Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?

LUCIAN C. MARTINEZ, JR.*

This paper examines the applicability of the Foreign Sovereign Immunities Act (FSIA) to the Holy See in the context of civil suits filed in the U.S. alleging sexual abuse by Catholic clergy and members of religious orders. The cases raise significant issues, not only because of the underlying nature of the claims, but perhaps more importantly because of their potential to expand the jurisdiction of the federal courts to cover claims of human rights violations by foreign entities. While the Holy See occupies a sui generis status in the international order, as an entity whose juridical personality does not derive from nor depend on its sovereignty over a particular territory, its unique status may be seen as a precursor of the international community's recognition of and relationship with non-territorial entities such as liberation movements or emerging states. With such international recognition comes not only rights but also responsibilities. Holding foreign governments responsible for the torts of their agents in certain circumstances could also have implications for state sponsors of terrorism. The response of the federal courts to these high profile cases might lead to a willingness to admit claims against foreign entities that would previously have been foreclosed under FSIA.

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* J.C.L., Pontificia Universita Gregoriana, 2000; J.D., Yale Law School, 2007. The author wishes to thank Professor Oona Hathaway for the guidance and structure that she gave to this project, as well as to my colleagues Krissa Lanham, Matiangai Sirleaf, and the other members of the International Law Research and Writing seminar for their advice, suggestions and encouragement from brainstorming through the final draft of this paper.

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INTRODUCTION

Among the many lawsuits against the Catholic Church in the United States alleging sexual abuse of minors by Catholic clergy and members of religious orders,[1] two recent cases stand out for their potentially significant contribution to the development of human rights jurisprudence in the United States. The plaintiffs in these cases have sought to join the Holy See,[2] in addition to the local church entities, as a defendant under the doctrines of negligent hiring and *respondeat superior*.[3] One case, *O'Bryan v. Holy See*, rather ambitiously seeks class certification on behalf of all victims of childhood sexual abuse committed by Catholic clergy and religious orders in the United States and names the Holy See as the sole defendant.[4] The other case, *Doe v. Holy See*, alleges that the single plaintiff was abused by a priest who had previously been accused of childhood sexual abuse in his native Ireland and elsewhere in the United States.[5] The plaintiff states that the priest had admitted to church authorities that the prior accusations were true before being reassigned to positions involving contact with minors.[6] *Doe* names the Holy See, the United States Catholic diocese where the subsequent alleged abuse occurred, and the religious order to which the alleged perpetrator belongs as defendants.[7]

Lawyers for the Holy See, in turn, have asserted that it is immune from suit under the Foreign Sovereign Immunities Act[8], which generally deprives the federal courts of jurisdiction over defendants that are foreign countries (or their agencies or officials).[9] FSIA codifies the principle that foreign states generally may not be sued

1. Catholic clergy are deacons, priests, and bishops; members of Catholic religious orders, such as the Benedictines, Franciscans, and Jesuits, are often referred to in shorthand as "religious." Depending on the order to which they belong, religious may be sisters, brothers, or members of the clergy.

2. The term "Holy See" refers to the central administration of the Catholic Church, composed of the pope and those individuals and entities that assist him in the worldwide governance of the church. U.S. DEP'T OF STATE, BACKGROUND NOTE: THE HOLY SEE (2008) [hereinafter HOLY SEE BACKGROUND NOTE], *available at* http://www.state.gov/r/pa/ei/bgn/3819.htm.

3. *See infra*, Part II.

4. O'Bryan, et. al., v. Holy See, 490 F.Supp.2d 826 (W.D. Ky. 2005) (mem.).

5. Doe v. Holy See, et. al., 434 F.Supp.2d 925, 931 (D. Or. 2006).

6. *Id.*

7. *Id.* at 930.

8. 28 U.S.C. §§ 1602–1611 (2008) (§ 1605(a)(7) repealed 2008).

9. *Id*. § 1604; *see also id.* § 1603(a) (defining foreign state to include an agency or instrumentality of the state).

in the courts of the United States and places in the federal courts the task of determining whether the general immunity provided by the Act attaches, weighing "the interests of justice" and "the rights of both foreign states and litigants in United States courts."[10] FSIA is based on the theory that sovereign states are equals, and one sovereign should not attempt to exercise its judicial authority over another.[11] A U.S. court may assert jurisdiction over a foreign nation, however, if the alleged actions of that nation or its agents fall under one of two principal exceptions outlined in the Act: the commercial activities of foreign states (including expropriations and disputes over rights in property in the United States)[12] and personal injury or death occurring in the United States caused by the tortious act or omission of the foreign state or any official or employee.[13]

While the courts in both of these recent cases have agreed that the Holy See is a foreign sovereign within the meaning of the Act and have insisted on strict compliance with the requirements for service of process on such a party, they have demonstrated a willingness to entertain arguments that the tortious activity exception to FSIA applies to these cases. In each case, the court denied FSIA-based motions for dismissal, the first time that suits naming the Holy See itself as a defendant have been allowed to proceed in the United States.[14] If those rulings are eventually upheld on appeal, a flood of complaints against the Holy See is certain to follow.

These cases call for a balancing of significant policy considerations.[15] The statute calls for protecting both the rights of domestic litigants and foreign states.[16] To err in the former direction could implicate foreign policy concerns, while being overly solicitous of the status of foreign states could make it impossible for aggrieved parties to be made whole. The suits considered in this article are distinct from those alleging human rights violations under the Alien Tort Claims Act (ATCA),[17] in that the alleged tortious activity took place in U.S. territory. Yet, the cases have in common with ATCA claims the significant issues of access to the courts and the principle that foreign entities, or individuals under their cover, should not be able to

10. *Id.* § 1602.

11. Marla Goodman, Note, *The Destruction of International Notions of Power and Sovereignty: The Supreme Court's Misguided Application of Retroactivity Doctrine to the Foreign Sovereign Immunities Act in Republic of Austria v. Altmann*, 93 GEO. L.J. 1117, 1117 (2004).

12. 28 U.S.C. § 1605(a)(2)–(a)(3).

13. *Id.* § 1605(a)(5).

14. *See, e.g.*, Alperin v. Vatican Bank et. al., 410 F.3d 532 (9th Cir. 2005) (allowing a case to proceed against the Vatican Bank for unjust enrichment and human rights violations arising from financial transactions with the Croatian occupation regime during World War II). The Vatican Bank argued against the district court's jurisdiction on political question grounds, rather than raising foreign sovereign immunity issues, probably because of the complicated legal structure of the bank itself, in addition to the likelihood that, even if it could be shown to be wholly owned or controlled by the Holy See, it would fall under FSIA's commercial activities exception.

15. One such consideration that is beyond the scope of this paper is the role of First Amendment considerations in civil liability cases against churches. *See generally* Kelly W.G. Clark, Kristian Spencer Roggendorf & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 OR. L. REV. 481 (2006) (discussing the intersection between the Catholic Church's First Amendment rights and plaintiffs' rights to relief under tort theories).

16. 28 U.S.C. § 1602 (2008).

17. *Id.* § 1350 (1948).

escape responsibility for serious harms that they inflict.[18] If the courts begin to exercise jurisdiction in cases against foreign defendants that they would previously have dismissed, the consequences would be significant for parties attempting to vindicate human rights abuses by foreigners for which they have not been able to obtain justice in foreign courts.

The principal difference between ATCA cases and the cases to be considered in this article is that, in the latter set of cases, there are domestic tortfeasors – the alleged abusers themselves and, most significantly for the purpose of recovering damages, the Catholic dioceses and religious orders to which they belong or were assigned. These defendants are unquestionably within the reach of the federal courts.[19] The alleged abusers are citizens or legal residents of the United States, and the religious entities with which they are affiliated are incorporated in the United States.[20] The dismissal of claims against the foreign sovereign in these cases arguably would not deprive the plaintiffs of the opportunity to redress their injuries,[21] although it would remove a defendant with substantial monetary resources.[22] Dismissal would also raise the crucial question of whether a foreign entity that exercises significant, ongoing contacts, via its agents, with persons in the United States loses the incentive to exert disciplinary control from the highest level to prevent harm from being done to those persons.

Moreover, like ATCA cases, the complaints allege major harms that cry out for redress. Yet even such a weighty purpose must be balanced against the important policy goals of FSIA. The principle of foreign sovereign immunity found statutory expression only relatively recently, but it has been applied since the earliest days of the United States.[23] The perceived inconsistencies in treatment of different countries, the suggestion that it was inappropriate for political considerations to play a role in deciding which nations were exempt, and the difficulty inherent in asking the State Department (part of the executive branch) to make what were essentially judicial determinations that certain parties were immune to suit were all factors in transferring the responsibility for determining the applicability of sovereign immunity to the courts and establishing statutory guidelines for making that determination.[24]

18. Although related to the issues raised by head of state immunity, these cases are also distinct from those that have been barred under that doctrine. An interesting comment examines the application of the doctrine of head of state immunity to a suit that named Pope Benedict XVI personally as a defendant for alleged conspiracy to fraudulently conceal tortious conduct by Catholic clergy in the U.S. in his capacity as a senior official of the Holy See prior to his election as pope. Dina Aversano, Comment, *Can the Pope Be a Defendant in American Courts? The Grant of Head of State Immunity and the Judiciary's Role to Answer This Question*, 18 PACE INT'L L. REV. 495 (2006). That suit was dismissed. Nicole Winfield, *Texas Court Dismisses Pope From Sex Abuse Case*, THE ASSOCIATED PRESS, Dec. 23, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1135245914903&rss=newswire.

19. These domestic tortfeasors are subject to normal procedural requirements of federal courts under diversity jurisdiction.

20. *See generally* 28 U.S.C. § 1332 (2008).

21. In fact, one of the named plaintiffs in *O'Bryan* has already recovered damages in a settlement with the local archdiocese. *Judge: Sex Abuse Victims May Go After Vatican*, THE ASSOCIATED PRESS, Jan. 11, 2007, *available at* http://www.msnbc.msn.com/id/16580947/?GT1=8921.

22. *See* Jeff Israely, *Should the Vatican Pay for Abuse?*, TIME, Jul. 18, 2007 (discussing the Holy See's tremendous wealth and U.S. plaintiffs' inability to sue it), *available at* http://www.time.com/time/world/article/0,8599,1644599,00.html.

23. Goodman, *supra* note 11, at 1117–18.

24. *Id.* at 1122–23.

This article will examine the applicability of FSIA to the Holy See in the context of domestic cases alleging sexual abuse by Catholic clergy in the United States. It will look at the status of the Holy See as a sovereign entity and distinguish the sovereignty of the Holy See from that of the Vatican City State. In doing so, it will review the typical aspects of sovereignty and statehood and how those concepts relate to the unique status of the Holy See as a non-territorial (and/or extra-territorial) sovereign. The treatment of the attributes of sovereignty in such a sui generis case will help sketch the outer contours of the concept of sovereignty and raise the question of whether other international entities that do not meet the generally accepted conditions for recognition as states might come to have such status as well. The application of sovereign immunity to such a figure as the Holy See will also test the policy rationale behind FSIA and raise the question of whether that rationale stands up against the importance of adjudicating serious harms and enforcing institutional responsibility for preventing them.

Part I examines the Foreign Sovereign Immunities Act of 1976 in detail. This Part will review the history of the use of the principle of sovereign immunity in the federal courts prior to its codification. It will then turn to the Act and the exceptions to the traditional doctrine that it incorporated and the significance of the shift from the determination of sovereign immunity in particular instances from the executive branch to the courts. Key to this Part is articulating the balance that the Act attempts to strike between comity on the one hand and the equities of the case on the other. Part II considers the rulings in *O'Bryan v. Holy See* and *Doe v. Holy See*. While both district courts found that the Holy See is a foreign state under the terms of FSIA, they held that the alleged conduct is subject to the tortious conduct exception, and therefore the Holy See is not immune from suit in these cases. Part III explores the unique status of the Holy See in international law as an entity whose claim to sovereign status exists independently of, although historically intertwined with, a particular territorial jurisdiction. This exploration of the basis of sovereignty in the international order sheds light on the question of whether other global actors might exercise a claim to some kind of sovereign status. Finally, Part IV discusses the complex theoretical and legal relationships between the Holy See and the various dioceses, parishes, religious orders in the Roman Catholic Church, including the individual clergy and members of religious orders that belong to those entities and how those relationships relate to the questions of agency and concomitant liability. The article concludes by weighing these significant policy and international law concerns against the need to do justice in specific cases where there have been grave harms and to encourage the development of policies that will prevent such harms from being repeated.

I. FOREIGN SOVEREIGN IMMUNITY AND FSIA

The principle of sovereign immunity has long been applied in U.S. law. It is based on the principle that since the relative power of two sovereign nations is equal, one should not enforce its juridical power over another.[25] The Supreme Court first

25. *Id.* at 1117.

articulated the principle in *The Schooner Exchange v. McFaddon*,[26] which laid the foundation for the doctrine of sovereign immunity in U.S. law.[27] That case involved the seizure at sea of a vessel owned by two citizens of Maryland on the orders of the emperor Napoleon of France.[28] When the ship, now operated under French control as a warship, docked in a U.S. port, the aggrieved owners filed suit to assert their ownership.[29] The district court denied their claim for lack of jurisdiction, but the court of appeals reversed. Following the "suggestion" of immunity made by the Attorney General,[30] the Supreme Court reversed the court of appeals and upheld the district court, ruling in accord with traditional principles of international law that by allowing a foreign military vessel to enter a U.S. port, the government implicitly waived its jurisdiction over the ship.[31] Significantly, the Court did not hold that the United States was *required* as a matter of international law to grant immunity to foreign states. Rather, it held that it was consistent with international practice for the United States to choose to do so, and that in circumstances such as the instant one in which states traditionally waived jurisdiction over other states, U.S. courts should assume that such a waiver had been made by the federal government.[32]

In *Berizzi Bros. Co. v. S.S. Pesaro* (The Pesaro), the Court extended the immunity to foreign vessels owned and operated by the foreign state and engaged in commerce.[33] The Court considered the advancement of trade and/or the raising of revenue for the state to be as much a public purpose as the maintenance of a naval force.[34] The State Department was responsible for deciding whether sovereign immunity applied in a given instance, a determination that the courts were theoretically not bound to follow, but nearly always did.[35] By the 1940's, it became the Court's policy not to second-guess the determination of the executive branch, but rather to follow its lead strictly in granting immunity.[36]

The U.S. continued to observe an absolute form of sovereign immunity that did not admit exceptions until the 1950's.[37] As the modes in which sovereign entities engaged with private actors in other nations began to multiply, particularly through the international commercial activities of state-owned and operated enterprises, the need for a revision of that principle gradually became clear.[38] The State Department had already begun to advocate for a restrictive application of the principle of immunity with regard to ships owned and operated by a foreign nation.[39] In 1952, it adopted a policy that distinguished the public acts of a sovereign state from the private and allowed for immunity only in the case of the former.[40] For example,

26. The Schooner Exchange v. McFaddon, 11 U.S. 116, 136–37 (1812).

27. HAZEL FOX, THE LAW OF STATE IMMUNITY 183 (2002).

28. *McFaddon*, 11 U.S. at 117.

29. *Id.*

30. FOX, *supra* note 27, at 184.

31. *McFaddon*, 11 U.S. at 145–46.

32. *Id.* at 146.

33. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1925).

34. *Id*. at 574.

35. FOX, *supra* note 27, at 184.

36. *Id*. at 185.

37. Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 767–69 (1996).

38. FOX, *supra* note 27, at 186 (showing the State Department's attempt to influence new policy).

39. *Id.*

40. Gergen, *supra* note 37, at 769.

while a foreign state itself might not be sued in U.S. courts, a passenger airline wholly owned by a foreign government would no longer be automatically immune from suit. When sovereigns engaged in commercial activities like any private actor, they could not claim immunity to suit.[41]

While this shift to a restrictive approach to sovereign immunity in some ways leveled the field as far as actors in the international commercial arena were concerned, it was not without arbitrariness. Because the responsibility for making the "suggestion" of sovereign immunity in a specific instance still rested with the executive department under its foreign policy authority, it is not surprising that the determination of whether immunity should be applied would at times be tainted by political and diplomatic considerations.[42] Even when there was not a question of diplomatic pressure, executive branch officials were less adept at making what was essentially a judicial determination.[43] There was also a question of the timely administration of justice. The private parties seeking to sue foreign states were left in limbo while the State Department considered the requests by those states for immunity.[44] To address these concerns, Congress codified the principle of restrictive sovereign immunity and laid down standards for its application in FSIA.[45]

The Foreign Sovereign Immunities Act of 1976[46] establishes the circumstances by which foreign states may be sued in the federal courts. It codified in law the restrictive form of sovereign immunity that had been the effective policy of the United States for a generation and placed in the courts the determination of whether sovereign immunity applies to a given defendant.[47] The two principal exceptions set out in the Act are for commercial activity carried on in the United States by the foreign state or any act in the United States in connection with a commercial activity carried out on the outside of the United States[48] and cases in which money damages are sought against a foreign state for personal injury or death occurring in the United States caused by the tortious act or omission of the foreign state or any of its officials or employees acting within the scope of employment.[49] These exceptions to the general principle of immunity are commonly known as the commercial activity and tortious conduct exceptions. A 1996 amendment created an additional exception for acts of state-sponsored terrorism, where the foreign state has been designated by the U.S. as a state sponsor of terrorism, and has committed or supported the commission of an act of terrorism in the foreign state against a U.S. citizen.[50]

41. *See id.* at 771 (listing commercial activities as an exception to foreign sovereign immunity).

42. *See* FOX, *supra* note 27, at 186–87 (detailing how political and diplomatic influences had greater effect on the State Department than legal principle).

43. *See id*. ("It is therefore not surprising that…opinion increasingly strengthened in favor of…sovereign immunity decisions [being] made by the courts…").

44. *Id*. at 187.

45. Goodman, *supra* note 11, at 1123.

46. 28 U.S.C. §§ 1602–11.

47. Sienho Yee, Note, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When In America, Do the Romans Do as the Romans Wish?*, 93 COLUM. L. REV. 744, 744–47 (1993).

48. 28 U.S.C. § 1605(a)(2).

49. *Id.* § 1605(a)(5).

50. *Id.* § 1605(a)(7) (repealed 2008). The political and diplomatic considerations that can affect the inclusion or exclusion of a state from the list of official sponsors of terrorism bear some similarity to the

The elements of the commercial activity exception are outlined at section 1608(a)(2). The federal courts may assume jurisdiction over a case where there is:

> a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[51]

The Supreme Court first addressed FSIA in *Dames & Moore v. Regan,* although only in passing; it held that the Act did not remove the President's authority to settle claims against foreign nations.[52] In 1989, the Court construed FSIA more thoroughly in *Argentine Republic v. Amerada Hess Shipping Corp*.[53] That case grew out of the 1982 conflict in the South Atlantic between Argentina and the United Kingdom. A Liberian flag oil tanker operating in international waters outside of the war zone was bombed by the Argentine military.[54] The owners of the vessel brought a tort action in federal court under the Alien Tort Claims Act (ATCA, also known as the Alien Tort Statute, ATS), as the contract for the oil was entered into and delivery was to be made in the United States.[55] The district court dismissed the case, holding that FSIA precluded the claim;[56] the Second Circuit reversed, holding that FSIA had not been intended to limit existing remedies in U.S. courts for violations of international law.[57] The Supreme Court held that FSIA was intended to be the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts[58] and that none of its exceptions applied to the case at hand.[59] In particular, it noted that the respondent had attempted to conflate the commercial and tortious activities exceptions by arguing that the non-commercial tortious action of the Argentine military had a "direct effect" in the United States because the attacked ship was transporting oil that was for use in the United States.[60] It held, however, that FSIA explicitly required that tortious activity occur in the United States and did not, as in the case of commercial activity, provide for cases in which an action outside of the United States had an effect within.[61]

The Court limited the use of the commercial activity exception in *Saudi Arabia v. Nelson*.[62] The case was brought by a U.S. citizen who was arrested and tortured by the Saudi authorities after exposing safety defects at the Saudi hospital where he was under contract.[63] The Court held that the commercial activity exception did not

situation prior to the codification of sovereign immunity.

51. 28 U.S.C. § 1605(a)(2).
52. Dames & Moore v. Regan, 453 U.S. 654, 683–84 (1981).
53. Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428 (1989).
54. *Id.* at 431–32.
55. *Id.*
56. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73, 75 (S.D.N.Y. 1986).
57. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426 (2nd Cir. 1987).
58. *Id.* at 439.
59. *Id.* at 439–41.
60. *Amerada Hess*, 488 U.S. at 441.
61. *Id*.
62. Saudi Arabia v. Nelson, 507 U.S. 349 (1993).
63. *Id.* at 352–53.

apply because the activity alleged – arrest and torture by the authorities – was not generally considered commercial activity.[64] A pointed concurrence by Justice White (who agreed with the majority that there was not sufficient contact with the United States for the exception to apply) noted that retaliation against whistleblowers is not an uncommon practice in the marketplace and observed that, had the hospital hired thugs to punish the respondent rather than calling the police, the activity might have indeed been considered part of the course of business.[65] The effect of the Court's ruling has been to limit the use of the commercial activity exception. In both the *Doe* and *O'Bryan* cases, the district courts held that the exception is not applicable because religious activity, while involving some financial aspects, is not essentially commercial.[66]

To understand how FSIA has been applied with regard to claims of human rights abuses, it is important to consider briefly ATCA. The latter Act has been the primary vehicle by which claims of human rights abuses committed abroad have been litigated in U.S. courts.[67] The jurisdictional limitations that the Supreme Court has placed on ATCA claims are identical to those faced by plaintiffs making a claim against a foreign sovereign for harms suffered in the United States.[68] While that has reduced the number of cases that can be brought under ATCA, the Act has still been an important tool for redressing significant harms.

A FSIA, ATCA, and Human Rights Claims

The Alien Tort Claims Act, part of the Judiciary Act of 1789, gives the United States district courts jurisdiction in cases sounding in tort for an action by an alien committed in violation of the law of nations or a treaty of the United States.[69] It lay largely dormant until the late twentieth century when it was re-discovered by activists seeking legal means to hold accountable perpetrators of human rights abuses who were effectively unable to be brought to justice in their own nations' courts.[70] Although the Supreme Court has limited its utility,[71] largely by insisting that it is subject to the jurisdictional requirements of FSIA, ATCA has nevertheless permitted some victims of gross abuses to vindicate their rights in U.S. courts.[72] The Second Circuit's 1980 decision in *Filartiga v. Pena-Irala* interpreted ATCA to allow for suits by non-citizens of the United States against defendants whom they allege to

64. *Id*. at 351.

65. *Id.* at 365–66.

66. *Doe*, 434 F. Supp. 2d at 942 (finding that the "true essence of the complaint" was not a commercial activity but a tort); O'Bryan v. Holy See, 471 F. Supp. 2d 784, 788 (W.D. Ky. 2007).

67. Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on their Watch*, 8 CHAP. L. REV. 135, 135 (2005).

68. *Compare* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."), *with* 28 U.S.C. § 1605 (listing "[g]eneral exceptions to the jurisdictional immunity of a foreign state").

69. 28 U.S.C. § 1350.

70. Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 170, 174 (2005). Rosencranz & Louk,, *supra* note 67, at 135.

71. *Amerada Hess*, 488 U.S. at 439.

72. Coliver et al., *supra* note 70, at 170.

have committed serious human rights violations against them,[73] a groundbreaking ruling that led to a number of judgments against human rights abusers.[74] The reach of ATCA is also limited by the fact that it applies only to claims of harm inflicted outside the United States.[75]

While the Supreme Court has now approved of a class of violations that may be brought under ATCA,[76] its ruling in *Amerada Hess* significantly limits the reach of ATCA by insisting that FSIA is the sole means by which the federal courts may assume jurisdiction over a foreign sovereign.[77] Thus, while an ATCA claim may be brought against a foreign official in his or her individual capacity, such a claim against the foreign state itself is subject to the same FSIA requirements as any other action against a foreign sovereign.[78] ATCA by itself does not provide jurisdiction for the courts to hear such claims.[79]

The Second Circuit's decision in *Filartiga* was groundbreaking for its application of ATCA to foreign officials who committed acts prohibited by the law of nations. The plaintiffs, citizens of Paraguay, brought an action against another citizen of Paraguay, a former police official, who was then residing in the United States.[80] The district court dismissed the suit for lack of subject matter jurisdiction, but the Second Circuit reversed, finding that the prohibition of official torture under international law is "clear and unambiguous," and, significantly, not dependent on the victim being of a different nationality than the perpetrator.[81]

The Ninth Circuit addressed FSIA in the context of claims of expropriation and torture in *Siderman DeBlake v. Republic of Argentina*.[82] The court articulated the difference between foreign sovereign immunity and the act of state doctrine; while the former is a rule to determine whether a court has jurisdiction, the latter operates to bar an action within the jurisdiction of the court for failure to state a claim upon which relief can be granted.[83] While asserting that the right to be free from official torture is fundamental, has the status of a jus cogens norm in international law,[84] and that "international law does not recognize an act that violates a jus cogens norm as a sovereign act,"[85] the court held that this fact alone does not mean that acts of torture are an exception to foreign sovereign immunity.[86] It emphasized that the only

73. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

74. Coliver et al., *supra* note 70, at 170.

75. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (holding that ATCA is essentially a jurisdiction-granting statute, giving federal district courts jurisdiction to hear "private causes of action for certain torts in violation of the law of nations . . ."). Torts committed in the United States are, of course, actionable according to the applicable substantive state law.

76. *Id.* at 720.

77. *Amerada Hess*, 488 U.S. at 428–29.

78. *Id.* at 438.

79. *Id.*

80. *Filartiga*, 630 F.2d at 878.

81. *Id.* at 884. The distinction is important since prior case law had held that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." Dreyfus v. von Fink, 534 F.2d 24, 31 (2d Cir. 1976). The Second Circuit found that distinction was "clearly out of tune with the current usage and practice of international law." *Filartiga*, 630 F.2d at 884.

82. Siderman DeBlake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

83. *Id*. at 707.

84. *Id*. at 717.

85. *Id*. at 718.

86. *Id.* at 718–19.

exceptions to immunity are those that are listed in FSIA.[87] The court further held that the Universal Declaration of Human Rights is not a binding international agreement within the meaning of FSIA (which provides that the immunity rule is subject to international agreements in force at the time of its enactment).[88]

Because FSIA does not contain an explicit exception for human rights violations, those seeking redress for such actions committed by foreign states or their agents have had to characterize their complaints as fitting into one of the existing statutory exceptions; the courts, however, have generally not been friendly to this approach.[89] For example in *Martin v. Republic of South Africa*, an African-American U.S. citizen sued a state-run South African hospital at the time of apartheid after being denied treatment on the basis of his race, arguing that there was a "direct effect" in the United States.[90] The courts refused to hear this case because "no direct effect exists when a victim simply remains affected by the injury after returning to the United States."[91] As noted above, the Supreme Court held in *Saudi Arabia v. Nelson* that the respondent could not bring suit under the commercial activity exception because an action is "based on" commercial activity only if the central aspects of the claim that would entitle the plaintiff to relief are themselves commercial.[92]

It has been suggested that one way of allowing jurisdiction in cases alleging gross violations of human rights by a foreign government is for the courts to adopt the theory that nations that violate jus cogens norms have implicitly waived their immunity by behaving in ways that are incompatible with sovereignty.[93] The case of *Letelier v. Republic of Chile*[94] is cited by proponents of this view for the proposition that a country has no discretion to conduct assassinations on the territory of another sovereign country.[95] This statement is not the same as holding that the country has waived its immunity; rather, it addresses the relationship between the sovereign and its agent. If the sovereign lacked the authority to engage in the behavior, then it is not possible to ascribe that behavior to the discretionary action of its officials or agents and gain immunity through 1605 (a)(5)(A).[96] Although it is not entirely persuasive, the argument for implicit waiver is attractive in that it places human rights abuses committed by a foreign sovereign on equal footing,[97] whether those abuses occur on the territory of the sovereign state or in the United States. FSIA

87. *Id.* at 719; 28 U.S.C. § 1604 (stating that immunity is subject to international agreements).

88. *Siderman,* 965 F.2d at 719.

89. Gergen, *supra* note 37, at 771. *See also* Philippe Lieberman, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act*: *Siderman DeBlake v. Republic of Argentina*, 24 U. MIAMI INTER-AM. L. REV. 503, 506 (1992) (noting the perverse paradox of the *Siderman* ruling, which made it easier for foreign nationals to sue their home country for expropriation of property than for torture).

90. Martin v. Republic of South Africa, 836 F.2d 91, 93 (2d Cir. 1987).

91. Gergen, *supra* note 37, at 772.

92. Saudi Arabia v. Nelson, 507 U.S. 349, 357, 363 (1993).

93. Lieberman, *supra* note 89, at 534.

94. Letelier v. Republic of Chile, 488 F.Supp. 665 (D.C. Dist. 1980).

95. Lieberman, *supra* note 89, at 536.

96. The issue of agency and discretion as it applies to immunity will be reviewed in greater detail *infra* Part IB.

97. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 6 cmt. d (Proposed Final Draft No. 1, 2005).

admits the exception of tortious conduct carried out on U.S. territory by a foreign state but not such conduct within the foreign state's own jurisdiction.[98]

While it may not be realistic to expect an implicit waiver for torture to be read into FSIA by the courts, especially given the narrow construction that they have given to each of the exceptions to sovereign immunity contained in the statute,[99] amendment of FSIA is a possibility. As noted previously, an exception for acts of state-sponsored terrorism was added in 1996.[100] This amendment addressed a nearly identical issue to that of official torture[101] . Given the preference of the courts for letting Congress make major changes in existing law,[102] the legislative process may be a more likely avenue for change. However, the 1996 amendment was part of the larger Antiterrorism and Effective Death Penalty Act (AEDPA), the focus of which was on increasing the punishments for a series of crimes.[103] Bringing acts of state-sponsored terrorism within the range of exceptions to FSIA was consistent with AEDPA's emphasis on tougher domestic law enforcement. It is not necessarily the case that Congress has an appetite for a significant expansion of the federal courts' jurisdiction to hear cases regarding human rights abuses by foreign governments in foreign countries.[104]

The use of ATCA to adjudicate human rights violations committed outside of the United States has demonstrated a limited willingness on the part of the courts to find ways to exercise jurisdiction in cases in which plaintiffs have no other forum to redress serious injustices. The district courts in *O'Bryan* and *Doe* have similarly read the exceptions to FSIA to permit the suits against the Holy See to proceed.[105] A key element in determining the applicability of FSIA and any of its exceptions is whether the person or entity being sued is a foreign sovereign. As explained in Parts II and IV, the relationship between the foreign entity and physical and corporate persons within the United States is an important part of the plaintiffs' cases. The following section examines the meaning of "agency or instrumentality of a foreign state."

B. The Meaning of "Agency or Instrumentality of a Foreign State"

When a case directly names a foreign country as a defendant, this issue is clear.[106] It is less so when the case names, or depends on the acts of, an individual or entity that is not unquestionably related to the foreign state.[107] Since any acts imputed to a foreign state are performed by physical persons who act in some

98. Gergen, *supra* note 37, at 775–76.

99. *Id.* at 789.

100. G. Michael Ziman, *Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976*, 21 LOY. L.A. INT'L & COMP. L.J. 185, 206 (1999) (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

101. *Id.*

102. *Id.* at 209.

103. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., and 42 U.S.C.) ("An act to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.").

104. *O'Bryan*, 471 F. Supp. 2d at 786–87.

105. *Doe*, 434 F. Supp. 2d at 931; *O'Bryan*, 490 F. Supp. 2d at 830.

106. 28 U.S.C. § 1603(a).

107. *O'Bryan*, 490 F. Supp. 2d at 829.

capacity on behalf of that state, properly characterizing the relationship of those persons to the legal entity that argues that it has immunity is essential to determining whether sovereign immunity applies.

FSIA attempts to clarify the issue of what constitutes an "agency or instrumentality of a foreign state."[108] Section 1603 (b) defines this as "a separate legal person, corporate or otherwise,…which is an organ of a foreign state or political subdivision thereof."[109] Although the language of the statute suggests that a person may be an "agency or instrumentality" of a foreign state, an examination of the cases that have sought to interpret this part of the Act demonstrates that the definition still leaves room for doubt about the complex relationships between a government entity and its staff. As will be seen in Parts III and IV, the nature of the relationship between the Holy See and the entities and physical persons of the Catholic Church in the United States is crucial to the plaintiffs' case. This section examines the case law that has attempted to define "agency or instrumentality of a foreign state."

In *Chuidian v. Philippine Nat'l Bank*, the plaintiff brought suit against both the bank and a Philippine government official after the bank, acting on the official's instructions, dishonored a letter of credit issued to him by the government.[110] After the case was dismissed by the district court, the plaintiff argued on appeal that "agency or instrumentality" includes only official government entities, not individuals.[111] The Ninth Circuit held that the language of section 1603(b) does not expressly exclude individuals, and the legislative history does not suggest that Congress meant to do so; on the contrary, it stated that FSIA was intended to codify existing common law principles of sovereign immunity at the time of its enactment, which extended immunity to individuals acting in their official capacity.[112] The Court noted the general principle of domestic law that a suit against an individual in his or her official capacity is the practical equivalent of a suit against the state itself.[113] It then held that allowing such suits in the context of FSIA would "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly."[114]

In a case two years later with more direct relevance to the question of human rights claims, the Ninth Circuit held that Imee Marcos-Manotoc, the daughter of the deposed Philippine president who controlled the military police, could not claim immunity under FSIA for her alleged actions that led to the torture death of a university student at the hands of the police.[115] The court noted that *Chiudian* did not hold that FSIA immunizes officials for acts which are not committed in an official capacity or which exceed the scope of an official's authority.[116] The case was simplified significantly by the fact that Marcos-Manotoc defaulted at the district

108. 28 U.S.C. § 1603(a).
109. *Id.* § 1603(b)(2).
110. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1097 (9th Cir. 1990).
111. *Id*. at 1100.
112. *Id*. at 1101.
113. *Id*.
114. *Id*. at 1102.
115. In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 498 (9th Cir. 1992).
116. *Id*. at 497.

court level.[117] Because she admitted acting on her own authority, her acts were without official sanction and did not fall under FSIA.[118]

While section 1603(b) brings individuals within the immunity of FSIA, the judicial interpretation restricting that immunity to officials acting in their official capacity is significant for human rights litigation, since few governments would be willing to go on the record as having officially authorized or mandated the violation of human rights norms. Similarly, it is difficult to imagine that the Holy See would argue that priests or religious orders accused of abusing minors were at all acting within their official capacity.

Having examined the notion of agency under FSIA, the following Part will review the two recent cases in which the district courts have held that FSIA does not bar them from exercising jurisdiction over the Holy See.

II. REVIEW OF RECENT U.S. CASES INVOLVING THE HOLY SEE

This Part examines recent rulings by two district courts in lawsuits filed against the Holy See alleging its responsibility for sexual abuse by members of the Catholic clergy in the United States. A study of these rulings helps to put the purposes and scope of FSIA in relief and highlights the tension inherent in a statutory provision that limits the jurisdiction of the courts while carving out exceptions that attempt to balance foreign policy goals with the right of plaintiffs to seek redress for serious harms.

In the first case, *O'Bryan v. Holy See*, the plaintiffs are seeking certification as a class representing all victims of child sexual abuse by Catholic clergy in the United States, arguing that the Holy See bears legal responsibility for every such instance of abuse.[119] The second case, *Doe v. Holy See*, is against a U.S. Catholic diocese, a Catholic religious order that operates in the United States and abroad, and the Holy See, alleging sexual abuse of a minor by a priest who had previously been accused of, and admitted to church authorities, the sexual abuse of other minors in a different diocese.[120] The federal district courts have arrived at similar conclusions regarding the applicability of FSIA to the Holy See in these cases and held that it does not preclude their jurisdiction.[121]

By alleging the church's liability under the doctrine of *respondeat superior*, the plaintiffs have been able to benefit from the greater flexibility of that theory compared to theories of negligent hiring, negligent supervision or negligent retention. Because the latter theories require findings of employer fault,[122] they are more difficult to prove. *Respondeat superior* allows the plaintiffs to hold the employing organization responsible for actions of the employee within the scope of employment, regardless of the employer's fault, on the policy grounds that if employers know that they are subject to such liability, they will be much more careful in selecting their employees.[123] In addition to providing an easier standard of

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117. *Id.* at 498.
118. *In re Estate of Ferdinand E. Marcos*, 978 F.2d at 498.
119. *O'Bryan*, 471 F. Supp. 2d at 786.
120. *Doe,* 434 F. Supp. 2d at 931.
121. *Id.* at 957; *O'Bryan,* 471 F. Supp. 2d at 792.
122. 27 AM. JUR. 2d *Employment Relationship* § 389 (2008).
123. Michael J. Sartor, Note, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct:*

liability, *respondeat superior* also presents a clear policy choice for the courts in these cases, balancing the responsibility to ensure the safety of church members against the foreign policy objectives of FSIA. That theory does, however, involve the courts in ascertaining the complex relationships in canon and civil law between the Holy See and Catholic dioceses and religious orders in the United States, an enterprise that may implicate questions of ecclesiastical abstention.[124] These cases will be examined to understand how the courts balanced these and other factors in arriving at their determination that FSIA's tortious conduct exemption applied.

O'Bryan v. Holy See[125] is unique among the numerous cases brought against Catholic clergy in the United States and their superiors in that it seeks to hold the Holy See responsible for all of the instances of sexual abuse of minors committed in the United States.[126] Previous cases have alleged liability on the part of the local diocese and/or the religious order to which the alleged perpetrator of abuse belonged.[127] *O'Bryan* is the first case to contend that the Holy See itself is responsible for every case of abuse under the doctrine of *respondeat superior*, most likely *respondeat superior* is an easier theory to prove than a claim of negligent hiring. One of the named plaintiffs was the first to file suit against the Archdiocese of Louisville in a series of cases that eventually culminated in a large settlement in 2003.[128] The other two plaintiffs are California residents who allege that they were abused as children by Louisville priests.[129]

In *O'Bryan*, the district court initially found that FSIA was applicable,[130] although the judge did not dismiss the suit outright.[131] While the court held that it did not have personal jurisdiction over the defendant, it was because the strict service of process rules of 28 U.S.C. § 1608(a)(3) had not been met.[132] That subsection requires service "by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."[133] The judge noted that the defective service of process

The Implications of Fearing v. Bucher, 62 WASH & LEE L.REV. 687, 689 (2005).

124. The doctrine of ecclesiastical abstention states that matters of ecclesiastical rule, church discipline and theological controversy are matters over which the civil courts exercise no jurisdiction. *Id*. at 692–93 (quoting *Watson v. Jones*, 80 U.S. 679 (1872)). To the extent that a determination of whether the Holy See exercises the effective control over U.S. dioceses and religious orders that the plaintiffs assert might require the courts to delve into matters of theology and church law that are not fully settled, the doctrine might forbid such an inquiry. *Id.*

125. O'Bryan v. Holy See, 490 F. Supp. 2d 826 (W.D. Ky. 2005).

126. Jason Riley, *Suit against Vatican Can Proceed*, COURIER-J. (Louisville, KY), Jan. 12, 2007, at 1A.

127. *E.g.*, Zumpano v. Quinn, 6 N.Y.3d 666, 621, 849 N.E.2d 926, 927 (2006); John Doe No. 23 v. Archdiocese of Miami, Inc., 965 So. 2d 1186, 1187 (Fla. Dist. Ct. App. 2007); Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295, 296 (Ky. Ct. App. 1993).

128. Gregory Hall, *Vatican Asks Court to Dismiss Suit; Louisville Case Charges Sex Abuse*, COURIER-J. (Louisville, KY), April 7, 2005, at 1B.

129. *Id*.

130. *O'Bryan*, 490 F. Supp. 2d at 830.

131. *Id.* at 826.

132. *Id.* at 832.

133. 28 U.S.C. § 1608(a)(3).

(based on a highly technical flaw) was curable[134] and gave plaintiffs an additional sixty days to perfect service.[135]

The district court treated the threshold question of whether the Holy See is a foreign state within the meaning of FSIA as settled, answering in the affirmative.[136] It also noted that the decision by the Executive Branch to recognize a foreign sovereign is a nonjusticiable political question.[137] The plaintiffs attempted to sidestep FSIA by arguing that the sovereign status of an entity must be determined at the time of the alleged conduct. The suit alleges sexual abuse prior to the 1984 establishment of diplomatic relations with the Holy See, that the Holy See has separate capacities as both a sovereign entity and a church, and it is thus subject to FSIA only in the former capacity.[138] The court responded to the first argument by noting that the decision to recognize an entity as a foreign sovereign is retroactive.[139] It dismissed the second only by observing that the plaintiffs "can point to no instance in which *any* sovereign's status has been disregarded on these grounds."[140]

Both of the arguments made by the plaintiffs can be addressed in a more substantial manner. First, determining the sovereign status of the Holy See need not rely on a principle of retroactivity. In fact, even before establishing full diplomatic relations with the Holy See, the United States interacted with it in a manner suggesting that it recognized its sovereignty (which is, of course, a separate issue from entering into diplomatic relations). President Roosevelt maintained back-channel communications with the Holy See through a personal representative who resided in the Vatican City and via members of the U.S. Catholic hierarchy who were able to travel to the Vatican after Italy declared war on the United States.[141] In order to avoid difficulties with the Italian government, which would object to the presence of an enemy alien unless he were an accredited diplomat, the status of the U.S. representative was quietly upgraded to that of charge d'affaires by President Roosevelt.[142] In communication with the pope after the Allies began bombing Italy, Roosevelt reassured him that the U.S. military had been specifically instructed to avoid violating the territorial sovereignty of the Vatican City or of "'Papal domains throughout Italy'."[143] The violation of the latter pledge, in particular by the bombing on four separate occasions of the papal villa at Castel Gandolfo (which the Lateran Treaty had made sovereign territory of the pope) gave rise to postwar negotiations between the United States and the Holy See over reparations.[144] At first, the U.S.

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134. *O'Bryan,* 490 F. Supp. 2d at 832. The summons and complaint were addressed to the wrong entity within the Secretariat of State at the Holy See. *Id.* The Section for Relations with States acts as the functional equivalent of a ministry of foreign affairs, and it is on this Section that the summons and complaint should have been served. However, the plaintiffs mistakenly addressed the documents to the Head of the Secretariat of State, Cardinal Angelo Sodano, perhaps confusing his title and functions with those of the U.S. Secretary of State. *Id.*

135. *Id*.

136. *Id.* at 829.

137. *Id*. at 839.

138. *O'Bryan*, 490 F. Supp. 2d at 829–30.

139. *Id*. at 830.

140. *Id*. (emphasis in original).

141. GERALD P. FOGARTY, THE VATICAN AND THE AMERICAN HIERARCHY FROM 1870 TO 1965 281–82 (1985).

142. *Id*. at 281.

143. *Id*. at 295 (citation omitted).

144. *Id*. at 305–06.

State Department took the position that the territory was "not territory of a neutral state, but had the status of a neutral diplomatic mission located in the territory of a belligerent."[145] It later relented on the question of reparations, although insisting that it be regarded as "a matter of grace."[146]

The plaintiffs' second argument in *O'Bryan* against foreign sovereign status for the Holy See, that it is subject to FSIA only in its capacity as a foreign sovereign and not in its capacity as a church, is based on a confusion between the entities of the Holy See and the Vatican City and disregards the fact that the Holy See's role as the head of the Roman Catholic Church is part of the historical basis of its sovereign status. The title of the lawsuit itself confuses the entities. The defendant is identified as the "Holy See, in its Capacity as a Foreign State (State of the Vatican City), and in its capacity as an Unincorporated Association and Head of an International Religious Organization."[147]

As noted in Part III of this article, the Holy See and the State of the Vatican City are separate entities,[148] and it is the former, not the latter, with which the United States and other nations maintain diplomatic relations. The Holy See itself is not a state, but it is the entity that is recognized as a sovereign. The plaintiff may have deliberately confused the two entities in order to create an artificial distinction between the entity recognized in international law (i.e., the Holy See) and the Catholic Church, for the purpose of preserving a defendant with an international character (the worldwide Catholic Church) in the event that the sovereign entity (the Holy See) were deemed to fall under FSIA.[149] That distinction, however, does not reflect their deeply interrelated status. As will also be shown in the Part III, the international status of the Holy See developed directly from its role in overseeing the worldwide Catholic Church. It is because the Holy See is the head of an international religious organization that it eventually gained a status equivalent to that of sovereign states.[150] There is no "Holy See" that is *not* the "Head of an International Religious Organization."[151] At the same time, as Part IV demonstrates, the relationship between the Holy See and the various civil and ecclesiastical entities that comprise the Catholic Church is different from the kind of direct, top-down control that characterizes multinational corporations.

On January 10, 2007, after service had been perfected, the court addressed the defendant's exception to its subject matter jurisdiction under FSIA, holding that some of the claims fall within FSIA exceptions.[152] After finding that the Holy See had

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145. *Id.* at 342.

146. *Id.* at 344.

147. *O'Bryan*, 490 F.Supp. 2d at 826. *See also id*. at 829 ("The United States has recognized the Holy See as a foreign sovereign since January 10, 1984.").

148. *See infra*, Part III.

149. It may also reflect that fact that there is no single entity incorporated as "the worldwide Catholic Church."

150. *See infra*, Part III.

151. *See* Josef L. Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 309 (1952) ("[T]he Holy See was always a subject of general international law"); Matthew N. Bathon, Note, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597, 599–600 (2001) (discussing background of "the Holy See as a person under international law").

152. *O'Bryan*, 471 F. Supp. 2d at 792. This process is typical when a FSIA claim of immunity has been made by a defendant.

not waived its sovereign immunity defense,[153] the court went on to assess the Holy See's liability under the commercial activity exception, finding that the "true essence" of the claim was not commercial.[154] The context in which the abuse arose was the provision of religious services, which the court did not consider a primarily commercial activity.[155]

The court then turned to the tortious acts exception. It addressed several issues in order to determine if the exception even applies: whether the geographic limitation of FSIA restricts claims in the case; whether the individuals or actors are actually officials or employees of the Holy See; and whether they were acting within the scope of their employment.[156]

Regarding the geographic limitation, the court cited *Argentine Republic v. Amerada Hess Shipping Corp.*[157] for the proposition that both the injury and the tortious act or omission that caused it must occur in the United States.[158] The court observed that the plaintiffs conceded that all of the acts of the Holy See itself (i.e., any alleged actions taken by officials of Holy See at the Vatican to cover up abuse allegations and promote the quiet reassignment of accused clergy) were committed outside of the United States and that any omissions committed (such as failure to mandate a comprehensive personnel policy for the U.S. church after there had been enough credible allegations of abuse) also clearly took place outside of the United States.[159] However, the court also noted that the acts and omissions of the Holy See's agents, officials and employees all occurred in the United States and were unquestionably within FSIA tortious activity exception.[160] But that simply raises the complex question of whether Catholic clergy and religious orders in the United States are such agents, officials, and employees of the Holy See, a question that will be taken up in greater detail in Part IV.

The court turned to Kentucky state law in an attempt to determine whether the actions and omissions of Catholic clergy in the United States could be imputed to the Holy See.[161] It used the "right to control" standard articulated by the Sixth Circuit in 1975[162] and found that the plaintiff's assertion that the Holy See has "absolute and unqualified power and control . . . over each and every priest, bishops [sic], brother,

153. *Id*. at 788. The waiver claim made by the plaintiffs appears to be based on the fact that, in over a decade of litigation and settlement of sexual abuse claims, the Holy See has not raised sovereign immunity as a defense. However, the defendant in these cases is the local diocese or archdiocese, or religious order, not the Holy See itself. As to whether these entities might be considered subdivisions of the Holy See, see Part IV, *infra*.

154. *Id*.

155. *Id.*

156. *Id.* at 789–92.

157. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

158. *O'Bryan*, 471 F. Supp. 2d at 790.

159. *Id.* at 790.

160. *Id*.

161. *Id.* (quoting First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 622 n.11 (1983), for the proposition that "where state law provides a rule of liability governing private individuals, FSIA requires the application of that rule to foreign states in like circumstances").

162. Grant v. Bill Walker Pontiac-GMC, Inc., 523 F.2d 1301, 1305 (6th Cir. 1975). *But see* Ky. Unemployment Ins. Comm'n v. Landmark Cmty. Newspapers of Ky., Inc., 91 S.W.3d 575, 579–80 (Ky. 2002) ("The ability to control the specific details of the work is an important factor for a court or administrative agency to consider. However, we do not believe this factor is of greater importance than the others. . . . [E]very case, where it must be determined whether an individual is an employee or an independent contractor for unemployment insurance purposes, needs to be resolved on its own facts.").

sister, parish, diocese, archdiocese, and instrumentality of the Church" sufficient to state a prima facie case for substantial control and therefore that "those persons are 'employees' of the Holy See for the purposes of FSIA."[163] In a footnote, the court pointed out the apparent paradox that under this definition, the Archbishop of Louisville is an "employee" of the Holy See under Kentucky law even though the Archdiocese of Louisville (over which he presides) is a citizen of Kentucky and thus not eligible to be considered an "agency or instrumentality of a foreign state."[164] The court attempted to resolve the paradox by raising the hypothetical of a state-owned foreign bank with a business entity incorporated in the United States and the president of that entity; the entity itself may not be a part of the foreign state for purposes of FSIA, but the president may be (regardless of his nationality) if he takes direction from the foreign government and follows policies laid down by its leaders.[165]

The Holy See apparently did not provide evidence sufficient to overcome the plaintiffs' prima facie showing of its control over the Catholic clergy in the United States, or at least over those members of the clergy at issue in the case.[166] Such an argument might be made by demonstrating that the internal structure of the Catholic Church, both in theory and practice, is more complex and nuanced than the system of "absolute and unqualified power and control" over local personnel that is asserted by the plaintiffs. This will be elaborated at length in Part IV, *infra*.

Next, the court addressed the "scope of employment" requirement of the tortious activity exception.[167] The test under Kentucky law is whether the conduct is "'of the same general nature as that authorized or incidental to the conduct authorized'."[168] While under Kentucky law a priest's sexual misconduct is outside the scope of employment,[169] the plaintiffs allege that the acts and omissions of the employees of the Holy See in covering up and failing adequately to address the sexual abuse crisis were directly pursuant to directives issued by the Holy See.[170] Therefore, these acts and omissions allegedly fall directly within the scope of office or employment of those persons who are determined to be agents or employees of the Holy See.[171] Even if were determined that there was no specific policy of the Holy See that officials of the Archdiocese of Louisville were implementing in their handling of abuse allegations by clergy under their control, the plaintiffs' arguments resonate with the duties of a Catholic bishop to maintain discipline among the clergy and to ensure the welfare of the faithful entrusted to their care. These are without a doubt two of the most important responsibilities of a Catholic bishop,[172] and if

163. *O'Bryan*, 471 F. Supp. 2d at 790–91.

164. *Id*. at 791 n.3.

165. *Id.*

166. *Id.* at 791.

167. *Id.* at 791–92.

168. *Id.* at 791 (quoting Wood v. Southeastern Greyhound Lines, 194 S.W.2d 81, 83 (1946)).

169. *See* Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000) (noting that a priest's affair with a woman whom he was counseling exceeded the scope of his employment because the priest was not "advancing any cause of the diocese or engaging in behavior appropriate to the normal scope of his employment.").

170. *O'Bryan*, 471 F. Supp. 2d at 792.

171. *Id.*

172. *E.g.*, CODE OF CANON LAW canons 375, 381, 383, 384, 387, & 391.

bishops are to be considered employees of the Holy See, then action in line with those duties would fall squarely within the scope of their employment.

Finally, the court examined the discretionary function exception to FSIA's scope of employment requirement. It concluded that the failure of the agents or employees of the Holy See to provide for the safety of the children under their care, to the extent that it constitutes a negligent hiring claim, falls under the discretionary function exception.[173] However, the failure to warn parishioners when a person known or suspected to have sexually abused minors was placed in charge of them, and the failure to report known or suspected incidents of the sexual abuse of minors were not discretionary acts on the part of those agents or employees, but rather strict compliance with the alleged policy of the Holy See.[174] The court did not find at this preliminary stage that such a policy actually existed, but it allowed the suit to proceed on those grounds for the purpose of determining whether it did.[175]

The court dismissed the Holy See's assertion that the First Amendment bars the plaintiffs' claims, on the basis that the suit applies only to the Holy See as a foreign state, not as the head of an international religious organization.[176] It points out that foreign sovereigns do not enjoy the rights guaranteed by the U.S. Constitution.[177] As has been demonstrated earlier in this section, the distinction between the Holy See's status as a sovereign and its role in the government of the Catholic Church is not a clean one. Articulating the exact juridical relationship between the Holy See and a Catholic bishop in the United States for purposes of determining whether an agency relationship exists under U.S. law requires a close examination of internal church law and its theological underpinnings. For this reason especially, this case may present the kind of entanglement that First Amendment jurisprudence seeks to avoid.[178]

The question of the Holy See's immunity to suit under FSIA has also arisen in *John V. Doe v. Holy See*, in which the district court found that the tortious conduct exception applies and allowed the case to proceed.[179] This case appears to be the first time that a suit against the Holy See for damages related to child sexual abuse by clergy has been allowed.[180] The suit names the Holy See as well as the Archdiocese of Portland and the Catholic religious order to which the priest who allegedly abused the plaintiffs belongs.[181] It alleges that the superiors of the religious order were aware of allegations of abuse made against the priest by a seminary student in Northern Ireland, to which he admitted at the time, and transferred him to an all-male high school run by the order in Chicago, where he worked for six years.[182] After further complaints there by three students, to which he also admitted

173. *O'Bryan*, 471 F. Supp. 2d at 793.

174. *Id.* at 793–94.

175. *Id.* at 795.

176. *Id.* at 794.

177. *Id*.

178. *See* Sartor, *supra* note 123, at 696–97 (discussing "the excessive-entanglement principle of the Ecclesiastical Abstention doctrine").

179. 434 F. Supp. 2d at 931. The *Doe* opinion largely follows the analysis of *O'Bryan* on the issues examined in this section.

180. The *O'Bryan* case, although filed first, was initially delayed for failure to properly serve the defendant; the judge in that case reached the issue of exemption under FSIA later and cites *Doe* frequently in his opinion. The analysis here of *Doe* omits those issues dealt with in *O'Bryan*.

181. *Doe,* 434 F. Supp. 2d at 930 (citing the Plaintiff's Complaint).

182. *Id.*

contemporaneously, he was again transferred to a parish church in Portland, Oregon, where he was accused of abusing the named plaintiff in the case.[183] The suit claims that the accused priest not only admitted his history of sexual misconduct in Chicago but also questioned his superiors there as to why, given his prior history, he had been assigned to work in the private counseling office of an all-male school, where both the opportunity and the temptation to molest minors would be maximized.[184]

The suit asserts that the Holy See should be held responsible because it did not promote policies that would have forbidden the reassignment of clergy and religious orders against whom there were credible (and in this case, admitted) allegations of abuse.[185] It claims that the failure of the Archbishop of Chicago, who had authority over a member of a religious order who was a priest working in his diocese, to remove or discipline the priest was "in accordance with the policies, practices and procedures" of the Holy See.[186]

The district court engaged in a much more exhaustive analysis of the commercial activity exception than the *O'Bryan* court before ultimately concluding that "the true essence of the complaint" is not commercial and that the plaintiff's principal complaint sounds in tort.[187] The commercial activity analysis, however, forms the basis for the court's agency argument,[188] which is apparently why the court addressed the issue exhaustively even though it had already concluded that it was inapplicable.

Both *Doe* and *O'Bryan* grapple with the *sui generis* status of the Holy See, and in both cases the court sought to ensure that serious substantive claims have a forum.[189] In this way, the cases resemble the human rights litigation that the courts have faced under ATCA. The principle differences are that most of the alleged tortious conduct (the abuse itself, and the mishandling of abuse allegations by U.S. Catholic Church officials) actually occurred in the United States, and in *Doe* there are named defendants who are not subject to foreign sovereign immunity claims.[190] In one sense, this does relieve some of the pressure to make sure that the plaintiffs have a way to redress the alleged harms. On the other hand, aside from the recovery of substantial monetary damages by adding a defendant with deep pockets,[191]

183. Cathleen Falsani, *Alleged Abuse Victim Gets OK to Sue Vatican: Oregon Judge's Ruling Called Legal Landmark; Appeal Is Likely*, CHI. SUN-TIMES, June 8, 2006, at 26.

184. *Doe,* 434 F. Supp. 2d at 931 (citing the Plaintiff's Complaint).

185. *Id.* at 931–32.

186. *Id.* at 932 (citing the Plaintiff's Complaint).

187. *Id*. at 942.

188. *See id.* at 936–37 (stating that it cannot be said that plaintiff's complaint is devoid of factual allegations regarding the Holy See's wrongdoing or its agency relationship with the Archdiocese, Order, and individual clergy").

189. *See O'Bryan*, 490 F. Supp. 2d at 826 (discussing whether plaintiffs' claims could be brought in U.S. courts); *Doe*, 434 F. Supp. 2d at 957 (denying the Holy See's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction).

190. Although *O'Bryan* does not name any party other than the Holy See as a defendant, a finding that the Holy See is immune from suit would not prevent the plaintiffs from suing the alleged perpetrators as well as the entities of the Catholic church to which they were subject. In fact, as noted *supra*, one of the plaintiffs has already recovered from the local archdiocese.

191. In addition to making the resources of the Holy See itself available for recovery, the expansive theory of agency articulated by the plaintiffs, particularly in *Doe*, by which the "Holy See has unqualified

allowing the Holy See to be sued could have a significant policy effect by encouraging better safeguards and more stringent oversight at the highest level of the church's administration. It would undoubtedly increase support by the Holy See for steps taken by Catholic bishops in the United States to deal with allegations of abuse in a more expeditious and public manner. Just as the argument is made that allowing courts to hear cases against foreign states that allege violations of human rights would discourage future misconduct,[192] holding the Holy See accountable for failing to implement an effective oversight regime would provide a strong incentive to strengthen existing disciplinary norms. It would also ensure that the church's internal administrative and penal processes facilitate the swift and equitable resolution of allegations of abuse and emphasize cooperation with law enforcement, while requiring church leaders to account for their effectiveness in overseeing their personnel and protecting the members of the faithful entrusted to their care.

There is some parallel between the equitable concern with finding a way for the courts to take jurisdiction in these cases and the reasoning behind the state-sponsored terrorism exception that was added to FSIA in 1996. The obvious difference is that the alleged acts and omissions of the Holy See with regard to the sexual abuse of minors in these cases have more to do with negligence or deliberate failure to exercise proper care than with an affirmative program of seeking to inflict harm on innocents. Procedurally, the terrorism exception required an amendment to the statute.[193] By contrast, if the suits against the Holy See reach a conclusion and survive appellate review, they might well result in an increase in successful claims against foreign officials in U.S. courts, particularly where there are allegations of human rights abuses. An expansive interpretation of the tortious activity exception might allow federal courts to hear human rights cases that are currently dismissed for lack of jurisdiction under FSIA without the need for further amendment of the statute.

The courts' FSIA analysis is predicated on the recognition that the Holy See is a sovereign entity. The following section will consider the threshold issue of the international status of the Holy See before looking at the relationship between the Holy See and the physical and juridical persons alleged to act on its behalf in the United States.

III. THE STATUS OF THE HOLY SEE IN INTERNATIONAL LAW

A. *The Holy See and the State of the Vatican City*

As an entity in international law, the Holy See is distinct from and predates by hundreds of years the Vatican City, the small territory created by the Lateran Treaty between Italy and the Holy See over which the Holy See exercises exclusive

power over the Catholic Church, including each and every individual section of the Church," could make the assets of any Roman Catholic entity within reach of the federal courts vulnerable to seizure for payment of court ordered damages, even if that entity itself were not directly in the alleged chain of control between the Holy See and the individual who committed the abuse. 434 F. Supp. 2d at 931. This would depend on a separate finding that the assets in question were involved in commercial activity.

192. Gergen, *supra* note 37, at 790.

193. 28 U.S.C. § 1605(a)(7) (repealed).

jurisdiction.[194] In essence, the Holy See is sovereign over the territory of the State of the Vatican City. As will be shown, its status as a sovereign entity has not been dependent on its control of any territory, an anomalous situation in international law.[195]

The first step in assessing the status of the Holy See in international law is distinguishing the Holy See from the State of the Vatican City. Such an untangling is not easily accomplished, since the two entities are not only obviously intertwined historically, but also often referred to interchangeably even in official parlance (much as diplomatic officials might refer to conversations with "Washington" as shorthand for the U.S. government). It is reasonable to conclude that the international legal status of the Vatican City is in some ways subordinate to that of the Holy See.[196]

The most useful framework for understanding the status of the Holy See apart from its connection to the Vatican City is to consider its status during two periods: prior to its role as the effective sovereign of large parts of Italy, and between the seizure of the last of its territorial holdings in 1870 and the recognition by Italy of its sovereignty over the Vatican City in 1929. Such an examination demonstrates that, even in the absence of any control over territory, the Holy See had a recognized status as a sovereign entity in international law.

The matter of the separate legal status of the Holy See rarely arose in practice prior to 1870, given its long involvement in the government of the Papal States.[197] Even before the popes began to exercise governance over parts of central Italy, however, the Holy See was a recognized entity in international law.[198] This status was derived from the involvement of popes in issues of doctrine and practice that were intimately connected with the government of the empire.[199] The institutions of papal diplomacy began with representatives named to oversee papal interests in remote areas of the empire and were expanded to include the important mission of representing the interests of the popes at the court of the Byzantine emperor.[200]

From the eighth century until the unification of Italy, the popes enjoyed almost continuous territorial jurisdiction and the rights of sovereignty that corresponded to

194. HOLY SEE BACKGROUND NOTE, *supra* note 2.

195. The Sovereign Military Order of St. John Of Jerusalem, of Rhodes, and of Malta, commonly known as the Knights of Malta, is the only other such entity, aside from either governments-in-exile or liberation movements, that enjoys a significant degree of international recognition. Although it once exercised sovereignty over Rhodes and Malta, the Order has not had territorial jurisdiction since the late eighteenth century. Nevertheless, it is recognized by more than eighty states, exchanges diplomatic representatives with many of these states, and has observer status at the General Assembly of the United Nations. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 231 (2d ed. 2006).

196. Kunz, *supra* note 151, at 313 ("Its constitution is not autonomous, but derived from the Holy See. It is a vassal state of the Holy See."). Descriptions of the exact relationship between the two entities vary, but Kunz's distinction helps to understand the nature of the relationship and highlights its uniqueness.

197. CRAWFORD, *supra* note 195, at 226.

198. *See* Kunz, *supra* note 151, at 308–14.

199. *See* Robert Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 295–300 (2000) (discussing the Holy See's involvement in international law).

200. HYGINUS EUGENE CARDINALE, THE HOLY SEE AND THE INTERNATIONAL ORDER 62–63 (1976).

those of a head of state.[201] Although matters of temporal governance often preoccupied the medieval and early modern papacy, its territorial holdings were not essential to the international authority that it exercised, an authority with many of the trappings of sovereignty.[202] This international authority was identified with the sense of the church's transnational mission at a time when western Europe shared a common religious faith.[203] That common faith allowed the Holy See to serve as a mediator of conflicts between nations, intervening both to end wars and resolve disputes before they rose to the level of armed conflict.[204] As Europe coalesced into national states, the Holy See maintained a unique status as a recognized sovereign entity with transnational authority.[205] While the doctrinal authority of the popes is analogous to the role of other international religious leaders, the unique status of the Holy See in the international arena gave a special force to pronouncements on moral issues that can be seen as the seeds of international human rights norms.[206]

The sovereignty of the Holy See continued to be recognized in international law in the period between the reunification of Italy in 1870 and the Lateran Treaty of 1929, a time during which the popes exercised no territorial jurisdiction,[207] although they maintained their claims of sovereignty over the former papal states.[208] It continued to send and receive ambassadors[209] and to conclude international agreements.[210] It also continued to exercise its status as mediator of conflicts and arbitrator of international disputes.[211] During this time, the image of the pope as a spiritual leader who was considered, perhaps idealistically, to be above the concerns of worldly politics led to the expectation that he could use his moral authority in the international arena to appeal to Catholics worldwide "to accept that standard of conduct which substitutes spirituality for materialism and which prefers settlements of international disputes according to law and justice to the settlement of disputes by the brutal arbitrament of the sword."[212] Crawford notes that, after 1870, the Holy See "retained . . . what it had always had, a degree of international personality, measured by the extent of its existing legal rights and duties, together with its capacity to conclude treaties and to receive and accredit envoys."[213]

The pope's status as a territorial sovereign resumed with the conclusion of the Lateran Treaty that created the State of the Vatican City. The agreement was concluded between Italy and the Holy See, implicitly recognizing the latter's ability to enter into binding international accords.[214] Even with the resumption of uncontroverted papal territorial sovereignty, the accreditation of ambassadors

201. Bathon, *supra* note 151, at 601.

202. Araujo, *supra* note 199, at 296.

203. *Id.* at 297.

204. *Id.* at 299.

205. *Id.* at 297.

206. *Id*. at 298–99.

207. Kunz, *supra* note 151, at 311 (The conquest of Rome and the annexation of the former papal states by the Kingdom of Italy completed the reunification of Italy under a secular monarch and brought the temporal authority of the popes to an end); Araujo, *supra* note 199, at 315.

208. Bathon, *supra* note 151, at 602.

209. *Id.*

210. CRAWFORD, *supra* note 195, at 226.

211. Araujo, *supra* note 199, at 303.

212. Editorial Comment, *The British Mission to the Vatican*, 9 AM. J. INT'L. L. 206, 208 (1915).

213. CRAWFORD, *supra* note 195, at 226.

214. Bathon, *supra* note 151, at 604.

remained, as always, to the Holy See rather than to the Vatican City.[215] The Vatican City participates in some international agreements, such as the postal union, that correspond to the functions of a territorial entity, although major international agreements are entered into by the Holy See.[216] It is the Holy See that conducts relations with foreign states[217] and holds observer status at the United Nations.[218]

Before considering the source of the sovereign status of the Holy See, it will be useful to examine briefly the relationship between sovereignty and statehood.

B. *Sovereignty and Statehood*

In the modern era, the notion of sovereignty is closely tied to that of statehood. At times, states have been held to be the only entities that could be considered persons under international law,[219] a viewpoint that has made it more difficult for non-state actors, such as territories with unresolved colonial status, occupied territories, and territories under the effective control of liberation movements to achieve recognition.[220] Sovereignty is certainly one of the characteristics (indeed, a sine qua non) of an independent state. The term is used almost interchangeably with the concept of exclusivity of jurisdiction over a delimited territory.

Surprisingly, given the ubiquity of the term, there is a lack of agreement over exactly what constitutes a state.[221] An often cited set of the essential elements of statehood is laid out in Article I of the Montevideo Convention of 1933: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[222] These criteria are reprised in the Restatement (Third) of the Foreign Relations Law of the United States.[223]

Gant suggests that the Montevideo criteria so concisely encapsulated the prevalent theory of statehood that they received very little examination at the time.[224] However, he argues that earlier conceptions of the foundations of sovereignty, particularly legitimism, can illuminate these criteria and fill in some of the gaps that they leave in the understanding of statehood.[225] Legitimism, or dynastic

215. Francis X. Murphy, *Vatican Politics: The Metapolitique of the Papacy*, 19 CASE W. RES. J. INT'L L. 375, 377–78 (1987).

216. *Id.* at 378.

217. *See* Bathon, *supra* note 151, at 613 (stating that the Roman Curia conducts foreign affairs on behalf of the Holy See).

218. *Id*. at 606.

219. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 405 (1999).

220. *See generally id*. (inferring that if states are the only entities recognized as persons under international law, non-states are not).

221. *Id.* at 412–13.

222. Convention on the Rights and Duties of States (Montevideo Convention), art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

223. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1986).

224. Grant, *supra* note 219, at 416.

225. *Id*. at 418.

succession, equated the state with the personal property of the monarch.[226] At its extreme, it denied the statehood of an entity where the legitimate succession had been interrupted, even if the facts on the ground suggested that a functioning state existed.[227] However, by the end of the nineteenth century, effective control over territory began to trump traditional dynastic rights.[228]

The emphasis on statehood has implications for U.S. jurisprudence. For example, in rejecting a sovereign immunity claim by the Palestinian Authority, the First Circuit relied in particular on the third of the Montevideo Convention criteria.[229] It focused on the issue of whether the Authority had a defined territory and permanent population under its control.[230] The emphasis on territorial control and population obviously restricts the notion of sovereignty to conventional states; it does not help to understand cases, such as that of emerging states, that exist at the margins of prevailing doctrine.

Having considered the historical development of the Holy See's role in international affairs and the relationship between sovereignty and statehood, the next section considers the unique status of the Holy See as a sovereign.

C. *The Holy See as a Sovereign Entity*

In his exhaustive study of the rise of the papal states, Thomas F.X. Noble observes that the territory controlled by the Holy See met all of the conditions required for an entity to be considered a state by the end of the eighth century, and most of them had been met by the middle of that century.[231] Although the general attributes of statehood outlined in the preceding section are not entirely applicable to the case of the Holy See, there is general agreement that it has a recognized status in international relations.[232] How exactly it fits into the international order is not completely settled.

As is clear from the consideration of the status of the Holy See when the papacy did not effectively govern any territory, its international personality, and thus its claim to sovereignty, is really independent of any territorial consideration.[233] In fact, one might assert that it is the converse that is true: the right of the pope to territorial sovereignty is the result of the recognized international status of the Holy See.[234] Indeed, the Lateran Treaty states that one of the purposes of the creation of the State of the Vatican City is to guarantee the independence of the Holy See.[235]

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226. *Id*. at 419.

227. *Id*.

228. *Id*. at 420.

229. Ungar v. Palestine Liberation Organization, 402 F.3d 274, 288 (1st Cir. 2005) (using the definition of "state" as defined in the Montevideo Convention of 1933).

230. John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT'L L. 691, 697 (2005).

231. THOMAS F.X. NOBLE, THE REPUBLIC OF ST. PETER: THE BIRTH OF THE PAPAL STATE, 680–825, at xxvi (1984).

232. Bathon, *supra* note 151, at 599.

233. Araujo, *supra* note 199, at 306.

234. CRAWFORD, *supra* note 195, at 226.

235. Treaty of the Lateran, Italy-Holy See, art. 2, Feb. 11, 1929, 130 B.S.P. 791.

If the territorial element of sovereignty is absent, the requirement of a permanent population is at best abstract. While the Vatican City does have a small population composed of residents with official status,[236] the Holy See itself is "populated" only in an analogical sense. The human beings who are the officials of the Holy See are a possible "permanent" population. Inasmuch as the Holy See is the apex of an international religious faith and claims the allegiance of a significant percentage of the world's population, it could even be said to "share" its population with the nations of the world. But both of these alternatives rely on characteristics of states that occupy territory. There is little reason to apply the general definition of statehood and sovereignty so rigidly to an entity that does not depend on a defined territory for its internationally recognized status.

The Holy See does satisfy the third element mentioned in the Montevideo Convention, that of government. Although some mention the temporal administration of the Vatican City as evidence of "government,"[237] this confuses the relationship between the two entities. If the Holy See's sovereign status is independent of its control of any territory (regardless of the fact that it currently has such control), then the administrative authority that it exercises over the Vatican City is not relevant to the issue of its status in international law. But that is not to say that the Holy See does not have a government. The administrative organization of the papacy in a form resembling its current structure predates that of almost all national states. It consists of bodies that exercise, on behalf of the pope, legislative, executive and judicial functions in the government of the church.[238]

Whether the capacity to enter into relations with other states is considered to be a necessary condition of sovereignty or a consequence of it, the Holy See also unquestionably satisfies that criterion. It was through such relations that it became an actor in the international arena, and across the centuries the Holy See has exchanged legates and maintained diplomatic relations with other sovereign entities and entered into binding international agreements, including the agreement that gave rise to the State of the Vatican City.[239]

The parallel between dynastic succession and the papacy suggests one alternative, or at least supplemental, source of the sovereign authority of the Holy See. Although not dynastic in the traditional sense of hereditary monarchies, the papacy emphasizes its continuity as a key part of its claim both to moral and juridical authority within the church and to sovereign status among the community of nations.[240] The role of the Holy See at the apex of the worldwide Catholic Church is dependent on the special authority of the apostle Peter, an authority which Catholic doctrine and canon law asserts is passed on through an unbroken line of succession of the popes.[241]

Regardless of its basis, the Holy See has for centuries enjoyed international legal personality.[242] The basis for its sovereignty is interesting because it suggests

236. Bathon, *supra* note 151, at 610.
237. *Id*. at 612.
238. *Id.* at 613.
239. *Id.* at 614–15.
240. Bathon, *supra* note 151, at 597.
241. CODE OF CANON LAW canon 331.
242. Araujo, *supra* note 199, at 322.

that other actors that do not meet all of the conditions considered to be constitutive of statehood[243] might come to enjoy an internationally recognized status if a significant number of international actors accord them such. Ultimately, whether focused on the narrow question of the Holy See's status or the larger question of what makes a state sovereign, the answer is closely related to the practice of the international community. Examining the cases that depart from the conventional understanding is one way of expanding the basis for recognizing the sovereign status of international actors.

The Holy See is unique not only for its anomalous status as a sovereign, but also for its distinctive relationships with constituent entities of the worldwide Catholic Church. Such entities, principally dioceses (and their subdivisions) and religious orders that operate across both ecclesiastical and national jurisdictional boundaries, have legal personality both in church law and in the laws of the nations where they are located.[244] This raises interesting questions as to the nature of the interrelationship of the Holy See and these entities and how that interrelationship informs conventional notions of agency. The final Part of this article will look at the relationship between the Holy See and the Catholic Church in the United States.

IV. THE RELATIONSHIP BETWEEN THE HOLY SEE AND THE U.S. CATHOLIC CHURCH

As noted in Part I, an important element of making a claim against a foreign sovereign is establishing that the alleged harm was inflicted by an "agency or instrumentality" of the foreign state. In the *O'Bryan* case, using Kentucky law, the court accepted the plaintiffs' contention that the Holy See exercises "absolute and unqualified control . . . over each and every priest, bishops, brother, sister, parish, diocese, archdiocese, and instrumentality of the Church" in the United States, and therefore that each of those entities or persons was an agency or instrumentality of a foreign state for FSIA purposes.[245] Although in its pleadings the Holy See did not adequately rebut that contention, it is an oversimplification of its relationship to other church entities to maintain that it exercises such a level of control over all Catholic institutions in the United States or elsewhere in the world.[246] At the same time, developments in the articulation of papal authority in church law over the last forty years have painted a much more robust picture of papal power. While the pope may not effectively exercise it on a regular basis, church law makes sweeping

243. Or that have lost them: consider the situation of the island nation of Kiribati, which faces complete inundation during this century because of rising ocean levels. If its inhabitants disperse to various host countries as refugees, would the now landless state (although, strictly speaking, not without territory – simply without territory that could be occupied on a permanent basis) with no fixed population continue to enjoy sovereign status? *See Key to the World: Kiribati, Paradise in Peril: For the Islands of Kiribati, Global Warming Poses Immediate Dangers*, ABC NEWS, Apr. 2, 2007, http://www.abcnews.go.com/WNT/story?id=3001691&page=1 (last visited Feb. 8, 2009) (discussing the shrinking Islands of Kiribati).

244. CODE OF CANON LAW canon 373; THE CODE OF CANON LAW: A TEXT AND COMMENTARY 318 (James A. Coriden, Thomas J. Green & Donald E. Heintschel eds., 1985).

245. *O'Bryan*, 471 F. Supp. 2d at 791.

246. *See* CODE OF CANON LAW canon 391 ("The diocesan bishop is to rule the particular church committed to him with legislative, executive and judicial power in accord with the norm of law.").

claims about the extent of papal authority over the entire church that could be read to substantiate the plaintiffs' contention.[247]

Canon 331 of the 1983 Code of Canon Law asserts that the pope possesses "supreme, full, immediate, and universal" power in the Church.[248] This is a statement of the extent of the pope's authority over the entire church; it is not a reflection of the actual control over an entity that is comprised of over one billion members and hundreds of thousands of clergy and religious sisters and brothers. Still, it does point to the fact that in the most important matters, the Holy See is capable of using its considerable authority over the worldwide church in an attempt to bring about the desirable outcome. The relationship between the Holy See and an individual member of the clergy or a religious order is attenuated by both geographic distance and the considerable autonomy of local church entities in their ordinary governance. However, when the Holy See has wanted to call a member of the clergy somewhere in the world to account for failure to adhere to a doctrinal position or a matter of church discipline, the Holy See has been able to breach that distance and autonomy and enforce its norms.[249] Given its ability to exercise direct control over recalcitrant clergy, the inaction of the Holy See, once there was credible evidence of a systemic problem with the handling of clergy and members of religious orders accused of abuse, may have been negligent.

The articulation in canon law of the pope's supreme authority has to be read and understood alongside a similar statement in church law made with reference to the college of bishops, the term used to refer to the collective body of the bishops of the worldwide Catholic Church. Canon 336 states that the college of bishops "is also the subject of supreme and full power over the universal Church."[250] The occasions for the college of bishops to exercise this authority are very infrequent, and, significantly, no claim is made that this corporate entity exercises the same kind of immediate, universal authority over the worldwide church as the pope does. Nevertheless, the statement is useful in understanding the different ways that apparently sweeping statements of authority in church law play out in actual practice.

A reading of the text of FSIA itself indicates that it is unclear whether a Roman Catholic diocese or religious order incorporated in the United States is an "agency or instrumentality of a foreign state." The Act defines such an entity as one that is a separate legal person, corporate or otherwise (which all such church entities in the United States are in civil law) that "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"[251] and that "is neither a citizen of a State of the United States . . . nor created under the laws of any third country."[252]

Here, the interplay between Catholic theology and canon law is essential to a proper application of the terms of the statute to the Holy See. Despite the fact that

247. *Id.* c.333.

248. *Id.* c.331.

249. Coriden et al., *supra* note 244, at 325.

250. CODE OF CANON LAW canon 336. That entity includes the pope, who is by necessity a bishop.

251. 28 U.S.C. § 1603(b)(2).

252. *Id.* § 1603(b)(3).

the Holy See is not a foreign state, as elaborated in Part III, it is a foreign sovereign for purposes of FSIA. However, a Catholic diocese or religious order in the United States (or elsewhere in the world) is neither an "organ" nor a "political subdivision" of the Holy See.[253]

Although the Holy See holds an exalted position both theologically and in terms of actual jurisdiction over every other diocese in the Catholic Church, it is not the exclusive central authority of the church.[254] That authority is shared in theory and church law (and, to some extent, practice) with the bishops of the Catholic Church worldwide.[255] But even to the extent that the pope exercises his authority directly over a subdivision of the Catholic Church—such as in the naming of a bishop or, extraordinarily, his removal—that subdivision of the church does not by that fact become a subdivision of the Holy See.[256]

Although the analogy is not an exact one, it is as inaccurate to refer to a Catholic diocese as an "organ" or "subdivision" of the Holy See as it would be to consider a state of the United States a "subdivision" of the federal government, even though the officials and citizens of the state owe allegiance to the federal government as to their own. While the federal government exercises supremacy in certain areas defined by the Constitution, it is co-sovereign with the states.[257] Similarly, although the Holy See has a priority over all other juridical entities in the church, and although it creates many of those entities (as in the case in which a new diocese is formed in a territory where the church had not previously existed institutionally or in which a diocese is spun off from an existing one), they are not "subdivisions" of it. Again by inexact analogy, if Congress granted statehood to an existing U.S. territory, or created a new state out of the territory of an existing one, that new state would be subject to the Constitution and laws of the United States,[258] but it would be a constituent member, not a "political subdivision" of the federal government. The Holy See exercises primacy over the worldwide Catholic Church, but it is not coterminous with the worldwide Catholic Church. Instead, it is a subdivision of that church. A subdivision of the church is not a subdivision of the Holy See.

The relationship is even more attenuated in the case of Catholic religious orders. The Holy See plays a key role in the process of recognizing religious orders, but this role is analogous to that played by state officials in chartering a corporation.[259] With regard to religious orders that are chartered by the Holy See,

253. Coriden et al., *supra* note 244, at 316 (stating that "a diocese is not primarily a subdivision of the universal Church but rather a community of the baptized confessing the Catholic faith, sharing in sacramental life, and entrusted to the ministry of the bishop").

254. *See* CODE OF CANON LAW canon 381 (stating a diocesan bishop has all "the ordinary, proper and immediate power which is required for the exercise of his pastoral office"); Coriden et al., *supra* note 244, at 324–25.

255. *See* KNUT WALF, *The Hierarchical Constitution of the Church, in* NEW COMMENTARY ON THE CODE OF CANON LAW 423, 423–29 (John P. Beal, James A. Coriden & Thomas J. Green eds., Ronny Jenkins trans., 2000), for an extensive discussion of the relationship between the pope and the rest of the bishops of the Catholic church.

256. Coriden et al., *supra* note 244, at 316.

257. Printz v. U.S., 521 U.S. 898, 918–19 (1997).

258. *See generally* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004) (discussing the conditions placed on new states by Congress before they enter statehood).

259. *See generally* Rose M. McDermott, *Institutes of Consecrated Life and Societies of Apostolic Life, in* NEW COMMENTARY ON THE CODE OF CANON LAW 741, 747–762 (John P. Beal, James A. Coriden &

they are no more "organs" or "subdivisions" of the Holy See than private universities chartered by the legislature of a state are subdivisions of the state. A Catholic religious order is bound to observe the norms for such entities that are articulated in canon law and to remain faithful to the laws and doctrine of the church (also analogous to the obligation of a corporation to obey the laws of the state, although it is not an organ of the state government), but within the church it is a private entity, juridically distinct from the Holy See.

Church law does state that members of religious orders are subject to the supreme authority of the Church.[260] It further asserts that individual members of religious orders are bound by obedience to the pope "as their highest superior."[261] While these provisions are largely hortatory, it is conceptually easier to posit a hierarchical relationship between the Holy See and an individual member of a religious order than it is to attempt to demonstrate that every juridical entity in the church subordinate to the Holy See is an organ or subdivision of it. Even that hierarchical relationship does not necessarily constitute agency as that concept is understood in U.S. law.[262]

The necessity of recourse to church law and theology to articulate the nature of the relationship between the Holy See and other entities and persons in the Catholic Church may implicate the doctrine of ecclesiastical avoidance. However, if the courts are willing to undertake an analysis of that relationship as they would with any foreign legal system, as the district court did in *O'Bryan*, they may also conclude that the effective control that the Holy See exercises over other components of the Catholic Church is sufficient to find that those components are its agencies or instrumentalities for FSIA purposes. Such a conclusion would rely more on the actual practice of authority in the church which presents a more multifaceted perspective on those relationships than strictly on theory or church law.

V. CONCLUSION

Recent litigation seeking to hold the Holy See liable for the alleged abuse of minors by members of the Catholic clergy in the United States and for its failure to take action when faced with credible accusations of abuse or admissions of guilt by the perpetrators provides a window to open the federal courts to claims of human rights abuses committed by agents or employees of a foreign sovereign. The cases examined in this article may provide such a vehicle not by expanding the exceptions to foreign sovereign immunity in FSIA, but rather by encouraging the courts to find a way to apply the law when there is both a serious harm to redress and the policy motive of discouraging future behavior and/or encouraging reform.

The Holy See presents a unique instance of an entity that has internationally recognized sovereign status even though it lacks some of the attributes of modern

Thomas J. Green eds. 2000) (discussing, among other issues, the formation, oversight, and mergers of religious orders).

260. CODE OF CANON LAW canon 590, § 1.

261. *Id.* canon 590, § 2.

262. *See* Terry M. Moe, *Political Control and Power of the Agent*, 22 J. L. ECON. & ORG. 1, 3 (2006) (providing an overview of political agency in the United States).

states. With that status comes both the responsibilities and the rights accorded states in the international order. It is unclear if the international community will begin to accord some of those rights and responsibilities to other entities that fall short of statehood, such as liberation movements or emerging states.

The cases examined in this article differ from most claims involving human rights abuses that seek to hold a sovereign foreign entity liable for those abuses because adjudication of the claim against some of the responsible parties—notably, the actual alleged perpetrators of the abuse, as well as their superiors in the United States who did not respond appropriately to earlier instances of alleged and/or confessed abusive behavior—is not completely barred by the application of FSIA to dismiss the claims against the Holy See.[263] The complex relationship in theory and practice between the central authority of the Roman Catholic Church and local church officials defies easy analogy to conventional conceptions of agency in U.S. law. Although bishops in the United States are appointed by the Holy See[264] and can be removed under extraordinary, rare circumstances[265] the relationship is not as direct as that between a corporation and its foreign subsidiary, much less between a firm and its own employees. The relationship between a priest and the Holy See is even more attenuated, and the mechanisms for discipline of rank-and-file clergy are often indirect, by way of the intermediate ecclesiastical structures to which they belong.

Nevertheless, the Holy See exerts tremendous moral and legal authority (canonical and civil) over subordinate physical and juridical persons in the Catholic Church. While policies articulated from the central authority of the church may meet with greater or lesser degrees of adherence at the local level, when the Holy See chooses to emphasize and insist on adherence to particular norms, it has the institutional tools at its disposal to ensure compliance and penalize infractions. In some ways, the Holy See might be considered a victim of its own success in asserting its juridical authority over rank and file clergy, leading to the expectation that it exercise that authority to prevent the human and institutional failings brought to light by the sexual abuse crisis from going unaddressed for so long. Arguably, a swifter response to the sexual abuse crisis by the central authority of the church would have led to the earlier development of personnel policies that would have prevented the actions of the alleged abusers in these two cases and scores of others. That is a claim that it seems fair to allow the courts to adjudicate.

These cases also differ significantly from claims under ATCA that often run aground on FSIA. While ATCA allows suits for harms committed outside of the United States, these cases allege that harms were inflicted on U.S. citizens on U.S. soil because of the negligence of a foreign entity that has significant, ongoing contacts with a substantial minority of the U.S. population. The refusal of the courts to hear such claims would have a far greater impact than their demurral in cases in which the harm was done by foreigners (often to other foreigners) outside of the territory of the United States. The present cases go to the heart of a nation's ability to enforce the law within its own borders and protect its most vulnerable citizens.

263. While the *O'Bryan* case names only the Holy See as a defendant, a previous case by some of the same plaintiffs alleging sexual abuse by priests was settled by the Archdiocese of Louisville in 2003. *Vatican Asks Court to Dismiss Suit; Louisville Case Charges Sex Abuse*, COURIER-J. (Louisville, KY), Apr. 7, 2005, at 1B.

264. CODE OF CANON LAW canon 377.

265. *Id.* canon 1341.

And while ATCA plaintiffs might (at least on paper) have legal recourse in the jurisdiction where they were allegedly harmed, no such alternative forum exists to determine the liability of the Holy See. While the church has a well-developed judicial system with the authority both to punish infractions and redress harms, Catholic canon law makes the Holy See absolutely immune to judgment by any church authority for any reason.[266]

Whatever the theoretical and juridical underpinnings of sovereignty, it is not a concept that exists in a vacuum. For all of its importance to the international order, sovereignty is properly understood as a means to an end: the welfare of peoples and peaceful coexistence within the international community.[267] In spite of the differences between the cases against the Holy See and human rights claims that have been brought under ATCA, the advancement of these cases could have significant effects on the likelihood that such claims will survive attempts to have them dismissed. The willingness of the district courts to allow these cases to proceed with the Holy See as a defendant indicates a desire to avoid dismissing such serious cases, at least insofar as they involve a foreign sovereign that has substantial contacts with persons residing in the United States. If the appellate courts, and ultimately the Supreme Court, agree that these cases fall under an exception to FSIA, it could be a signal that they would entertain a less restrictive reading of those exceptions when faced with other cases that they are equally loathe to allow to go unadjudicated.[268] Ultimately, this could open the door to suits against foreign states and their agents for human rights violations committed outside of the United States.[269] It would be a bittersweet irony for the Holy See if its longstanding advocacy of greater international enforcement of human rights norms was advanced by a historic legal judgment against it.

266. *Id.* canon 1405.

267. The Secretary-General's High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, paras. 29–30, U.N. Doc. A/59/565 (Dec. 1, 2004), *available at* http://www.un.org/secureworld/report2.pdf.

268. On March 1, 2007, a federal district judge for the District of Columbia allowed a case against several state entities of the People's Republic of China for the beatings of Falun Gong practitioners to proceed under the commercial activities exception to FSIA. Youming Jin, et. al., v. Ministry of State Sec., 475 F. Supp. 2d 54, 67 (D.D.C. 2007).

269. *See* Donald W. Garner & Robert L. McFarland, *Suing Islam: Tort, Terrorism and the House of Saud*, 60 OKLA. L. REV. 223, 273 (2007) (making the provocative suggestion that the Saudi state might be held civilly liable for acts of terrorism inspired by radical Islamists supported by the state).