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**The Holy See: Sovereign Power internationally recognised.  
Does the authority the Holy See exercises within the  
International Community go along with a responsibility  
for Human Rights violations?**

Author **Nathalie Leyns**

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THE HOLY SEE: SOVEREIGN POWER INTERNATIONALLY  
RECOGNISED. DOES THE AUTHORITY THE HOLY SEE  
EXERCISES WITHIN THE INTERNATIONAL COMMUNITY  
GO ALONG WITH A RESPONSIBILITY FOR HUMAN  
RIGHTS VIOLATIONS?

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CAT	Committee against Torture
CDF	Congregation for the Doctrine of the Faith
CERD	Committee on the Elimination of Racial Discrimination
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
FSIA	Foreign Sovereign Immunities Act
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
IHEU	International Humanist and Ethical Union
ILC	International Law Commission
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	United Nations Convention on the Rights of the Child
UNHRC	United Nations Human Rights Committee
US	United States
VCLT	Vienna Convention on the Law of Treaty

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## INTRODUCTION

The purpose of this thesis is to consider the relationship between the Holy See and international human rights law from the perspective of responsibility for human rights violations. In order to assess whether the Holy See could face such liability, this thesis is divided into three main parts. First, Chapter 1 has the purpose to explain what the Holy See and the Vatican City are under international law, their difference and the specificity of their status. The first part discusses from a general perspective the main reasons for the creation of the Vatican City State. Then, after a brief consideration for the generally accepted statehood criteria, the chapter also considers whether, under international law, it is the Holy See as such that is active within the international community of states or whether it is the State of the Vatican City instead. This will lead to the analysis of the special link between the Holy See and the State of the Vatican City, especially the exercise of sovereign authority through the establishment of diplomatic relations, the signature of concordats with foreign countries and even the ratification of human rights international treaties.

Secondly, Chapter 2 examines in more detail the connection between the Holy See and the United Nations Convention on the Rights of the Child, which the Holy See ratified. Thus, it is relevant to look at the obligations imposed to all states party as well as the effectiveness of the implementation mechanisms established to ensure the protection of the rights recognised to children. The objective of the chapter is, through the examination of the Convention as a case study, to show that the Holy See as a state party has the obligation to respect and implement the rights and freedoms protected under the Convention in an efficient way. So, it is directly liable for any violation of human rights and principles recognised under the Convention. The first and second sections consist of a brief explanation of the status of the Holy See within the United Nations and the type of implementation

mechanisms created by the United Nations treaties. The third section focuses on the Holy See's obligations under the Convention on the Rights of the Child. After considering the question of the Holy See's «jurisdiction» under the Convention, and because the religious mission of the Holy See influences its relation to the Convention, the section analyses the type of reservations made by the Holy See. Then, the third part discusses the problems the state reporting mechanism, established under the competence of the Committee on the Rights of the Child, meets in the realisation of its work. Finally, the chapter ends by an analysis of the possible allegations to bring against the Holy See as regards the issue of clerical sexual abuses as well as its modification of Canon Law in this matter. This last part introduces the question considered in Chapter 4 of the possible judicial consequences for the Holy See as regards sexual abuses committed by priests in the United States.

The third part is comprised of Chapters 3 and 4, which discuss from another perspective the issue of the responsibility of the Holy See regarding alleged violations of certain human rights principles. First, Chapter 3 concentrates on the analysis of some decisions of the European Court of Human Rights and their impact on the Holy See. Under the European Convention on Human Rights, states party have the duty to ensure the protection of these rights and freedoms. The first question considered is whether states, when delegating some competence to other private or public institutions, are still liable for any human rights violations that would emerge from a decision or action of the institutions concerned. Then, the chapter concentrates on certain cases brought before the European Court, involving such delegation of power or privileges recognised to religious communities. Due to the profusion of cases involving religious communities, such as the Holy See but also other churches, a selection has been made, so that the cases that are analysed concern the protection of the right to a fair trial, the right to respect for private and family life as well as the right to freedom of thought, conscience and religion. The five cases examined in this chapter illustrate different type of relations existing between individuals, member states and the church. The two first cases, which occurred in Italy, consider the special relationship the Italian Republic built with the Holy See through the signature of a concordat. While this agreement recognised the authority of certain ecclesiastical courts of the Holy See, individuals are still entitled to benefit from the protection of their rights recognised under the European Convention. Thus, the issue is whether the European Court can shape church-state relationship through the protection of certain fundamental rights and free-

doms. However, the three last cases, all involving Germany, discuss the particular situation where lay people decide to engage in an employment relationship with a religious community. The question then is how far can churches go, as employers, in the establishment of obligations for their employees to respect, within the employment contract. It is important to point out that the circumstances analysed under this chapter involve lay people in relation to the church. The situation of ministers of the cult, such as priests, is examined in the next chapter.

Finally, Chapter 4 reflects on one recent case that occurred in the United States of America where a judicial complaint was lodged before the District Court of Oregon against the Holy See in order to hold it liable for sexual abuses committed by priests. The Holy See's responsibility discussed in this chapter differs from the previous analysis. First, because the United States judicial system is very different from the one of the European Court, it is necessary to examine the decisions the courts have already taken and their consequences. Secondly, the issue is not any more focused on the protection of employees from the church employer's violations of human rights, but looks at the possibility to consider that the Holy See is the priests' employer under state law, which would allow the courts to declare its liability for the delicts committed by its employees while acting within the scope of employment. Thirdly, because the issue is strongly connected to state employment legislation, the next question to discuss is whether the decisions taken by the Oregon courts could be equally applied in all situations involving priest abusers.

## CHAPTER 1

### THE DIPLOMATIC RECOGNITION OF THE HOLY SEE AND THE VATICAN CITY STATE

For the purpose of this thesis, it is essential to recall the differences between the Vatican City and the Holy See. Thus, the aim of this first chapter is to look at the unique status the international community of states granted the Holy See and its consequences for the Vatican City State in the exercise of foreign policy. This will allow the further examination of the possible legal ways to hold the Holy See responsible for its policy in matters related to human rights.

#### 1.1. THE CREATION OF THE STATE OF THE VATICAN CITY AND THE INTERNATIONAL STATUS OF THE HOLY SEE

While the Vatican City is a state created by the Lateran Treaty, signed on 11 February 1929 and ratified on 7 June 1929 between the Holy See and Italy<sup>1</sup>, and recognised by the international community, the Holy See is the ecclesiastical sovereign government of the Roman Catholic Church, which has «full ownership, exclusive and absolute dominion and sovereign jurisdiction over the Vatican City<sup>2</sup>.»

Having a look at the role the Holy See played throughout history, since the Roman Period and Emperor Constantine's declaration that the Roman Empire was Christian, to the current diplomatic relations the Holy See entertains with 178 countries around the world<sup>3</sup>, including the United States and some Muslim countries, it is fair to say that the

<sup>1</sup> Panara, 2011, p. 78.

<sup>2</sup> Preamble of the Lateran Treaty, *Treaty between the Holy See and Italy*, 11 February 1929, at <http://vaticanstate.va/NR/rdonlyres/3F574885-EAD5-47E9-A547-C37117005E861/2528/LateranTreaty.pdf> (consulted on 25 February 2011); Duursma, 1994, p. 426; Neu, 2010, p. 1510.

<sup>3</sup> Holy See, *Bilateral Relations of the Holy See*, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/documents/rc\\_seg-st\\_20010123\\_holy-see-relations\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html) (consulted on 15 March 2011).

Holy See was recognised as a legal person under international law long before the signature of the Lateran Treaty<sup>4</sup>. Through the negotiation and signature of the Treaty that created the State of the Vatican City, the Holy See as a sovereign power has been allowed to exercise its capacity to act internationally<sup>5</sup>.

Originally, the State of the Vatican City has been created to ensure freedom and sovereignty to the Holy See, as well as to provide it with a territorial identity in order to secure a temporal power to the Holy See. The objective was to guarantee the Holy See an independence from any states and facilitate its religious task in the world<sup>6</sup>. As Pope Pius XII has declared it: «in spiritual order it [the Vatican City] is a symbol of great value and of universal extension, for it is the guarantee of the absolute independence of the Holy See in accomplishment of its world mission [...]»<sup>7</sup>. Therefore, the existence of the Holy See and the Vatican City are closely and indissolubly connected. This is expressed by the Lateran Treaty itself, as in addition to the recognition of the Holy See's superiority over the Vatican City State within the Preamble, Article 3 also states that the Holy See has full property rights and sovereign jurisdiction on the territory of the Vatican City State<sup>8</sup>.

Even though the Holy See was already granted a special international recognition by foreign countries, the creation of the State of the Vatican City was necessary to formally guarantee it enough independence<sup>9</sup>. This superiority of the Holy See over the Vatican City State was then implicitly adopted by the international community of states, which allowed the Holy See to replace the Vatican City in international conferences and organisations<sup>10</sup>.

The Holy See's international personality stems mainly from other states' acceptance that the Roman Catholic Church is an important actor for millions of people around the world<sup>11</sup>. This spiritual sover-

<sup>4</sup> Dias, 2001, p. 111; Walter, 2007, paras. 2 and 7.

<sup>5</sup> Cardinale, 1976, p. 83; Westdickenberg, 2006, para. 2; Bathon, 2001, p. 604; Araujo & Lucal, 2004-2005, pp. 311-320.

<sup>6</sup> Duursma, 1994, p. 414.

<sup>7</sup> Address to the Diplomatic Corp accredited to the Holy See on December 29, 1929; Cardinale, 1976, p. 101; Murphy, 1987, p. 375.

<sup>8</sup> Treaty of Conciliation of the Lateran Pacts, 11 February 1929, Article 3: «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.» at <http://www.vaticanstate.va/NR/rdonlyres/3F574885-EAD5-47E9-A547-C3717005E861/2528/LateranTreaty.pdf> (consulted on 25 February 2011).

<sup>9</sup> See D'Onorio, 1997, pp. 497-502; Brun, 1964, pp. 536-542.

<sup>10</sup> Duursma, 1994, p. 462.

<sup>11</sup> Acquaviva, 2005, p. 354; Molen, 1984, p. 201.

eignty and influence of the Holy See is the reason for the international sovereignty that has been recognised to the Pope and the Holy See. Thus, the Holy See has benefited from a diplomatic recognition in many countries, such as the United States of America when on 10 January 1984, the White House and the Vatican announced the establishment of full diplomatic relations at the ambassadorial level, in which it was made very clear that «the diplomatic relations were being made with the Holy See and not with the State of the Vatican City<sup>12</sup>.»

Therefore, the Holy See has a very special and unique status under international law, which is expressed in many different ways. The international community has accepted its power to establish diplomatic relations, to sign concordats, to ratify treaties as equal with states party and to be of a great influence when it comes to political decisions<sup>13</sup>. Moreover, the Holy See characterises itself as a sovereign subject of international law with a specific nature that is «essentially of a universal religious and moral character.» Its jurisdiction over the territory of the Vatican City State contributes to its autonomy, «guarantees the free exercise of its spiritual mission» and encourages its presence in many international organisations as well as its accession to international conventions<sup>14</sup>.

## 1.2. THE RECOGNITION OF THE VATICAN CITY AS A STATE AND THE HOLY SEE'S SOVEREIGN AUTHORITY

### 1.2.1. *The Population and Territory of the Vatican City*

In addition to the creation of the Vatican City State by the Lateran Treaty, Article 1 of the Montevideo Convention on the Rights and Duties of a State establishes four elements required for a state to have an international personality. These elements are the following: «A permanent population, a defined territory, a government and the capacity to enter into relations with the other states<sup>15</sup>.»

Therefore, with its 44 hectares, the State of the Vatican City is the

<sup>12</sup> Coriden, 1988, p. 490; Coriden, 1987, p. 362; see also Araujo & Lucal, 2004-2005, pp. 320-327.

<sup>13</sup> See Araujo, 2001, p. 337.

<sup>14</sup> United Nations Committee on the Rights of the Child, *UN Committee on the Rights of the Child: State Party Report: Holy See*, 28 March 1994, CRC/C/3/Add.27, para. 1, at <http://www.unhcr.org/refworld/docid/3ae6af7f4.html> (consulted on 25 May 2011).

<sup>15</sup> Montevideo Convention on the Rights and Duties of a State, 26 December 1933, Article 1, at <http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml> (consulted on 7 March 2011).

smallest territorial entity claiming statehood, even though the Lateran Treaty granted the Holy See complete ownership as well as exclusive and absolute power and sovereign jurisdiction over all the Vatican territory, in order to guarantee it an indisputable sovereignty in the international field<sup>16</sup>.

The population of the Vatican City is about 800 people and not all of them have Vatican citizenship<sup>17</sup>. As there is no concept of nationality under Vatican constitutional law, citizenship is based on the *ius officii*, i.e. the connection that binds an individual to a given legal society «by virtue of the community of origin and tradition<sup>18</sup>.»

Some authors deny the fact that the Vatican City complies with all of these criteria, particularly because of the absence of a Vatican nationality, its establishment in the service of the Holy See and its economic dependence on the Italian Republic<sup>19</sup>. However, in addition to the Vatican City State's membership to international organisations such as the Universal Postal Union, the International Telecommunication Union and the International Wheat Council, foreign countries sharing diplomatic relations with the Holy See never objected the legal personality of the Vatican City State<sup>20</sup>. This may be considered as recognition of the Vatican's statehood<sup>21</sup>. Besides, international law does not require a minimum number of inhabitants nor a minimal amount of territory to constitute a state<sup>22</sup>.

### *1.2.2. The Government of the Vatican City and the Capacity of the Holy See to Engage in International Relations*

According to the Code of Canon Law, the Holy See refers to the Sovereign Pontiff and the Roman Curia<sup>23</sup>, which is the governing body of the Holy See and consists of the Secretary of State, the Council for Public Ecclesiastical Affairs, the Sacred Congregations, the ecclesiastical tribunals and other institutions<sup>24</sup>. Thus, the Holy See, which is neither a

<sup>16</sup> Cardinale, 1976, pp. 105-106; Duursma, 1994, p. 413.

<sup>17</sup> Westdickenberg, 2006, para. 5; D'Onorio, 1997, p. 505.

<sup>18</sup> Dias, 2001, p. 125.

<sup>19</sup> See Abdullah, 1996, pp. 1860-1868; the Lateran Agreements ensure that the Vatican City is adequately served by water, telephone and postal service.; see also Acquaviva, 2005, pp. 355-356 *contra* Dias, 2001, pp. 124-128.

<sup>20</sup> Candrian, 2007, p. 1060; Brun, 1964, pp. 540-541.

<sup>21</sup> Duursma, 1994, p. 457.

<sup>22</sup> *Ibidem*, p. 489.

<sup>23</sup> Code of Canon Law, 1983, Canon 361, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 23 February 2011); Dias, 2001, pp. 110-111.

<sup>24</sup> Code of Canon Law, 1983, Canon 360, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 23 February 2011); Siat, 2011, V-7.

state nor a territorial entity, partly coincides with certain Vatican temporal governmental institutions that operate from inside the Vatican City<sup>25</sup>.

The Pope, Sovereign Pontiff, is both the ruler of the Vatican City where he gathers in his hands full legislative, executive and judicial powers, and the head of the Roman Catholic Church where He is the supreme leader in religious, administrative, diplomatic and political affairs<sup>26</sup>. Therefore, the Pope can act on the basis of both the spiritual sovereignty of the church and its temporal power recovered after the ratification of the Lateran Treaty. He has the right to represent the State of the Vatican City and the Holy See with foreign powers, to engage in treaty making, to establish diplomatic relations and to maintain external relations<sup>27</sup>. In these tasks, he is assisted by the Secretary of State, who is a cardinal appointed by the Pope that has both external and internal tasks and exercises the political and diplomatic functions of the Vatican City and the Holy See<sup>28</sup>. Thus, as regards the signature of treaties with foreign countries, it is usually the Secretary of State who signs the treaties, which are afterwards ratified by the Pope<sup>29</sup>.

It is important to clarify that, since both the Vatican City State and the Holy See are entities under the sovereignty of the same ruler, namely the Pope, who is helped in his functions by the Cardinal Secretary of State, the same papal representative accomplishes its tasks in relation to the one and the other. Thus, «there are not two different Diplomatic Corps accredited by or to the Pope, one for the Vatican City State and the other for the Holy See<sup>30</sup>.» Because of the general principle that the State of the Vatican City depends on the existence of the Holy See, the latter, through the authority of the Pope in cooperation with the Secretary of State, may take international actions either in its own name or in the name of the Vatican City<sup>31</sup>.

As the Holy See is entitled to take international engagements on behalf of the Vatican City, and due to the fact that they are two separate entities, when a treaty is ratified by the Pope in the name of the Holy See, the Vatican City's temporal government is not bound by it and does not have to implement the treaty within the jurisdiction of its territory.

<sup>25</sup> Duursma, 1994, p. 459.

<sup>26</sup> Fundamental Law of the Vatican City State, 22 February 2001, Article 1, para. 1, at [http://www.vatican.va/vatican\\_city\\_state/legislation/documents/scv\\_doc\\_20001126\\_legge-fondamentale-scv\\_it.html](http://www.vatican.va/vatican_city_state/legislation/documents/scv_doc_20001126_legge-fondamentale-scv_it.html) (consulted on 20 February 2011).

<sup>27</sup> D'Onorio, 1997, p. 511.

<sup>28</sup> Dias, 2001, p. 127; Candrian, 2007, p. 1060.

<sup>29</sup> Duursma, 1994, p. 417.

<sup>30</sup> Cardinale, 1976, p. 123; Bettwy, 1984, pp. 232-233, at <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/cathl29&div=28&id=&page=> (consulted on 19 June 2011).

<sup>31</sup> Duursma, 1994, pp. 417, 426; Dias, 2001, p. 128.



On the other hand, when the treaty is ratified on behalf of the Vatican City, it will then be applicable within the territory of the State. As a consequence, the actions of the Holy See might produce effects in the territory of the Vatican City<sup>32</sup>.

### 1.3. THE FOREIGN POLICY OF THE HOLY SEE

It follows from what has been stated previously that both the Vatican City and the Holy See are international subjects, of which the former has been created for the better running of the latter and which are at the same time distinct and united in the person of the Pope<sup>33</sup>. In addition to this distinction, it is also possible to separate the Roman Catholic Church from the Holy See, as the latter is the supreme organ of the government of the church<sup>34</sup>. However, I will not enter the details of this debate. For the purpose of this thesis, it is more interesting to focus on the close interaction between the Holy See and the State of the Vatican City.

As regards human rights issues and treaties, the Vatican City does not intervene in the international community. Although the Holy See is not a state regarding to the criteria of the Montevideo Convention, it surely has an international legal personality. This allows it to send delegations, to maintain diplomatic relations, to participate to the work of many international organisations as well as to conclude international treaties, sometimes on behalf of the Vatican City<sup>35</sup>, and concordats with foreign countries<sup>36</sup>.

However, because of the spiritual mission of the Holy See and the recognition of the distinct international legal personality of the Vatican City State through the Lateran Treaty, the question of the definitive legal personality of the Holy See remains troubled<sup>37</sup>. As the head of the

<sup>32</sup> Duursma, 1994, p. 425.

<sup>33</sup> Dias, 2001, p. 107; Candrian, 2007, p. 1060.

<sup>34</sup> See Dias, 2001, pp. 108-115; Cardinale, 1976, p. 85: «The Holy See is to the church what the government is to the state.»

<sup>35</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, at [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSO&tabid=3&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSO&tabid=3&mtdsg_no=IV-9&chapter=4&lang=en) (consulted on 7 April 2011); Cardinale, 1976, p. 265; Duursma, 1994, p. 444.

<sup>36</sup> Council of Europe, Parliamentary Assembly, Committee on Culture, Science and Education, Report, *State, Religion, Secularity and Human Rights*, 8 June 2007, Doc. 11298, para. 28, at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11298.htm> (consulted on 7 June 2011); see also Holy See, *Le Saint-Siège et les Organisations Internationales*, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/org-intern/documents/rc\\_segstat\\_20100706\\_org-internaz-2009\\_fr.html](http://www.vatican.va/roman_curia/secretariat_state/org-intern/documents/rc_segstat_20100706_org-internaz-2009_fr.html) (consulted on 14 April 2011); Bathon, 2001, p. 615.

<sup>37</sup> See Cardinale, 1976, pp. 319-340, Appendix 2, *Complete Text of Agreements Between the Holy See and Italy*; Westdickenberg, 2006, para. 3.

Roman Catholic Church, it differs from other states. The goals pursued by the Holy See are mostly of a spiritual order, while states' interests are of temporal order<sup>38</sup>. Its sovereignty is exercised over the entire community of believers, which implies that all international treaties ratified and concordats signed by the Holy See not only bind the Holy See as well as all the Catholic institutions under its authority but also influence all the people belonging to the Catholic community around the world<sup>39</sup>.

The main objective of the Holy See's policy is based on the defence of Roman Catholic values and the doctrine of divine law established by God. This law consists of both natural divine law, which tells what is «just» according to natural values, and positive law, which is the law originated by the institutions of the Holy See<sup>40</sup>. Under Catholic doctrine, the divine law is to be considered as supreme, thus allowing the Holy See to refuse to respect international or national rules if they are in conflict with a divine norm<sup>41</sup>. On the other hand, as international law is superior to national legislation, a general principle is that states do not have the possibility to invoke the latter in order to avoid their obligations under international law<sup>42</sup>.

This particularity of the Catholic doctrine has also led the Holy See to make reservations to the United Nations Treaties it ratified in order to protect the supremacy of divine rules. However, a general rule under international and European law is the invalidity of reservations that are of a general character or vague and which do not specify the provisions of the treaty or convention affected<sup>43</sup>. The European Court of Human Rights (ECtHR) has declared reservations as invalid when they were «couched in terms that are too vague or broad for it to be possible to determine the exact meaning and scope<sup>44</sup>» or when they «do not specify the relevant provisions of the national law or fail to indicate the Convention articles that might be affected by the application of those

<sup>38</sup> Cardinale, 1976, p. 39.

<sup>39</sup> *Ibidem*.

<sup>40</sup> Duursma, 1994, p. 427; Skubiszewski, 2007, p. 500.

<sup>41</sup> See *infra* Chapter 2.3.1; Code of Canon Law, 1983, Canon 22, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 23 February 2011).

<sup>42</sup> See Vienna Convention on the Law of Treaties, Article 27, at <http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=UNTS&no=XXIII-1&chapter=23&Temp=mt&lang=en> (consulted on 14 May 2011); Polakiewicz, 2001 (a), p. 32; Cameron, 2011, p. 30.

<sup>43</sup> European Convention on Human Rights and Fundamental Freedoms, Article 57, at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (consulted on 5 March 2011); Harris, O'Boyle & Warbrick, 2009, p. 22; see *infra* Chapter 2.3.1.

<sup>44</sup> *Belilos v. Switzerland*, ECtHR, Application No. 10328/83, 29 April 1988, para. 55, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BELILOS&sessionid=73348519&skin=hudoc-en> (consulted on 7 April 2011).

provisions<sup>45</sup>.» The United Nations (UN) system regarding the validity of treaty reservations is very similar, as will be discussed later<sup>46</sup>.

The Holy See is also characterised by its neutral status, as defined under Article 24 of the Lateran Treaty. This implies that it should remain external to temporal disputes between states or international discussions, except when it comes to peace missions or when particular circumstances of a situation call for the moral and spiritual authority of the Holy See<sup>47</sup>. Among other reasons, this is one obstacle that prevents the Holy See to become a full member of the UN<sup>48</sup>.

<sup>45</sup> Harris, O'Boyle & Warbrick, 2009, p. 22.

<sup>46</sup> See *infra* Chapter 2.3.1.

<sup>47</sup> Cardinale, 1976, p. 127.

<sup>48</sup> See *infra* Chapter 2.1.

## CHAPTER 2

### INTERNATIONAL HUMAN RIGHTS LAW AND THE POSSIBLE DIRECT RESPONSIBILITY OF THE HOLY SEE

In the previous chapter, we have seen that, although the Holy See is not a state, the international community has recognised its legal personality and sovereignty long before the official creation of the Vatican City under the Lateran Treaty, mainly because of the importance of its spiritual mission for millions of believers worldwide. This unique status allows the Holy See to develop its foreign policy through the establishment of diplomatic relations, signature of concordats or agreements and participation to the work of several intergovernmental organisations.

The issue now is whether the Holy See can be held responsible for its policy in matters related to human rights. The first part of the chapter briefly introduces the status of the Holy See within the UN. Then, it considers the UN conventions on human rights the Holy See has ratified or accepted and their implementation mechanisms, which role is to verify that states party are compelling with their obligations. The main question that arises is then to know if these mechanisms allow in any way to hold the Holy See and other states party directly responsible in case a violation of the Convention is committed, and force them to respect human rights principles as protected under the Convention.

#### 2.1. THE STATUS OF THE HOLY SEE WITHIN THE UNITED NATIONS

During the first years following the creation of the UN and the development of its relations with the Holy See, the latter was often referred to as the Vatican City. This confusion was cleared up when, in a 1957 exchange of letters between the UN Secretary-General and the Secretary of State of the Holy See, it was specified that the Holy See, rather than the Vatican City, would maintain relations with the UN<sup>49</sup>.

<sup>49</sup> Bathon, 2001, p. 605; Cardinale, 1976, p. 257; Holy See, *Address of His Holiness John*

Then, on 6 April 1964, the Holy See was granted the status of Non-Member State Permanent Observer to the UN<sup>50</sup>. Since then, it has been invited to all the sessions of the General Assembly, but does not have the right to vote<sup>51</sup>. However, as a non-member state, the Holy See is also allowed to attend and participate to the meetings and conferences almost «on an equal footing with the members.» Thus, it has the power to shape the work of the UN as well as the outcome of the conferences<sup>52</sup>. At UN international conferences, decisions are taken by consensus, which implies that all participating states, including non-member states, must agree to the final document. By relying on consensus rather than upon vote, the participation of the Holy See to the UN conferences offers it the ability to apply international pressure and «veto» to the opinion of the majority of states in order to prevent the formation of consensus<sup>53</sup>.

Within the UN, the Holy See represents the Roman Catholic Church. As it is a religious entity without defined temporal territory, even though it governs the Vatican City, its mission is to promote Catholic doctrine and faith<sup>54</sup>. Thus, due to the specific nature of its spiritual mission, its participation in the UN activities differs from that of the other member states «which are communities in the political and temporal sense<sup>55</sup>.»

*Paul II to the 34th General Assembly of the United Nations*, New York, 2 October 1979, para. 2, at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1979/october/documents/hf\\_jp-ii\\_spe\\_19791002\\_general-assembly-onu\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/october/documents/hf_jp-ii_spe_19791002_general-assembly-onu_en.html) (consulted on 26 February 2011); Holy See, *Pacem in Terris, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity and Liberty*, 11 April 1963, at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html) (consulted on 28 February 2011): where the Pope encouraged the increasingly improving functioning of the UN; Holy See, Première Session du Conseil des Droits de l'Homme, *Discours de Son Excellence Monseigneur Giovanni Lajolo, Secrétaire pour les Relations avec les Etats*, Genève, 20 June 2006, at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/holy\\_sec.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/holy_sec.pdf) (consulted on 15 May 2011): the Holy See sent its first Permanent Observer to the UN headquarters in New York on 21 March 1964, while another Permanent Observer was sent to the Geneva office on 1 February 1967.

<sup>50</sup> UN General Assembly, Resolution 58/314, *Participation of the Holy See in the Work of the United Nations*, 16 July 2004, A/RES/58/314, at <http://www.holyseemission.org/about/participation-of-the-holy-see-in-the-un.aspx> (consulted on 29 May 2011).

<sup>51</sup> *Ibidem*, para. 1.

<sup>52</sup> Abdullah, 1996, p. 1842.

<sup>53</sup> *Ibidem*, pp. 1844-1845, 1852; Bathon, 2001, pp. 607-608: at the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing, the Holy See managed to block consensus and used its influence to object to the language used in matters of abortion, contraception and other issues of reproductive health.

<sup>54</sup> Ruston, 2004, p. 26.

<sup>55</sup> Abdullah, 1996, p. 1869; Westdickenberg, 2006, para. 3; Holy See, *Address of His Holiness John Paul II to the 34th General Assembly of the United Nations*, New York, 2 October 1979, para. 2, at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/speeches/1979/](http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/)

Finally, it is legitimate to wonder whether or not the State of the Vatican City could become a full member of the UN. Among other issues that would block this process, its neutral status established by Article 24 of the Lateran Treaty is incompatible with the responsibilities of state members, as the Holy See would not be able to support the sanctions inflicted by the Security Council<sup>56</sup>. Moreover, because of its religious nature, the Holy See exercises its power over millions of people all around the world, which would theoretically prevent it from adopting a position against another state<sup>57</sup>.

## 2.2. UNITED NATIONS MECHANISMS TO PROMOTE AND PROTECT HUMAN RIGHTS

Under international human rights law, when states become party to a treaty, their sovereignty is limited with respect to human rights standards protected by the international convention<sup>58</sup>. States are put under international scrutiny and become liable for domestic acts affecting human rights. Thus, they carry an obligation to ensure that their national legislation, policies or practices follow the requirements of the treaty and respect human rights principles established under its authority<sup>59</sup>.

Like many other states, the Holy See also expressed its interests in the promotion and protection of human rights and fundamental freedoms under international law<sup>60</sup>. Since the second half of the 20th century, human rights have been given a central place in the church's policy. In

october/documents/hf\_jp-ii\_spe\_19791002\_general-assembly-onu\_en.html (consulted on 26 February 2011).

<sup>56</sup> See Abdullah, 1996, footnote 54.

<sup>57</sup> Lateran Treaty, *Treaty between the Holy See and Italy*, 11 February 1929, Article 24, at <http://www.vaticanstate.va/NR/rdonlyres/3F574885-EAD5-47E9-A547-C3717005E861/2528/LateranTreaty.pdf> (consulted on 25 February 2011); Duursma, 1994, p. 450; Holy See, *Letter of the Holy Father John Paul II to the H.E. Dr Javier Pérez De Cuellar, Secretary-General of the United Nations Organisation*, 15 May 1989, at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/letters/1989/documents/hf\\_jp-ii\\_let\\_19890515\\_cuellar-onu\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/letters/1989/documents/hf_jp-ii_let_19890515_cuellar-onu_en.html) (consulted on 19 April 2011): the Holy See has participated in the life of the international community throughout the past twenty-five years. «It has done so while maintaining its status as an Observer. This status allows it an active presence, while safeguarding its ability to maintain the stance of universality which its very nature demands.»

<sup>58</sup> Bayefsky, 2002, p. 1.

<sup>59</sup> See e.g. Vienna Convention on the Law of Treaties, Article 26, which is the consecration of the international principle *pacta sunt servanda*, Bayefsky, 2002, p. 1.

<sup>60</sup> Nouailhat, 2006, pp. 97-107; Holy See, H.E. Archbishop Celestino Migliore, Intervention to the UN General Assembly, *Permanent Observer Mission of the Holy See to the United Nations*, New York, 29 September 2009, at <http://www.holyseemission.org/statements/statement.aspx?id=126> (consulted on 5 April 2011); see also Skubiszewski, 2007, pp. 499-511.

his encyclical *Pacem in Terris*, Pope John XXIII stated that «the rights and duties flow as a direct consequence from his [the human person] nature [...] these rights and duties are universal and inviolable [...]»<sup>61</sup>.» It went even further when, in 1983, after the Second Vatican Council<sup>62</sup> and the revision of the Code of Canon Law, a set of rights and obligations for the laity and clergy was enumerated. Among these were freedom of conscience, of assembly and association and the right of women to equality in the church<sup>63</sup>. However, just because the Pope declares human rights should be respected by all does not mean that the Holy See or the Vatican City actually follow its own words or that they can be held legally responsible for their policy in this matter.

Among the core UN human rights treaties ratified by the Holy See are the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) ratified on 1 May 1969, the Convention on the Rights of the Child (UNCRC) ratified on 20 April 1990 and its two Optional Protocols and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) ratified on 26 June 2002<sup>64</sup>. Each of these treaties has established monitoring mechanisms in order to inspect the implementation of human rights standards. The following treaty bodies are serviced by the Office of the UN High Commissioner for Human Rights: the Committee on the Rights of the Child (CRC), the Committee against Torture (CAT) and the Committee on the Elimination of Racial Discrimination (CERD), which are composed of independent experts elected by state parties<sup>65</sup>.

The mechanisms implemented by the treaties are of three types: an individual complaints mechanism under the ICERD<sup>66</sup> and the UNCAT<sup>67</sup>, a system of inquiries under the UNCAT and finally a state reporting mechanism under the two former conventions and the UNCRC. In addition to this, the ICERD and the UNCAT also recog-

<sup>61</sup> Holy See, *Pacem in Terris, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity and Liberty*, 11 April 1963, No. 9, at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html) (consulted on 28 February 2011).

<sup>62</sup> 1962-1965.

<sup>63</sup> Dias, 2001, p. 131; see also Ruston, 2004, p. 18; Hehir, 1996, pp. 97-121.

<sup>64</sup> See United Nations Treaty Collection, at [http://treaties.un.org/Pages/UNTSONline.aspx?id=3&clang=\\_en](http://treaties.un.org/Pages/UNTSONline.aspx?id=3&clang=_en) (consulted on 2 March 2011): the Holy See also ratified the Convention relating to the Status of Refugees on 15 March 1965 and the protocol thereto.

<sup>65</sup> Kedzia, 2003, p. 32; Rachel Brett, 2009.

<sup>66</sup> International Convention on the Elimination of all forms of Racial Discrimination, Article 14, at <http://www2.ohchr.org/english/law/cerd.htm> (consulted on 10 June 2011).

<sup>67</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22, at <http://www.hrweb.org/legal/cat.html> (consulted on 10 June 2011).

nise a fourth mechanism according to which states themselves can complain about a treaty violation committed by another state party. So far, this has never been used.

As regards the individual complain mechanism, one of the conditions to allow the treaty bodies to scrutinise individual complaints made against a particular state is the acceptance, by the state concerned, of the competence of the treaty body<sup>68</sup>. However, the Holy See did not make any such declaration recognising the competence of either the CAT or the CERD. Concerning the inquiry procedure, the Committee can investigate states' practices when there is an allegation of systemic or grave breaches of treaty rights, provided that the state concerned has not opted out of the inquiry provision<sup>69</sup>, which the Holy See did not<sup>70</sup>. As to the state reporting mechanism, it will be considered in the next chapter.

### 2.3. THE HOLY SEE AND THE CONVENTION ON THE RIGHTS OF THE CHILD

The third section focuses specifically on the UNCRC, used as a case study in order to illustrate the possible direct responsibility of the Holy See in case of human rights violations. After a brief comment on what could be considered as falling within the «jurisdiction» of the Holy See under the Convention, the second section discusses the specificity of the Holy See's reservations to the Convention. Then, the third part raises the issue of the weakness of the implementation mechanism, which leads to the analysis of clerical sexual abuses. Under the Convention, all states have a duty to protect children from all type of abuses. However, from the past years, the Roman Catholic Church has faced the scandal of clerical sexual abuses committed against children. The interest is thus to look at the Holy See's compliance with its obligations under the Convention, especially the duty to submit periodical reports. Finally, the chapter ends with an analysis of the Holy See's reaction to the cases of sexual abuses committed by priests through the modification of its legislation in this matter.

<sup>68</sup> See Marks, 1999, p. 331.

<sup>69</sup> See Bayefsky, 2002, p. 21; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 20 and 28, at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=3&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=3&mtdsg_no=IV-9&chapter=4&lang=en) (consulted on 10 June 2011).

<sup>70</sup> For both of these mechanisms, see Bayefsky, 2002, pp. 37-57 and 147-153.



### 2.3.1. *Within the Holy See's Jurisdiction*

According to Article 2(1) of the Convention, «States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction, without discrimination of any kind [...]». As the Holy See is not a territorial entity, even though it exercises its authority over the territory of the Vatican City State, it is important to consider when people are «within its jurisdiction<sup>71</sup>». One way to interpret it would be to draw an analogy between the situation of the Holy See and the decision of the ECtHR in the *Ilascu* case, though the decision had not been taken as regards the application of the UNCRC<sup>72</sup>. Without entering the details of the case, it is relevant to note that the European Court decided that a member state could be held responsible of human rights violations committed by their subordinates, who remained «under the effective authority, or at the very least under the decisive influence» of the state, even when such situations occurred in non-member states' territory. According to the Court, such circumstances come within the «jurisdiction» of the member state concerned<sup>73</sup>.

As the Holy See is not a state, it would not be reasonable to except the same level of jurisdiction as proper states. However, it has a degree of control over the Catholic hierarchy and ecclesiastical institutions<sup>74</sup>, some of them being established in countries all around the world. Thus, even though it does not exercise overall control in these territories, it still has a certain influence. Besides, priests are in a position that allows them to get close to children and gain their trust. Therefore, it could be argued that, even though the Holy See does not have the same level of jurisdiction as states, it would commit a violation of the UNCRC in case it makes it more difficult for state authorities to investigate alleged clerical sexual abuses.

### 2.3.2. *The Holy See's Reservations to the Convention*

The UNCRC is a legally binding instrument setting up minimum entitlements and freedoms that apply to all children and should be

<sup>71</sup> Cameron, 2005, pp. 303-308; Cohen-Jonathan & Flauss, 2001, pp. 453-456; Benoît-Rohmer, 2005.

<sup>72</sup> *Ilascu and others v. Moldova and Russia*, ECtHR, Application No. 48787/99, 8 July 2004, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ILASCU&sessionId=73344591&skin=hudoc-en> (consulted on 28 June 2011).

<sup>73</sup> *Ibidem*, para. 392.

<sup>74</sup> Code of Canon Law, 1983, Canons 330-572, «The Hierarchical Constitution of the Church», at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 23 February 2011).

respected by governments of state parties as well as by individuals<sup>75</sup>. It provides a framework of rights and principles which aim is to ensure the protection of children.

In addition to the Convention, states may ratify its two Optional Protocols, and thus be legally bound by the extensive catalogue of civil, political, economic, social and cultural rights, which have to be guaranteed to all children within state parties' jurisdiction without any discrimination of any type<sup>76</sup>. By the ratification or accession to the Convention, governments and states commit themselves to the implementation of these rights and therefore are accountable for any violation occurring within their jurisdiction<sup>77</sup>.

Even though the Holy See was one of the first «state» to ratify the UNCRC in 1990, and is a party to the two Optional Protocols, it made three reservations and a declaration to the Convention due to the spiritual characteristic of its mission<sup>78</sup>. In its declaration, the Holy See stated that, «in acceding to this Convention, [the Holy See] does not intend to prescind in any way from its specific mission which is of a religious and moral character<sup>79</sup>.» As for the reservations, the third one concerns the implementation of the Convention by the Holy See and the particular State of the Vatican City, which expressed that «The application of the Convention [should] be compatible in practice with the particular nature of the 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<sup>80</sup>.»

<sup>75</sup> Kjaerum, 2009 (b), p. 17; Franklin, 1995, p. 3.

<sup>76</sup> Bayefsky, 2002, p. 34.

<sup>77</sup> Mower Jr., 1997, p. 3.

<sup>78</sup> The Optional Protocol on the involvement of children in armed conflicts and the Optional Protocol on the sale of children, child prostitution and child pornography, in October 2001; see United Nations Treaty Collection, at [http://treaties.un.org/Pages/UNTSONline.aspx?id=3&clang=\\_en](http://treaties.un.org/Pages/UNTSONline.aspx?id=3&clang=_en) (consulted on 2 March 2011): the Convention entered into force on 2 September 1990 and the two Protocols respectively entered into force on 12 February 2002 and 18 January 2002.

<sup>79</sup> The Holy See has made a similar declaration to the Convention against Torture and clarified that «in becoming a party to the Convention on behalf of the Vatican City State, [the Holy See] undertakes to apply it insofar as it compatible, in practice, with the peculiar nature of that State.» at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=3&mtdsg\\_no=IV-9&chapter=4&clang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=3&mtdsg_no=IV-9&chapter=4&clang=en) (consulted on 10 June 2011).

<sup>80</sup> United Nations Convention on the Rights of the Child, 20 November 1989, at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=3&mtdsg\\_no=IV-11&chapter=4&clang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=3&mtdsg_no=IV-11&chapter=4&clang=en) (consulted on 6 June 2011). The 1st and 2nd reservations are the following:

«a) [The Holy See] interprets the phrase “Family planning education and services” in article 24.2, to mean only those methods of family planning which it considers morally acceptable, that is, the natural methods of family planning.

b) [The Holy See] interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern

The aim of states' reservations and interpretative declaration that accompany the ratification of the Convention is to limit the scope of their obligations<sup>81</sup>. Thus, allowing reservations is a way to encourage the wide ratification of an instrument, as states know they can ratify it without binding themselves to all the provisions, especially to the ones that might be in conflict with their internal legislation<sup>82</sup>. On the other hand, the consequences of reservations is the reduction of the effectiveness of the instrument concerned as well as the limitation of the protection of individuals with the rights recognised. Therefore, states are usually urged to avoid making reservations, or once they have been made, to reduce their scope and withdraw them as soon as possible. This is the reason why, in 1995, when the CRC send its Concluding Observations in considerations of the Holy See's report, it expressed its concern for the full recognition of the child as a subject of rights and invited the Holy See to review its reservations in order to finally withdraw them<sup>83</sup>.

According to Article 51, reservations to the UNCRC are allowed provided their compatibility «with the object and purpose of the Convention<sup>84</sup>». However, this provision does not say anything about either the legal effects of a reservation or any type of mechanism to use in order to determine whether a reservation is valid or not<sup>85</sup>. The Vienna Convention on the Law of Treaty (VCLT), which the Holy See is a party to, partially deals with these issues when it provides in Articles 20 and 21 that a reservation might be considered as valid when no objections are made by other states party<sup>86</sup>. Thus, it is for each state individually to decide whether or not other states' reservations are worth objecting them and in which case such objection would constitute an obstacle to the entry into force of the Convention between the reserving and the objecting states<sup>87</sup>. In other words, the effect of an objection will depend on the intentions of the state objecting, whether or not this state considers the reservation so unacceptable that it does not wish to be in treaty relations with the state reserving<sup>88</sup>. It is not clear whether the

education (articles 13 and 28), religion (article 14), association with others (article 15) and privacy (article 16).»

<sup>81</sup> Sepúlveda *et al.*, 2004, p. 41.

<sup>82</sup> Schabas, 1996, p. 473.

<sup>83</sup> United Nations Committee on the Rights on the Child, *Concluding Observations of the Committee on the Rights of the Child: Holy See*, 27 November 1995, CRC/C/15/Add.46, paras. 7-10, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.46.En?Open-document](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.46.En?Open-document) (consulted on 6 June 2011).

<sup>84</sup> This formulation is similar to Article 19 c) of the VCLT.

<sup>85</sup> Schabas, 1996, p. 481.

<sup>86</sup> Lijnzaad, 1995, pp. 38-41.

<sup>87</sup> *Ibidem*, pp. 53-54.

<sup>88</sup> Leblanc, 1996, p. 372; see also Lijnzaad, 1995, pp. 38-47.

Vienna Convention rules regarding the effectiveness and acceptability of reservations are to be applied for every treaty<sup>89</sup>. However, it seems that under the UNCRC, as well as under the UNCAT, states act in conformity with the rules as defined under the Vienna Convention<sup>90</sup>.

Another problem would be due to the vagueness and general nature of reservations. When states make a specific reference to domestic legislation in conflict with some provisions of the treaty, it allows other states to know about the implication of the reservations. However, although the UNCRC does not require that reservations shall not be vague, it can be a problem, as a vague reservation may deprive other states party, the CRC and individuals of a correct representation of the reserving state's rights and obligations<sup>91</sup>. Besides, reservations expressed in a broad way have a potential impact on the application of many indeterminate articles of the Convention.

For example, Pakistan's reservation, which was withdrawn on 23 July 1997, stated that the «provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values<sup>92</sup>.» The idea was to assert the primacy of Islamic laws and values as well as to avoid the application of any provisions of the Convention that might be incompatible with Islamic religion<sup>93</sup>. Similarly, in their reservations, the states of Indonesia, Malaysia and Singapore refer to their national legislation, national policies and Constitution in general. In total, ten states made broad reservations by the time of their ratification or accession<sup>94</sup>. Objecting to these vague and general reservations, the government of Sweden, Norway, Portugal and Ireland argued that

<sup>89</sup> See Articles 19 to 21 VCLT, at [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=UNTSO&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=UNTSO&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (consulted on 14 May 2011).

<sup>90</sup> United Nations International Law Commission (ILC), Current Programme of Work, *Reservations to Treaties*, at <http://www.un.org/law/ilc/> (consulted on 8 June 2011): as regards reservations rules, the International Law Commission (ILC) noticed that the principles set out by the VCLT are too general and vague to serve as a proper guide for state practice. This is why the ILC is currently working on the topic; United Nations General Assembly, Official Records, International Law Commission, *Report of the Work of Its 62nd Session*, 2010, 65th Session, Supplement No. 10 (A/65/10), at <http://untreaty.un.org/ilc/reports/2010/2010-report.htm> (consulted on 4 June 2011).

<sup>91</sup> Schabas, 1996, p. 478.

<sup>92</sup> United Nations Convention on the Rights of the Child, 20 November 1989, para. 26, at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=3&mtdsg\\_no=I-V-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=3&mtdsg_no=I-V-11&chapter=4&lang=en) (consulted on 6 June 2011): on 23 July 1997, the government of Pakistan informed the Secretary-General that it had decided to withdraw its reservation made upon signature and confirmed upon ratification.

<sup>93</sup> Leblanc, 1996, p. 368.

<sup>94</sup> Indonesia, Singapore, Afghanistan, Brunei Darussalam, Djibouti, Iran, Mauritania, Pakistan, Qatar and Syrian Arab Republic. Since the time of the ratification or accession to the Convention, the government of Pakistan, Indonesia and Djibouti informed the Secretary-General that it had decided to withdraw their reservations.

reserving states were limiting their responsibilities under the Convention by invoking general principles of national law, which «may cast doubts on the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law<sup>95</sup>.»

In the same way, the Holy See stated that the application of the Convention should be compatible with the particular nature of the Vatican City State, characterised by its religious and moral function and the sources of its objective law. This, it should be stressed, means that the Sovereign Pontiff has full legislative power and claims to be successor of St. Peter, the Vicar of Christ upon earth. Besides, he is considered by the Roman Catholic community to be infallible<sup>96</sup>. Such a reservation is likely to affect every single provision of the Convention. However, no other state party to the Convention has made an objection to the Holy See's reservation, although it is expressed in general and vague terms as well and applies to the entire Convention<sup>97</sup>.

### 2.3.3. *Implementation of the Convention*

As it has been noted previously, the Convention does not establish either a complain mechanism or an inquiry system but only a state reporting mechanism. Thus, states party are required to submit initial and periodic reports to the CRC<sup>98</sup>. Although they do not have to be fully in compliance with the Convention at the time of ratification or accession, they are expected to comply with the Convention's obligations within a reasonable time<sup>99</sup>. The purpose of the reporting system is thus to promote states' compliance with their obligations and allow the treaty body to receive information on both the law and practices of the state<sup>100</sup>. For that reason, the reports should indicate which measures state parties have adopted «which give effect to the rights recognized,» what progress

<sup>95</sup> The objections of Sweden, Ireland and Portugal to the reservations made by Indonesia, Tunisia, Thailand, Myanmar, Pakistan, Turkey, Singapore, etc., are available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=3&mtidsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=3&mtidsg_no=IV-11&chapter=4&lang=en) (consulted on 6 June 2011); see also Leblanc, 1996, pp. 375-377; I will not enter here in the discussion aiming to give a definition of what is the «object and purpose» of a treaty. See Lijnzaad, 1995, pp. 80-98; Schabas, 1996, pp. 475-486.

<sup>96</sup> Schatz, 1993, pp. 143-145.

<sup>97</sup> Bathon, 2001, p. 615.

<sup>98</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Articles 43(2) and 44, at <http://www2.ohchr.org/english/law/crc.htm> (consulted on 6 March 2011); Price Cohen, Hart & Kosloske, 1996, pp. 441-444.

<sup>99</sup> Catholics for a Free Choice, *The Holy See and the Convention on the Rights of the Child: A Shadow Report*, September 2002, p. 4, at <http://www.catholicsforchoice.org/topics/other/documents/2002rightsofthechildshadowreport.pdf> (consulted on 10 May 2011).

<sup>100</sup> O'Flaherty, 2002, p. 1; Kedzia, 2003, pp. 32, 6; Kjaerum, 2009 (b), pp. 18-19.

has been made «on the enjoyment of those rights» as well as «the factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the Convention<sup>101</sup>.» Then, the Committee has the duty to examine the progress made by states in achieving the realisation of their obligations. It also takes into consideration the scope of reservations and their consequence on the effectiveness of the protection of rights<sup>102</sup>. Thus, the Committee should recommend states to review and withdraw their reservations or inform them that a reservation could be considered as being incompatible with the object and purpose of the treaty<sup>103</sup>.

However, this mechanism is facing numerous difficulties to work properly. On the one hand, many states have never or rarely submitted their reports to the Committee, even though any delay in the submission of the report constitutes in itself a breach of their legal duties<sup>104</sup>. On the other hand, the recommendations made by the Committee afterwards are not legally binding. Thus, the only mechanism established by the treaty is not even efficient enough to ensure the full implementation of the rights<sup>105</sup>. As a consequence, without any judicial or effective system to check on the breach of states' legal obligations, there is no possibility to ensure an efficient protection of the rights and principles defined by the Convention.

The Holy See submitted its initial report on the measures adopted to give effect to children's rights to the CRC in 1994<sup>106</sup>. However, as discussed further below, it does not present its periodic reports on a regular basis<sup>107</sup>.

#### 2.3.4. *The Problem of Sexual Child Abuses and the Submission of Reports*

According to the main guiding principle of the Convention, «the best interests of the child» shall be a primary consideration for all state's actions concerning children «whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

<sup>101</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Article 44, at <http://www2.ohchr.org/english/law/crc.htm> (consulted on 6 March 2011).

<sup>102</sup> *Ibidem*, Article 43; Mower Jr., 1997, p. 66.

<sup>103</sup> Schabas, 1996, p. 487.

<sup>104</sup> Marks, 1999, p. 327; Bayefsky, 2002, p. 155; Smith, 2009, p. 114.

<sup>105</sup> Marks, 1999, p. 327; Kedzia, 2003, p. 43; Kjaerum, 2009 (a), p. 185: the CERD is the only treaty body that set up, in 1991, a special review procedure according to which, after five years of silence from a state, a member of the Committee is requested to give information about the country situation to the Committee, which will then make a report on this basis.

<sup>106</sup> United Nations Committee on the Rights of the Child, *UN Committee on the Rights of the Child: State Party Report: Holy See*, 28 March 1994, CRC/C/3/Add.27, at <http://www.unhcr.org/refworld/country,,,VAT,,3ae6af7f4,0.html> (consulted on 25 May 2011).

<sup>107</sup> See Mower Jr., 1997, pp. 109-115; Brett, 2009.

legislative bodies<sup>108</sup>» as well as all decision-making regarding the implication of children in judicial trials and their exposition to child perpetrators<sup>109</sup>. In addition to this, states have the duty to ensure children's protection from all type of violence, including sexual abuses, «while in the care of parent(s), legal guardian(s) or any other person who has the care of the child<sup>110</sup>.» They should comply with this obligation by taking all appropriate measures, which should «include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement<sup>111</sup>.»

In addition to the Holy See's non compliance with its obligation to present its periodic reports to the Committee, allegations have been made that it has failed to effectively implement the rights recognised under the Convention, especially in relations to child sexual abuses<sup>112</sup>. In March 2011, at the plenary session of the UN Human Rights Council, Britain's National Secular Society Director, Keith Porteous Wood, accused the Holy See of flouting the Convention. He noted the absence of reports for thirteen years and attacked the problematic record on child abuse cases<sup>113</sup>. Similar criticism had already been brought before the Council in September 2009. At that time, the Holy See had not sent its reports for twelve years but the Papal Nuncio

<sup>108</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Article 3, para. 1, at <http://www2.ohchr.org/english/law/crc.htm> (consulted on 6 March 2011); Arts & Popovski, 2006, p. 11.

<sup>109</sup> Brett, 2009, pp. 236-238; Arts & Popovski, 2006, p. 10; Willems, 2006, p. 266: «The best interest of the child is a legal concept which centres around a child's well-being and healthy holistic development.»

<sup>110</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Article 19, at <http://www2.ohchr.org/english/law/crc.htm> (consulted on 6 March 2011).

<sup>111</sup> *Ibidem*.

<sup>112</sup> United Nations Human Rights Council, *Human Rights Situations that Require the Council's Attention, Written Statement Submitted by the International Humanist and Ethical Union (IHEU), A Non-governmental Organization in Special Consultative Status*, 8 September 2009, A/HRC/12/NGO/25, at [http://www.secularism.org.uk/uploads/unhrc-iheduconholyssee-\(2\).pdf](http://www.secularism.org.uk/uploads/unhrc-iheduconholyssee-(2).pdf) (consulted on 7 June 2011); International Human and Ethical Union, *Criticism of the Holy See over Child Abuse at the UNHRC*, Geneva, 22 September 2009 and 16 March 2010, at <http://www.secularism.org.uk/uploads/unhrc-holy-see-pack.pdf> (consulted on 7 June 2011).

<sup>113</sup> National Secular Society, *NSS Director Slams Vatican Failures over Child Abuse at UN Human Rights Council*, 18 March 2011, at [http://www.secularism.org.uk/keith-again-slams-vatican-failur.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+nssnews+%28NSS+News%29&utm\\_content=Google+Reader](http://www.secularism.org.uk/keith-again-slams-vatican-failur.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+nssnews+%28NSS+News%29&utm_content=Google+Reader) (consulted on 30 March 2011).

claimed that it was being finalised. In 2011, Mr. Wood was speaking as the international representative of the NGO International Humanist and Ethical Union (IHEU), whose written statement was published by the UN Human Rights Council in 2009. The IHEU report relates to the revelations which have been made regarding sexual abuses by priests. It alleges that the Holy See appeared to be in breach with five articles of the Convention<sup>114</sup>.

The first issue the report noted was the absence of periodical reports that the Holy See, like all states party, should submit in order to relate the measures adopted in view of giving effect to the rights protected under the Convention and the progress made on the enjoyment of these rights<sup>115</sup>. Secondly, the reports should indicate the possible difficulties affecting the efficient implementation of the rights, in order to provide the CRC with enough information to have a comprehensive understanding of the situation in the country concerned<sup>116</sup>. Moreover, according to the IHEU, the Holy See was under the duty to take all appropriate measures to protect the children against all form of abuses, including sexual abuses. These measures should include effective procedures to prevent abuse cases and, in case such situation occurs, to identify, report, refer, investigate, treat and follow-up the cases of child mistreatment<sup>117</sup>. Then, Article 34 also requires states to protect children from all form of sexual exploitation and abuse and to take all measures to prevent the exploitation or coercive use of children in unlawful sexual activities. Finally, all actions concerning the children taken by any type of state authority should be based on the best interest of the child.

By looking at the number of victims of sexual abuses committed by priests around the world, sometimes by the same priests who have been moving from one place to another, it is possible to argue that the Holy See did not take the appropriate measures and sanctions to prevent such abuses and efficiently protect the children. Moreover, the Holy See never reported to the Committee the cases of sexual abuses in which members of the Catholic clergy were involve, nor the difficulties

<sup>114</sup> United Nations Human Rights Council, *Human Rights Situations that Require the Council's Attention, Written Statement Submitted by the International Humanist and Ethical Union (IHEU), A Non-governmental Organization in Special Consultative Status*, 8 September 2009, A/HRC/12/NGO/25, at [http://www.secularism.org.uk/uploads/unhrc-iheudocon-holysee-\(2\).pdf](http://www.secularism.org.uk/uploads/unhrc-iheudocon-holysee-(2).pdf) (consulted on 8 June 2011).

<sup>115</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Article 44, para. 1, at <http://www2.ohchr.org/english/law/crc.htm> (consulted on 6 March 2011); O'Flaherty, 2002, pp. 162-164.

<sup>116</sup> United Nations Convention on the Rights of the Child, 20 November 1989, Article 44, para. 2.

<sup>117</sup> *Ibidem*, Article 19; Brett, 2009, p. 244.



it might have faced. Although the number of cases of abuse by clergy is unknown, it is clear that cases have occurred. In its initial report, when explaining the meaning of its second reservation, which aims to emphasise on the superior rights of parents, the Holy See recognised the gravity of abuses committed against children by members of the family. It stated that in such situation the rights of the child must prevail over the «primary and inalienable rights» of the parents<sup>118</sup>. The Holy See also mentioned the alarming situation of sexually exploited children but focused on the practices of sex tourism and child prostitution<sup>119</sup>. Thus, the Holy See was well aware of the situation where a child is victim of abuses but only pointed out the situations where it is «proved that abuses have been committed within the family» or the sex tourism «particularly in Asia and Latin America» and remained silent on situations where abuses are committed by its priests<sup>120</sup>.

### 2.3.5. *The Reaction of the Church: Catholic Rules Regarding Clerical Sexual Abuses*

Under the 1917 Code of Canon Law, «adultery, debauchery, bestiality, sodomy, pandering [and] incest» were ecclesial crimes reserved to the exclusive jurisdiction of the Sacred Congregation of the Holy Office, which is the actual Congregation for the Doctrine of the Faith (CDF), leading without reservation to the suspension of responsible priests and their exclusion from any office<sup>121</sup>. However, one of the major defects of this Code was that it did not clearly require either clerics or the laity to report civil crimes to the civil authorities<sup>122</sup>. In 1922, the Holy See issued the «Crimen Sollicitationis» Instruction, which gave useful instructions to bishops and dioceses in order to help them dealing with the canonical delict of solicitation, sexual abuses of children, etc., and instituted an entire canonical procedure where confidentiality was a main order<sup>123</sup>. Then, in 1962, the Holy See

<sup>118</sup> United Nations Committee on the Rights of the Child, *UN Committee on the Rights of the Child: State Party Report: Holy See*, 28 March 1994, CRC/C/3/Add.27, Reservation b), para. 16(b), at <http://www.unhcr.org/refworld/country,,,VAT,,3ae6af7f4,0.html> (consulted on 25 May 2011).

<sup>119</sup> *Ibidem*, paras. 38-39.

<sup>120</sup> *Ibidem*, paras. 16, 39.

<sup>121</sup> Peters, 2001, Article 2359, para. 2, at [http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Frank\\_Morrisey/pdf/26\\_1917\\_Canon.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Frank_Morrisey/pdf/26_1917_Canon.pdf) (consulted on 15 May 2011).

<sup>122</sup> Neu, 2010, p. 1515.

<sup>123</sup> Holy See, *The Norms of the Motu Proprio «Sacramentorum Sanctitatis Tutela», Historical Introduction*, 2001, at [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (consulted on 27 May 2011).

established a policy, which was distributed in the form of a document entitled *Instruction on the Manner of Proceedings in Cases of Solicitation*<sup>124</sup>. This 1962 policy issued specific instructions to handle cases of solicitation in ecclesiastical courts<sup>125</sup> where investigations should be pursued «in the most secretive way» and with «the greatest circumspection»<sup>126</sup>. There was no requirement to inform the civil authorities in case the solicitation also amounted to a civil crime but only a duty to notify alleged sexual abuse cases to the Holy Office in the Holy See<sup>127</sup>.

After the Second Vatican Council, the 1983 Code of Canon Law was adopted, which updated the sanctions inflicted to priests involved in sexual abuses with a minor and stated that trials were held within the dioceses. In addition to this, the Code did not ignore civil authorities any more, as it stated that «civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise»<sup>128</sup>. Afterwards, in 2001, the Holy See adopted the *Motu Proprio* «*Sacramentorum Sanctitatis Tutela*», which included the delict of sexual abuse on a minor under eighteen by a cleric among the list of canonical offenses reserved to the jurisdiction of the CDF<sup>129</sup>.

Finally, on 21 March 2010, the Holy See officially approved the revised text of the *Motu Proprio*, which amended the norms in regards clerical sexual abuses and published new rules. As the main idea is to treat priest abusers in a more severe way, clerical sexual abuses are now included in the category of «more grave delicts against moral»<sup>130</sup>. The Tribunal competent to judge about the delicts defined in the Substantive Norms is the CFD, whose decisions do not need to be submitted for the approval of the Sovereign Pontiff, except for the gravest cases, which can be presented to the decision of the Roman Pontiff when it is evident that the delict was committed and after the

<sup>124</sup> Holy See, Supreme and Holy Congregation of the Holy Office, 1962, para. 1, at <http://www.sarabite.info/crimen.pdf?q=crimen> (consulted on 27 May 2011): solicitation occurs when a priest solicits or provokes a layperson towards impure and obscene matters, during or in connection with the sacraments of confession.

<sup>125</sup> Neu, 2010, p. 1516; Catholic Encyclopedia, at <http://www.newadvent.org/cathen/14134b.htm> (consulted on 28 May 2011).

<sup>126</sup> Holy See, Supreme and Holy Congregation of the Holy Office, 1962, paras. 11, 38, at <http://www.sarabite.info/crimen.pdf?q=crimen> (consulted on 27 May 2011).

<sup>127</sup> *Ibidem*, para. 27.

<sup>128</sup> Code of Canon Law, 1983, Canon 22, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 23 February 2011).

<sup>129</sup> Holy See, *The Norms of the Motu Proprio* «*Sacramentorum Sanctitatis Tutela*», *Historical Introduction*, 2001, at [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (consulted on 27 May 2011).

<sup>130</sup> Holy See, *Substantive Norms*, 21 March 2010, Article 6, para. 1, at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (consulted on 22 May 2011).

hearing of the guilty part<sup>131</sup>. Before the case is brought before the Congregation, preliminary measures are to be taken by local diocese or bishops, who must investigate every allegation of clerical sexual abuse and report the result of the investigation to the CDF. Local bishops may also impose precautionary measures in order to protect the victim and the community<sup>132</sup>. Thus, these Substantive Norms are entirely part of the penal code of Canon Law and distinct from state legislation<sup>133</sup>.

Among other legal modifications, the Holy See revised the proceedings in cases of child abuses and decided that the trial of alleged priest abusers should be faster than what the former law had organised. Thus, measures intended to accelerate procedures have been introduced<sup>134</sup>. Besides, the statute of limitations has been increased from ten to twenty years, starting to run when the victim reached eighteen years old, with the possibility of further extension beyond that period<sup>135</sup>. Other aspects are the establishment of a parallel between abuses of minors and mentally disabled people as well as the introduction of a sanction for paedophile pornography<sup>136</sup>.

However, the text remains silent on the question of collaboration with the civil authorities and the possible jurisdiction of secular civil courts, due to the fact that the modifications are internal to the church. On the other hand, Mr. Lombardi, who is the Holy See's Press Office Director, noted that in order to rebuild a climate of trust in the ecclesiastical institution, collaboration «with the civil authorities in matters concerning their judicial and penal competence» would be needed, taking into account «the specific norms and situations of the various countries»<sup>137</sup>. Besides, the Holy See also specified that «civil law concerning reporting of crime to the appropriate authorities should always be followed»<sup>138</sup>. This means that in practice it would be

<sup>131</sup> *Ibidem*, Article 8, paras. 1-3, Article 21, para. 2, 2°, at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (consulted on 22 May 2011).

<sup>132</sup> Holy See, *Guide to Understanding Basic CDF Procedures Concerning Sexual Abuse Allegations*, 12 April 2010, A. Preliminary Procedures, at [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (consulted on 2 June 2011).

<sup>133</sup> Holy See, *Note by Fr. F. Lombardi, The Significance of the Publication of the New «Norms Concerning the Most Serious Crimes»*, 2010, at [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (consulted on 2 June 2011).

<sup>134</sup> *Ibidem*.

<sup>135</sup> Holy See, *Substantive Norms*, 21 March 2010, Article 7 para. 1, at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (consulted on 22 May 2011).

<sup>136</sup> *Ibidem*, Article 6, para. 1, 1°-2°, Article 21, para. 2, 2°, at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (consulted on 22 May 2011).

<sup>137</sup> Fr. Lombardi, *Note on the Sexual Abuse Crisis, Following Holy Week, Holding Our Course*, 9 April 2010.

<sup>138</sup> Holy See, *Guide to Understanding Basic CDF Procedures Concerning Sexual Abuse Allegations*, 12 April 2010, A. Preliminary Procedures, at [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (consulted on 2 June 2011).

necessary to comply with the requirements of law in the different countries, «and to do so in good time, not during or subsequent to the canonical trial<sup>139</sup>,» even though sacramental seal and pontifical secret are still imposed for ecclesiastical proceedings under Canon Law and sanctions are provided in case of violation<sup>140</sup>.

In addition to this, in a Circular Letter, the Congregation stated that sexual abuse of minors is also a crime prosecuted by civil law, whether it is committed by a priest or any religious or lay person working in the church's structure. Thus, even though relations with civil authority differ in various countries, it is important to cooperate with such authority within their responsibilities, provided it would not cause any prejudice to the «sacramental internal forum» and taking into account the prescriptions established for such crimes under civil law<sup>141</sup>. As a consequence, bishops are not compelled to report allegations to civil authorities if local legislation does not require it and only if it does not prejudice the «sacramental internal forum,» according to which secrecy should be ensured. Finally, it still remains an issue as to how these measures will be applied in practice and what their effectiveness will be in the protection of victims sexually abused by priests.

It may be possible to look at certain justifications for the Holy See not to cooperate with civil authorities in general. First, under Canon Law, the seal of confession requires all priests, bishops and other ordained ministers to maintain secrecy towards any information they receive in confession<sup>142</sup>. Thus, the priests can only enquire the penitent to report him or herself to the civil authorities. In some countries, this duty of secrecy may even be included within criminal law and sanctions established in case of violation<sup>143</sup>.

<sup>139</sup> Holy See, *Note by Fr. F. Lombardi, The Significance of the Publication of the New «Norms Concerning the Most Serious Crimes»*, 2010, at [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (consulted on 2 June 2011).

<sup>140</sup> Holy See, *Substantive Norms*, 21 March 2010, Articles 24 and 30, at [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (consulted on 22 May 2011).

<sup>141</sup> Holy See, *Congrégation pour la Doctrine de la Foi, Lettre Circulaire pour aider les Conférences épiscopales à établir des Directives pour le traitement des cas d'abus sexuels commis par des prêtres à l'égard de mineurs*, 3 May 2011, I. e), at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20110503\\_abuso-minori\\_fr.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_fr.html) (consulted on 2 June 2011).

<sup>142</sup> Code of Canon Law, 1983, Canon 983, para. 1, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 10 March 2011).

<sup>143</sup> Code Pénal Belge, 8 June 1867, Article 458, at [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?DETAIL=1867060801%2FF&caller=list&row\\_id=1&numero=2&rech=4&cn=1867060801&table\\_name=LOI&nm=1867060850&la=F&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi\\_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=41&imgcn.y=12](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1867060801%2FF&caller=list&row_id=1&numero=2&rech=4&cn=1867060801&table_name=LOI&nm=1867060850&la=F&dt=CODE+PENAL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27PENAL%27and+actif+%3D+%27Y%27&tri=dd+AS+RANK+&imgcn.x=41&imgcn.y=12) (consulted on 29 June 2011): «Les médecins, chirurgiens, officiers de santé, pharmaciens, sages-femmes et toutes autres personnes

Secondly, in certain countries, it may be important for the Holy See to keep the secrecy of alleged sexual abuses against children until the bishop's investigation is over, in order to protect the rights of both the victim and the priest. If the Holy See were under a duty to cooperate with civil authorities, it would have to do so in every case of alleged sexual abuses, whether it occurred within a democratic state or an authoritarian one. If such cooperation is acceptable when the former states are involved, the Holy See may legitimately fear that reporting information to authorities within a state where fundamental human rights and principles are hardly respected would facilitate the oppression of ministers of the cult concerned and be used as a justification for the harassment of the church and persecution of religious people<sup>144</sup>. Therefore, it is reasonable to wait the result of the ecclesiastical investigation and the certainty of the abuses before reporting to civil authorities.

After the issue of a possible direct responsibility of the Holy See comes the question of whether it can be indirectly required to respect human rights principles, especially under the European Convention on Human Rights (ECHR). Thus, after a brief introduction as regards the status of the Holy See within the Council of Europe (CoE), the purpose of Chapter 3 is to assess the possible impact of decisions of the European Court on the Holy See's policy in matters related to human rights. The first part of the chapter looks over the possibility for states party to a Convention, particularly the ECHR, to delegate certain competences to public or private institutions. Such delegation may occur through the signature of concordats or agreements with the Holy See. The question is then whether this delegation delivers states from their duty to ensure the protection of rights and principles recognised under the Convention. Secondly, although neither the Holy See nor the Vatican City ratified the European Convention, there might be a possibility for the former to be indirectly required to respect human rights principles as recognised under the Convention, through the convictions of member states for a violation of human rights, which has originated from a decision or action of ecclesiastical institutions.

dépositaires, par état ou par profession, des secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice [...] et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis d'un emprisonnement de huit jours à six mois et d'une amende de cent [euros] à cinq cents [euros].»

<sup>144</sup> See Catholic Answers Forums, at <http://forums.catholic.com/showthread.php?p=7996951> (consulted on 29 June 2011).

## CHAPTER 3

### THE INDIRECT RESPONSIBILITY OF THE HOLY SEE IN THE PROTECTION AND RESPECT OF HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

#### 3.1. THE STATUS OF THE HOLY SEE WITHIN THE COUNCIL OF EUROPE<sup>145</sup>

Although the Holy See had been in relations with the CoE since 1962, it was officially granted Observer Status on 7 March 1970. Its Permanent Observer to the CoE was appointed at the Committee of Ministers<sup>146</sup>, which is the executive body acting «on behalf of the Council of Europe<sup>147</sup>.» Although the Holy See is not a member state, it still has the right to sign agreements and conventions of the Council as well as the ability to co-operate, by mutual agreement with member states, on projects compatible with the mission of the church<sup>148</sup>.

However, the Holy See's status is different from the one of the other states Permanent Observer to the CoE. The Statutory Resolution on Observer Status of the Committee of Ministers established four criteria «for the granting of the Observer Status<sup>149</sup>.» Nonetheless, in addition to

<sup>145</sup> See Dias, 2001, pp. 117-119: the Holy See is also accredited with an Apostolic Nuncio with the European Union, a representative at the Office of Security and Cooperation in Europe, a Permanent Observer at the Organisation of American States (in Washington), is a participating state of the OSCE since 25 June 1973 and an Observer at the European Court on Human Rights.

<sup>146</sup> The actual Permanent Observer is Mgr. Aldo Giordano.

<sup>147</sup> Statute of the Council of Europe, Article 13, at <http://conventions.coe.int/Treaty/EN/Treaties/Html/001.htm> (consulted on 8 June 2011); Polakiewicz, 2008, para. 17.

<sup>148</sup> Cardinale, 1976, p. 262; Concil of Europe, *The Holy See in the Council of Europe*, «Factsheet 15», 7 March 2011, at <http://wcd.coe.int/ViewDoc.jsp?id=1756607&Site=DC> (consulted on 3 June 2011); see also Siat, 2011, V-9 to V-26; the Holy See is also a member of the CoE Development Bank (since 1973) and of the European Centre for Global Interdependence and Solidarity (North-South Centre). It participates in over 80 Council of Europe Committee and working groups, as well as in many of UNESCO's working groups, and maintains active relations with different ministries and bodies in the areas of culture, social matters and realisation of human rights and fundamental freedoms. The Holy See has ratified six conventions of the CoE and signed another one without ratifying yet.

<sup>149</sup> Council of Europe Committee of Ministers, *Statutory Resolution 93 (26) on Observer Status*, 14 May 1993, Article I at [http://www.coe.int/t/der/docs/CMStatutoryRes9326\\_en.pdf](http://www.coe.int/t/der/docs/CMStatutoryRes9326_en.pdf) (consulted on 23 April 2011).

the fact that states are not formally required to abide by these criteria, but should only be «willing to accept» them, the Holy See received the Observer Status prior to their adoption<sup>150</sup>. Thus, it «is not covered by the statutory resolution and was not required to give any undertakings» so that its participation is exceptionally due to its «specific nature and mission<sup>151</sup>.» Moreover, as regards the possibility for the Holy See to become a full member of the CoE, although that it does not seem to envisage it, one of the technical objections would be its «lack of respect for human rights and democratic principles<sup>152</sup>.»

### 3.2. THE QUESTION OF DELEGATION OF COMPETENCE

According to Article 1 of the European Convention, states party «shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.» Thus, they have the obligation to ensure that domestic laws, policy and practices are complying with human rights standards<sup>153</sup>. However, how they choose to fulfil their obligation is a matter for the states themselves, as they are not required to incorporate the Convention into domestic law, although in practice this is what contracting parties have done<sup>154</sup>.

The European Court, which has the jurisdiction to interpret and apply the Convention, has the final authority to verify the compatibility of states' legislation with the Convention<sup>155</sup>. Thus, in order for the states to properly comply with their duty, they shall take into consideration the judgements of the Court when deciding on alleged violations of the Convention, whether the decisions involve their own countries or other states<sup>156</sup>. Articles 41 and 46 of the European Convention expressly deal with the legal consequences of a decision in which the Court finds a

<sup>150</sup> Council of Europe Parliamentary Assembly, Political Affairs Committee, Report, *The Council of Europe and Its Observer States - The Current Situation and a Way Forward*, 20 December 2007, Doc.11471, A para. 6 and C paras. 12-16, at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11471.htm> (consulted on 17 April 2011).

<sup>151</sup> Council of Europe Parliamentary Assembly, Resolution 1600, *The Council of Europe and Its Observer States - The Current Situation and a Way Forward*, 2008, para. 10, at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1600.htm> (consulted on 17 April 2011): on the other hand, four states were granting with this status under the Resolution: the United States of America in December 1995, Canada in April 1996, Japan in November 1996 and Mexico in December 1999.

<sup>152</sup> Polakiewicz, 2008, para. 17; Tulkens, 2009, p. 2577; Council of Europe Parliamentary Assembly, *Official Report of the Debate*, 27 Sept.-5 Oct. 1978, vol. II, p. 386.

<sup>153</sup> Janis, Kay & Bradley, 2008, pp. 831-846.

<sup>154</sup> Harris, O'Boyle & Warbrick, 2009, p. 23.

<sup>155</sup> Cameron, 2011, p. 47.

<sup>156</sup> *Ibidem*, p. 48.

breach of the Convention, according to which the respondent state as well as all other states party have a legal obligation to abide by the judgement, principles and rights as interpreted by the Court in order to put an end to the violation<sup>157</sup>.

Regarding the terms used by Article 1 and the interpretation made by the European Court, «state» is to be understood as including «all public authorities and even private groups or organisations, which have been entrusted with certain public law functions<sup>158</sup>.» Besides, although individuals cannot complain before the Court of a violation of human rights committed by another individual, states are under a positive obligation to protect individual's rights and freedoms from the actions of others, so that individuals can truly enjoy their rights recognised under the Convention<sup>159</sup>. In case states do not give them enough protection, they might be held responsible for a violation of the Convention by omission<sup>160</sup>. Thus, in addition to their positive duty consisting in taking actions to secure human rights, states have also a negative obligation to refrain from acting in a way that could cause a breach of the Convention<sup>161</sup>. The situation that will be examined *infra* is where public authorities, such as domestic tribunals and courts, do not sufficiently intervene in favour of the protection of individuals' rights within their private sphere, «by not providing legal aid or by not protecting personal integrity<sup>162</sup>.»

The Convention, through the word «everyone,» means that states shall protect not only their nationals or citizens but also aliens who are «under their jurisdiction<sup>163</sup>.» Thus, a high contracting party might be held responsible for actions or omissions committed by their public authorities within their territory but also in territories of other states, provided that the public authorities concerned have exercised *de facto* or *de jure* actual authority over the alleged victim<sup>164</sup>, or even exceptionally when public acts are committed in other territories by foreign agencies on their behalf<sup>165</sup>.

Likewise, through the communication of their General Comments,

<sup>157</sup> Hunt, 2005, pp. 25, 32; Polakiewicz, 2001 (b), p. 66; Greer, 2006, p. 156.

<sup>158</sup> Cameron, 2011, p. 48.

<sup>159</sup> Harris, O'Boyle & Warbrick, 2009, p. 19.

<sup>160</sup> Cameron, 2011, p. 49.

<sup>161</sup> Evans, 2001, p. 69; Harris, O'Boyle & Warbrick, 2009, p. 18.

<sup>162</sup> See *infra* Chapter 3.3; Cameron, 2011, p. 49.

<sup>163</sup> Eissen, 1963, p. 715; *Austria v. Italy*, European Commission of Human Rights, Application No. 788/60, 11 January 1961, Yearbook 4, p. 116.

<sup>164</sup> Nijhoff Law Specials, 2007, p. 84.

<sup>165</sup> Cameron, 2011, p. 50; see *Cyprus v. Turkey*, European Commission of Human Rights, Application No. 8007/77, 10 May 2001, at <http://www.uniset.ca/microstates/15EHRR509.htm> (consulted on 8 May 2011); Carrillo-Salcedo, 1999, p. 136; Velu & Ergec, 1990, p. 68; Cohen-Jonathan & Flauss, 2001, p. 438.



the United Nations treaty bodies also develop their interpretation of human rights standards and indicate that states party to the treaty have «the obligation to respect, fulfil and protect human rights» for everyone within their jurisdiction<sup>166</sup>. These international requirements are understood as being both a positive obligation to fulfil and protect human rights and a negative obligation to respect these rights and freedoms<sup>167</sup>. Therefore, under international law, states party to a convention or treaty have both a positive obligation, which implies to take all necessary measures to ensure the respect of the principles recognised within the treaty, and a negative duty according to which states must avoid any limitations of these rights and principles<sup>168</sup>.

It is not the purpose of this thesis to enter the details of states' international positive and negative obligations. However, it has to be noted that this also applies when states party to international or regional human rights treaties delegate certain competences to the Holy See through bilateral agreements and concordats. The Holy See or the Vatican City have made agreements and concordats with numerous countries regarding sensitive matters for the Catholic doctrine such as the Catholic educational system, the celebration of marriages, religious assistance to armed forces, freedom of religion and conscience, the establishment of ecclesiastical jurisdictions, etc.<sup>169</sup>. For example, the Republic of Malta granted the Catholic Church with the right to establish and direct its own schools, gave a civil effect to canonical marriages and restricted the declaration of nullity of these marriages to ecclesiastical tribunals<sup>170</sup>. Besides, following the Lateran Treaty, the Italian Republic has recognised the right of the Vatican City State to punish offenses that occur within its territory and has committed itself to apply international law regulations for the execution, «within the Kingdom of Italy, of sentences pronounced by the Courts of the Vatican City<sup>171</sup>.»

<sup>166</sup> Kedzia, 2003, p. 32.

<sup>167</sup> Harris, O'Boyle & Warbrick, 2009, p. 19.

<sup>168</sup> For exceptions to the general rules see Himes & Saltarelli, 1995, pp. 15-17; Forsythe, 2000, p. 55.

<sup>169</sup> Holy See, *Agreements of the Holy See*, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/index\\_concordati-accordi\\_en.htm](http://www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm) (consulted on 22 April 2011).

<sup>170</sup> Holy See, *Agreement between the Holy See and the Republic of Malta on Church Schools*, 18 February 1993, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19930218\\_santa-sede-rep-malta-scuole\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_santa-sede-rep-malta-scuole_en.html); Holy See, *Agreement between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals about the Same Marriages*, 3 February 1993, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19930203\\_s-sede-malta\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930203_s-sede-malta_en.html) (consulted on 10 May 2011).

<sup>171</sup> Lateran Treaty, *Treaty between the Holy See and Italy*, 11 February 1929, Articles 22-23, at <http://www.vaticanstate.va/NR/rdonlyres/3F574885-EAD5-47E9-A547-C3717005E861/2528/LateranTreaty.pdf> (consulted on 25 February 2011).

These delegations of powers do not free the states from their duty to ensure respects of human rights standards protected by customary law or by international and regional treaties they ratified. States bound by human rights treaty have the positive duty to intervene in order to secure the rights and freedoms recognised, even though they may delegate some public law functions to other public authorities, private groups or organisations<sup>172</sup>. Thus, they are responsible for any violation committed by one of their «agents» in the exercise of their public authority, within or outside the territory, provided that at the time of the violation, the state had an effective control over the alleged victims<sup>173</sup>. Therefore, in case of a violation of these rights and principles by an agent of the church, within the territory of the state or against people under its jurisdiction, the state concerned might be held legally responsible on the ground that it did not take all necessary measures to prevent or to put an end to the violation<sup>174</sup>.

### 3.3. SOME DECISIONS OF EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT ON THE HOLY SEE

The next part goes through certain decisions of the ECtHR, where alleged violations of the Convention have originated from a decision of ecclesiastical institutions. The question is whether the Holy See is required under international law to ensure compliance with the ECHR, including the fair trial standard and the right to respect for private and family life. Although the decisions of the Court are taken against member states, they may have repercussions on the Holy See's policy, which would be indirectly forced to respect human rights standards under the Convention. The first decision deals with the enforcement of ecclesiastical decisions by Italian courts and the necessity for member states' tribunals and courts to ensure Article 6(1) of the Convention has been respected by ecclesiastical proceedings. Then, the second case, in addition to Article 6(1), also verifies that domestic courts properly

<sup>172</sup> Cameron, 2011, p. 48.

<sup>173</sup> Carrillo-Salcedo, 1999, p. 136.

<sup>174</sup> See United Nations Human Rights Committee, Communication No. 1472/2006, *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006, 29 December 2008, paras. 2, 4 and 12, at [http://www.statewatch.org/terrorlists/docs/Vinck%20-%20Sayadi%20\(English\).pdf](http://www.statewatch.org/terrorlists/docs/Vinck%20-%20Sayadi%20(English).pdf) (consulted on 19 June 2011); in the *Sayadi* case, a similar interpretation of the words «subject to its jurisdiction» has been made by the UNHRC, as regards the International Covenant on Civil and Political Rights. A state party (Belgium) had been considered responsible for a violation of individuals' rights due to national measures taken by the state in implementation of a Security Council resolution. Thus member states cannot invoke their international obligations to justify a violation of the Convention rights.

checked the respect of Articles 9 and 10 before enforcing a decision of ecclesiastical institutions.

### 3.3.1. *Pellegrini v. Italy*

#### *The Circumstances of the Case*

It follows from a significant decision of the ECtHR that states can be declared responsible when, under private international law rules, national jurisdictions give binding force to judgements decided by foreign courts and tribunals that did not respect the procedural guarantees of the right to a fair trial as protected under the ECHR. The circumstances in which this decision was pronounced are particularly relevant for the issue at stake and concern the complex relations between national «lay» law and Canon Law<sup>175</sup>. Under the Code of Canon Law, the Holy See has established ecclesiastical courts and tribunals, their competence to decide about specific offenses as well as the procedure for ordinary and special trials as defined under the Books VI and VII of the Code<sup>176</sup>. Among these trials is the special process to declare the nullity of marriages<sup>177</sup>. Besides, the Italian Republic and the Holy See, through an agreement that modified the Lateran Concordat, recognised the possibility for ecclesiastical judgements pronouncing the nullity of marriages, which has been enforced by a decision of the superior ecclesiastical authority control, to be declared effective by the competent Italian Court of Appeal<sup>178</sup>.

In 1987, Ms. Pellegrini saw her marriage annulled on the ground of consanguinity by the Lazio Regional Ecclesiastical Court of the Rome Vicariate, which followed the summary procedure under Article 1688 of the Code of Canon Law. She lodged an appeal against this decision but in April 1988, the Rota upheld the declaration of nullity of the marriage<sup>179</sup>. Then, although she complained that her defence rights and right to adversarial proceedings, recognised under Article 6(1) of the European Convention, had been violated by the proceedings before the ecclesiastical courts, the judgement was declared enforceable by the Florence Court of Appeal, which considered that Ms. Pellegrini had

<sup>175</sup> Costa, 2002, p. 470.

<sup>176</sup> Code of Canon Law, 1983, at [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (consulted on 10 March 2011).

<sup>177</sup> *Ibidem*, Canons 1671-1707.

<sup>178</sup> Holy See, *Agreement between the Holy See and the Italian Republic Modifying the Lateran Concordat*, 3 June 1985, Article 8, para. 2, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19850603\\_santa-sede-italia\\_it.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19850603_santa-sede-italia_it.html) (consulted on 10 March 2011); Ventura, 2005, p. 921.

<sup>179</sup> Rota, or *Tribunal Apostolicum Rotae Romanae*, is the highest Canon Law court, with jurisdiction all over the Roman Catholic Church and the Holy See.

freely chosen to bring the case before the Rota and thus had been able to exercise her defence rights «irrespective of the special features of proceedings under canon law<sup>180</sup>.»

After exhausting all national remedies, Ms. Pellegrini brought the case before the ECtHR, which had to examine the extraterritorial effects of the European Convention, the states' duties in relation to applying foreign law under international private law rules, and particularly the procedural guarantees under Article 6. Normally, non-member states' courts do not have to comply with the principles of the Convention. However, according to the jurisprudence of the European Court, the judges of a member state that is required to enforce a foreign decision will have to verify that all parties to the trial had enjoyed the guarantees established by Article 6. Thus, a foreign judgement should be declared enforceable under national law of a member state only if the answer is positive<sup>181</sup>.

### *The Decision of the European Court of Human Rights*

Neither the Holy See nor the Vatican City State have ratified the European Convention so that theoretically they do not have any obligation to comply with human rights principles under the Convention. This is the reason why the application was lodged against the Italian Republic, which is a member state. Thus, in order to avoid any future criticism, the European Court specified that it is not for the Court to verify the direct adequacy of proceedings before ecclesiastical courts with Article 6 of the Convention<sup>182</sup>. However, it is the duty of the Court to control «whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantee of article 6 [...] when the decision requesting enforcement emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties<sup>183</sup>.» According to this, a state party to the European Convention cannot declare a foreign decision enforceable within its territory, without having first ensure that

<sup>180</sup> *Pellegrini v. Italy*, ECtHR, Application No. 30882/96, 20 July 2001, para. 26, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=PELL&sessionid=73348595&skin=hudoc-en> (consulted on 19 March 2011).

<sup>181</sup> Cuniberti, 2008, p. 30.

<sup>182</sup> *Pellegrini v. Italy*, ECtHR, Application No. 30882/96, 20 July 2001, para. 40, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=PELL&sessionid=73348595&skin=hudoc-en> (consulted on 19 March 2011).

<sup>183</sup> *Ibidem*.

the proceedings before the foreign courts respect the guarantee of a fair trial. Otherwise, the member state itself would be held responsible of a violation of Article 6<sup>184</sup>.

For this, the European Court had to consider the reasons given both by the Italian Court of Appeal and the Court of Cassation to dismiss the complaints regarding the ecclesiastical proceedings. However, according to the European Court, the examination of the motivation of these domestic courts showed their failure. The Court of Appeal stated that the circumstances in which the applicant had appeared before the Ecclesiastical Court and her possibility to lodge an appeal against the judgement were sufficient to conclude that the right to an adversarial trial had been respected. In addition to that, the Court of Cassation only held that in general the ecclesiastical proceedings complied with the adversarial principle<sup>185</sup>.

The European Court was not satisfied by these reasons that did not attach any importance to the various elements supporting the argument of the applicant, who had not the opportunity of examining the evidences produced by her ex-husband and the so-called witnesses<sup>186</sup>. However, according to the right to adversarial proceedings, which is one of the elements of a fair hearing, «each party to a trial, be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision<sup>187</sup>.» The Court added that it is for the parties to a trial alone to decide whether a document produced by the other party calls for their comments. It is thus irrelevant that, in the government's opinion, the nullity of the marriage derived from an objective fact so that the applicant would not have been able to challenge it<sup>188</sup>. Regarding the applicant's right to the assistance of a lawyer, the European Court declared that «even in the context of the summary procedure before the Ecclesiastical Court, the applicant should have been put in a position enabling her to secure the assistance of a lawyer if she wished<sup>189</sup>.» Thus, the argument of the Court of Cassation that the applicant should have been familiar with the case-law is not satisfying. Although the European Court clarified that it would not examine the compliance of the Vatican tribunals with Article 6, it

<sup>184</sup> Costa, 2002, p. 472.

<sup>185</sup> *Pellegrini v. Italy*, ECtHR, Application No. 30882/96, 20 July 2001, para. 43, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=PELL&EGRINI&sessionid=73348595&skin=hudoc-en> (consulted on 19 March 2011).

<sup>186</sup> *Ibidem*, para. 44; Dias, 2002, p. 71.

<sup>187</sup> *Pellegrini v. Italy*, ECtHR, Application No. 30882/96, 20 July 2001, para. 44.

<sup>188</sup> *Ibidem*, para. 45.

<sup>189</sup> *Ibidem*, para. 46.

still believed that, given that the applicant did not know what the case was about when she appeared before the ecclesiastical courts, these tribunals «had a duty to inform her that she could seek the assistance of a lawyer before she attended for questioning<sup>190</sup>.»

Therefore, the European Court came to the conclusion that «the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law» and therefore Article 6(1) of the European Convention had been violated<sup>191</sup>.

### *The Importance of the Decision for Human Rights Law*

Two main consequences appear from this reasoning. Firstly, the Court overruled its former analysis according to which national courts of a state party to the European Convention did not have the duty to check the respect of the Convention principles before they enforce a judgement rendered by tribunals of a state where the Convention does not apply<sup>192</sup>. In the nineties the Court had already reviewed partly this former decision and decided that national tribunals and courts as well as the European Court must limit their control to the situations of «flagrant denial of justice<sup>193</sup>.» This decision was criticised, particularly because of the vagueness of the terms used and the apparent auto-limitation of the Court's power. However, the *Pellegrini* case allowed the Court to realise its full control in order to ensure a greater protection of human rights under the Convention<sup>194</sup>.

The verdict of the *Pellegrini* case extended the responsibility of member states. This implies that they have an additional duty to ensure that the right to a fair trial is respected by other states' courts before they give effect to the decision within the national territory, especially if the decision to enforce comes from a country that does not apply the Convention<sup>195</sup>. Therefore, this decision is of particular importance for

<sup>190</sup> *Ibidem*.

<sup>191</sup> *Ibidem*, paras. 47-48.

<sup>192</sup> *M. & Co. v. Federal Republic of Germany*, ECmHR, Application No. 13258/87, 9 February 1990, at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=665025&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (consulted on 29 March 2011); however this judgement of the European Commission was rendered in a special context, as the decision at stake had been taken by the Court of Justice of Luxembourg. Thus, a control from the European Commission would have opened a conflict between the two courts.

<sup>193</sup> *Drozd and Janousek v. France and Spain*, ECtHR, Application No. 12747/87, 2 June 1992, para. 110, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=JANOUSEK&sessionId=73348007&skin=hudoc-en> (consulted on 20 March 2011); Pierini, 2006, p. 412; Flauss, 2002, p. 73.

<sup>194</sup> Flauss, 2002, pp. 74-75.

<sup>195</sup> Cohen-Jonathan & Flauss, 2001, p. 453; Harris, O'Boyle & Warbrick, 2009, p. 203.

European human rights law because of the reviewed protection given to human rights. The responsibility of member states is extended to a breach of the duty of vigilance or insufficient motivation regarding the compliance with Article 6 of the Convention before foreign courts' proceedings<sup>196</sup>.

Secondly, although the European Court extended only member states' responsibility, and did not explicitly decide anything regarding the Vatican and its ecclesiastical proceedings, it is worth noticing that the Italian Republic is held responsible because of the violations of Article 6 before ecclesiastical courts<sup>197</sup>. The European Court attributed to the state not a direct violation of Article 6 but a lack of vigilance, or insufficient motivation, regarding procedures before foreign courts<sup>198</sup>. According to the Court, a state party to the Convention cannot declare a foreign decision enforceable within its own territory without first having checked that the proceedings before the foreign tribunals and courts respected the right to a fair trial as guaranteed by the Convention. Otherwise, the state concerned exposes itself to a condemnation before the Court<sup>199</sup>. The European Court will then have to check if the national jurisdictions comply with their obligation before enforcing the foreign decision. Therefore, although member states have the right to ratify several treaties or join international organisation, this does not entitle them to avoid their responsibilities under the European Convention<sup>200</sup>. As a consequence, the special relationship established between the Italian Republic, or any other state, with the Holy See by means of concordats does not result in a limitation of the states' duty to protect fundamental rights and freedom under the Convention.

Because the procedure before the Vatican courts did not fully respect human rights principles as recognised under Article 6(1), the Italian Republic is guilty of breaching this article<sup>201</sup>. The consequences of such a decision is that, in order for Italy not to be held responsible of a violation of human rights standards, Italian national courts will have to ensure that Article 6 of the European Convention had been respected before the ecclesiastical courts and thus refused to enforce their decisions in case of such a violation<sup>202</sup>. Therefore, it is possible to argue that such a decision will in the future allow individuals to get around the judicial immunity of

<sup>196</sup> Costa, 2002, p. 474.

<sup>197</sup> Flauss, 2002, p. 76.

<sup>198</sup> *Ibidem*, p. 75; Cohen-Jonathan & Flauss, 2001, p. 453.

<sup>199</sup> Flauss, 2002, p. 76; Costa, 2002, p. 475; Costa, 2007, p. 190.

<sup>200</sup> Cameron, 2011, p. 174.

<sup>201</sup> Costa, 2002, p. 475.

<sup>202</sup> *Ibidem*, p. 472.

non-member states before the European Court and reinforce the protection of human rights principles<sup>203</sup>. Regarding the Holy See's rights, many states parties to the European Convention have signed agreements or concordats in which they gave Catholic tribunals and courts the competence to decide on marriage annulations' cases<sup>204</sup>. Thus, the Court's decision should be understood as targeting all member states where ecclesiastical decisions can be enforced by national courts, due to the existence of such special agreement or concordat<sup>205</sup>. So, the obligation to comply with Article 6 indirectly weight on the Vatican City, which will have to ensure that proceedings before ecclesiastical courts respect Article 6 of the European Convention in order to allow the decisions to be declared enforceable under Italian law<sup>206</sup>.

If the *Pellegrini* case first aims at states that signed agreements or concordats with the Holy See, more generally all states bound by the Council Regulation «Bruxelles II» are concerned<sup>207</sup>. This instrument establishes specific rules for this type of agreements that are related to the subject of the Regulation. According to the Regulation, a state member of the European Union, which has signed an agreement with the Holy See, has the right to oppose itself to the recognition of an ecclesiastical decision about the invalidity of a marriage when «such recognition is manifestly contrary to the public policy of the member state in which recognition is sought<sup>208</sup>.» With the evolution of the perception of the right to a fair trial, it might be argued that Article 6 of the European Convention is part of the public policy of member states<sup>209</sup>.

### 3.3.2. *Lombardi Vallauri v. Italy*

#### *The Circumstances of the Case*

In 2009, the European Court confirmed its jurisprudence regarding the responsibility of member states in case of a violation of Article 6 by

<sup>203</sup> *Ibidem*, p. 475.

<sup>204</sup> Holy See, *Agreements of the Holy See*, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/index\\_concordati-accordi\\_en.htm](http://www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm) (consulted on 22 April 2011).

<sup>205</sup> Fawcett, 2007, p. 23; see also Cuniberti, 2008, p. 30 for the discussion of whether the decision in *Pellegrini* is to become generally applied in all enforcement matters or only in situations where states are in a special relationship with the Holy See, due to the signature of a concordat.

<sup>206</sup> Costa, 2002, p. 475.

<sup>207</sup> Council of the European Union, *Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000*, Article 63, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML> (consulted on 20 April 2011).

<sup>208</sup> *Ibidem*, Article 22(a).

<sup>209</sup> Flauss, 2002, p. 82.



ecclesiastical jurisdictions. In addition to this, the Court also recognised the duty to ensure the protection of Article 9 and 10 of the Convention for individuals employed in a Catholic university.

In this case, Mr. Vallauri, having Italian nationality, was a teacher at the Faculty of Law of the *Università Cattolica del Sacro Cuore* (University of the Sacred Heart) in Milan. His work was based on contracts renewed on an annual basis for twenty years. Then, the University decided to create a competition for the post, to which Mr. Vallauri applied. However, the Congregation for Catholic Education, which is an institution of the Holy See in charge to approve the application of the candidates, informed the President of the University that some of Mr. Vallauri's views were «in clear opposition to the Catholic doctrine» and that «in the interests of truth and of the well being of students and the University» he should no longer teach there<sup>210</sup>. Because of this position, Mr. Vallauri's application was unsuccessful.

Before the Lombardia Regional Administrative Court, Mr. Vallauri argued that the decision to dismiss his application was unconstitutional because of a breach of his right to equality, freedom to teach and freedom of religion<sup>211</sup>. Nevertheless, his contestation was rejected on the grounds that not only adequate reasons for his refusal had been given but also because of the existence of a Concordat between the Holy See and the Italian Republic, ratified by an Italian law on 25 March 1985, which did not require the mention of religious grounds for refusing approval<sup>212</sup>. In addition to that, the Court held that it did not have the competence to verify the legitimacy of the Holy See's decision, which is a foreign state's decision. The Court also noted that the applicant, like all members of the Catholic University staff, had the choice to adhere to or leave the Catholic faith, so that the rights mentioned previously were not violated<sup>213</sup>.

<sup>210</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, para. 8, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=VALLAURI%20%7C%2039128/05&sessionid=73348034&skin=hudoc-en> (consulted on 29 March 2011); European Court of Human Rights, Press release issued by the Registrar Chamber judgment, *Catholic University of Milan Should Have Given Reasons for Refusing to Employ a Lecturer Who Had Not Been Approved by the Ecclesiastical Authorities*, 20 November 2009, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39128/05&sessionid=73348068&skin=hudoc-pr-en> (consulted on 29 March 2011).

<sup>211</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, para. 12.

<sup>212</sup> Holy See, *Agreement between the Holy See and the Italian Republic Modifying the Lateran Concordat*, 3 June 1985, Article 10, para. 3, at [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19850603\\_santa-sede-italia\\_it.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19850603_santa-sede-italia_it.html) (consulted on 10 March 2011). This Agreement has been ratified by the Law No. 121 on 25 March 1985.

<sup>213</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, paras.

Then, Mr. Vallauri appealed to the *Consiglio di Stato* and argued both on the lack of motivation for the decision to refuse his application and on the apparent lack of jurisdiction of the administrative court<sup>214</sup>. His appeal was dismissed on the grounds that the decision emanated from a Vatican's institution, which is independent from the national authority and that «no authority in the [Italian] Republic may rule on the findings of the ecclesiastical authority<sup>215</sup>.» In their reasoning, the Italian courts referred to a previous decision of the Italian Constitutional Court, which had to verify whether the prerequisite condition of the Holy See's Agreement to the nomination of teachers in a Catholic university was compatible with the right to teach and the right to freedom of religion as protected under the Italian Constitution<sup>216</sup>. The Court concluded that it was the right of any free university to ask for specific condition regarding its teachers and staff. Whereas teachers have the right to belong to a particular confession and change it, on the other hand to force a university to hire people from diverse confessions would consist in a breach of its own freedom of religion.

#### *The Procedure before the European Court of Human Rights*

Before the ECtHR, Mr. Vallauri argued there was a breach of Articles 6, 9 and 10 of the European Convention. It is relevant to notice already that the circumstances are similar to the one that led to the decision of the Court in the *Pellegrini* case, as the Holy See's requirements imposed on the admission of teachers in a Catholic University are at the origin of the judicial action brought against the Italian Republic.

Relying on Articles 9 and 10, the applicant complained that the lack of reasons and adversarial debate that preceded the decision of the University consisted in a breach of both his right to freedom of expression and right to freedom of thought, conscience and religion and their procedural guarantees. First, the European Court admitted that, even though there was a breach of Article 10, it was based on the Italian legislation, which gave the Holy See the right to organise Catholic education. The Court also noted that this privilege was both justified by the specific aim pursued by the Catholic University to stick to the Catholic faith and doctrine of the Holy See and allowed by the

12-16, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=VALLAURI%20%7C%2039128/05&sessionid=73348034&skin=hudoc-en> (consulted on 29 March 2011).

<sup>214</sup> *Ibidem*, para. 17.

<sup>215</sup> *Ibidem*, para. 18.

<sup>216</sup> See *ibidem*, para. 21 for the relevant reasoning of Decision No. 165 of the Constitutional Court, 14 December 1972.

decision of the Constitutional Court, which was itself confirmed by the Directive 2000/78/CE<sup>217</sup>. According to this Council Directive, member states of the European Union may allow differential treatments based on religion or beliefs in employment without being considered as committing discrimination, provided that the nature of the professional activities or the context of their exercise constitute a «genuine and determining occupational requirement» that is both proportionate and based on a legitimate objective<sup>218</sup>. Besides, although Article 14 of the Convention aims to ensure the enjoyment of the Convention's rights without discriminations, including discrimination based on religious grounds, this article does not establish a general provision requiring equality of all people before the law, so that the Court agreed with the decision of the Constitutional Court and the Council Directive<sup>219</sup>.

Secondly, the Court verified if such a limitation to the applicant's rights was necessary in a democratic society. Thus, it had to balance the applicant's right to freedom of expression with the right of the University to follow its own religious convictions. For this, it was necessary to look at whether or not the applicant had enjoyed enough procedural guarantees regarding his opportunity to know and dispute the reasons of the restriction of his right to freedom of expression both before the Faculty Board and the domestic jurisdictions that were supposed to judicially control the respect of Article 10<sup>220</sup>.

The Court noted that nowhere were mentioned the reasons why Mr. Vallauri's views were considered in opposition to the Catholic doctrine. Neither the Faculty Board, which only referred to the Congregation's position, nor the domestic courts, which refused to consider that the Faculty Board never pointed out which views were in contradiction with the catholic faith, gave the applicant the possibility to contest the position of the Congregation in an adversarial debate. Because the Faculty Board omitted to explain in which way the applicant's positions, which were alleged to be in contradiction with the Catholic doctrine, were predisposed to affect the university's interests, it did not offer an adequate explanation for its decision<sup>221</sup>. Besides, the Court

<sup>217</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, paras. 38-41, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=VALLAURI%20%7C%2039128/05&sessionid=73348034&skin=hudoc-en> (consulted on 29 March 2011).

<sup>218</sup> Council of the European Union, *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation*, Article 23, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> (consulted on 22 March 2011).

<sup>219</sup> *Ibidem*, para. 78.

<sup>220</sup> *Ibidem*, paras. 44-46.

<sup>221</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, paras.

pointed out that before the domestic courts, the communication of the substance of the Congregation's observations would not have implied an examination by the domestic courts of the compatibility between the applicant's views and the Catholic doctrine. However, it would have given Mr. Vallauri the opportunity to argue about the alleged incompatibility in an adversarial debate<sup>222</sup>. As a consequence, the European Court concluded that the University's interest in dispensing Catholic education could not extend to such a restriction of the procedural guarantees conferred to the applicant by Article 10 of the Convention<sup>223</sup>. Therefore, both during the administrative phase and the judicial control by domestic courts, the breach of the right to freedom of expression was not necessary in a democratic society, so that there had been a violation of Articles 9 and 10 of the Convention<sup>224</sup>.

Relying on Article 6(1) of the Convention, Mr. Vallauri first complained that the domestic courts failed to rule on the lack of reasons for the dismissal decision, which consisted in a breach of his right to a fair trial and a restriction of his right to an adversarial debate and secondly that the Faculty Board had only taken note of the Congregation's position, which had also been taken without any adversarial debate<sup>225</sup>. The Court dismissed the argumentation of the government stating that the petition was not admissible because, as the Congregation is not a judicial institution, Article 6 should not apply. Besides, the Court held that the domestic administrative courts did not rule out the examination of the case brought by the applicant, so that Article 6 applied. Then, as the government argued that domestic courts were not competent to give a ruling on the decisions of a foreign State, the European Court recalled its jurisprudence of the *Pellegrini* case<sup>226</sup>. The decision of a non-member state to the European Convention, i.e. of the Holy See through the Congregation for Catholic Education, had been given legal effects through the Faculty Board's choice, which is an Italian authority, so that the conformity of its decision to the human rights principles of the

47-49, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=VALLAURI%20%7C%2039128/05&sessionid=73348034&skin=hudoc-en> (consulted on 29 March 2011).

<sup>222</sup> *Ibidem*, paras. 50-54.

<sup>223</sup> European Court of Human Rights, Press release issued by the Registrar Chamber judgment, *Catholic University of Milan Should Have Given Reasons for Refusing to Employ a Lecturer Who Had Not Been Approved by the Ecclesiastical Authorities*, 20 November 2009, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=39128/05&sessionid=73348068&skin=hudoc-pr-en> (consulted on 29 March 2011).

<sup>224</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, paras. 55-58.

<sup>225</sup> *Ibidem*, para. 59.

<sup>226</sup> *Ibidem*, paras. 67-72.

European Convention can be controlled by domestic courts. Thus, domestic courts have a duty to verify whether or not Article 6(1) of the Convention was respected by the national authority. As a consequence and for the same reasons discussed previously regarding Article 10<sup>227</sup>, the European Court decided both that the applicant did not have effective access to a court and that this restriction was not proportionate, with the result that Article 6(1) had been violated.

Although the European Court did not explicitly control the ecclesiastical proceedings before the Congregation and confirmed the right for a confessional university to submit the applications to specific conditions based on religion or beliefs, it did state that, because the Faculty Board contented itself with the Congregation's decision, it did not give a sufficient motivation for its own decision to dismiss Mr. Vallauri's application<sup>228</sup>. However, it is worth noticing that for the Faculty Board to be able to explain its decision, it would have been necessary for the Congregation to give a formal motivation of its views and pass it to the Faculty Board. Thus, the European Court condemned the decision of the Faculty Board to let the Congregation's position produce its effects within the national order without having previously checked if the procedural guarantees of Article 10 had been respected. According to the Court, the Board had the duty to ensure the protection of human rights principles in these circumstances. In a way, it implies that although the ecclesiastical authority does have the power to challenge the application of a teacher candidate in a Catholic university, this power is not discretionary, so that the reasons of its *veto* should be submitted to an adversarial debate before the domestic courts through the challenge of the Faculty Board's decision<sup>229</sup>. Therefore, the Holy See's institutions are indirectly invited to respect human rights standards as protected by the European Convention ratified by the Italian Republic if they want their decisions to be declared enforceable by Italian jurisdictions and institutions.

### 3.3.3. *The Key Provisions in the European Convention that Might Influence Church-State Relations*

As has been seen in the previous sections, the ECtHR does not have the competence to deal directly either with the ecclesiastical system organised by the Holy See and the Vatican City State or with their relationship with

<sup>227</sup> See *supra* chapter 3.3.2. *Lombardi Vallauri v. Italy*.

<sup>228</sup> Hervieu, 2009; Puppinc, 2009.

<sup>229</sup> Puppinc, 2009.

European countries, as neither the Holy See nor the Vatican City ratified the ECHR<sup>230</sup>. However, all states that ratified the Convention agreed to the Court's jurisdiction over human rights cases and thus are under the scrutiny of the European Court<sup>231</sup>. As member states have an obligation to «secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the ECHR]<sup>232</sup>,» the role of the Court is to help «ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention<sup>233</sup>.» As a consequence, the Court indirectly regulates the permissible relations between states party to the Convention and religious institutions, including the Holy See, in order to ensure the respect of rights and principles recognised and protected under the Convention<sup>234</sup>.

To accomplish this, the Court refers to the key provisions of the Convention dealing with religion and the relationship between church and state. Among them, Article 9 provides the basic framework for the right to freedom of religion and Article 14 ensures that the enjoyment of the Convention's rights is free from religious discrimination. Although Article 14 does not include a general provision calling for the equality of all people before the law, it prohibits discrimination with respect to European Convention's rights<sup>235</sup>. However, if discriminations on the basis of one of these rights occur, the discriminatory law may be acceptable provided a legitimate and reasonable justification for the distinction. Besides, exceptions have been clearly established under European law. Taking the example of the *Vallauri* case, the European Court recognised the possibility for member states to allow discriminations on the grounds of beliefs and religion provided the respect of the conditions enunciated within the Council Directive 2000/78/CE<sup>236</sup>. To look at church-state relationship, the Court also considers other articles referring to freedom of expression, the right to privacy, freedom of

<sup>230</sup> Evans & Thomas, 2006, p. 699.

<sup>231</sup> Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms Restructuring the Control Machinery Established Thereby, ETS 155, 11 May 1994, at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=0&NT=155> (consulted on 6 March 2011).

<sup>232</sup> European Convention on Human Rights and Fundamental Freedoms, Article 1, at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (consulted on 5 March 2011).

<sup>233</sup> *Ibidem*, Article 19.

<sup>234</sup> Evans & Thomas, 2006, p. 699.

<sup>235</sup> *Ibidem*, pp. 703, 715-716.

<sup>236</sup> See Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> (consulted on 22 March 2011).

assembly and freedom of marriage<sup>237</sup>. This will be discussed in more details in the next sections, through the analysis of three cases that occurred in Germany, where the relationship between religious communities and the state is shaped by constitutional law and a leading decision of the Federal Constitutional Court.

The type of relations between member states and churches differs strongly across Europe, from a strict separation and secularity to an official, established church<sup>238</sup>. Because of this absence of uniform conception, the European Court recognised the states some flexibility in their decision to restraint human rights. This «margin of appreciation» is justified by the consideration that «state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [i.e., the requirement to restrict human rights] as well as on the “necessity” of a “restriction” or “penalty” intended to meet them<sup>239</sup>.»

### 3.3.4. *Obst v. Germany and Schüth v. Germany*

#### *Introduction*

The previous decisions are not the only ones where the European Court had to consider the particular relationship between religious societies and member states. In six other cases, all involving Germany, the Court had to reflect on the right for religious organisations and churches to organise themselves in an autonomous way within the territory of a member state, in these cases Germany, under secular labour law<sup>240</sup>. There is no space here to examine in detail all the cases. Thus, I will briefly overview them and focus on the first three, which are also the most recent.

The six cases are the following: *Obst v. Germany*, where the Church of Jesus Christ of Latter-day Saints, usually referred as the Mormon Church, dismissed an employee because of adultery<sup>241</sup>, *Schüth v. Germany*, where a Roman Catholic Church musician was dismissed by his parish for adultery<sup>242</sup>, *Siebenhaar v. Germany*, where a Roman

<sup>237</sup> European Convention on Human Rights, Articles 8, 10, 11 and 12, at <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (consulted on 5 March 2011).

<sup>238</sup> Evans & Thomas, 2006, p. 705.

<sup>239</sup> *Handyside v. United Kingdom*, ECtHR, Application No. 5493/72, 7 December 1976, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=HANDYSIDE&sessionid=73348117&skin=hudoc-en> (consulted on 16 March 2011).

<sup>240</sup> Robbers, 2010-2011, p. 282.

<sup>241</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011).

<sup>242</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, at <http://>

Catholic head of an evangelical kindergarten was dismissed by her Church employer because of her membership and participation to the Universal Church/Brotherhood of Humanity whose teachings were in contradiction with the Evangelical Church in Baden ideals<sup>243</sup>, *Müller v. Germany*, where spouses officers of the Salvation Army were dismissed by their Church because of misconduct<sup>244</sup>, *Baudler v. Germany*, where a pastor of the Evangelical Church had been forced to an early retirement because of insurmountable differences in his parish<sup>245</sup> and finally *Reuter v. Germany* where a pastor of the Evangelical Church was pensioned off earlier because of parish conflicts<sup>246</sup>.

### *The Constitutional Mapping of the Autonomy of Religious Societies in Germany*

It is worth having a look at the particular privileges recognised to all religious communities under German legislation and case law. According to a leading decision of the German Federal Constitutional Court, regarding «the lawfulness of the dismissal of church employees after a violation of their loyalty obligations<sup>247</sup>», religious communities benefit from a right to self-determination, whether they are part of the Catholic, Protestant, Mormon or other religious community. This principle is set forth in Article 137(3) of the Weimar Constitution read in conjunction with Article 140 of the Basic Law. According to this privilege, all religious communities in Germany can administer their affairs independently, within the limits of the «law that applies to all<sup>248</sup>», including general state

cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SCH%DCTH%20%7C%201620/03&sessionid=73347954&skin=hudoc-en (consulted on 4 April 2011).

<sup>243</sup> *Siebenhaar v. Germany*, ECtHR, Application No. 18136/02, 3 February 2011, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SIEBENHAAR%20%7C%2018136/02&sessionid=72781688&skin=hudoc-en> (consulted on 8 April 2011).

<sup>244</sup> *Müller v. Germany*, ECtHR, Application No. 12986/04, 20 May 2008, partial decision on admissibility, at <http://strasbourgconsortium.org/document.php?DocumentID=3901> (consulted on 3 April 2011).

<sup>245</sup> *Baudler v. Germany*, ECtHR, Application No. 38254/04, 24 April 2008, at <http://strasbourgconsortium.org/document.php?DocumentID=3897> (consulted on 3 April 2011).

<sup>246</sup> *Reuter v. Germany*, ECtHR, Application No. 39775/04, at <http://strasbourgconsortium.org/document.php?DocumentID=3929> (consulted on 3 April 2011).

<sup>247</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 26, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011); *Rommelfanger v. Germany*, ECmHR, 4 June 1985, at <http://strasbourgconsortium.org/document.php?DocumentID=5523> (consulted on 3 April 2011): a medical doctor in a Catholic hospital maintained by the Catholic Church was dismissed because he had signed a public statement favouring a liberalisation of the abortion legislation, which was in contradiction to the teachings of the Catholic Church.

<sup>248</sup> This criterion has been the matter of controversial discussions for years and I will not



legislation protecting employees against unjustified dismissal, and have the right to confer their offices without the participation of the state or the civil community<sup>249</sup>. This right to self-determination is not only attributed to all religious communities but also to all affiliated institutions contributing to the church's mission and run by a religious community regardless of their legal structure<sup>250</sup>. Thus, Article 137(3) of the Constitution of Weimar covers all social institutions of churches, such as hospitals, schools, nurseries, etc. that are connected to a church<sup>251</sup>.

As will be seen in the following cases, this constitutional autonomy includes all matters that a religious society consider as its own affairs<sup>252</sup>, such as the establishment of their own legislation for church civil servants, i.e. priests but also deacons and other people employed in certain position within the church administration<sup>253</sup>. This embraces the opportunity for churches to structure contractual relations with their employees in ways that are consistent with the community's religious beliefs and to impose the respect of the fundamental religious and moral principles as a condition, provided their compatibility with the fundamental principles of the national legal order<sup>254</sup>. A specific expression of this right to self-determination is the particular obligation of loyalty that church-employees owe to their employers, with the right for the religious community itself to determine the content of this obligation, within the constitutional constraints of public order, good faith and the prohibition against arbitrary action<sup>255</sup>. This duty of loyalty can even affect the employees' conduct, beyond the working hours, i.e. within their private life<sup>256</sup>. Moreover, according to German law, which transposed Article 4(2) of the 2000 Council Directive in a statutory provision, the duty of loyalty churches may impose to their employees does not in itself constitute discrimination on the grounds of religious beliefs<sup>257</sup>.

enter the details of its signification. See Seifert, 2009, p. 538.

<sup>249</sup> The Reich Constitution of 11 August 1919 (Weimar Constitution), Article 137, para. 3, at [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php) (consulted on 3 April 2011); the Weimar Constitution is part of the Basic Law due to Article 140 of the Basic Law for the Federal Republic of Germany, 23 May 1949, at <http://www.iuscomp.org/gla/statutes/GG.htm#140> (consulted on 3 April 2011); Robbers, 2010-2011, p. 284.

<sup>250</sup> Robbers, 2010-2011, p. 285.

<sup>251</sup> Seifert, 2009, p. 537.

<sup>252</sup> *Ibidem*.

<sup>253</sup> *Ibidem*, p. 542.

<sup>254</sup> Religion and Law Consortium: A Research Forum for Legal Development on International Law and Religion or Belief Topic, *European Court Issues Rulings in Two German Church Employment Cases*, September 2010, at [http://www.religlaw.org/index.php?blurb\\_id=1035&page\\_id=19](http://www.religlaw.org/index.php?blurb_id=1035&page_id=19) (consulted on 7 April 2011).

<sup>255</sup> Robbers, 2010-2011, p. 289.

<sup>256</sup> Seifert, 2009, p. 556, see *infra* the discussion about *Obst* and *Schüth*.

<sup>257</sup> Seifert, 2009, 544; General Act on Equal Treatment, Germany, 14 August 2006, section

*Religious Expression at the Workplace - The Labour Law of Churches and Religious Societies in Germany*

In matters of employment, when a church decides to establish a contract as an employer, state labour law will apply as well, which includes statutory rules protecting workers, without putting aside the constitutional principle of self-determination. Thus, for most of the church-employees who are under employment contract, except those who hold church offices, such as priests, church officials, monks or nuns, general secular labour law applies with some exceptions due to the right to self-determination of churches<sup>258</sup>.

Therefore, in case of dispute, the labour courts have to consider the general secular employment legislation as well as to respect the moral standards of the religious community, what is required to ensure its credibility, the specific duties of church-employees resulting from the employment contract and the type of behaviour considered as contrary to these norms<sup>259</sup>. However, labour courts should respect religious principles of church-employers «only to the extent that they did not conflict with the fundamental principles of the legal order of the State»<sup>260</sup>. Thus, although the secular labour courts are bound by the religious and moral principles of the church employer, they have the final authority to decide if termination of employment is justified or not.

*The Circumstances of the Obst Case*

Before the European Court, the applicant was a German national who grew up in the Mormon faith and married in accordance with Mormon rites. He was the director of public relations for Europe from 1986 to 1993, when he was dismissed without notice by his employer, the Church of Jesus Christ of Latter-day Saints, for adultery. It happened following his confession that he had an affair with another woman than his wife and his request for pastoral help. Then, Mr. Obst was excommunicated by way of an internal disciplinary procedure<sup>261</sup>.

9, para. 2, at [http://www.ilo.org/aims/legislation/lang--en/docName--WCMS\\_142667/index.htm](http://www.ilo.org/aims/legislation/lang--en/docName--WCMS_142667/index.htm) (consulted on 7 April 2011).

<sup>258</sup> Robbers, 2010-2011, p. 288.

<sup>259</sup> *Ibidem*, p. 289.

<sup>260</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 14, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011); European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011); Robbers, 2010-2011, p. 285.

<sup>261</sup> European Court of Human Rights, Press release issued by the Registrar of the Court,

Mr. Obst first brought the case before the Frankfurt Labour Court, which declared the dismissal void, because it did not follow the rules of the creator of the Mormon Church, according to which the dismissal of a church member should occur only in case of no repentance<sup>262</sup>. Although the Labour Court of Appeal upheld the judgement, the Federal Labour Court overturned it and remitted the case, observing that Mr. Obst did not respect the obligations arising from the paragraph 10 of his work contract. According to that, he had the duty to follow high moral principles and abstain from all communications or behaviour likely to harm the reputation of the church or endanger its fundamental principles, otherwise he would risk a dismissal without notice<sup>263</sup>.

Then, the Federal Court referred to the 1985 leading decision of the Federal Constitutional Court and recalled that the Mormon Church, as a religious society recognised under the Weimar Constitution read in conjunction with Article 140 of the Basic Law, has a right to religious self-determination. Thus, labour courts should take moral precepts of the Mormon Church and religious principles of the church employer into consideration and respect them «only to the extent that they did not conflict with the fundamental principles of the legal order of the State<sup>264</sup>.» According to the Federal Court, in order to ensure its credibility, the Mormon Church was entitled to require marital fidelity from its employees, which did not conflict with the fundamental principles of the legal order, mainly because marriage was also considered as particularly important and was protected under the German Basic Law<sup>265</sup>. The Court added that the dismissal had been necessary for the church to maintain its credibility, which was under threat considering the applicant's responsibilities as director of public relations for Europe<sup>266</sup>.

*Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>262</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 10, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011).

<sup>263</sup> *Ibidem*, para. 8.

<sup>264</sup> European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>265</sup> *Ibidem*.

<sup>266</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 17, at

Afterwards, the Labour Court of Appeal followed the reasoning of the Federal Court and overturned the first instance judgement. Then, both the Federal Labour Court and the Federal Constitutional Court dismissed the applicant's complaint<sup>267</sup>.

*The Circumstances of the Schüth Case*

Mr. Schüth was an organist and choirmaster in a Catholic parish in Germany. He separated from his wife in 1994 and was living with his new partner when, in 1998, he was dismissed for engaging in extra-marital relationship. The parish's decision was taken on the grounds that Mr. Schüth had violated the regulations of the Catholic Church on employment, particularly the obligation of loyalty regarding ecclesiastical job, and was guilty of both adultery and bigamy<sup>268</sup>.

The applicant brought the case before the Essen Labour Court, which declared the dismissal void. Though the Labour Court of Appeal upheld the judgement, the Federal Labour Court repealed it and remitted the case. The reasoning of the Court was mainly based on the same argumentation developed for the *Obst* case<sup>269</sup>.

When a church employer concludes an employment contract, he is using both general secular labour law and the constitutional right to self-determination. The Catholic Church, like the Mormon Church, has the right to govern its affairs in an autonomous matter<sup>270</sup>. Thus, the Court held that, in order to ensure its credibility, the church could have imposed the respect of religious and moral Catholic provisions to their church employees not only regarding their professional duty but also their private life<sup>271</sup>. The Court also pointed out that the requirements of the Catholic Church regarding marital fidelity did not conflict with the fundamental principles of the legal order. Besides, the Court considered that the Labour Court of appeal should have heard the dean of the

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011).

<sup>267</sup> *Ibidem*, paras. 22-23.

<sup>268</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 13, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SCH%DCTH%20%7C%201620/03&sessionid=73347954&skin=hudoc-en> (consulted 4 April 2011).

<sup>269</sup> *Ibidem*, para. 22.

<sup>270</sup> *Ibidem*, para. 20; The Reich Constitution of 11 August 1919 (Weimar Constitution), Article 137, para. 3, at [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php) (consulted on 3 April 2011).

<sup>271</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 21, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SCH%DCTH%20%7C%201620/03&sessionid=73347954&skin=hudoc-en> (consulted on 4 April 2011).

parish in order to determine whether he had tried to encourage the applicant to end his extra-marital relationship<sup>272</sup>.

Then, the Labour Court of appeal followed the remittal and over-turned the first instance decision. The applicant's further complains before the Federal Labour Court and Federal Constitutional Court were both dismissed<sup>273</sup>.

*The Decision of the European Court on the Alleged Violation of Article 8*

Among the relevant domestic law and practices, the European Court recalled the specific status of religious communities recognised by the Federal Constitutional Court and established under the Weimar Constitution and Basic Law<sup>274</sup>.

Because the Federal Labour Court had decided that the requirements of the Mormon and the Catholic Church regarding marital fidelity did not conflict with the fundamental principles of the legal order, Mr. Obst and Schüth complained before the European Court about the refusal of the German labour courts to overturn their dismissal. They both relied on their right to private and family life, so that in both cases, the argumentations of the applicants and of the government were very similar. The particularity of the applicants' complaint is that they did not litigate about an action from the state but about its failure to properly protect their right to private and family life against their employer's interference<sup>275</sup>.

According to the European Court, member states benefit from a certain margin of appreciation regarding the balancing of the common or public interest with the private interests of individuals<sup>276</sup>. This margin of appreciation is bigger when there is no consensus among member states. Thus, the main question was whether the state, according to its positive duty under Article 8, had to recognise the applicants the right to respect of their private life against the dismissal decided by the Mormon or the Catholic Church<sup>277</sup>. In order to look at the alleged violation of Article 8, the Court had to examine the balancing exercise of the German labour courts between on the one hand the applicants' right to respect for their

<sup>272</sup> *Ibidem*, para. 19.

<sup>273</sup> *Ibidem*, paras. 26-27.

<sup>274</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, paras. 26-27; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, paras. 35, 40.

<sup>275</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 40; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 54.

<sup>276</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 42; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 56.

<sup>277</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 43; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 57.

private and family life as protected under Article 8, and on the other hand the Convention rights of the Mormon Church and Catholic Church protected against undue interference by the state under the right to freedom of religion of Article 9 read in the light of freedom of assembly and association of Article 11 of the Convention<sup>278</sup>.

In both cases, the Court noted that the Federal Labour Court referred to the leading decision of the Constitutional Court and found that the requirements of the Mormon and the Catholic Church did not conflict with the fundamental principles of the legal order<sup>279</sup>.

*i. As regards Mr. Obst*

The European Court noted that, according to the German labour courts, Mr. Obst's dismissal for engaging in extra-marital relationship had only been possible because of his own initiative to inform his superiors<sup>280</sup>. Then, after having considered the reasoning of the domestic labour courts regarding the necessity of the dismissal, the Court pointed out that, according to the domestic courts, the prejudice suffered as a result of the dismissal was limited, due both to the relatively young age of the applicant and to his experience of the Mormon values. Thus, he had been or should have been aware of the importance of marital fidelity for his employers and of the incompatibility of his extra-marital relationship with his obligation of loyalty towards the church<sup>281</sup>.

Therefore, the European Court assessed that the German labour courts had taken account of all the relevant elements of the situation in order to realise a proper balance of the interests at stake. The fact that these courts gave more weight to the interests of the church and that the dismissal was based on the applicant's private behaviour did not itself raise an issue under the Convention. Moreover, the Labour Court of appeal clarified that its decision did not imply that adultery itself was recognised as a sufficient reason to dismiss a church-employee<sup>282</sup>. However, in the circumstances of the case, the gravity of adultery for the Mormon Church and the important position of the applicant within the

<sup>278</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 44; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 58; European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>279</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 47; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 61.

<sup>280</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 47.

<sup>281</sup> *Ibidem*, para. 50.

<sup>282</sup> *Ibidem*, para. 51.

church justified the dismissal. Therefore, the Court concluded that the sanction inflicted to the applicant was not unreasonable and thus, Article 8 of the Convention had not been violated.

*ii. As regards Mr. Schüth*

Unlike its decision in the *Obst* case, the European Court found that the German labour courts had failed to properly balance the interests at stake in a manner compatible with the Convention<sup>283</sup>. The Court decided that the interests of the church employer had «not been balanced against the applicant's right to respect for his private and family life, but only against his interest in keeping his post,» so that Article 8 had been violated<sup>284</sup>. The reason for this difference, which appeared in the reasoning of the Court, is that the domestic labour courts did not correctly review the applicant's particular situation and the consequences of the dismissal on his private and professional life, especially the fact that he had only limited opportunities of finding another job outside the Catholic Church because of his special qualifications<sup>285</sup>.

Mr. Schüth, by the signature of the employment contract, had entered into a duty of loyalty towards the Catholic Church, which could demand a restriction of his right to respect for his private life. However, the European Court considered that his signature «could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce,» which is at the core of his right of respect for his private life<sup>286</sup>. Besides, due to his job as a musician, the situation did not receive media coverage and Mr. Schüth did not appear to have challenged the position of the Catholic Church itself but only failed to practice it in his private life<sup>287</sup>. The Court finally observed that the Labour Court of Appeal had contented itself with reproducing the argumentation of the church employer, about the close connection of the applicant's job with the church's mission and the necessity of the dismissal, without verifying this argument any further<sup>288</sup>.

<sup>283</sup> European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>284</sup> *Ibidem*; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 67.

<sup>285</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 73.

<sup>286</sup> *Ibidem*, para. 71; European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>287</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 73.

<sup>288</sup> *Ibidem*, paras. 66-69.

### 3.3.5. *Siebenhaar v. Germany*<sup>289</sup>

Mrs. Siebenhaar is a German national who was working as a childcare assistant in a day nursery run by a Protestant parish and later as a manager of kindergarten run by another Protestant parish. As the Protestant Church required loyalty from its employees, which was stated in the employment contracts, they were not allowed to be members of or collaborate with organisations whose activities were in contradiction with the ideals of the church<sup>290</sup>. Thus, the applicant was dismissed without notice after her employer had been informed that she was also a member of and a teacher in the Universal Church/Brotherhood of Humanity.

The German labour courts considered that she had violated her obligation of loyalty towards the Protestant Church, which had justified her dismissal. Besides, the Federal Labour Court believed that the church employer could have rightly feared that her work in the kindergarten would be affected by her activities and put the church's credibility at risk<sup>291</sup>. To support their decisions, the labour courts referred to the same leading judgement of the Federal Constitutional Court as in the *Obst* and *Schüth* cases.

Before the European Court, the applicant complained of her dismissal and relied in particular on Article 9 of the Convention. Then, the Court had to examine whether the labour courts had given sufficient protection against the applicant's dismissal when balancing the applicant's right to freedom of religion and the Convention rights of the church. The reasoning of the Court was very similar to the one of the previous cases and it concluded that the German labour courts had taken all the relevant factors of the situation into consideration and undertaken a proper balance of interests<sup>292</sup>. From the moment of signing the contract, the applicant had been or should have been aware that her activities for the Universal Church were incompatible with her

<sup>289</sup> *Siebenhaar v. Germany*, ECtHR, Application No. 18136/02, 3 February 2011, at [http://www.globalgovernancewatch.org/docLib/20110211\\_GGW-ECHR\\_Termination.pdf](http://www.globalgovernancewatch.org/docLib/20110211_GGW-ECHR_Termination.pdf) (consulted on 8 April 2011).

<sup>290</sup> European Court of Human Rights, Press released issued by the Registrar of the Court, *Dismissal of Kindergarten Teacher by Protestant Church for Active Commitment to Another Religious Community Was Justified*, No. 091, 3 February 2011, at [http://www.globalgovernancewatch.org/docLib/20110211\\_GGW-ECHR\\_Termination.pdf](http://www.globalgovernancewatch.org/docLib/20110211_GGW-ECHR_Termination.pdf) (consulted on 8 April 2011); Ouald-Chaib, 2011.

<sup>291</sup> *Siebenhaar v. Germany*, ECtHR, Application No. 18136/02, 3 February 2011, paras. 14-16, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SIEBENHAAR%20%7C%2018136/02&sessionId=72781688&skin=hudoc-en> (consulted on 8 April 2011).

<sup>292</sup> *Ibidem*, paras. 37-45.



job within the Protestant Church<sup>293</sup>. Thus, the latter was entitled to end the employment contract in order to protect its credibility. Therefore, there had been no violation of Article 9. However, the decision of the Court is not final, as a request for the case to be referred to the Great Chamber of the Court is pending.

### 3.3.6. *The Interests of the Cases for the Principle of Autonomy Recognised to Religious Communities*

These decisions have consequences for the autonomy granted to religious communities not only in Germany but also in all member states, as the Court has jurisdiction over the 47 states member of the Council of Europe<sup>294</sup>. By addressing the issue of «dismissal of Church employees on grounds of conduct falling within the sphere of their private life»<sup>295</sup>, the European Court developed a very similar reasoning in the three cases exposed previously. In each situation, it had to verify whether national jurisdictions had properly balanced the interests of all parties, i.e. the individual rights of the applicants against the collective rights of a religious community<sup>296</sup>, and whether they had taken into consideration the particularity of each situation, such as the type of work realised within the church, the possible impact of the situation on the public and the personal situation of the applicant.

A main difference between these judgements is that in the *Obst* and *Schüth* cases the conflict arose between on the one hand the applicants' individual right to respect for their private and family life under Article 8 and on the other hand, the religious autonomy of religious communities under Article 9 read in light with Article 11<sup>297</sup>. As for the *Siebenhaar* case however, the clash occurred between the right of both the church and the applicant to freedom of religion and the right to

<sup>293</sup> *Siebenhaar v. Germany*, ECtHR, Application No. 18136/02, 3 February 2011, paras. 44-46, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SIEBENHAAR%20%7C%2018136/02&sessionid=72781688&skin=hudoc-en> (consulted on 8 April 2011); Council of Europe Human Rights Europe, *German Protestant Church Wins Religious Freedom Row with Dismissed Catholic employee*, 3 February 2011, at <http://www.humanrightseurope.org/2011/02/german-protestant-church-wins-religious-freedom-row-with-dismissed-catholic-employee/> (consulted on 10 April 2011).

<sup>294</sup> Robbers, 2010-2011, p. 283.

<sup>295</sup> European Court of Human Rights, Press release issued by the Registrar of the Court, *Dismissal of Church Employees for Adultery: Domestic Courts Required to Balance Rights of Both Parties and Take Account of Specific Nature of Post Concerned*, 23 September 2010, at <http://www.codexnews.com/codex/contents.nsf/WNPPrintArticles/C6DA8ADD1885E5B9C22577AC006CE616?open> (consulted on 6 April 2011).

<sup>296</sup> Hervieu, 2011 (a), p. 4.

<sup>297</sup> Ouald-Chaib, 2011.

manifest one's religious belief under Article 9 of the Convention<sup>298</sup>. While the church called upon its freedom to organise itself according to its own religious principles, the applicant alleged a breach of her right to freedom of religion, since her dismissal was based on her membership to another religious institution<sup>299</sup>.

Nevertheless, all these decisions enlighten the difficult balance to find between the protection of individuals' rights and freedoms and the right of a very particular employer whose ethic is based on religion or beliefs<sup>300</sup>. The three applicants were not complaining about a positive action from the state but about a lack of protection that state authorities should have ensured to the church-employees against interference by their employer<sup>301</sup>. Even though the European Court recognised the right for the states to benefit from a certain margin of appreciation when granting certain privileges to a specific type of employer, states' freedom is not unlimited as the Court still exercises a minimum control<sup>302</sup>.

The autonomy of religious communities, which is the equivalent of the right to self-determination in German law<sup>303</sup>, is one of the fundamental elements of the principle of separation of church and state, democracy, pluralism and state neutrality. It is also recognised under international human rights law through the right to freedom of thought, conscience and religion under Article 9 of the European Convention read in light with the right to freedom of association under Article 11<sup>304</sup>. Besides, states' obligation to remain neutral *vis-à-vis* religious communities is essential to prevent state supremacy, to maintain the separation between church and state and avoid the privileging or ban of certain confessions or religious beliefs<sup>305</sup>. As a third party intervenor in each case, the churches based their argumentation mainly on these considerations in order to support the idea that a decision from the Court ruling that a violation had occurred would have major implications for employment relationships of all religious communities in Europe and could compromise their ability to act as an employer in accordance with religious values<sup>306</sup>. On the other hand, the churches held that a decision

<sup>298</sup> Cranmer, 2011, para. 27; Hervieu, 2011 (b).

<sup>299</sup> Ouald-Chaib, 2011.

<sup>300</sup> Hervieu, 2011 (b).

<sup>301</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 40; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 54; *Siebenhaar v. Germany*, ECtHR, Application No. 18136/02, 3 February 2011, para. 37.

<sup>302</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 50; *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, paras. 57-59.

<sup>303</sup> Robbers, 2010-2011, p. 284; Seifert, 2009, p. 534.

<sup>304</sup> Robbers, 2010-2011, p. 305.

<sup>305</sup> Seifert, 2009, p. 534.

<sup>306</sup> *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 37;

in its favour would «result in an important strengthening of the Church's freedom of religion<sup>307</sup>.» In its Application, the Mormon Church also noted that «the exact contents of the requirements of loyalty and personal worthiness of church employees cannot be determined by State law. They must be left – within the limits drawn from the Convention – to the free discretion of the churches themselves. Any State definition of these obligations would involve a violation of the obligation of the State to remain neutral in matters of religion, and to refrain from evaluating religious doctrines and practices» and would be a state intervention in the church's internal affairs<sup>308</sup>.

Thus, the protection of rights and interests of religious societies recognised by the Convention may become a justification for the limitation of individual's freedoms and rights, particularly in the special context where church employees accept a duty of loyalty and an obligation to follow high standards of conduct, through the signature of the employment contract<sup>309</sup>. Following the Court's decisions, such a constraint is not only limited to the professional area but can also embrace private behaviour and might result in the dismissal of employees. Besides, the Court admitted that the interests of the church employer could weight more than those of the individuals<sup>310</sup>. However, it follows from the *Schüth* case that the restrictions on employees' private life cannot go too far, as the Court considered that it was not possible to impose a life of abstinence in case of separation or divorce, even though adultery is a sin under church values<sup>311</sup>.

Therefore, these decisions confirm that under the European Convention, states not only have a negative obligation not to unduly interfere with the fundamental human rights recognised and protected by the articles of the Convention, but also a positive duty to take all necessary measures in order to ensure an effective respect of the rights of individuals under their jurisdiction<sup>312</sup>. Although Germany has delegated a part of its function regarding employment to the different churches, the state still has to respect its positive duty. Thus, in case a dispute arises between individuals

*Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 52.

<sup>307</sup> Corporation of the President of the Church of Jesus Christ of Latter-day Saints, *Obst v. Germany - Third-Party Intervention*, Prof. Dr. Gerhard Robbers on Behalf of The Church of Jesus Christ of Latter-day Saints, in *Strasbourg Consortium, Freedom of Conscience and Religion at the European Court of Human Rights*, 12 June 2008, paras. 2 and 11, at <http://strasbourg-consortium.org/document.php?DocumentID=3956> (consulted on 12 April 2011).

<sup>308</sup> *Ibidem*, para. 80.

<sup>309</sup> Hervieu, 2011 (a), p. 6; Robbers, 2010-2011, pp. 307, 312.

<sup>310</sup> Robbers, 2010-2011, pp. 305, 312.

<sup>311</sup> *Schüth v. Germany*, ECtHR, Application No. 1620/03, 20 September 2010, para. 71.

<sup>312</sup> Robbers, 2010-2011, p. 311.

and a church-employer, national tribunals and courts will apply general secular labour law significantly modified by the churches' right to self-determination<sup>313</sup>. However, even though labour courts have to respect the standards of religious communities, the conditions imposed to their employees and the obligation of loyalty, which might include the applicants' behaviour in their private life, judges still have to balance the interests and rights of the applicant with the interests of the church, in accordance with the positive duty of the state<sup>314</sup>.

This is where these decisions indirectly join the lessons from the *Pellegrini* and *Vallauri* cases. Churches have the right to organise their affairs independently, provided the respect of the fundamental principles of member states' legal order, which includes human rights principles recognised under the European Convention. Thus, national labour courts must realise a proper balancing of the interests at stake based on the principle of proportionality, and take into consideration the nature of the work of church-employees<sup>315</sup>. Although the Roman Catholic Church, Holy See or Vatican City did not ratify the European Convention, it still has to follow basic human rights principles in order for its decisions not to be overturned by member states' courts, as the latter must ensure sufficient protection of individual's rights through their final power to verify the decision of church authorities<sup>316</sup>.

It can be noticed that if the Court has decided to recognise the necessity to protect the rights recognised under Articles 8 and 9 of the Convention, it is possible to think that the same reasoning could be applied for other human rights standards under the Convention. As a consequence, churches, including the Holy See, need to be very careful when dealing with lay employees. The privileges recognised to religious societies by member states do not free the churches to respect human rights standards. In addition to this, religious values or personal behaviour traditionally expected from the clergy cannot simply be imposed on the laity<sup>317</sup>.

<sup>313</sup> *Ibidem*, p. 284.

<sup>314</sup> Hervieu, 2010, p. 2.

<sup>315</sup> *Lombardi Vallauri v. Italy*, ECtHR, Application No. 39128/05, 20 October 2009, para. 69, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=VALLAURI%20%7C%2039128/05&sessionid=73348034&skin=hudoc-en> (consulted on 29 March 2011); *Obst v. Germany*, ECtHR, Application No. 425/03, 23 September 2010, para. 51, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OBST%20%7C%20425/03&sessionid=73347922&skin=hudoc-en> (consulted on 3 April 2011).

<sup>316</sup> Robbers, 2010-2011, p. 285.

<sup>317</sup> Cranmer, 2011, para. 28; Ouald-Chaib, 2011, which refers to *X v. Denmark* (ECmHR, Application No. 7374/76, 8 March 1976), *Karlsson v. Sweden* (ECmHR, Application No. 12356/86, 8 September 1989), ECmHR, at [http://strasbourgconsortium.org/cases.php?page\\_id=10#portal.case.table.php](http://strasbourgconsortium.org/cases.php?page_id=10#portal.case.table.php) (consulted on 10 April 2011); in recent cases where the

This specific status is recognised towards the employees of religious community. However, the situation is different as regard the status of church officers and ministers of the cult. One of the consequences of state neutrality is the immunity of religious communities from state courts jurisdiction in this matter. Thus, legal remedies concerning this issue are not admissible before a court in a state that respects the principle of neutrality in matters of religion. In question of priesthood and the status of ministers, religious principles based on the service to God apply, for which domestic courts cannot interfere with, as it is totally left to religious institutions and belongs to religious rights guaranteed by the Convention<sup>318</sup>. Church ministers or officials have given their consent to the special and spiritual relationship with their religious community on a completely voluntary basis. Thus, an eventual interference of public authorities would undermine the religious freedom of any of the individuals who decided to become an entire member of a religious community but also the right of the community itself<sup>319</sup>.

church is involved in its employer capacity, the decisions of the court differs from the previous one, in which the court tended to give more weight to the interests of the church by arguing that, in case of disagreement, church employees always had the possibility to leave the church.

<sup>318</sup> Robbers, 2010-2011, p. 310.

<sup>319</sup> *Ibidem*, p. 312.

## CHAPTER 4

### THE HOLY SEE IN THE UNITED STATES, A POSSIBLE VICARIOUS LIABILITY FOR CLERICAL SEXUAL ABUSES COMMITTED AGAINST CHILDREN: THE CASE OF *DOE V. HOLY SEE*<sup>320</sup>

After the examination of the international status of the Holy See, its liability under ratified international treaties and indirect accountability for human rights violations under the European Convention, the next step is to investigate the possible liability for the Holy See as an employer for clerical sexual abuses. Here, the issue not only involves human rights violations, but mainly contravention of domestic legislation by ministers of the cult. The scandal of sexual abuses committed by clergy has burst in many countries around the world. Thus, the question that naturally arose is whether the Holy See could be legally seen as an «employer» of the abusers and thus could be liable for their actions occurring while they were acting as priests.

The case studied here was brought before the United States (US) domestic courts. Although the American judicial system is very different from the one used in Europe, the case of *Doe v. Holy See* deserves to be considered and focuses the discussion on civil *respondeat superior* liability, i.e. responsibility of employers for their employees' tortious act within the scope of employment. Therefore, it is important to emphasise that the liability considered in this part is very different from the one analysed in the previous chapters, as the question focused on the employment relationship between clergy and the Holy See. Thus, the issue is not any more about the protection of church employees from interference of the church but about the possible liability of the Holy See as an employer for damages committed by their priests employee acting as such.

<sup>320</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (or), 3 March 2009, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

#### 4.1. THE CIRCUMSTANCES OF THE CASE AND THE DECISION OF THE DISTRICT COURT

The case started when an anonymous party, John Doe<sup>321</sup>, alleged before the US District Court for the District of Oregon that he was sexually abused around 1965 by a Roman Catholic priest, Reverent Ronan. The priest, dead by the time, was first suspected of paedophilia in Ireland, before he was moved to Chicago and then Portland in Oregon after he admitted having molested minors in Ireland and Chicago<sup>322</sup>. Doe decided to sue the Archdiocese of Portland, the Bishop of Chicago, the priest's religious Order, but also the Holy See on several grounds. First, he argued that the Holy See was vicariously liable for the actions taken by the Archdiocese and the Order of the priest, seen as «Holy See's instrumentalities.» Secondly, Doe argued that the Holy See was liable through *respondeat superior* liability based on vicarious liability according to which employers can be held responsible for their employees' tortious acts committed within the scope of their employment<sup>323</sup>. Thirdly, he held that the Holy See engaged its direct liability due to its own negligent supervision of the priest and failure to warn Mr. Doe of the danger the priest represented<sup>324</sup>. The Holy See asked for the dismissal of the action «because, as a foreign sovereign, it is immune from suit in US courts» under the Foreign Sovereign Immunities Act (FSIA)<sup>325</sup>.

However, except for Doe's first claim, the District Court held that it had jurisdiction under the FSIA's tortious act exception to sovereign immunity, which applies when «money damages are sought against a foreign state for personal injury or death, [...] occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment»<sup>326</sup>.» In case a foreign state is not immune from suit, the same responsibility as a private individual under similar circumstances shall apply<sup>327</sup>.

<sup>321</sup> «John/Jane Doe» is used in the US when a party does not want to disclose his identity in a court case.

<sup>322</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, paras. 1069-1070.

<sup>323</sup> Neu, 2010, p. 1509.

<sup>324</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1069, p. 2548, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>325</sup> *Ibidem*, para. 1069.

<sup>326</sup> Foreign Sovereign Immunities Act, 28 USC, 1605(a)(5), at <http://uscode.house.gov/download/pls/28C97.txt> (consulted on 16 May 2011); see also Martinez Jr., 2008-2009, p. 124, 1603 (a), (b) for the definition of a «foreign state» under the FSIA.

<sup>327</sup> Foreign Sovereign Immunities Act, 28 USC, 1606, at <http://uscode.house.gov/download/pls/28C97.txt> (consulted on 16 May 2011).

## 4.2. THE COURT OF APPEALS OF THE 9TH CIRCUIT

Then, after the Holy See had appealed the decision of the District Court, the Court of Appeals determined which acts might be attributed to the Holy See in order to establish jurisdiction<sup>328</sup>. At this point, it is important to note that there has been no trial regarding Doe's allegations yet. Before the Court of Appeals, all the legal proceedings have been exclusively questions of law, so that at this stage the Court had to assume that everything alleged by the plaintiff was true in order to decide whether the Holy See could be liable<sup>329</sup>.

The Court of Appeals first considered the alleged tortious acts committed by the Archdiocese, the Order and the Bishop, alleged to be corporations created by the Holy See. On this point, the Court agreed with the Holy See on the fact that Doe had not alleged sufficient facts to overcome the presumption of separate judicial status in order to demonstrate that the actions of these «corporations» could be attributed to the Holy See<sup>330</sup>. According to the Supreme Court of the United States, this presumption can be overcome when enough evidences that «a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created» or that the recognition of a separate status «would work fraud or injustice<sup>331</sup>». However, Doe's allegations that the Holy See participated to the creation of these institutions and promulgated laws and regulations that apply to them are insufficient to overcome this presumption or to provide enough evidence of a day-to-day control<sup>332</sup>.

On the other hand, according to the District Court, certain actions performed by the Holy See itself, such as its «negligent retention and supervision of Ronan and its failure to warn Doe of Ronan's dangerousness» could establish jurisdiction over the Holy See<sup>333</sup>. However,

<sup>328</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, paras. 1076-1077, pp. 2562-2570, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>329</sup> Addison, 2010.

<sup>330</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, paras. 1076-1077, pp. 2563-2570, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>331</sup> This decision was taken in the case *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 US 611 (1983), para. 629, at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=462&invol=611> (consulted on 25 May 2011), where the Supreme Court had to consider a situation reverse to the one of the *Doe* case, as the question was whether an instrumentality created by a foreign state could be held responsible for the acts of the foreign state itself.

<sup>332</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1080, p. 2569, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>333</sup> *Ibidem*, paras. 1080-1081.



reversing the District Court, the Court of Appeals decided that the claim against the Holy See for negligent retention and supervision of the priest could not be brought under the tort exception because of the exclusion of «any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused»<sup>334</sup>.

Finally, the third issue was whether the Holy See would engage its *respondeat superior* liability for the priest's actions as an alleged employee. The Court noted that the claim based on the priest's behaviour fell under the exception to immunity. Then, because the FSIA does not give any definition of «employee» and «within the scope of employment,» their meaning depends on the definition given by state law and their interpretation by the Oregon Supreme Court. Under Oregon employment legislation, *superior* vicarious liability of employers may be engaged towards actions committed by their employees «within the scope of employment.» Without going into the details of this legislation, it is worth noticing that the Oregon Supreme Court had established a test for employers' vicarious liability especially applicable to intentional torts or criminal acts that were engendered by and resulted from actions committed by employees within the scope of employment<sup>335</sup>.

Thus, it was necessary for the Court of Appeals to look if the acts that were within the priest' scope of employment resulted in actions leading to injury to the plaintiff<sup>336</sup>. The Court recognised Doe's allegations as meeting this standards, as he held that Ronan used his «position of authority» to «engage in harmful sexual contact» upon him<sup>337</sup>. Therefore, the Court decided that Doe had alleged enough facts to overcome the pleading standard and to show that his claim was

<sup>334</sup> Foreign Sovereign Immunities Act, 28 USC, 1605 (a) (5) (A), at <http://uscode.house.gov/download/pls/28C97.txt> (consulted on 16 May 2011); *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, paras. 1083-1085, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011); Pyke Malson et al., 2011, p. 64.

<sup>335</sup> *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999), para. 1166, at <http://www.publications.ojd.state.or.us/S44382.htm> (consulted on 25 May 2011): the plaintiff alleged he had been sexually molested by a Catholic priest who used his position to gain his trust, which gave the priest the opportunity to be alone with him and sexually assault him. The Supreme Court had held that even though the alleged sexual assaults committed by the priest «clearly were outside the scope of his employment under the traditional test,» vicarious liability could still be imposed if «acts that were within the scope of employment resulted in the acts which led to injury to the plaintiff.»

<sup>336</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1083, p. 2575, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>337</sup> *Ibidem*.

based on an injury caused by an «employee» of the foreign sovereign while acting «within the scope of his employment.» As a consequence, the Holy See did not benefit from immunity under the FSIA<sup>338</sup>.

As regards the question of whether the priest was actually a church employee, the issue is still to be debated<sup>339</sup>. The 9th Circuit only decided that the Holy See could be held vicariously responsible for sexual abuses committed by a priest, if the latter was to be considered as a church employee. Thus, the Court neither decided whether Father Ronan had or had not done anything wrong, nor had it decided whether or not he was an employee of the Holy See<sup>340</sup>.

#### 4.3. ON PETITION FOR A WRIT OF CERTIORARI

The question then presented to the Supreme Court of the United States was whether the tortious act exception «authorises a court to exercise jurisdiction over respondent's vicarious liability claim against petitioner, the Holy See, for a priest's sexual abuse committed in Oregon, where sexual abuse is outside the scope of the priest's employment as a matter of Oregon law<sup>341</sup>.» The Court refused to review the decision of the Court of Appeals, despite the position of the Obama administration that supported the Holy See's claim for immunity<sup>342</sup>. It is extremely important to notice that the Supreme Court did not decide either in favour or against the position of the Holy See. The Court denied the petition for a *writ of certiorari* on 28 June 2010, thus leaving the decision of the 9th Circuit in place and allowing the District Court to decide whether priests are to be seen as church employees<sup>343</sup>. The case is now pending before the District Court for further proceedings.

Before the US Federal District Court of Oregon, Doe now has to bring evidences that the priest was a Holy See employee and that the latter knew or should have known about the sexual abuses he was

<sup>338</sup> *Ibidem*; Burkett, 2010, p. 46.

<sup>339</sup> Burkett, 2010, p. 40.

<sup>340</sup> Addison, 2010.

<sup>341</sup> Holy See petitioner v. John V. Doe, *On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*, No. 09-1, Brief for the US as Amicus Curiae, at <http://www.justice.gov/osg/briefs/2009/2pet/6invt/2009-0001.pet.ami.inv.pdf> (consulted on 23 May 2011).

<sup>342</sup> Zapor, 2010 (a).

<sup>343</sup> A «writ of certiorari» is «A document which a losing party files with the Supreme Court asking the Supreme Court to review the decision of a lower court. It includes a list of the parties, a statement of the facts of the case, the legal questions presented for review, and arguments as to why the Court should grant the writ.» at <http://www.techlawjournal.com/glossary/legal/certiorari.htm> (consulted on 27 May 2011).

involved in. On Thursday 21 April 2011, US District Judge Michael Mosman decided that the victim had offered evidence «that tends to show the Holy See knew of Ronan's propensities and that, in some cases, the Holy See exercised direct control over the conduct, placement, and removal of individual priest accused of similar sexual misconduct<sup>344</sup>.» Thus, he stated that the plaintiff is entitled to «jurisdictional discovery<sup>345</sup>» and ordered the Holy See to produce documents related to alleged clergy abuses and cover-up. The request covers documents related to the Holy See's «laicisation process, its policies regarding sexual abuse and its regulation of priests' conduct<sup>346</sup>.» This should offer more elements showing whether Father Ronan was a proper employee of the Holy See. However, the Holy See has the possibility to appeal the order to a higher court or may file an objection with the judge on First Amendment to the United States Constitution grounds<sup>347</sup> and because of its status as a sovereign person under international law<sup>348</sup>.

#### 4.4. THE CONSEQUENCES FOR THE HOLY SEE AND THE VICTIMS: UNPREDICTABLE APPLICATION OF THE FSIA

The decision of the Court of Appeals may have a substantial contribution to the possibility of prosecuting the Holy See, as regards its responsibility in clerical sexual abuse cases, as well as to the development of human rights jurisprudence in the United States<sup>349</sup>. Not only the decision will serve as a guide for all other alleged victims in the State of Oregon but many other states, within the US and abroad, may also consider following the reasoning of the courts in matters of vicarious liability of the Holy See<sup>350</sup>. Whatever the final decision of the District Court will be, it may have important consequences on the possibility to consider the Holy See as a church-employer, not only as regards lay employees, but this time also for clergy.

*Doe* is not the first case involving the Holy See's liability for clerical sexual abuses. In 2009, three plaintiffs sued the Holy See both directly

<sup>344</sup> Jeff Anderson & Associates PA, 2011.

<sup>345</sup> *Ibidem*.

<sup>346</sup> Allen Jr., 2011.

<sup>347</sup> «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,» at <http://www.usconstitution.net/const.html> (consulted on 26 May 2011).

<sup>348</sup> Allen Jr., 2011.

<sup>349</sup> Martinez Jr., 2008-2009, p. 124.

<sup>350</sup> Burkett, 2010, pp. 49-50.

and as the employer of the priests' bishops alleging claims for *respondeat superior* liability<sup>351</sup>. In both cases, the sovereign status of the Holy See was never disputed, so that the Holy See had been officially recognised by US courts as a foreign sovereign within the meaning of the Act<sup>352</sup>. The Court of Appeals in *Doe* went even further when it indicated that the Holy See was a foreign «state»<sup>353</sup>.

In *O'Bryan*, the Court of Appeals of the 6th Circuit allowed the proceedings under the tortious act exception to the FSIA. Therefore, in both cases, the courts agreed that the Holy See was not completely immune from litigation regarding clerical sexual abuses<sup>354</sup>. Moreover, both decision raised the issue of the Holy See's *respondeat superior* liability. This does not require the plaintiffs to prove the employer's fault in order to hold it responsible for the actions of its employees, but only to bring evidence that besides the employment relationship, the employees acted within the scope of employment<sup>355</sup>.

Although both reasoning of the courts are similar in some aspects, these two decisions also illustrate the difference that might occur when US courts apply the FSIA. In order to decide whether the Holy See is responsible for clerical sexual abuses under *respondeat superior* liability, the applicants must bring evidence that the priest abusers are the Holy See employees acting within the scope of employment. However, the FSIA does not define either «employee» or «within the scope of employment.» Thus, each court will refer to the definition given by state law and apply the FSIA in accordance with applicable employment rules of different state jurisdictions. One of the consequences of this importance of state legislation is that, although the original objective of the FSIA was to ensure uniformity and predictability in setting up jurisdiction over foreign sovereign, suits against the Holy See would be followed in some states while not in others<sup>356</sup>. This is the reason why the decision of the 6th Circuit, which referred to Kentucky state law, differed from the one of the 9th Circuit based on Oregon

<sup>351</sup> *O'Bryan v. Holy See*, 556 F.3d 361, (6th Cir., 2009), paras. 370, 383, pp. 6, 23, at <http://www.ca6.uscourts.gov/opinions.pdf/09a0044a-06.pdf> (consulted on 29 May 2011): in this case, the plaintiffs filed a class action suit, as they were seeking to hold the Holy See liable for every case of abuse that occurred in the US. In order to support their complaints and to bring evidence that the Holy See knew or should have known about the abuse cases, the plaintiffs relied on the 1962 Policy of the Holy See.

<sup>352</sup> Martinez Jr., 2008-2009, p. 125.

<sup>353</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1083, p. 2575, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>354</sup> Martinez Jr., 2008-2009, p. 125; Black, 2009-2010, p. 302.

<sup>355</sup> Martinez Jr., 2008-2009, p. 136.

<sup>356</sup> Koss, Galardi & Strain, 2005, p. 1; Mason, 2008, p. 658.

legislation. In contrast to *Doe*, the 6th Circuit focused on «the degree of control exercises by the employer» in order to decide whether the applicant sufficiently alleged the existence of an employment relationship<sup>357</sup>. Besides, the Court decided that sexual abuses fell outside the priest's scope of employment, so that the Holy See could not be held vicariously responsible for it under the tortious act exception<sup>358</sup>. However, the Court held that the Holy See *respondeat superior* liability for the bishop's negligent supervision of its abusive priests fell under this exception, because the bishops and other clergy supervisors acted within the scope of their employment<sup>359</sup>. On the contrary, the 9th Circuit decided that the Holy See's liability for negligent supervision fell under the exclusion of discretionary function from the FSIA's exception<sup>360</sup>. Finally, the 6th Circuit found that the Holy See *respondeat* liability could rest on the actions of the bishop, while the 9th Circuit focused on the priest<sup>361</sup>.

Therefore, under the FISA, decisions of US courts, which depend on definitions of «employee» and «scope of employment» in their state law, may differ from one another. Each court must determine whether a priest is a Holy See employee under applicable state law<sup>362</sup>. Yet, not all priests and bishops will be considered as «employee.» As a consequence, the Holy See's responsibility for clerical sexual abuse could be admitted before some state courts while not others. It is also important to note that under the FSIA, the tortious exception to immunity can only apply if the tort occurred within the territory of the United States<sup>363</sup>.

Other difficulties may also arise when plaintiffs invoke the Holy See's *respondeat superior* liability. The priests and bishops involved in

<sup>357</sup> *O'Bryan v. Holy See*, 556 F.3d 361, (6th Cir., 2009), (Amended opinion), para. 386, pp. 27-28, at <http://www.ca6.uscourts.gov/opinions.pdf/09a0044a-06.pdf> (consulted on 29 May 2011).

<sup>358</sup> *Ibidem*, para. 58: under Kentucky law, in order for a conduct to fall «within the scope of employment,» it must be of the same general nature of the conduct authorised by the employer.

<sup>359</sup> *O'Bryan v. Holy See*, 556 F.3d 361, (6th Cir., 2009), C.A.9 (Or.), 3 March 2009, para. 54, pp. 27-28, at <http://www.ca6.uscourts.gov/opinions.pdf/09a0044a-06.pdf> (consulted on 29 May 2011); Mason, 2008, p. 667; Allen Jr., 2010: nevertheless, the plaintiffs have since dropped the case.

<sup>360</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1069, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>361</sup> Neu, 2010, p. 1519.

<sup>362</sup> *Ibidem*, p. 1521.

<sup>363</sup> See Black, 2009-2010, pp. 322-323: because the courts may interpret this condition in different ways, I will not enter this discussion, but focus on the issue of employment relationships.

sexual abuse cases tend to be citizens of the nation in which they work. In the same way, while the Holy See is a sovereign person under international law, its archdioceses and dioceses are recognised under state law and thus have the nationality of the states in which they are incorporated<sup>364</sup>. They differ from traditional sovereign agents, because they maintain stronger material ties with their local order and diocese than with the Holy See. Within the territory of a state, national and international rules ratified or accepted have to be respected by everyone, including local churches as citizens. Thus, in case the latter are responsible for a violation of national law or human rights principles protected by an international agreement the state is bound to, national courts and tribunals might condemn local churches for this violation. However, it is less clear whether the Holy See could be liable of such violation under employment law.

Therefore, the role of the court is not easy, as it probably needs to explore both state law and Catholic theology in order to properly understand the specific relationship between priests, bishops and the Holy See and decide whether the former are the Holy See employees<sup>365</sup>. Another problem would be to determine how far it is possible for the Court to delve into Catholic doctrine and rules in order to interpret them. Traditionally, secular courts abstain from religious question under the doctrine of ecclesial abstention, developed by the Supreme Court's tradition of abstaining from deciding questions that implicates church doctrine, and leave religious issues to the church. However, courts refer to this doctrine usually when they have to deal with matters purely ecclesiastical, such as the decision to hire or defrocking ministers of the cult<sup>366</sup>.

In *Doe*, in order for the Holy See to be liable for Father Ronan's activities, the plaintiff must bring enough evidences that the priest was an actual employee of the Holy See and committed the abuses within the scope of employment. Thus, the District Court will consider the nature of the relationship between the priest or the bishop and the Holy See. It is important to point out that the decision, whatever will be decided, is only focusing on Father Ronan's possible status of church-employee. Nothing will be decided regarding whether all priests and bishops are actually Holy See employees<sup>367</sup>. Therefore, the defence of the Holy See's attorney will focus on the absence of employment contract between the Holy See and

<sup>364</sup> *Doe v. Holy See*, 557 F.3d 1066, (9th Cir. 2009), C.A.9 (Or.), 3 March 2009, para. 1083, pp. 2575-2578, at <http://www.ca9.uscourts.gov/datastore/opinions/2009/03/03/0635563.pdf> (consulted on 25 May 2011).

<sup>365</sup> Neu, 2010, p. 1509.

<sup>366</sup> *Ibidem*, pp. 1527-1532.

<sup>367</sup> *Ibidem*, pp. 1522-1523.

the priest concerned<sup>368</sup>. In general, the Holy See considers that priests, dioceses, bishops and orders cannot be considered as its employees, due to the fact that it does not pay them any salary and does not exercise a day-to-day control on their activities<sup>369</sup>. Instead, it tends to recall that discipline and control over priests is left to the diocese and religious orders, which have a great autonomy in their function and also provide their priests a salary from diocesan funds<sup>370</sup>. Thus, if an employment relationship seems to exist between a priest and his order or bishop, it is harder to demonstrate the same relation towards the Holy See, which directs its bishops and priests through its spiritual authority and Canon Law<sup>371</sup>. Therefore, before the Court, the Holy See's attorneys will focus the argumentation on the absence of an employment relationship between the priest and the Holy See and the fact that the only church entity possibly aware of the priest's problems was his own religious order<sup>372</sup>.

I noticed previously that the 9th Circuit referred to a decision of the Oregon Supreme Court including certain intentional torts in the definition of what is included within the scope of employment<sup>373</sup>. As each court must apply its own state law, which differ from one state to another, this interpretation is not followed by all US courts. Some of them even have explicitly held that sexual abuse does not fall within the priests' scope of employment<sup>374</sup>. For example, the Georgia Court of Appeals refused to hold religious organisations vicariously liable for the sexual torts committed by their ministers and stated that under Georgia law an employer is not responsible for the sexual misconduct of his employee. The Court added that intentional torts are outside the scope of employment because they are purely personal in nature and are in contradiction with the principles of the Methodist Church<sup>375</sup>.

<sup>368</sup> Tincq, 2010.

<sup>369</sup> Neu, 2010, p. 1519.

<sup>370</sup> Martinez Jr., 2008-2009, p. 151.

<sup>371</sup> Neu, 2010, pp. 1509, 1519, 1523; Albanese, 2010.

<sup>372</sup> Zapor, 2010 (b).

<sup>373</sup> *Fearing v. Bucher*, 977 P.2d 1163 (Or. 1999), 8 April 1999, paras. 1168-1169, at <http://www.publications.ojd.state.or.us/S44382.htm> (consulted on 25 May 2011).

<sup>374</sup> *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532, 18 June 1996, para. 533, at <http://www.lawskills.com/case/ga/id/279/32/index.html> (consulted on 25 May 2011).

<sup>375</sup> *Ibidem*, paras. 535-536.

## CONCLUSION

This thesis discusses the question of the possibility to hold the Holy See responsible for human rights violations. The first chapter introduces the reasons and consequences of the creation of the Vatican City State, to which the Holy See contributed. It demonstrates that the Holy See has a unique status under international law and possesses a recognised sovereign personality. It also clarifies that the Holy See and the Vatican City State are two separate entities, however united under the authority of the Pope and the Cardinal Secretary of State. Besides, even though the Vatican City has been recognised as a state by the Lateran Treaty, it is mainly the Holy See that exercises its foreign policy within the international community, through the establishment of diplomatic relations, the signature of concordats with foreign countries and even the ratification of human rights international treaties. Being a unique subject of international law, the Holy See is also characterised by its spiritual and religious mission, which shapes its participation in international affairs and diplomatic relations.

The second chapter clarified that within the United Nations, the Holy See has been granted the special status of Non-Member State Permanent Observer. This status allows it to participate to the work of the international organisation, including in matters related to human rights, and gives the Holy See the possibility to influence the outcome of the organisation's work. In addition to this, due to its unique status under international law, the Holy See also ratified several UN treaties related to human rights issues, such as the UN Convention on the Rights of the Child. The examination of this Convention was relevant for the objective pursued by the thesis. First, like any other state party to the Convention, the Holy See has the obligation to respect children's rights and ensure their implementation towards people within its jurisdiction. Then, in order to understand the term «jurisdiction» as regards the Holy See, which is a sovereign authority without a defined



territory, a parallel might be drawn with the decision of the European Court of Human Rights in the *Ilascu* case. Even though the Holy See does not exercise a complete control over territories where ecclesiastical institutions and ministers of the cult are established, it still has a certain influence, as it is the head of the Catholic Church at the top of the ecclesiastical hierarchy.

However, although the Holy See is directly liable under the Convention it ratified, the state implementation mechanism does not allow the Committee on the Rights of the Child to take any sanctions in case of human rights violation, neither does it create a possibility for the Committee to investigate states' situations in case of non compliance with their obligation to submit periodical reports. Moreover, the Holy See made certain reservations at the time of the ratification in order to ensure the compatibility of the Convention with the nature of the Vatican City State and the sources of its objective law. Even though its reservation is vague and applies to the entire Convention, other states party did not object to it, which allows thinking that they accepted it. Finally, following the scandal of clerical sexual abuses, the Holy See has been criticised not only because of the absence of periodic reports but also for the way it dealt with alleged abuse cases. In 2010, the Holy See revised its law in this matter but it still remains an issue as how the new rules will be applied in practice and what their effectiveness will be.

Then, the third chapter illustrates that, although neither the Holy See nor the Vatican City State has ratified the European Convention on Human Rights, the Court gives such an interpretation of the Convention that the Holy See is indirectly required to respect the fundamental principles and rights. Even though member states may sign concordats or agreements with the Holy See, which grant the latter a certain authority within the public area, as states party to the European Convention such delegation does not free them to ensure the protection of human rights. Thus, the Court indirectly limits the power member states recognised to the church, whether it is the Roman Catholic Church, the Protestant or the Mormon Church. Through the *Pellegrini* and *Vallauri* cases, the Court decided that, although it does not have the jurisdiction to control the decisions taken by Catholic ecclesiastical courts, as these are decisions from a sovereign authority that did not ratify the Convention, it could still verify whether member states properly ensure the respect of the Convention's rights and principles. Therefore, before domestic courts declare a foreign decision enforceable within the territory of the state, they must verify that human rights standards, such as the right to a fair trial or the right to freedom of expression and religion, had not been violated by the ecclesiastical

proceedings. In case national courts do not comply with their obligation, member states are liable for a violation of the Convention on the grounds of a lack of vigilance or insufficient motivation. As regards the *Obst*, *Schüth* and *Siebenhaar* cases, the circumstances differ from the previous cases. The autonomy Germany recognised to religious communities allows them to administer their affairs independently. This includes the possibility to sign employment contracts and impose the respect of certain obligations to their employees, such as a loyalty duty. However, this autonomy is not limitless, so that member states must verify that the churches requirements towards their employees do not violate individual's human rights, in these cases the right to respect for private and family life. Thus, in parallel with the *Pellegrini* and *Vallauri* cases, member states may be held responsible of a violation of the Convention if domestic courts do not properly balance the interests of individuals to see their rights respected by all, including religious communities, with the interests of the latter.

The cases examined in Chapter 3 focused on the relation lay people may develop with churches, whether they are individuals married under Canon Law or lay employees of the Catholic, Protestant or Mormon Church. On the other hand, Chapter 4 considers the special relationship between ministers of the cult, mainly priests, and the Holy See and discusses the possibility to see an employment relationship between them. This question is of particular relevance following the recent suits that have been brought against the Holy See within the United States, which aim to hold it responsible for clerical sexual abuses committed against children. Because the US judicial system is different from the European Court of Human Rights, US courts did not yet decide about the existence of an actual employment relationship between priests or bishops and the Holy See, even though there is no doubt that the Holy See has been recognised as a sovereignty that could benefit from the immunity of jurisdiction under the Foreign Sovereign Immunities Act. However, it is still unclear which actions of ecclesiastical institutions and ministers of the cult might be attributed to the Holy See under the tortious exception to immunity. As there is no general definition of «employee» or «within the scope of employment» that could be applied by all US courts, each of them relies on state law in order to define the relationship between the Holy See and its alleged employees. Thus, the final decision will not only depend on the application and the interpretation of state employment legislation but also on the circumstances of each situation. The *Doe* case analysed in the chapter is still pending before the Oregon District Court, which will finally decide whether, in the particular circumstances of the case, the priest was a

Holy See employee acting within the scope of employment while committing the abuses. Nevertheless, whether the Court decides in favour of the Holy See or the victims abused, the judgement may serve as a precedent and inspire other courts, within the US and outside, as regards the possible responsibility of the Holy See for clerical sexual abuses.

In summary, the issues that have been analysed throughout the thesis allow to answer the question of whether the Holy See as a legal personality has any obligation to respect human rights standards recognised within the United Nations and European systems. Whereas the Holy See ratified the UN Convention on the Rights of the Child, there is not a judicial mechanism allowing individuals or other states to complain of an alleged violation of the Convention. Neither there is the possibility for the Committee to investigate states' compliance with their obligations in case they do not submit their periodical reports. On the other hand, the Holy See, which did not ratify the European Convention on Human Rights, is indirectly required to respect these human rights, due to the European Court's interpretation of member states' duty to ensure the protection of the rights under the Convention. Besides, it is possible to wonder whether the Court might use a similar reasoning for other articles of the Convention. Finally, the particular issue of the Holy See's liability as an employer under US law may be brought before tribunals and courts of all countries where sexual abuses by clergy have been committed.

Therefore, it clarifies that, even though the Holy See, which is not a state but a sovereign legal person, has the right to act within and influence the international community of states, these competences and powers are not free from both a certain responsibility in case human rights violations emerge from the actions of ecclesiastical institutions and a duty to respect fundamental human rights and freedoms.

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