

A SOLUTION TO THE SILENCING AND DENIAL: HOW ADR CAN HARMONIZE CATHOLIC LAW WITH THE INTERNATIONAL COMMUNITIES DEMAND TO END THE SEXUAL VICTIMIZATION OF CHILDREN IN THE CATHOLIC CHURCH

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I. INTRODUCTION

Instances of sexual malfeasance¹ within the Catholic Church can be traced back to the formal recognition of ecclesiastics² in the 4th century.³ With this acknowledgment, Catholic ecclesiology⁴ took shape under the theological teaching of apostolic succession,⁵ in effect exalting priesthood over the laity.⁶ The newly recognized

* This note is dedicated to my mother, Lori Shapero, whose constant encouragement, infinite support, and constructive feedback fostered my curiosity and greatly assisted me through this note writing process.

¹ *Malfeasance*, Black's Law Dictionary (9th ed. 2009). "A wrongful or unlawful act; esp. wrongdoing or misconduct by a public official."

² *Ecclesiastics*, MERRIAM WEBSTER'S INTERNATIONAL DICTIONARY (3rd ed. 1961). "A Christian priest or minister."

³ See Rev. Thomas Doyle, *A Very Short History of Clergy Sexual Abuse in the Catholic Church*, CRUSADE AGAINST CLERGY ABUSE, www.crusadeagainstclergyabuse.com/html/AShortHistory.htm (last visited Oct. 20, 2019) (For a discussion on the history of legislation passed through the Christian world, dating back to the 4th century, illustrating the vast number of individual councils and synods who felt it necessary to draft laws regarding sexual violations prior to the centralization of power in a time where communication between diocese was almost obsolete). See also *Id.*, (referencing ST. PETER DAMIAN, BOOK OF GOMORRAH (1051), "[t]he most dramatic and explicit condemnation of forbidden clergy sexual activity" in condemning superiors who admitted abusive men to the clergy, those who "defile" boys coming to them for confession and the canonical sources used by abusive clerics. Written by Cardinal Peter Damian during his time as Archbishop in a society whether "clerical decadence was not only widespread and publicly known, but generally accepted as the norm.").

⁴ *What is the Theological Study of Ecclesiology?*, COMPELLING TRUTH, www.compellingtruth.org/ecclesiology.html (last visited Feb. 6, 2019).

⁵ See *How Did the Priesthood Arise?*, WHAT IS SO BAD ABOUT CHRISTIANITY?, www.badnewsaboutchristianity.com/bf0_priesthood.htm (last visited Feb. 1, 2019) (Apostolic Succession is the notion that members of the Christian Church ministry derive from the apostles, through a continuous succession leading back to Jesus himself. This forms the theoretical links which vests in the ministry their divine spiritual authority).

⁶ *Laity*, MERRIAM WEBSTER'S INT'L DICTIONARY (3rd ed. 1961) ("the people of a religious faith as distinguished from its clergy").

clergy “were soon pointing out that disobedience to them amounted to disobedience to God.”⁷ With the evolution of the monarchical clergy, based on the power and rule of the Lord, master and father, a system of domination and capitulation over innocently vulnerable children was created. In 2014 the United Nations Children’s Fund estimated that over 120 million children between the ages of 2 and 17 had been sexually abused by members of the Catholic clergy.⁸

Historically, victims of clerical abuse sought help from their religious leaders, believing that canon law, the Church’s internal legal system, secured a fair process enabling them to obtain justice while remaining faithful to the religious order.⁹ However, in confronting their parochial leaders, victims were met with a network of intimidation, manipulation, stonewalling, threats, and deception, designed by the Church’s top officials to obtain victim silence and uphold the Church’s reputation.¹⁰ After years of being denied relief, victims began to turn to secular authorities; however, it was not until the 20th century that civil authorities began to notice an influx of cases alleging child abuse by the Catholic clergy. The public exposure forced the Church into a new era of public scrutiny and global scandal.¹¹

With revelations of sexual abuse by the clergy beginning to rock the Catholic Church, the institution’s hierarchy maintained this to be “a phenomenon new to the late 20th century.”¹² As more victims became empowered to join the *kairos* movement¹³ the true scope of the issue was revealed. Not only were children being sexually abused by low-level officials, but the highest-level officials also played a role in silencing, ignoring, and denying these victims relief, as well as demanding bishops and priests cover up their allegations.

⁷ *Id.*

⁸ *A look at child abuse on the global level*, THE PROTECTION OF MINORS IN THE CHURCH, <https://www.pbc2019.org/protection-of-minors/child-abuse-on-the-global-level> (last visited Dec. 20, 2019). Although agencies such as UNICEF, have worked to collect statistics on this matter, the true number of child abuse cases remains largely unknown. One out of every three minors who have endured sexual abuse do not report it.

⁹ Doyle, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Doyle, *supra* note 3.

¹³ Harry Bruinius, *Churches Struggle with Their #MeToo Movement*, CHRISTIAN SCI. MONITOR (Apr. 20, 2018), <https://www.csmonitor.com/USA/Politics/2018/0420/Churches-struggle-with-their-MeToo-moment> (defining *Kairos* as a “theological term referring to a crucial moment to take action”).

The prevailing opinion asserts that the foundation of this egregious phenomenon stems from the organizational structure of the Catholic Church.¹⁴ Operating under a structure of administrative control, the Catholic Church is referred to as the last absolute monarchy in the modern world.¹⁵ At the very top of the episcopal structure is the Pope, who is considered the successor of the Apostle.¹⁶ Under the Pope are cardinals, archbishops, bishops, priests, and deacons, respectively.¹⁷ At the local level, Bishops oversee dioceses¹⁸ and priests, giving them unqualified authority subject only to the Pope, whose power is absolute.¹⁹ Understanding the hierarchical system and how the institution has become increasingly clericalized²⁰ is critical to recognizing how the leadership has used its governmental structure to protect its own positions and executive authority—the “central focus has always been the ‘good of the church’ which in reality has often meant the good of the hierarchy.”²¹

The causal connection between clericalism and sexual abuse is evident, “namely the tendency of the hierarchy to protect priests, the tendency to cover reports in deep secrecy and the massive denial about the seriousness of the problem.”²² In order to truly combat the global crisis of child abuse permeating the religious order, alternative dispute resolution strategies between the Holy See and the global community should be considered as a means of promulgating new ecclesiastical laws for the successful manage-

¹⁴ Tom Roberts, *Thomas Doyle traces the disintegration of clerical/hierarchical culture*, NAT'L. CATH. REP. (Nov. 27, 2019), <https://www.ncronline.org/news/accountability/ncr-connections/thomas-doyle-traces-disintegration-clericalhierarchical-culture>.

¹⁵ Jason Breslow, *Tom Doyle: “Vatican is the World’s Last Absolute Monarchy,”* PBS (Feb. 25, 2014), www.pbs.org/wgbh/frontline/article/tom-doyle-vatican-is-the-worlds-last-absolute-monarchy/ (“The pope, when he is elected, is answerable to no human power. He has absolute authority over the entire Roman Catholic Church, direct authority that reaches down to individual members.”).

¹⁶ *Structure Of The Church*, ENCYCL. BRITANNICA, (last visited Jan 12, 2020), <https://www.britannica.com/topic/Roman-Catholicism/Structure-of-the-church>.

¹⁷ *Roman Catholic Church Hierarchy*, HIERARCHYSTRUCTURE (last visited Jan 13, 2020), <https://www.hierarchystructure.com/roman-catholic-church-hierarchy/>.

¹⁸ *Diocese*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/diocese> (last visited Oct. 2, 2018) (defining diocese as “the territorial jurisdiction of a bishop”).

¹⁹ Breslow, *supra* note 15.

²⁰ *Clericalism*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/clericism> (last visited Oct. 2, 2018) (defining clericalism as “a policy of maintaining or increasing the power of a religious hierarchy”).

²¹ Thomas P. Doyle, *Clericalism: Enabler of Clergy Sexual Abuse*, 54 PASTORAL PSYCHOL. 189, 194 (2006).

²² *Id.* at 190.

ment of institutionalized sexual misconduct. In Part II, this Note will discuss the history of exposure leading to the public's knowledge and outrage of clerical abuse, explaining the inadequacies of the Institution's response. Part III discusses the international status and internal structure of the Church and the mechanisms utilized to establish the legal barriers preventing the world from rectifying this issue. Finally, Part IV proposes that mediation, under the paradigm of interest-based negotiations, is the best mechanism to reconcile the interest of the Church and the International Community. Additionally, this Note proposes the establishment of a comprehensive network of regional mediation and arbitration tribunals, overseen by a new subsidiary organ of the United Nations Security Council, created for the purpose of equilibrizing the current abuse of ecclesiastical power within the Church's judicial process and allow for a system of transparency and accountability.

II. BACKGROUND

The global community became aware of clergy sexual misconduct in 1984 when the family of a 10-year-old boy sued the Lafayette, Louisiana diocese in the secular court system.²³ Reverend Gilbert Gauthe (hereinafter "Gauthe") became the first Catholic priest in U.S. history to face criminal charges in the secular system for multiple cases of child molestation.²⁴ While under oath, Gauthe admitted to "sexually molesting 37 youngsters in hundreds of incidents while a priest"²⁵ in various parishes.²⁶ News surfaced of a systematic cover-up by the parish's bishop Gerard Frey, who had not only suppressed these sexual misconduct allegations, but also facilitated such molestation by moving Gauthe to different parishes once a report was made.²⁷ Prior to the filing of criminal charges against Gauthe, the Lafayette diocese had settled 13 lawsuits with families alleging abuse by Gauthe, offering a reported 5.5

²³ Madeleine Baran, *Betrayed by Silence: A Story in Four Chapters*, MINN. PUB. RADIO (July 21, 2014), <http://minnesota.publicradio.org/collections/catholic-church/betrayed-by-silence/ch1/>.

²⁴ *Id.*

²⁵ Breslow, *supra* note 15.

²⁶ Baran, *supra* note 23. Gauthe subsequently confided to a psychologist, admitting to abusing over 300 children over the course of decades.

²⁷ *Id.*

million dollars²⁸ in confidential settlement agreements.²⁹ As the scandal unfolded, more victims came forward³⁰ sparking additional public outrage.

Gauthe's admission made national news and the domino effect the Vatican feared³¹ became a reality.³² In the wake of rising allegations and newfound developments in the Gauthe case, reporters began vigorously investigating clergy misconduct within the Church. It was uncovered that clergy sexual misconduct stretched across numerous United States' dioceses³³ and sexual abuse permeated the walls of the institutional Church through a systemic cover-up by its leadership.³⁴ For decades, the leadership of the monarchy successfully concealed allegations of sexual abuse, settling claims outside of court, transferring those accused to other dioceses, and handling problems internally in order to preserve the prestige, faith, and sanctity of the Catholic Church.³⁵

While the media coverage surrounding Gauthe in Lafayette was a "major catalyst for the legal and cultural explosions that rocked the Catholic Church,"³⁶ it was not until 1992 that the international community became aware of the breath of sexual malfea-

²⁸ Associated Press, *Boy, 11, Tells Court of Seduction by Priest*, L.A. TIMES (Feb. 6, 1986), <https://www.latimes.com/archives/la-xpm-1986-02-06-mn-4682-story.html>.

²⁹ Jason Berry, *The Tragedy of Gilbert Gauthe: Part II*, THE TIMES OF ACADIANA (May 30, 1985), http://www.bishop-accountability.org/news/1985_05_30_Berry_TheTragedy.htm (quoting Channel 10 news director Jim Baronet, "'We knew something was going on, but we were cut off. Neither party would talk, the Church for liability reasons, and Hebert because he was bargaining an out-of-court, secret settlement.'").

³⁰ *Id.* At this time, 11 additional children have come forward alleging that they had been sexual abused by clergy men. Actions were filed in court for claims totaling approximately \$114 million.

³¹ Baran, *supra* note 23 (quoting Reverend Thomas Doyle, "The Vatican 'feared a domino effect,' . . . 'The risk was the loss of prestige, the loss of power, the loss of respect,' and the loss of money.").

³² See Berry, *supra* note 29. Gauthe was indicted and charged with "11 counts of aggravated crimes against nature, 11 counts of committing sexually immoral acts with minors, 1 count of aggravated rape (sodomizing a boy under the age of 12) and 11 counts of crimes of pornography involving juveniles, through pornographic photo sessions," in 1985 Reverend Gauthe plead guilty to 34 criminal counts and was sentenced to 20 years for molesting 11 boys.

³³ *Id.*

³⁴ Thomas P. Doyle, *Cardinal Law's Complex Role in the Contemporary History of Clergy Sexual Abuse*, NAT'L CATH. REP. (Dec. 28, 2017), <https://www.ncronline.org/news/accountability/cardinal-laws-complex-role-contemporary-history-clergy-sexual-abuse>.

³⁵ Jon Henley, *How the Boston Globe Exposed the Abuse Scandal that Rocked the Catholic Church*, GUARDIAN (Apr. 21, 2010), <https://www.theguardian.com/world/2010/apr/21/boston-globe-abuse-scandal-catholic>.

³⁶ Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 554 (2004).

sance by clergymen within the walls of the holy institutions.³⁷ In the years that followed, several major revelations surfaced³⁸ and despite the media coverage surrounding this issue, “the bishops remained in control, giving the expected lip-service followed by continued lying, stone-walling and cover up.”³⁹

In 2002, it was revealed that the veil of silence surrounding the Church hid a larger managerial scheme of cover-up and corruption—all made possible by the governmental structure of the institution itself.⁴⁰ Cardinal Law, one of the most respected and influential Cardinals of his time, disclosed his participation in the Church’s historical practice of reassigning clergymen who had molested children to different parishes across the country to protect the Church’s reputation.⁴¹ With this disclosure, there was now proof that not only was clergy abuse a significant problem, but that top officials throughout the Church hierarchy were also conspiring, to cover up this problem. With increasing media coverage and endless public scrutiny, Cardinal Law resigned.

To address this issue, Pope Francis founded *The Pontifical Commission for the Protection of Minors* in 2014, which developed guidelines and proposed initiatives to protect children from clergy sexual abuse.⁴² Pope Francis also established a church tribunal charged with holding bishops accountable for their failure to act on cases of abuse brought to their attention.⁴³

In the face of cover-ups, corruption, and injustices by the Church, it has been shown that the Vatican cannot be said to be an impartial adjudicator and will protect its officials, in the name of the Church, over its children members. What the outside world at first believed to be a problem of clergy perpetrators using their spiritual authority to manipulate vulnerable children has proven to exist at the top level of the episcopate. The existence of canon law

³⁷ *Id.*

³⁸ See Doyle, *supra* note 34 (“Between 1985 and 2002, there were several major eruptions, including the Jim Porter trial, the Rudy Kos trial and the exposure of multiple perpetrators among the faculties at two seminaries — St. Anthony’s in Santa Barbara, California, run by the Franciscans, and St. Lawrence Seminary near Fond du Lac, Wisconsin, run by the Capuchins.”).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Henley, *supra* note 35. Although Cardinal Law was aware that Father Geoghan had been accused of molesting seven boys, he subsequently assigned him to a parish in Boston even though sexual abuse allegations were outstanding.

⁴² Adrian Walker, *Keeping the Spotlight on the Catholic Church*, BOSTON GLOBE (Nov. 1, 2015), www.bostonglobe.com/metro/2015/11/02/the-clergy-abuse-scandal-changed-catholic-church-but-has-church-changed-enough/RQidk9tC28Nk7jyprisGQO/story.html.

⁴³ *Id.*

governing the procedures implemented to deal with clergy abuse, is no longer sufficient. The combination of the Church's uniquely complex organizational structure, in effect enabling clergy sexual malfeasance, strengthened by external canonical provisions, has resulted in an end-run around canonical policies denouncing sexual abuse and has prompted dioceses across the world to disregard local legislation. Collectively, this structure provides the requisite foundation justifying the need to strip the Church of its authority to independently combat clergy abuse, and to finally allow the international community to protect its citizens through jointly promulgated canonical legislation.

III. DISCUSSION

To understand why child abuse within the Church has continued without repercussion and why individual states within the international community have been unable to battle this issue through legislation or judicial intervention, it is important to address the difference in the legal characterization between the Vatican City State and the Holy See. This legal characterization forms the basis of each entity's jurisdictional reach, international influence, and legal responsibility to the world community.⁴⁴ As such, this character differential is germane to understanding why solving the problem of sexual abuse within the Catholic Church must be addressed at the international rather than local level.

The cumulative effect of the Church's hierarchal structure and the construction of its governing laws has created unbreakable barriers between the outside world and the Church, in turn, contributing to its ability to "cover-up" the problem. This Note proposes that without the use of a neutral intermediary to facilitate the conscription of new and jointly created canonical laws and directives between the Church and the secular world, the Church will continue to follow inadequate practices of internally dealing with this issue, leaving States powerless to protect and defend its citizens.

⁴⁴ Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U.L. REV. 291 (2001).

A. *The Difference Between Vatican City State and the Holy See*

The Church is made up of two distinct entities—The Vatican City State and the Holy See. At the head of these two distinct entities is the absolute monarch—the Pope.⁴⁵ As follows, the Pope is considered to speak faultlessly and absolutely.

1. *Vatican City State*

Vatican City is comprised of the Vatican building and its surrounding territory. Pursuant to the 1929 Lateran Treaties, Italy recognized “papal sovereignty⁴⁶ over the Vatican City⁴⁷. . . and secured full independence over the Pope.”⁴⁸ The Vatican City State is the last standing absolute monarchy in Europe and one of the few left in the world. “Vatican City State is governed as an absolute monarchy, the Head of State is the Pope who holds full legislative, executive and judicial powers.”⁴⁹ Vatican City provides the necessary physical territorial base for the Church as well as its administrative agencies.

Under international law,⁵⁰ the Vatican does not differ from the status of any province or subdivision of a state, as it meets the requirements of statehood set forth under the *Montevideo* criteria.⁵¹ The Montevideo Convention stipulated that in order to be deemed an equally sovereign state under international law, the qualifications of (1) defined territorial boundaries, (2) a permanent population, (3) a government, and (4) the ability to enter into agreements

⁴⁵ See *Matthew* 16:18 (the successor of the Apostle Peter, about whom Christ said, “You are Peter and on this rock I will build my church.”).

⁴⁶ See Daniel Philpott, *Sovereignty*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 14, 2018), <https://plato.stanford.edu/entries/sovereignty/> (Defining the core meaning of sovereignty as the “supreme authority within a territory.”) (noting that “[h]istorical variations can be understood along three dimensions – the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty.”).

⁴⁷ *Lantern Treaty*, ENCYCLOPEDIA BRITANNICA (Oct. 14, 2018), www.britannica.com/event/Lateran-Treaty.

⁴⁸ Philpott, *supra* note 46.

⁴⁹ *State Department*, VATICAN CITY STATE, www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html (last visited Oct. 1, 2018).

⁵⁰ See *Uphold International Law*, UNITED NATIONS, www.un.org/en/sections/what-we-do/uphold-international-law/index.html (last visited Feb. 3, 2019) (“International law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries.” Thus, the criteria for statehood is particularly relevant when determining the primary subjects of international law.)

⁵¹ Cedric Ryngaert, *The Legal Status of the Holy See*, *GoJIL* 3 (2011).

with other states, must be met.⁵² Unlike the Holy See, the Vatican City State meets the criteria of statehood. Notably, the “Vatican City is the only state that is generally recognized by the international community that is not a member of the United Nations.”⁵³ Why is that? One view reconciles this question with the Vatican’s history of dealing only with the “internal-political” domain and policies of the Church.⁵⁴ Commonly viewed as a “vassal” territory of the Holy See⁵⁵ its sole purpose is to provide the central administration of the Roman Catholic Church.⁵⁶ Others believe the Vatican has avoided being viewed internationally as a state because the Catholic Church is unwilling to assent to the obligations that accompany a designation of statehood, namely acknowledging responsibility for wrongful acts committed by or attributable to the state.⁵⁷

2. The Holy See

The Holy See is the “ecclesiastical, governmental, and administrative capitol of the Roman Catholic Church.”⁵⁸ The Holy See’s governance, authority, and jurisdiction are based on global spiritual sovereignty with the Pope, designated as the head of the Code of Canon Law, possessing plenary power over the judicial, legislative, and executive functions of the Church.⁵⁹ The Holy See handles all external political and religious matters for the Church “functioning as a global network of territorial jurisdictions (dio-

⁵² ENCYCLOPEDIA BRITANNICA, www.britannica.com/event/Montevideo-Convention (last visited Oct. 2, 2018) (“Montevideo Convention on the Rights and Duties of States agreement signed . . . on December 26, 1933 . . . established [a] standard definition of a state under international law.”).

⁵³ DAVID HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 99 (6th ed. 2004).

⁵⁴ Jodok Troy, *The Catholic Church and International Relation*, OXFORD HANDBOOKS ONLINE (Apr. 2016), www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935307.001.0001/oxfordhb-9780199935307-e-2.

⁵⁵ *Church or State? The Holy See at the United Nations*, CTR. FOR RES. ON POPULATION AND SECURITY, www.population-security.org/crlp-94-07.htm (last visited Oct. 14, 2018).

⁵⁶ *Id.* (explaining the distinction between modern nations around the world that exist in order to support their citizens, and the Holy See which exists in order to provide the central administration of the Catholic Church).

⁵⁷ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 77 (2002).

⁵⁸ Cedric Ryngaert, *The Legal Status of the Holy See*, 3 GOETTINGEN J. INT’L. L. 830, 837 (2011) (citing *Doe v. Holy See*, 434 F. Supp. 3d D.Or. 2009).

⁵⁹ *State Department*, VATICAN CITY STATE, www.vaticanstate.va/content/vaticanstate/en/stato-e-governo/organi-dello-stato.html (last visited Oct. 1, 2018).

ceses) which serve the spiritual and material needs of the world's estimated 1.2 billion Catholics."⁶⁰

Conferred with universal spiritual sovereignty,⁶¹ the jurisdiction of the Holy See reaches over "all things and rules over all things."⁶² Viewing the jurisdiction of the Church as one of universal spiritual sovereignty, the Holy See is in a unique position to exude influence over the international community. Historically, the Church has interpreted this vast jurisdictional grant as sufficient authority to implement its own laws, procedures, and practices internationally through its network of local dioceses.⁶³ This designation is the basis for the Church's belief that it has plenary authority to govern over the epidemic of child abuse occurring within its walls.

The power of the Holy See descends from one of two views regarding its legal characterization. The first view designates the Holy See as a state. This view equates the Vatican City State and the Holy See as one legal entity, leading to the belief that the Holy See, as an institution, is a sovereignly immune state actor. Conversely, the second possible designation of the Holy See, views the body as a *sui generis* entity⁶⁴ with a far-reaching international personality, standing not as its own state, but as a separate entity to the Vatican City State.⁶⁵ The issue that arises given the lack of an established legal characterization of the Holy See, is the great amount of undefined power given the Holy See. Consequently, states are left with an unspecified system of control over the Catholic Church within its own territorial boundaries, and in turn, have no clear pathway to implement legislation or regulatory authority, or sanction abusers.

B. *Status of the Holy See*

1. The Status of the Holy See in the United States

Historically the United States has classified the Holy See and the Vatican as one legal entity, together making up the Catholic

⁶⁰ Troy, *supra* note 54 (citing KATHERINE MARSHALL, *GLOBAL INSTITUTIONS OF RELIGION: ANCIENT MOVERS, MODERN SHAKERS*, (Routledge Global Institutions Series 2013)).

⁶¹ Ryngaert, *supra* note 58, at 838.

⁶² *Matthew* 28:18-20.

⁶³ See Ryngaert, *supra* note 58.

⁶⁴ *Id.* at 838; see also *Sui Generis*, BLACK'S LAW DICTIONARY (9th ed. 2009) "[defining the Latin work *Sui Generis* as 'of its own kind']," of its own kind or class; unique or peculiar."

⁶⁵ *Id.*

Church as viewed under the Constitution and the laws of the United States.⁶⁶ In the seminal case, *O'Bryan v. Holy See* (2009), the 6th Circuit defined the legal characterization of the Holy See as “a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church.”⁶⁷ Noting that the United States has recognized the Holy See as a foreign sovereign since 1984, the Court rejected O'Bryan's argument that “the Holy See [could] be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization.”⁶⁸ The Holy See's designation, under the Foreign Sovereign Immunities Act of 1976 (“hereinafter FSIA”)⁶⁹ is extremely significant in that the Supreme Court interpreted “the text and structure of the FSIA [to] demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”⁷⁰ Notably, the act applies exclusively to foreign states and their political subdivisions, agents and instrumentalities.⁷¹ Treating the Holy See as a sovereign for FSIA purposes affirms the idea that the United States and its courts view the Holy See and the Vatican as interchangeable, parallel sovereign entities.⁷²

2. International Status of the Holy See

Whether viewed as a sovereign state or a *sui generis* international personality, one thing is certain, the Holy See has established itself as a substantial international power with the ability to act under its own laws throughout the world.⁷³ Even though the international legal status of the Holy See has been subject to much debate, the Holy See has enjoyed status under international law

⁶⁶ *Id.*

⁶⁷ *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009).

⁶⁸ *Id.* at 373.

⁶⁹ 28 U.S.C. § 1602 (2008).

⁷⁰ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

⁷¹ 28 U.S.C § 1603(a)–(b).

⁷² See *O'Bryan v. Holy See*, 556 F.3d at 373 (explaining the proposition that U.S. courts generally treat the Holy See and Vatican City State as interchangeable entities for purposes of the FSIA—“Courts have generally treated the Holy See as a foreign state for purposes of the FSIA”); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 832 (S.D. Miss 2004) (treating the Vatican as a foreign state for purposes of the FSIA); *English v. Thorne*, 671 F. Supp.2d 825, 764 (S.D.Miss. 1987) (concluding that the Vatican is a foreign state for the purposes of the FSIA); *Doe v. Holy See*, 434 F. Supp. 2d 925, 933 (D. Or. 2006) (applying FSIA's foreign state status to the Holy See).

⁷³ Araujo, *supra* note 44, at 322.

since the 5th century.⁷⁴ This international status, absent the requisite state designation, has not only prevented the Holy See from being subject to the International Court of Justice,⁷⁵ but has permitted the Holy See to reject the responsibilities that accompany state identification. Conversely, the rights and powers that flow from statehood—i.e. the capacity to enter into diplomatic relations and foreign recognition of the State’s “dignity, the retention of its independence, of its territorial and its personal supremacy”⁷⁶—are qualities the Holy See has chosen to retain in its position as the “preeminent episcopal see of the Catholic Church.”⁷⁷

Under international law, for a state to be considered a sovereign entity within the territorial boundaries of another state, that state alone must accept the sovereignty of the entity in question.⁷⁸ “Often the best evidence of such acceptance is the establishment of diplomatic relations.”⁷⁹ Another indication being “the invitation of the entity to diplomatic conferences and treaty negotiations as an equal.”⁸⁰ The international power of the Holy See is well established.⁸¹ As communicated by Archbishop Jean-Louis Tauran, “[t]here is no doubt about the Holy See’s full belonging to the international community.”⁸² A single statistic is enough: in 1978, Pope John Paul II was elected Supreme Pontiff, the Holy See had diplomatic relations with 84 countries; today, this number has risen to 172.⁸³ The “Holy See represents both the Vatican City State *and* the Holy See, [while] formally maintain[ing] diplomatic relations in the name of the Holy See and not in the name of the Vatican.”⁸⁴ The autonomous character of the Holy See is further illustrated in its treaty making capacity, its ability to enter into multilateral conventions, and its permanent observer status at the

⁷⁴ *Id.*

⁷⁵ See Statute of the International Court of Justice, art. 34 (San Francisco, 26 June 1945), 3 Bevens 1179, 59 Stat. 1055, T.S. No. 993, *entered into force* 24 Oct. 1945) (“Only States may be parties in cases before the Court.”).

⁷⁶ See 1 L. OPPENHEIM, *International Law: A Treatise* § 113. (2d ed. 1912).

⁷⁷ *Holy See, UNITED STATES CONFERENCE OF BISHOPS*, www.usccb.org/about/leadership/holy-see/ (last visited Feb. 1, 2019) (“Although it is often referred to by the term ‘the Vatican,’ the Holy See is not the same entity as the Vatican City State.”).

⁷⁸ Araujo, *supra* note 44 at 322 (2001).

⁷⁹ *Id.*

⁸⁰ *Id.* at 323.

⁸¹ *Id.*

⁸² Archbishop Jean-Louis Tauran, *The Presence of the Holy See in the International Organizations*, LA SANTA SEDE (Apr. 22, 2002), http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20020422_tauran_en.html.

⁸³ *Id.*

⁸⁴ See Ryngaert, *supra* note 58, at 836.

United Nations (hereinafter “UN”).⁸⁵ In holding permanent observer status at the UN, a right traditionally reserved for non-member states,⁸⁶ the Holy See has continuously participated in the international forum in a state-like manner while simultaneously asserting otherwise.

As a self-designated universal and spiritual sovereign, the Holy See believes its sovereignty not to be “created by the states through their recognition of it, but exists independently from the recognition of the states”.⁸⁷ Additionally, the Holy See claims to take part in international relations as a “*sovereign and independent moral authority*.”⁸⁸ These two assertions illustrate that while the Holy See may be recognized as a subject of international law, it has taken the position of a sovereign entity under its authority.⁸⁹ Notably, as demonstrated in part IV of this Note, the UN and its member States have denounced the Holy See’s position, calling on the Holy See to comply with the 1969 Vienna Convention on the Law of Treaties,⁹⁰ declaring that the Holy See, which exists apart from the Vatican City State, must be subject to international law and must observe these obligations, as signatories of multiple treaties, regardless of the nomenclature in use.⁹¹

⁸⁵ See *Participation of the Holy See in The Work of the United Nations*, PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE U.N. (July 16, 2004), <https://holyseemission.org/contents/mission/mission-55e373817eccc8.37288214.php> (acknowledging “the Holy See, in its capacity as an Observer State, [shall be accorded] the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspicious of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex.”).

⁸⁶ CTR. FOR RES. ON POPULATION AND SECURITY, *supra* note 55 (“An applicant to the United Nations must: (1) be a State; (2) be peace-loving; (3) accept the obligations of the United Nations Charter; (4) be able to carry out these obligations; and (5) be willing to do so.”).

⁸⁷ Araujo, *supra* note 44 at 323 (citing G. LaPiana, 25 AM. J. INT’L. L. 405, 406 (1931) (reviewing Louis Lefor, *LESAINTE-SIEGE ET LE DROIT DES GENS* (1929))).

⁸⁸ Tauran, *supra* note 82.

⁸⁹ Araujo, *supra* note 44 at 323 (nothing that the Holy See has a sovereignty that is recognized under international law. “However, its personality as a subject of international law and the sovereignty it exercises are not precisely those of other subjects of international law.”).

⁹⁰ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.

⁹¹ Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

C. *Canon Law*

Canon law is the legal order of ecclesiastical laws governing the Catholic Church at the global level.⁹² Promulgated by the Pope, canon law is said to guide the actions of bishops, outline their responsibilities, and to assure their rights.⁹³ The Code of Canon Law encompasses the entire legal system of the Church, and includes provisions related to procedural law, penal law, governmental structure, and the rights and duties of office holders.⁹⁴ Canon law, whether criminal or penal, “exists not only to protect individuals from infringements upon their rights, but also to protect the integrity of the Church as a community of faith, service and hope.”⁹⁵ As explained by Father McKenna, a Pastor and canon law expert, “[w]hen an allegation such as abuse occurs – such as sexual abuse – the church handles cases much the same way as a criminal case proceeds in a civil court.”⁹⁶ Canon law provides an individual with the right to bring an allegation to the attention of church authorities “for the express purpose of initiating a process that will lead to healing, reconciliation, a just resolution of the harm which has been suffered, and to prevent any further harm from occurring.”⁹⁷ Given that canon law contains these specific provisions, it has been argued that failure to solve the problem of clergy sexual abuse is not due to the absence of a legal structure relating to child abuse within the Church, but rather the failure of leadership to adhere to the procedures canon law has established to combat this issue.⁹⁸ Contrary to this argument is the view that canon law also contains provisions requiring clergymen to cover up sexual abuse within the Church and as a result, those provisions act as a limita-

⁹² *Canon Law*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/index.cfm> (last visited Oct. 10, 2018).

⁹³ *Canon Law Guides Church's Response to Clergy Sexual Abuse*, CATH. REV. (Jan. 19, 2012), www.archbalt.org/canon-law-guides-churchs-response-to-clergy-sexual-abuse.

⁹⁴ Doyle & Rubino, *supra* note 36, at 555.

⁹⁵ *Trials According to the Canon Law of the Roman Catholic Church*, ARCHDIOCESE OF MILWAUKEE (2016), <https://www.archmil.org/ArchMil/Resources/TRIB/Tribunalbrochure.pdf>; *see also* 1983 Code c. 277 § 2 (“Clerics are to behave with due prudence towards persons whose company can endanger their obligation to observe continence or give rise to scandal among the faithful”).

⁹⁶ CATH. REV., *supra* note 93.

⁹⁷ ARCHDIOCESE OF MILWAUKEE, *supra* note 95.; *see also* 1983 Code c. 277 § 2 (“Clerics are to behave with due prudence towards persons whose company can endanger their obligation to observe continence or give rise to scandal among the faithful”).

⁹⁸ Doyle & Rubino, *supra* 36, at 555 (noting that Canon Law 1395.2 deals with sexual abuse within the Church).

tion, legally permitting church officials to disregard the procedures relating to the issue of child abuse in their adherence to external canonical provisions.⁹⁹ This latter view is substantiated by the fact that Pope Francis has the authority under the Holy See to promulgate new canonical provisions and retract current provisions.¹⁰⁰ However, provisions requiring Church officials to cover up child abuse are “still there in black and white . . . Pope Francis has been asked to change it and he’s refused.”¹⁰¹ Others argue the process itself was inadequate from its very inception, fostering an imbalance of power between members of the Church who report allegations and the Church authorities they are reporting to.¹⁰²

1. Canon Law Policies Relating to Sexual Abuse

Canon 1395.2 is the canonical provision addressing child abuse.¹⁰³ Canon 1395 § 2 states:

A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.¹⁰⁴

As stated in canon 227, clergymen are “bound to celibacy” thus, any sexual act with a minor violates this clergy obligation.¹⁰⁵ Notably, § 3 of this canon gives authority to “[t]he diocesan bishop . . . to establish more specific norms concerning this matter and to pass judgment in particular cases concerning the observance of this obligation.”¹⁰⁶ Under canon 1389 § 1 a sexual act with a minor can be deemed an abuse of an “ecclesiastical power or function” which

⁹⁹ *Id.*

¹⁰⁰ See *infra* page 24.

¹⁰¹ Charlotte King, *Vatican Requires Bishops ‘to Cover up Child Sex Abuse’ in Absence of Reporting Laws, Expert Says*, ABC NEWS AU (Aug. 2, 2018), www.abc.net.au/news/2018-08-02/vatican-law-requires-catholic-bishops-cover-up-abuse-expert-says/10057532.

¹⁰² Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 FORDHAM URB. L.J. 549, 561 (2004).

¹⁰³ 1983 CODE c.1395.

¹⁰⁴ 1983 CODE c.1395, § 2.

¹⁰⁵ See 1983 CODE, c.277, § 1. “Clerics are obliged to observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are bound to celibacy which is a special gift of God by which sacred ministers can adhere more easily to Christ with an undivided heart and are able to dedicate themselves more freely to the service of God and humanity.”

¹⁰⁶ See *id.*, § 3.

is to be punished “according to the gravity of the act or omission.”¹⁰⁷

Part IV of the Code of Canon Law outlines the penal process for investigating allegations of clergy sexual abuse.¹⁰⁸ Under canon 1717 § 1, “whenever an Ordinary¹⁰⁹ has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and immutability, unless such an inquiry seems entirely superfluous.”¹¹⁰ Particularly interesting is the assertion made directly following this directive: “[c]are must be taken so that the good name of anyone is not endangered from this investigation.”¹¹¹

Once the initial investigation is complete, the evidence gathered by those appointed to conduct the investigation is presented to the bishop who has the discretionary authority to determine whether to proceed with further action.¹¹² Hearsay, including information gathered from anonymous sources, or circulated rumors, is admitted as credible evidence.¹¹³ If witnesses are presented, there is no defined procedure for aggressive cross-examination in order to ascertain all the facts regarding the abuse allegation.¹¹⁴ Rather, a witness may be asked to provide a deposition, usually attended by only one presiding member of the Tribunal, or to fill out a questionnaire regarding his knowledge of the circumstances.¹¹⁵

If the bishop deems the victim’s allegations to be credible, he has three choices: a full judicial process, an administrative process, or a “pastoral” admonition.¹¹⁶ Canon 1719 provides that the inves-

¹⁰⁷ See 1983 CODE c.1395, § 1 (“A person who abuses an ecclesiastical power or function is to be punished according to the gravity of the act or omission, not excluding privation of office, unless a law or precept has already established the penalty for this abuse.”).

¹⁰⁸ 1983 CODE c. 1717–1731.

¹⁰⁹ *Ordinary*, NEW ADVENT CATHOLIC ENCYCLOPEDIA ONLINE, <http://www.newadvent.org/cathen/11284b.htm> (last visited Nov. 11, 2004) (Defining Ordinary as “a cleric, such as a bishop, that has jurisdiction over an area, such as a parish or diocese.”).

¹¹⁰ See 1983 CODE c. 1717, § 1.

¹¹¹ See *id.*, c. 1717, § 2.

¹¹² See 1983 CODE c. 1718, § 1 (“When it seems that sufficient evidence has been collected, the ordinary is to decide: 1. whether a process to inflict or declare a penalty can be initiated; 2. whether, attentive to canon 1341, this is expedient; 3. whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.”).

¹¹³ Doyle & Rubino, *supra* note 36, at 557.

¹¹⁴ *Cross Examination Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/c/cross-examination/> (last visited Feb. 1, 2019).

¹¹⁵ ARCHDIOCESE OF MILWAUKEE, *supra* note 95.

¹¹⁶ See 1983 CODE c. 1341 (“The Ordinary is to state a judicial or an administrative procedure for the imposition or the declaration of penalties only when he perceives that neither by frater-

tigation will be closed if not found to be “necessary for the penal process.”¹¹⁷ Canon 1722 also permits the Ordinary to restrict an accused cleric’s activities or movements if necessary “[t]o prevent scandals, to protect freedom of witnesses, and to safeguard the course of justice.”¹¹⁸ This entire process is carefully documented and all records surrounding the case are kept in the secret archives of the dioceses.¹¹⁹

Where formal charges are filed against the accused, the judicial process proceeds in front of a “collegiate tribunal” consisting of three ecclesiastical judges, appointed by the Archbishop, no juries are provided.¹²⁰ The burden of proof rests on the Promoter of Justice,¹²¹ who must corroborate the charges to a degree of “moral certitude.”¹²²

If an affirmative decision is made, the judges move on to the penalty phase of the judicial process, where one of three penalties can be imposed on the accused.¹²³ The most common censures canon law envisages are: excommunication,¹²⁴ interdict,¹²⁵ and sus-

nal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed.”).

¹¹⁷ See 1983 CODE c. 1719.

¹¹⁸ See *id.* c. 1722.

¹¹⁹ See *id.* c. 1719 (stating “[t]he acts of the investigation, the decrees of the ordinary which initiated and concluded the investigation, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process.” This instruction has caused much debate regarding the lack of information available to the public and to secular authorities); see Doyle and Rubino, *supra* note 36 (estimating from a compilation of private reports by attorneys and press reports that since 1984 several hundred criminal prosecutions of clergymen have been initiated in the United States); see *also id.* at 550 n.8 (stating that “[t]here is no official list of clergy-abusers who have been charged, tried and sentenced. Information about the variety of charges is based on various media accounts and the author’s experience.”).

¹²⁰ Compare 1983 CODE, *supra* note 81, c. 1425 §1 (where the process is conducted by three to give judge panel since there are no juries in the Canon Law system) with U.S CONST. amend. VII (which guarantees parties to an action the right to a jury trial, unless expressly waived by both sides. Failing to offer a jury trial is another instance in which the Canon process contradicts important principles in American jurisprudence that ensures fairness.).

¹²¹ See ARCHDIOCESE OF MILWAUKEE, *supra* note 95 (explaining the role of the Promoter of Justice as one who acts similar to that of a District Attorney in the secular and criminal court system. Having been delegated the responsibility of safeguarding the public good, in this role, the Promoter of Justice relies on the victims’ testimony in order to establish a case against the accused clerk. Yet in their official capacity the Promoter of Justice does not act solely as an advocate for the alleged victim).

¹²² *Id.* at 12 (defining moral certitude as, “the firm and unwavering assent of the mind”).

¹²³ 1983 CODE c.1718, § 1.

¹²⁴ See 1983 CODE c. 1331.

¹²⁵ See *id.* c. 1332. Interdict prohibits a person from participating in the ministry and reception of the sacraments and sacramentals.

pension.¹²⁶ Additionally, abusers can be punished with expiatory penalties.¹²⁷ The most severe penalty imposed, other than excommunication, results in the offender being dismissed from the clerical states.¹²⁸ Although he maintains his title, the priest is stripped of the duties, responsibilities and privileges that correlate with his position.¹²⁹ When an initial decision has been entered, and a penalty imposed, the case is then transmitted to the Congregation of the Doctrine of the Faith in Rome.¹³⁰ Only after this body affirms and accepts the penalty, can the penalty be applied and the case be considered closed.

2. Limitation Tactics: Hiding Behind Secret Directives for Protection

In 1922, Pope Pius XI issued a confidential memo known as *Crimen Sollicitationis* or “*The Crime of Solicitation*.”¹³¹ This document, reissued in 1962, codified the procedures to be employed when a member of the clergy was accused of using the confessional as a means of soliciting sex from Church members.¹³² *Crimen Sollicitationis* was to be used as an instructional handbook, a guide for administrative procedures in these types of cases.¹³³ Title V, “*De crimine pessimo*” or “*The Worst Crimes*,” directly addresses the sexual acts of clergymen with same sex partners, minors, and bestiality.¹³⁴ Clearly recognizing the disastrous effect these crimes, if known, could have on the Church, the document demanded matters be treated with the “utmost confidentiality,” requiring “permanent silence” of all those involved, or with any knowledge regarding such matters “under pain of incurring automatic excommunication.”¹³⁵ While the directive clearly shows that the highest-

¹²⁶ See *id.* c. 1333. Suspension is a penalty that can only be imposed upon members of the clergy. The sanctions under suspension, vary depending on the crime, circumstances and degrees.

¹²⁷ See *id.* c. 1336, § 1.

¹²⁸ Doyle & Rubino, *supra* note 102.

¹²⁹ See 1983 CODE c.291–93 (providing a comprehensive list of effects imposed upon a priest who has been dismissed from the clerical state).

¹³⁰ Doyle & Rubino, *supra* note 102.

¹³¹ King, *supra* note 101.

¹³² John Allen, *1962 document orders secrecy in sex cases*, NAT'L. CATH. REP., (last visited Jan. 1, 2020), <http://www.nationalcatholicreporter.org/update/bn080703.htm>.

¹³³ Brendan Daly, *The Instruction Crimen Sollicitationis on the Crime of Solicitation: Confusion or Cover-up of Pedophilia*, 7 THE CANONIST 10 (2016).

¹³⁴ *Id.* (defining the worst crime under section 73 as “obscene behavior with pre-adolescent children of either sex or with brute animals.”).

¹³⁵ The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

ranking Vatican officials had knowledge of sexual abuse taking place across the Catholic Church, it was not until Pope St. John XXIII's 1962 re-released instruction that the *Crimen Sollicitationis* was distributed to bishops worldwide.¹³⁶ Approved, confirmed, and ordered by the Holy Father, the instruction was to be observed to the "minutest detail."¹³⁷

"[D]iligently stored in the secret archives of the Curia as strictly confidential,"¹³⁸ as per the document's explicit instructions posted on page one, evidence of the document's existence only came to light in 2002 when attorney and former Catholic Deacon, Dan Shea, noticed a reference to the document in a footnote within a letter sent to bishops around the world, from the head of the Vatican's doctrinal congregation, regarding new procedures for sex abuse cases.¹³⁹ Shea believed it "not just [to be] a smoking gun, but a nuclear bombshell . . . show[ing] that the Vatican has been providing instruction to all the bishops in the United States to obstruct justice."¹⁴⁰ Consistent with this position is that of Kireran Tapsell, an expert witness for the 2017 Royal Commission Panel on canon law, who maintains that the secrecy of that confidential instruction has been "confirmed."¹⁴¹

The *Crimen Sollicitationis* illuminates the long-standing policy of the Vatican regarding sexual offenses—"to control and maintain these situations" under a veil of absolute secrecy.¹⁴² Notably, the instruction places the same requirement of secrecy on the victim as

¹³⁶ Thomas Doyle, *THE 1962 VATICAN INSTRUCTION "CRIMEN SOLLICITATIONIS," PROMULGATED ON MARCH 16, 1962*, ARCHIVES.WEIRDLOAD, (last visited Jan. 1, 2020), <http://archives.weirdload.com/docs/doyle-crimen-4-10-8.pdf>. Notably, Doyle addresses the "unofficial sources" claiming that the 1962 document was not issued to bishops worldwide, but rather was only sent to bishops upon their express request. Doyle argues that "there is no reason to believe such an assertion." However, Doyle does note that unlike most legal documents issued by the Holy See the 1962 document, like its 1922 predecessor was "not included in any of the collections, official or private."

¹³⁷ The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

¹³⁸ *Id.*

¹³⁹ John L. Allen, *1962 Document Ordered Secrecy in Sex Cases*, NAT'L. CATH. REP. (Aug. 7, 2003), www.nationalcatholicreporter.org/update/bn080703.htm.

¹⁴⁰ Alan Cooperman, *Vatican Memo Cited In Sex Abuse Cases*, WASH. POST (Aug. 25, 2003), www.washingtonpost.com/archive/politics/2003/08/25/vatican-memo-cited-in-sex-abuse-cases/de496188-bc95-4c7d-913e-b7845f6cc2db/?utm_term=.86a2b7927b11.

¹⁴¹ King, *supra* note 101.

¹⁴² Father Thomas Doyle, *Crimen Sollicitationis: An Interpretation*, BBC NEWS (Sept. 29, 2006), www.news.bbc.co.uk/2/hi/programmes/panorama/5392338.stm.

it does on the accused.¹⁴³ Doyle suggests that the “almost paranoid insistence on secrecy throughout the document is probably related to two issues: the first is a scandal that would arise were the public to hear stories of priests committing such terrible crimes.¹⁴⁴ The second reason is the protection of the inviolability of the sacrament of penance.”¹⁴⁵ Defenders of the Article condemn the majority view, believing that the public has misinterpreted the instruction.¹⁴⁶ Nicholas Cafardi, Dean Emeritus for the Duquesne University School of Law, claims that the document solely requires secrecy regarding the Church’s internal legal process and not the crime itself.¹⁴⁷ Cafardi further argues that nothing within the directive prevents victims or Church officials from “reporting a civil crime to the civil authorities or to the media.”¹⁴⁸

The practice of secrecy perpetuated by the Catholic Church and its highest-ranking officials disregarded the rights of victims in an attempt to avoid scandal and maintain the holy aura surrounding the institution.¹⁴⁹ This notion is advanced by the fact that the 39-page document fails to mention any form of support or relief for the victim.¹⁵⁰ However, as Doyle notes an equitably informed interpretation requires analyzing the 1922 and 1962 instructions from an originalist perspective, viewing the intention of its drafters in conjunction with the time period in which it was written.¹⁵¹ The “highly confidential and even secretive attitude with regard to internal church matters” was common during the period in which *Crimen Sollicitationis* was written.¹⁵² Still, critics believe its exist-

¹⁴³ The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962) ¶ 13 (“The oath of keeping the secret must be given in these cases also by the accusers or those denouncing [the priest] and the witnesses.”).

¹⁴⁴ Doyle, *supra* note 102. Thomas Doyle, *The 1992 Instruction and the 1962 Instruction “Crimen Sollicitationis,” Promulgated by the Vatican* (Oct. 3, 2008), www.awrsipe.com/doyle/2008/2008-10-03-Commentary-on-1922-and-1962-documents.pdf.

¹⁴⁵ *Id.*

¹⁴⁶ Dave Sutor, ‘Confidential Archives’: Experts Divided on Impact of Canon Law in Diocese of Altoona-Johnstown Child Abuse Scandal, *TRIBUNE-DEMOCRAT* (Apr. 3, 2016), www.tribdem.com/news/local_news/confidential-archives-experts-divided-on-impact-of-canon-law-in/article_c9e8aa53-ff6e-52dc-951a-337844c84ef8.html.

¹⁴⁷ *See Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Thomas Doyle, *The 1992 Instruction and the 1962 Instruction “Crimen Sollicitationis,” Promulgated by the Vatican* (Oct. 3, 2008), www.awrsipe.com/doyle/2008/2008-10-03-Commentary-on-1922-and-1962-documents.pdf.

¹⁵⁰ *See* The Supreme and Holy Congregation of the Holy Office, *On the Manner of Proceeding in Cases of Solicitation* (1962).

¹⁵¹ *See* Doyle, *supra* note 149.

¹⁵² *Id.*

tence alone is evidence of a systematic scheme of cover-up perpetrated by the Church because at the time of its creation procedures for handling such an issue were already codified within the Code of Canon Law.¹⁵³ To this point, Doyle emphasizes the common Vatican practice of issuing directives to implement particular procedures for the handling of specific and sensitive crimes.¹⁵⁴ Thus, Doyle argues that “we cannot accurately interpret and criticize this document solely by out contemporary standards based on the institutional church’s handling of clergy sexual abuse cases over the past few years.”¹⁵⁵ Nonetheless, whether the secrecy of this document is viewed as proof of a conspiracy, orchestrated by the Vatican, to perpetuate a worldwide cover-up of clergy sexual abuse¹⁵⁶ or as merely requiring secrecy of only the churches internal legal process,¹⁵⁷ viewed under the totality of the circumstances two things are evident: secrecy is deeply rooted in Catholic culture and for decades the Church has been aware of the sexual abuse permeating its walls.¹⁵⁸ Although it may be impossible to ascertain the true intentions of the Church in analyzing the 1922 and 1962 documents in an isolated manner, Tapsell claims that these secret instructions have been ratified by every Pope since Pope Pius XI, including the current Pope, Pope Francis.¹⁵⁹

Updated again in 1974, Pope Paul VI issued the *Secreta Continere*, a canonical directive demanding that those bound by the pontifical secret take an oath before being sworn into the Curia or diplomatic Corps in which they promise to “in no way, under any pretext, whether of greater good, or of very urgent and very grave reason,” break the pontifical secret.¹⁶⁰ This directive, commonly

¹⁵³ *Id.* See 1917 CODE c. 2359, § 2 (discussing sexual contact with minors and bestiality); see also *id.* 2368 § 1 (discussing solicitation).

¹⁵⁴ See Doyle, *supra* note 149.

¹⁵⁵ *Id.*

¹⁵⁶ Nicholas Cafardi, *The Scandal of Secrecy*, COMMONWEAL (July 21, 2010), <https://www.commonwealmagazine.org/scandal-secrecy>.

¹⁵⁷ Dave Sutor, ‘Confidential archives’: Experts divided on impact of Canon Law in Diocese of Altoona—Johnston child sexual abuse scandal, THE TRIBUNE DEMOCRAT (Apr. 3, 2016), https://www.tribdem.com/news/local_news/confidential-archives-experts-divided-on-impact-of-canon-law-in/article_c9e8aa53-ff6e-52dc-951a-337844c84ef8.html (In defense of his stance that the pontifical secret does not reflect a systematic cover up of clergy child abuse Cafardi notes that “Canon law doesn’t say take it to law enforcement, but it also doesn’t say that you can’t.”).

¹⁵⁸ See Doyle, *supra* note 149.

¹⁵⁹ See King, *supra* note 101. See also Doyle, *supra* note 149 (“Under ordinary circumstances *Crimen Sollicitationis* would have ceased to have legal force with the promulgation of the 1983 Code of Canon Law. [However,] [t]his was not the case.”).

¹⁶⁰ Hannah Brockhaus, *What Is the Pontifical Secret?*, CATHOLIC NEWS AGENCY, www.catholicnewsagency.com/news/what-is-the-pontifical-secret-78234 (last visited Oct. 1, 2018).

known as the *pontifical secret*, was published in the official acts of the Holy See as a “legislative document with the force of the law” and still remains in place today.¹⁶¹ Issued by Pope Paul VI, the *pontifical secret* was considered the “Church’s highest form of secrecy outside the confessional and extended [the obligation of mandatory silence] . . . to cover the allegations of child abuse itself, and not just the information obtained in the Church’s internal inquiries and trials.”¹⁶² Contrary to this assertion, Monsignor Lawrence A. DiNardo, claims that the “practice of secrecy was not established because the church wanted to hide its shortcomings”¹⁶³ but rather as an incumbent practice compulsory to the protection of both the privacy and rights of the alleged victim and the accused official.¹⁶⁴

This directive unequivocally contradicts secular law in jurisdictions that require church officials to report abuse to local law enforcement and has directly led to the continuation of clergy sexual malfeasance.¹⁶⁵ Not only has the United Nation’s Committee on the Rights of the Child, the Australian Royal Commission, and various other international organizations asserted the need for its abolishment, but the commission Pope Francis created to help combat child abuse within the Church, has done so as well. Nonetheless, the Pope refuses to amend canon law and repeal the directive.¹⁶⁶ Thus, regardless of the Church’s initial intentions in implementing the *pontifical secret*, or the *Crimen Sollicitationis*, its continued use in clerical sex abuse cases illustrates the Church’s modern intentions—to continue with the “playbook for concealing the truth.”¹⁶⁷

¹⁶¹ King, *supra* note 101.

¹⁶² Kieran Tapsell, *Canon Law On Child Abuse Thru The Ages*, GLOB. CATHOLIC NETWORK, <https://www.catholicsforrenewal.org/Documents%202016/CanonLawOnChildAbuseThruTheAges.pdf> (last visited Oct. 01, 2018).

¹⁶³ Dennis Sadowski, *Canon Law Guides Church’s Response to Clergy Sexual Abuse*, CATHOLIC NEWS SERV. (May 26, 2010), www.catholicnews.com/services/englishnews/2010/canon-law-guides-church-s-response-to-clergy-sexual-abuse.cfm.

¹⁶⁴ *Id.*

¹⁶⁵ Christopher Knaus, *Catholic church’s ‘pontifical secret’ stops disclosure of sex abuse allegations, expert says*, THE GUARDIAN (Feb. 9, 2017), <https://www.theguardian.com/australia-news/2017/feb/09/catholic-churchs-pontifical-secret-stops-disclosure-of-sex-abuse-allegations-expert-says>.

¹⁶⁶ Carol Glatz, *‘Pontifical secret’ in abuse cases needs review, advisors tell pope*, CRUX (Sep. 22, 2017), <https://cruxnow.com/vatican/2017/09/pontifical-secret-abuse-cases-needs-review-advisors-tell-pope/>.

¹⁶⁷ Scott Dodd, *Pennsylvania Grand Jury Says Church Had A Playbook For Concealing the Truth*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/pennsylvania-child-abuse-catholic-church.html>.

3. The Principal of Confidentiality within Canon Law

Promulgated from the ancient understanding that everyone is entitled to a good reputation, canon law also establishes the principle of confidentiality as crucial to affirming and protecting the reputation of all parties involved in a dispute.¹⁶⁸ An essential element to ensuring an individual's reputation remains unblemished is that the identity of victims and survivors are kept confidential.¹⁶⁹ This principle, while affording protection to a victim, has clear roots in aiding the Church in its decades-long practice of secrecy.¹⁷⁰ Additionally, contrary to secular laws which mandate church officials report all instances of abuse to the civil authorities, under the Church's confidentiality practices, those involved in the investigation are forbidden from speaking to any unauthorized person regarding the case.¹⁷¹

Many believe that the seal of confession is an adequate justification for a priest's failure to report instances of child abuse to secular officials, regardless of whether he resides in a jurisdiction possessing mandatory reporting statutes.¹⁷² The authority for this inaction is found in Catechism¹⁷³ 2490 which declares: "The secret of the sacrament of reconciliation is sacred, and cannot be violated

¹⁶⁸ See 1983 CODE, cc. 220 ("No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy").

¹⁶⁹ John Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 989 (2003); see John P. Beal, *Doing What One Can: Canon Law and Clerical Sexual Misconduct*, 52 JURIST 642, 653 (1992) (noting that "[w]hen an accusation of sexual misconduct is made public, [a] cleric's career in ministry may be destroyed whether he is guilty or not.>").

¹⁷⁰ Amy Hereford, *Book II – Part III: People of God [Canon Law]*, RELIGIOUS LAW AND CONSULTATION (last visited Jan. 2, 2020) http://www.ahereford.org/canonlaw/doku.php?id=book_2.3#book_ii_-_part_iii. ("In accordance with Canon Law 667 § 1, "there is to be in all houses an enclosure appropriate to the character and mission of the institute." Thus, "[c]loister establishes zone or privacy [. . .] restricting the right of ingress of nonmembers and the right of egress of members.").

¹⁷¹ ARCHDIOCESE OF MILWAUKEE, *supra* note 95.

¹⁷² Joe Harman, 'The Power of Confession: Mandatory Reporting, Confession and the Evidence Act,' 38 ALTERNATIVE L. J. 239, 243 (2013).

[d]ifferent protections for perpetrators and victims are arguably problematic given what we now know of clergy abuse and the difficulties, to date, of prosecution for offences or civil suit for compensation. Notwithstanding that the actions confessed have been morally (sin) and legally (crime) wrong (both on the basis of canon and secular law) no action or disclosure by clergy has been compellable. The effect has been to conceal and allow the ongoing perpetration of abuse

See 1983 CODE c. 983 making it absolutely forbidden to use knowledge acquired from confession when it might harm the penitent.

¹⁷³ Santiago Cortes-Sjoberg, U.S. Catholic (last visited Jan 1, 2020), <https://www.uscatholic.org/church/2011/05/what-catechism-catholic-church> (defining Catechism of the Catholic Church as a "compendium of all Catholic doctrine regarding both faith and morals" promulgated bish-

under any pretext;”¹⁷⁴ bearing in mind canon law 983 §1 which deeming “[t]he sacramental seal [] inviolable; [and] therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”¹⁷⁵ Although the Church claims to have taken the position, at the recommendation of the 2017 Royal Commission, that priests residing in jurisdictions with mandatory reporting laws are under an obligation to report instances of child abuse, they have stood in strong opposition to extending the obligation to include information revealed in the sanctity of the confessional.¹⁷⁶ Thus, while the Catechism expressly states that “[t]he right to the communication of the truth is not unconditional”¹⁷⁷ it is the clergy, rather than a legislature who is to “judge whether or not it is appropriate to reveal the truth to someone who asks for it.”¹⁷⁸ Further, Catechism 2492 states that “[t]hose in charge of communications should maintain a fair balance between the requirements of the common good and respect for individual’s rights.”¹⁷⁹

D. *The United Nations and the Holy See’s Participation in the Organization*

1. The United Nations

The United Nations (hereinafter “UN”) is an international organization made up of 193 member states, with the power to act in order to maintain international peace and security.¹⁸⁰ The UN’s key objective is “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”¹⁸¹ In relation to non-member states, this objective is carried out by the use of multilat-

ops, theologians and other experts “in the light of the Second Vatican Council and the whole of the Church’s tradition.”).

¹⁷⁴ CCC, 2490 1983 CODE c. 983 §1.

¹⁷⁵ 1983 CODE c. 983 §1.

¹⁷⁶ King, *supra* note 101.

¹⁷⁷ CCC, 2488.

¹⁷⁸ *Id.*

¹⁷⁹ CCC, 2492.

¹⁸⁰ See *What We Do*, UNITED NATIONS, www.un.org/en/sections/what-we-do/ (last visited Feb. 1, 2019) (noting that the United Nations has “one central mission: the maintenance of international peace and security.”).

¹⁸¹ U.N. Charter. Pmb. (vesting the organization with considerable power to uphold international law).

eral treaties of which the Security Council may impose various sanctions in the event that such treaties are violated.¹⁸²

As a non-member state with permanent observer status, the Holy See actively participates in deliberations, organizations, and conferences at the UN, in addition to being a signatory to various international treaties.¹⁸³ Under the “non-member state” designation, the Holy See enjoys state status and is provided with the same privileges granted to member states at international conferences sponsored by the UN.¹⁸⁴ The “Permanent Observer” designation entitles the Holy See to various privileges within the UN and its subsidiary bodies.¹⁸⁵ The considerable role the Holy See plays at the UN was enumerated by passage of resolution 58/314—titled “Participation of the Holy See in the Work of the United Nations”—where the General Assembly re-affirmed and strengthened the role and participation of the Holy See in the work of the UN.¹⁸⁶

2. The United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (hereinafter “Convention”) is a human rights treaty that delineates the civil, procedural, economic, social, and cultural rights of every child.¹⁸⁷ Under the Convention, ratifying nations agree to be bound by international law and to act in the best interests of each child.¹⁸⁸ Since its adoption in 1989, 194 countries have agreed to be bound by the Convention.¹⁸⁹ Similar to many other multilateral conventions the Convention established a monitoring body, the United Nations Committee on the Rights of the Child (hereinafter

¹⁸² U.N. Charter art. 2, ¶ 6 (“The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”).

¹⁸³ Josef Klee, *The Role of the Holy See and Catholic Organizations at the United Nations*, SCHOOL OF DIPLOMACY AND INTERNATIONAL RELATIONS SETON HALL UNIV. (Oct. 31, 2017), <https://blogs.shu.edu/unstudies/2017/10/31/the-role-of-the-holy-see-and-catholic-organizations-at-the-united-nations/>.

¹⁸⁴ R.G. SYBESMA-KNOL, *THE STATUS OF OBSERVERS IN THE UNITED NATION* 24 (1981).

¹⁸⁵ *Id.*

¹⁸⁶ G.A. Res. 58/314, (July 1, 2003) (acknowledging, “that the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in the annex to the present resolution.”).

¹⁸⁷ G.A. Res. 44/25 Convention on the Rights of the Child (Nov. 20, 1989).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

“CRC” or “Committee”), to oversee the implementation and compliance of the agreement.¹⁹⁰

Implicit in the Convention’s 54 articles is the notion that every child has basic, fundamental rights which explicitly include the right to be protected from violence and abuse. Under its terms, parties are obliged to amend and create laws and policies that will fully implement the Convention. In 1990, the Holy See acceded to the Convention¹⁹¹ in its capacity as a state.¹⁹² By acceding to the convention, the Holy See agreed to undertake several initiatives to protect children from abuse within the Church. However, the Holy See asserted its compliance was subject to numerous reservations¹⁹³ deemed necessary based on its status as a religious institution.¹⁹⁴ In submitting these reservations, the Holy See found a way to contravene the Convention by interpreting relevant provisions in its favor and against its original understanding.¹⁹⁵ By adopting procedures that facially appear to produce the Convention’s intended results, yet in practice prove to be trivial and irrelevant, the Holy See has thus far succeeded in circumventing the Convention’s required implementation.¹⁹⁶ Of particular relevance is the Holy See’s continuous claim that its compliance with the Convention is limited solely to the territory within Vatican City.¹⁹⁷

Twenty years after ratification and with mounting pressure from the international community, the CRC rejected the Holy See’s actions in limiting the Convention’s territorial reach to

¹⁹⁰ See *id.*; see also *Treaty Research - UN Documentation: International Law*, UNITED NATIONS, <http://research.un.org/en/docs/law/treaties> (last visited Jan. 12, 2019).

¹⁹¹ G.A. Res. 44/25, *supra* note 187.

¹⁹² U.N. Comm. on the Rights of the Child, *State Party Report: Holy See*, U.N. Doc. CRC/C/3/Add.27 (1994). [hereinafter *State Party Report*].

¹⁹³ See Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 (defining “reservation” as: “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”).

¹⁹⁴ *State Party Report*, *supra* note 192.

¹⁹⁵ See *State Party Report*, *supra* note 192. In relying on its dual nature, the Holy See has chosen to restrict its commitment to comply with the CRC to activities taking place squarely within the geographical territory of the Vatican City.

¹⁹⁶ Sue Cox, *Submission to the U.N. Committee Against Torture*, Survivors Voice Europe (May 4, 2014), <http://survivorsvoice-europe.org/?p=6841>.

¹⁹⁷ *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN (last visited May 12, 2019), http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html.

strictly within the walls of Vatican City.¹⁹⁸ The Committee has officially called on the Church to comply with the Convention irrespective of the “dual nature of the Holy See’s ratification,” or its designation as a “sovereign subject of international law having an original, non-derived legal personality independent of any territorial authority or jurisdiction.”¹⁹⁹ Cleverly, in accepting the Holy See’s argument that “bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff,”²⁰⁰ the Committee demanded the Holy See comply with canons 331 and 590, which provide that subordinate members of the Catholic Church be bound to the Supreme Pontiff who shall directly call upon Catholics in the religious order to abide by the Convention.²⁰¹ After considering multiple periodic reports submitted to the Committee by the Holy See, in addition to reviewing letters from outside organizations, and analyzing appropriate canon law sections and the Convention’s articles, the Committee condemned the restriction of these practices, “remind[ing] the Holy See that in ratifying the Convention it made a commitment to implement it not only within the territory of Vatican City State, but also, as the supreme power of the Catholic Church, worldwide through individuals and institutions under its authority.”²⁰²

E. *Mediation and the Parties’ Desire to Find a Resolution*

Mediation is the voluntary process by which two parties come to a consensus, and therefore a mutually acceptable agreement, through the help of a neutral third party.²⁰³ The role of the neutral (the mediator), is to facilitate communication between the parties by exploring and encouraging them to find creative resolutions. If

¹⁹⁸ Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 ¶ 8 (Feb. 24, 2004) [hereinafter C.R.C Observations].

¹⁹⁹ *Id.*

²⁰⁰ *Id.* ¶ 8.

²⁰¹ G.A. Res 44/25, *supra* note 187; *See generally*, *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

²⁰² *Id.*

²⁰³ *See* Katie Shonk, *What is Alternative Dispute Resolution*, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL (July 1, 2019), www.pon.harvard.edu/daily/dispute-resolution/what-is-alternative-dispute-resolution/ (defining alternative dispute resolution as “a process in which a neutral third party [] assists parties who are embroiled in a dispute to come to an agreement.”).

done effectively the opposing parties can promulgate a resolution that is sustainable, mutually beneficial, and voluntarily agreed upon.

In the context of the Catholic Church the voluntary nature of mediation is essential. As discussed above, for any resolution to be binding on the Catholic Church as a whole, the Pope must voluntarily amend canon law to reflect the terms of the agreement. Therefore, an alternative dispute resolution process such as arbitration, where the neutral is vested with the authority to render and impose a binding decision on the parties,²⁰⁴ will have no more success in implementing change than the CRC has already had. Thus, it is proffered that entering into voluntary mediation would be more successful.

1. The Religious Command of Mediating Disputes Arising Within the Church

The Roman Catholic Church has a long history of promoting the use of various alternative dispute resolution (hereinafter “ADR”) techniques to settle sexual and nonsexual abuse allegations outside of formal litigation.²⁰⁵ The long history of religious authority promoting ADR and the Church’s frequent use of Papal mediation can arguably be traced back to biblical times; as the Bible tells us²⁰⁶ under the rules of “our Lord” Christians must settle disputes amongst themselves.²⁰⁷ This command has intensified with the promulgation of new canonical provisions in the 1983 Code of Canon Law.

Thus: In the early stages of litigation, and indeed at any other time as often as he discerns any hope of a successful outcome, the Judge is not to fail to exhort and assist the parties to seek an equitable solution to their controversy in discussions with one

²⁰⁴ See *Arbitration*, A.B.A., www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ (last visited Oct. 11, 2018).

²⁰⁵ See F. Matthews-Giba, *Religious Dimensions of Mediation*, 27 *FORDHAM URB. L.J.* 1695, 1695 (2000) (tracking the Church’s use of ADR back to the thirteenth century, where St. Francis of Assisi mediated a dispute between the Bishop of Assisi and the town Mayor to restore order in the community.).

²⁰⁶ *Matthew* 18:15–17.

²⁰⁷ *Id.* “if your brother sins against you, go and confront him privately. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that ‘every matter may be established by the testimony of two or three witnesses.’”; see also, Lee Tarte, *Clergy Arbitrator Liability: A Potential Pitfall of Alternative Dispute Resolution in the Church*, 32 *CATHOLIC J. CATH. LAW* 310 (2017) (arguing “in the Bible, the Apostle Paul exhorts Christians to choose from among their number a ‘wise man’ who can ‘judge’ and ‘decide between his brethren” (quoting *I Corinthians* 6:1-7 (New American Standard Version)).

another. He is to indicate to them suitable means to this end and avail himself of serious-minded persons to mediate.²⁰⁸

Perceivably, the expansion of the 1983 Code of Canon Law came at a time of heightened parochial conflicts, “clergy strife and restiveness, controversies arising from ordinary and extra-ordinary Church administration and alienation.”²⁰⁹

2. The Positive Attributes of Alternative Dispute Resolution

In analyzing the Church’s response to victims of clergy abuse, along with the institution’s internal policies and governing structure, the Church has strategically used ADR to avoid public accountability and transparency.²¹⁰ However, due to the nature of ADR, the positive effects this process can have on abuse victims cannot be ignored. Importantly, the ADR process offers far more flexibility than litigation by encouraging victims to raise emotional issues and enabling the creation of unique solutions custom-tailored to the needs of individual parties.²¹¹ “This underlines a key element of ADR—that it has the potential to enhance the empowerment of those involved in its processes” due to its therapeutic design.²¹² Survivors of abuse have been through a traumatic experience, which in many instances is both emotionally and psychologically incapacitating.²¹³ The litigation process, which can take years to reach a verdict, causes victims to relive traumatic events during the extensive pre-trial process and again throughout adversarial litigation.²¹⁴ The ADR process, on the other hand, focuses on solving problems rather than exacerbating them and can be far less intrusive and emotionally damaging to victims.²¹⁵ Many survivors of clerical sexual abuse feel embarrassed and ashamed and are reti-

²⁰⁸ 1983 CODE c.1395 c. 1446, § 2.

²⁰⁹ Don Nnagha, *The Use Of Alternative Dispute Resolution In The Church (ADR): The Need For Ecclesiastical Paradigm Shift(2)*, THE LEADER, FOR GOD AND NIGERIA (Apr. 20, 2014), <https://theleaderassumpta.com/2014/04/20/the-use-of-alternative-dispute-resolution-in-the-church-adr-the-need-for-ecclesiastical-paradigm-shift2/>.

²¹⁰ THE INVESTIGATIVE STAFF AT THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH 5 (2002) (noting that “the church had engaged in largely successful damage control, taking advantage of the widespread deference toward it.”).

²¹¹ Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 5, 115 (2004).

²¹² ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND CONCILIATION 3 (LCR 98-2010) (Ir.).

²¹³ Michelle Rosenblatt, *Hidden in the Shadows: The Perilous Use of ADR by the Catholic Church*, 5 PEPP. DISP. RESOL. L.J. 5, 115 (2004).

²¹⁴ *Id.*

²¹⁵ *Id.*

cent to come forward.²¹⁶ This may be the result of feeling a deep sense of betrayal having been abused by someone who was a trusted leader and intimate spiritual advisor. Reluctant to suffer the harsh effects of public exposure inherent in the litigation process, ADR quietly addresses the abuse and offers victims the privacy they may need to come forward with their grievances.²¹⁷

3. What are the Church's Actual Intentions in Settling Disputes Outside of Court?

While the Church claims to have good intentions in insisting on using ADR to settle these disputes, its behavior has shown that negotiations are often imbalanced and conducted in bad faith.²¹⁸ Given the Church's control over the abuser, discovery material, and witnesses, coupled with its desire to avoid accountability and transparency, it is not unreasonable to conclude that only through the use of newly promulgated ADR guidelines, where intermediaries are independent from the Church, will all parties—the victim, the Church, and the international community—benefit from the process.

Upholding the veil of secrecy in the context of sexual abuse allegations against its clergymen is still, today, of paramount importance to the Church. This is demonstrated by the institution's attempts to evade litigation by settling cases outside of court and away from the public eye.²¹⁹ Since 2018, out-of-court settlements and civil damages paid by the Church to victims of clergy abuse have reached the astonishing amount of \$3.8 billion.²²⁰ After mak-

²¹⁶ *Id.*

²¹⁷ Jeffery Pruzan, *Abuse, Mediation and the Catholic Church: How Enforcing and Improving Existing Statutes Will Help Victims Recover*, 13 *CARDOZO J. CONFLICT RESOL.* 593, 596 (2012); see also Dianne Post, *Mediation Can Make Bad Worse*, 14 *NAT'L L.J.* 19, 19 (1992) (noting that "mediation is based on a therapeutic theory" with its focus on communication and private resolutions that are specifically custom-tailored to the needs of the individual parties).

²¹⁸ *Id.*

²¹⁹ See *Confidentiality in Settlement Agreements Is a Virtual Necessity*, AMERICAN BAR ASSOCIATION (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity/ (arguing "[i]ncluding a confidentiality provision in a settlement agreement is generally not only good practice for both sides, but for a defendant, it's a virtual necessity." Including a confidentiality clause goes hand in hand with the reason for settling cases—"shut down the litigation quickly" and explaining that "This is why most potential public relations litigation nightmares are kept under wraps by means of settlements with well-drafted confidentiality agreements.").

²²⁰ Bernadette Deron, *The Catholic Church Reportedly Spent \$3.8 Billion In Abuse Pay-Offs*, ALL THAT'S INTERESTING (Aug. 27, 2018), <https://allthatsinteresting.com/catholic-church-abuse> (stating that the Catholic Church has been paying out sexual abuse victims since the 1980's and

ing large settlement payments to victims of abuse, approximately 20 dioceses and religious orders have subsequently filed for bankruptcy.²²¹

Over the years, the Church has attempted to lower the amount awarded to victims during negotiations by arguing that the staggering number of additional claims asserted by victims coupled with the Church's desire to award fair compensation to all, poses too great a financial burden on the Church.²²² To counter this position, Doyle, a consultant in 200 cases of this nature, has argued, "the archdiocese should start being a church and stop being a kingdom and divest itself of some of its property, if that's what it needs to do."²²³ Critics also fear that if the Church is allowed to settle sexual abuse cases for less compensation it will establish harmful precedent for what is considered to be the benchmark for fair damages in future cases.²²⁴

Despite the claimed impact the financial burden has placed on the Church, the Church has continued to partake in negotiations and mediations to prevent secular courts from delving into private Church practices. Its continued participation in mediation arguably undermines the claim that the Church's reluctance to properly address the issue of clergy sexual abuse is strictly motivated by its financial limitations given the \$30 billion in wealth the Church has accumulated throughout generations.²²⁵ This advances the idea that the driving force demanding use of ADR is imbedded in the

"the out-of-court settlements and civil suits cases have cost the church a staggering \$3.8 billion.").

²²¹ Elizabeth Llorente, *Clergy Sex Abuse Has Cost Catholic Church \$3 Billion in Settlements*, FOX NEWS (Aug. 19, 2018), <https://www.foxnews.com/us/clergy-sex-abuse-has-cost-catholic-church-3-billion-in-settlements>.

²²² Michael Rezendes, *\$10m Geoghan Deal Is Dwarfed by Others*, BOSTON GLOBE (Sept. 8, 2002), archive.boston.com/globe/spotlight/abuse/stories3/090802_geoghan.htm.

²²³ *Id.*

²²⁴ *Id.* In Boston, 86 victims came forward accusing priest John J. Geoghan of sexual abuse. As discussed above, this situation was one of the most widely broadcasted scandals involving clergy sexual abuse at a time when the public was only beginning to comprehend the scope of this catastrophic issue. In negotiations, the Church made an initial offer of \$10 million to be distributed among all 86 victims. Church spokesman Reverend Christopher Coyne attempted to justify this number stating, "In the Archdiocese of Boston we're dealing with a large number of victims in comparison to some other areas, while the funds that are available through insurance and through archdiocesan funds and disposable property are limited." Jeffrey Anderson countered the Church's argument, expressing concern that "the \$10 million figure is so low that, if it is approved, [not only will] other dioceses . . . attempt to use it as a standard," but the figure itself does not provide full reparations to the 86 victims in this case.

²²⁵ Ben Schneiders ET AL., *With \$30b in Wealth, Why is the Catholic Church Struggling to Pay for Justice?*, SYDNEY MORNING HERALD (Feb. 11, 2018), www.smh.com.au/national/with-30b-in-wealth-why-is-the-catholic-church-struggling-to-pay-for-justice-20180208-p4yzra.html.

very cultural fabric deemed to be of the utmost importance within the seminary system—to remain highly valued in the eyes of society and free from state intervention into internal affairs, in turn, keeping the Church answerable to itself.

F. *The Church Can No Longer Sustain its Current System—
It Needs Help!*

The Church favors mediation and negotiation because the process allows the Church to conceal the true scope of criminal behavior within its walls.²²⁶ Settling disputes outside of court also shields the Church from substantial embarrassment and liability that may arise during the discovery process as damaging information has the potential to expose the Church's system of cover-up by highlighting its practice of protecting abusive clergymen at the cost of victimized children.²²⁷ Despite the fact that the Church has used mediation's confidential nature as means of shielding itself from public accountability and preventing access to the secrete archives, the global campaign to uncover the spiritual manipulation and sexual coercion within its walls has greatly stigmatized these efforts.²²⁸ Widespread investigations into sexual misconduct occurring within the institution has revealed a "playbook for concealing the truth"²²⁹ and the international community is demanding change. If the Church wishes to uphold its current cachet, it must do so by affirmatively promulgating new rules and regulations in the framework of the Convention.²³⁰ Considering the long-awaited response for a conclusive declaration regarding the sexual abuse crisis and the diminished hope the international community has expressed in the Church's commitment to taking concrete steps in protecting children from sexual brutality, this Note asserts that a joint effort between the Church and the UN is not only necessary, but also the only reliable solution.

²²⁶ Pruzan, *supra* note 217 at 596; *see also* Post *supra* note 217 at 19.

²²⁷ *Id.*

²²⁸ Beth Backes, #ChurchToo, INFLUENCE (May 30, 2018), <https://influencemagazine.com/practice/churchtoo>.

²²⁹ Scott Dodd, *Pennsylvania Grand Jury Says Church Had a 'Playbook for Concealing the Truth,'* N.Y. TIMES, Aug. 14, 2018, www.nytimes.com/2018/08/14/us/pennsylvania-child-abuse-catholic-church.html.

²³⁰ *See, e.g.,* Bobette Wolski, *New Rules to Facilitate the Use of ADR in Resolving International Commercial Disputes*, 5 ADR BULLETIN 149, (2003).

IV. PROPOSAL

Despite the efforts of the UN, the Catholic Church, and secular officials to address the issue of clerical sexual misconduct, the scale of abuse world-wide has yet to waiver. As many have asserted, this is largely due to the Church's failure to accept liability and in turn, its refusal to amend its current laws, policies, and teachings.²³¹ On January 16, 2014, the United Nation's Committee of the Rights of the Child met in Geneva for its 65th session, during which time the Holy See was subject to its periodic review.²³² The Committee condemned the Holy See for failing to comply with the legal obligations bestowed upon them as signatories to the Convention.²³³ In response the Holy See largely reiterated its previous assertions and chastised the Committee for going beyond its mandate, arguing they lacked any authority over the institution to make their recommendations and requests.²³⁴ Notably, the Holy See expressly denied neglecting to implement the Convention properly, arguing that it contracted into the Convention with "reservations and interpretative declaration."²³⁵ Central to the Committee's recommendations were the issues of transparency, failure to fully implement the Convention, the systematic cover-up perpetuated by church leaders, and the continued existence of laws and policies²³⁶ contrary to combating abuse.

Despite the recommendations and its obligations under the Convention, the Holy See has yet to implement any of the CRC's suggestions, rather "in dealing with allegations of child sexual abuse, the Holy See has consistently placed the preservation of the reputation of the Church and the protection of the perpetrators above the child's best interests."²³⁷ Consequently, in order to ef-

²³¹ Angelina Chapin, *The Catholic Church Ignores This Child Sexual Abuse Law*, HUFFINGTON POST (Aug. 16, 2018), https://www.huffpost.com/entry/catholic-church-mandatory-reporting-sex-abuse_n_5b74c725e4b02b415d752ed8.

²³² *Committee on the Rights of the Child Holds Sixty-fifth Session in Geneva from 13 to 31 January 2014*, U.N. HUM. RIGHTS OFF. OF THE HIGH COMMISSIONER (Jan. 9, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14158&LangID=E>.

²³³ Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

²³⁴ *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

²³⁵ *Id.*

²³⁶ Convention on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, U.N. Doc. CRC/C/VAT/CO/2 (Feb. 24, 2004).

²³⁷ *Id.*

fectively address the issue of clergy abuse on a world-wide level and ensure the implementation of proper substantive rules and appropriate procedures into the Code of Canon Law this Note proposes that the use of a neutral mediator is necessary to promulgate legislation specifically for the Catholic Church, rather than continuing to succumb to Church-imposed obstacles and tediously wait for the Holy See to have a change of heart. However, as the Holy See continues to affirm its “commitment to mak[ing] protection of the child a priority”²³⁸ the institution has made clear that measures will only be employed “according to the moral and religious values offered by Catholic doctrine”.²³⁹ Notably, the Holy See plans to continue this commitment, without adopting the Committee’s recommendations, as they constitute an unacceptable “attempt to interfere with Catholic Church teaching on the dignity of human person and in the exercise of religious freedom.”²⁴⁰ Although this rhetoric indicates that the Holy See will never fully comply with the current terms of the Convention, it is encouraging in that a mediator may be able to assist in creating a joint resolution within the framework of the Convention and viewed as acceptable to the Church if developed in accord with Catholic Doctrine.

This Note proposes that the United Nations Committee on the Rights of the Child enter into mediation with the Holy See, through a paradigm of interest-based negotiations, in order to (1) promulgate new and specifically tailored legislation, which the Supreme Pontiff shall implement into canon law; (2) negotiate which canonical provisions and internal directives to amend and repeal; (3) create a committee charged with overseeing the implementation and regulation of the newly enacted laws and practices across their designated jurisdictions; and (4) establish a comprehensive network of dispute resolution tribunals throughout the diocesan network responsible for mediating or arbitrating future disputes.

²³⁸ *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

²³⁹ *Id.* ¶ 21.

²⁴⁰ *Id.* ¶ 19.

A. *Mediating Negotiations between the Holy See and the United Nations Committee on the Rights of the Child*

As mentioned above, “mediation is an assisted and facilitated negotiation carried out by a third party.”²⁴¹ Based on the current tumultuous relationship between the Committee and the Holy See, this Note proposes that mediation is the best method to devise an agreement the Holy See will embrace in conformity with Catholic law and the CRC will view as acceptable under the principles of the Convention. Here, the presence of the mediator is essential due to the current impasse resulting from each party’s staunch position on the Convention.

There are two negotiation paradigms that can be used in mediation: position-based and interest-based.²⁴² Interest-based negotiation is a method of negotiation where the parties focus on developing mutually acceptable solutions by concentrating on the their common interests rather than their respective positions or individual powers.²⁴³ Currently, the Holy See and the CRC are in stark disagreement regarding how to combat the issue of clerical abuse spreading throughout the religious order. The CRC continues to claim the power to compel the Church to implement the Convention into canon law, amend relevant provisions and remove those it deems incompatible with the Convention’s purpose.²⁴⁴ Conversely, the Holy See continues to reject the CRC’s authority and refuses to conform its practices to the Convention’s mandate.²⁴⁵ This tension illustrates the parties’ unworkable negotiation paradigm—positional negotiations. Positional negotiations, which in contrast to interest-based negotiations, focuses on the party’s narrow stance on a specific subject.²⁴⁶ This adversarial technique forgoes the notion of transparency and collaboration which is cen-

²⁴¹ Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, UNESCO (2003) (quoting GOLDBERG, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* (2d ed. 1992)).

²⁴² Neil Katz & Kevin McNulty, *Interest-Based Negotiation*, MAXWELL (1995), <https://www.maxwell.syr.edu/uploadedFiles/parcc/cmc/Interested-Based%20Negotiation%20NK.pdf>.

²⁴³ Brad Spangler, *Integrative or Interest-Based Bargaining*, BEYOND INTRACTABILITY (June 2003), https://www.beyondintractability.org/essay/interest-based_bargaining.

²⁴⁴ UN Committee on the Rights of the Child (CRC), *Concluding observations on the second periodic report of the Holy See*, Jan. 31, 2014, CRC/C/VAT/CO/2.

²⁴⁵ *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

²⁴⁶ Mark Geiger, *Interest Based Bargaining*, <https://www.blaney.com/files/Interest-Based-Bargaining.pdf> (last visited Nov. 18, 2018).

tral to interest-based negotiations and focuses on objective criteria independent of the other parties' interests.²⁴⁷

The premise behind entering into interest-based negotiation is simple; both parties have something to gain from the negotiation. By centering the discussion on the individual interests underlying each parties position, this negotiation style opens the door to a variety of possible solutions that can be used in crafting creative legislation, custom-tailored to the needs and fundamental interests of both sides.²⁴⁸

Given the Holy See's long-standing and uncompromising position of maintaining absolute sovereignty, in conjunction with its unwavering dedication to secrecy,²⁴⁹ one might ask why the Holy See would agree to participate in mediation, the process and result of which would open the doors of the Church to the outside world? The answer is simple. The Holy See's failure to affirmatively act, in a manner the CRC deems proper, is slowly causing the institution to lose its ability to assert unwavering dominance over the international community. Neither the CRC nor the international community is willing to continuously sit back in deference to the Catholic Church because of its divine nature and claim of absolute spiritual sovereignty. Additionally, as noted above, as a non-member state with permanent observer status and as a signatory of the Convention, the Holy See has placed itself squarely within the confines of UN jurisdiction and as such is subject to UN sanctions.²⁵⁰ The Holy See has a strong interest in maintaining its status and relationship with the UN and its members.²⁵¹ After being reprimanded in Geneva it is evident that the UN has taken the position that it is

²⁴⁷ *Id.*

²⁴⁸ Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, UNESCO (2003).

²⁴⁹ Michelle Boorstein & Paul Farhi, *Why Juicy Vatican Secrets are Getting Harder to Keep, Even Under Pope Francis*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/11/06/why-juicy-vatican-secrets-are-getting-harder-to-keep-even-under-pope-francis/?utm_term=.Aa3d42418177.https://www.washingtonpost.com/news/acts-of-faith/wp/2015/11/06/why-juicy-vatican-secrets-are-getting-harder-to-keep-even-under-pope-francis/?utm_term=.aa3d42418177.

²⁵⁰ U.N. Charter, *supra* note 182, at art. 2, ¶ 6 ("The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.").

²⁵¹ *See generally* The Catholic Church at the United Nations, Catholics for choice (last visited Nov. 1, 2020), <http://www.catholicsforchoice.org/wp-content/uploads/2014/08/2013-See-Change.pdf>.

ready and willing to intervene in the matter.²⁵² Therefore, this Note argues it is in the best interest of the Holy See to voluntarily agree to mediation in order to ensure its interests are accounted for before the UN either imposes the full Convention upon the Holy See or revokes its observer status.

Due to the complex nature of the disputes arising in the international arena, reaching an amicable resolution while simultaneously maintaining relationships and strengthening partnerships is critical to forming a mutually acceptable and lasting agreement. As such, the UN has expanded its use of mediation; launching numerous initiatives to enhance its capacity to mediate disputes in the name of human rights.²⁵³ This Note suggests that the UN Secretary-General employ his High-Level Advisory Board on Mediation (hereinafter “Panel”) to mediate this resolution.²⁵⁴ Further, this Note proposes that each party choose one member from the 18 member Panel to jointly facilitate the mediation. Sitting on the Panel are “current and former global leaders, [religious leaders], senior officials, and renowned experts – bring[ing] together an unparalleled range of experience, skills [and] knowledge.”²⁵⁵

There are many advantages in using members of the Panel as the mediators. First, employing credible figures to mediate the dispute fosters trust in the process, and enables constructive dialogue. Additionally, the parties are more likely to be transparent with the mediators, and in turn each other, if the mediators are viewed as competent in handling disputes of a sensitive nature.

Whereas the cornerstone of interest-based negotiations is transparency, the utilization of Panel members as the mediator will offer the Holy See a dimension of security and assurance vital to promoting unfettered communication and useful dialogue. This is essential in order to overcome the Holy See’s staunch commitment to confidentiality. If the parties agree to be transparent with their “needs, concerns, fears, [and] desires . . . it is likely that they will be

²⁵² Lizzy Davies & Henry McDonald, *UN denounces Vatican over child abuse and demands immediate action*, *THE GUARDIAN* (Feb. 5, 2014), <https://www.theguardian.com/world/2014/feb/05/un-denounces-vatican-child-abuse>.

²⁵³ U.N. Secretary-General, *United Nations Activities in Support of Mediation*, U.N. Doc. A/72/115 (June 27, 2017).

²⁵⁴ See *Secretary-General’s High-Level Advisory Board on Mediation*, UNITED NATIONS, (Sept. 13, 2017), <https://www.un.org/sg/en/content/sg/personnel-appointments/2017-09-13/secretary-general’s-high-level-advisory-board-mediation>.

²⁵⁵ See *id.*

easier to meet.”²⁵⁶ Whether the interests align or sharply contrast, when successfully negotiated, each party will walk away with his or her interests protected and advanced. Further, by creating an environment of confidence, competence, and credibility, the Panel will be able to leverage its relationship with the parties and in turn, influence the trajectory of the conflict in a constructive fashion.

By agreeing to mediate, using an interest-based negotiation approach, the parties can come to an agreement specifically designed to fall within the framework of Catholic Law and teachings while simultaneously upholding the central commandments of the Convention. For example, when the Holy See stood before the CRC in Geneva, the Committee interrogated the Holy See on its failure to turn over internal documents potentially useful in holding abusers accountable.²⁵⁷ In response, the Holy See simply reiterated its policy of secrecy and has yet to turn over these documents.²⁵⁸ In an interest-based mediation the mediator would be able to extract from the Holy See the true reasons behind its refusal to turn over the requested documents. Whether it be the fear of the public obtaining them or the CRC using the information garnered from the documents to further impose obligations on the Church, once the interest underlying the position has been disclosed the parties can find a solution that best conforms to that specific interest.

Further, allowing the Holy See to participate in designing and shaping the legislation to be adopted into canon law performs the important function of fulfilling the religious order’s identity based needs.²⁵⁹ The Holy See has maintained the position that it will only consider implementing the Convention’s norms that are in line with Catholic Doctrine and Catholic Teachings.²⁶⁰ In response to the CRC’s recommendations, the Holy See “reserve[ed] to itself

²⁵⁶ Jean-François Tremblay, *From Principled Negotiation to Interest-based Bargaining*, 4 UNIVERSAL J. INDUS. AND BUS. MGMT. 71, www.hrpub.org/download/20160630/UJIBM5-11606991.pdf.

²⁵⁷ *United Nations Recommendations for Vatican Accountability for Sexual Violence in the Church*, CTR. FOR CONST. RTS. (Sept. 22, 2015), <https://ccrjustice.org/UnitedNationsRecommendsVaticanAccountability>.

²⁵⁸ *Id.*

²⁵⁹ See Douglas Noll, *A Theory of Mediation*, DISPUTE RESOL. J. (Feb. 2001) www.mediationtools.com/articles/ART%20Noll%20A%20Theory%20of%20Mediation. (Defining identity-based needs “concern self-esteem, face, impression management, and social identity.”).

²⁶⁰ *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*, VATICAN, http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140205_concluding-observations-rights-child_en.html#_ftnref3 (last visited Jan. 1, 2019).

the exclusive competence to interpret” Canon Law.²⁶¹ These proclamations, viewed in light of the Holy See’s righteous superiority, advances the significance of the Holy See feeling as though it has kept its identity in the new laws that the CRC demands it implement. The Catholic Church is an absolute monarchy that maintains internal order through its stringent controls and its non-negotiable requirement of papal allegiance.²⁶² If the Holy See is concerned with “maintaining a perception of control, confidence, and independence from the outside world, then yielding to predetermined rules and process” fails to serve the Holy See’s interest in maintaining its identity.²⁶³ By participating in a process undertaken for the sole purpose of conforming the laws to the identity of the Church, mediation can foster communication, participation and compliance in a manner the Convention has failed to do. Additionally, this process will promote the legitimacy of these laws. Perceptions which will directly impact the Church’s willingness to comply with the agreement and implement them into canon law.²⁶⁴

B. *New Mediation and Arbitration Tribunals Under the Agreement*

To fully combat the issue of clerical child sexual abuse the problem must not only be addressed through a change in the substantive laws governing the institution, but the procedural process provided to each individual victim seeking redress. As previously argued, the current canonical procedure is considerably tainted by the institution’s hierarchical structure and the monarch’s unrestricted authority to preempt any facially equitable procedure by employing subsequent laws and policies. This scheme, lacking any system of separation of powers or checks and balances, arguably has caused two major issues: (1) a deep-rooted system of cover-up and corruption; and (2) a judicial system the Catholic laity cannot rely on, as its main focus is on exonerating the institution rather than the plight of the victims harmed in the arms of their spiritual leaders. To rid the system of its current improprieties this Note

²⁶¹ *Id.*

²⁶² *How the Church Dominated Life in the Middle Ages*, HISTORY HIT (Nov. 11, 2018), www.historyhit.com/how-the-church-dominated-life-in-the-middle-ages/.

²⁶³ Anna Spain, *Using International Dispute Resolution to Address the Compliance Question in International Law*, 40 CARDOZO J. CONFLICT RESOL. 807, 815 (2009).

²⁶⁴ *Id.*

proposes the establishment of a new ADR program which would enable victims and accusers to assert their claims and defenses in a truly neutral forum.

1. Proposed Plan: Comprehensive Network of Regional Mediation & Arbitration Tribunals

The proposal below seeks to establish a comprehensive network of mediation and arbitration tribunals, positioned across the catholic diocese network, in order to provide victims of clergy abuse a fair process when asserting sexual abuse grievances, as well as allow for greater transparency and accountability. This goal will be accomplished by removing the judicial process from the Church and placing it under the authority of a fully independent UN subsidiary organ: the Dispute Resolution Commission on the Malfeasance of the Child (hereinafter “CMC”).

The CMC would operate as a new subsidiary organ of the UN Security Council,²⁶⁵ comprised of “18 independent experts who are persons of high moral character and recognized competence in the field of” ADR and human rights.²⁶⁶ The CMC’s first task would be developing a roster of acceptable arbitrators and mediators located across the various diocese in each member state.²⁶⁷ The neutrals on this roster would consist of individuals who are familiar with the rights of the child and/or religious doctrine and are neither affiliated with the Church, nor currently associated with the secular courts or the criminal justice system.²⁶⁸ Once compiled, these lists would be distributed to the President of each state’s respective episcopal conference,²⁶⁹ who shall assemble the bishops for review and distribution of the roster. Upon review, the bishops may remove from the list any arbitrators or mediators they believe unqualified to conduct these proceedings. This review process is essential, as it will illustrate to church officials that a legitimate and

²⁶⁵ See U.N. Charter, *supra* note 182, art. 29 (“The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.”); *Security Council & Mediation*, UNITED NATIONS PEACEMAKER, <https://peacemaker.un.org/peacemaking-mandate/security-council> (last visited Feb. 1, 2019) (“[The Security Council] has used this power to establish subsidiary organs to carry out mediation.”).

²⁶⁶ *Committee on the Rights of the Child*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER, ohchr.org/en/hrbodies/crc/pages/membership.aspx (last visited Feb. 1, 2019).

²⁶⁷ The United Nations representatives from each member state shall assist the CMC in undertaking this task.

²⁶⁸ For example: teachers, professors, law guardians, retired family court judges, religious experts, etc.

²⁶⁹ *Christus Dominus* Art. 38 (An Episcopal Conference is a formal assembly of every bishop in a given territory. Every bishop within the Catholic Church belongs to a conference.).

impartial system is being created for both victims and clergyman. The approved neutrals will make up the Agency of Neutrals on the Malfeasance of the Child (hereinafter “Agency”), a worldwide network of arbitrators and mediators that will operate throughout and within their respective regions.²⁷⁰ Further, the CMC shall hire administrative officials to work in each region’s diocesan offices.

When a dispute arises, three Agency members shall preside over the dispute: one chosen by the offender, one by the victim, and one assigned by the respective administrative office. Having each party to the dispute choose a third-party neutral empowers both parties to speak up and have their voices heard and accounted for during the dispute process. This system will ensure integrity, fairness and impartiality throughout the entire process.

Under this framework, the victim has one of two dispute resolution options—Mediation or Arbitration. The mechanism chosen will largely depend on what the victim’s goal is for entering into the dispute resolution process and what outcome they are seeking to obtain. Notably, in order for this new process to work, three provisions must be enacted into the CMC’s charter as they differ from the traditional elements of each processes. First, in both processes the victim and offender will agree to sign a confidentiality agreement, however; the Panel’s obligation to confidentiality is limited.²⁷¹ Second, the alleged offender is required to participate in the victim’s chosen dispute resolution method. Lastly, any verdict and/or award rendered by the Panel is binding upon the parties.

Due to the circumstances, it is extremely important that the process be conducted in a victim-sensitive manner while simultaneously attending to the needs of the offender. Victim-offender mediation (hereinafter “VOM”), is a restorative justice approach that provides victims the opportunity to confront their offender directly.²⁷² VOM rests on the notion that by utilizing specific techniques the mediator can produce a safe and comfortable environment conducive to meaningful dialogue. This process is mainly for victims who wish to directly express to their offender

²⁷⁰ See AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org> (last visited July 5, 2019). The American Arbitration Association (“AAA”) is the world’s largest private global provider of ADR services and uses a similar business model to that described in this Note. The AAA has developed a national roster of arbitrators and mediators who possess the knowledge, prowess, and proficiency in particular fields. Once an arbitration or mediation is initiated the parties select a panel of arbitrators from the roster to administer the dispute.

²⁷¹ See *infra* Part IV. C.

²⁷² *Victim/Offender Mediation*, COURTS.CA, www.courts.ca.gov/documents/VictimOffenderMediation.pdf (last visited Feb. 7, 2019).

the full impact his actions had on their lives, need answers to important questions, and who ultimately wish to repair their relationship with the Catholic Church.²⁷³ Notably, the desired results produced by this system are harmonious with the restorative justice approach historically maintained by the Church to urge personal responsibility and reconciliation with God through its confessional system.²⁷⁴ VOM is primarily dialogue driven, which has proven to be “central to both the empowerment of the victims and the development of victim empathy in the offenders, which can help to prevent criminal behavior in the future.”²⁷⁵

Under this Note’s proposal, if victims chose to participate in VOM, the only restitution offered will be Church funded therapy if the victim so desires.²⁷⁶ This is largely due to studies providing that the least restorative impact is rendered when financial restitution is a focus in the discussions.²⁷⁷ By removing the threat of monetary penalties against the accused victims gain the benefit of engaging in truthful, open, and unrestricted dialogue with their offenders in a structured amiable environment.

However, if a victim is seeking restitution, the arbitration process is more likely suited to their needs. Under this Note’s proposal, arbitration will proceed in a trial-like manner. The victim will file a complaint with their regional Agency, who will immediately notify the accused and a date to file an answer will be provided. Within 30 days of the offender being notified, a conference call will take place between the parties’ counsel and a member of the Agency office. During this call each side will choose their arbitrator,²⁷⁸ discovery demands will be made, and an exchange date and hearing date will be scheduled. Witness lists and discovery demands will also be provided to the Agency who will notify wit-

²⁷³ *Victim-Offender Mediation: A National Perspective*, OFFICE FOR VICTIMS OF CRIME (Apr. 2000), www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

²⁷⁴ Diana L. Grimes, *Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases*, 63 WASH. & LEE. L. REV. 1693, 1702 (2006).

²⁷⁵ *Victim-Offender Mediation: A National Perspective*, OFFICE FOR VICTIMS OF CRIME (Apr. 2000), www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

²⁷⁶ Although mediation is generally not a binding process, when accepting the terms of the CMC a provision shall be incorporated making all judgements providing for Church funded therapy binding on the offender’s diocese. Details regarding the time frame of these payments will be determined by the Panel and will be binding.

²⁷⁷ *Victim-Offender Mediation: A National Perspective*, NCJRS (Apr. 2000), https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

²⁷⁸ The arbitrator chosen by the CMC will remain anonymous until the hearing. Additionally, each party shall provide the Agency with a list of three suitable arbitrators, in the parties’ preferential order. The agency will handle scheduling.

nesses of their obligation and maintain records of all documents requested. At the hearing, each side will have the opportunity to present their case to the Panel, who will render a decision within 30 days. All awards are final and binding.

For a victim who wishes to seek justice through an adversarial system that produces winners and losers, arbitration provides them with that opportunity.²⁷⁹ Under this plan the presence of an arbitration panel provides multiple perspectives in the analysis of each case and minimizes the risk a final decision will be biased, uninformed or inequitable. Additionally, the risk either side is exploited in the media is greatly minimized by employment of a private process.

C. Transparency and Accountability Under this New System

It is evident that the main goal of the Church is secrecy and the avoidance of liability, as conceding guilt would damage its imperial and apostolic status. In order to ensure the Church will be held accountable and its practices made more transparent, this Note proposes that the regional administrative offices keep records of all Church officials who have been accused of sexual abuse, other officials mentioned during proceedings, and their role in the alleged abuse, as well as all judgements rendered. Additionally, the administrative offices will keep records of all discovery materials provided during each arbitration or mediation proceeding and conduct thorough analyses regarding additional practices, customs and internal laws, and directives uncovered in the documents provided.

Once every two years the CMC shall hold a conference at the UN where the Agency president from each diocesan region shall present a report to the CMC, the other Agency presidents, the CRC, and the Holy See delineating their region's annual findings. After all reports are made the CMC shall make conclusive findings regarding the Church's level of compliance with its new laws, the progress the Church has made, if any, in combating the issue of sexual abuse, reservations the CMC may have, new recommendations, and the success/failure rate of the program. The CMC's conclusions shall be made known to the public in a written report distributed through the CMC's webpage, along with a list of all of-

²⁷⁹ Lawrence A. Cunningham, *So Much for Your Day in Court*, *BALT. SUN* (Mar. 21, 2012), www.baltimoresun.com/news/opinion/oped/bs-ed-arbitration-20120321-story.html.

ficials who have been found guilty in the arbitration process. This will provide the public with the transparency they need, while at the same time creating the largely private and highly regulated process the Holy See would require in signing the mediated agreement.

V. CONCLUSION

The public revelation of the scope of systematic abuse that has long infiltrated the Church has presented the international community with an unprecedented crisis. As a result, the international community has forgone its subservience and the Catholic Church, which was once viewed as an untouchable spiritual sovereign, is facing a social movement that is demanding change in the institution's ancient policies and practices. In an effort to maintain its provincial status, all amicable negotiations between the Church and the international community have been exhausted. My proposal to utilize the professional competence of the United Nations to mediate new ecclesiastical laws while still in harmony with Catholic doctrine and the spirit of the Convention will likely facilitate a long-awaited solution. Additionally, the framework set forth in this proposal, for the promulgation of diocesan regional mediation and arbitration tribunals, tackles many of the problems perpetrated by the Church's current judicial process, properly shifting the balance of power from the hands of the abused into the hands of the laity.