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The Child's Best Interests and Religion: A Case Study of the Holy See's Best Interests Obligations and Clerical Child Sexual Abuse

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A Introduction

Does religion and belief carry any relevance for the child's best interests? The United Nations Committee on the Rights of the Child (hereafter, the Committee) provides indicia in General Comment 14. Therein, the treaty body stipulates that in assessing a child's best interests, the right to preserve her identity as guaranteed by the Convention on the Rights of the Child (CRC) in article 8 must be taken into consideration; whereby religion and beliefs, form part of a child's identity.¹ Thus, in considerations related to foster home and placement for a child, adoption, separation of parents and divorce, for instance, the assessment of the child's best interests should pay due regard to the 'desirability of continuity in a child's upbringing and to the child's ... religious... background'.²

Yet, the relation between religious interpretations and the child's best interests proves to be much more complex. Reflecting this complexity, the UN Committee emphasizes:

Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests.³

Consistent with these cautionary words, the Committee holds that authorities may not invoke the preservation of a child's identity in their attempt to propagate 'traditions and cultural values that deny the child ... the rights guaranteed by the Convention'.⁴ Against this background, a question that adds another layer of complexity to our considerations regarding religion and the child's best interest emerges: are religious state actors⁵ bound by a similar obligation to that of (assumingly secular) authorities? In other words, should they consider a

¹ Committee on the Rights of the Children, General comment No. 14, The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14 (2013), para. 55.

² Ibid., para. 56.

³ Ibid., para. 57.

⁴ Ibid., para. 57.

⁵ This chapter defines religious actors as those entities that assume the authority to interpret religion, i.e. by using religion as an important or primary source of law, whose executive and judiciary enforce religious laws, or who grant religious authorities a principal role in the executive. See I. Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014), pp. 51-58 and especially p. 53.

child's best interests in their interpretations of religion, i.e. their rules and actions? And do they consider the child's best interests? This chapter addresses these two questions in relation to a very specific religious actor, the Holy See, while employing the context of clerical child sexual abuse as a case study.

The chapter is structured in three parts. The first analytical part will establish whether the Holy See, as a party to the CRC, has international legal obligations related to the child's best interests and whether these are different in nature compared to those of other (secular) state parties. In answering these questions, the analysis challenges the dual personality scenario proposed by the Holy See and supported by parts of doctrine. The second part of the study draws on doctrinal and judicial developments in the area of extraterritoriality and argues that the Holy See's child rights obligations do not stop at the tiny borders of the Vatican. In reaching this conclusion it discusses critically the UN Committee's 2014 Concluding Observations on the Holy See's report. Third, normative and institutional changes undertaken by the Holy See in recent years with the aim to address child sexual abuse will be examined in order to ascertain whether and to what extent such changes take into account the child's best interests at the Vatican and extraterritorially.

B When Status Matters

Much of the work on the Holy See in general international law manuals and specialised literature starts (and often ends) with a discussion of the international legal status of the actor. The fascination of scholars with the Holy See's status can be seen as an intellectual exercise aimed at clarifying the odd contours of an actor that defies traditional criteria of statehood. Or, it reflects an understanding that status in international law matters; and that the exact form which such status takes—statehood or not—is of great significance, for therefrom flows a specific set of rights and obligations.

With the loss of the Papal States to Italy in 1870, it is generally accepted that the Holy See ceased its existence as a state.⁶ Thus, some early writers argued that, alongside statehood, the Holy See lost its international legal status⁷; others concede 'a degree of international personality'⁸ to the Holy See due to custom and acquiescence of other states rooted not in statehood but in the important religious role of the actor.⁹ Instead of putting to rest such debates, the conclusion of the Lateran Treaty between the Holy See and Italy in 1929—whereby the latter granted the Vatican territory to the Holy See—amplified confusion. Legal scholars appear to have resorted to mathematics, exploring permutations between two elements: international legal personality and statehood (or absence thereof). The result is a multitude of variants: the Holy See as a state or as a non-state actor; the Holy See having one international legal personality, that of the state, or alternatively that of the Roman Catholic

⁶ See J. L. Kunz, 'The Status of the Holy See in International Law' (1952) 46 *American Journal of International Law* 308, at 311.

⁷ For an overview of early writings on the Holy See and the various positions of scholars see C. G. Fenwick, 'The New City of the Vatican', (1929) 23 *American Journal of International Law* 371, at 371.

⁸ See J. Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford: Oxford University Press, 2006), p. 226; see also P. Fauchille, *Traité de droit international public*, 8ème ed., Entièrement refondue, complétée et mise au courant, du Manuel de droit international public de M. Henry Bonfils ed., vol. I, (Paris: Rousseau & Co., 1922), pp. 732-755.

⁹ Expressed elsewhere as 'religious legitimacy'. See discussion in Cismas, *Religious Actors and International Law*, pp. 163-164.

Church; and, the Holy See's self-portrayal of a dual personality.¹⁰ This latter variant portrays the Holy See as enjoying two international legal personalities, as the government of the Vatican and, *separately*, as the government of the Catholic Church.

Over the years and in various circumstances the legal implications of this latter arrangement have become apparent. One such consequence of the dual personality scenario is that it facilitates the 'shifting of the two personae', thereby allowing the Holy See to avail itself of the privileges of statehood, while at times denying the corresponding statal obligations.¹¹ It is relevant to note, as an illustration, that the Holy See has become party to a number of human rights treaties open for membership exclusively to states, among which is the CRC.¹² When the validity of the Holy See's general reservations entered to the CRC were challenged by a member of the Committee,¹³ the Holy See specifically invoked its right *qua* state to join treaties and make reservations.¹⁴ In turn, an analysis of the review processes of the Holy See by various treaty bodies, including the UN Committee on the Rights of the Child, demonstrates that the party understands its obligations arising from human rights instruments as 'moral obligations', drawing on its personality *qua* Catholic Church.¹⁵

Another example illustrates a second use of the dual personality scenario, whereby the Holy See invokes at the same time rights *qua* state *and* non-state entity. In *O'Bryan v. the Holy See*, the plaintiffs brought a putative class action on behalf of all victims of sexual abuse by Catholic clerics in the US; they alleged that the Holy See was liable under the doctrine of *respondeat superior*, and *inter alia*, for violations of customary international human rights law.¹⁶ In this case the Holy See argued that it should enjoy state immunity under the Foreign Sovereign Immunities Act – it did so successfully. In the same breath, however, the Holy See also argued that the freedom of religion clause entailed by the First Amendment to the US Constitution should bar the plaintiffs' claim. In denying this path of defense, the judge appeared mystified: 'Defendant Holy See cannot simultaneously seek the protections of the Foreign Sovereign Immunities Act and the United States Constitution.'¹⁷

Perhaps unsurprisingly, challenges to the legal status of the Vatican have flared up in contexts in which the Holy See has exercised in a visible manner rights restricted to states in international conferences, and in instances where it arguably eluded some of the concurrent state obligations.¹⁸ Clerical child sexual abuse is the most prominent of such contexts.

¹⁰ On the self-perception of the Holy See and the logic of the dual personality scenario see, Cismas, *Religious Actors and International Law*, pp. 185-188.

¹¹ Described in Cismas, *Religious Actors and International Law*, p. 10, 13, 158-159.

¹² Among the ratified human rights treaties of significance for the analysis here are: Convention on the Rights of the Child, New York, 20 November 1989, into force 2 September 1990, 1577 UNTS 3 (ratified 20 April 1990) (Hereafter, CRC); Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, New York, 25 May 2000, in force 18 January 2002, A/54/49, Vol. III (2000), (ratified 24 October 2001).

¹³ For an analysis the reservations entered by the Holy See upon ratification of the CRC see Cismas, *Religious Actors and International Law*, pp. 219-223.

¹⁴ UN Committee on the Rights of the Child, *Compte rendu analytique de la 255ème seance, Examen des rapports présentés par les Etats parties: Rapport initial du Saint-Siège*, UN Doc. CRC/C/SR.255, 24 novembre 1995, para. 47.

¹⁵ See for instance UN Committee on the Rights of the Child, UN Doc. CRC/C/SR.255, para. 19.

¹⁶ *O'Bryan v. Holy See*, 490 F. Supp. 2d 826 (W.D. Ky. 2005) and *O'Bryan v. Holy See*, 471 F.Supp.2d 784 (W.D. Ky. 2007). See also L. C. Martinez Jr, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against Holy See in Clerical Sexual Abuse Cases?', (2008) 44 *Texas International Law Journal* 123.

¹⁷ *O'Bryan v. Holy See*, 471 F.Supp.2d 784 (W.D. Ky. 2007), at 794.

¹⁸ See for example Y. Abdullah, 'The Holy See at United Nations Conferences: State or Church?', (1996) 96 *Columbia Law Review* 1835-1875.

In a systematic study of the question of the personality of the Holy See, this author has shown that the dual personality scenario is legally untenable and fails to garner consequential support from state practice.¹⁹ While the international personality of the Holy See (but not as a state) continued to exist after the extinction of the Papal States by virtue of its religious legitimacy, it was only as a result of the Lateran Treaty that the construct (not the Holy See, nor the Vatican on its own) could ‘clothe’²⁰ itself with the semblance of statehood. On the one hand, by reading the Lateran Treaty in the light of the effectiveness criteria for statehood (territory, population, government, and independence), the Holy See’s claim to an external, separate international personality invalidates its other invoked personality qua state, mainly because the requirement of independence would not be realized. On the other hand, when divorced from the construct, the Vatican is essentially a territory and has *on its own* no legal basis to support the claim for a distinct international legal personality. Instead, the study posited that the Holy See and the Vatican form a construct with one single international personality which however derives from two sources: international custom recognizing the religious legitimacy of the Holy See and the state-like resemblance conferred upon the construct by the Lateran Treaty in 1929. It demonstrated that the construct personality reflects history, is supported by the Lateran Treaty and general international law, domestic case law and the monitoring of human rights bodies, and ‘makes sense of what otherwise would be erratic state practice’. Crucially, it has shown that the Holy See-Vatican construct enjoys the rights *and* incurs the obligations of a state.²¹

For the purpose of this chapter, a brief review of the UN Committee on the Rights of the Child’s monitoring activity of the Holy See’s obligations under the CRC is in order. The treaty body’s early practice accommodated the dual personality claimed by the Holy See and thereby, to a certain extent, also the shifting of personalities and the invocation of rights qua both state and church.²² Yet, even in the 1995 Concluding Observations the Committee underscored that the best interests of the child, alongside the principles of non-discrimination and respect for the views of the child, should be ‘fully taken into account in the conduct of all the activities of the Holy See and of the various Church institutions and organizations dealing with the rights of the child’.²³

Recent practice accepts *formally* the dual personality variant but, proceeds *substantively* as if the Holy See has only one international legal personality. In the 2014 review of the Holy See’s obligations under the Convention and its Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), the UN Committee was uncompromising: it regarded the Holy See as a party with obligations no different than those of any of other state party to these instruments—regardless of its invoked special, religious nature.²⁴

¹⁹ Cismas, *Religious Actors and International Law*, chapter 4.

²⁰ The notion ‘clothing itself with the formal attributes of statehood’ was used by H. Lauterpacht, ‘General Rules of the Law of Peace’, in E. Lauterpacht (ed.), *International Law Being the Collected Papers of Hersch Lauterpacht*, vol. I, The General Works, (Cambridge: Cambridge University Press, 1970), p. 306.

²¹ Cismas, *Religious Actors and International Law*, chapter 4, pp. 308-309, and citations at 156.

²² For an examination of the review processes of the UN Committee on the Rights of the Child, see discussion in Cismas, *Religious Actors and International Law*, pp. 218-237.

²³ Concluding Observations of the Committee on the Rights of the Child: Holy See, UN Doc. CRC/C/15/Add.46, 27 November 1995, para. 14.

²⁴ Concluding Observations on the Second Periodic Report of the Holy See, U.N. Doc. CRC/C/VAT/CO/2, 25 February 2014 (Hereafter, CRC/C/VAT/CO/2); See also I. Cismas, ‘Introductory Note to Committee on the Rights of the Child Concluding Observations on the Second Periodic Report of the Holy See’, *International Legal Materials*, Vol. 53, No. 3 (2014), pp. 580-596.

Best interests obligations appeared prominently in the 2014 Concluding Observations. As such, the treaty body noted with concern that the Holy See's legislative, administrative and judicial proceedings and other programmes impacting children have failed to sufficiently incorporate children's best interests as a primary consideration.²⁵ The Committee showed itself particularly concerned with the Holy See's handling of clerical child sexual abuse allegations as 'the Holy See has consistently placed the preservation of the reputation of the Church and the protection of the perpetrators above the child's best interests.'²⁶ Finally, it drew the attention of the Holy See to General Comment 14 and recommended that it 'strengthen its efforts to ensure that this right is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programmes and projects that are relevant to and have an impact on children.'²⁷

It is beyond doubt that the Holy See has *legal* obligations in relation to the child best interests, in particular in the context of child sexual abuse. Unlike in previous monitoring cycles the actor appears to assume the legality of these obligations, however, it recognizes their applicability only within the territory of the Vatican.²⁸ Given that there are a handful of children at the Vatican, and the vast majority of cases of clerical sexual abuse have occurred outside the Vatican's borders, what do these best interests obligations signify? If the Holy See's obligations under the CRC, including those related to the child's best interests, are to have any meaning, their extraterritorial application is crucial.

C Beyond the Borders

International courts²⁹, treaty bodies³⁰, UN Special Procedures³¹, and an increasingly solid body of scholarly work³² have tackled extraterritoriality. Writing in 2011, Françoise Hampson summarized the state of the debate as follows: 'the principal argument is not between those who think there is some extra-territorial applicability of human right law and those who think there is none... the dispute is over the precise scope of such applicability'.³³ Her conclusion, that the extra-territorial applicability of 'human rights law would depend on the control exercised by the state over the harm inflicted' on an individual, whereas the 'scope of the state's responsibility would depend on the degree of control exercised by the state over the

²⁵ CRC/C/VAT/CO/2, para. 29.

²⁶ Ibid.

²⁷ Ibid., para. 30.

²⁸ Comments, 2014, para. 3.

²⁹ See, for example, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Report 2005, p. 168. See also *infra* note 27.

³⁰ See Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

³¹ Special Rapporteurs with socio-economic rights and with civil and political rights mandates have examined extraterritorial obligations in their thematic reports and communications to states.

³² Notable works are: M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford: Oxford University Press, 2011); R. Wilde, 'The Extra-territorial Application of International Human Rights Law on Civil and Political Rights' in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (Abingdon: Routledge, 2013), 435-461; Olivier De Schutter et al, 'Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', (2012) 34 *Human Rights Quarterly* 1084.

³³ F. Hampson, 'The Scope of the Extra-territorial Applicability of International Human Rights Law', in G. Gilbert, F. Hampson and C. Sandoval (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Abingdon: Routledge, 2011), 157-182, p. 158.

conduct alleged to constitute a violation of human rights law³⁴ appears to have been also validated by recent case-law of the European Court of Human Rights.³⁵

These judicial and doctrinal developments have taken place over the past decade or so—roughly the same period which elapsed since the last review of the Holy See by the Committee on the Rights of the Child and the most recent monitoring exercise. It is against this dynamic, that the 2014 Concluding Observations, which place a paramount emphasis on the Holy See’s extraterritorial obligations, should be understood. Therein, paragraph 8 states:

The Committee is aware of the dual nature of the Holy See’s ratification of the Convention as the Government of the Vatican City State, and also as a sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction. While being fully conscious that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee nevertheless notes that subordinates in Catholic religious orders are bound by obedience to the Pope in accordance with Canons 331 and 590. The Committee therefore reminds the Holy See that by ratifying the Convention, it has committed itself to implementing the Convention not only on the territory of the Vatican City State but also as the supreme power of the Catholic Church through individuals and institutions placed under its authority.³⁶

A similar statement, which places the onus on the Holy See to respect its obligations *extraterritorially* can be found in the Concluding Observations on the Holy See’s report on the implementation of the OPSC.³⁷

While acknowledging that concluding observations are not the most convenient instruments for the theoretization of complex concepts such as extraterritoriality, both more and less (or rather different) conceptualization may have strengthened the Committee’s argument.

First, paragraph 8 could have listed those provisions of the Convention with an explicit extraterritorial reach, thereby clarifying the intention of the drafters of the CRC in what regards extraterritoriality.³⁸ In a review of the *travaux préparatoires*, Sigrun Skogly shows that ‘for large parts of the drafting process, international cooperation was linked to all rights in the Convention’ and it was only in the technical phase that this was placed in the area of socio-economic rights, in an attempt to ensure textual conformity with other instruments.³⁹ By no means, the scholar suggests, is the extraterritorial effect of the Convention limited to

³⁴ *Ibid.*, p. 182.

³⁵ For the evolution of extraterritoriality in the case law of the European Court of Human Rights see M. Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’, (2012) 23(1) *European Journal of International Law* 121-139.

³⁶ CRC/C/VAT/CO/2, para. 8.

³⁷ UN Committee on the Rights of the Child, Concluding Observations on the report submitted by the Holy See under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/OPSC/VAT/CO/1, 25 February 2014.

³⁸ Notably, in its Comments on the Concluding observations, the Holy See argues that it should be ‘[o]f general concern, for all States Parties, ... the fact that para. 8 ... offers a controversial new approach to “jurisdiction”, which clearly contradicts the general understanding of this concept in international law.’ Mission permanente du Saint-Siège auprès de l’Office des Nations Unies et des Organisations internationales à Genève, Comments of the Holy See on the Concluding observations of the Committee on the Rights of the Child, 23 September 2014, para. 10. [Hereafter Comments, 2014].

³⁹ S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Antwerpen: Intersentia, 2006), pp. 103-104.

articles 4 and 24, given the centrality of extraterritoriality in the conceptual architecture of the CRC⁴⁰.

Article 34—whereby ‘States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse’ through ‘national, bilateral and multilateral measures’⁴¹—would have been worth recalling in an enumeration of extraterritorial provisions of the CRC. This stipulation showcases the strong grounding of such obligations in the text of the Convention, and specifically in the area of protection against child sexual abuse. Article 34 thus provides a solid extraterritorial anchor for the Committee to ‘encourage’ the Holy See to provide ‘guidance to all relevant persons in authority with a view to ensuring that the best interests of the child is a primary consideration’ and for it to ‘urge’ that the state party ‘disseminate such guidance to all Catholic churches, organizations and institutions worldwide.’⁴²

Second, the main conceptual vulnerability of the Concluding Observations lies in the UN Committee’s acceptance of the Holy See’s dual personality scenario, and thus of the actor’s submission that these two personalities are separate (or distinct) one from the other. The treaty body’s attempt to conceptualize extraterritoriality to fit with the dual personality scenario⁴³ exposes the Concluding Observations to an unusually ingenious critique.

In its striking Comment on the Observations, the Holy See denies the existence of obligations which may arise from the CRC, requiring it to respect and protect the rights stipulated in the Convention beyond its borders.⁴⁴ In doing so it cites precisely the separateness of the two personalities as evidence. First, the Holy See argues that its personality qua government of the Vatican lacks the capacity to be in control over the acts of ‘bishops and major superiors of religious institutes’; it thus claims to have such capacity solely over the citizens at the Vatican ‘as well as, where appropriate, the diplomatic personnel of the Holy See or its Officials residing outside the territory of Vatican City State’.⁴⁵ Second, as to the Holy See’s personality qua Church, it submits that this enjoys church autonomy defined as ‘the exclusive power of faith communities to organize and govern their internal affairs’.⁴⁶ Overall, the Holy See’s submission in response to the 2014 Concluding Observations provide the most vivid illustration of the legal consequences which the acceptance of the dual personality scenario entails: enabling the actor to shift its personalities to enjoy state privileges, yet denying its obligations, and permitting it to invoke at the same time rights qua state and non-state entity.

Had the treaty body chosen to regard the Holy See-Vatican as a construct, with one single international personality—the variant, which despite the Holy See’s insistence to the contrary, is the only one consistent with international law and supported by state practice—the

⁴⁰ Ibid., p. 104. Other clauses with explicit extraterritorial effect are CRC, arts. 7.2, 11.2, 17.b, 21.e, 22.2, 23.4, 24.4, 27.4, 28.3, 34 and 35.

⁴¹ CRC, article 34.

⁴² CRC/C/VAT/CO/2, para. 30.

⁴³ The Committee added another layer of confusion by calling on the Holy See to exercise its ‘moral authority’ and ‘moral leadership’. CRC/C/VAT/CO/2, para. 26 and CRC/C/OPSC/VAT/CO/1, paras. 16 and 21. While certainly the Holy See may well possess such moral powers, the terms are unfortunate in the context of a review process of *legal* obligations, not least because in the past the Holy See had claimed to incur solely ‘moral’ obligations under the CRC. See *supra* note 15. Ironically, in its response to the Concluding observations, the Holy See did not hesitate to call the Committee out on this point. Comments, 2014, para. 6, footnote 9.

⁴⁴ Comments, 2014, paras. 3 and 10.

⁴⁵ Ibid., para. 3.

⁴⁶ Ibid., para. 8. See also para 18.

possibility for the actor to elude state obligations, while claiming state privileges *and* church autonomy would simply not exist.

What is certain is that extraterritoriality does not mean that the Holy See, in becoming party to the Convention, has ratified a treaty ‘*on behalf of every Catholic in the world*’ and that it has ‘obligations to “implement” the Convention within the territories of other States Parties *on behalf of Catholics*, no matter how they are organized.’⁴⁷ Such an understanding seems to implicate the absurd outcome that if a Catholic anywhere in the world should suffer any sort of harm, the Holy See would by a mysterious linkage incur responsibility for such harm. These propositions are misinterpretations of extraterritoriality—on this author’s reading, the Concluding Observations do not advance such an understanding of extraterritoriality.

On the other hand, picture the following hypothetical. Through a letter of the Apostolic Nuncio in Ireland, the Holy See’s Congregation for the Clergy informs the Irish Bishops that the procedures and dispositions which they had established in response to clerical child sexual abuse do not conform to canonical norms—as they should. The Congregation emphasizes that ‘in particular, the situation of “mandatory reporting” [to civil authorities] gives rise to serious reservations of both a moral and a canonical nature’⁴⁸. It proceeds by directing the nuncio ‘to inform the individual Bishops of Ireland [. . .] that in the sad cases of accusations of sexual abuse by clerics, the procedures established by the Code of Canon Law must be meticulously followed under pain of invalidity of the acts involved if the priest so punished were to make hierarchical recourse against his Bishop’.⁴⁹ If as a result, the bishops feel compelled or even only encouraged not to cooperate with Irish authorities, then we would move away from the register of the absurd, towards that of extraterritoriality. Evidence demonstrates that the above is not within the realm of the hypothetical, but has in fact occurred.⁵⁰

In this context, the Holy See acts are acts of authority with an extraterritorial effect which resulted in the Irish bishops’ non-reporting of cases of clerical child sexual abuse. This is in stark disaccord with the Holy See’s obligation under the CRC, article 34, taken together with article 19 and article 3 on the child’s best interests. These acts may have also interfered with Ireland’s obligations to comply with the said provisions of the Convention. Ironically thus, whereas the Holy See considers extraterritorial human rights obligations to be in contradiction to the principle of non-interference in the internal affairs of third states,⁵¹ the extraterritorial effect of its actions, in this context, apparently amounted to interference. As Marco Milanovic put it, ‘[t]he bottom line of the Committee’s approach is that if, for instance, there are reports of sexual abuse of children by Catholic clergy in Ireland, both Ireland and the Holy See have a positive obligation to protect and ensure the human rights of these children’.⁵² Such an approach is largely consistent with the European Court of Human Rights’ (ECtHR) judgment in *O’Keefe v. Ireland*.⁵³

⁴⁷ *Ibid.*, para. 10.c. [Emphasis added].

⁴⁸ See Apostolic Nunciature in Ireland, N. 808/97, Strictly Confidential, Dublin, 31 January 1997, accessed January 2012, <http://graphics8.nytimes.com/packages/pdf/world/Ireland-Catholic-Abuse.pdf>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*; Commission of Investigation, Report into the Catholic Diocese of Cloyne, December 2010, accessed March 2012, <http://www.dacoi.ie/>, especially paras. 1.18 and 1.76.

⁵¹ Comments, 2014, para. 3.

⁵² M. Milanovic, ‘CRC Concluding Observations on the Holy See’, *EJILTalk!*, 5 February 2014, <http://www.ejiltalk.org/crc-concluding-observations-on-the-holy-see/>; CRC/C/VAT/CO/2, paras. 37-38, 43-44.

⁵³ *Ibid.*, *O’Keefe v. Ireland*, Application no. 35810/09, Judgment of 28 January 2014. Ireland was found in violation of its obligation to prevent ill-treatment of children because it continued to entrust the management of the primary education to National Schools (privately run by Catholic clerics) without establishing an effective mechanism of state control over them.

D On Norms and Institutions

It flows from the reading of the 2014 Concluding Observations, together with provisions of General Comment 14, that the child's best interests should be employed by the Holy See as a fundamental legal principle and a rule of procedure in decision-making related to clerical child sexual abuse even when, or in particularly when, such abuse occurs extraterritorially. Such conclusion has important implications for prevention, identification, reporting, referral, investigation, treatment and follow-up of clerical child sexual abuse victims.

Passages in the Concluding Observations, as well as reports produced at domestic level by commissions of inquiries portray a damning picture of the Holy See's handling of past clerical child sexual abuse and specifically the failure to accord primacy to the child's best interests. It remains to be seen whether and to what extent the Holy See-Vatican's normative and institutional changes incorporate article 3 requirements, and other relevant provisions of the CRC and OPAC.

The Holy See's norms and procedures aimed at addressing clerical child sexual abuse are contained in the *Normae de gravioribus delictis* approved by Pope Benedict XVI on 21 May 2010, and canons 1717–1719 of the Code of Canon Law of 1983.⁵⁴ Under the current *Normae*, bishops or major superiors are responsible for dealing with cases of sexual abuse of minors. If an accusation 'has the semblance of truth', they must carry out a preliminary investigation in accordance with canon 1717 and communicate the outcome to the Congregation for the Doctrine of the Faith (CDF). As the Supreme Apostolic Tribunal for 'delicts' of child sexual abuse by clerics, the CDF will then direct the bishops how to proceed. Alternatively, the case may be referred directly to the CDF, which will itself undertake the preliminary investigation.⁵⁵

Two aspects deserve emphasis at this stage. First, the aim of these norms and procedures should not be confused with the purpose of criminal law proper; under the *Normae*, the maximum penalty which a cleric who was found guilty of abusing a minor can incur is dismissal from the clergy.⁵⁶ As the Holy See itself clarifies, these norms and procedures are not designed to replace criminal investigations of local authorities wherever such clerical abuse occurs.⁵⁷ However, the procedure in the *Normae* may prove to be a formidable obstacle to attempts of local authorities to investigate clerical sexual abuse—investigations which should be seen as a minimum threshold in ensuring a child's best interests in such contexts. Article 30 of the *Normae* suggests that as soon as a bishop starts his preliminary investigation into an allegation of sexual abuse he would be bound by pontifical secret and would therefore be prevented from informing civil authorities.⁵⁸ A CDF Circular Letter sought to assist

⁵⁴ The *Normae* amend the 2001 issued Norms of the *Motu Proprio Sacramentorum sanctitatis tutela*. See *Normae de gravioribus delictis* (2010), http://www.vatican.va/resources/index_en.htm (Hereafter, *Normae*); J. P. Beal, 'The 1962 Instruction *Crimen sollicitationis*: Caught Red-handed or Handed a Red Herring?', 41 *Studia Canonica* (2007) 199–236, at 199–201.

⁵⁵ See *Normae*, arts. 1, 16 and 17; Congregation for the Doctrine of the Faith, *Circular Letter to Assist Episcopal Conference in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics*, Rome, 3 May 2011, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html. (Hereafter, Circular Letter).

⁵⁶ Circular Letter, para. II.

⁵⁷ Comments, 2014, para. 9.d.

⁵⁸ *Normae*, art. 30. See also G. Robertson, *The Case of the Pope: Vatican Accountability for Human Rights Abuse*, (London: Penguin Books, 2010), pp. 57–62, 116.

bishops in developing guidelines for dealing with cases of child sexual abuse seems to relativise this provision; nonetheless, it explicitly maintains that information obtained during confession is not to be reported to local authorities.⁵⁹

The absurdity of the situation is fully revealed when one considers that as a result of the current *Normae*, the Holy See's authorities seeking to implement new penal legislation in the Vatican territory may be hampered in doing so. In 2013, Pope Francis adopted supplementary norms on criminal matters and amendments to the criminal code and criminal procedure at the Vatican. Crimes against children (sale of children, child prostitution, child pornography, sexual violence against children, sexual acts with children) were entrusted to the competent judicial authorities of the Vatican City State whereby their penal jurisdiction was to be exercised when these crimes were committed by persons deemed 'public officials'—including those working within the Roman Curia and related institutions, and diplomatic personnel serving worldwide.⁶⁰ Would a priest at the Vatican hearing confession from a Vatican public official as to its role in child sexual be able to share this information with Vatican judicial authorities? The answer is at best unclear, at worse negative.

The above-mentioned legislative additions and amendments are of crucial importance.⁶¹ Yet, a proper understanding of the Holy See's obligations under the CRC and OPSC, and an acknowledgment of the extraterritorial reach of the instruments' provisions, would require amendments to canon law whereby a procedure of mandatory reporting to local authorities is introduced to replace the current qualifications in article 30 of the *Normae* including in respect to confessional secret.

Second, and central to this chapter, is the absence of any express reference to the best interests of the child in canon law norms on addressing child sexual abuse. This is an area where article 3 of the CRC is not only applicable, but its extraterritorial application, as noted above, is paramount. Interestingly, the Pontifical Commission for the Protection of Minors established by Pope Francis in December 2013, appears to embrace extraterritoriality in as far as its mission is to 'study present programmes in place for the protection of children' and to 'formulate suggestions for new initiatives on the part of the Curia, in collaboration with bishops, Episcopal conferences, religious superiors and conferences of religious superiors.'⁶² The mandate of the Commission does not explicitly adopt a child rights perspective, nor does it expressly stipulate the child's best interests as a primary consideration. It does include former child sexual abuse victims, but no children are part of the Commission. However, on this author's reading of the Commission's public declarations it is the child's best interests, rather than the Church's reputation, which appear to implicitly guide its work. To clarify matters and focus its work, the adoption of an explicit child rights and best interests approach would be invaluable in view of the Commission's role as guidance hub to bishops across the world on procedures for protecting children.

E Conclusion

This chapter has shown that the Holy See incurs legal obligations under the CRC and that the

⁵⁹ Circular Letter, para. I.e.

⁶⁰ Vatican City State Law No. VIII of 11 July 2013; Vatican City State Law No. IX of 11 July 2013; Apostolic Letter Issued *Motu Proprio* of the Supreme Pontiff Francis on the Jurisdiction of the Judicial Authorities of the Vatican City State in Criminal Matters, September 2013.

⁶¹ They are indeed giving effect to provisions of the OPSC and OPAC.

⁶² Briefing on the Meeting of the Council of Cardinals, 5 December 2013, http://www.vatican.va/resources/resources_briefing-consiglio-cardinali_20131205_en.html.

treaty body monitoring these obligations emphasizes the crucial importance of their extraterritorial reach. Having reviewed the Holy See's Comments on the 2014 Concluding Observations, on the one hand, and recent legislative additions at the Vatican and the work of the new Pontifical Commission, on the other, what appears most striking is their dissonance. The former are characterized by obstinacy in their rejection of extraterritorial obligations under the CRC, obstinacy which in turn can be explained by the enarmoration with the Holy See's dual personality scenario. Yet, Pope Francis' new legislative and institutional additions, present a promise to translate into practice child rights obligations extraterritorially. In Pope Francis' words: 'I believe that the Commission can be a new, important and effective means for helping me to encourage and advance the commitment of the Church at every level – Episcopal Conferences, Dioceses, Institutes of Consecrated Life and Societies of Apostolic Life, and others – to take whatever steps are necessary to ensure the protection of minors and vulnerable adults, and to respond to their needs with fairness and mercy.'⁶³

In the end, complexity stemming from the above-observed dissonance, characterizes the answer which we can provide to the two initial questions of this study: Should the Holy See consider a child's best interests in its rules and actions? They should and they say they should not. And do they consider the child's best interests? They did not and there is some (institutional and legislative) hope that they will, even if not necessarily as an expression of the acknowledgment of legal obligations with extraterritorial reach.

⁶³ Letter of His Holiness Pope Francis to the Presidents of the Episcopal Conferences and Superiors of Institutes of Consecrated Life and Societies of Apostolic Life concerning the Pontifical Commission for the Protection of Minors, 2 February 2015, https://w2.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150202_lettera-pontificia-commissione-tutela-minori.html