

HOLDING THE CATHOLIC CHURCH RESPONSIBLE  
ON AN INTERNATIONAL LEVEL: THE  
FEASIBILITY OF TAKING HIGH-RANKING  
OFFICIALS TO THE INTERNATIONAL  
CRIMINAL COURT

HEATHER McADAMS\*

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*In 2002, U.S. reporters shocked the world with the revelation that the Catholic Church had spent decades systematically hiding widespread sexual*

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*abuse of minors committed by clergy, a coverup that reached as high as the Vatican. Since then, several countries have brought criminal charges against individual priests accused of sexual abuse. However, many found this piecemeal justice unsatisfactory. In 2011, an abuse survivors' organization lodged a formal submission to the International Criminal Court (ICC), accusing Pope Benedict XVI and other officials of committing crimes against humanity by concealing sexual crimes around the globe. The ICC Prosecutor rejected the submission, citing lack of temporal and subject-matter jurisdiction. However, in 2018, an individual from Australia, Peter Gogarty, submitted the claim again. Gogarty reframed the situation so as to avoid several weaknesses in the 2011 submission, specifically those related to the ICC Prosecutor's previous jurisdictional objections. The response to this submission is still pending.*

*This note looks to both submissions and ICC practice in order to answer three questions: Whether circumstances have changed enough for Gogarty's submission to succeed where its predecessor failed; what are the necessary circumstances to convince an ICC Prosecutor to launch an investigation; and why exactly should the ICC be involved? This note attempts to answer these questions first by examining the reasons for bringing the Catholic Church coverup of sexual abuse to the ICC specifically. Next, the note examines the details of the dismissal of the first failed submission. The note then considers potential issues with current and future submissions based on the jurisdiction and admissibility requirements of the ICC. Finally, the note asks whether the current circumstances meet these requirements, and, if not, whether any foreseeable circumstances could. Ultimately, the note will demonstrate that the situation, though sensitive and complicated, warrants ICC investigation, and that circumstances have changed enough to justify investigation where the ICC Prosecutor could not in 2013.*

## I. INTRODUCTION

In 2002, *The Boston Globe* shocked the United States—and, ultimately, the world—when its Spotlight team published a detailed investigation into the Catholic Church's history of covering up the sexual abuse of minors committed by its clergy.<sup>1</sup> This publication sparked a global response that motivated other countries to similarly investigate, and as results poured in from legal and journalistic investigations around the world, the horrifyingly grand scope of the underage sexual abuse became clear. There were abusive clergy members in countries on almost every continent, with the United States and Ireland

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1. Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html> [<https://perma.cc/R82A-3GYQ>].

reporting a particularly high number of cases.<sup>2</sup> Instances of abuse had been frequently ignored or covered up since the 1950s: A 2004 study revealed that between 1950 and 2002, 10,667 individuals in the United States alone had accused 4392 Catholic priests or deacons of underage sexual abuse, putting the estimate of abusive clergy in the United States at 4% of all active priests and deacons.<sup>3</sup> The U.S. Conference of Catholic Bishops later released a report that extended this range by sixteen years (between 1950 and 2018) and adjusted the estimates to 20,052 victims and 7002 allegedly abusive priests, findings which increased the estimated percentage of abusive priests to 5.9% of all active priests.<sup>4</sup>

There were two general reasons for the world's horror at the exposure of the abuse: the victims were children, and the prevalence indicated that the entire Catholic Church was complicit in hiding the abuse. It is difficult to understate the revulsion associated with abuse of children, particularly sexual abuse. The impact of sexual abuse on children has been studied for decades, and its effects are well-known: Abuse survivors frequently commit suicide, develop addictions, suffer from mental disorders, and struggle to form and maintain relationships.<sup>5</sup> Further, there exists a cross-cultural impulse to protect children as both particularly vulnerable members of society and representative of the society's future. Unwanted sexual contact is considered a particularly horrific form of abuse. Domestic statutory rape laws around the world suggest a common

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2. Paul Michael Garrett, *A "Catastrophic, Inept, Self-Serving" Church? Re-examining Three Reports on Child Abuse in the Republic of Ireland*, 24 J. PROGRESSIVE HUM. SERVS. 43, 45 (2013).

3. JOHN JAY COLL. OF CRIMINAL JUSTICE, *THE NATURE AND SCOPE OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 1950–2002* 4, 26–27 (2004), <https://www.usccb.org/sites/default/files/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf> [<https://perma.cc/Q4G8-26M4>].

4. *Collated USCCB Data on the Number of U.S. Priests Accused of Sexually Abusing Children and the Numbers of Persons Alleging Abuse 1950–2018*, BISHOPACCOUNTABILITY.ORG, [http://www.bishop-accountability.org/AtAGlanceUSCCB/\\_Yearly\\_Data\\_on\\_Accused\\_Priests.htm](http://www.bishop-accountability.org/AtAGlanceUSCCB/_Yearly_Data_on_Accused_Priests.htm) [<https://perma.cc/2GPB-X4G6>] (last updated Feb. 16, 2020).

5. See generally Shanta R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREVENTIVE MED. 430 (2005) (reporting the results of a retrospective study examining the various consequences of childhood sexual abuse).

belief that children should not engage in sexual contact because they are unable to give fully-informed consent.<sup>6</sup> Similarly, international criminal law has evolved to account for the inherent incapacity of children, even in circumstances in which they are perpetrators.<sup>7</sup> The International Criminal Court (ICC) has not only recognized conscription of children as a war crime, but has charged militia leaders with sexual violence against the very children that formed part of their militia.<sup>8</sup>

Perhaps more drastically, *The Globe's* report indicated that the abuse of children was not just the doing of a few bad actors, but was ingrained in the system of the Catholic Church. As the Spotlight team investigated, its story transformed from a summary of the allegations against several pedophile priests into an exposé of the efforts of the Boston diocese to hide the actions of those priests at any cost.<sup>9</sup> The more allegations the reporters uncovered, the more obvious it became that senior clergy must have known about the abuse. The strict hierarchical structure of the Church supported this conclusion, as it would be difficult for priests to consistently engage in abusive behavior without their superiors knowing.<sup>10</sup> But there was concrete evidence beyond conjecture that the Church coordinated the coverup. The conclusion that a large-scale operation existed was inevitable in the face of consistent proof that senior clergy knew about the abuse and handled it by quietly

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6. See *Legal Ages of Consent by Country*, AGEOFCONSENT.NET, <https://www.ageofconsent.net/world> [<https://perma.cc/YB4P-3RBU>] (last visited Nov. 16, 2020) (explaining that sexual intercourse with someone under the age of consent constitutes statutory rape and listing the legal age of consent in countries around the world).

7. See generally Noëlle Quénié, *Does and Should International Law Prohibit the Prosecution of Children for War Crimes?*, 28 EUR. J. INT'L L. 433, 435 (2017) (“[T]here is a growing tendency on the international plane to view children almost exclusively as victims of armed conflict and consider them as unable to understand their own actions in the context of the conflict.”).

8. Fatou Bensouda, Prosecutor, Int'l. Crim. Ct., *Children and International Criminal Justice*, Keynote Address at the University of Georgia School of Law (Oct. 28, 2014), in 43 GA. J. INT'L & COMP. L. 591, 592–95 (2015).

9. Carroll et al., *supra* note 1.

10. See generally Carolyn M. Warner, *The Politics of Sex Abuse in Sacred Hierarchies: A Comparative Study of the Catholic Church and the Military in the United States*, 10 RELIGIONS 281 (2019) (comparing the hierarchal and insular structure of the Church to that of the military and examining how factors inherent to that structure contribute to the coverup of sexual abuse scandals).

transferring or retiring accused subordinates.<sup>11</sup> The scheme of secrecy sent a message: The Catholic Church valued its reputation and influence more than the well-being of vulnerable members of its congregation.

The widespread reporting that carried this message around the globe caused a crisis for the Catholic Church. Its congregation felt betrayed, particularly parents, victims, and the now-older children who experienced a form of survivor's guilt. Even today, of former Catholics in the United States, 27% of those who now identify as agnostic cite the abuse coverup as their reason for leaving the Church and 21% of those who are now Protestant cite the same reason.<sup>12</sup> The crisis has endured as new information has been consistently uncovered since 2002, but the summer of 2018 in particular put the Church sexual abuse scandal back in the media.<sup>13</sup> Chilean prosecutors began investigating abuse claims against clergy at the behest of the Vatican, which was attempting to back-track after Pope Francis defended a Chilean bishop with a history of abuse.<sup>14</sup> In Australia, Vatican treasurer Cardinal George Pell stood trial on multiple counts of sex abuse.<sup>15</sup> The highest-ranking Church official to face such charges, Pell was convicted in December 2018 (though was ultimately acquitted on appeal in September 2020).<sup>16</sup> In the United States, a grand

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11. See Carroll et al., *supra* note 1 (discussing various instances in which Church authorities knew of allegations against former priest John J. Geoghan and responded by transferring him to another location).

12. Julie Zauzmer et al., "Wasted Our Lives:" Catholic Sex Abuse Scandals Again Prompt a Crisis of Faith, WASH. POST (Aug. 19, 2018, 4:40 PM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/19/wasted-our-lives-catholic-sex-abuse-scandals-again-prompt-a-crisis-of-faith> [https://perma.cc/C9S7-4U2Z].

13. Daniel Burke, *How 2018 Became the Catholic Church's Year from Hell*, CNN (Dec. 29, 2018), <https://www.cnn.com/2018/12/28/world/catholic-church-2018/index.html> [https://perma.cc/5QMX-NTYE].

14. Pascale Bonnefoy, *Catholic Church Faces Reckoning in Chile as Sex Abuse Scandal Widens*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/world/americas/chile-pope-francis-catholic-church-sexual-abuse.html> [https://perma.cc/AJS8-69NR].

15. Lucie Morris-Marr & Ben Westcott, *Cardinal George Pell to Face Trial on Historical Abuse Charges*, CNN (May 1, 2018), <https://www.cnn.com//30/asia/cardinal-george-pell-trial-may-intl/index.html> [https://perma.cc/VYT5-VZBD].

16. Melissa Davey & Angela Giuffrida, *George Pell Returns to Rome After Acquittal on Child Abuse Charges*, THE GUARDIAN (Sept. 30, 2020), <https://www.theguardian.com/world/2020/sep/30/george-pell-returns-to-rome>

jury report alleged that 301 Pennsylvania priests had abused up to one thousand children in the last seventy years.<sup>17</sup> A retired cardinal from Washington state, Theodore McCarrick, was removed from the ministry in June 2018, but was stripped of his title a month later following new allegations.<sup>18</sup> This particular incident was noteworthy due to reports that Pope Francis knew about and covered up allegations against McCarrick.<sup>19</sup>

Given the controversies of 2018, it is no surprise that Peter Gogarty, an Australian survivor of Catholic clergy abuse, chose the end of that year to call for justice on a global scale, specifically through the International Criminal Court (ICC).<sup>20</sup> Abuse survivors and their supporters have long demanded accountability beyond domestic remedies, and such a resolution would be particularly fitting here. International action would more appropriately reflect the global nature of the Church's misdeeds, signal the global community's attitude toward those who abuse children, and proportionally punish the entire organization. Because of Vatican City's "sovereign status,"<sup>21</sup> international criminal law offers another benefit: Popes and senior Vatican officials lose the head-of-state immunity they are

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[www.theguardian.com/australia-news/2020/sep/30/george-pell-returns-to-rome-after-acquittal-on-child-abuse-charges](http://www.theguardian.com/australia-news/2020/sep/30/george-pell-returns-to-rome-after-acquittal-on-child-abuse-charges).

17. Alex Norcia, *A Timeline of This Summer's Horrific Catholic Abuse Scandals*, VICE (Aug. 28, 2018), [https://www.vice.com/en\\_us/article/vbjk5m/a-timeline-of-this-summers-horrific-catholic-abuse-scandals](https://www.vice.com/en_us/article/vbjk5m/a-timeline-of-this-summers-horrific-catholic-abuse-scandals) [https://perma.cc/A3LP-WFAX].

18. Elisabetta Povoledo & Sharon Otterman, *Cardinal Theodore McCarrick Resigns Amid Sexual Abuse Scandal*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/world/europe/cardinal-theodore-mccarrick-resigns.html> [https://perma.cc/6DRK-EZVQ].

19. Emma Green, *The Sex-Abuse Scandal Has Come for Pope Francis*, ATLANTIC (Aug. 27, 2018), <https://www.theatlantic.com/international/archive/2018/08/pope-francis-sex-abuse-ireland-vigano/568615> [https://perma.cc/F5CN-NDD6].

20. Nancy Notzon, *International Criminal Court Urged to Investigate Catholic Church for the Cover-Up of Child Sexual Abuse*, ABC NEWS (Dec. 12, 2018), <https://www.abc.net.au/news/2018-12-13/church-child-sex-abuse-international-court-probe-bid/10612718> [https://perma.cc/6F7M-P9KM].

21. Jason Walsh, *Why the ICC Likely Won't Charge Pope Over Catholic Church Sex Abuses*, CHRISTIAN SCI. MONITOR (Sept. 15, 2011), <https://www.csmonitor.com/World/Europe/2011/0915/Why-the-ICC-likely-won-t-charge-pope-over-Catholic-Church-sex-abuses> [https://perma.cc/W666-F26H].

granted under international law by virtue of their high positions in the Vatican government.<sup>22</sup> The ICC is thus appealing as an avenue for justice. In fact, there already was an attempt, albeit ultimately unsuccessful, to bring the previous Pope and three of his most senior cardinals before the ICC. In 2011, the Survivors Network of those Abused by Priests (SNAP), represented by the Center for Constitutional Rights (CCR), lodged a formal submission (SNAP/CCR Submission) accusing Pope Benedict XVI and three cardinals of committing crimes against humanity by systematically concealing sexual crimes around the globe.<sup>23</sup> The ICC rejected the submission two years later.<sup>24</sup>

Gogarty lodged his submission (Gogarty Submission) in November 2018, and has yet to receive a response from the ICC.<sup>25</sup> However, this new submission raises several questions. The first question is whether circumstances have changed enough for the Gogarty Submission to succeed where the SNAP/CCR Submission failed. Much has changed since the ICC first declined to prosecute Church officials: Pope Bene-

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22. For a more detailed discussion of immunity of Vatican officials, see *infra* notes 118–21 and accompanying text.

23. Karen McVeigh, *Pope Accused of Crimes Against Humanity by Victims of Sex Abuse*, *GUARDIAN* (Sept. 13, 2011), <https://www.theguardian.com/world/2011/sep/13/pope-crimes-humanity-victims-abuse> [<https://perma.cc/56UA-ABVM>]; Tom Roberts, *Int'l Criminal Court Urged to Investigate Vatican Officials*, *NAT'L CATH. REP.* (Sept. 13, 2011), <https://www.ncronline.org/news/vatican/intl-criminal-court-urged-investigate-vatican-officials> [<https://perma.cc/USG5-7YL6>].

24. Brian Roewe, *International Criminal Court Declines to Pursue 'Crimes Against Humanity' Case Against the Vatican*, *NAT'L CATH. REP.* (June 18, 2013), <https://www.ncronline.org/news/accountability/international-criminal-court-declines-pursue-crimes-against-humanity-case> [<https://perma.cc/VW55-8MWR>]; Letter from M.P. Dillon, Head of the Info. & Evidence Unit, Office of the Prosecutor, Int'l Criminal Court, to Pamela C. Spees, Senior Staff Attorney, Ctr. for Constitutional Rights, Ref. No. OTP-CR-159/11 (May 31, 2013), *available at* [http://d3n8a8pro7vbm.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC\\_letter\\_from\\_Prosecution.pdf?1372188351](http://d3n8a8pro7vbm.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC_letter_from_Prosecution.pdf?1372188351) [<https://perma.cc/36BV-ACVV>].

25. Joanne McCarthy, *Peter Gogarty Campaigned for a Royal Commission, Now He Wants to See the Catholic Church in Court*, *NEWCASTLE HERALD* (Jan. 29, 2019), <https://www.newcastleherald.com.au/story/5873094/unfinished-business-abuse-survivors-call-on-international-court> [<https://perma.cc/ESQ5-VQK2>]. It is worth noting that such a delay is not unexpected, in light of the two-year gap between the SNAP/CCR Submission and the ICC response. *See supra* note 24 and accompanying text.

dict XVI resigned shortly before the ICC answered the first submission in 2013 and was replaced by Pope Francis; national courts around the world have uncovered further evidence in the process of doling out domestic consequences; and ICC jurisprudence has further defined elements of crimes against humanity. The second question, Gogarty Submission aside, is what the circumstances would have to be to convince an ICC Prosecutor to launch an investigation. In an effort to answer these questions, Part II of this note begins by examining the reasons for bringing the Catholic Church coverup of sexual abuse to the ICC. Next, Part III analyzes the details of the dismissal of the SNAP/CCR Submission. Finally, in Parts IV and V, the note will consider potential issues with current and future submissions based on the jurisdiction and admissibility requirements of the ICC; whether the current circumstances meet these requirements; and, if not, whether any foreseeable circumstances could. Part VI concludes, tying together the reasons for ICC involvement with the court's formal and informal requirements to determine the effectiveness of utilizing the ICC as an avenue for justice in this particular situation.

## II. WHY THE ICC IS AN APPROPRIATE FORUM TO ADDRESS THE ABUSE COVERUP

There are three overarching reasons as to why the ICC is an appropriate, if not ideal forum to address the Catholic Church sex abuse coverup: practicality, efficiency, and justice. For the high-ranking officials in the Church hierarchy, the ICC is the most practical option. Officials with immunity, such as popes and secretaries of state, cannot be prosecuted anywhere else.<sup>26</sup> Even though the ICC cannot compel states to surrender their citizens, the court can bring a case against officials even without arresting them.<sup>27</sup> This is more than can be said for any other court. Additionally, most legal systems would find prosecuting these officials troublesome, regardless of immunity issues. The Catholic Church is notorious for transferring abusive clergy, sometimes across country lines and often back to the Vatican to shield abusers from legal conse-

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26. For a more detailed discussion of immunity of Vatican officials, see *infra* notes 118–21 and accompanying text.

27. See *infra* Part V(b).



quences.<sup>28</sup> For domestic legal systems to continue pursuit of these clergy, they would need to extradite, a process that requires a treaty with the other state and can be “slow, complicated, and even cumbersome.”<sup>29</sup> These drawbacks are likely intensified when the individual sought is in the Vatican, which would be highly resistant to any extradition attempts. These obstacles would discourage states from pursuing transferred priests and could even render domestic prosecution functionally impracticable. While the ICC would not be insulated from the Vatican’s uncooperativeness or the difficulties of cross-border prosecution, it is at least familiar with these issues and better equipped to handle them.

Another benefit of ICC prosecution is efficiency. Although domestic legal systems are capable of tackling several defendants at once<sup>30</sup> and can charge defendants even when accusations surface years later,<sup>31</sup> these criminals are scattered around the globe, and each domestic system can only reach so many. Due to the sheer number of abusive clergymen, their various locations around the world, and the unpredictability of when victims will make accusations, centralized, top-down criminal liability is the best way to hold the entire system accountable. The alternative is leaving the issue to individual states to assert jurisdiction over whomever they can as claims arise, creating a rather piecemeal form of accountability. Given the scope and scale of both the abuse and coverup, holding the entire Church system accountable is a reasonable goal, and one which only the ICC can achieve. Additionally, an ICC investigation, even one that ultimately does not result in charges, would signal to certain countries that it is morally re-

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28. See Brian J. Clites, *The Catholic Church’s Grim History of Ignoring Priestly Pedophilia—and Silencing Would-Be Whistleblowers*, CONVERSATION (Oct. 9, 2018), <https://theconversation.com/the-catholic-churchs-grim-history-of-ignoring-priestly-pedophilia-and-silencing-would-be-whistleblowers-102387> [https://perma.cc/FS9X-CEFS] (“Instead of reporting rape and sexual abuse to secular authorities, bishops instead continue to transfer predatory priests from one unsuspecting parish to the next.”).

29. DAVID J. LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 452 (3d ed. 2018).

30. A grand jury in the United States identified over 300 priests in one report just last year. Norcia, *supra* note 17.

31. Last year, Australia and Chile both charged clergy members in high-profile trials. See Bonnefoy, *supra* note 14 (discussing Chile); Morris-Marr & Westcott, *supra* note 15 (discussing Australia).

sponsible and politically permissible to wield their criminal justice systems against abusive clergy. While many majority-Catholic countries, like Ireland, pursued legal action out of a sense of betrayal, others, like Poland, remain reluctant to hold Catholic clergy criminally responsible.<sup>32</sup> Still others, like India, while not majority-Catholic, are overly sensitive to the “sexual” nature of these crimes and so encourage silence.<sup>33</sup> Encouragement from a politically, religiously, and culturally neutral body such as the ICC could result in the adoption of accountability measures in such countries.

A final reason why the ICC is the ideal forum to punish those involved in the sex abuse coverup concerns the interests of justice. First, it is a central tenant of international criminal law that those higher in a chain of command bear more responsibility for international crimes because they had the most knowledge of and control over the system.<sup>34</sup> Second, a benefit of international criminal law, particularly as practiced in the ICC, is its focus on justice for victims. International criminal law’s outlook on victim participation and rehabilitation tends to result in victims enjoying greater priority in the process than in many domestic systems. The ICC granted victims participatory rights in 2006,<sup>35</sup> and since then, the ICC Prosecutor has prioritized victim participation.<sup>36</sup> While it is true that victim engagement is risky—an investigation that results in international charges could be gratifying, while an investigation that ultimately does not result in charges could be devastating to participating victims—this argument is somewhat nullified

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32. Although Poland saw a significant number of Catholic sex abuse cases, it has not set up the same formal mechanisms as the countries listed in the Gogarty Submission. *Victims Group in Poland Maps 255 Sex Abuse Cases by Priests*, NEWS24 (Oct. 8, 2018), <https://www.news24.com/World/News/victims-group-in-poland-maps-255-sex-abuse-cases-by-priests-20181008> [<https://perma.cc/9BHT-S9NV>].

33. Michael Paulson, *World Doesn’t Share US View of Scandal*, BOS. GLOBE (Apr. 8, 2002), [http://archive.boston.com/globe/spotlight/abuse/print/040802\\_world.htm](http://archive.boston.com/globe/spotlight/abuse/print/040802_world.htm) [<https://perma.cc/6FGF-ESJ8>].

34. *See In re Yamashita*, 327 U.S. 1, 15 (1946) (creating and justifying the doctrine of command responsibility).

35. LUBAN ET AL., *supra* note 29, at 791.

36. Oumar Ba, *What Jean-Pierre Bemba’s Acquittal by the ICC Means*, AL JAZEERA (June 12, 2018), <https://www.aljazeera.com/indepth/opinion/jean-pierre-bemba-acquittal-icc-means-180612121012078.html> [<https://perma.cc/JB2H-YPMC>].

by the fact that SNAP, the largest advocacy group for survivors of clergy sexual abuse, was the party that first requested ICC investigation. Finally, criminal investigation at the ICC signals that covering up child sexual abuse is as horrifying and criminal as the abuse itself. This message, insofar as it reflects the attitude of the public toward abuse coverup, is certainly in the interests of justice.

### III. *SNAP v. THE POPE, ET AL.*

Beginning in September 2011, the CCR, on behalf of SNAP, filed complaints against Church officials with the ICC, the U.N. Committee on the Rights of the Child, and the U.N. Committee Against Torture.<sup>37</sup> The two U.N. Committees reviewed the issue in 2014 and “sharply criticized the Vatican,” whose reports to both Committees are currently “overdue.”<sup>38</sup> The ICC, in contrast, declined to open a full investigation, but indicated that it would “reconsider upon submission of new evidence.”<sup>39</sup> The CCR’s current focus is urging the U.S. Department of Justice to investigate the abuse coverup.<sup>40</sup>

The SNAP/CCR Submission before the ICC, though ultimately rejected, provides a solid foundation for anyone who might later attempt to pursue justice through the ICC. Specifically, the submission requested that the ICC Prosecutor, pursuant to Article 15 of the Rome Statute of the International Criminal Court (Rome Statute), initiate an investigation “upon his own initiative” of high-level Vatican officials accused of crimes against humanity.<sup>41</sup> The submission alleged that

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37. *Snap v. the Pope, et al.*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/snap-v-pope-et-al> [https://perma.cc/7P9T-XZQC] (last updated Aug. 20, 2018).

38. *Id.* It is worth noting that, while SNAP filed similar complaints with both the ICC and the U.N. Committees at the same time, the ICC has an entirely different function and mandate than the two Committees. The opinion of the Committees did not and should not influence the legal findings and conclusions of the ICC.

39. *Id.*

40. *Id.*

41. Communication to the International Criminal Court from the Center for Constitutional Rights, on Behalf of the Survivors Network of Those Abused by Priests and Individual Victims and Survivors, Victims’ Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-Level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime

widespread sexual abuse by clergy and efforts of Vatican authorities—four in particular—to conceal the abuse constituted crimes against humanity.<sup>42</sup> The complaint notably named Pope Benedict XVI, both as pope and in his former capacity as head of the Vatican Congregation for the Doctrine of the Faith (CDF), the administrative department that handled sex abuse complaints.<sup>43</sup> The other named individuals were Angelo Sodano and Tarcisio Bertino, respectively the former Vatican Secretary of State and his 2006 successor, and U.S. Cardinal William Levada, whom Pope Benedict XVI appointed to succeed him as Prefect for the CDF in 2005.<sup>44</sup>

Several months before filing the formal submission in September 2011, the CCR sent an initial filing communicating its intent to file a more detailed brief.<sup>45</sup> The initial filing provided a summary of the CCR's argument that the conduct of to-be-named individuals falls within ICC jurisdiction. Their first point was that child molestation meets the definition of crimes against humanity and is thus within ICC jurisdiction. To support this, the initial filing asserted that the abuse and coverup constituted a "widespread or systematic attack directed against a civilian population."<sup>46</sup> The Rome Statute recognizes the "evolution of rape law" insofar as genuine consent is impossible under coercive circumstances, such as when the victims are children and the perpetrators are authority figures.<sup>47</sup> Sexual violence in this context may even amount to torture.<sup>48</sup> The second point was that, not only are the charged individuals directly responsible for "physical and psychological

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Against Humanity, ¶ 167, ICC File No. OTP-CR-159/11 (Sept. 13, 2011), available at <http://s3.documentcloud.org/documents/243877/victims-communication.pdf> [<https://perma.cc/7THR-CXWS>] [hereinafter SNAP/CCR Submission].

42. Roberts, *supra* note 23.

43. *Id.*

44. *Id.*

45. Letter from Pamela C. Spees & Katherine Gallagher, Senior Staff Attorneys, Ctr. for Constitutional Rights, to Luis Moreno Ocampo, Prosecutor, Int'l Criminal Court (May 19, 2011), available at <https://ccrjustice.org/sites/default/files/assets/Survivors%20Network%20Art%20%2015%20Communication%20to%20ICC%20OTP%20%283%29.pdf> [<https://perma.cc/3BJS-ZRGB>] [hereinafter SNAP/CCR Initial Filing].

46. *Id.* at 8.

47. *Id.* at 4.

48. *Id.*

torture of victims” because their efforts to conceal the abuse permitted it to continue, but they are also responsible through command responsibility.<sup>49</sup> The Vatican is structured hierarchically, such that all authority “lead[s] to and ultimately resid[es] in” the Pope, and Vatican officials possess authority over bishops and priests.<sup>50</sup> Accordingly, the initial filing asserted that Vatican officials are “non-military superiors” who can be held accountable for crimes “committed by subordinates.”<sup>51</sup>

The September submission closely followed the initial filing, formally including names of specific Vatican officials at fault. The final submission was also bolstered by a detailed factual background derived from government inquiries, organization investigations, descriptions of specific activities of the accused that “aid[ed] in the coverup” of sexual violence, and victim testimony.<sup>52</sup> Like the initial filing, the submission asserted that the conduct of the four named individuals constituted a “widespread or systematic attack directed against a civilian population”; that rape and sexual violence are crimes against humanity and “among the most serious crimes of concern to the international community as a whole,” even constituting torture; and that the four named officials had individual criminal responsibility due to their direct roles in the coverup and command responsibility on behalf of subordinates.<sup>53</sup> However, the ICC prosecutor declined to investigate in 2013, citing temporal and subject-matter jurisdiction concerns.<sup>54</sup>

The submission fought an uphill battle from its conception, if only because the ICC “normally acts on complaints advanced by a country.”<sup>55</sup> Worse, the Vatican is not a party to the Rome Statute (or even, technically, a state, despite its sovereign status),<sup>56</sup> and SNAP and the CCR are both based in the

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49. Roberts, *supra* note 23.

50. SNAP/CCR Initial Filing, *supra* note 45, at 11.

51. *Id.*

52. SNAP/CCR Submission, *supra* note 41, at 37.

53. *Id.* at 61, 65.

54. Roewe, *supra* note 24.

55. Roberts, *supra* note 23.

56. For an in-depth discussion of the exact international legal status of what some have termed the “Vatican/Holy See complex,” see generally John R. Morss, *The International Legal Status of the Vatican/Holy See Complex*, 26 EUR. J. INT’L L. 927 (2015). While most acknowledge that the Vatican is a sover-

United States, another non-party.<sup>57</sup> Furthermore, despite the fact that ICC temporal jurisdiction requirements prevent it from considering situations arising before 2002, the submission leaned on older material to demonstrate the pattern of abuse and lack of Vatican response. Presumably, this was the most effective way to demonstrate that while the Church punished priests for committing abuse, bishops did not face penalties for participating in coverups by hiding or transferring priests.<sup>58</sup> Nevertheless, reliance on such old material certainly disadvantaged the cause. Additionally, commenters questioned if the situation truly fit the “widespread of [sic] systematic attack directed against any civilian population” requirement for crimes against humanity, suggesting that for the crimes to constitute such an attack, the submission would have the unenviable task of proving the coverup “followed a defined church policy to do so.”<sup>59</sup> Ultimately, the ICC Prosecutor’s response to the submission simply listed the jurisdictional bases lacking without explaining the rationale for finding them inapplicable. Although this response was relatively vague, the most pertinent concerns seemed to be the presence of pre-2002 evidence and whether the abuse coverup fit the definition of crimes against humanity.

#### IV. REQUIREMENTS OF ICC JURISDICTION AND THE CATHOLIC CHURCH ABUSE COVERUP

For the ICC to have jurisdiction over a situation, it must be referred under one of three acceptable avenues.<sup>60</sup> It must also satisfy the ICC requirements of subject-matter, temporal, and territorial or personal jurisdiction.<sup>61</sup> Subject-matter juris-

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eign entity, there is no consensus as to whether its status “amounts to statehood or to something less than statehood.” *Id.* at 928. It is a complicated question, but important in determining what liability the Vatican and its subjects can face under international law. *Id.* That said, this note proceeds assuming that the Vatican’s status brings it close enough to statehood to grant its officials head-of-state immunity and to sign on to and be bound by treaties.

57. Roewe, *supra* note 24.

58. *Id.*

59. *Id.*

60. Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

61. *Id.* arts. 5, 11–12.

diction encompasses responsibility of accused individuals and the exact crime alleged. The ICC only maintains jurisdiction over genocide, crimes against humanity, war crimes, and aggression.<sup>62</sup>

A. *Referral to the ICC*

There are three ways for a situation to come before the ICC: the U.N. Security Council (UNSC) can refer for investigation, Rome Statute state parties can do the same, or the ICC Prosecutor can independently launch an investigation.<sup>63</sup> Both the SNAP/CCR and Gogarty Submissions were submitted via the third avenue.

The specific situation put forward in the Gogarty Submission is the widespread abuse and coverup by Catholic Church officials. The Gogarty Submission names these officials, but limits them to living members of the CDF—the body it labels “most responsible” for the situation—who served between the Rome Statute ratification and November 28, 2015, when the submission was finalized.<sup>64</sup> Three of the officials were also named in the SNAP/CCR Submission: Pope Benedict XVI (CDF Prefect under the name Cardinal Joseph Ratzinger from 1981 to 2005, and Pope from 2005 to 2013), Cardinal William Joseph Levada (CDF Prefect from 2005 to 2012), and Tarcisio Pietro Evasio Bertone (CDF Secretary from 1995 to 2002, and Secretary of State from 2006 to 2013). In addition to these officials, the Gogarty Submission also names Cardinal Angelo Amato (CDF Secretary from 2002 to 2008), Archbishop Luis Francisco Ladaria Ferrer (appointed CDF Secretary in 2005, then CDF Prefect in 2017), Cardinal Gerhard Ludwig Muller (CDF Prefect from 2012 to 2017), Archbishop Joseph Augustine Di Noia (appointed to the CDF in 2013), and Archbishop Jose Luis Mollaghan (appointed to the CDF in 2014).<sup>65</sup>

62. *Id.* art. 5.

63. *Id.* art. 13.

64. Peter Gogarty, *Crimes Against Humanity by Members of the Hierarchy of the Catholic Church*, ROYAL COMM’N INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE 12–13 (Nov. 2015), <https://www.childabuseroyalcommission.gov.au/sites/default/files/SUBM.0046.001.0953.pdf> [<https://perma.cc/YM44-FQJ9>] [hereinafter Gogarty Submission].

65. *Id.*

Notably, because the Gogarty Submission limits itself to members of the CDF, the current pope is not named. However, other potential referrals or submissions may still name Pope Francis; indeed, if the Gogarty Submission succeeds, it could open the door for such an allegation. Other notable positions of authority within Church hierarchy are those that oversee the CDF. Given that only the Secretariat of State and Secretariat for the Economy rank above Roman Congregations,<sup>66</sup> the current Secretary of State, Cardinal Pietro Parolin, could also be implicated, as could Cardinal Angelo Sodano, named in the SNAP/CCR Submission, and Tarcisio Bertone, named in both.

Regardless of the specifics of the situation, the avenue of referral could influence the success of the case. While within an accepted avenue of referral, the fact that the Gogarty Submission petitions the ICC Prosecutor directly hurts its likelihood of success. Of the thirteen cases that the ICC Prosecutor has investigated, state parties referred five, the UNSC referred two, and the ICC Prosecutor launched six.<sup>67</sup> While this does not indicate that submissions to the ICC Prosecutor are particularly disadvantaged (especially when eighteen of twenty-five preliminary investigations were triggered this way),<sup>68</sup> it is worth noting that as of October 2015, the ICC Prosecutor had received 11,519 communications about alleged crimes,<sup>69</sup> indicating that the vast majority of direct petitions to the ICC are rejected. While UNSC referral is perhaps the most influential avenue, it would be near-impossible in this case. Even if a re-

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66. See generally Catholic News Service, *Changing Needs, Changing Names: Reform of Curia Is Vatican Tradition*, CATH. SUN (July 31, 2014), <http://www.catholicsun.org/2014/07/31/changing-needs-changing-names-reform-of-curia-is-vatican-tradition> [<https://perma.cc/Z8EK-PF37>] (outlining the structure of the Roman Curia).

67. *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> [<https://perma.cc/U8BW-LZE4>] (last visited Nov. 16, 2020).

68. Sara Wharton & Rosemary Grey, *Preliminary Examinations: A Closer Look at One of the Most Important Parts of the ICC Office of the Prosecutor's Work*, INTLAWGRRLS (Dec. 8, 2017), <https://ilg2.org/2017/12/08/preliminary-examinations-a-closer-look-at-one-of-the-most-important-parts-of-the-icc-office-of-the-prosecutors-work> [<https://perma.cc/LXF4-LWCC>].

69. Office of the Prosecutor, Int'l Criminal Court, *Report on Preliminary Examination Activities (2015)*, ¶ 18 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [<https://perma.cc/7VQB-DVAJ>].



referral resolution could win the required number of votes, no such resolution could pass as long as the United States holds a veto, distrusts the ICC, and maintains a sizeable Catholic population.<sup>70</sup> Meanwhile, state party referral tends to carry more weight if the state party refers a situation within its own borders or involving its own citizens. This is a route certain countries could consider in the future: Australia, for example, was significantly impacted by the abuse and coverup, and has proven its willingness to pursue justice against even high-ranking Vatican officials.<sup>71</sup> The Gogarty Submission lists several other state parties that were similarly affected by the abuse coverup.<sup>72</sup> Should that submission fail, this domestic recourse would be the most strategic avenue for victims to pursue.

### B. *Subject-Matter Jurisdiction*

Subject-matter jurisdiction concerns both the responsibility of individuals before the ICC and the specific crime alleged. This note will consider each component as it relates to this situation separately.

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70. About one-fifth of the adult population in the United States is Catholic. David Masci & Gregory A. Smith, *7 Facts About American Catholics*, PEW RES. CTR. (Oct. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics> [https://perma.cc/U6US-JMWD]. For descriptions and examples of the historically fraught relationship between the United States and the ICC, see Stephanie van den Berg & Leslie Wroughton, *U.S. Revokes ICC Prosecutor's Entry Visa Over Afghanistan Investigation*, REUTERS (Apr. 4, 2019), <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP> [https://perma.cc/BNC7-3WWF]; Lesley Wroughton, *U.S. Imposes Visa Bans on International Criminal Court Investigators - Pompeo*, REUTERS (Mar. 15, 2019), <https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-court-investigators-pompeo-idUSKCN1QW1ZH> [https://perma.cc/QV59-NCFG]; *The US-ICC Relationship*, ABA-ICC PROJECT, <https://www.aba-icc.org/about-the-icc/the-us-icc-relationship> [https://perma.cc/4UJ5-RJPP] (last visited Nov. 16, 2020).

71. See Morris-Marr & Westcott, *supra* note 15 (reporting that Cardinal George Pell, the third-highest ranking Vatican official, is facing trial in Australia for perpetration of child abuse).

72. In addition to Australia, the Submission lists Ireland, Canada, Germany, Belgium, the Netherlands, the United Kingdom, Mexico, and the Dominican Republic. Gogarty Submission, *supra* note 64, at 7–8.

### 1. *Responsibility of Individuals Before the ICC*

For an individual to be brought before the ICC, he must bear responsibility for the alleged crimes. The Rome Statute provides two relevant grounds of criminal responsibility: individual responsibility under Article 25 and superior—or, in the case of military, command—responsibility under Article 28.<sup>73</sup> Absent any evidence that the named officials abused children themselves, superior responsibility is the only way to hold them accountable. Granted, officials involved in the coverup could be held responsible as individuals under Article 25 insofar as the act of coverup is a crime itself as an action that aids or abets abuse.<sup>74</sup> However, superior responsibility is the route more likely to succeed, as the Article 25 list is viewed as hierarchical, and aiding and abetting is the third of only four provisions (and, incidentally, requires fairly complex analysis).<sup>75</sup>

Under Article 28(b) of the Rome Statute, a superior is responsible for crimes committed by subordinates under the superior's "effective authority and control" where: the superior knew or disregarded information that indicated subordinates were committing crimes; these crimes concerned activities within the superior's effective responsibility and control; and the superior failed to take "all necessary and reasonable measures" in his power to "prevent or repress" the crimes or to "submit the matter to the competent authorities for investigation."<sup>76</sup> Meeting this criteria was likely not the ICC Prosecutor's primary concern in dismissing the SNAP/CCR Submission. The Catholic Church is extremely hierarchical, such that it would have been nearly impossible for abuse to occur without superiors' knowledge.<sup>77</sup> The SNAP/CCR Submission also emphasized this.<sup>78</sup> Based on this fact alone, for most of the discussed officials, "effective control" is satisfied, as is the requirement that the criminal activities rest within their control. Because review of abuse complaints is a task specifically dele-

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73. Rome Statute, *supra* note 60, arts. 25, 28.

74. *Id.* art. 25(3)(c).

75. LUBAN ET AL., *supra* note 29, at 889–90, 931–37.

76. Rome Statute, *supra* note 60, art. 28(b).

77. See Warner, *supra* note 10 (comparing the Church structure to the military and examining several contributing factors, including hierarchy, inherent to that structure).

78. SNAP/CCR Submission, *supra* note 41, at 51–54.

gated to the CDF, any members serving at the time the CDF unreasonably dismissed a likely-true complaint also satisfy the “knew or disregarded information” and the “failed to take reasonable measures” prongs. In those cases, it was their duty as members of the CDF to address such complaints and take appropriate action. The analysis is not as smooth for non-CDF members, such as the current Pope and Secretary of State, but as long as there is some evidence they knew about an abusive priest and failed to act,<sup>79</sup> the prongs can be satisfied under the same logic. This is particularly true if they knew the CDF was refusing to act.

Additionally, Article 30 of the Rome Statute elaborates on the mental element required for criminal liability before the ICC, specifying that material elements of the crime require intent and knowledge.<sup>80</sup> Article 30 further defines these requirements, but there are unsettled questions in this area: namely, whether *dolus eventualis*—essentially, recklessness—is applicable under the definition.<sup>81</sup> Perhaps this would be a relevant question if any Church officials were charged under Article 25 for aiding and abetting, but otherwise there is likely no room for *dolus eventualis* in the Article 30 analysis.<sup>82</sup> Simply based on definitions of intent and knowledge, high-ranking officials likely satisfy these requirements. After all, many of the requirements for liability under superior responsibility are clearly meant to assess intent and knowledge, so the evidence that satisfies those requirements would naturally satisfy the requirements of the mental element under Article 30 of the Rome Statute.

## 2. Crimes Against Humanity

Of the four categories of crimes over which the ICC enjoys jurisdiction,<sup>83</sup> crimes against humanity is plainly the only

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79. See, e.g., Brett M. Decker, *In a Catholic Church Where Even the Pope Covers for Sexual Abuse, Everywhere Is as Bad as Boston*, USA TODAY (Aug. 28, 2018), <https://www.usatoday.com/story/opinion/2018/08/28/pope-francis-knew-cardinal-mccarrick-sexual-abuse-catholic-churchcolumn/1109251002> [<https://perma.cc/4QPX-MG7F>] (highlighting claims that Pope Francis knew of at least two sexual abusers).

80. Rome Statute, *supra* note 60, art. 30.

81. LUBAN ET AL., *supra* note 29, at 897–98.

82. *Id.* at 901.

83. Rome Statute, *supra* note 60, art. 5.

category applicable to this situation. Crimes against humanity are defined in the Rome Statute as “any of the [acts listed in Article 7(1)(a)–(k) of the Rome Statute] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>84</sup> This definition indicates that crimes against humanity have three elements: a physical element, or acts listed in Article 7(1)(a)–(k); a contextual element, further defined as a “course of conduct involving the multiple commission of [crimes] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”;<sup>85</sup> and a mental element, requiring knowledge. Regarding the physical element, only three of the listed crimes could apply: torture,<sup>86</sup> “rape . . . or any other form of sexual violence of comparable gravity,”<sup>87</sup> and the catchall “other inhumane acts” provision.<sup>88</sup> The widespread abuse falls so neatly into the sexual violence provision that the possibility of using the catchall or torture provisions hardly warrants discussion. Although the SNAP/CCR Submission notes torture,<sup>89</sup> the applicability of the sexual violence provision is clear and simple. This note thus proceeds generally assuming that the abuse satisfies Article 7(1)(g) of the Rome Statute, if not as rape, then at least as comparable sexual violence.

The ICC Prosecutor cited subject-matter jurisdiction as a problem with the SNAP/CCR Submission. Given that criminal responsibility was likely not the faltering point, the question

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84. *Id.* art. 7(1).

85. *Id.* art. 7(2)(a).

86. *Id.* art. 7(1)(f). Article 7(2)(e) further defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” *Id.* art. 7(2)(e). Whether the situation at hand constitutes torture is unclear.

87. *Id.* art. 7(1)(g).

88. *Id.* art. 7(1)(k).

89. Torture is defined in the Rome Statute as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.” SNAP/CCR Submission, *supra* note 41, at 66 (quoting Rome Statute, *supra* note 60, art. 7(2)(e)). The SNAP/CCR Submission makes the convincing argument that sexual abuse of nonconsenting minors by clergy with “effective ‘custody or control’” meets this definition. However, this note focuses on the clear applicability of the sexual violence provision. *See id.* at 66–69.

becomes which elements of crimes against humanity were problematic. Because the actual crime at issue is the abuse—which will then be extended to officials via superior responsibility—rather than the coverup, this analysis is from the perspective of the abusers and their actions, rather than that of the named officials.<sup>90</sup> The physical element was likely satisfied; even if it were ambiguous, the ICC has recently favored protection of victims of sexual violence, as evidenced by decisions that have extended protections against sexual violence beyond the scope of traditional international law.<sup>91</sup> The mental element was likely satisfied as well. It is almost certain that perpetrators of the crime were aware that their conduct constituted sexual violence, and that knowledge can be attributed to the officials through the previously discussed mental element for superior responsibility. Therefore, the contextual element was the most likely element of concern to the ICC Prosecutor. This is unsurprising: The Rome Statute specifies that crimes against humanity must be part of a “widespread or systematic attack.”<sup>92</sup> According to past ICC cases, an attack need not be both widespread and systematic, and “a widespread attack may be the ‘cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.’”<sup>93</sup> However, in these cases, the attacks at issue were still intentional and coordinated. The Church’s affirmative actions

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90. This note does not seriously consider the possibility that named officials could be charged as individuals for the crime of the coverup under Article 25. See *supra* Part IV(b)(i). Under the present analysis, which treats the abuse as the criminal activity at issue, the coverup merely serves as evidence that the named officials met the requirements for superior responsibility.

91. For example, the ICC has recently recognized sexual violence committed against a military commander’s own troops as a crime over which it has jurisdiction, despite the original intention of international criminal law to regulate behavior between armies and civilians or opposing armies. Benjamin Duerr, *ICC Decision Extends Protection for Sexual Violence Victims*, MUKWEGE FOUND., <https://www.mukwegefoundation.org/icc-decision-extends-protection-for-sexual-violence-victims> [<https://perma.cc/7S4E-QDL3>] (last visited Nov. 16, 2020).

92. Rome Statute, *supra* note 60, art. 7(1).

93. Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 94–95 (Mar. 31, 2010) (quoting Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-T, Judgement, ¶ 545 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), <https://>

to cover up the abuse could potentially be considered an “attack” in that sense, but the crime at issue here is the abuse, not the coverup. That being said, the elaboration on this phrase in the subsequent definitional article, Article 7(2), allows for some flexibility. The actions of the abusive priests need only involve “multiple commission of acts” of sexual violence, “pursuant to or in furtherance of . . . organizational policy to commit such attack.”<sup>94</sup> Given that clergy who participated in the coverup were explicitly directed by their superiors to shield accused clergy from liability, the coordinated coverup likely amounted to an “organizational policy,”<sup>95</sup> and arguably constituted a policy to *permit* the “multiple commission of acts” that Article 7(2) of the Rome Statute deems an “attack.” Of course, the intent of the Church likely was not to permit, but simply to hide, the attacks, so it could be problematic to accuse them of such a policy. However, once abusive priests discovered their actions would be shielded, they likely believed that Church leadership maintained an informal attitude of tolerance, perhaps even permission.<sup>96</sup> Thus, even if a policy of permission was not the Church’s intent, if clergy believed it was, it would be fair to hold the officials to any policy they may have implied by not discouraging the commission of abuse. Still, this is likely why the SNAP/CCR Submission failed, as “permit” is not the same as “commit.” However, circumstances may have changed

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[www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf) [<https://perma.cc/V9KR-5JSX>].

94. Rome Statute, *supra* note 60, art. 7(2)(a).

95. “Organizational policy” has not been further defined in the Rome Statute or subsequent ICC case law. Prosecutor v. Ruto, ICC-01/09-01/11, Defence Challenge to Jurisdiction, ¶ 13 (Aug. 30, 2011), [https://www.icc-cpi.int/CourtRecords/CR2011\\_12702.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_12702.PDF) [<https://perma.cc/5NWW-8XMY>]. Though its exact definition has been debated, this debate has largely focused on the status and nature of the organization at issue and would be irrelevant in a situation where the Vatican, if not a state, is at least “State-like.” See *generally id.* (attempting to define “organizational policy” through inquiry whether the organization at issue must possess “State-like elements”).

96. The fact that this behavior was treated as an “open secret” within the Church contributed to the abuse prevalence. See Lucky Severson & Bob Abernethy, *Pedophile Priests*, BISHOPACCOUNTABILITY.ORG (Feb. 22, 2002), [http://www.bishop-accountability.org/news/2002\\_02\\_22\\_Abernethy\\_Pedophile\\_Priests.htm](http://www.bishop-accountability.org/news/2002_02_22_Abernethy_Pedophile_Priests.htm) [<https://perma.cc/8N4S-H9N7>] (discussing the Church’s knowledge of abusive priests and victims’ perception that the lack of consequences allowed the abuse to continue).

enough for the Gogarty Submission—or any future referral—to pass muster on this ground.<sup>97</sup>

Assuming that the contextual element was the ICC Prosecutor’s concern with the SNAP/CCR Submission, the ICC’s opinion on the difference between a policy of permission and a policy of commission is clear. For a better result, a submission would either need to present evidence that Church policy involved some affirmative step to facilitate—not just permit—the abuse, or directly address this point in a convincing manner. The Gogarty Submission, while detailed and well-researched, does not devote any analysis to this question. It does helpfully note three policies between 2010 and 2014 that furthered the Church’s atmosphere of permission, emphasizing the secrecy of “canonical tribunals” and lack of obligation to “secular authorities.”<sup>98</sup> However, that is the extent of the discussion. Thus, the Gogarty Submission in its published form could very well fail for lack of subject-matter jurisdiction like the SNAP/CCR Submission before it.

Future submissions or referrals would need to address this question more directly if they want a chance of success. While that chance may seem slim based on the language of the text, subsequent interpretations of crimes against humanity could work in an applicant’s favor. Specifically, there seems to be some flexibility of this requirement when responsibility for crimes against humanity interacts with superior responsibility.

For example, when Jean-Pierre Bemba stood trial at the ICC, he was initially convicted under the doctrine of command responsibility.<sup>99</sup> The ICC Trial Chamber focused on Bemba’s inaction in the face of his soldiers’ criminal behavior, but did not find the soldiers were acting under any sort of direction to attack civilians, despite their direction to suppress a (non-civil-

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97. The ICC’s decisions on the Jean-Pierre Bemba case have indicated how the ICC may interpret this difference. For an analysis of this decision, see *infra* notes 101–04 and accompanying text.

98. Gogarty Submission, *supra* note 64, at 4.

99. Dieneke de Vos, *ICC Issues Landmark Judgment: Bemba Convicted as Commander-in-Chief for Sexual Violence Crimes*, INTLAWGRRLS (Mar. 22, 2016), <https://ilg2.org//03/22/icc-issues-landmark-judgment-bemba-convicted-as-commander-in-chief-for-sexual-violence-crimes-part-22> [<https://perma.cc/K5QY-2LZQ>].

ian) military coup.<sup>100</sup> This indicates that if subordinates have the impression that there is nothing particularly wrong with their actions, their superiors can be held accountable even in the absence of an organizational policy to commit these acts. Importantly, in 2018, the ICC Appeals Chamber overturned the conviction that resulted from this reasoning.<sup>101</sup> However, this decision did not criticize the trial chamber's analysis on this point; the appeals chamber based its conclusion on the trial chamber's questionable assumptions about the defendant's actual power to prevent the crimes at issue.<sup>102</sup> If the relevant assumptions of the trial chamber, untouched by the appeals chamber, still constitute good law, it seems that situations involving superior responsibility need not adhere to the exact wording of the elements of crimes against humanity. This provides hope for potential future referrals of the Catholic Church sex abuse coverup and may even assist the Gogarty Submission.

### C. Temporal Jurisdiction

Perhaps the least complex of the ICC's jurisdiction requirements, temporal jurisdiction limits the ICC's reach to crimes committed after July 1, 2002.<sup>103</sup> Relatedly, the ICC cannot exercise jurisdiction over a state's citizens or territory before the date at which it became party to the Rome Statute.<sup>104</sup> Despite the simplicity of this rule, temporal jurisdiction was the second faltering point of the SNAP/CCR Submission.

Though the SNAP/CCR Submission insisted that it only included pre-2002 incidents in order to contextualize the pattern of Church behavior,<sup>105</sup> the ICC Prosecutor cited temporal

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100. See *Prosecutor v. Gombo*, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶¶ 152–56 (Mar. 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF) [<https://perma.cc/SC9B-2A8Q>].

101. *Prosecutor v. Gombo*, ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF) [<https://perma.cc/TB9W-URTB>].

102. *Id.* ¶¶ 2–11.

103. Rome Statute, *supra* note 60, art. 11(1).

104. *Id.* art. 11(2).

105. SNAP/CCR Submission, *supra* note 41, at 5. For discussion of why using pre-2002 evidence for context is permissible, see generally Hassan Ahmad, *Context at the International Criminal Court*, 29 PACE INT'L L. REV. 132



jurisdiction as a reason to dismiss, apparently concluding that the references were not merely contextual. There are several possible reasons for this: First, the majority of evidence in the SNAP/CCR Submission was from 1979 to 2001.<sup>106</sup> This reason alone likely would not have been enough for the Prosecutor to conclude that the ICC lacked temporal jurisdiction, especially when the submission took care to present the behavior of the accused individuals as beginning prior to 2002 and *continuing* after. As such, the ICC Prosecutor likely had other reasons for the rejection. The second possible reason is the nature of the pre-2002 evidence compared to that of later evidence. As a matter of circumstance, officials covering up abuse were more capable of doing so before the public exposure that coincidentally occurred in 2002, so older evidence is more plentiful, obvious, and direct. While the Church could not have possibly dismantled its problematic system overnight, it could not continue to blatantly cover up abuse after the system was revealed. To match the strength of evidence from prior years, any direct evidence post-2002 would have to be a product of the months after *The Boston Globe* published its exposé, when the world had yet to determine whether the coverup was isolated to the

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(2017). See also Scott W. Lyons, *Introductory Note to the International Criminal Court: Decisions Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire*, 51 I.L.M. 225, 226 (Oct. 3, 2011) (in Côte d'Ivoire, the ICC established a "continuing" crimes standard, broadening temporal jurisdiction, though here it was for crimes committed *after* the prosecutor mandate).

106. To summarize the evidence presented: Pope Benedict XVI, then Cardinal Ratzinger, changed the formal Holy See policy so that all cases of sexual abuse (now considered "delicta graviora") were turned to the CDF for review. As evidenced by letters, he also allowed a known predator priest to transfer in 1979 and delayed priests with little to no explanation in 1982, 1989, and 1992 due to scandals. Later, as Pope, Benedict XVI also refused to accept the resignations of two abusive clergymen in Ireland. The Church policy implemented and followed from 1991 to 2006 was attributed to Cardinal Secretary of State Sodano; Cardinal Secretary of State Bertone took over from 2006 to 2011. Cardinal Bertone, as Secretary for the CDF, took no action on several letters received between 1996 and 1998 and allowed at least one abusive priest to retain his position (as did Pope Benedict XVI, as Prefect for the CDF at that time). In 2002, Cardinal Bertone claimed publicly that civil laws do not apply to Vatican norms, specifically regarding child abuse cases. Finally, according to a letter and victim testimony, Cardinal Levada, as CDF Prefect, failed to act on accusations in 2004 and 2010. SNAP/CCR Submission, *supra* note 41, at ix–xi, 37, 49, 57–58.

United States. The third and perhaps most likely reason for rejection concerns the evidence presented against the four individuals accused in the SNAP/CCR Submission. There is evidence from before and after 2002, and at first blush, it does not seem that the older evidence is inherently stronger in each case. However, the comparative strength of the older evidence is tied to the fact that the CDF is considered primarily responsible for implementing and overseeing the policies that could constitute crimes against humanity. With the exception of Cardinal Levada, who did not rise above the level of archbishop until he became CDF Prefect in 2005, those named in the SNAP/CCR Submission were most directly involved in the abuse coverup before 2002. For example, though later responsible via his authoritative position as pope, Pope Benedict XVI's most egregious involvement in the coverup occurred while he led the CDF as a cardinal between 1981 and 2005. Similarly, Cardinal Bertone was more directly involved from 1995 to 2002 as CDF Secretary.

Fortunately for future submissions, this issue is easier to resolve than subject-matter jurisdiction. While it would be helpful to know the ICC Prosecutor's reasoning, knowing that the SNAP/CCR Submission as published did not satisfy temporal jurisdiction roughly indicates the cut-off of what constitutes relevant evidence, and signals that future submissions should focus on incidents that arose after the signing of the Rome Statute. The Gogarty Submission understood that the Church did not resolve the issue immediately after the 2002 Spotlight story, and in fact still grapples with crafting and implementing an appropriate response. While the SNAP/CCR Submission framed the crimes as the responsibility of four officials who contributed individually to facilitating abuse, the Gogarty Submission targeted the CDF as a whole between 2002 and 2015.<sup>107</sup> The Gogarty Submission, rather than focusing on individual responses that largely occurred pre-2000,<sup>108</sup> briefly surveyed the relevant actions of the CDF from 1741 to 2014, taking care to include as many incidents post-2002 as possi-

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107. See Gogarty Submission, *supra* note 64, at 12–13 (listing the names of all living members of the CDF as of November 28, 2015 who served between July 1, 2002 and November 28, 2015).

108. See *supra* note 106 and accompanying text.

ble.<sup>109</sup> Widening the range of the survey supported the notion that pre-2002 evidence was truly intended only to establish context and demonstrated that the well-documented policy of the late 1900s had not meaningfully changed.

While this bodes well for the Gogarty Submission, future submissions could struggle in light of a recent change to Church policy. If prior Church policy could be considered permissive, the newly announced policy would be a revocation of that permission.<sup>110</sup> This formal policy change does not mean that any Church actions between 2002 and 2019 no longer satisfy the requirements for ICC investigation, but the Vatican's signaling of its willingness to effectively handle sex abuse internally may affect the ICC Prosecutor's discretionary decision to investigate.<sup>111</sup>

#### D. *Territorial or Personal Jurisdiction*

The third required basis of jurisdiction may be the easiest for the abuse coverup to satisfy. After all, the ICC Prosecutor only stated that the original SNAP/CCR Submission failed to meet the other two jurisdiction requirements. However, this omission could imply either that only those two requirements were an issue or simply that the ICC Prosecutor did not feel the need to consider the third when the other two jurisdictional grounds were sufficient to justify dismissal. Although the former implication is likely, this note will fully address the third requirement.

The Rome Statute does not require both territorial and personal jurisdiction, indicating that meeting one of these jurisdictional requirements is sufficient.<sup>112</sup> To satisfy these requirements, the accused must have committed the crime within the territorial jurisdiction of the ICC or committed the

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109. Gogarty Submission, *supra* note 64, at 3–4.

110. See generally Jason Horowitz, *Pope Issues First Rules for Catholic Church Worldwide to Report Abuse*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/world/europe/pope-francis-abuse-catholic-church.html> [<https://perma.cc/N65U-3R5B>] (reporting that Pope Francis “issued the first law obligating officials in the Roman Catholic Church worldwide to report cases of clergy sexual abuse—attempts to cover it up—to their superiors”).

111. See *infra* Part V(c).

112. Rome Statute, *supra* note 60, art. 12(2); see LUBAN ET AL., *supra* note 29, at 175 (describing territorial and personal jurisdiction generally).

crime while a national of a state within that territorial jurisdiction.<sup>113</sup> This jurisdiction includes the territory of parties to the Rome Statute and of states that accept ICC jurisdiction over the crime at issue through formal declaration.<sup>114</sup> Importantly, because the Vatican did not sign the Rome Statute, the ICC does not have territorial jurisdiction over the sovereign.<sup>115</sup>

As of December 31, 2011, there were 594 citizens of the Vatican, most of whom were high-ranking officials who reside there due to their rank or status as papal diplomats.<sup>116</sup> Naturally, most of the named officials in any potential referral would be citizens of the Vatican due to their rank, and at least part of the coverup would have likely physically occurred within that territory. While this would be a hurdle to prosecution if the coverup was the crime itself, the crime is the abuse rather than the coverup. Even so, it is worth noting that in September 2018, the ICC Pre-Trial Chamber decided that the ICC had territorial jurisdiction over Myanmar officials who engaged in the deportation of the Rohingya people to Bangladesh, finding generally that the ICC may assert territorial jurisdiction “if at least one element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the [Rome] Statute.”<sup>117</sup> This ruling effectively granted the ICC territorial jurisdiction over potential defendants who were in Myanmar, not a party to the Rome Statute, when they ordered or initiated deportation to the state party Bangladesh. One report even concluded that

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113. Rome Statute, *supra* note 60, art. 12(2).

114. *Id.* art. 12(3).

115. *Holy See*, ABA-ICC PROJECT, <https://www.aba-icc.org/country/holy-see> [<https://perma.cc/7N4E-49KC>] (last visited Nov. 16, 2020); *see also* Morss, *supra* note 56 (assuming that the Vatican is a sovereign entity).

116. Catholic Church officials who reside in the Vatican are granted citizenship. *Vatican Citizenship*, HOLY SEE PRESS OFF., [http://www.vatican.va/news\\_services/press/documentazione/documents/sp\\_ss\\_scv/informazione\\_generale/cittadini-vaticani\\_en.html](http://www.vatican.va/news_services/press/documentazione/documents/sp_ss_scv/informazione_generale/cittadini-vaticani_en.html) [<https://perma.cc/ALU4-UXU8>] (last updated Dec. 31, 2011).

117. Request Under Regulation 46(3) of the Regulations of the Court, ICC-RoC46(3)-01/18, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute,” ¶ 72 (Sept. 6, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF) [<https://perma.cc/26XR-H5TK>].

the ruling was “potentially more expansive than some experts had foreseen.”<sup>118</sup>

For the purpose of this analysis, the perspective is that of the abusers for whom named officials have superior responsibility. With such a wide scope, it is easy to conclude that the SNAP/CCR Submission, Gogarty Submission, and any other potential referrals would all be within the scope of ICC territorial or personal jurisdiction. Once established that accused officials were aware of and responsible for the crimes of certain clergy, these crimes would satisfy this requirement as long as the clergy at issue committed the crime in the territory of, or were nationals of, a state party. As there are 123 state parties to the Rome Statute,<sup>119</sup> there is a wide range of options for finding jurisdiction in any particular case. The Gogarty Submission even noted which state parties were particularly impacted by widespread sexual abuse.<sup>120</sup> A more detailed analysis would be required later in the investigatory process to isolate which officials knew of which complaints and which complaints involved state parties to the Rome Statute. But, at the referral phase, this information should be enough to satisfy jurisdiction in either the Gogarty Submission or any other potential attempts.

## V. OTHER ISSUES WITH AN ICC INVESTIGATION

Unfortunately, ICC jurisdiction is not the end of the battle for potential referrals. The ICC Prosecutor dismisses only half of the thousands of submissions received due to jurisdictional problems; other requirements help whittle down the rest to a mere handful of acceptances.<sup>121</sup> These other factors include the ICC admissibility requirements, which involve eval-

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118. Toby Sterling, *International Criminal Court Says It Has Jurisdiction Over Alleged Crimes Against Rohingya*, REUTERS (Sept. 6, 2018), <https://www.reuters.com/article/-rohingya-icc/international-criminal-court-says-it-has-jurisdiction-over-alleged-deportations-of-rohingya-idUSKCN1LM23H> [<https://perma.cc/37Y9-YDY9>].

119. *The State Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [<https://perma.cc/55YX-3G3R>] (last visited Nov. 16, 2020). This list notably omits the United States, which saw a significant number of Church sex abuse cases. Garrett, *supra* note 2, at 45.

120. See *supra* note 72 and accompanying text.

121. *Report on Preliminary Examination Activities (2015)*, *supra* note 69, ¶ 15.

uations of complementarity, gravity, and interests of justice.<sup>122</sup> Softer considerations, such as surrender and willingness to pursue, are also relevant.

#### A. *Admissibility Requirements*

Article 17 of the Rome Statute requires that a case not violate the principle of complementarity and be of “sufficient gravity” to justify ICC action.<sup>123</sup> Article 53 of the Rome Statute requires the ICC Prosecutor, while considering investigation, to take into account these requirements and ask whether the action would “serve the interests of justice.”<sup>124</sup>

##### 1. *Complementarity*

Article 17 of the Rome Statute reflects the principle of complementarity, which requires a certain level of deference to domestic legal systems. Specifically, cases are inadmissible where “investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution,” or where already investigated by a state that decided not to prosecute (unless the state so decided because it was unwilling or unable to prosecute), or where the individual was already tried for the relevant conduct.<sup>125</sup>

Even before the Church’s coverup was widely publicized, some countries saw acknowledgement of a problem domestically. In Australia, the Catholic dioceses began damage control as early as 1996.<sup>126</sup> However, for the most part, it was not until the Spotlight story broke that domestic courts began holding clergy members legally accountable. Some of the more active legal systems in this regard were those of the United States, Australia, Ireland, and Canada, though several other states also established accountability mechanisms.<sup>127</sup> It is no surprise

122. Rome Statute, *supra* note 60, art. 17.

123. *Id.* art. 17(1).

124. *Id.* art. 53(1)(c).

125. *Id.* art. 17(1)(a)–(c).

126. The Catholic Church in Australia published a document claiming to advocate for collaborative handling of sex abuse cases. AUSTL. CATHOLIC BISHOPS CONFERENCE & CATHOLIC RELIGIOUS AUSTL., TOWARDS HEALING (digital ed. 2016) (first published December 1996).

127. See Gogarty Submission, *supra* note 64, at 7–8.

that the countries most invested in accountability are those with the largest number of abuse victims. For that reason, it cannot be said that these domestic systems are unwilling to prosecute. In fact, if they have jurisdiction over the defendant, they tend to move forward with the prosecution.

However, there are multiple reasons that named officials have not been investigated in these states, and these reasons indicate that referring them to the ICC would not violate complementarity. For some officials, immunity applies. If the Vatican is considered a sovereign,<sup>128</sup> then Pope Francis, as its head of state, is immune under international law, protecting him from prosecution outside the ICC.<sup>129</sup> This immunity also applies to former heads of state,<sup>130</sup> shielding Pope Benedict XVI as well. The Secretary of State would also enjoy immunity outside the ICC, as would his predecessors, including Cardinal Bertone.<sup>131</sup> Immunity thus allows these officials to fall under the “unable” exception to complementarity,<sup>132</sup> but the analysis is more complicated for the six other CDF members whom the Gogarty Submission names. Spain, Germany, Italy, and Argentina could each claim personal jurisdiction over one national, the United States could claim the same over two, and the Vatican could claim jurisdiction over them all as its citizens.<sup>133</sup> The bases of jurisdiction for each of these countries widen even further when considering the exact crime with which these officials would be charged; in the United States alone, there are options under conspiracy and accomplice doctrines. Naturally, the more options a country has in utilizing its criminal justice system, the more likely it is to prosecute domestically in some form. While Article 17 of the Rome Statute requires the case to be “investigated or prosecuted” by a state with jurisdiction<sup>134</sup> and there is no evidence of such actions with respect to these

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128. For discussion of the Vatican’s status in international law, see *supra* note 56 and accompanying text.

129. Geoffrey Robertson, *Put the Pope in the Dock*, *GUARDIAN* (Apr. 2, 2010), <https://www.theguardian.com/commentisfree/libertycentral/2010/apr/02/pope-legal-immunity-international-law> [<https://perma.cc/DU6T-N7ZT>].

130. LUBAN ET AL., *supra* note 29, at 269.

131. *Id.* at 282–86.

132. Rome Statute, *supra* note 60, art. 17(1)(a).

133. See Gogarty Submission, *supra* note 64, at 12–13 (noting the citizenship of each named CDF member).

134. Rome Statute, *supra* note 60, art. 17(1)(a).

six, that could change if the ICC Prosecutor began investigating. Even if the four relevant, ICC-friendly countries deferred, the Vatican could launch an investigation. While such an investigation, if undertaken to prevent ICC involvement, would plainly be “unwillingness” per the text,<sup>135</sup> in practice, the “unwillingness” standard is very difficult to meet,<sup>136</sup> and the Vatican would be able to structure the investigation so as not to run afoul of this provision. As such, while some officials easily satisfy the complementarity principle, naming others could violate it, depending on future action that states with jurisdiction, particularly the Vatican, undertake.

## 2. *Gravity and Interests of Justice*

In addition to enshrining the principle of complementarity, Article 17 of the Rome Statute also requires that a case be “of sufficient gravity to justify further action by the Court.”<sup>137</sup> This is a relatively low bar, and widespread sexual abuse of children over decades should clear it without a problem. Since the scope and scale of the sex abuse was reported in 2002, there have been countless studies and research endeavors that evidence the gravity of the situation, analyzing how it happened, the role of Church officials, the effect on the Catholic community, and the toll on victims of childhood sexual abuse.<sup>138</sup> It could be argued that because the abuse came to light and some countries responded via their domestic justice systems, the gravity does not justify further ICC action. However, this is a relatively weak argument, as the Rome Statute does not indicate that the current status of a situation has any bearing on the assessment of gravity. In fact, given that the ICC hears most of its cases after the defendants are no longer able to cause harm, it would cripple the ICC to interpret this requirement otherwise.

The “interests of justice” requirement is another low bar, and any referral of the situation should pass it easily. Specifi-

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135. *Id.* art. 17(2).

136. See Vincent Dalpé, *On the Difficult Case for a Functional Interpretation of the Unwillingness Criterion Before the International Criminal Court*, 13 J. INT’L L. & INT’L REL. 48, 53–54 (2017) (discussing how the vagueness of the “unwillingness criterion” could allow even “sham trials” to pass muster if carried on convincingly).

137. *Id.* art. 17(1)(d).

138. See *supra* Part I.



cally, Article 53 of the Rome Statute states that the ICC Prosecutor must evaluate whether there are “substantial reasons to believe that an investigation would not serve the interests of justice” in the face of the gravity of the crime and interests of victims.<sup>139</sup> The gravity of this crime cannot be overstated, and victim interests are sufficiently represented based on the fact that the original SNAP/CCR Submission was on behalf of victims. The only potential wrinkle is the recent policy changes in the Church<sup>140</sup>—does it truly serve the interests of justice to bring such a harsh action on the heels of internal improvement? Perhaps not, but this is hardly a “substantial reason” in light of the gravity of the crime, the interests of victims, and the fifteen-year time period during which the Church continued to operate without reform.

### B. *Surrender*

While surrender is not particularly important to the stage at which the ICC Prosecutor decides to investigate, it may nevertheless have some bearing on that decision and so is worth mention. One potential issue relevant to officials without immunity involves certain domestic prohibitions on extradition to the ICC. This is rare, but it would be an issue for the two named U.S. officials, as U.S. law prohibits extradition to the ICC.<sup>141</sup>

As for the officials with immunity, Article 98 of the Rome Statute prohibits the ICC from requesting the surrender of an individual if doing so would require the requested state to “act inconsistently with its obligations . . . with respect to the State or diplomatic immunity” of that individual, unless the ICC has the cooperation of that individual’s state.<sup>142</sup> Essentially, for those officials with immunity as heads of state or foreign ministers, the ICC would need the (unlikely) consent of the Vatican to request their surrender, even if they are physically within the territory of another state. There is a recognized tension between this provision and the ICC prohibition on immunity,

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139. Rome Statute, *supra* note 60, art. 53(1)(c).

140. Horowitz, *supra* note 110.

141. 22 U.S.C. § 7423(d) (2018).

142. Rome Statute, *supra* note 60, art. 98(1).

but as it has not been resolved,<sup>143</sup> it is difficult to predict how this would play out. Although this has no formal bearing on the initial decision to investigate, it is reasonable that the ICC Prosecutor might be hesitant to pursue an investigation due to later impracticability.

### C. *Willingness to Pursue*

The softest of the requirements, the ICC Prosecutor's willingness to pursue is almost a bonus issue. It is not enshrined in the Rome Statute, but it could still be a determinative point. The phrasing of Article 53 of the Rome Statute allows such willingness to come into play under the aforementioned "interests of justice" point.<sup>144</sup> While the list of what the ICC Prosecutor may consider is apparently exhaustive, and the "interests of justice" consideration is limited to "substantial reasons to believe" an investigation would not serve these interests, there is no requirement that the ICC Prosecutor defend the reasoning to not proceed.<sup>145</sup> There are justified, practical reasons for this, given the number of submissions the ICC Prosecutor receives from individuals and organizations.<sup>146</sup> However, this lack of oversight allows trivial reasons to creep into the decision-making. Despite the previous conclusion that new Church policy is not a substantial reason to not proceed, it is a reason nonetheless, and could factor into the ICC Prosecutor's decision at this stage.

Moreover, the ICC Prosecutor could have several reasons for factoring in outside motives. For one, the fact that state parties can handle cases against Vatican citizens, meaning the ICC is not the only viable source of recourse,<sup>147</sup> undermines the strength of the "interests of victims" point. Also, despite complementarity favoring ICC prosecution, the Vatican's attempts to handle these cases internally implicates the ideas

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143. Benjamin David Landry, *The Church Abuse Scandal: Prosecuting the Pope Before the International Criminal Court*, 12 CHL. J. INT'L L. 341, 372 (2011).

144. Rome Statute, *supra* note 60, art. 53(1)(c).

145. *Id.*

146. *Report on Preliminary Examination Activities (2015)*, *supra* note 69, ¶ 18 (noting that the ICC had received 11,519 communications as of October 2015).

147. *See* Morris-Marr & Westcott, *supra* note 15 ("Thousands of cases brought to light around the world have led to investigations and convictions in countries including the United States, Canada, Ireland and Australia.").

and norms that underlie the principle of complementarity. Additionally, the aforementioned unlikelihood that the Vatican would surrender its citizens if the ICC chose to move forward with the case would surely be a consideration.

Finally, it is worth acknowledging the relationship between the ICC and the Catholic Church. The ICC is controversial, beholden to no one country and granted great power by virtue of its ability to circumvent principles of immunity.<sup>148</sup> Its mandate intrudes upon state sovereignty by design, and as such it faces constant criticism even from friendly countries and strong opposition from influential countries like the United States.<sup>149</sup> Its most recent crisis comes in the form of threats of withdrawal by African countries who cite the ICC's apparent bias. Kenya made the longest strides toward exit in 2013, and at that time, the Catholic Church was one of the ICC's staunchest defenders.<sup>150</sup> The ICC is aware that its continued ability to carry on its mandate depends on the favor of states and influential organizations that still defend its operation—given the timing of Kenya's vote, this awareness may have even factored into the decision to dismiss the SNAP/CCR Submission.

With these considerations in mind, it would be reasonable to conclude that the ICC Prosecutor's attitude toward investigating the Vatican would be reluctant at best. However, pursuing such an investigation may not be the political poison it seems. The specific individuals discussed are largely retired from service in the Vatican, so the ICC could not be accused of needless disruption of governance. Additionally, while the Vatican is powerful, public opinion regarding this specific incident is firmly negative. Perhaps most importantly, the findings and harsh criticisms of the U.N. Committee on the Rights of

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148. LUBAN ET AL., *supra* note 29, at 269.

149. *See generally* Luis Moreno Ocampo (unpublished manuscript excerpt) (on file with author) (describing political attempts to influence the ICC, the involvement of the United States in several such political discussions, and the African Union criticism of the ICC).

150. Christopher Cardona, *Kenya's Withdrawal from ICC Was Bound to Happen*, JURIST (Sept. 26, 2013), <https://www.jurist.org/commentary/2013/09/christopher-cardona-kenya-icc> [<https://perma.cc/5HPA-2C8M>]; *Kenya: Catholic Bishops Slam ICC Pull-Out Vote*, KURUNZI AFRIKA (Sept. 13, 2013), <https://kurunziafrika.wordpress.com/2013/09/13/kenya-catholic-bishops-slam-icc-pull-out-vote> [<https://perma.cc/T4HJ-8SV9>].

the Child and the U.N. Committee Against Torture, while not relevant to the ICC legal conclusions, reflect political support for the choice to pursue legal consequences.<sup>151</sup>

## VI. CONCLUSION

Only time will tell if the 2018 Gogarty Submission proves more successful than its SNAP/CCR predecessor in 2011, but it seems unlikely. The ICC dismissed the SNAP/CCR Submission because the situation was outside ICC subject-matter and temporal jurisdiction. While the Gogarty Submission successfully reframed events such that the situation is brought within ICC temporal jurisdiction, it may not have adequately established subject-matter jurisdiction. While the 2016 *Bemba* decision allows room for referrals to manipulate the facts of the Church abuse coverup to fit within ICC subject-matter jurisdiction, these potential submissions likely need to address the issue more directly than the Gogarty Submission. As such, the Gogarty Submission has a slight chance of succeeding, but in the event that it fails, it is possible for future submissions to successfully prompt an ICC investigation of Church officials. After all, if such officials hold superior responsibility, the requirement of territorial or personal jurisdiction would be satisfied in most situations, as would admissibility requirements. However, the willingness of the ICC Prosecutor to pursue this on more discretionary grounds could remain a problem, and may ultimately be responsible for the failure of any future submissions. Regardless, this situation practically begs to be brought before the ICC. The practicality and efficiency that the ICC can provide cannot be matched by any domestic criminal remedy. Public opinion is on the side of prosecution. And the victims of the Catholic Church child sex abuse scandal deserve justice.

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151. See *supra* note 38 and accompanying text.