

Crimes against Humanity by members of the Hierarchy of the Catholic Church.

Are there grounds for an investigation by the International Criminal Court of a situation involving senior officials of the Vatican City State for Crimes against Humanity? Why, why not? What barriers exist to a possible prosecution?

Respectfully reminding the Court of the relevant sections of the preamble of the Rome Statute:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; Recognizing that such grave crimes threaten the peace, security and well-being of the world; Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation; Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...

Requesting that the ICC investigates a situation where –

- a. Tens of thousands of people under the age of 18 years have been sexually abused within various institutions run by the Catholic Church by priests and other religious officials in every country where that church has a presence.
- b. The impact of sexual abuse on children has been described as an egregious betrayal of trust which has life-long deleterious effects for most, and for up to 38% ends in suicide.
- c. The Catholic Church hierarchy, from Bishops to Archbishops, Cardinals and Popes have known that these abuses were being perpetrated.
- d. In every country where this abuse has been studied, the pattern of cover-up, protection of the church and disregard for children has been identical.
- e. From at least 1962 up to the present, successive Popes have given exclusive management of the CSA issue within its ranks to the Congregation for the Doctrine of the faith (CDF)
- f. The CDF has issued clear and unambiguous directives to all Bishops and heads of Catholic religious congregations world-wide regarding the process for dealing with allegations of CSA.
- g. The Catholic Church has for decades denied it had any knowledge of the crimes of its priests and clergy.
- h. The Catholic Church hierarchy has, to date, acted with complete impunity in every National Jurisdiction in the world.
- i. The International Community has expressed both disbelief and outrage that the Catholic Church has concealed these crimes for centuries

Background

International Criminal Law – Peter Gogarty. November 2015

In virtually every country in the world where the Catholic Church has a presence, hundreds of its priests and members of other “religious orders” have been convicted for the sexual abuse of tens of thousands of children (minors under the age of 18 years) ¹ Investigations in many of these countries have shown that evidence of this issue has existed from the beginnings of the 20th Century – with thousands of victims giving first hand testimony of physical, emotional and sexual abuse within various institutions run by the Catholic Church – including at schools, orphanages, in churches and priests residences. First hand testimony regarding this issue for more than 100 years seems only limited by the life expectancy of generations of victims – that is, earlier victims have all died. Nonetheless there is evidence of identical circumstances existing for centuries prior to this period. A Commission of Inquiry in Ireland found written records within the Congregation of the Christian Brothers which show knowledge of the child abuse crimes by its members throughout the 19th century while Catholic Church documents demonstrate a formalised policy for dealing with child abuse accusations against clerics from 1741. Responding to questions by the author of this paper at the NSW Special Commission of Inquiry into certain issues in the Newcastle Diocese of NSW (the SCol), expert witness Dr Roger Austin said that it was important for people to understand that while this scandal appears to be a relatively recent phenomenon, it had in fact been occurring and managed by the Church for centuries. ²

What is Child Sex Abuse?

Child sex abuse is any form of sexual activity between a person under the age of 18 years with another person over that age – typically with at least a four year age difference. It includes fondling, sexualised kissing, sexualised language and discussion, exposure to pornography, exposure of genitalia of either party through to penetrative forms of sexual activity. This type of activity is potentially captured by Rule 85 of the Procedures of evidence of the ICC, and falls within the relevant Rome Statute Articles as a Crime Against Humanity committed against a civilian population.³

Discussing the impact of childhood sexual abuse on victims, the Irish Commission of Inquiry in 2009 noted that for many adult survivors their lives were blighted by fear and by memories of the abuse and were marked by alcohol and substance abuse, poverty, social isolation, aggressive behaviour

¹ See John Jay College February 2004 Gerald W. Lynch President, John Jay College of Criminal Justice *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons*. uscbb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf Retrieved 05 November 2015 The Commission to Inquire into Child Abuse (The Irish Commission) – 1936 – 2004 Executive Summary Report <http://www.childabusecommission.ie/rpt/> Retrieved 07 November 2015

² Dr Roger Austin, Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle Dr RJ Austin, Expert Witness on Canon Law. Transcript of Evidence of 31 July 2013 pages 2213 – 2267i` [http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/\\$file/Day_20_31_July_updated_page_numbers.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/$file/Day_20_31_July_updated_page_numbers.pdf)

³ **Rule 85 ICC rules of Evidence and Procedure** Definition of victims. ‘For the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court...’

International Criminal Law – Peter Gogarty. November 2015

and self-harm. 30% of survivors it says, suffered from an ongoing “constellation of depression and suicidal behaviours, and an inability to trust.”⁴

Bishop Charles Scicluna, a previous Vatican City State prosecutor was reported in The Economist on May 17 2014 as saying that CSA is “...an egregious betrayal of trust and a violation of the innocence of victims, it causes untold suffering...”⁵

Australian academic, Jill Astbury, in 2013, wrote that all forms of CSA are a “...profound violation of the Human Rights of Children”...and a crime based on an “extreme transgression” of the trust, duty of care and power afforded to those who perpetrate these crimes. This violation leads to physical and psychological problems, with long term impacts on mental health, personality, sleep, self-esteem, self-harm, substance abuse, life expectancy, panic disorders, depression and severe forms of Post-Traumatic Stress Disorder. She suggests that various Australian studies show suicide rates amongst victims of child abuse as being up to 38 times higher than the National rate, with 32% of surveyed survivors having attempted suicide, and some 43% having had suicidal thoughts.⁶

Is there a documented History of the Catholic Church knowing of, and managing child sexual abuse by members of its clergy?

What follows is a brief chronology of Catholic Church documents showing a consistency of policy and procedure from the year 1741 up until the present time. From 1962, the Congregation of the Holy Office, later renamed the Congregation for the Doctrine of the Faith (the CDF) has had exclusive carriage of the management of the sexual abuse of children within the Catholic Church world-wide – including directing Bishops and heads of various religious congregations to pass all information on child sexual abuse allegations to the CDF.

- **1741** *Sacramentum Poenitentiae* (Pope Benedict XIV), was the first known recognition within the Roman Catholic Church of Child Sexual Abuse by priests, and set down procedures for dealing with such matters. In particular, it dealt with the solicitation of sexual activity within the “confessional”.
- **1917** The first *Code of Canon Law* was assembled from centuries of “ecclesiastical doctrine” and contained specific “canons” regarding sexual abuse of minors and sanctions for such activities.
- **1922** saw the first edition of *Crimens Solicitationis* dealing with soliciting sex with people including minors within the confessional. *Crimen Pessimum* deals specifically with what today is recognised as childhood sexual assault.

⁴ The Commission to Inquire into Child Abuse (The Irish Commission) – 1936 – 2004 *Executive Summary* Report [http://www.childabusecommission.ie/rpt/ exec summary p 15](http://www.childabusecommission.ie/rpt/exec_summary_p_15)

⁵ Bishop Scuciana quoted in The Economist 27 May 2014.
<http://www.economist.com/news/international/21602248-bid-hold-catholic-leadership-responsible-paedophile-priests-looming-shadows> *The Catholic Church and Child Abuse – Looming Shadows*. May 27 2014

⁶ Professor Jill Astbury MAPS, College of Arts, Victoria University.
www.psychology.org.au/inpsych/2013/october/astbury Australian Psychology Society retrieved 02 November 2015

International Criminal Law – Peter Gogarty. November 2015

- **1962** The revised version of *Crimens Solicitationis* provides exclusive competence to the *Congregation of the Holy Office* and is promulgated to all bishops and heads of religious orders. It makes specific provision for absolute secrecy and preservation of documents in secret archives.
- **1967** Pope Paul VI confirmed the *Congregation of the Holy Office* as having administrative and judicial exclusivity over “crimes of solicitation”.
- **1983** Revised *Code of Canon Law* adopted. Inclusion of “laws” adopted since 1917 and modifications to others. Provides for canonical trials in the case of clergy abuse of children.
- **1988** Pope John Paul ii establishes *Congregation for the Doctrine of the Faith* as the replacement for the *Congregation for the Holy Office* and announces an examination of “grave delicts” (serious transgressions) against morals.
- **2001** *Sacramentorum Sanctitatis Tutela* (Pope John Paul ii) confirms the nature of “grave delicts” and includes crimes of solicitation and breaches of the sixth commandment - “though shall not commit adultery”. (NB the number and order of the commandments can vary according to religious tradition) with a minor (person under the age of 18 years) and confirms that the “competence of the CDF remains exclusive”.
- **2010** *Graviora Delicta* confirms that crimes against a minor relates to persons under the age of 18, and details regulations concerning the secrecy of canonical trials so as to “maintain the dignity of all involved”.
- **2011** (May) Letter from CDF to “Episcopal Conferences in Developing Guidelines for dealing with cases of Childhood Sexual assault by clerics” which notes that bishops and superiors should cooperate with Civil authorities but which also reminds them of the primacy of Canon law, emphasises secrecy and confirms the application of the 2001 document *Sacramentorum sanctitatus tutela*.
- **2014** (May) The Holy See advises the Conference of Italian Bishops that they (the bishops) are under no obligation to tell secular authorities of cases of sexual abuse of minors perpetrated by priests.⁷

The relationship between the Vatican City State, the Holy See and the Catholic Church – Sovereign State or Organisation?

People not familiar with the Catholic Church may find the terms used to refer to it, confusing and interchangeable. The “Holy See” is the universal authority of the Catholic Church and operates from the Vatican City State. The Holy See, according to the United States State Department is “...the supreme body of government of the Catholic Church...(and)... a sovereign juridical entity under international law”.⁸ The Vatican City State came into being in 1929 following an agreement between Italy and the Holy See. It has observer status at the United Nations (UN) and (together with the Holy See) is party to a number of UN conventions. It is recognised internationally as a sovereign state – but not without some controversy. It has a population of around 800 people, slightly more than half of which are thought to be citizens and most of whom are Catholic clerics of various rank. The Catholic Church (aka the Roman Catholic Church) is a religion which is said to have 1.2 billion

⁷ Source Vatican and Holy See Websites 16 Nov 2015 –see Apostolic letters, Encyclicles, Motu proprio, doctrinal documents, Disciplinary documents, laws and decrees)

⁸ (Source USA state department state.gov/r/p/ei/bgn/3819.htm retrieved 15/10/15)

International Criminal Law – Peter Gogarty. November 2015

adherents throughout the world. It has a clearly defined structure based on the primacy of the Pope who is also the head of the Vatican and the Holy See. Beneath the Pope are a College of Cardinals, and nine “congregations” whose role is to manage certain affairs of the religion. Beneath this Vatican based hierarchy are a large number of Bishops who are responsible for a defined geographic region of the world within which there are smaller areas called Parishes, (each managed by a Priest) and leaders of “Congregations” or “orders” whose role is more broadly pastoral around particular social issues.⁹ Canon Law is the term used to describe all of the documents held by the Vatican/Holy See/Catholic Church which describe its religious and administrative laws. It includes religious scriptures, the 1983 “Code” of Canon Law and any document authorised by the Pope as being binding on the Church.

Criticisms of the Catholic Church/Vatican response to the CSA situation.

The Canadian Report “Restoring Dignity” (2000) found that the circumstances in Catholic institutions in Canada went “well beyond” the obvious power imbalance between children and those entrusted with their care – added to that imbalance were the institutional and moral weight of a well-respected religious organisation. Beyond individual criminal breaches which could be dealt with by the national criminal justice system, the report found that the same system was far less well equipped to “...shed light on the systematic problems which allowed the abuse to occur in the first place.”¹⁰

In 2012, Bishop Hans Kung, in an open letter to all Catholic Bishops, discusses the oath of obedience owed by Bishops to the Pope and the role of the CDF in managing the world-wide CSA scandal. In pressing his position, Kung uses the strongest of language, referring to Papal authority as autocratic and notes “grave penalties” Bishops would face if they breached the pontifical directive of secrecy regarding all CSA matters. He goes on to say that then Cardinal Josef Ratzinger (later to become Pope) under the direction of Pope John Paul II, as the head of the CDF had “taken charge” of all such cases from 2001 and states emphatically “There is no denying the fact that the world-wide system of covering up cases of sexual crime committed by clerics was engineered by the CDF...”¹¹

The Irish Commission on Child abuse (2009) noted that notwithstanding the “shocking” nature of individual cases, they “...illustrate the ease with which sexual predators could operate without fear of disclosure or sanction.” It goes on to say that “The Commission has no doubt that clerical sexual abuse was covered up by (specific congregations) and other Church authorities...the structure and rules of the Catholic Church facilitated that cover-up”. The Commission looked to the pattern of abuse and the behaviour of the Catholic hierarchy overall. In this regard it made a number of findings including that the abuse, rather than being the result of errant individuals behaving in a criminal manner, had occurred as part of a harsh culture which favoured the protection of the congregation specifically and the Institution more generally over any consideration for the safety

⁹ (Source abc.net.au/religion/stories/S817512.htm “Christianity – Roman Catholicism” retrieved 18/10/15)

¹⁰ www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Peter_Jaffe/pdf/Restoring_Dignity.pdf Restoring Dignity. Responding to Child Abuse in Canadian Institutions. Law Commission of Canada.

¹¹ Bishop Hans Kung. Open Letter to Bishops. 10 July 2012. *From Eternity to Here – The Voice of Injustice is Silence*. www.Dgsmith.org/hans-kung-open-letter-full-text/ Retrieved 04 November 2015

International Criminal Law – Peter Gogarty. November 2015

and well-being of children in its care. “It was systemic ... and chronic sexual and physical abuse therefore remained undiscovered”. The Commission noted that there was little variation in this approach across regions and even across decades.

Significantly, the Commission uses language such as the *management of cases* to avoid scandal and public disclosure, the existence of a cultural *understanding within the system* of the problem and impacts of abuse but where the damage to children was disregarded, *clear knowledge of the recidivist nature of the offending, knowledge of the propensity* for sexual abuse of minors, sexual abuse was known in male religious organisations to be a *persistent problem*, these *policies resulted in the protection of the perpetrators*, there were no attempts to address the *underlying systemic nature* of the problems, there were no protocols for prevention and *authoritarian management* prevented disclosures and *served to perpetuate the abuse*, and the existence of documents revealing that sexual offenders were known to be long term abusers.¹²

Jodie Death, a Victorian Academic in 2013 referred to the “construction of strategies” to cover up CSA which rely on the exercise of privileged institutional power, and the “...significant role of institutional culture structure and policy in allowing this situation to unfold”. She discusses the consistency of approach across the Catholic world, stating that “...it is now untenable for the Catholic Church to claim that strategies designed to create and maintain secrecy surrounding the nature and extent of CSA by clergy...were not strategies of cover-up.” On the issue of “strict directives” issued by the CDF to Bishops and heads of religious orders/congregations world-wide, Death argues that the centralisation of complaints within the CDF could not be described as anything other than the exercise of a higher authority giving instruction on the management of local matters. Death uses words including “policy”, “mandated” and “implemented” to support her final contention that Catholic clergy CSA “...is not a case of bad apples, but a function of systems of power – bad barrels.”¹³

The UN Committee on Rights of the Child (2014) expressed “deep concern” about the abuse of children by members of Catholic Church clergy operating under the authority of the Holy See and the fact that the Holy See had neither acknowledged the extent of the abuse, taken necessary steps to protect children nor adopted policies and procedures, the result being that the Vatican/Holy See had “...enabled the continuation of sexual abuse by clerics and impunity for the perpetrators.” Reviewing the systematic nature of the situation, the Committee notes that abusers have been transferred from parish to parish and internationally in order to cover up their crimes – allowing offenders to escape prosecution and to facilitate their further offending – “placing children in many countries at high risk of sexual abuse by clerics.” The committee confirms the exclusive and complete jurisdiction the Vatican City State and the Holy See has afforded itself over clerical sexual abuse cases via Papal Decree in 1962 and the placement of all such cases worldwide within the “competence” of the Congregation for the Doctrine of the Faith in 2001. The Committee notes that the Holy See “...declined to provide data on all cases of childhood sexual assault brought to its attention...and the outcome of internal procedures in those cases.”

¹² The Commission to Inquire into Child Abuse (The Irish Commission) – 1936 – 2004 *Executive Summary Report* p6 <http://www.childabusecommission.ie/rpt/>

¹³ Jodi Death, University of Technology Qld 2015 *Bad Apples Bad Barrel: Exploring Institutional Responses to Childhood Sexual Assault by Catholic Clergy in Australia*. International journal for crime, Justice and Social Democracy 4 (2):94-110.doi:10.5204/ijcjsd.v312.229 www.crimejusticejournal.com retrieved 02 November 2015

International Criminal Law – Peter Gogarty. November 2015

Reflecting that the Vatican/Holy See had knowingly engaged in the cover-up of CSA cases, the Committee stated “...due to a code of silence imposed on all members of the clergy, cases of CSA have hardly ever been referred to law enforcement authorities in the countries where the crimes occurred.”¹⁴

Sydney University Professor Patrick Parkinson recently wrote about the cover-up of CSA by members of the Catholic Church hierarchy. He notes that for reasons of protecting their own interests, these officials neither involved the police against the criminals under their supervision nor acted in a protective way towards children, and that far from being a problem restricted to Australia, this is a pattern replicated in many countries across the western world. Exploring whether or not the world-wide Catholic Church was aware of the reality of CSA by its clerics, Parkinson says that denials and claims of non-awareness are a “convenient fiction.” He says that this defence has been the subject of forensic examination in a number of inquiries (including in Australia and Ireland).¹⁵

Are the Countries in which CSA by Catholic Clerics have occurred member states of the Rome Statute?

Clergy CSA has been identified in countries throughout Europe, South America, North America, the Philippines, and Papua New Guinea. However, the following countries have held specific Inquiries, or have had significant numbers of successful prosecutions – each is a party to the Rome statute.

Table 1.

Country	Signed	Ratified	Effective in Force	Complementarity/cooperation legislation
Australia	09 December 1998	01 July 2002	01 September 2002	Both in place
Ireland	07 October 1998	11 April 2002	01 July 2002	Draft of both
Canada	18 December 1998	07 July 2000	01 July 2002	Both in place
Germany	10 December 1998	11 December 2000	01 July 2002	Both in place
Belgium	10 September 1998	28 June 2000	01 July 2002	Both in place
Netherlands	18 July 1998	28 June 2000	01 July 2002	Both in place
United Kingdom	30 November 1998	04 October 2001	01 July 2002	Both in place
Vatican City State	Non-member observer status with UN.	Has neither signed or acceded to the Statute	Not Applicable	Not applicable. Note: The Vatican City State has observer status at the United Nations.

¹⁴ United Nations Convention on the Rights of the Child. Committee on The Rights of the Child. *Concluding Observations on The Second Periodic Report of the Holy See*. 25 February 2014
http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_16302_E.pdf

¹⁵ Patrick Parkinson, Professor of law, Sydney Law School, University of Sydney. *Current Issues in Criminal Justice* Volume 26 number 1. Austlii.edu.au/journals/CICrimJust/2014/16pdf Retrieved 02 November 2015

International Criminal Law – Peter Gogarty. November 2015

Mexico	07 September 2000	28 October 2005	01 January 2006	Draft cooperation legislation
Dominican Republic	08 September 2000	12 May 2005	01 August 2005	Draft Complementarity legislation

16

The United States has conducted a number of inquiries and prosecutions regarding the sexual abuse of minors by members of the Catholic clergy. Despite having signed the Rome Statute on 31 December 2000, there has never been a ratification by that Country, - accordingly, identical or substantially similar crimes falling within the territory of the United States have not been included within this exercise.¹⁷

The Rome Statute and the International Criminal Court

The Rome Statute is the Treaty established by a conference of 160 states on 17 July 1998. It details the creation of the International Criminal Court (ICC) and describes crimes falling within its jurisdiction. It also articulates ways in which member States (that is, Countries which have accepted the jurisdiction of the Court) are to cooperate with the Court. The ICC came into existence in July 2002 after a sufficient number of States agreed to its jurisdiction. The Court says its primary purpose is to end impunity for the perpetrators of the most serious crimes of concern to the international community. As at April 2015, there are 123 countries which have acceded to its jurisdiction. It sees itself as a Court of last resort – acting only if a National jurisdiction has failed to act, or is not genuine in acting, in its efforts to bring perpetrators to account.¹⁸

REFERRALS TO THE OTP (Article 13 14 and 15)

There are three means of a “Situation” being considered by the ICC. They are: Security Council referral under Art **13b** resolution acting under Chapter VII of the UN Charter; a State referral under Art **14**; or a decision by the prosecutor him or herself to investigate under Art **15**.¹⁹

There are 5 permanent members of the United Nations Security Council. They are China, Russia, France, The United Kingdom and the United States. Of these, China and Russia have not been exposed to, or threatened by, the Catholic Clergy child sex abuse situation. The United States has had numerous convictions against Catholic priests who abused children within its borders, and some of its state jurisdictions have attempted to bring convictions against members of the Catholic hierarchy who were thought to have concealed offences. Nonetheless, the United States is not a member state of the Rome Statute nor has it acceded to the United Nations Convention on the Rights of the Child. It is possible for it to submit to the jurisdiction of the ICC in this situation but it may see such a decision to be at odds with its position on the Court. The United Kingdom, and to a lesser extent France have had hundreds of their Nationals suffer from Sexual abuse within Catholic

¹⁶ www.icccpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/mexico.aspx **The States Parties to the Rome Statute ICC retrieved 05/11/15**

¹⁷ www.icccpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/mexico.aspx **The States Parties to the Rome Statute ICC retrieved 05/11/15**

¹⁸ www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx retrieved 19/11/15 about the Court. –ICC

¹⁹ Rome statute articles 13, 14 and 15 www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

International Criminal Law – Peter Gogarty. November 2015

Institutions and each has seen numerous convictions against individual priests within their own jurisdictions.

Given the potency of the described situation for well over a decade, together with the United Nations Committee on the Rights of the Child report on the Vatican response to the Convention on the Rights of the Child, the UNSC has had ample opportunity to make a referral to the OTP and has not done so. Similarly, national jurisdictions (such as France, Belgium, Italy, the United Kingdom, the United States, Ireland, Canada and Australia) have held inquiries into Institutional child abuse within the Catholic Church and many have dozens of convictions against individual priests and member of religious orders, yet none has made any attempt to refer these circumstances as a situation to the ICC. A concerted effort of lobbying diplomats to the United Nations by various nationally based victims' support groups might lead to a referral to the OTP by one or more state parties.

The most likely source of referral of this situation will be a submission such as this forwarded to the OTP for her consideration. Dozens of victim support groups and thousands of individual victims of childhood sexual assault within Catholic Institutions have come to know that protestations by those in authority within the Vatican that they knew nothing of this scandal ring hollow. Their pain and sense of betrayal are a powerful motivator.

Article 15 Determination by the OTP

Should a referral come from an external source, and the OTP subsequently decides to consider it as a "situation" within its purview, it must consider provisions under Article 15 including an analysis of the seriousness of the information it has received. If it thinks appropriate it can seek further information from National Jurisdictions, organs of the United Nations, from Victims or from various Non- Governmental Organisations (NGO's). It can also decide at this stage whether it would be beneficial to receive direct evidence from victims. It must decide if there is a "reasonable basis" to proceed to a preliminary investigation and, where it does think that moving forward is appropriate it must seek authorisation from the pre-trial Chamber (PTC). The PTC focus will be on determining whether there is a "reasonable basis" to proceed and whether or not the Court has jurisdiction over the situation.

Other matters the OTP must consider at this stage are detailed at Articles 5, 7 and 17.

Article 5 (Jurisdiction over Certain Crimes) of the Rome Statute details the jurisdiction the Court has to investigate and or prosecute matters with respect of certain crimes. Relevant to the current situation, Article 5 (1) (b) holds – *"Crimes within the jurisdiction of the Court... 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (b) Crimes against humanity..."*

The definition of Crimes against Humanity can be found at **Article 7** which relevantly includes- *Crimes against humanity 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (g) ... or any other form of sexual violence of comparable gravity; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

Article 7 (2) *For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1*

International Criminal Law – Peter Gogarty. November 2015

against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

Article 17 deals with “admissibility” and holds that the ICC does not have jurisdiction if the case is being investigated or prosecuted by a State (other than if it appears that the State effort is not genuine), a State has investigated the case and has decided not to proceed, the person(s) concerned have already been prosecuted, or the case is not of “sufficient gravity” to warrant further action by the Court.²⁰

Questions which arise for the OTP include:

Is there a situation to investigate?

What are the crimes which constitute the situation under Article 5?

Is this a most serious crime of concern to the International Community within the meaning of Article 5(1) (b)?

Is the extant situation a Crime against Humanity captured within the intent of Article 7?

Can it be argued that the current situation results from a widespread or systematic or planned approach by Vatican Officials?

Who is a “victim” within the meaning of the statute and can they be deemed to be civilians?

Did Vatican/Catholic Church Officials have knowledge of the Attack?

Have there been multiple commissions of the Act?

Were the Acts in furtherance of a State or Organisational policy?

Does then, the Court have jurisdiction under Article 5?

PRE-CONDITIONS TO EXERCISE OF JURISDICTION (Article 12 and 13)

There are other pre-conditions to the exercise of jurisdiction under Article 12 of the Statute. The first is where a State has already submitted itself to the Court’s jurisdiction by way of the ratification process. Jurisdiction can also apply over the State of the territory on which the alleged crimes occurred or where the accused person(s) are a National of a State Party or, where either of the above states, not already being member states, formally accept the jurisdiction of the Court for this situation. Table 1 above lists a number of States which have been closely linked with this situation and notes their status with regard to the Rome Statute.²¹

Article 12 considerations for the OTP are therefore likely to include:

²⁰ Rome Statute of the International Criminal Court Articles 5, 7, 15, and 17. www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

²¹ Rome Statute of the International Criminal Court Articles 12 and 13. www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

International Criminal Law – Peter Gogarty. November 2015

Are there other non-member states upon whose territory the crimes have been committed and who may accept the Courts jurisdiction under Article 12(3)?

What is the “home” State of the accused persons, and is that State a party to the Rome Statute? If that State is not a member, will they accept jurisdiction of the Court under Article 12 (3)?

Are the pre-conditions to the exercise of jurisdiction met?

Preliminary Investigation by OTP

Assuming a trigger mechanism is found, and the OTP decides that it may have jurisdiction in these circumstances then Article 53 through the use of the word “shall” in its chapeau effectively requires the Prosecutor to proceed to a preliminary investigation unless she or he can determine that there is no reasonable basis to proceed, or that notwithstanding, it would not be in the interests of justice to do so. (in which case the PTC must be advised) Article 53 relevantly holds that in deciding whether to conduct a preliminary investigation it is necessary to consider whether the case would be admissible under article 17 and whether the crimes are sufficiently grave.²²

Questions posed for the OTP include -

Is there likely to be a reasonable basis to proceed under 53 1?

Does the situation meet the requirements of Article 1 re “persons for the most serious crimes of International concern?”

Does the info avail to the prosecutor provide a reasonable basis to believe that a crime has been committed or is being committed within the jurisdiction of the Court?

Does the ICC have temporal jurisdiction? (when did the crimes occur?)

Does the ICC have material jurisdiction? (crimes against humanity)

Is the case admissible under article 17? Is any state currently prosecuting? Or about to/likely to prosecute?

Is the crime sufficiently grave? What factors inform the determination of gravity? The statute does not detail “gravity” considerations, however Court jurisprudence indicates that the following are relevant:

1. The number of victims
2. The severity of the crimes
3. The scale of the crimes
4. The systematic, planned or “policy” nature of the crimes
5. The manner in which the crimes were committed
6. The impact of the crimes

What are the interest of the victims in this situation?

Will an investigation serve the interests of justice?

²² Rome Statute of the International Criminal Court Article 53 (1) (a-c). www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

International Criminal Law – Peter Gogarty. November 2015

Does the ICC have territorial and personal jurisdiction? Are the material element requirements under Article 30 Met?

Article 25 would be a critical consideration for the OTP in determining whether or not it has jurisdiction over the persons most responsible for the CSA issue within the Catholic Church. Relevantly it states that a person shall be criminally responsible if they commit the crime through another person, if they “order, solicit or induce” the commission of the crime or if they either assist or facilitate its commission. It appears from the information available that the circumstances in the present case meet those criteria. Officials of the CDF with the authority of the Pope, have instructed and directed Bishops and the head of catholic congregations to avoid the scrutiny of National jurisdictions, and to protect clerics who have harmed tens of thousands of children.²³

Of particular importance in this matter, **Article 27** removes any capacity of any person(s) to attempt to avoid investigation or prosecution by virtue of their National position or status. Accordingly, Diplomatic Immunity afforded to its senior officials by the Vatican City State should have no bearing on the situation proceeding. This assumes some level of cooperation from the Vatican – cooperation which is far from guaranteed.²⁴

Who are the persons considered to be those most responsible for the situation – members of the Congregation for the Doctrine of the Faith (CDoF)?

There are eight living members of the CDoF as at 28 November 2015 who served during the period 01 July 2002 (Rome Statute ratified) and 28 November 2015. They are:

1. **Cardinal Joseph Ratzinger**. Born on 16 April 1927 in Germany. He was the prefect (chairperson) of the CDoF from 25 November 1981 until made Pope on 19 April 2005. Ratzinger’s home Country signed the Rome Statute on 10 December 2008 and ratified it on 24 October 2000 with an Effective in Force date of 1 July 2002. Germany has enacted complementary legislation. (Currently 88 years old)
2. **Cardinal William Joseph Levada** was born in the USA on 15 June 1936 and served as Prefect of the CDoF from 13 May 2005 until his retirement on 02 July 2012. The USA signed the Rome Statute on 31 December 2000 under then president Clinton. However, on 06 May 2002, President G. W Bush wrote to the Secretary General of the United Nations advising that the USA would not be ratifying the Rome Statute and that the Country would accept no legal liability arising from the previous commitment of President Clinton. At the time of writing, the USA has not ratified the Rome Statute. (Currently 79 years old)
3. **Cardinal Angelo Amato** is a native of Italy – born on 08 June 1938. Amato served as Secretary to the CDoF from 19 December 2002 until 09 July 2008. Italy signed the Rome Statute on 18 July 1998 and ratified it on 26 July 1999 with an Effect in Force Date of 01 July 2002. As at 13 October 2015, Italy had drafted Complementary legislation, but still not enacted it. (Currently aged 81 years)
4. **Tarcisio Pietro Evasio Bertone** is a Cardinal of the Catholic Church born in Italy on 02 December 1934. He was appointed Secretary of the CDoF from 13 June 1995 until 10 December 2002. (currently 81 years old)

²³ Rome Statute of the International Criminal Court Article 25. www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

²⁴ Rome Statute of the International Criminal Court Article 27. www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

International Criminal Law – Peter Gogarty. November 2015

5. From Spain, **Archbishop Luis Francisco Ladaria Ferrer** has served as a Secretary of the CDoF since 09 July 2005. Ferrer’s country of birth signed the Rome Statute on 18 July 1998 with Ratification and Effect in Force dates following on 24 October 2000 and 01 July 2002 respectively.
6. **Cardinal Gerhard Ludwig Muller**. Born 31 December 1947 in Mainz Germany. Became prefect of CDF on 02 July 2012. Currently 68 years old.
7. **Archbishop Joseph Augustine Di Noia**. Born 10 July 1943 in New York, USA. On 21 September 2013, he became an official of the CDF. The United States is not a member of the Rome Statute. Currently 72 years of age.
8. **Archbishop Jose Luis Mollaghan** was born in Buenos Aires Argentina on 02 May 1946, and was appointed as an official of the CDF on 19 May 2014. Currently 69 years old.²⁵

Relevantly, **Article 11** states that the ICC only has jurisdiction over situations which have occurred after the Rome Statute entered into force - in July 2002. Table 1 above shows a number of states for whom CSA by catholic clerics has been particularly well documented – all are member States of the Rome Statute. The above named people all held, or hold, senior rank within the CDF during the same period.

Authorisation by the Pre Trial Chamber

If the OTP is acting of its own volition under **Article 15** and, believing there is a “reasonable basis to proceed with an investigation”, it must submit a request to the PTC for authorisation under **Article 15(4)**. The PTC must then decide if there is a reasonable basis to proceed using the **Article 53 (1) a-c** criteria.

The OTP is to advise victims if it is seeking authorisation under **Art 15(3)** and **Rule 50**. Victims, and/or the people who referred the matter, can make written representations to the PTC. The protection of victims is a primary consideration in this process and if specific victims have not been identified, the OTP can provide a general notice that it is seeking authorisation from the PTC. For its part, the PTC can request additional information from the OTP or from victims who have made representations to the process to date. The PTC must put its decision and reasoning in writing to both the OTP and to victims.²⁶

LIKELY PROBLEMS

Should the circumstances described in this report see the OTP decide there is a reasonable basis to proceed, and if the PTC agrees, then there are mechanisms for other affected parties (such as the accused or a State Party) to challenge both jurisdiction and admissibility. (under articles 18 and 19) It

²⁵ Membership of the Congregation for the Doctrine of the Faith. Historical Details/Bishops www.catholic-hierarchy.org/diocese/dxcdf.html retrieved on 05 November 2015

²⁶ Rome Statute of the International Criminal Court Article 15 (3).www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf and Regulations of the office of the prosecutor ICC –BD 05-01-09 retrieved 12/11/15www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf

International Criminal Law – Peter Gogarty. November 2015

is highly likely that the accused persons in this matter, and the Vatican City State will lodge objections. It is also highly likely that the Vatican will engage in an extensive lobbying program with member states to have them support objections. A detailed assessment of the likely outcome of such action is beyond the scope of the present task.

There are a number of potential reasons why the circumstances detailed in this report will fail to become a “situation” for investigation and possible prosecution by the ICC. Some relate to the processes of the Court itself, others to the likely lack of cooperation of the Vatican, through to the probable age of possible defendants at the time of prosecution as well as the nature of international relations.

Before the present matter becomes a situation, the OTP must either receive a referral or decide on a preliminary investigation of its own volition. Subjective matters within the wording of the Rome Statute will play a significant part in any subsequent decision to proceed. Whether there is a “reasonable” basis to proceed, whether the alleged crimes are “sufficiently grave”, whether the International community is sufficiently “outraged”, whether it is in the interests of justice to proceed. Even if the OTP believes the matter is worthy of its consideration, it will also be mindful of the time and resources it will need to devote to the case, and the limits of its resources in pursuing this and numerous other referrals or circumstances. Additionally, the ICC will be mindful that the accused persons, and therefore potential defendants in this matter are already all in their 7th or 8th decade of life.

While there will be ample information available from various National Jurisdictions and even from organs of the United Nations, it is highly unlikely that the Vatican will cooperate in handing over its internal documents. It has a history of declining to cooperate with National Investigations, and despite appropriate internal legislation, it has demonstrated that its deeds do not often match its rhetoric. (see below for further detail). Similarly, the ICC will be reluctant to proceed in circumstances where it knows that it is unlikely that the Vatican will extradite its “citizens” to face the Court.

The Catholic Herald reported on 11 July 2013 that Pope Francis had issued new Vatican Laws (including on extradition proceedings and the provision of documents – that is both are possible unless it is not in the interest of the Vatican State to do so) regarding CSA which are said to apply to Vatican employees around the world. The laws discuss the need for international cooperation on criminal issues such as this, and in his commentary he referred to the benefit of International Conventions as being an effective means of “...preventing criminal activities that threaten human dignity, the common good and peace.” However the article goes on to quote the Pope as saying that the changes are “separate from the universally applicable canon law...which require bishops around the world to turn over to the Congregation for the Doctrine of the Faith cases of priests accused of child sexual assault.”²⁷

Notwithstanding the above commitment, On 10 January 2014, Radio Poland announced that a Polish Archbishop, resident in the Vatican City, and accused of the sexual abuse of children while he was the Papal Nuncio (Popes Diplomat) in the Dominican Republic, would not be extradited to Poland by the Vatican and that the Vatican was conducting its own criminal investigation. The program referred to a *Holy See* statement which said that “...the Archbishop in question is a *citizen*

²⁷ (Catholic Herald Pope Francis Approves Updating of Criminal Laws for Vatican City State. 11 July 2013)

International Criminal Law – Peter Gogarty. November 2015

of the Vatican and Vatican law does not allow his extradition”. The program also noted that the Archbishop was recalled to Rome after a fellow Archbishop advised the Vatican of pending charges.²⁸

Similarly, the Vatican has at least twice declined to cooperate with authorities in Australia by providing information and documents – citing Diplomatic Immunity. The NSW Special Commission of Inquiry into Certain matters pertaining to Catholic priests in the Hunter Valley of NSW (SCoI) wrote to the Vatican/Holy See three times between August and November of 2013 seeking documents relevant to its brief. The papal Nuncio to Australia - Bishop Paul Gallagher responded that the request could not be accommodated as the documents related to the internal workings of a sovereign state.²⁹ Then, responding to a request from the Royal Commission into Institutional Responses to Child Abuse, the Vatican Secretary of State, in July 2014, refused a request for documents relating to child sexual assault by catholic clerics in Australia. One month later, Australian Cardinal George Pell, now resident in the Vatican, supported that position saying that “these are the internal working documents of another sovereign state”.³⁰

Article 16, on the issue of Deferral of investigation or prosecution relevantly holds “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”. This is a potential roadblock in the current matter proceeding. The Vatican/Holy See is a highly influential institution with observer status at the UN and it is likely to engage in an extensive diplomatic effort to ensure that it is never exposed to the scrutiny that the investigation of a situation such as this would receive.

²⁸ Radio Poland Radio Poland 10 January 2014 9.29 am retrieved at thenews.pl/1/10/Artykul/158234,Vatican-refuses-to-extradite-Polish-archbishop-accused-of-child-sex-abuse on 14 November 2015

²⁹ Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle Dr RJ Austin, Expert Witness on Canon Law. Transcript of Evidence of 31 July 2013 pages 2213 – 2267i`
[http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/\\$file/Day_20_31_July_updated_page_numbers.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/$file/Day_20_31_July_updated_page_numbers.pdf)

³⁰ Cardinal George Pell backs Vatican over dealings with abuse victims. August 21 2014. Shannon Deery. Herald Sun. <http://www.heraldsun.com.au/news/law-order/cardinal-george-pell-backs-vatican-over-dealings-with-abuse-victims/news-story/418753eb14fb2efbac80b667173b5cc6>

International Criminal Law – Peter Gogarty. November 2015

Bibliography

United Nations Convention on the Rights of the Child. Committee on The Rights of the Child. *Concluding Observations on The Second periodic Report of the Holy See*. 25 February 2014
http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_16302_E.pdf

The States Parties to the Rome Statute ICC
www.icccpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/mexico.aspx retrieved 05/11/15 Retrieved 02 November 2015

Rome Statute of the International Criminal Court www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf Retrieved 02 November 2015

<http://www.economist.com/news/international/21602248-bid-hold-catholic-leadership-responsible-paedophile-priests-looming-shadows> The Catholic Church and Child Abuse – Looming Shadows. May 27 2014. Retrieved 02 November 2015

The Vatican's Child Abuse response. Source BBC retrieved 05 /11/15 bbc.com/news/world-europe-25757218

Regulations of the office of the prosecutor - ICC –BD 05-01-09 retrieved 12/11/15 www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf
 Retrieved 02 November 2015

Radio Poland 10 January 2014 9.29 am retrieved at thenews.pl/1/10/Artykul/158234,Vatican-refuses-to-extradite-Polish-archbishop-accused-of-child-sex-abuse. retrieved on 14 November 2015

“Pope Francis approves Updating of criminal laws for Vatican City State” Catholic Herald 11 July 2013. Retrieved n 14 November 2015 at catholicherald.co.uk/news/2013/07/11/pope-francis-approves-updating-of-criminal-laws-for-vatican-city-state/

LAW N. IX: AMENDMENTS TO THE CRIMINAL CODE AND THE CODE OF CRIMINAL PROCEDURE (11 July 2013) THE PONTIFICAL COMMISSION FOR THE VATICAN CITY STATE retrieved on 14/11/15 vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/Law%20N.%20IX%20-%20Amendments%20to%20the%20Criminal%20Code.pdf

The Current Legislation on Citizenship in the Vatican City State

July 18, 2012 by [Tina Gheen](http://blogs.loc.gov/law/2012/07/the-current-legislation-on-citizenship-in-the-vatican-city-state/) <http://blogs.loc.gov/law/2012/07/the-current-legislation-on-citizenship-in-the-vatican-city-state/> retrieved 14 11 15 Library of Congress.

Vatican's representative seeks immunity over sex abuse inquiry. Stephen Crittenden. theguardian.com/world/2013/dec/19/vaticans-representative-seeks-diplomatic-immunity-from-inquiry retrieved 15/11/15

International Criminal Law – Peter Gogarty. November 2015

www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Peter_Jaffe/pdf/Restoring_Dignity.pdf *Restoring Dignity. Responding to Child Abuse in Canadian Institutions*. Law Commission of Canada.

www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx retrieved 19/11/15 *about the Court*. –ICC

www.communities.qld.gov.au/childsafety/protecting-children/what-is-child-abuse/child-sexual-abuse *child sexual assault* retrieved 19/11/15 Qld dept of community, child safety, and disability services.

Patrick Parkinson, Professor of law, Sydney Law School, University of Sydney. *Current Issues in Criminal Justice* Volume 26 number 1. Austlii.edu.au/journals/CICrimJust/2014/16pdf Retrieved 02 November 2015

Professor Jill Astbury MAPS, College of Arts, Victoria University.
www.psychology.org.au/inpsych/2013/october/astbury Australian Psychology Society retrieved 02 November 2015

John Jay College February 2004 Gerald W. Lynch President, John Jay College of Criminal Justice *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons*. usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf

Jodi Death, University of Technology Qld 2015 *Bad Apples Bad Barrel: Exploring Institutional Responses to Childhood Sexual Assault by Catholic Clergy in Australia*. *International journal for crime, Justice and Social Democracy* 4 (2):94-110.doi:10.5204/ijcjsd.v3i2.229 www.crimejusticejournal.com retrieved 02 November 2015

Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle Dr RJ Austin, Expert Witness on Canon Law. Transcript of Evidence of 31 July 2013 pages 2213 – 2267i`
[http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/\\$file/Day_20_31_July_updated_page_numbers.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_20_31_July_updated_page_numbers.pdf/$file/Day_20_31_July_updated_page_numbers.pdf)

Bishop Hans Kung. *Open Letter to Bishops*. 10 July 2012. *From Eternity to Here – The Voice of Injustice is Silence*. www.Dgsmith.org/hans-kung-open-letter-full-text/ Retrieved 04 November 2015

The Commission to Inquire into Child Abuse (The Irish Commission) – 1936 – 2004 *Executive Summary Report*<http://www.childabusecommission.ie/rpt/> retrieved 05 November 2015

Shannon Deery. *Cardinal George Pell backs Vatican over dealings with abuse victims*. August 21 2014. Herald Sun. <http://www.heraldsun.com.au/news/law-order/cardinal-george-pell-backs-vatican-over-dealings-with-abuse-victims/news-story/418753eb14fb2efbac80b667173b5cc6>

International Criminal Law – Peter Gogarty. November 2015