

DELIVER US FROM EVIL: DOMESTIC AND INTERNATIONAL SOLUTIONS TO CLERICAL SEX ABUSE

Jordan Paul*

TABLE OF CONTENTS

I. INTRODUCTION503

II. UNITED STATES LEGAL OVERVIEW506

 A. United States: Federal Law506

 B. United States: State Law507

 1. Jurisdiction and Ability of Attorneys General to Convene Statewide Investigating Grand Juries.....507

 2. Statutes of Limitation for Child Sexual Abuse508

 3. Mandatory Reporting Laws for Clergy508

III. INTERNATIONAL LAW OVERVIEW.....509

 A. Crimes Against Humanity Generally509

 1. Threshold Requirements.....509

 a. Widespread or Systematic Attack.....509

 b. Attack Directed Against any Civilian Population510

 c. Knowledge of the Attack510

 2. Crimes Constituting Crimes against Humanity.....511

 B. The International Criminal Court511

 1. Jurisdictional Requirements511

 a. Subject Matter Jurisdiction511

 b. Territorial and/or Personal Jurisdiction512

 c. Temporal Jurisdiction512

 2. Admissibility Requirements512

 a. Complementarity512

 b. Gravity513

* J.D. Candidate, 2020, University of Arizona, James E. Rogers College of Law. Thank you to Professor Andrew Woods for your valuable feedback. To Peggy Rowe, for listening to me talk endlessly about this paper. To the *AJICL* editors, for your editing help. And to all the victims of clerical sex abuse, for bringing these abuses to light.

c. Interests of Justice.....	513
C. International Criminal Tribunals	514
IV. UNITED STATES ANALYSIS	515
A. Grand Juries.....	515
1. The “Runaway” Problem.....	516
2. Jurisdiction	516
3. Public Release	517
B. Statutes of Limitation	519
C. Mandatory Reporting.....	520
V. INTERNATIONAL ANALYSIS	521
A. Do Priests’ Crimes Qualify as Crimes Against Humanity?	522
1. Threshold Requirements.....	522
a. Widespread or Systematic Attack.....	522
b. Attack Directed Against any Civilian Population	522
c. Knowledge of the Attack	525
2. Specific Crimes	526
a. Torture	526
b. Rape.....	527
c. Sexual Violence	527
B. Could Priests be Tried Before the International Criminal Court?.....	528
1. Jurisdictional Requirements	528
a. Subject Matter Jurisdiction	528
b. Territorial and/or Personal Jurisdiction	529
c. Temporal Jurisdiction	529
2. Admissibility Requirements.....	530
a. Complementarity	530
b. Gravity.....	530
c. Interests of Justice.....	531
C. Could Priests be Tried Before an International Criminal Tribunal?	531
VI. SUGGESTIONS FOR THE FUTURE.....	533
A. United States	533
B. International.....	534

I. INTRODUCTION

“They like to use those fancy words. They don't like to say ‘raped,’” he said. “They say ‘misdeed,’ ‘inappropriate touching,’ ‘mistake.’ That's insulting. I'm not a mistake.” – Charles L. Bailey, Jr.¹

In August 2018, a Pennsylvania grand jury released its latest report on Catholic sex abuse in the United States, documenting the abuse of over a thousand children by over three hundred Catholic priests over the course of decades.² “We showed no care for the little ones; we abandoned them,” Pope Francis wrote in a letter after the report was released.³ His response was undoubtedly sincere, but it was ultimately just another inadequate response by Church leaders, who have responded in similar ways for years: showing remorse, but offering little sign that there will be any meaningful changes.⁴

That is not to say that there have not been changes in how instances of abuse are handled or that these crimes always go unpunished. Following the award-winning reporting by the Boston Globe on abuse in the Archdiocese of Boston in 2002,⁵ the United States Conference of Catholic Bishops (USCCB) adopted the Charter for the Protection of Children and Young People.⁶ The Charter directed local dioceses to, among other things, follow “all applicable civil laws” regarding

¹ CHARLES L. BAILEY, JR., *IN THE SHADOW OF THE CROSS: THE TRUE ACCOUNT OF MY CHILDHOOD AND RITUAL SEX ABUSE AT THE HANDS OF A ROMAN CATHOLIC PRIEST* 179 (2006).

² OFFICE OF THE ATT'Y GEN. – COMMONWEALTH OF PA., *REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY 1* (2018) [hereinafter REPORT I].

³ Pope Francis, *Letter of His Holiness Pope Francis to the People of God*, FRANCIS: LETTERS 2 (Aug. 20, 2018), http://w2.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.pdf.

⁴ See e.g., Pope Benedict XVI, *Pastoral Letter of the Holy Father Pope Benedict XVI to the Catholics of Ireland*, BENEDICT XVI: LETTERS 1 (Mar. 19, 2010), http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.pdf (“I can only share in the dismay and the sense of betrayal that so many of you have experienced on learning of these sinful and criminal acts and the way Church authorities in Ireland dealt with them.”); Pope John Paul II, *Address of John Paul II to the Cardinals of the United States*, JOHN PAUL II: SPEECHES, 2 (April 23, 2002), http://w2.vatican.va/content/john-paul-ii/en/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals.pdf (“People need to know that there is no place in the priesthood and religious life for those who would harm the young.”).

⁵ *2003 Pulitzer Prizes*, PULITZER, <http://www.pulitzer.org/prize-winners-by-year/2003> (last visited Sept. 18, 2018).

⁶ U.S. Conference of Catholic Bishops, *Charter for the Protection of Children and Young People*, USCCB, <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm> (last visited Sept. 18, 2018).

the reporting of sexual abuse,⁷ to remove offending priests from public ministry,⁸ and to set “clear and well publicized” standards of behavior for priests.⁹ Further, there have even been prosecutions of offending priests and bishops.¹⁰ Finally, Pope Francis recently issued a directive ordering all priests and nuns across the world to report any abuse to their superiors, but stopped short of ordering them to report to civil authorities.¹¹

These changes, however, are not enough. Dioceses technically must follow civil laws about reporting abuse.¹² However, civil laws vary, and some states extend clergy-penitent privilege, which prevents the disclosure of certain communication between clergy and parishioners even in cases of sexual abuse.¹³ Dioceses must remove accused priests from public ministry, but those priests are only removed from the clergy entirely “if warranted.”¹⁴ In some cases, priests left, but were paid to do so, with the Church continuing to pay them a monthly salary and provide health insurance.¹⁵ Dioceses are required to have clear standards, but there were nevertheless cases included in the Pennsylvania grand jury that still fell within the statute of limitations, including one case where the abuse did not end until 2010,¹⁶ demonstrating that those standards are not always followed. Furthermore, these changes only apply to dioceses in the United States. However, this is not a problem confined to the United States. International reports of historical and current abuses abound, with disturbing statistics emerging not only from the

⁷ U.S. CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE 10 (2018), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-2018-final.pdf> [hereinafter USCCB CHARTER].

⁸ *Id.* at 11.

⁹ *Id.*

¹⁰ See *Overview of Criminal Cases Against Catholic Officials for Enabling Child Sexual Abuse*, BISHOPACCOUNTABILITY.ORG, http://www.bishopaccountability.org/criminal/charges_for_enabling/ (last updated Jan. 9, 2017).

¹¹ Jason Horowitz, *Pope Issues First Rules for Catholic Church Worldwide to Report Sex Abuse*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/world/europe/pope-francis-abuse-catholic-church.html>.

¹² USCCB CHARTER, *supra* note 7, at 10.

¹³ U.S. CHILDREN’S BUREAU, CLERGY AS MANDATED REPORTERS OF CHILD ABUSE AND NEGLECT 3 (2016), <https://www.childwelfare.gov/pubPDFs/clergymandated.pdf> [hereinafter MANDATED REPORTERS].

¹⁴ USCCB CHARTER, *supra* note 7, at 11.

¹⁵ Laurie Goodstein, *In Milwaukee Post, Cardinal Authorized Paying Abusers*, N.Y. TIMES (May 30, 2012), <https://www.nytimes.com/2012/05/31/us/cardinal-authorized-payments-to-abusers.html>.

¹⁶ REPORT I, *supra* note 2, at 6-7.

United States, but also Australia,¹⁷ Ireland,¹⁸ and most recently Germany.¹⁹ Sexual abuse by clergy is too large and too serious a problem to be handled by the Church itself. This problem requires a robust and coordinated international and domestic response to finally put an end to this dark chapter in history.

Much has been written about the Catholic Church's ongoing sexual abuse scandal. Like this Note, writings on the international dimension of the abuse scandal focus largely on crimes against humanity.²⁰ However, much of the writing is focused on either the prosecution of high-level Church officials,²¹ or the challenges of holding the Church accountable through civil lawsuits.²² This Note, however, focuses on the prosecution of individual abusers, and in part, aims to fill the gap regarding whether individual abusers' knowledge of their role in an existing attack is sufficient to bring charges of crimes against humanity against them.

Part II of this Note examines the powers of the United States, through both federal and state governments, to handle these cases on a large scale. Part III examines the powers and abilities of the international system, through the International Criminal Court (ICC) and international criminal tribunals, to handle such cases. Part IV analyzes United States law and suggests that the most effective way of dealing with the problem of abusive priests is through a combination of convening robust investigating grand juries, changing statutes of limitation, and, to a lesser extent, eliminating clergy-penitent privilege as it relates to cases of sexual abuse. Part V analyzes international law and examines both the challenge of bringing charges of crimes against humanity against individual priests at the ICC, and the challenge of creating an international tribunal to try individual priests, ultimately concluding that while there is clearly an international crime, there likely is not an international solution. Part VI concludes.

¹⁷ E.g., Clare Blumer, Rebecca Armitage & Simon Elvery, *Child Sex Abuse Royal Commission: Data Reveals Extent of Catholic Allegations*, ABC NEWS (Feb. 7, 2017, 9:41 PM), <http://www.abc.net.au/news/2017-02-06/child-sex-abuse-royal-commission:-data-reveals-catholic-abuse/8243890> (“Counsel Gail Furness, SC, said 4,444 alleged child sex abuse incidents were recorded in the survey.”).

¹⁸ E.g., *85 Priests were Accused of Abuse – Catholic Church Reviews*, BBC NEWS (Nov. 30, 2011), <https://www.bbc.com/news/uk-northern-ireland-15960621> (“Six reports published by the Catholic Church in Ireland have revealed there were child abuse allegations against 85 priests across the dioceses.”).

¹⁹ E.g., Kirsten Grieshaber, *Report: 3,677 Sex Abuse Cases in German Catholic Church*, AP NEWS (Sept. 12, 2018), <https://www.apnews.com/cbb427f29d0643059860f5efbc255031> (“A report on sexual abuse inside the Catholic Church in Germany says 3,677 people were abused by clergy between 1946 and 2014.”).

²⁰ E.g., Dermot Groome, *The Church Abuse Scandal: Were Crimes Against Humanity Committed*, 11 CHI. J. INT’L L. 439 (2011).

²¹ E.g., David Landry, Comment, *The Church Abuse Scandal: Prosecuting the Pope Before the International Criminal Court*, 12 CHI. J. INT’L L. 341 (2011).

²² E.g., Melanie Black, Comment, *The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for its Role in the Global Priest Sexual Abuse Scandal*, 27 WIS. INT’L L. J. 299 (2009).

II. UNITED STATES LEGAL OVERVIEW

A. United States: Federal Law

Federal jurisdiction over sexual abuse of a minor is typically limited to crimes occurring in “the special maritime and territorial jurisdiction of the United States,” federal prisons, or anywhere someone is held “pursuant to a contract or agreement” with the federal government.²³ However, there are exceptions, such as if the offender crosses state lines with the specific intent to abuse a minor,²⁴ or if the abuse occurs on a reservation.²⁵ Although federal charges are serious and carry potentially lengthy prison terms,²⁶ most abusers will not fall under federal jurisdiction.²⁷ A notable exception to this general rule is priests on reservations, where the Church sent many of its worst priests for much of the 20th century.²⁸

Despite the limited power of the federal government to try instances of sexual abuse, both United States Attorneys and the United States Attorney General have vast powers to investigate the other federal crimes that accompany sexual abuse,²⁹ including obstruction of justice and witness tampering.³⁰ This investigatory power is typically broader than what states have, and could be used by state investigators to initiate their own cases as well.³¹

²³ 18 U.S.C.A. § 2243(a) (Westlaw through Pub. L. No. 116-53).

²⁴ *Id.* § 2241(c).

²⁵ *Id.* § 1153.

²⁶ *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A3.1(a)-(c), § 5(A), § 5E1.2 (U.S. SENTENCING COMM’N 2016) (explaining that punishments for a conviction under 18 U.S.C. § 2241(c) could carry a prison term ranging from 235 months to life and a fine of up to \$500,000).

²⁷ U.S. Dep’t of Justice, *Citizen’s Guide to U.S. Federal Law on Child Sexual Abuse*, JUSTICE.GOV (Jul. 6, 2015), <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-sexual-abuse>.

²⁸ *E.g.*, Seaborn Larson, *Montana Reservations Reportedly ‘Dumping Ground’ for Predatory Priests*, GREAT FALLS TRIBUNE, <https://www.greatfallstribune.com/story/news/2017/08/16/montanas-reservations-were-dumping-grounds-predatory-priests-suit-alleges/504576001/> (last updated Dec. 20, 2017, 7:52 AM).

²⁹ U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-2.010 (2018); 28 U.S.C.A. § 509 (Westlaw through Pub. L. No. 116-53).

³⁰ Center for Constitutional Rights & Survivors Network of those Abused by Priests, *Demand for Investigation and Prosecution of High-level Officials in the Catholic Church for Widespread and Systemic Rape and Other Forms of Sexual Violence*, CENTER FOR CONST. RTS. (Aug. 15, 2018), <https://ccrjustice.org/sites/default/files/attach/2018/08/CCR%20SNAP%20ltr%20to%20DOJ%20w%20Exhibit%20Aug%2015%202018%20web%202.pdf>.

³¹ *See infra* Section II.B.1.

B. United States: State Law

Sexual abuse of a minor is prohibited in all 50 states.³² Despite this, states still differ with respect to their investigatory powers. Namely, with respect to jurisdiction of various state attorneys general and their ability to convene statewide investigating grand juries,³³ the statutes of limitation for sexual abuse of a minor,³⁴ and mandatory reporting laws.³⁵

1. Jurisdiction and Ability of Attorneys General to Convene Statewide Investigating Grand Juries

An exhaustive review of state law regarding both jurisdiction and ability of attorneys general to convene statewide investigating grand juries is outside of the scope of this Note. However, most states prefer local prosecutors to statewide prosecutors, except in specific types of cases such as election fraud, benefits fraud, and multi-jurisdictional crimes.³⁶ In at least 17 states, attorneys general do not have direct authority to convene a statewide or multi-jurisdictional investigating grand jury.³⁷ And, despite the statutory authority of attorneys general both with respect to jurisdiction and ability to convene statewide investigatory grand juries, internal rules and/or norms can restrict what attorneys general do in practice, complicating the issue further.³⁸

³² U.S. CHILDREN'S BUREAU, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2016), <https://www.childwelfare.gov/pubPDFs/define.pdf>.

³³ Compare 42 PA. STAT. AND CONS. STAT. ANN. § 4548 (West, Westlaw through 2019 Act 72) (giving statewide investigatory grand juries the power to issue subpoenas and presentments) with KY. REV. STAT. ANN. § 29A.200-260 (West, Westlaw through 2019) (containing no mention of statewide investigating grand juries).

³⁴ Compare D.C. Code Ann. § 23-113(a)(2)(C)-(D) (West, Westlaw through Aug. 6, 2019) (setting the statute of limitations for first and second degree child sexual abuse at 15 years after commission) with *State v. Hardin*, 201 S.E.2d 74, 75 (N.C. App. 1973) ("In North Carolina, there is no statute of limitations barring the prosecution of a felony.").

³⁵ Compare ALA. CODE § 26-14-3(f) (West, Westlaw through Act 2019-540) ("a member of the clergy shall not be required to report information gained solely in a confidential communication") with N.H. REV. STAT. ANN. § 169-C:29 (West, Westlaw through Chapter 175 of 2019 Reg. Sess.) ("Any . . . priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter.").

³⁶ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545-50 (2011).

³⁷ See Ed Mahon, *Will More States Follow Pennsylvania's Lead and Investigate Priest Sexual Abuse? Here's what they Say*, USA TODAY, <https://www.usatoday.com/story>

[/news/nation-now/2018/08/30/catholic-church-priest-abuse-how-all-50-states-handling/1142234002/](https://www.usatoday.com/story/news/nation-now/2018/08/30/catholic-church-priest-abuse-how-all-50-states-handling/1142234002/) (last updated Sept. 4, 2018, 6:01 AM).

³⁸ E-Mail from Paul Nolette, Assistant Professor of Political Science, Marquette Univ. (Sept. 1, 2018, 10:28 AM MST) (on file with author).

2. Statutes of Limitation for Child Sexual Abuse

Only seven states have completely eliminated statutes of limitation for felony sex crimes.³⁹ However, other states with statutes of limitation make enumerated exceptions when the victim is a minor.⁴⁰ Further, a majority of states have eliminated the requirement to report the abuse to extend the statute of limitations.⁴¹ Finally, 28 states either extend or eliminate statutes of limitation if DNA evidence identifies the perpetrator of the crime.⁴² Because of recent high profile scandals, including those of Harvey Weinstein, Bill Cosby, and Roy Moore, there is an increasing movement to extend or eliminate statutes of limitation for sex crimes, although it is still a slow process of piecemeal state legislation.⁴³

3. Mandatory Reporting Laws for Clergy

Of the 37 states that either explicitly include clergy as mandatory reporters of abuse or where clergy could be covered under a statute declaring “any person” to be a mandatory reporter, only six explicitly deny clergy-penitent privilege in cases of child abuse.⁴⁴ The remaining states do not address the issue.⁴⁵

³⁹ Rape, Abuse & Incest Nat’l Network, *State by State Guide on Statutes of Limitation*, RAINN, <https://www.rainn.org/state-state-guide-statutes-limitations> (last updated Dec. 2017) (identifying Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming as having eliminated statutes of limitation for all felony sex crimes).

⁴⁰ *E.g.*, ALA. CODE § 15-3-5(a)(4) (West, Westlaw through Act 2018-579) (“There is no limitation of time within which a prosecution must be commenced for: Any sex offense involving a victim under 16 years of age, regardless of whether it involves force or serious physical injury or death.”).

⁴¹ *See* Rape, Abuse & Incest Nat’l Network, *supra* note 39.

⁴² *Id.*

⁴³ *See* Laura Santhanam, *Why Do State Laws Put an Expiration Date on Sex Crimes?*, PBS NEWSHOUR (Nov. 28, 2017, 5:02 PM), <https://www.pbs.org/newshour/nation/why-do-state-laws-put-an-expiration-date-on-sex-crimes>.

⁴⁴ MANDATED REPORTERS, *supra* note 13.

⁴⁵ *Id.*

III. INTERNATIONAL LAW OVERVIEW

A. Crimes Against Humanity Generally

International law is complex and multifaceted, deriving from multiple sources.⁴⁶ The focus of this discussion will be crimes against humanity: the international crime that can most clearly be attributed to Catholic clergy.⁴⁷

For this Note, the definition of crimes against humanity comes from the Rome Statute of the International Criminal Court (Rome Statute) and related caselaw, as they contain a comprehensive definition that has been agreed upon by the international community.⁴⁸ The Rome Statute does not reserve crimes against humanity exclusively to times of war,⁴⁹ requiring only that one of 11 articulated crimes be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁵⁰

1. Threshold Requirements

a. Widespread or Systematic Attack

The first requirement that must be met before a crime can be considered a crime against humanity is that it must be committed in the context of a widespread or systematic attack, to “exclude isolated or random acts from the notion of crimes against humanity.”⁵¹ Both factors, widespread and systematic, are highly fact dependent.⁵² A widespread attack typically means either (i) an attack across a wide area and/or (ii) affecting a large number of people, but is “neither exclusively

⁴⁶ Statute of the International Court of Justice, art. 38, ¶ 1 (stating that the sources of international law include international conventions, international customs, “general principles of law recognized by civilized nations,” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations.”).

⁴⁷ *See generally* Groome, *supra* note 20 (concluding that a plausible case could be made that the Christian Brothers Congregation in Ireland committed crimes against humanity for repeated physical and sexual abuse of children).

⁴⁸ Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

⁴⁹ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment, ¶ 86 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://cld.irmct.org/assets/filings/Judgement-Kunarac.pdf> (holding that “‘attack’ and ‘armed conflict’ are not identical. . . . Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.”).

⁵⁰ Rome Statute, *supra* note 48, art. 7, ¶ 1.

⁵¹ *Situation in the Republic of Kenya*, Case No. 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 (Mar. 31, 2010), <https://www.legal-tools.org/en/doc/338a6f/>.

⁵² *See id.* ¶¶ 95-96.

quantitative nor geographical.”⁵³ Whether an attack is systematic is determined by its “organized nature” and “improbability of [its] random occurrence,” not by its scale or number of people affected.⁵⁴ Again, an attack needs to be only widespread or systematic, but not both, to qualify as a crime against humanity.⁵⁵

b. Attack Directed Against any Civilian Population

The Rome Statute further defines the meaning of “[a]ttack directed against any civilian population” as “a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁵⁶ This definition is important, as it can be read to encompass both state and non-state actors.⁵⁷ Further, the ICC has clarified that although inaction cannot in and of itself be relied upon to determine whether there is a policy, a policy can be inferred in part by a failure to act.⁵⁸

c. Knowledge of the Attack

The knowledge prong requires that the attack take place in the larger context of a widespread or systematic attack⁵⁹ and that the perpetrator of the crime have general knowledge that their individual crime is taking place in the context of a larger attack.⁶⁰ The perpetrator does not need to have complete knowledge or exact details.⁶¹

⁵³ *Id.* ¶ 95.

⁵⁴ *Id.* ¶ 96.

⁵⁵ Rome Statute, *supra* note 48, art. 7, ¶ 1.

⁵⁶ *Id.* art. 7, ¶ 2(a).

⁵⁷ See *Situation in the Republic of Kenya*, ¶¶ 90, 93 (Mar. 31, 2010) (articulating a non-exclusive list of factors to take into account in determining whether a group is an organization under the Rome Statute); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1117 (Mar. 7, 2014) (“the organisation is not the State, as the text uses the conjunction ‘or’ to denote that the concepts are and must remain distinct.”).

⁵⁸ INT’L CRIMINAL COURT, ELEMENTS OF CRIMES 5 n.6 (2011) (“[A] policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”) [hereinafter ELEMENTS].

⁵⁹ *Prosecutor v. Katanga*, ¶ 1124.

⁶⁰ *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 167 (Jun. 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

⁶¹ *Id.* (“[K]nowledge’ should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”).

2. Crimes Constituting Crimes against Humanity

Of the 11 crimes that constitute crimes against humanity,⁶² the three most applicable to clergy sexual abuse cases are torture,⁶³ rape,⁶⁴ and sexual violence.⁶⁵ This is based both on the circumstances surrounding various cases of abuse and a previous complaint lodged with the ICC demanding an investigation into high-ranking Church officials.⁶⁶

B. The International Criminal Court

The Rome Statute, the treaty establishing the ICC, officially came into existence on July 1, 2002.⁶⁷ The Rome Statute sets a high bar for a case to come before the ICC, requiring cases to meet six requirements: three regarding jurisdiction⁶⁸ and three regarding admissibility.⁶⁹ Additionally, the ICC prosecutor must have a reasonable basis to believe that a crime has occurred or is occurring.⁷⁰

1. Jurisdictional Requirements

a. Subject Matter Jurisdiction

The ICC has jurisdiction over four crimes: genocide, crimes against humanity, war crimes, and aggression.⁷¹ The crime of aggression is not currently defined, and the ICC may not prosecute anyone for aggression until the Rome Statute is amended to include a definition.⁷² Additionally, the ICC may prosecute officials for intentional “offences against its administration of justice,” although

⁶² Rome Statute, *supra* note 48, art. 7, ¶ 1.

⁶³ *Id.* art. 7, ¶ 1(f).

⁶⁴ *Id.* art. 7, ¶ 1(g).

⁶⁵ *Id.*

⁶⁶ See Center for Constitutional Rights & Survivors Network of those Abused by Priests, *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 Against Humanity*, CENTER FOR CONST. RTS. (Sept. 13, 2011), <http://s3.documentcloud.org/documents/243877/victims-communication.pdf> (providing additional analysis regarding the Church's commission of crimes against humanity).

⁶⁷ Rome Statute, *supra* note 48 (entered into force July 1, 2002).

⁶⁸ See *infra* Section III.B.1.

⁶⁹ See *infra* Section III.B.2.

⁷⁰ Rome Statute, *supra* note 48, art. 53, ¶ 1(a).

⁷¹ *Id.* art. 5, ¶ 1.

⁷² *Id.* art. 5, ¶ 2.

these crimes only occur in the context of a prosecution for one of the above crimes.⁷³ The focus of this Note with respect to the ICC is crimes against humanity.⁷⁴

b. Territorial and/or Personal Jurisdiction

The ICC must have either territorial or personal jurisdiction to prosecute crimes.⁷⁵ Territorial jurisdiction exists when either the crime occurs within the boundaries of a state that is a party to the Rome Statute,⁷⁶ or when a non-state party notifies the ICC that it will accept the ICC's exercise of jurisdiction.⁷⁷ Personal jurisdiction exists when a citizen of a state party commits a crime, regardless of location.⁷⁸ Additionally, when the United Nations Security Council (UNSC) refers crimes to the ICC, it sets the jurisdictional requirements, meaning that it can expand the ICC's jurisdiction to reach crimes committed outside of party states by persons who are not citizens of a party state.⁷⁹

c. Temporal Jurisdiction

None of the crimes that are prosecutable by the ICC have statutes of limitation.⁸⁰ However, the ICC can only prosecute crimes that occurred either after the Rome Statute came into effect, or after the Rome Statute came into effect in the country in question, whichever is later.⁸¹

2. Admissibility Requirements

a. Complementarity

The ICC was designed to function as a “court of last resort.”⁸² As such, the ICC only prosecutes when a national government is unwilling or unable to do so.⁸³ Additionally, the ICC typically will not prosecute a crime if the individual has

⁷³ *See id.* art. 70.

⁷⁴ *See supra* Section III.A.

⁷⁵ Rome Statute, *supra* note 48, art. 12.

⁷⁶ *Id.* art. 12, ¶ 2(a).

⁷⁷ *Id.* art. 12, ¶ 3.

⁷⁸ *Id.* art. 12, ¶ 2(b).

⁷⁹ *Id.* arts. 12, ¶ 2, 13(b).

⁸⁰ Rome Statute, *supra* note 48, art. 29.

⁸¹ *Id.* art. 11.

⁸² Vanderbilt Law School, *International Criminal Court Serves as a “Court of Last Resort,”* VANDERBILT LAW SCHOOL: NEWS (Apr. 6, 2010), <https://law.vanderbilt.edu/news/international-criminal-court-serves-as-a-court-of-last-resort/>.

⁸³ Rome Statute, *supra* note 48, art. 17, ¶ 1(a)-(b).

already been tried for their conduct.⁸⁴ However, the ICC reserves the right to do so if the previous proceedings were either undertaken to shield the individual from ICC jurisdiction or were not conducted in accordance with due process and without an intent to bring the individual to justice.⁸⁵

b. Gravity

Any case investigated by the ICC must be of “sufficient gravity to justify further action by the Court.”⁸⁶ Traditionally, the gravity requirement has played a minor role in the ICC’s overall analysis, with an early appellate decision overturning the Pretrial Chamber’s attempt to impose a strict, categorical approach to the gravity analysis.⁸⁷ The Appeal Chamber held that imposing such an approach both blurred clearly articulated jurisdictional requirements⁸⁸ and reduced the deterrent effect by focusing entirely on the highest ranking perpetrators only instead of both high and low ranking perpetrators.⁸⁹

However, the gravity analysis also comes into play when the court approves the prosecutor’s request to initiate an investigation. Here, the ICC has taken a slightly stricter approach, finding that the prosecutor should focus their investigation on those most responsible for the crimes.⁹⁰ However, while the Pretrial Chamber had previously attempted to impose a similar requirement, this only affects who the prosecutor opens their investigation against, not who is ultimately prosecuted, thus not artificially limiting the ICC’s jurisdiction.⁹¹

c. Interests of Justice

The determination of whether an investigation serves the interests of justice must consider the gravity of the crime, the interests of the victims, the perpetrator’s physical and mental condition, and the perpetrator’s role in the crime.⁹² Finally, the prosecutor must have “substantial reasons” that prosecution would not serve the interests of justice to use this requirement to not investigate.⁹³

⁸⁴ *Id.* art. 17, ¶ 1(c).

⁸⁵ *Id.* art. 20, ¶ 3.

⁸⁶ *Id.* art. 17, ¶ 1(d).

⁸⁷ Margaret M. DeGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475, 484 (2013).

⁸⁸ *See* Situation in the Democratic Republic of Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ¶ 70 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

⁸⁹ *See id.* ¶ 73.

⁹⁰ DeGuzman, *supra* note 87, at 485.

⁹¹ *Id.* at 483.

⁹² Rome Statute, *supra* note 48, art. 53, ¶ 2(c).

⁹³ *Id.* ¶ 1(c).

In practice, there are conflicting interpretations over what exactly it means for an investigation to be in the interests of justice or not.⁹⁴ Some argue that the interests of justice analysis should only comprise those factors laid out in the Rome Statute, which is also the stated view of the ICC prosecutor.⁹⁵ Others argue that the prosecutor should take other factors into account, such as budget concerns or other forms of justice.⁹⁶ Despite disagreements about the precise meaning of the text and decisions by the prosecutor that could be interpreted as involving the consideration of other factors besides those in the Rome Statute,⁹⁷ the prosecutor has clarified numerous times that it analyzes the interests of justice based on the text of the Rome Statute.⁹⁸ Finally, the prosecutor has also stated that decisions not to prosecute based on the interests of justice are “highly exceptional.”⁹⁹

C. International Criminal Tribunals

International criminal tribunals are ad hoc courts established to prosecute violations of international criminal or international humanitarian law arising out of a specific event or series of events.¹⁰⁰ Tribunals can be established by the UNSC when it finds that there is or has been a “threat to the peace, breach of the peace, or act of aggression.”¹⁰¹ Recently, tribunals have been established to try crimes arising out of the Yugoslav Wars¹⁰² and the Rwandan Genocide.¹⁰³

The UNSC has complete discretion not only to determine which crimes to give a tribunal jurisdiction over,¹⁰⁴ but also to define what constitutes the commission of each crime.¹⁰⁵ Further, the UNSC also has complete discretion to

⁹⁴ See generally Talita De Souza Dias, ‘Interests of Justice’: Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court, 30 LEIDEN J. INT’L L. 731 (2017) (explaining the different interpretations of “interests of justice” and exploring possible remedies to the ambiguity).

⁹⁵ *Id.* at 732-33.

⁹⁶ *Id.* at 732.

⁹⁷ *Id.* at 733.

⁹⁸ See INT’L CRIMINAL COURT – THE OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS ¶¶ 67-68 (2013).

⁹⁹ See *id.* ¶ 71.

¹⁰⁰ *International criminal tribunals*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/International_criminal_tribunals (last visited Oct. 3, 2018).

¹⁰¹ See U.N. Charter arts. 39, 41 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”).

¹⁰² S.C. Res. 827 (May 25, 1993).

¹⁰³ S.C. Res. 955 (Nov. 8, 1994).

¹⁰⁴ See U.N. Charter arts. 39, 41.

¹⁰⁵ See, e.g., S.C. Res. 955, arts. 2-4 (Nov. 8, 1994).

set all jurisdictional requirements of any tribunal.¹⁰⁶ Because of this vast discretion, the definition of crimes set forth by the UNSC in any particular tribunal could deviate from the definitions set out in the Rome Statute.¹⁰⁷

IV. UNITED STATES ANALYSIS

A. Grand Juries

At their worst, grand juries serve simply to rubber stamp charges for prosecutors, exemplified by the famous saying that a prosecutor could get a grand jury to “indict a ham sandwich.”¹⁰⁸ However, although “runaway” grand juries—grand juries that a prosecutor loses control of—have occurred in the past, their modern occurrence is rare.¹⁰⁹ At their best, however, they serve as a shield, protecting innocent citizens from overzealous prosecutors.¹¹⁰

One significant hurdle to successful state investigations of clerical sex abuse is that these crimes do not fall neatly within jurisdictions of specific counties, hindering the ability of individual county prosecutors to successfully take on a problem that exists across a particular state.¹¹¹ Pennsylvania, the state of the most recent grand jury report and the state used as a model in this Note, has largely solved all of these problems. A final issue, which is currently being litigated, deals with the constitutionality of the investigating grand jury publicly issuing its report.¹¹²

¹⁰⁶ See, e.g., *id.* arts. 5-9.

¹⁰⁷ Compare S.C. Res. 955, art. 3 (Nov. 8, 1994) (including nine crimes as the basis of crimes against humanity and requiring that the attack be on “national, political, ethnic, racial or religious grounds”), with Rome Statute of the International Criminal Court, art. 7, ¶ 1, July 17, 1998, 2187 U.N.T.S. 38544 (including eleven crimes as the basis of crimes against humanity and not including the requirement that the attack be on national, political, ethnic, racial, or religious grounds).

¹⁰⁸ Christopher Hooton, *A Grand Jury Could ‘Indict a Ham Sandwich,’ but Apparently Not a White Police Officer*, THE INDEPENDENT (Nov. 25, 2014, 4:18 PM), <https://www.independent.co.uk/news/world/americas/a-grand-jury-could-indict-a-ham-sandwich-but-apparently-not-a-white-police-officer-9882529.html>.

¹⁰⁹ Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 822 (1999) (explaining that runaway grand juries have been “virtually eliminated” at the federal level).

¹¹⁰ Lena H. Sun, *Grand Jury: Sword, Shield or Rubber Stamp*, WASH. POST (Apr. 9, 1999), https://www.washingtonpost.com/archive/politics/1998/04/09/grand-jury-sword-shield-or-rubber-stamp/474758ef-8918-4c4f-9929-a137d37fc8a4/?noredirect=on&utm_term=.747184bf1780.

¹¹¹ REPORT I, *supra* note 2.

¹¹² In re Fortieth Statewide Investigating Grand Jury, 190 A.3d 560,562 (Pa. 2018).

1. The “Runaway” Problem

Pennsylvania divides grand juries into two types: indicting¹¹³ and investigating.¹¹⁴ The indicting grand jury performs as most people expect a grand jury to: a prosecutor presents evidence, the grand jury subpoenas witnesses and documents, takes testimony, and ultimately indicts or declines to indict.¹¹⁵ The investigating grand jury has all of the same powers, with one exception: it cannot indict.¹¹⁶ Instead, the investigating grand jury has the option of issuing a presentment.¹¹⁷ If a prosecutor decides to initiate charges on the basis of a presentment, the procedure is the same as with bringing any other charges,¹¹⁸ beginning with either a preliminary hearing¹¹⁹ or an indicting grand jury.¹²⁰ Additionally, investigating grand juries are limited by statute to an eighteen month term,¹²¹ with a possible six month extension.¹²² Finally, the grand jury can be disbanded at any time, either by a majority vote of its members at the conclusion of its work,¹²³ or by the court if it concludes that the grand jury is no longer “conducting proper investigating activity.”¹²⁴ Because investigating grand juries lack the power to indict and are term-limited, valid concerns about the use of grand juries, including their use as a “rubber stamp,”¹²⁵ are avoided entirely.

2. Jurisdiction

Another common issue with grand juries is their limited jurisdiction.¹²⁶ As shown in the Pennsylvania report, the scope of the abuse, even in a single state, is vast.¹²⁷ A related problem deals with who has the ability to convene grand juries.

¹¹³ See PA. R. CRIM. P. 556.11.

¹¹⁴ 42 PA. STAT. AND CONS. STAT. ANN. § 4548 (West, Westlaw through 2018 Act 76).

¹¹⁵ PA. R. CRIM. P. 556.11.

¹¹⁶ 42 PA. STAT. AND CONS. STAT. ANN. § 4548(c) (West, Westlaw through 2018 Act 76).

¹¹⁷ *Id.* § 4551.

¹¹⁸ *Id.* § 4551(e).

¹¹⁹ PA. R. CRIM. P. 542(A).

¹²⁰ PA. R. CRIM. P. 556.2(A).

¹²¹ 42 PA. STAT. AND CONS. STAT. ANN. § 4546(a) (West, Westlaw through 2018 Act 76).

¹²² *Id.* § 4546(b).

¹²³ *Id.* § 4546(a).

¹²⁴ *Id.* § 4546(c).

¹²⁵ Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1219 (2017).

¹²⁶ See, e.g., N.M. STAT. ANN. § 31-6-1 (West, Westlaw through 2d Reg. Sess. of 53rd Legis.) (defining grand juries at the county level).

¹²⁷ REPORT I, *supra* note 2 (stating that the report covers six out of seven dioceses and 54 of 67 counties in Pennsylvania).

Typically, single county grand juries are impaneled by a local judge¹²⁸ after a request by a local prosecutor.¹²⁹ Further, in addition to the straightforward jurisdictional problem that arises when a single county-level prosecuting agency is forced to take on a statewide crime, there is also the more practical problem of funding. Even among affluent counties, there are tremendous disparities in spending power.¹³⁰

To remedy these problems, Pennsylvania gives its Attorney General the power to convene a multicounty investigating grand jury when “organized crime or public corruption or both” occurs across multiple counties and cannot be adequately handled by a single county investigating grand jury.¹³¹ Although this does not relieve individual county-level prosecutors from their responsibility to investigate as well,¹³² having the assistance of a statewide investigating grand jury and potentially the state attorney general’s office could lead to both a more thorough investigation and reduce the strain on local budgets.

3. Public Release

The public release of the Pennsylvania grand jury report made headlines across the United States for both its immense scale and graphic depictions of abuse.¹³³ However, upon reading the report, two additional facts stand out: significant redactions¹³⁴ and the few prosecutions that resulted from its release.¹³⁵

Pennsylvania’s investigating grand jury statute provides that a grand jury may vote to release a report of its findings at any time,¹³⁶ which is then subject to approval by the supervising judge to determine both that the report is based on the

¹²⁸ *E.g.*, KY. REV. STAT. ANN. § 29A.210 (West, Westlaw through 2018) (“A regular grand jury shall be summoned upon the order of the Chief Circuit Judge.”).

¹²⁹ *E.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 4543(b) (West, Westlaw through 2018 Act 76) (“Application . . . by the attorney for the Commonwealth for an . . . investigating grand jury . . .”).

¹³⁰ *Top 20 U.S. Counties by Budget – and Their CIOs*, GOV’T TECH. (May 15, 2007), <http://www.govtech.com/biz/Top-20-US-Counties-by-Budget--and-Their-CIOs.html>.

¹³¹ 42 PA. STAT. AND CONS. STAT. ANN. § 4544(a) (West, Westlaw through 2018 Act 76).

¹³² *Id.* § 4544(d).

¹³³ *E.g.*, Michelle Boorstein & Gary Gately, *More than 300 Accused Priests Listed in Pennsylvania Report on Catholic Church Sex Abuse*, WASH. POST (Aug. 14, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/14/pennsylvania-grand-jury-report-on-sex-abuse-in-catholic-church-will-list-hundreds-of-accused-predator-priests/?utm_term=.d694e047565a (“Another boy was repeatedly raped from ages 13 to 15 by a priest who bore down so hard on the boy’s back that it caused severe spine injuries.”).

¹³⁴ *See, e.g.*, REPORT I, *supra* note 2, at 441-42.

¹³⁵ *Id.* at 1 (“As a consequence of the coverup, almost every instance of abuse we found is too old to be prosecuted.”); *see also infra* Section IV.B.

¹³⁶ 42 PA. STAT. AND CONS. STAT. ANN. § 4552(a) (West, Westlaw through 2018 Act 76).

investigation and is supported by a preponderance of the evidence.¹³⁷ Additionally, the judge may allow someone portrayed negatively in a report but not ultimately indicted through an indicting grand jury or preliminary hearing to write a response to the report, which is then attached to and incorporated as part of the report to be released.¹³⁸ Ultimately, it is up to the grand jury whether the crimes are serious enough to even attempt to release a report. In this case, they felt the need to release the report due to the scale of the injustice:

[W]e are not satisfied by the few charges we can bring, which represent only a tiny percentage of all the child abusers we saw. We are sick over all the crimes that will go unpunished and uncompensated. This report is our only recourse. We are going to name their names, and describe what they did – both the sex offenders and those who concealed them. We are going to shine a light on their conduct, because that is what the victims deserve. And we are going to make our recommendations for how the laws should change so that maybe no one will have to conduct another inquiry like this one. We hereby exercise our historical and statutory right as grand jurors to inform the public of our findings.¹³⁹

Preceding the release of the report, a number of the priests named brought a challenge based both in the guarantee of Pennsylvania's Constitution for citizens to be secure in their reputations and the Due Process Clause of the US Constitution.¹⁴⁰ In addition to alleging the falsity of the report itself, they also alleged that the preponderance of the evidence standard in the statute authorizing the release of the report is an insufficient safeguard to protect their fundamental constitutional rights.¹⁴¹

The Supreme Court of Pennsylvania agreed with the challengers, holding that the right to one's reputation is a fundamental right.¹⁴² Further, the court held that the procedures in the investigating grand jury were insufficient,¹⁴³ and that a redacted version of the report be released pending a final decision on "whether additional process can and should now be provided as a curative measure."¹⁴⁴

¹³⁷ *Id.* § 4552(b).

¹³⁸ *Id.* § 4552(e).

¹³⁹ REPORT I, *supra* note 2, at 2.

¹⁴⁰ *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 562 (Pa. 2018).

¹⁴¹ *Id.*

¹⁴² *Id.* at 572 ("[T]he right of citizens to security in their reputations is not some lesser-order precept. . . . Rather, in Pennsylvania it is a fundamental constitutional entitlement.").

¹⁴³ *Id.* at 575.

¹⁴⁴ *Id.* at 578.

Ultimately, the Court held that the redactions would be made permanent to protect the priests' due process rights.¹⁴⁵

Despite the grand jury's admirable intention in bringing awareness to the scope of clerical sex abuse in Pennsylvania, the challengers and the Supreme Court of Pennsylvania brought legitimate problems with the statute to light. Regardless, Pennsylvania's statute should still be seen as an important model for other states, especially when combined with reforms to statutes of limitations for sex crimes.¹⁴⁶

B. Statutes of Limitation

One reason that the grand jurors investigating in Pennsylvania were palpably incensed at the lack of prosecutable cases that they found was due to statutes of limitation.¹⁴⁷ While the jurors were right to be outraged, the debate over statutes of limitation,¹⁴⁸ in particular for those involving sex crimes, is both difficult and emotionally charged.

The argument for keeping statutes of limitation focuses both on preventing false accusations¹⁴⁹ and preventing claims after "evidence has been lost, memories have faded, and witnesses have disappeared."¹⁵⁰ Unfortunately, research shows that false accusations of rape do occur,¹⁵¹ with studies placing the false reporting rate in the range of 2.1% to 10.9%,¹⁵² although the higher numbers have been criticized.¹⁵³ However, these statistics only reflect those rapes that were reported, and it is estimated that in 2016, less than a quarter of rapes and sexual assaults were

¹⁴⁵ *Id.* at 577-78. *SHOULD BE SUPRA OR SHORT CITE (ID #5)*

¹⁴⁶ *See infra* Section IV.B.

¹⁴⁷ REPORT I, *supra* note 2, at 1 ("As a consequence of the coverup, almost every instance of abuse we found is too old to be prosecuted.").

¹⁴⁸ *Compare Criminal Justice: Removing the Statute of Limitations (HB 3057) (2011)*, ACLU OREGON, <https://www.aclu-or.org/en/legislation/criminal-justice-removing-statute-limitations-hb-3057-2011> (arguing against the extension of the statute of limitations in sex crimes) with Rape, Abuse & Incest Nat'l Network, *Five Things that Make an Effective Statute of Limitations*, RAINN, <https://www.rainn.org/articles/five-things-make-effective-statute-limitations> (arguing for the elimination of statutes of limitation for felony sex crimes and sex crimes against minors) (last visited Nov. 1, 2018).

¹⁴⁹ *Criminal Justice: Removing the Statute of Limitations (HB 3057) (2011)*, *supra* note 148.

¹⁵⁰ New York Civil Liberties Union, *Legislative Memo: Statute of Limitations Expansion for Certain Sex Offenses*, NYCLU, <https://www.nyclu.org/en/legislation/legislative-memo-statute-limitations-expansion-certain-sex-offenses> (last visited Nov. 3, 2018) (citing *Pedzewick v. Foe*, 963 F.Supp. 48, 51 (D. Mass 1997)).

¹⁵¹ NAT'L SEXUAL ASSAULT RESOURCE CENTER, *FALSE REPORTING: OVERVIEW 3 (2012)*, <https://www.nsvrc.org/publications/false-reporting-overview>.

¹⁵² David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010).

¹⁵³ *See id.* at 1321-22 (criticizing some of the studies for relying on stereotypes and for allowing police to make the sole determination of veracity).

reported.¹⁵⁴ Although the judicial system is often imperfect,¹⁵⁵ more comprehensive reforms to the criminal justice system, including better police training for what does and does not indicate a false report,¹⁵⁶ combating the reasons that victims give for not reporting rape,¹⁵⁷ and timely processing of rape kits¹⁵⁸ should ultimately be part of the solution. Finally, more wholesale reforms to increase reporting, combined with the continually increasing use of DNA testing to both convict real perpetrators¹⁵⁹ and clear wrongful convictions,¹⁶⁰ could ultimately render the statute of limitations question moot, as cases would surface quicker. In the meantime, existing statute of limitation laws only serve to deny justice and allow perpetrators to walk free, especially in the case of child victims of clerical sex abuse.¹⁶¹

C. Mandatory Reporting

Everyone, including priests, should be required to report child abuse regardless of where they learned of it, even if it was through confession. However, even though few states waive the clergy-penitent privilege in this context,¹⁶² it is unclear how much of an effect the change in laws would have. Priests are forbidden by the Church to reveal anything that is said in confession,¹⁶³ and incur automatic

¹⁵⁴ See, e.g., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2016: REVISED 7 (2018).

¹⁵⁵ See, e.g., *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (listing that 365 people have been exonerated in the US through the use of DNA) (last accessed Nov. 5, 2018).

¹⁵⁶ See Lisak et al., *supra* note 152, at 1321-22.

¹⁵⁷ See Rape, Abuse & Incest Nat'l Network, *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (listing reasons for not reporting such as the fear of retaliation, not trusting that police would act, and believing it was not important enough to report) (last visited Nov. 5, 2018).

¹⁵⁸ *Where the Backlog Exists and What's Happening to End It*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> (last visited Nov. 5, 2018).

¹⁵⁹ *Featured Cases – 179 Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases-categories/real-perpetrator-found/#perp-subsequent-yes,exonerated-by-dna> (listing the 179 cases where both the defendant was exonerated and the true perpetrator was found through the use of DNA) (last accessed Nov. 5, 2018).

¹⁶⁰ See, e.g., *DNA Exonerations in the United States*, *supra* note 155 (listing that 362 people have been exonerated in the US through the use of DNA) (last accessed Nov. 5, 2018).

¹⁶¹ REPORT I, *supra* note 2 (“As a consequence of the coverup, almost every instance of abuse we found is too old to be prosecuted.”).

¹⁶² MANDATED REPORTERS, *supra* note 13 (listing the six states that both include clergy as mandatory reporters and waive clergy-penitent privilege).

¹⁶³ 1983 CODE c.983, §1 (“The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason.”).

excommunication for doing so.¹⁶⁴ Indeed, some priests have indicated that they would go to jail rather than break the seal of confession.¹⁶⁵ Additionally, the idea of abrogating the clergy-penitent privilege as it relates to mandatory reporting raises First Amendment concerns, although there is a powerful argument to be made for the constitutionality of doing so.¹⁶⁶

Ultimately, while states should make all members of the clergy mandatory reporters and abrogate clergy-penitent privilege when child abuse is revealed to them, it is of lesser importance as compared to the enactment and empanelling of investigating grand juries and the extension or elimination of statutes of limitation for sex crimes.

V. INTERNATIONAL ANALYSIS

Currently, there have only been 27 cases of any kind before the ICC,¹⁶⁷ compared to 161 before the International Criminal Tribunal for Yugoslavia (ICTY),¹⁶⁸ and 93 before International Criminal Tribunal for Rwanda (ICTR).¹⁶⁹ Because of this disparity, some of the analysis concerning crimes against humanity will come from cases decided by the ICTY and ICTR, even though the discussion is about trying the case before the ICC or another criminal tribunal. While these cases provide a useful comparison, it is important to note that neither the ICC nor any future tribunal are bound by the decisions of other international bodies.¹⁷⁰

¹⁶⁴ 1983 CODE c.1388, § 1 (“A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See.”).

¹⁶⁵ *Australian Priests “Willing to go to Jail” Rather than Break Confessional Seal*, CATHOLIC NEWS AGENCY (Jun. 18, 2018, 12:53 PM), <https://www.catholicnewsagency.com/news/australian-priests-willing-to-go-to-jail-rather-than-break-confessional-seal-95237>.

¹⁶⁶ See generally Caroline Donze, *Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law*, 78 LA. L. REV. 268 (2018) (summarizing the history of the privilege and the First Amendment issues involved before concluding that its abrogation is constitutional).

¹⁶⁷ *Facts and Figures*, INT’L CRIM. COURT, <https://www.icc-cpi.int/about> (last visited Nov. 12, 2018).

¹⁶⁸ *Infographic: ICTY Facts & Figures*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/content/infographic-icty-facts-figures> (last visited Nov. 12, 2018).

¹⁶⁹ *The ICTR in Brief*, UNITED NATIONS INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <http://unictr.irmct.org/en/tribunal> (last visited Sept. 22, 2019).

¹⁷⁰ Volker Nerlich, *The Status of ICTY and ICTR Precedent in Proceedings before the ICC*, in THE EMERGING PRAC. OF THE INT’L CRIM. CT. at 310-11 (Carsten Stahn et al. eds., 2009) (explaining that the ICTY, ICTR, and ICC are all governed by different documents and are therefore not bound by each other’s decisions, despite being helpful to each other).

A. Do Priests' Crimes Qualify as Crimes Against Humanity?

Before an analysis of whether priests could be tried before the ICC or a tribunal, there must be a determination of whether individual priests' crimes satisfy the definition of crimes against humanity. Every crime that constitutes a crime against humanity needs to satisfy the threshold requirements of being committed as part of a widespread or systematic attack against a civilian population and the perpetrator's knowledge that their individual crime was meant to be part of that widespread or systematic attack.¹⁷¹ This is in addition to the specific requirements of each crime. Further, these crimes, like all criminal cases, are highly fact dependent and not every offending priest will have committed each crime. Rather, torture, rape, and sexual violence are the most likely crimes to have been committed based on the available records of offending priests' courses of conduct.¹⁷²

1. Threshold Requirements

a. Widespread or Systematic Attack

It is most likely that the abuse would be classified as widespread, rather than systematic, given that there is no evidence that the Church specifically directed priests to abuse children. But the problem of clerical sex abuse is certainly widespread.¹⁷³ The ICC has found that an attack was widespread when an attack was committed "over a large geographical area" and included a large number of victims.¹⁷⁴ Here, the abuse affected over a thousand children in one state alone.¹⁷⁵ Taken alone, that would satisfy the requirement that there be a large number of victims. Given that the abuse also occurred across the rest of the United States and around the world, the abuse also occurred over a large geographical area, making the attack widespread.

b. Attack Directed Against Any Civilian Population

There are four elements to this requirement: there must be an attack, the attack must be directed against any civilian population, there must be a policy and

¹⁷¹ ELEMENTS, *supra* note 58, at 5 ("The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population.").

¹⁷² REPORT I, *supra* note 2, at 285-94 (describing a case that potentially consists of all three crimes, wherein a priest impregnated a girl and then arranged an abortion, causing the girl to, among other things, question her faith).

¹⁷³ See discussion *supra* Section I.

¹⁷⁴ See *Prosecutor v. Bemba Gombo*, ¶¶ 688-89.

¹⁷⁵ See REPORT I, *supra* note 2.

the attack must be pursuant to or in furtherance of that policy, and the policy must come from a state or organization.¹⁷⁶

The conduct of priests in these cases constitutes an attack. In defining the term “attack,” the ICC has held that proving an attack “consists of proving only that the course of conduct involved the multiple commission of acts referred to in article 7(1).”¹⁷⁷ This is clearly the case here, even if the analysis consisted solely of the events in Pennsylvania.¹⁷⁸

Further, this attack was directed against a civilian population. To protect against excess claims of crimes against humanity, it is not enough to prove that the attack was directed against a limited group of random civilians.¹⁷⁹ Rather, it must be shown that a sufficient number of civilians were attacked, without having to prove that the entire civilian population was targeted.¹⁸⁰ In that case, 33 confirmed civilian deaths within a single village was found to be enough to constitute a civilian population.¹⁸¹ Although the crimes by priests were random in the sense that priests did not always target specific children, they were not committed randomly, as they were targeted at civilians that priests had regular access to, whether that was altar servers,¹⁸² seminarians,¹⁸³ or someone in a confessional.¹⁸⁴ Further, the victims of clerical sex abuse far exceed 33.¹⁸⁵

According to the ICC’s definitions, it was the policy of the Catholic Church for these attacks to happen and the attacks were pursuant to that policy. In its evaluation of the term “policy,” the ICC has found that a policy can be found either through action or deliberate failure to act,¹⁸⁶ that a formally designed policy is not required,¹⁸⁷ and that a policy can be determined in part by “repeated actions occurring according to a same sequence.”¹⁸⁸ Here, there is no evidence that the Church had a formal policy of targeting children, but its repeated failure to act had that same effect, whether through the quiet transferring of abusive priests or treating

¹⁷⁶ Rome Statute, *supra* note 48, art. 7, ¶ 2(a).

¹⁷⁷ See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, ¶ 1101.

¹⁷⁸ See *infra* Section (V)(A)(2)(a)-(c); see generally REPORT I, *supra* note 2 (describing the commission of multiple acts referred to in article 7(1)).

¹⁷⁹ Prosecutor v. Katanga, ¶ 1105.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ¶ 1136.

¹⁸² See, e.g., Lauren Chval, *Former Altar Boy Sexually Abused by Priest Tells Why He’s Raising His Kids in the Catholic Church*, CHIC. TRIBUNE (Oct. 26, 2018, 11:55am), <https://www.chicagotribune.com/lifestyles/ct-life-catholic-church-sex-abuse-parenting-1025-story.html>.

¹⁸³ See, e.g., Laurie Goodstein & Sharon Otterman, *He Preyed on Men Who Wanted to Become Priests. Then He Became a Cardinal*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/us/cardinal-mccarrick-abuse-priest.html>.

¹⁸⁴ See, e.g., REPORT I, *supra* note 2, at 398 (“When she was practicing confession, Bolton entered her side of the confession booth. . . . He fondled her and rubbed his penis against her.”).

¹⁸⁵ See REPORT I, *supra* note 2.

¹⁸⁶ Prosecutor v. Katanga, ¶ 1108.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* ¶ 1109.

the abuse as a personal failure rather than a crime and repeatedly protecting abusive priests from any serious consequences.¹⁸⁹ Further, this failure to act spans all levels of Catholic hierarchy, from local authorities transferring individual priests¹⁹⁰ to accusations that each of the last three Popes have had personal knowledge of the situation.¹⁹¹ Furthermore, these attacks were in furtherance of this policy. For this requirement to be met, it must be shown that the “policy . . . has a part in making sense of the acts committed by connecting them in such a way as to establish the existence of a course of conduct . . . that constitutes an attack.”¹⁹² Here, the repeated worldwide abuse has occurred because of, or pursuant to, the policy of transferring or otherwise protecting abusive priests.

Finally, the Catholic Church is an organization within the meaning of the Rome Statute. The Rome Statute says that the policy must come from a “State or organizational policy”¹⁹³ and the ICC has held that the use of “or” means that they are distinct.¹⁹⁴ The ICC has additionally held that although the Rome Statute does not define organization, “the organisation concerned must have sufficient means to promote or encourage the attack, with no further requirement necessary.”¹⁹⁵ It has also not ruled out a private entity having this capability, in addition to a state or state-like organization.¹⁹⁶ The Catholic Church clearly has sufficient means, with hundreds of thousands of clergy spread worldwide¹⁹⁷ and power centralized in one man.¹⁹⁸ Additionally, the Catholic Church could be seen as a private organization,

¹⁸⁹ See, e.g., Tara Isabella Burton, *The Decades-Long Catholic Priest Child Sex Abuse Crisis, Explained*, VOX (Sept. 4, 2018, 7:10 AM), <https://www.vox.com/2018/9/4/17767744/catholic-child-clerical-sex-abuse-priest-pope-francis-crisis-explained> (“It meant priests would simply be transferred to new parishes . . . [C]oncluded that the church hierarchy had systematically defended and protected priests, treating their offenses as sins that demanded repentance and forgiveness, rather than criminal prosecution.”).

¹⁹⁰ See *id.* (“Law was directly responsible for some of Geoghan’s transfers, the *Globe* found, allowing him to continuously abuse children throughout the area.”).

¹⁹¹ 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, 5:00 AM), <https://www.usatoday.com/story/opinion/2018/08/28/pope-francis-knew-cardinal-mccarrick-sexual-abuse-catholic-churchcolumn/1109251002/>; See, e.g., Alexander Stille, *What Pope Benedict Knew About Abuse in the Catholic Church*, THE NEW YORKER (Jan. 14, 2016), <https://www.newyorker.com/news/news-desk/what-pope-benedict-knew-about-abuse-in-the-catholic-church>; See, e.g., *Cardinal: Pope John Paul II Approved Letter on Shielding Priest Abuser*, CATH. REV. (Jan. 19, 2012), <https://www.archbalt.org/cardinal-pope-john-paul-ii-approved-letter-on-shielding-priest-abuser/>.

¹⁹² *Prosecutor v. Katanga*, ¶ 1114.

¹⁹³ Rome Statute, *supra* note 48, art. 7, § (2)(a).

¹⁹⁴ *Prosecutor v. Katanga*, ¶ 1117.

¹⁹⁵ *Id.* ¶ 1119.

¹⁹⁶ *Id.*

¹⁹⁷ *Pontifical Yearbook 2016 and the Annuario Statisticum Ecclesiae 2014: Dynamics of a Church in Transformation, 05.03.2016*, VATICAN.VA: PRESS OFFICE (Mar. 3, 2016), <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2016/03/05/160305b.html>.

¹⁹⁸ CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH 882 (Doubleday, 2003) (“For the Roman Pontiff, by reason of his office as Vicar of Christ, and as pastor of

like most other religious institutions, or a state-like organization, given its vast power and influence and its unique position at the United Nations.¹⁹⁹

c. Knowledge of the Attack

Acts committed by individual priests occurred in the context of a larger attack, and those priests had knowledge of that larger attack. To prove that the acts were committed in a larger context, each individual act must not “clearly differ in their nature, aims and consequences from other acts that form part of an attack,”²⁰⁰ with the court considering the nature of the act, its aims and consequences, and part of the larger widespread or systematic attack by comparing the pattern of acts and victims, and other relevant factors.²⁰¹ To show that the priests had knowledge of the larger attack, it is enough to show that they had “knowledge of the particular fact that his or her act formed part of the attack.”²⁰²

Here, all of the acts of the priests were part of a larger attack. All followed a similar pattern of priests abusing their power to take advantage of minors or adults otherwise under their supervision.²⁰³ Further, while it is unlikely that priests knew every detail about priest-shifting or how the Church went about protecting them, that is not a requirement.²⁰⁴ Rather, it is enough that they knew that their actions would most likely result in being transferred or shielded from legal consequences, demonstrated by cases where priests were moved numerous times²⁰⁵ or where bishops were explicitly commended for not turning over abusive priests.²⁰⁶

the entire Church has full, supreme, and universal power over the whole Church, a power which he can always exercise unhindered.”) [hereinafter CATECHISM].

¹⁹⁹ See *generally Non-Member States*, UNITED NATIONS,

<https://www.un.org/en/sections/member-states/non-member-states/index.html> (last visited Dec. 16, 2018).

²⁰⁰ See *Prosecutor v. Katanga*, ¶ 1124.

²⁰¹ *Id.*

²⁰² *Id.* ¶ 1125.

²⁰³ See *supra* notes 182-84 and accompanying text.

²⁰⁴ *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 167 (Jun. 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF (“‘with knowledge’ ‘should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.’”).

²⁰⁵ See, e.g., Candy Woodall, *One Priest was Arrested for Soliciting Sex, but His Diocese Just Moved Him Again*, USA TODAY (Aug. 22, 2018, 8:15 PM), <https://www.usatoday.com/story/news/nation-now/2018/08/22/priests-moved-around-catholic-churches-not-prosecuted/1061445002/> (“He’s one of several examples in central Pennsylvania of the diocese shuffling predator priests, called ‘passing the trash.’”).

²⁰⁶ *Cardinal: Pope John Paul II Approved Letter on Shielding Priest Abuser*, CATH. REV. (Jan. 19, 2012), <https://www.archbalt.org/cardinal-pope-john-paul-ii-approved-letter-on-shielding-priest-abuser/> (“‘I congratulate you for not denouncing a priest to the civil administration,’ Cardinal Castrillon wrote to Bishop Pierre Pican of Bayeux-Lisieux.”).

2. Specific Crimes

a. Torture

To be guilty of torture under the Rome Statute, the perpetrator must inflict severe mental or physical pain and have the victim in their custody or control.²⁰⁷ Additionally, the pain or suffering cannot “arise only from, [or be] inherent in or incidental to, lawful sanctions.”²⁰⁸

Whether a victim endured severe mental or physical pain as a result of being raped and undergoing an abortion,²⁰⁹ after having been raised in a religion that strictly forbids abortion,²¹⁰ is a question to be decided in court, but certainly not out of the realm of possibility. Additionally, the ICTY has held that sexual violence “necessarily gives rise to severe pain or suffering,” and that rape is properly characterized as torture.²¹¹ Next, the victim must be in the perpetrator’s custody or control. Neither the ICTY nor the ICTR have the requirement for custody or control in their definitions of torture.²¹² Furthermore, none of the cases that have come before the ICC involving torture have yet resulted in a judgment, leaving no precedent to consider.²¹³ Therefore, the definition of custody or control for the purposes of the Rome Statute are unclear. However, in its letter requesting an investigation to the ICC, the Center for Constitutional Rights notes that victims are often effectively under priests’ custody or control, particularly when the abuse occurs in the confessional or “other religious settings,” where parents are not present.²¹⁴ Finally, there are no “lawful sanctions” that involve the sexual abuse of a minor.

²⁰⁷ ELEMENTS, *supra* note 58, at 7.

²⁰⁸ *Id.*

²⁰⁹ REPORT I, *supra* note 2, at 285-94 (describing a case that potentially consists of all three crimes, wherein a priest impregnated a girl and then arranged an abortion, causing the girl to, among other things, question her faith).

²¹⁰ CATECHISM, *supra* note 198, at 606 (“Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law . . .”).

²¹¹ *See Prosecutor v. Kunarac*, ¶ 150, at 46.

²¹² *Id.* ¶¶ 142-44.

²¹³ *Case Information Sheet – Callixte Mbarushimana*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/CaseInformationSheets/MbarushimanaEng.pdf> (last visited Dec. 15, 2018) (showing that the court “found that Callixte Mbarushimana did not provide any contribution to the commission of the alleged crimes”); *Case Information Sheet - Dominic Ongwen*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/CaseInformationSheets/ongwenEng.pdf> (last visited Dec. 15, 2018) (showing that the defendant’s trial for torture is still in progress); *Case Information Sheet - Alfred Yekatom*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/CaseInformationSheets/yekatomEng.pdf> (showing that the defendant is still awaiting a confirmation of charges hearing) (last visited Dec. 15, 2018).

²¹⁴ *See* Center for Constitutional Rights & Survivors Network of those Abused by Priests, *supra* note 66, at 68.

b. Rape

To be guilty of rape under the Rome Statute, the perpetrator must penetrate “any part of the body of the victim or of the perpetrator with a sexual organ” or penetrate the victim’s genital opening or anus with any object or part of their body.²¹⁵ Additionally, the penetration must occur by force, by the threat of force, by coercion, by taking advantage of a coercive situation, or by penetrating someone incapable of giving consent.²¹⁶

Regarding the first requirement, the Pennsylvania Grand Jury found evidence of penetration by priests in all six of the dioceses investigated.²¹⁷ Regarding the second requirement, although there are adult victims,²¹⁸ they are traditionally children, with the Pennsylvania report alone finding over a thousand victims.²¹⁹ Therefore, while other elements of the charge may be present, the second requirement is satisfied because minors are unable to give consent.²²⁰

c. Sexual Violence

Similar to rape, to be guilty of sexual violence under the Rome Statute, the perpetrator must commit a sexual act against a victim or cause the act to occur by force, by the threat of force, by coercion, by taking advantage of a coercive situation, or by committing the act against someone incapable of giving consent.²²¹

In addition to being an additional charge for crimes discussed previously, the main use of this charge as it relates to clerical sex abuse is to prosecute sexual acts that are not covered by the charge of rape because there was no penetration, something which was also present in every Pennsylvania diocese investigated.²²² The relationship between sexual abuse and resulting mental health problems is well documented,²²³ despite the fact that sexual abuse involving penetration has been shown to lead to mental health problems at a higher rate than sexual abuse not

²¹⁵ ELEMENTS, *supra* note 58, at 8.

²¹⁶ *Id.*

²¹⁷ REPORT I, *supra* note 2, at 16, 66, 114, 150, 209, 252.

²¹⁸ See generally Goodstein & Otterman, *supra* note 183 (describing the abuse of seminarians by former Cardinal Theodore McCarrick).

²¹⁹ See REPORT I, *supra* note 2, at 1.

²²⁰ See ELEMENTS, *supra* note 58, at 8 n.16 (“It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”).

²²¹ *Id.* at 10.

²²² REPORT I, *supra* note 2, at 16, 66, 114, 150, 209, 252.

²²³ See generally JUDY CASHMORE & RITA SHACKEL, THE LONG-TERM EFFECTS OF CHILD SEXUAL ABUSE: CFCA PAPER NO. 11, 1-29, at 7 (2013), <https://aifs.gov.au/cfca/sites/default/files/cfca/pubs/papers/a143161/cfca11.pdf> (reviewing the literature on the mental health problems of child sexual abuse victims).

involving penetration.²²⁴ Regardless, the sexual abuse of a minor of any kind would seem to be of the same gravity, and any abuse of one of the world's most vulnerable populations should be punished. It should be clear to the abusers that what they are doing is wrong and a crime, which should satisfy the requirement that the perpetrator was aware of the factual circumstances that established the gravity of the act.

Finally, there is case law on whether an act is one of sexual violence. Although the ICTR was tasked only with the prosecution of rape, it found sexual violence to fall under its category of "other inhumane acts," holding that ordering a subordinate to "undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence."²²⁵ This holding supports the finding of nonpenetrative sexual abuse as a crime of sexual violence, given that the crime in that case involved minimal contact with the victim.

B. Could Priests be Tried Before the International Criminal Court?

Because the ICC has previously rejected taking up an investigation of Catholic sex abuse because of undisclosed jurisdictional issues,²²⁶ less time will be spent on the analysis of whether the ICC specifically could prosecute priests than whether any tribunal could. However, because the focus of this Note is on individual priests rather than Church officials, as has been advocated for previously,²²⁷ and because the prosecutor left the door open for future investigations,²²⁸ a brief examination of whether this case could feasibly meet the ICC's requirements is necessary. Ultimately, while it is likely that priests committed crimes against humanity, it is unlikely that the ICC would be able to bring charges against them.

1. Jurisdictional Requirements

a. Subject Matter Jurisdiction

²²⁴ *Id.* at 8 ("[A]fter adjusting for a range of other factors, children exposed to sexual abuse involving attempted or completed sexual penetration had rates of mental health disorders, including suicidality, that were 2.4 times higher than those of children not so exposed.")

²²⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Int'l Crim. Trib. for Rwanda September 2, 1998), <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf>.

²²⁶ *For Now, Vatican Officials Will Not Face Criminal Charges*, SNAP (June 13, 2013), http://www.snapnetwork.org/for_now_vatican_officials_will_not_face_criminal_charges.

²²⁷ Center for Constitutional Rights & Survivors Network of those Abused by Priests, *supra* note 66.

²²⁸ *For Now, Vatican Officials Will Not Face Criminal Charges*, *supra* note 226.

As detailed previously, it is likely that priests committed crimes against humanity by abusing children.²²⁹ Assuming that they did, the ICC would have subject matter jurisdiction.²³⁰

b. Territorial and/or Personal Jurisdiction

As the United States is not a party to the Rome Statute,²³¹ the ICC would not automatically have territorial jurisdiction over crimes committed in the United States by United States citizen priests. There would only be territorial jurisdiction over such crimes if the United States notified the ICC that it would allow the court to have jurisdiction,²³² or if the case was referred to the ICC by the UNSC.²³³ Likewise, the ICC would not automatically have personal jurisdiction over crimes committed in the United States by United States citizen priests, unless the case was referred by the UNSC.²³⁴ However, as the problem of predator priests is not limited to the United States,²³⁵ many offenders are still within the ICC's territorial and personal jurisdiction.

Regardless, given the Trump Administration's harsh rhetoric toward the ICC²³⁶ and the refusal of the United States to ratify the Rome Statute by administrations of both parties,²³⁷ it is unlikely that the ICC would ever gain jurisdiction over priests in the United States unless they committed the same crimes in another country or the UNSC refers the case to the ICC.

c. Temporal Jurisdiction

The ICC can only prosecute crimes that occurred, at the earliest, on or after July 1, 2002, the day the Rome Statute came into force.²³⁸ Therefore, regardless of whether the crimes meet the other admissibility requirements, the ICC cannot

²²⁹ See *supra* Section V.A.2.a-c.

²³⁰ Rome Statute, *supra* note 48, art. 5, ¶ 1.

²³¹ *The State Parties to the Rome Statute*, INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Dec. 17, 2018).

²³² Rome Statute, *supra* note 48, art. 12, ¶ 3.

²³³ *Id.* art. 12, ¶ 2, art. 13, ¶ (b).

²³⁴ *Id.*

²³⁵ See *supra* notes 17-19 and accompanying text.

²³⁶ *John Bolton Threatens ICC with US Sanctions*, BBC (Sept. 11, 2018), <https://www.bbc.com/news/world-us-canada-45474864> (“We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us.”).

²³⁷ *Id.* (“President George W Bush's administration told the UN that the US would not join the ICC. . . . [A]lthough [Obama's] administration also opted not to ratify the Rome Statute.”).

²³⁸ Rome Statute, *supra* note 48.

prosecute crimes that occurred before that date.²³⁹ Because of the inability to prosecute older crimes, it is likely that other problems would arise with respect to the prosecution of newer crimes, especially regarding the principle of complementarity.²⁴⁰

2. Admissibility Requirements

a. Complementarity

Because the ICC functions under the principle of complementarity and is unable to prosecute unless a national government is unwilling or unable to do so,²⁴¹ it is unlikely that the ICC would be able to prosecute priests from the United States, especially given the trend toward eliminating statutes of limitation for sex crimes.²⁴² Additionally, European countries tend to have long statutes of limitation,²⁴³ making it difficult for the ICC to prosecute recent cases there as well. Although the United States and Europe are not the only places that have experienced these crimes,²⁴⁴ the ICC loses much of its deterrent effect when it cannot reach a large segment of abusers.²⁴⁵

b. Gravity

Because gravity plays a minor role in the overall ICC analysis, and the view of the judges that gravity should not interfere with other, more well-defined jurisdictional requirements, it is unlikely that the gravity analysis would play any significant role in a prosecution of abusive priests.²⁴⁶ Further, despite the likelihood that the abuse of thousands of children worldwide for decades would meet the

²³⁹ *Id.* art. 11.

²⁴⁰ *See supra* Section III.B.2.a.

²⁴¹ Rome Statute, *supra* note 48, art. 17, ¶ 1(a)-(b).

²⁴² *See* Laura Santhanam, *Why Do State Laws Put an Expiration Date on Sex Crimes?*, PBS NEWSHOUR (Nov. 28, 2017, 5:02 PM), <https://www.pbs.org/newshour/nation/why-do-state-laws-put-an-expiration-date-on-sex-crimes>.

²⁴³ *See* David Martin, *Child Sex Abuse: How Long do the Statutes of Limitations Run in the EU?*, DEUTSCHE WELLE (Apr. 5, 2018), <https://p.dw.com/p/2xBns>.

²⁴⁴ *See, e.g.*, Graeme Hosken, *Catholic Church Distances Itself from Explosive Sex Abuse Claims*, TIMES LIVE (Oct. 9, 2018, 6:05 PM), <https://www.timeslive.co.za/news/south-africa/2018-10-09-catholic-church-distances-itself-from-explosive-sex-abuse-claims/> (describing Catholic sexual abuse in South Africa).

²⁴⁵ Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, THE SENT'G PROJECT (Nov. 2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

²⁴⁶ *See supra* Section III.B.2.b.

gravity requirement, it is almost certain that ICC prosecution would again be denied on jurisdiction grounds,²⁴⁷ rendering the question moot.

c. Interests of Justice

Similarly to gravity, the question of whether the prosecution would be in the interests of justice is also moot. Regardless, since the crimes would likely meet the gravity requirement, analysis of the interests of justice would likely come down to how the victims felt about the prosecution, each priest's role in the crimes, and his ability to stand trial. Although the last two require a case by case analysis of the facts, it seems that the victims' interest was satisfied when they called on the ICC to investigate previously.²⁴⁸

C. Could Priests be Tried Before an International Criminal Tribunal?

In contrast to the numerous requirements that govern the jurisdiction and admissibility of cases that come before the ICC, a tribunal can be established by the UNSC when it finds that there has been a “threat to the peace, breach of the peace, or act of aggression.”²⁴⁹ As the UNSC has complete control over all aspects of the tribunal²⁵⁰ and the United States and the other four permanent members of the UNSC have the power to unilaterally veto any part of the potential tribunal that it or its allies does not agree upon,²⁵¹ any potential issues regarding jurisdiction and complementarity would be handled with input from the countries involved, eliminating the concerns raised regarding those issues at the ICC.²⁵² Therefore, the main question is whether the Catholic sex abuse crisis constitutes a “threat to the peace, breach of the peace, or act of aggression.” The following analysis will focus

²⁴⁷ Brian Roewe, *International Criminal Court declines to pursue 'crimes against humanity' case against Vatican*, NAT'L CATHOLIC REP. (Jun. 18, 2013), <https://www.ncronline.org/news/accountability/international-criminal-court-declines-pursue-crimes-against-humanity-case>.

²⁴⁸ See generally Center for Constitutional Rights & Survivors Network of those Abused by Priests, *supra* note 66.

²⁴⁹ See U.N. Charter arts. 39, 41 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken. . . . The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”).

²⁵⁰ See *supra* Section III.C.

²⁵¹ See U.N. Charter art. 27, ¶ 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”).

²⁵² See *supra* Section V.B.

on “threat to the peace,” which has not yet been defined.²⁵³ It is not a breach of the peace, as that has come to be defined as armed hostilities,²⁵⁴ and it is not aggression, as that also has a definition that requires armed conflict.²⁵⁵

The UNSC has justified numerous actions through a finding that there was a “threat to the peace,” including the establishment of both the ICTY and ICTR.²⁵⁶ While those tribunals arose out of human rights violations during war and genocide respectively, the UNSC has found other situations to be a “threat to the peace” as well, including a lack of democracy²⁵⁷ and sponsoring terrorism.²⁵⁸ Additionally, the UNSC has indicated a willingness to view other problems as a “threat to the peace” that go beyond concrete threats on at least three occasions. First, in the aftermath of the September 11 attacks, when it condemned international terrorism as a threat without considering a particular situation, determining a time limit for action, or specifically applying to any individual or state.²⁵⁹ Second, when it declared that the proliferation of nuclear, chemical, and biological weapons was a threat, again without considering a situation or responsible actor and without setting a time limit.²⁶⁰ Third, when it held a session on the link between climate change and global conflict, ultimately agreeing that it was a threat but unable to agree on whether it was the UNSC’s responsibility to address it.²⁶¹

The decision of whether Catholic sex abuse is a “threat to the peace” is ultimately a political decision. However, based on the flexible definition of “threat to the peace” and the demonstrated willingness of the UNSC to consider action on nontraditional security threats, action on the issue of Catholic sex abuse merits, at the least, a discussion by the UNSC. Despite being nontraditional in the sense that it is not accompanied by armed conflict, the sex abuse scandal is more similar to the situations that brought about the ICTY and ICTR than terrorism or climate change. In contrast to the threat of climate change, Catholic sex abuse has had specific, verifiable instances that have occurred worldwide²⁶² for decades²⁶³ and

²⁵³ See Mónica Lourdes de la Serna Galván, *Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council. Is the Security Council a Legislator for the Entire International Community?*, 11 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 147, 148 (2011) (Mex.) (“Notwithstanding, as we will further analyze, there is no express provision in the UN Charter that establishes the limits of this power or suggests the form in which the Security Council has to interpret the term ‘threat to the peace.’”).

²⁵⁴ Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT’L HUM. RTS. 24, 36, 36 n.76 (2008).

²⁵⁵ G.A. Res. 3314 (XXII), Annex arts. 1-4, U.N. Doc. A/9619 (Dec. 14, 1974).

²⁵⁶ Mónica Lourdes de la Serna Galván, *supra* note 253, at 167-69.

²⁵⁷ *Id.* at 170-72.

²⁵⁸ *Id.* at 172-74.

²⁵⁹ *Id.* at 176-78.

²⁶⁰ *Id.* at 179-81.

²⁶¹ Leila Mead, *UN Security Council Addresses Climate Change as a Security Risk*, IISD: SDG KNOWLEDGE HUB (Jul. 13, 2018), <http://sdg.iisd.org/news/un-security-council-addresses-climate-change-as-a-security-risk/>.

²⁶² See *supra* notes 17-19 and accompanying text.

²⁶³ See *Pastoral Letter*, *supra* note 4.

have identifiable perpetrators that have both committed and concealed the abuse.²⁶⁴ Additionally, the Catholic Church has a long history of engaging in world affairs.²⁶⁵ The Church has formal diplomatic relations with 182 countries,²⁶⁶ is a party to numerous international treaties,²⁶⁷ and has played a role in numerous international events and debates from the democratization of Poland²⁶⁸ to climate change advocacy.²⁶⁹ If the abuse continues to go unpunished, children not only remain in danger, but the Church risks becoming irrelevant on the world stage if it refuses to hold its own actors accountable for their crimes.

Because of this, the likelihood that priests have committed crimes against humanity under the Rome Statute, and the apparent willingness of the UNSC to embrace an expansive definition of “threat to the peace,” the UNSC most likely has the power to establish an international tribunal for those priests that have committed or enabled sexual abuse.

VI. SUGGESTIONS FOR THE FUTURE

A. United States

The Catholic Church will only reform if it is held accountable with criminal penalties and laws are changed so that it cannot continue to avoid responsibility. The first step in accountability is to launch investigations, some of which have already begun. Currently, there are ongoing investigations in 12 states and Washington, D.C.²⁷⁰ The remaining 38 states must follow suit. Further, a comprehensive federal investigation is needed, given the movement of priests from diocese to diocese. There are signs that this has already begun as well, as the U.S. Department of Justice has opened investigations into all of Pennsylvania’s dioceses and one in New York.²⁷¹ Additionally, the U.S. Attorney for the Eastern District of

²⁶⁴ See generally *REPORT I*, *supra* note 2, at 1-2 (naming numerous abusers and those who moved them from diocese to diocese).

²⁶⁵ See generally Timothy A. Byrnes, *Sovereignty, Supranationalism, and Soft Power: The Holy See in International Relations*, REV. FAITH & INT’L AFF. 6, (2017), (discussing various international roles that the Catholic Church has played throughout history).

²⁶⁶ *Id.* at 8.

²⁶⁷ *Treaties, State Parties and Commentaries: Holy See*, INT’L COMMITTEE OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=VA (last accessed Jan. 2, 2019).

²⁶⁸ Byrnes, *supra* note 265, at 6, 10-11.

²⁶⁹ Pope Francis, *Encyclical Letter Laudato Si’ of the Holy Father Francis on Care for Our Common Home*, THE HOLY SEE: ENCYCLICALS (May 24, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_encyclica-laudato-si.html.

²⁷⁰ 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>.

²⁷¹ Laurie Goodstein, *Federal Government Tells Catholic Bishops Not to Destroy Sex Abuse Documents*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10>

Pennsylvania has also taken the additional step of sending a letter to every diocese in the country requesting that they preserve documents related to sexual abuse in their respective dioceses, potentially a sign of a larger federal investigation.²⁷²

The next step is to change state laws. The first change that should be made is to allow state attorneys general to impanel investigative grand juries. These grand juries would have the power to investigate the misconduct of the Church in the entire state rather than jurisdiction by jurisdiction²⁷³ while also relieving prosecutorial agencies from some of the enormous burden that would result from a statewide investigation going back decades.

The second change is to extend or eliminate statutes of limitation for sexual offenses. Despite powerful evidence from the Pennsylvania grand jury report, few prosecutions have ultimately resulted.²⁷⁴ Although changing statutes of limitation would not allow states to pursue cases where they have already run,²⁷⁵ it would both give more time to prosecute cases that have yet to be discovered and prevent a reoccurrence of a successful coverup on this scale from happening ever again.

The final change is to make priests mandatory reporters of child abuse in all cases and eliminate clergy-penitent privilege as it applies to sexual abuse. Because of longstanding Catholic doctrine,²⁷⁶ it is unlikely that this change would have as much of an effect as the previous two changes. However, it would send two powerful messages: one to victims that the government takes their claims seriously, and one to the Church that governments will no longer allow it to place its reputation and doctrine ahead of the protection of children.

B. International

First, national governments should follow the lead of Australia and Ireland²⁷⁷ and open their own investigations into the actions of the Church within their respective countries. Second, the UNSC should hold a meeting on the issue of clerical sexual abuse. Although the UNSC could most likely justify the creation of an international tribunal, it is unlikely to do so for purely political reasons, two of which are the reluctance of the United States to subject its own citizens to international justice²⁷⁸ and China's recent deal with the Catholic Church over the

[/26/us/catholic-bishops-sex-abuse.html](#).

²⁷² *Id.*

²⁷³ See *supra* Section IV.A.2.

²⁷⁴ REPORT I, *supra* note 2, at 1 (“As a consequence of the coverup, almost every instance of abuse we found is too old to be prosecuted.”).

²⁷⁵ *Stonger v. California*, 539 U.S. 607, 632-33 (2003) (holding that the retroactive extension of statutes of limitation is unconstitutional).

²⁷⁶ See *supra* Section IV.C.

²⁷⁷ Goodstein, *supra* note 271.

²⁷⁸ *US Opposition to the International Criminal Court*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc.html> (“The United States government has consistently opposed an

appointment of bishops,²⁷⁹ which would likely be jeopardized by its accession to the creation of a tribunal. However, discussing the issue in a high-profile international forum like the UNSC would send another powerful message to victims and the Church.

VI. CONCLUSION

For decades, the Catholic Church has used a complex web of priest-shifting, destruction of documents, and doctrine to cover-up countless crimes committed against the world's most vulnerable population. Although action should have been taken long ago, that is not an excuse to continue on the path of inaction. Already, there are signs of change, from multiple investigations worldwide to the prosecution of high-ranking officials for their roles in the abuse. This is not enough. Everyone in the Church who has ever abused a child or covered for someone who did must face their crimes and be brought to justice for their actions. When the Church ratified the Convention on the Rights of the Child, it quoted Pope John Paul II in its signing declaration, writing that children are a "precious treasure given to each generation."²⁸⁰ It is time for the world, and the Church, to live up to those words.

international court that could hold US military and political leaders to a uniform global standard of justice.") (last accessed Jan. 3, 2019).

²⁷⁹ Jason Horowitz & Ian Johnson, *China and Vatican Reach Deal on Appointment of Bishops*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/world/asia/china-vatican-bishops.html>.

²⁸⁰ GEOFFREY ROBERTSON, THE CASE OF THE POPE: VATICAN ACCOUNTABILITY FOR HUMAN RIGHTS ABUSE ¶ 245 (2010).

