1065] *Ibid*., 340.
[1066] Rachel Kerr, 'Aesthetics, justice and reconciliation: What can art do?', *Symposium on art, aesthetics and international justice-Art' (2020)* AJIL Unbound. <

specifically: what role can art play within the recognition of the injustice done within the sexual abuse scandal in the Catholic Church, viewed within the broader process of transitional justice?

The interaction between art and law is part of the Law & the Humanities movement and shed a light on how art can play a crucial role in legal awareness in general and need for legal change in particular. It should thus not be surprising that many artworks try to play a role in processes of transitional justice, human rights, democratization, and many other areas of law.[1067] In the recent *Oxford Handbook of Law and Humanities*, contributions such as Human Rights, Democracy and Law and Personhood addresses the interdisciplinary relationship between law, art and civil society.[1068] The Fundamental Rights Agency (FRA) furthermore explored the connections between arts and human rights. In a report, the FRA affirms the shared space between the disciplines, which should be better approached to build mutually beneficial agendas in both fields.[1069]

6.1.3 The force of art

The author believes that the broad power emanating from art will contribute from different angles around greater social awareness around the reprehensible nature of the Roman Catholic Church's conduct in the sexual abuse scandal.

A. Preventive, repressive and healing power

What if the state, policymakers used art in a proactive way? Instead of merely abstract laws to prevent and combat sexual violence without effective enforcement, engage the arts as a medium of policy. Both preventively, to sensitise society and repressively as part of the broader punishment/treatment of offenders. Or as part of the process of victimisation? To better place and process as a victim the injustice done. Indeed, art constitutes one of the best means of shaping the human personality and enabling people to achieve the values and ethics of the community. The role of the visual arts is decisive in communicating and expressing the principles of human rights and even in spreading and promoting the culture of human rights. To put it simply, actions speak louder than words: art touches deeper than abstract laws.

B. Images as acts

The power of art to move people to fight for (human) rights, through active citizenship and political participation has been studied by João Motta Guedes in his text 'images that provoke citizenship'. The author develops the theory of the 'image act', trying to frame how aesthetics are able to provoke emotions and how consequently these emotions call for action and legal

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https://www.cambridge.org/core/journals/american-journal-of-international-law/article/art-aesthetics-justice-and-reconciliation-what-can-art-do/8965A016EB04B26925F6CF16E1BF65B0> accessed 10 July 2024.

[1067] Georges Martyn, 'Can Art Inspire and Guarantee Better Laws and Law-Making?' (2022) Humanities and Rights Global Network Journal 73 < https://www.academia.edu/94241935/Can_art_inspire_and_guarantee_better_laws_and_law_making?email_work_card=view-paper> accessed 20 May 2023. ; Simon Stern, Maksymilian Del Mar, and Bernadette Meyler, *The Oxford Handbook of Law and Humanities.* (Oxford University Press, New York, 2020) 242.

[1068] *Ibid..*

[1069] *Ibid.*

change.[1070] He pays attention to the theory of Bredekamp that configures images and works of art as carriers of an intrinsic force that moves people ('the energeia') and thus operate as engines of legal, political and social change.[1071] At its heart is the plea that artworks are not just the passive recipients of a spectator's aestheticizing gaze, but that they are the protagonist transposing a power to the spectator.[1072] The 'Sociological Aesthetics of Law', as elaborated by Fischer-Lescano, furthermore perceives images as contributing factors to the justification of law, explaining several possible connections between aesthetics and the practice of law.[1073]

C. Narrative

Visual methodologies can help us to articulate the extent to which the process itself is visual and performative. This can be especially apparent where international justice is invoked to reinforce the power of the state, faith in justice and the rule of law, or to relate a particular historical narrative. In this regard, it becomes a site of storytelling.[1074]

D. Art as a policy tool

The (visual) arts are one of the most important tools to promote and strengthen the rule of law and its values and to stimulate civic engagement. After all, art occupies an important place in the world and helps achieve educational, ethical, policy and even political goals. Throughout (legal) history images of law and justice were intended to strengthen the message of law and political power and to educate, to inspire and to inform the population. There has always been a very strong link between art and law, particularly if we look at both as means of social ordering.[1075]

6.1.4. Specific artworks

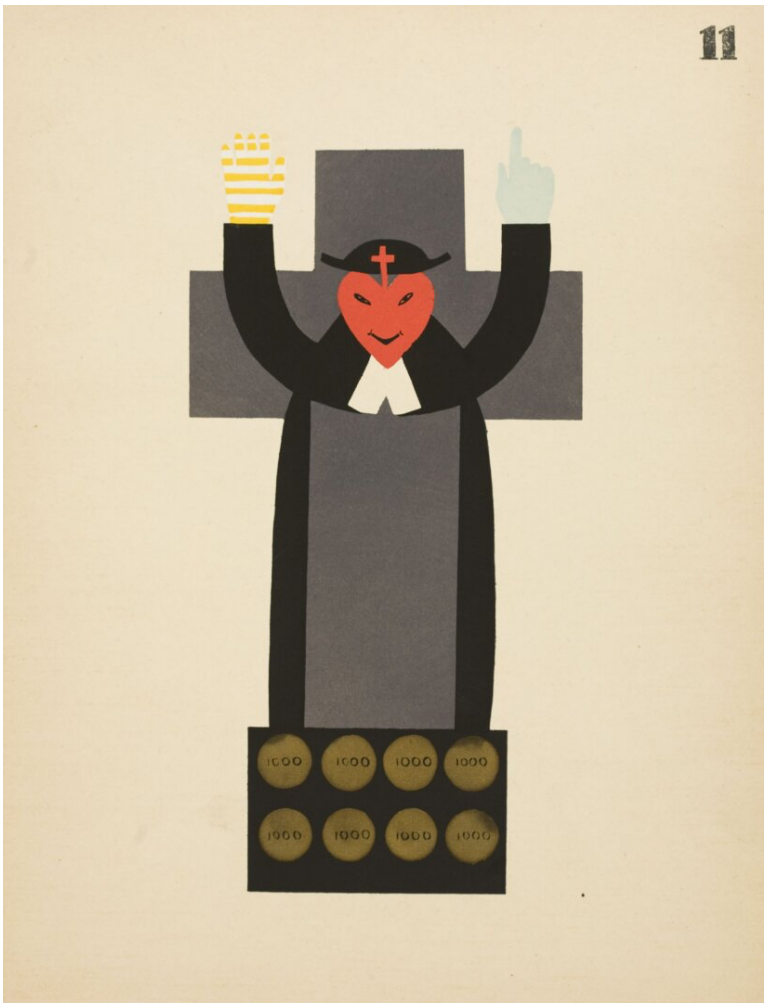
Three artworks and their legal iconographic and (iconological) meaning will briefly be set out to unveil the intrinsic force these artworks carry to trigger social movement and reflection within society on the sexual abuse scandal in the Church, and broader the undisputed and 'moral' higher authority of the Roman Catholic Church.

[1070] João Motta-Guedes, 'Aesthetics of Human Rights: Images that provoke citizenship' (2022) Humanities and Rights Global Network Journal 208 < https://www.humanitiesandrights.com/journal/index.php/har/article/view/74> accesed 20 July 2023.
[1071] *Ibid.*
[1072] *Ibid*.
[1073] Andreas Fisher Lescano, 'Sociological Aesthetics of Law' (2016) Law, Culture and the Humanities < https://journals.sagepub.com/doi/10.1177/1743872116656777> accessed 10 July 2023. 268-293.
[1074] Rachel Kerr, 'Aesthetics, justice and reconciliation: What can art do?', *Symposium on art, aesthetics and international justice-Art' (2020)* AJIL Unbound. < https://www.cambridge.org/core/journals/american-journal-of-international-law/article/art-aesthetics-justice-and-reconciliation-what-can-art-do/8965A016EB04B26925F6CF16E1BF65B0> accessed 10 July 2024.
[1075]Georges Martyn, 'Can Art Inspire and Guarantee Better Laws and Law-Making?' (2022) Humanities and Rights Global Network Journal 73 < https://www.academia.edu/94241935/Can_art_inspire_and_guarantee_better_laws_and_law_making?email_work_card=view-paper> accessed 20 May 2023.

i. MSK exhibition: Fred Deltor- La religion

Departing from a collaboration with *Schoonvolk* within the Museum of Fine Arts (MSK) in Ghent, museum visitors will be confronted with the institutionalized power position of the Holy See by the work *La religion* by Fred Deltor at the exposition of Alternatief Narratief.[1076] The following departs from the museum text written by the present author for the exposition.

'*The Roman Catholic Church, an (un)contested power player? Over the centuries, the Church has occupied both prominent and contested positions. From a patrimony of historic buildings and rich art collections to a school battle, political parties and a sexual abuse scandal. To this day, as a believer or non-believer, the power of this institution cannot be dismissed. While this institution continues to flaunt its authority under moral premises, Deltor seems to expose a less sacred facet here. Deltor's depiction could be considered a deus ex machina: God out of the machine. This work knocks the Church off her ivory tower and places her on the confession(chair). The building blocks to its power (abuse) are highlighted. La Religion is supported by a pedestal filled with money: a metaphor for her leading power in society? Moreover, the heart-shaped red mask shows demonic features and, according to art critics, should be seen as a demagogic heart. Demagogy (> demagogic; from Greek δημος= 'people' and αγ(ωγ)ειν = '((educate)') is a way of convincing the viewer of an untruth by appealing to a person's 'common sense' and 'logic'. Through this intriguing imagery, Deltor confronts the masses at the Church's deceptive tools to display its moral authority (read: position of power*).'



This abstract and symbolic set of pochoirs is an illustration of its own time and an indictment of the institutionalised powers in our society. With this oeuvre, artist Fred Deltor, pseudonym of Federico Antonio Carasso, wishes to awaken 'the masses' by bringing them to a higher awareness of the abuse of power by the fixed powers. The 12 pochoir prints depict 12 puppet-like fixed powers who are the targets of a game of Jeu De Massacre: they are ready to be put on a stage, as on the portfolio's cover, and knocked down in a game of Jeu de Massacre. Deltor himself states: 'C'est sur ces roulettes d'or que tout roule, et que vous [namely: the masses] êtes roulés, vous tous'. This depiction of the 'parasites of modern society' constitutes

[1076] Museumdossier Fred Deltor, Jeu de Massacre, <https://www.mskgent.be/fr/collection/2011-a-8> accessed 16 May 2024.

one of Deltor's numerous hidden imagery. This body of work is among the rare Belgian Constructivist examples of socially engaged art in the interwar period. Direct confrontation with the brutality of war, as a result of authoritarian leaders, fuelled in Deltor a struggle for greater justice. Jeu de Massacre and its activist tinge are situated within inspiring contacts with prominent avant-garde artists during the interwar period. This critical transitional period between the two world wars and a fertile environment helped shape these progressive pochoirs of Deltor. Stylistically, the figures testify to a knowledge of legions of leading international impulses that can be associated with progressive art organisations, magazines and movements of the 1920s. The representation of these social power wielders frames itself within a call for critical reflection on the institutionalised powers in our society.[1077]

ii. Dees de Bruyne - De Kindervrienden

Ghent artist Dees De Bruyne created the work 'The Children's Friends' in 1972. It is De Bruyne's most important work. The artist took it as an opportunity to create a very critical work in which he depicts some dignitaries eating cake and drinking coffee while mistreating children. Today, however, this work is without a trace. Has it deliberately disappeared off the radar, in line with the whole cover-up and culture of silence within the Roman Catholic Church?

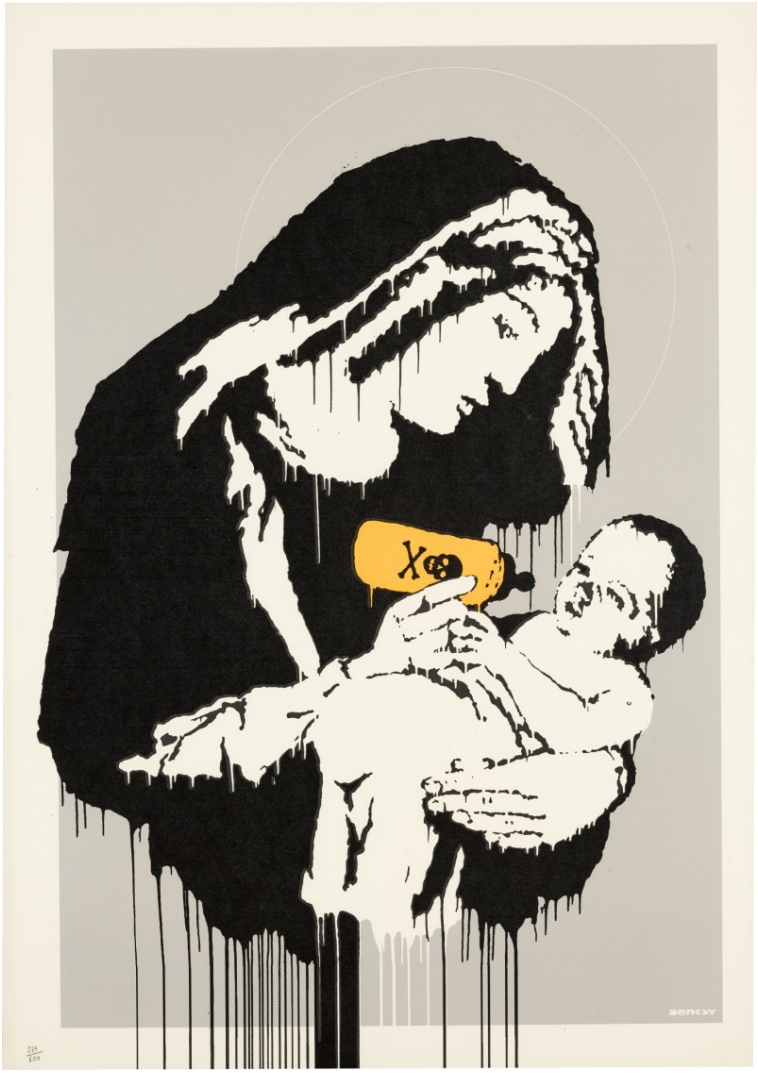
De Bruyne painted, among others, Pope Paul VI and Cardinal Leo Suenens. De Bruyne also depicts the then director of the youth center, the minister of justice and US President Richard Nixon. The latter is a reference to the Vietnam War, where many children also died. De Bruyne considered Nixon a child killer. Police and army helmets can also be seen in the background. The Children's Friends' turns this children's party around a round table of peace on which a cake marked 'free and happy' is a slaughter party: they will drink their own coffee (five cups) and eat their own cake. 'The Children's Friends' is moreover clearly structured according to three plans, from top to bottom: the sky with helmets and the table with slaughtered children.[1078] It forms an image that is instantly imprinted on the viewer's retina and confronts him with the reprehensible and dark reality of sexual abuse in the church: defenseless children as victims of higher powers.

[1077] J.E. Daele, De Kindervrienden-Dees De Bruyne, OKV < https://www.okv.be/sites/default/files/2020-08/Dees%20de%20Bruyne%20-%20De%20kindervrienden.pdf > accessed 10 July 2024.
[1078] *Ibid*.

iii. Toxic Mary- Banksy

'*A poignant and insightful picture that powerfully critiques organized religion, and no-one wants to buy. Absolutely nobody*.'[1079]

'Toxic Mary' depicts the Virgin Mary, draped in classic Renaissance-style clothing, feeding her infant. However, instead of nursing, she offers a bottle marked with skull and crossbones, symbolizing poison. In contrast to Banksy's typically clean aesthetic, paint drips down the image, creating the effect of the scene melting away, which evokes a sense of despair. Through this piece, Banksy critiques religion as a toxic ideology passed down from parents to children. More broadly, the artwork comments on the pervasive toxicity in family relationships, where outdated ideas and traditions are perpetuated.[1080]



[1079] X., Banksy explained: Toxic Mary (2003) < https://banksyexplained.com/toxic-mary/ > accessed 10 July 2024.
[1080] *Ibid*.

6.1.5. Conclusion: a call for more

The present author believes that the broad power emanating from these artworks can contribute from different angles toward greater social awareness around the reprehensible nature of the Roman Catholic Church's conduct in the sexual abuse scandal. In that sense, it will be shaken to its foundations and lose (a part) of its undisputed position of power in the present society. Therefore, this forms an invitation to integrate the arts within the broader process of transitional justice in the church's legacy of widespread child sexual abuse committed by priests and religious individuals. The recommendations of the Flemish special commission in this regard form a un applaudable step forward, as they propose the installation of a monument or a permanent exhibition in institutions where abuse took place to acknowledge the suffering of victims. (*See supra*: Parliamentary investigation commissions 2024)

7. Conclusion: Something is rotten in the state of the Vatican[1081]

'*Mais que'est-ce qu'il faut faire? Il faut se bruler, se mettre en feu à la place publique pour qu'ils sachent, pour que tout est fini… J'en ai marre de cette vie. Toutes ces années de solitude… C'est pas possible*.'[1082]

With the ECtHR's final ruling in the background, these are the words of Eva Demoor Dubuisson when she learned the news that the granting of State immunity to the Holy See does not unjustifiably infringe upon her and all victims' (within the European continent) right of access to court. '*La fin'*, the end: *'They can cheer again*.' Eva Demoor Dubuisson, was the oldest survivor of sexual abuse in the Church in Belgium and died last year. At a young age, Eva was sexually abused by a priest when she reached out to him with her grief for her deceased mother. Eva went to report this abuse to the superior and the police. From that day on, Eva would be locked up in improvement homes and consecutive years in prison. Her perpetrator: a free life on the loose.

This research brought up above how 'justice' can be an intuitive concept. This testimony constitutes what feels like 'injustice' to a normal, empathetic person and anything but 'justice'. Intuition is a good virtue, however, applying the law in the exercise of judicial powers is a distinct challenge. In the administration of justice, while the sense of justice may often be intuitive, relying on 'intuition' in judicial decisions is questionable. A sound model requires judges to act based on legal principles and not only correctly apply the law but also to find a just solution to the case.

Therefore, justice, in the sense of a legal procedure where law is administered based on legal principles, is anything but done for the victims of the sexual abuse in the Roman Catholic Church. This research brought to the fore how the victims of sexual abuse in the Church were not merely victims of the behavior of the individual clergy and the Holy See, but how they became a second time the victim of a violation of their right of access to court. Because, apparently, being a victim of sexual abuse and a procedural battle along two tracks over a decade is not enough to get recognition of the injustice suffered as a child.

This research evaluated the four-part reasoning of the ECtHR in *J.C. and others v. Belgium* against the described principles of international law. The *J.C. and others v. Belgium* judgment was evaluated against the principles of state immunity (including non-state qualification) of the Holy See and the right of access to a court under article 6 ECHR. The extent to which the ECtHR's ruling conformed to those principles or deviated and in that sense, disregarded the law and violated fundamental principles was thus assessed. This evaluation revealed a distressing result: the Court's four-part reasoning, in all its parts, stands at variance with the outlined principles on state immunity and human rights. In other words: the ECtHR disregards, even worse, violates the general principles of international law and human rights law.

[1081] Walter Van Steenbrugge, *Operatie Kerk* (Pelckmans Uitgeverij, Antwerpen 2023) 7.
[1082] *See* documentary: https://www.vrt.be/vrtmax/a-z/godvergeten/ (Episode 4, minute 11.)

The four reasonings and subsequent four shortcomings in the ECtHR's *J.C. and others* v. Belgium judgment to the evaluation criteria of state immunity and the right of access to court under art. 6 §1 ECHR are briefly reiterated:

1. The Holy See is not a State, but a *sui generis* religious entity. Non-State actors are not entitled to State immunity as it is a state prerogative. *Ergo*: where there is no State actor, the question of state immunity does not arise. State practice in favor of granting (State) immunity is lacking. Therefore, in such uncertain situation a right to State immunity cannot be presumed.

2. If State immunity is applied, it is only applicable to *acta jure imperii*. The Holy See's acts in the administration of the Roman Catholic Church are *acta jure gestionis* and therefore fall out of the scope of State immunity.

3. If State immunity is applicable, exceptions are equally at stake. Both the *material* (compensation for torts) as the *territorial* (both the act and the author were present on the Belgian territory) scope of the territorial tort exception are fulfilled. As a result, the applicability of State immunity extinct.

4. The grant of State immunity is not contingent on the availability of alternative remedies. If this test were to be applied, the absence of an effective alternative remedy for the applicants would become clear: neither the criminal proceedings, nor the Arbitration Procedure, nor a remedy before the Vatican Judiciary forms an effective remedy. If the grant of State immunity is contingent on an alternative remedy, State immunity should be denied because of an absence of the latter.

In this sense, at four instances in the *J.C. and others v. Belgium* judgment, the ECtHR juxtaposes the principles of international law and human rights. The author wishes to dwell for an instant on the fourth shortcoming: the alternative remedies test. The ruling in the *J.C. and others* case is all the more distressing for the victims because there is no alternative remedy available. The High Council for the Judiciary's (Hoge Raad voor de Justitie) investigation was univocal: one irregularity after another crept into the investigation. On 1 July 2024, the federal prosecutor's office had completed its final claim: no one must be prosecuted. At this point, attention should be paid to the fact that taking proceedings before a court that would have jurisdiction based on territorial jurisdiction, namely courts of the Vatican, is impossible. In any civil or penal case and at any stage, the Supreme Pontiff can namely 'defer the instruction and the decision to a particular subject, even with the faculty of pronouncing a decision according to equity and with the exclusion of any further recourse.' Beyond that, only the Supreme Pontiff himself can authorize judicial action in individual cases. It is obvious that these principles violate fundamental human rights and the rule of law. However, seeking protection against these violations is out of the question as neither the Holy See, nor Vatican is a member state of the Council of Europe.

But most importantly, this judgment overlooks the whole meaning of the claim in terms of accountability for the real underlying, structural and systematic cause of the sexual abuse: the clerical mismanagement and cover-up culture in the womb of the Holy See, at the apex of the Roman Catholic Church. How can one expose the actual existence of a 'cover-up culture' if not by suing the Holy See, and more generally, those having the power to tackle the systemic causes of the sexual abuse within the Catholic Church? By suing the Holy See, the applicants rightly wanted to tackle the sexual abuse they suffered from the root cause: the structural mismanagement of the Holy See.

In the present author's view, it can be said that perhaps the greatest human rights violator, after the Holy See, is the ECtHR itself.

From the Holy See, as objectionable as it is, it is aligned with its spiritual, divine mission to place itself above the law and could not be expected, after centuries of refusing responsibility for injustices done, to submit observations now suddenly to its detriment in this case of *J.C. and others v. Belgium*.

The ECtHR, on the other hand, in my view, with *J.C and others v. Belgium*, violates not only the right to a fair trial under article 6 ECHR, but even stronger; its entire intrinsic duty to protect the Convention rights and in that sense, its entire raison d'être. The ECtHR has the exclusive competence to watch over the fundamental human rights of the citizens of the member states of the Council of Europe. Citizens. Not states. This is even more incomprehensible considering that Holy See is not even a State, but a *sui generis* non-state entity.

If this research brings anything to the fore, it is how the Holy See, over the centuries to the present day, uses its moral, spiritual authority to shape and manipulate the international legal order to its advantage. To repeat: the Holy See, as the head of a religious institution manages to manipulate to its advantage the flexible and changing features of the regimes of international law that belong purely to State actors. Indeed, it was observed how both the State qualification of actors and the grant of State immunity, unlike any other area of law, are subject to political influences. Indeed, Lauterpacht argued that there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven. As the result, there has grown up a tendency to maintain that the crucial question is not one of international law.

This confirms exactly what this research reveals: international law and basic human rights are not at the root of the case. Instead, other factors are at play. Factors that have no place in a 21st century rule of law where human rights should be the guiding thread. Especially not when they serve to protect a sacred outdated institution. Religion does not stand above law. Core human rights and *jus cogens* are highest in the hierarchy of legal norms. Not canon law. The ECtHR appears in need to be reminded of this.

This research wishes to call for additional research that examines these additional factors more thoroughly. This research unveiled that the principles of international law and fundamental human rights were not at the root of *J.C. and others v. Belgium*. The author herself suggested political factors and the moral, spiritual authority of a religious institution which developed in the European Middle Ages.

As long as that religious institution is seen as a ‘universal value’, as long as the Roman Catholic Church has a social foundation, it has power: power it uses at all times to obstruct the temporal legal order and place itself above the law.

As long as our state (read: politics) does not radically break with sustaining the Roman Catholic Church, the Holy See will abuse these privileges in the good name of its spiritual mission. At this point, the author wishes to express disbelief for such politics which forms a major factor here. After Godvergeten, politics had, *read*: had to, once again take notice of the injustices that took place (under their watch), followed by a political recovery. (This shows all the more the power of (visual) arts to raise awareness within society and trigger change.)

In line of this, the present author genuinely asks the question: where was that attention when, the Belgian government, in submitting its observations to the *J.C. and others v. Belgium* judgment, supported the grant of State immunity along the full line. The injustice may have been there, according to the Belgian government, the Holy See should be able to claim State immunity. Minister of justice, Koen Geens, eminent member of the CD&V, could not be expected to disavow the Catholic upper echelons, but what about those other non-Christian parties? When I asked this same justice minister how he, as a member of a Christian party, looked at how the institution of Church was crippling the institution of the judiciary within this sexual abuse scandal. I received the generalizing and disappointing answer that sexual abuse is a phenomenon of all strata of society and the Holy See here, like other perpetrators, enjoyed no privileges. This caused me much disbelief: how can even one of the greatest jurists so side-step basic human rights and principles of the rule of law to protect an outdated Holy institution that tramples on rights of abused children.

As long as the (social and political) awareness around the Roman Catholic Church and its spiritual mission to place itself above the law does not evolve, the Church will retain its support base and thus its power.

The author is aware that religion must be distinguished from the institution. However, as long as that institution uses (read: abuses) its historically grown, spiritual authority over a mass of religious members to undermine legal responsibility for a sexual abuse scandal, this difference is not legitimate.

'*Indifference to me, is the epitome of evil*.'[1083]

As long as the Church has indifferent followers, it remains an undisputed actor of power in our society.

With this research, I wanted to express my opposition to this indifference and injustice. As long as the path to justice is influenced by spiritual and political factors, the international legal order of law and justice will never be ours. Our anchored human rights are the cornerstone of our democratic rule of law. Every actor of the international order must act in accordance with them. Forgiveness is not legal recognition and is an obstacle to true justice and '*en ce sens l'athéisme est une purification'*.

[1083] Elie Wiesel.

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