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THE "STATEHOOD" OF THE HOLY SEE AND THE CIVIL JURISDICTIONAL IMMUNITY: THE JUDGEMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

O "ESTADO" DA SANTA SÉ E A IMUNIDADE JURISDICIONAL CIVIL: A SENTENÇA DO TRIBUNAL EUROPEU DE DIREITOS HUMANOS

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ABSTRACT

Holy See's role, in an international level, has always been a very controversial issue due to the strict relationship with the Vatican City State. The European Court of Human Rights third section's judgement of October 12th, 2021, represents a real innovation in the international framework as thirty-nine people of different nationalities, reported some representatives of the Belgian Catholic Church for sexual abuses. The applicants filed an appeal for the alleged violation of article 6 ECHR against the Holy See which acts, on one hand, as the beating heart of the Vatican City State and the Catholic Church, and, on the other, as the Pope's moral representation.

Key-words: Holy See; civil jurisdictional immunity; sovereign State; article 6 ECHR.

RESUMO

O papel da Santa Sé, em nível internacional, sempre foi uma questão muito controversa devido ao estreito relacionamento com o Estado da Cidade do Vaticano. O julgamento da terceira seção do Tribunal Europeu de Direitos Humanos de 12 de outubro de 2021, representa uma verdadeira inovação no âmbito internacional, pois trinta e nove pessoas de diferentes nacionalidades, delataram alguns representantes da Igreja Católica Belga por abusos sexuais. Os requerentes apresentaram um recurso pela suposta violação do artigo 6º da CEDH contra a Santa Sé que atua, por um lado, como o coração pulsante do Estado da Cidade do Vaticano e da Igreja Católica, e, por outro, como a representação moral do Papa.

Palavras-chave: Santa Sé; imunidade jurisdicional civil; Estado soberano; artigo 6º da CEDH.

INTRODUCTION

The European Court of Human Rights third section's judgement represents a real innovation in the international framework, in relation to civil jurisdictional immunities of States.

The judgement represents the outcome of a really complex proceeding which involved different parties, including, for the first time, the Holy See, to whom civil jurisdic-

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tional immunity was applied[1].

Immunity must be meant in relative terms, holding fast to the partition between *iure imperii* e *iure gestionis* acts[2], approach that characterized the European Court's judgement and that, nowadays, after the United Nation Convention on jurisdictional immunities of States and their properties of 2004, overcame the absolutistic theory, nevertheless it is still appreciated by a very small part of the international doctrine[3].

In order to understand the judgement, it is important to briefly look at the case events.

In 2011, thirty-nine people of different nationalities, coming from France, Belgium and The Netherlands, reported some representatives of the Belgian Catholic Church for sexual abuses.

Consequently, they filed an appeal to the Ghent first instance tribunal, bringing a civil class action for damages through which they demanded a compensation of $10,000 for each person, putting forward not only the crime itself perpetrated by members of the clergy but, most of all, the Holy See behavior when it internally tackled and managed the reported problem.

So, with the civil action took by the claimants, not only the abuses committed by the ecclesiastics towards victims in childhood age were complained, but also the way, structurally deficient, through which the Church had systematically dealt with an already know, problematic situation.

For this reason, applicants filed a suit against the Holy See which is, on one hand, the role of the Pope's moral representation but, on the other, also the beating heart of the Vatican City State and the Catholic Church[4].

[1] M. Morgese, La garanzia dell'immunità giurisdizionale per acta iure imperii può giustificare la compressione del diritto di accesso ad un Tribunale (art. 6.1. CEDU). L'immunità della Santa Sede per la prima volta a Strasburgo.", (2022), Judicium; M. Castellaneta, Immunità della Santa Sede: prima pronuncia della CEDU sul Vaticano, 2021, Marina Castellaneta: notizie e commenti sul diritto Internazionale e dell'Unione Europea, sezione Diritti Umani.

[2] The first ones are acts that the State implements through the exercise of its public functions, while the second ones, have a private-law character and the State implements them regardless of its sovereign power. This theory defends State's immunity with an exclusive regard towards *iure imperii* acts, leaving all the private-law acts out of this protection. Yang X., State immunity in international law, (2012) Cambridge, Cambridge University Press, history of state immunity, 10; Sapienza R., Diritto internazionale: Casi e materiali, (2014), IV edition, Turin, 90 ff.; Fox H. e Webb P., The Law of State Immunity, (2015), Oxford International Law Library, 57; Dupuy P. e Kerbrat Y., Droit international public, (2016) XIII edition, Dalloz-Sirey, 142; Bankas E., The State Immunity Controversy in International Law (2005) Berlin, 7; Ronzitti N. e Venturini G., Le immunità giurisdizionali degli Stati e degli altri enti internazionali, La Convenzione delle Nazioni Unite del 17 gennaio 2005 sulle immunità giurisdizionali degli Stati e dei loro beni, (2008) Padova, 1 ff; The overcoming of the absolute theory was started by the so-called Tate Letter, a document drawn up by Jack B. Tate, legal counsel to the US general prosecutor in office Philip B. Perlman, on the 19th of May, 1952.

[3] Some of the International law reports' editors affirmed the groundlessness of the distinction. An example is given by Lauterpacht et al. (eds.), ILR Consolidated Indexes, 1484. "With the restrictive doctrine now long established, it seems inappropriate to continue to index material under the subheadings 'absolute' and 'restrictive' immunity".

[4] N. Picardi, Alle origini della giurisdizione vaticana, in Historia *et ius*, (2012) 27 ff.; Carbone S.M., La Santa Sede in S.M. Carbone, R. Luzzato, A. Santa Maria, s. Bariatti, M. Condinanzi, Z. Crespi Reghizzi, M. Frigo, L. Fumagalli, P. Ivaldi, F. Munari, B. Nascimbene, I. Queirolo, L. Schiano di Pepe, Istituzioni di diritto internazionale, Torino, (2021), 21 ff.

However, in order to understand the weight of this judgement, it is necessary to take a brief look at the particular characteristics of the Holy See.

Excursus on the Holy See role

Holy See must not be confused with the Vatican City State, peacefully recognized as a sovereign State by the international community because of its territory, even if narrow, its population and its sovereignty[5].

Holy See must be qualified instead as a subject with international legal personality: an entity able to conclude treaties and agreements autonomously, regardless of the presence of a territory or a specific population which refer to[6].

The canonical system supplies a more precise definition of Holy See with the Canon 361 of the code of Canon Law in which it is establishes that "In this Code, the term Apostolic See or Holy See refers not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words"[7].

The canonist science therefore offers a double interpretation of the Holy See concept: on one hand there is who interprets it in a strict sense, as the moral representation of the Pope and as its office at the top of all the local Catholic Churches[8]; on the other hand, there is who perceives the Holy See in a broad sense, as an entity that rules the Church itself but also the Vatican City State[9]. This dichotomy, on an international level, has always raised doubts[10].

[5] The State's territory covers an area of 0,44 km2 and it is limited to the internal area of the Vatican walls, extending itself from S. Peters Square until a travertine strip that connects the two parts of the colonnade, marking the border between Italy and the Vatican. Vatican citizens are overall 618, of whom only 246 live inside the Vatican walls. (104 work as Swiss Guards). The form of government is the absolute monarchy, and, for this reason, the head of the State is the Pope, who has the fullness of legislative, executive and judicial powers. Information available at https://www.vaticanstate.va/it/.

[6] C. Ryngaert, The Legal Status of the Holy See, Goettingen Journal of International Law 3 (2011), 829-859; N. Picardi, Lo Stato Vaticano e la sua giustizia, Bari, (2009), p. 78 et seq.; Id., Alle origini della giurisdizione vaticana, in Historia et ius, (2012), 27 ff.; F. Cammeo, Ordinamento giuridico dello Stato della Città del Vaticano (1932), Città del Vaticano, (2005), 300 ff.; Y. Abdullah, The Holy See at the United Nations Conferences: State or Church?, in Columbia Law Review, vol.96, n. 7, (1996), 1835-1875; T. Maluwa, The treaty-making capacity of the Holy See in theory and practice: A study of the jus tractum of a non-state entity, in *The Comparative and International Law Journal of Southern Africa*, v. 20, n. 2, (1987), 155-174; I. Cismas, Religious Actors and International Law, Oxford, (2014), 17 ff.

[7] It is possible to find this definition also in the Convention on the Rights of the Child, 2014, paragraphs 6 and 7.

[8] Code of Canon Law, can. 331.

[9] V. Buonomo. *Considerazioni sul rapporto tra diritto canonico e diritto internazionale,* (2015), Anùario de Derecho Canonico, revista de la Facultad de Derecho Canonico integrada en la UCV, 13-70.

[10] Ex multis: A. Notaro, Santa Sede, soggetto di diritto internazionale, in *De Iustitia*, (2017), p. 1-30; L. Caveada, Questioni aperte sulla presenza della Santa Sede nel diritto internazionale, *Padova*, (2018), 9 ff.; J.R. Morss, The international legal status of the Vatican/Holy See complex, in *European Journal of International law*, v. 26, issue 4, (2016), p. 927-946; R. J. Araujo, The International Personality and Sovereignty of the Holy See, in *Catholic University Law Review*, (2001), p. 291-360; A. Rahman, Church or State? The Holy See at the United Nations, in *Conscience* v. 20, n. 2, (1999), p. 2-5; T. A. Byrnes, Sovereignty, Supranationalism, and Soft Power: The Holy See in International Relations, in *the review of faith &*

In fact, the Holy See has concluded, during the years, treaties and agreements with more than 180 States[11], it has been a fundamental mediator in international controversies[12] and it obtained the permanent observer role at the United Nations[13].

By virtue of this role in the international community, the Holy See became an international law subject quite controversial, de facto comparable to a sovereign State, but practically devoid of specific regulations and, particularly, specific rules on liability[14].

With the help of this short examination, it is easy to make out that the issue brought before the European Court of Human Rights owes its complexity to the symbiotic relationship between the Vatican City State and the Holy See and to the doubtful qualification of the Church in an international perspective.

The events: first and second instance judgements

In July 2011 the plaintiffs[15] filed an appeal before the Ghent tribunal against the Holy See and the archbishop of the Catholic Church in Belgium with his two predecessors, who were believed to be fully aware of the facts and the sexual abuses on minors[16]. The action was brought also against several bishops and two associations of religious orders[17].

international affairs, (2017), p. 6-20; J. G. Cussen, *The Church-State(s) Problem:* The Holy See in the International Theoretical (or theological) Marketplace, during the International Symposium on religion and Cultural Diplomacy, Rome, (2014), p. 1-31. M. Benigno. *Santa Sede, Città del Vaticano e Unione Europea.* Modulo Jean Monnet. Divenire europei: la dimensione sociale dell'integrazione europea, (2022), Centro Studi Europei.

[11] Geneva Convention on the Law of War (1949), Convention on the Status of Refugees (1951), Vienna Convention on Diplomatic Relations (1961), Vienna Convention on Consular Relations (1963), International Convention on the Elimination of All Forms of Racial Discrimination (1966), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989). With particular attention to the article 2, 3 and 4 of the Lateran Treaty signed with Italy in 1929: "Italy recognizes the sovereignty of the Holy See in international matters as an inherent attribute in conformity with its traditions and the requirements of its mission to the world.", art 3 para. 1 "Italy recognizes the full ownership, exclusive dominion, and sovereign authority and jurisdiction of the Holy See over the Vatican as at present constituted, together with all its appurtenances and endowments, thus creating the Vatican City, for the special purposes and under the conditions hereinafter referred to. […]" and art. 4 "The sovereignty and exclusive jurisdiction over the Vatican City, which Italy recognizes as appertaining to the Holy See, forbid any intervention therein on the part of the Italian Government, or that any authority other than that of the Holy See shall be there acknowledged"; On the point, see M. Morgese. *Op. cit.*, 3.

[12] V. Beagle Channel Case, 1979.

[13] Qualification obtained in 1964. V. UN Doc A/58/314 (16 July 2004) on the Participation of the Holy See in the work of the United Nations. Moreover, the Vienna Convention on Diplomatic Relations had compared the Apostolic Nuncio to that of the States' ambassadors, under articles 14 e 16 VCDR. The Holy See became part as well of other authorities, linked to the United Nations, like the United Nations Economic and Social Council (ECOSOC).

[14] G. Balladore Pallieri, "Il rapporto fra Chiesa Cattolica e Stato Vaticano secondo il diritto ecclesiastico ed il diritto internazionale", (1930), Rivista Internazionale di Scienze Sociali e Discipline Ausiliarie, Series III, v. 1, n. 3, p. 195-221.

[15] For the first instance appeal there were only 4 plaintiffs, among which one, R.V., represented beside himself, 35 victims.

[16] V. G. Cuniberti, ECtHR Affirms Holy See's Jurisdictional Immunity in Sexual Abuse Case, (2021) in European Association of Private International Law Blog; C. Burdeau, Rights court: Vatican can't be sued in *European Courts by sex abuse victims*, in Courthouse news, (2021).

[17] European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12 October 2021.

The plaintiffs based their claim principally on articles 1382[18] by which "Any act whatever of man which cause damage to another obliges him by whose fault it occurred to make reparation" and 1384 of the Belgian civil code, basing their appeal on three different forms of liability:
i) joint and several liability of the defendants, Holy See included, for faults and omissions related to the general policy adopted in the field of sexual abuses.
ii) liability of the defendants, Holy See excluded, for faults and omissions in the particular events.
iii) liability of the Holy See for not having acted internally against the bishops[19].

With the judgement of October 1st 2013, the Ghent Tribunal declared its lack of jurisdiction due to two reasons: in *primis* it compared the Holy See to a sovereign State and, as such, beneficiary of rights and recipient of obligations of international law; in *secundis*, it recognized to the Holy See the civil jurisdictional immunity by virtue of the existing customary rule that admits this guarantee to States when they carry out *iure imperii* acts[20], which were found as prevailing in the present case.

In February 2016, thirty-six of the thirty-nine initial applicants lodged an appeal before the Court of Appeal of Ghent, which examined with particular attention the first instance Court judgement[21].

The Court, in line with the contested judgement, compared the Holy See to an international law sovereign State, deriving the whole judgement from this hermeneutic approach.

Upholding the first instance judgement, the Court based its recognition on the stipulation concluded by the Holy See of international treaties and agreements, which, according to the judges, made it comparable *quoad effectum* to a sovereign power and, as such, beneficiary of rights and recipient of obligations of international law, including civil jurisdictional immunity rules.

The Holy See not only was submitted to the application of the immunity *ratione personae* due to its nature which was similar to that of a sovereign State, but also *ratione materiae*, including the contested events by the claimants in the categories of actions – in this case omissions – carried out in the public duties' development and, thus, excluded from any Court's review[22].

At the base of the appeal two principal themes were identified: the opposition to the immunity recognition and the identification of a vicarious liability of the Holy See.

[18] Article 1382 of the Belgian civil code, similar in the content to Article 2043 of the Italian civil code.
[19] Liability under art. 1382 c.c. or, subordinately, under art. 1384 para. 3 c.c. (which refers to article 2049 of the Italian civil code).
[20] Ex multis: De Vittor F., Recenti sviluppi in tema di immunità degli Stati dalla giurisdizione: la Convenzione di New York del 2 dicembre 2004, in Lanciotti A. e Tanzi A. (eds), Le immunità nel diritto internazionale, (2007), 153-189; Frulli M., Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali, Torino, (2007), 10 ff.; Izzo S., Le immunità giurisdizionali: questioni di carattere processuale in N. Ronzitti e G.Venturini (eds.), Le immunità giurisdizionali degli Stati e degli altri enti internazionali, (2009), 291 ff.
[21] See also C. Van der Plas, ECtHR on State immunity from jurisdiction, (2021), Jahae Raymakers.
[22] M. Morgese. *Op. cit.*, 2.

Relating to the first ground, as previously mentioned, the Court concluded for a lack of jurisdiction, as it noticed a public-law activity performed by the ecclesiastics in the exercise of their administrative functions in each diocese; this recognition linked immunities to *iure imperii* acts, rather than to *iure gestionis* acts.

On the second ground, the Court of Appeal's judges believed that the relationship between the Holy See and the bishops was an "horizontal" public international law one, characterized by the bishops' autonomy, excluding the existence of a hierarchical relationship in a strict sense and so denying the Pope and Holy See's vicarious liability[23].

Insisting on the point, with the judgement of February 25th, 2016, the Ghent Court of Appeal pointed out how the bishop, for his community, was kind of a local legislator which has decision-making powers with regard to the assessment, the treatment and the repression of crimes committed in his diocese.

In light of this reasoning, the Court of Appeal believed that the reported mechanism of silence inside the Church in order to preserve its reputation was not enough to convict the priests' actions, which, according to the Ghent Court of Appeal, could undoubtedly be considered as *iure imperii* acts[24].

Once the possibility of applying the New York Convention rules of 2004[25] to the present case was allowed, the Court of Appeal examined the possible existence of exceptions to these rules.

The case, however, did not seem to be comprehended in the exceptional provisions of Article 12 of the United Nations Convention nor in Article 11 of the European Convention of 1972, under Belgian judges' point of view[26].

[23] According to the Ghent Court of Appeal, the charges against Belgian bishops couldn't be broaden to the Holy See as well, under article 1384, paragraph 3, of the civil code, since the Pope is not at the head of the bishops.

[24] European Court of Human Rights, affaire J.C. et autres c. belgique (Requête n. 11625/17), 12th October 2021, para. 9: "[…] Cette circonstance impliquait non seulement que les manquements reprochés aux évêques belges ne pouvaient être attribués au Pape, en tant que commettant, mais aussi que ces manquements concernaient également des actes iure imperii. Le fait que la politique dite du silence aurait été organisée, comme le soutenaient les requérants, dans le but de préserver la réputation de l'Église ou d'un membre du clergé n'était pas suffisant, selon la cour d'appel, à les faire échapper à la qualification d'acte d'autorité. Les tribunaux belges s'attachaient en effet à la nature de l'acte et non à sa finalité pour déterminer s'il y avait acte d'autorité ou acte de gestion".

[25] Article 12, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission." So, the action or the omission, reason of the material damage, must take place, entirely or partially, in the forum State and the author of the action or the omission must be present in that State at the time of the action or omission.

[26] Article 11, European Convention on States Immunities, signed in Basle on May 16th, 1972, "Un Etat Contractant ne peut invoquer l'immunité de juridiction devant un tribunal d'un autre Etat Contractant lorsque la procédure a trait à la réparation d'un préjudice corporel ou matériel résultant d'un fait survenu sur le territoire de l'Etat du for et que l'auteur du dommage y était présent au moment où ce fait est survenu". So, a material damage deriving from a fact committed in the State of the forum territory, with the presence of its author therein at the moment in which the action took place.

Moreover, the Belgian Court of Appeal highlighted the total lack of precision in the enunciation of the facts behind the action for damages exposed by the claimants, with reference to both sexual abuses and the conducts connected to the policy of silence, blamed to the Holy See[27].

The same Court, eventually, highlighted that the complaint raised by the applicants against the first instance's judgement, concerning the violation of the right to access to justice[28], was unfounded by virtue of the existence of alternative remedies that, according to the Court, the applicants could have used in order to satisfy their claims: specifically, an action for damages against the bishops or their superiors, a request before an arbitration panel specialized in sexual abuses set up inside the Catholic Church or an appeal before an ecclesiastic Tribunal established within the Belgian Catholic Church[29].

The appeal before the European Court of Human Rights

On 3rd of August 2016, an attorney admitted to practice before the Supreme Court, consulted by the parties, expressed negative opinion on the chance of admission of a possible appeal before the Belgian Supreme Court[30].

In his opinion, the lawyer believed that the Ghent Court of Appeal had correctly concluded that the Holy See both benefitted of jurisdictional immunity personae and materiae and that there hadn't been any violation of article 6 § 1 of the ECHR[31]: this conclusion was reached both applying the international customary law principle of jurisdictional immunity and the systematic Belgian procedural law.

[27] European Court of Human Rights, affaire J.C. et autres c. belgique (Requête n. 11625/17), 12th October 2021, p. 12.

[28] Arranged inside article 6§1 ECHR, Right to a fair trial. See Guide on Article 6 of the European Convention of Human Rights - Right to a fair trial (civil limb), para. II, Right to a Court, 2021, 26 ff., available on the Strasbourg Court website https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

29 European Court of Human Rights, affaire J.C. et autres c. belgique (Requête n. 11625/17), 12th October 2021, para. 11: "La cour d'appel nota ensuite que les requérants disposaient d'autres voies pour faire valoir leurs droits, parmi lesquelles une action en responsabilité contre l'évêque ou le supérieur concerné, une demande devant le centre d'arbitrage en matière d'abus sexuels établi au sein de l'Église catholique (paragraphes 31-33 ci-dessous), ou une plainte devant un des tribunaux ecclésiastiques constitués au sein de l'Église catholique belge, et que les requérants n'avaient pas démontré que ces autres voies n'étaient pas suffisantes." The Court of Appeal in addition to the uphelding of the first instance judgemnt, went further by almost antipating the ECtHR judgement. The second instance judges, in fact, handled the right to a fair trial, analsying ultra petita the alternative remedies' role and mentioning the alleged violation the article 6§1 ECHR. See also M. Morgese. *Op. cit.*, p. 5.

[30] In Belgium, attorneys admitted to practice before the Supreme Court are limited in the number as highly specialised. They are the only ones who are authorised to represent parties before the Court and, for this reason, prior to bring an action before the Supreme Court it is necessary to contact an authorized attorney. These information are available at the website https://justitie.belgium.be/nl/rechterlijke_orde/hoven_en_rechtbanken/hof_van_cassatie/informatie_over_het_hof/advocaten_bij_het_hof/opdracht.

[31] Article 6 § 1, European Convention on Human Rights: "any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Due to this consideration, twenty-four victims applied to the European Court of Human Rights believing that there has been a violation of article 6 paragraph one of the ECHR arguing that they had not been able to receive a jurisdictional protection in Belgium as they were not given the possibility to support their civil claims before the Belgium tribunals of first and second instance.

The European Court of Human Rights, after declaring the admissibility of the appeal, evaluated the validity of the grounds by examining the reasonableness of the title of State attributed to the Holy See by national Tribunals of first and second instance and the applicability to the latter of the civil jurisdictional immunity; considering the qualification of the blamed acts e their relationship with ius cogens violations; lastly, evaluating the existence of alternative remedies that the applicant could have used: everything in contemplation with the right of access to justice as explained in the conventional rule mentioned.

Analysis on the immunities' applicability

The recognition of the civil jurisdiction immunity to the Holy See, as a preliminary question obstructing to their claims' assessment, according to the applicants, had precluded ex ante that access to the justice that the European Convention of Human Rights establishes as a fundamental right.

The lack of jurisdiction declared by Belgian judges, in other words, didn't allow them to judicially assert their claims, thus making, based on their opinion, the State's interference disproportionate in relation to their right to access to justice.

The European Court as well, preliminarily, had to examine the Holy See role in the international community, wondering if it might have been treated as a State or whether if it should have been kept the character of a religious organization settled into the Vatican State.

The European Court of Human Rights opted for the qualification as a de facto State[32], pursuant to the international treaties stipulated by the Holy See and due to the undisputed recognition of this title by some States and, above all, by the United Nations. According to the European Court, the Holy See is similar to a sovereign State, sharing with this status quo the international legal personality[33].

So, if it is true that, under a merely regulatory point of view, the difficult connection of the Holy See to the idea of State forbids the application of those primary rules which guarantee the unequivocal coexistence between Nations under an international point of view, it is also true that, especially with States that have an institutional and territorial bond with the Holy See, it is nowadays a consolidated habit to compare the Holy See to a State, with all the rights and the obligations that descend from that.

[32] See Martinez L. C. Jr., "Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?", (2008), 44 Texas International Law Journal, 136 ff.
[33] It is worth remembering that the Holy See has technically nothing to do with the "State" concept, as it is a sui generis organization that, however, is not properly equal to States neither for nature nor for right and obligations, as repeated also by European Court of Justice in the "Réparation des dommages subis au service des nations unies", 1949.

By virtue of this application, the Court preliminary evaluated the lack of jurisdiction declarations intervened from the first and second instance tribunals, considering them as legitimate and non-arbitrary or unreasonable, in light of the above-mentioned reasoning[34].

For these reasons, the European Court concluded, coherently with the judgement of the Appeal Court of Ghent, in favour of the jurisdictional immunity's recognition of the Holy See[35], just as it is described inside Article 5 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties[36].

The Court assessed then the possibility for the present case to be included within one of the jurisdictional immunity exceptions to the customary law principle, by doing a cross check between the United Nations Convention on Jurisdiction Immunities of States and Their Properties and the European Convention of State Immunities, an analysis already carried out by the Ghent Court of Appeal[37].

The only exception that potentially would have prevented the Holy See from the application of the jurisdictional immunity, would have been the one under Article 12 of the New York Convention which excludes the applicability of the customary law principle in case of a procedure concerning

> a pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission[38].

In light of this possibility, the Court observes that the exception could have been applied only if the author of the action or the omission had been present in the territory where this conduct had occurred, at the moment of the harmful behavior.

This requirement, according to the judges, excludes the application of the exception to the present case, considering that, at the time of the actions, neither the Pope nor the Holy See were clearly present in Belgium during the tempus commissi delicti, on

[34] See also M. Morgese. *Op. cit*., 6.

[35] European Court of Human Rights, affaire J.C. et autres c. belgique (Requête n. 11625/17), 12th October 2021, para. 57 and 58 "57. La Cour n'aperçoit rien de déraisonnable ni d'arbitraire dans la motivation circonstanciée qui a mené la cour d'appel à cette conclusion. Elle rappelle en effet qu'elle a déjà elle-même caractérisé des accords conclus par le Saint-Siège avec des États tiers comme des traités internationaux […] Cela revient à reconnaître que le Saint-Siège a des caractéristiques comparables à ceux d'un État. La Cour estime que la cour d'appel pouvait déduire de ces caractéristiques que le Saint-Siège était un souverain étranger, avec les mêmes droits et obligations qu'un État. 58. La Cour d'Appel de Gand en a ensuite déduit que le Saint-Siège jouissait en principe de l'immunité juridictionnelle, consacrée par le droit coutumier international et codifiée dans l'article 5 de la Convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens et l'article 15 de la Convention européenne sur l'immunité des États. Le Gouvernement ne conteste pas que les requérants ont subi de ce fait une limitation de leur droit d'accès à un tribunal".

[36] Article 5, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention".

[37] As already done in Cudak c. Lituania; Guadagnino c. Italia e Francia; Sabeh El Lei c. Francia; Oleynikov c. Russia; Wallishhauser c. Austria (n. 2); Radunović e altri c. Montenegro; Naku c. Lituania e Svezia.

[38] Article 12, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

the contrary, the Holy See blamed behaviour was allegedly committed in Rome.

Once examined the Holy See nature, admitted the jurisdictional immunity and excluded the applicability of any exception, the Strasbourg Court evaluated the nature of the actions performed by the ecclesiastics.

Analysis on acts' nature and their relationship with *ius cogens* rules

The claimants, which argued the impossibility to compare the Holy See to a sovereign State under international law, denying to accept the application of the civil jurisdictional immunity, gathered that, at most, the conducts subject to the procedure couldn't have been considered - in any case - as *iure imperii* acts, but rather as *iure gestionis* acts, as such uncovered from immunity.

This exception, on a closer inspection, concerning the nature of the actions of the Catholic Church priests, was analyzed in the present case by the European Court of Human Rights through a cross check between international public law, canon law and Belgian procedural law.

On the basis of these laws of reference, the Court ended up by affirming that faults and omissions which Holy See was blamed for, were, however, the result of the exercise of a public function and, for this reason and coherently with the international system, covered by jurisdictional immunity[39].

Through this argumentation, it is necessary to examine the method and the reasons adduced by Strasbourg Judges in relation to the contrast between the international customary immunity principle and the presence of *ius cogens* rules potentially breached, considering that the sexual abuses contested in the procedure could fall, according to the applicants, into article 3 of the ECHR[40], due to the particular seriousness that would classify them as inhuman and/or degrading treatment.

In this regard, considering national and international Courts' rulings, it is important to highlight two different interpretative lines: on one hand there is an branch that biases in favor of the non-relevance of the violation of *ius cogens* rules for the purposes of the application of the jurisdictional immunity principle represented by the International Court of Justice with the judgement of February 3rd 2012 and, on the other hand, an opposite branch that prefers human rights and fundamental rights, represented by the Italian legal practice, with particular reference to the judgement of the United Sections of the Italian Supreme Court in 2004[41] (and to the next judgements which, as it is known, overruled the initial approach) and to the judgement no. 238/2014[42] of the Ita-

[39] The so-called policy of silence, reported by victims, was considered by the Court – even if implicitly – perfectly in line with the freedom of choice on the internal administration that each organization/State boastes. Even if condemnable from a moral point of view, this reticent attitude is part of the normal development of the public duties, which strategy can only be decided from the government.

[40] Article 3, European Convention of Human Rights, Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[41] Sezioni Unite Civili, Corte di Cassazione no. 5044, 11th March 2004.

[42] Corte Constituzionale, judgement no. 238, 22th October 2014.

lian Constitutional Court[43].

It is worth remembering that the European Court, when asked about the balance between the immunity principle and *ius cogens* rules, has always decided in favor of the customary law principle[44], excluding that the violation of the binding rule makes the civil jurisdictional immunity principle inapplicable[45].

Nevertheless, regardless of the – embraceable or not – Court's practice, it is important to highlight that the appeal subject of the judgement of October 12th, 2021, did not have as its object acts of torture, as in the cases already considered by the Court, but a simple omission, concerning the necessity to take measures to prevent or to fix acts constituting inhuman or degrading treatment[46].

[43] On the hermeneutical positions, a part of the international doctrine expressed itself: See Bianchi A., L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international, Revue générale de droit international public, (2004), 63-101; id. Serious Violations of Human Rights and Foreign States, Accountability Before Municipal Courts, L.C. Vorah, F. Pocar, Y. Featherstobe et al (eds.) Man's Inhumanity to Man: essays in honor of Judge A. Cassese, (2002), The Hague, 149-181; H. Blanke e L. Falkenberg, Is There State Immunity in Cases of War Crimes Committed in the Forum State: On the Decision of the International Court of Justice (ICJ) of 3 February 2012 in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), (2013), German Law Journal, 1817-1850; Bröhmer J., State Immunity and the Violation of Human Rights, The Hague, (1998), 165-167; Chiusolo A., Immunità giurisdizionale e diritti inviolabili: una nuova frontiera per la "giuristocrazia"?, Rassegna Parlamentare, no. 2/2015, 1-24; Focarelli C., I limiti dello jus cogens nella giurisprudenza più recente, (2007), Rivista di diritto internazionale,637-656; Nappi S., Diritti inviolabili, apertura coraggiosa ma ancora troppo limitata, (2004), Diritto e Giustizia, file 15, 24 ff.; Pavoni R., Human Rights and Immunity of Foreign States and International Organizations, Hierarchy in International Law: The Place of Human Rights, E. De Wet e J.Vidimar (eds.), (2012), Oxford, paragraph no. 4: Human Rights and the Immunities of Foreign States and International Organizations; P. Veronesi, "Stati alla sbarra"? Dopo la sentenza costituzionale n. 238 del 2014, (2016), Quad. Cost., 3, 485-512; C. Consolo, V. Morgante, Immunità e crimini di guerra: la Consulta decreta un "plot-twist", abbraccia il dualismo e riapre alle azioni di danno, Corr. giur., (2015), 1, p. 100-113; S. Battini, È costituzionale il diritto internazionale?, (2015), Giorn. dir. amm., 3, p. 368-377.

[44] Al-Adsani v. United Kingdom, in which the claimant Al Adsani appealed to the Strasbourg Court contesting the British judgement with which the civil jurisdictional immunity was recognized to the Kuwait State, which, through its officials, inflicted torture and inhuman treatments to the claimant. The appeal was rejected by the Court and the immunity was recognized to the defendant State; Kalogeropoulou and others v. Greece and Germany, in which claimants appealed to the European Court to contest the Ellenic Supreme Court judgement with which it stated the impossibility to proceed by forced execution against Germany due to its civil jurisdictional immunity, the Strasbourg Court rejected the appeal for the groundlessness of the claims; Stichting Mothers of Srebrenica and others v. the Netherlands in which the European Court of Human Rights declared the civil jurisdictional immunity to the Netherlands and to the UN blue helmets, even if the object of the appeal was a bloody genocide; Jones e altri c. Regno Unito, in which the Court stated that Saudi Arabia's officials, guilty of the crime of torture towards some British citizens, couldn't be sued due to the civil jurisdictional immunity related to the *iure imperii* acts.

[45] M. Morgese, op. cit., 11 "La Corte ricorda, infatti, di essere stata chiamata più volte a vagliare l'opportunità di una recessione della norma sull'immunità giurisdizionale in favore delle norme a tutela dei diritti fondamentali dell'uomo, ma di aver sempre concluso escludendo che nell'ambito della comunità internazionale fosse lecito negare l'immunità giurisdizionale per atti iure imperii, anche in presenza di gravi violazioni dei diritti umani, del diritto internazionale umanitario o di una norma di jus cogens. Tale conclusione appare, per un verso, paradossale, in quanto promana proprio dalla Corte posta a tutela dei diritti umani. Per un altro, tuttavia, parrebbe ammettere la possibilità – e confessare l'opportunità – di un (auspicabile) inversione di rotta, nel momento in cui dichiara di non escludere in futuro uno sviluppo del diritto internazionale consuetudinario o convenzionale".

[46] The judges recognized the seriousness of the conducts brought about by the ecclesiastics, framing the behavior inside article 3 ECHR, as it can be seen from paragraph 71 of the judgement: "[...] Toutefois, elle a également conscience du fait que les intérêts en jeu pour les requérants sont très sérieux et concernent de

In light of this, the Court, while acknowledging the existence of a recent international practice open to the exclusion of immunity rules when grave breaches of ius cogens came upon, believes that the omission of the Holy See in the adoption of internal measures related to the sexual abuses was not sufficiently serious to fall into the category of the *ius cogens* law and it did not allow, in any case, the disapplication of the consolidated international customary law principle[47].

Analysis on alternative remedies

The Court then evaluated the actual presence of alternative remedies that the applicants could have chosen in order to assert their claims.

To this regard, Strasbourg judges highlighted that, inside the Belgian Parliament House of Representatives, it had been already established, prior to this appeal before the European Court of Human Rights, a Parliamentary Committee of inquiry, related, precisely, "on the managing of sexual abuses and *paedophilia* facts within an authority relationship, in particular inside the Church system"[48], whose goal was to analyze the relationship between the judiciary and the Church, by looking for a solution in case of demonstrated criminal offences.

Moreover, it was created an ad hoc an arbitration center for sexual abuses within the Catholic Church[49] for a limited period of time from 2011 to 2012, an organism in charge of managing the compensation requests proposed to the Church, especially regarding those victims who were unable to take legal action, because of the prescription period or due to the guilt's death[50].

The claimants, however, excluded the possibility to apply to that center, believing

façon sous-jacente des agissements graves d'abus sexuel relevant de l'article 3 de la Convention (voir, mutatis mutandis, O'Keeffe c. Irlande [GC], no 35810/09, §§ 144-146, CEDH 2014 (extraits)) et que l'existence d'une alternative est pour le moins souhaitable [...]". However, the subject-matter of the action were exclusively the Holy See omissions on the abuses and not the abuses themselves; for this reason, the Court concluded declaring the exclusion of the omission from the *ius cogens* field, since they couldn't be considered as torture acts under art. 3 ECHR.

[47] European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12th October 2021, p. 64 e 65: "Dans la mesure où les requérants allèguent que l'immunité de juridiction des États ne peut être maintenue dans des cas où sont en jeu des traitements inhumains ou dégradants, la Cour rappelle qu'elle a déjà examiné à plusieurs reprises des arguments similaires. Elle a toutefois conclu chaque fois que dans l'état du droit international, il n'était pas permis de dire que les États ne jouissaient plus de l'immunité juridictionnelle dans des affaires se rapportant à des violations graves du droit des droits de l'homme ou du droit international humanitaire, ou à des violations d'une règle de jus cogens [...] En tout état de cause, ce que les requérants reprochent au Saint- Siège, ce ne sont pas des actes de torture mais une omission de prendre des mesures pour prévenir ou réparer des actes constituant des traitements qu'ils caractérisent comme des traitements inhumains. La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionnelle des États ne s'applique plus à de telles omissions. Or, elle ne voit pas de développements dans la pratique des États qui permettent, à l'heure actuelle, de considérer que ce pas a été franchi".

[48] Established by House of Representatives unanimously on 28th October 2010, led by Karine Lalieux.

[49] The arbitration center was created by mutual agreement between the Belgian Catholic Church and the State, in order to tackle abuses and sexual harassment. The process provided for an analysis completed by a specialized equip, made up by judges, lawyers, psychologists and Church representatives.

[50] 628 victims turned to the arbitration center and 1046 notices were reported in total.

that the reason at the base of the compensation action, which was the structural failure of the ecclesiastic authorities in the sexual abuses fight, wouldn't have been allowed due to the indispensable requirements to obtain a compensation therein[51].

The Strasbourg Court, even recognizing the absolutely gravity of the ecclesiastics' blamed conducts and their imputability to article 3 of the ECHR, underlines how the application of the jurisdictional immunity does not depend on the existence of reasonable alternatives for the dispute resolution.

Moreover, even though the Court recognizes that the presence of an alternative is always desirable, it analyses that, in the present case, the claimants actually had some alternatives which, according to the judges, they could have been using[52].

The European Court of Human Rights, in fact, considers that the arbitration procedure and the civil action would have been adequate remedies if used in compliance with procedural provisions, which is an extremely relevant perspective by virtue of the rejection pronounced by the Ghent first instance Tribunal, not only for the recognition of the Holy See immunity but also for the lack of respect for substantive and procedural rules, in relation to civil liability.

Analysis on the alleged violation of article 6 ECHR

Eventually, the Court analyzed, as the last item, the alleged violation of the article 6 paragraph one of the ECHR, claimed by the applicants, who argued the impossibility to access to justice due to the first and second instance judgements[53].

The Court, remembering mutatis mutandis McKinney case[54] and Al-Adsani case[55], fundamental legal precedents concerning immunities, recalls the necessary balance that any judge must carry out while deciding what has to prevail between the right to access to justice and the jurisdictional immunity of a foreign State.

This aim, according to Strasbourg Judges, can be achieved only by analyzing the legitimacy of the limitation purpose and its proportionality.

[51] In order to address to the arbitration center it is necessary that the subject-matter of the appeal relates exclusively to the sexual abuse suffered by the victims. In fact, an ad hoc compensation action, bound to the Church's inability to internally manage these crimes, is not allowed.

[52] European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12th October 2021, p. 71: "La Cour rappelle à cet égard que la compatibilité de l'octroi de l'immunité de juridiction à un État avec l'article 6 § 1 de la Convention ne dépend pas de l'existence d'alternatives raisonnables pour la résolution du litige (Ndayegamiye-Mporamazina c. Suisse, no 16874/12, § 64, 5 février 2019, avec référence à Immunités juridictionnelles de l'État (Allemagne c. Italie ; Grèce (intervenant)), précité, § 101). Toutefois, elle a également conscience du fait que les intérêts en jeu pour les requérants sont très sérieux et concernent de façon sous-jacente des agissements graves d'abus sexuel relevant de l'article 3 de la Convention (voir, mutatis mutandis, O'Keeffe c. Irlande [GC], no 35810/09, §§ 144-146, CEDH 2014 (extraits)) et que l'existence d'une alternative est pour le moins souhaitable. Or, à cet égard et à titre surabondant, la Cour note que les requérants ne se sont pas trouvés dans une situation d'absence de tout recours".

[53] See also M. Tommasini, La Corte europea dei diritti dell'uomo si pronuncia per la prima volta sulla questione dell'immunità della Santa Sede, (2021), Unione Forense per la tutela dei diritti umani.

[54] McElhinney v. Ireland, judgement November 21st 2001, appeal no. 31253/96, available on the Court's website www.coe.echr.int.

[55] Al-Adsani v. United Kingdom, judgement November 21st 2001, appeal no. 35763/97, Rivista di diritto internazionale.

The first one, in the present case, it's strictly linked to the principle of the *par in parem non habet iudicium* and in compliance with international law – in this case customary law - each State must ensure a peaceful coexistence within the international community[56].

As for the disproportionality, it will be important to weigh up the two fundamental rules, which are part of the ECHR system, considering, however, that the so-called fair trial, no matter how supported is by the right to access justice, can also provide for some exceptions, among which some generally accepted limitations concerning the civil jurisdictional immunities of States[57].

Anyway, the European Court of Human Rights believes that the rejection of the compensation action by the first and second instance judges represents the result of the compliance to international law rules, which are generally recognized on the subject of immunity and of the necessary balancing with the right access to justice.

It is noted, in fact, that the balance found by Belgian judges is proportionate to the intended purpose, excluding, so, a violation of the article 6 ECHR.

It is also interesting to observe the Belgium Government position, before the European Court of Human Rights, sued as defendant, who represented his standing through three generic remarks:

1. The Government highlighted what was already affirmed by the Ghent Court of Appeal claiming that the restriction of right to access to justice did not show a disproportionality but a balance considering the interests at stake. It was, in fact, considered a reasonable and adequate choice taking into account the victims' claims and the procedural needs;
2. It stated that, differently from what applicants affirmed, the fact that the applicants were able to argue their case before the first instance Tribunal and the Court of Appeal, even if with a negative result, excluded completely any violation of the article 6 ECHR, namely the rule that guarantees the right access to a Tribunal, affirming, in fact, that the concept of fair trial formulated in article 6 of ECHR was complemented by the presence of the fair trial, which is specifically the one that ensures at least two stages of proceedings.
3. It reaffirmed the existence of reasonable alternatives which were in the applicants' availability in order to fulfil their rights, among which the arbitration procedure.

In conclusion, the European Court of Human Rights rejected the appeal, declaring it unfounded, recognizing the claimants' sacrifice of the right to access to justice but considering it as proportionate and balanced with regards to the recognition of the Holy See civil jurisdictional immunity, which was compared to a proper sovereign State[58].

[56] If the Holy See is compared to a State, sharing with it rights, duties and obligations, it can only be considered as one of those "Par" that the principle par in *parem non habet iudicium* mentions. As a de facto State, it has to be treated within the international community as a sovereign State, and as such safeguarded by *ratione personae* and *ratione materiae* immunity rules.

[57] See Guide on Article 6 of the European Convention of Human Rights - Right to a fair trial (civil limb), paragraph II, Right to a Court, 2021, p. 26 et seq., available on the Strasbourg Court's website https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

[58] European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12th October 2021, p. 75 and 76: "Eu égard à l'ensemble des éléments qui précèdent, la Cour estime que le rejet par les

With a judgement that was clearly inspired to the old tendency on the subject of immunities, the Court, excluding the alleged violation of the fair trial under article 6 paragraph 1 ECHR, seems to have created a legal precedent that, henceforth, could bring to the permanent and final recognition of the Holy See as a sovereign power and to guarantee civil jurisdictional immunity to it[59].

The Strasbourg Court judgement and its role within the international community

The judgement of October 12th, 2021, of the European Court of Human Rights is, without a doubt, in a particular position within the international community. In the last years, in fact, the awareness on lots of innovative judgements about States' immunity had increased, called into question by the latest judgement of the European Court of Human Rights.

To this regard, particularly to be remembered are the Italian judgements of the Italian Supreme Court no. 5044/2004 and of the Constitutional Court no. 238/2014, which distanced Italian justice from those attitudes concerning customary law as peacefully understood in the international community, making the immunity application a no more automated mechanism but a privilege only applicable to certain legally determined cases, excluding this opportunity when *ius cogens* is violated.

This approach, even if contested by a part of international and national doctrine, had undoubtedly opened the doors to a new practice that, until a few years ago, had never found a real space within national systems[60].

Focusing on the Italian situation, the judicial framework that has been created notwithstanding Italy had ratified the New York Convention with the law of the 14th of January 2013 n. 5[61] and although it didn't enter into force due to the failure to reach the threshold provided for by article 30 of the same Convention[62],

tribunaux belges de leur juridiction pour connaître de l'action en responsabilité civile introduite par les requérants contre le Saint- Siège ne s'est pas écarté des principes de droit international généralement reconnus en matière d'immunité des États et que l'on ne saurait dès lors considérer la restriction au droit d'accès à un tribunal comme disproportionnée par rapport aux buts légitimes poursuivis. Partant, il n'y a pas eu violation de l'article 6 § 1 de la Convention à cet égard".

[59] An interesting perspective is given by also the Press Release issued by Registrar of the European Court of Human Rights, Dismissal of civil action on grounds of Holy See's jurisdictional immunity did not violate Convention, 2021, available on the HUDOC database. For a systematic review on the subject, see Di Stefano M., Immunità degli Stati e art. 6 della Convenzione europea dei diritti dell'uomo: coerenza sistemica e garanzie di non impunità, (2007), Comunicazioni e Studi, vol. XXIII, Giuffrè, 207 ff.; Padelletti M.L., L'esecuzione delle sentenze della Corte Europea dei diritti umani tra obblighi internazionali e rispetto delle norme costituzionali, Rivista Diritti umani e diritto internazionale, (2008), 353-370; M. Morgese. *Op. cit*., p. 6.

[60] See also C. Ryngaert, The Immunity of the Holy See in Sexual Abuse Cases – the ECtHR decides J.C. v. Belgium, (2021), Utrecht Centre for Accountability and Liability Law Blog.

[61] "Adesione della Repubblica italiana alla Convenzione delle Nazioni Unite sulle immunità giurisdizionali degli Stati e dei loro beni, fatta a New York il 2 dicembre 2004, nonché norme di adeguamento all'ordinamento interno".

[62] Article 30, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004: "1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval, or accession with the Secretary- General of the United Nations. 2. For each State ratifying, accepting, approving, or acceding to the present Convention after

> It is generally interpreted as a Convention that codifies customary law. Therefore, even if it did not enter into force, it mirrors costumary law and assumes a primary role in a hermeneutic key for the purposes of the individuation of the applicable customary law[63].

Coherently with the mentioned Italian judgements, not only some Italian tribunals[64] expressed themselves, but so did also the Supreme Court of Greece[65] which adopted that kind of hostile attitude towards the immunity recognition in case of violation of *ius cogens* rules and some overseas Tribunals, which were able to compare themselves to the different Italian approach[66].

However, it is important to recognize that this orientation, even if revolutionary, does not create, for the moment, a real split within the international community, rather acting as an exception to the rule reiterated by the Court of Justice in 2012 with the judgement of the 3rd of February, about the Ferrini case[67].

Keeping in mind this international framework, the judgement of the European Court of Human Rights lays itself in a particular position in compliance with the international practice, not for the coherent choice of the Strasbourg judges about the preference of the civil jurisdictional immunity to the right of access to justice, but rather for the recognition to the Holy See of the State title, identification that makes the European Court of Human Rights the first one in the international framework to express in that sense.

the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession." So, the sufficient number of 30 ratifications established in the article is lacking.

[63] Sezioni Unite Civili, Corte di Cassazione, September 16th 2021, no. 25045.

[64] See judgement no. 21946, 20th October 2015; judgement no. 43696, 29th October 2015 and judgement no. 15812, 3rd May 2016.

[65] Prefecture of Voiotia v. Federal Republic of Germany, case No. 11/2000, Hellenic Supreme Court, 4th May 2000.

[66] Central District Court of Seoul, 8th of January 2021, Comfort Women Case.

[67] See Viterbo A., I diritti fondamentali come limite all'immunità dello Stato, (2004), Responsabilità Civile e Previdenza,1030-1039; Tanzi A., Un difficile dialogo tra Corte internazionale di giustizia e Corte costituzionale, (2015), La Comunità internazionale, 13 ff.; Serranò G., Considerazioni in merito alla sentenza della Corte internazionale di giustizia nel caso relativo alle immunità giurisdizionale dello Stato, Rivista di diritto internazionale privato e processuale, (2012), 617 ff.; Salerno F., Giustizia costituzionale versus giustizia internazionale nell'applicazione del diritto internazionale generalmente riconosciuto, (2015), Quaderni costituzionali, 35-58; Rivello P.P., La Corte internazionale di Giustizia disattende le impostazioni volte a ritenere possibile un'ulteriore contrazione del principio dell'immunità giurisdizionale degli Stati, (2012), Cassazione penale, no. 6, 2010-2038; Pisillo Mazzeschi R., La protezione internazionale dei diritti dell'uomo e il suo impatto sulle concezioni e metodologie della dottrina giuridica internazionalistica, (2014), in Diritti umani e diritto internazionale, 275-318; Persano F., Il rapporto tra immunità statale dalla giurisdizione e norme di jus cogens: una recente pronuncia della CIG, (2012), Responsabilità Civile e Previdenza, 4, 1118-1131; Nigro R. Le immunità giurisdizionali dello Stato e dei suoi organi e l'evoluzione della sovranità nel diritto internazionale, (2018), 310 ff..; Lanciotti A., Longobardo M., La Corte Costituzionale risponde alla Corte di giustizia internazionale: l'ordinamento italiano non si adatta alla regola sull'immunità degli Stati, (2015), federalismi.it, 1-15; D'agnone G., Immunità degli Stati stranieri e garanzia costituzionale dell'accesso al giudice: conflitto reale?, (2014), Quaderni costituzionali, 639-658; Consolo C., Morgante V., La Corte dell'Aja accredita la Germania dell'immunità che le Sezioni Unite avevano negato, (2012), Corriere giuridico, p. 597-605; Atteritano A., Crimini internazionali, immunità degli Stati, giurisdizione italiana: il contenzioso italo-tedesco dinanzi alla Corte Internazionale di Giustizia, Diritti umani e diritto internazionale, (2011), v. 5, p. 271-297.

Dissenting opinions: Judge Pavli's point of view

An interesting aspect that combines the International Court of Justice judgement and the Strasbourg Court judgement, is represented by the dissenting opinions attached to both, the first by Judge Cançado Trindade and the second one by Judge Pavli[68].

Mutatis mutandis to the dissenting opinion attached to the European Court Judgement, the Judge Cançado Trindade affirmed before the International Court that the *ius cogens* rules, coherently with the hierarchy of international sources of law, couldn't be waived and couldn't be given up, especially if in relation to the international principle of jurisdictional immunity, considering the implicit waiver of human rights, deducible from the judgement of the 3rd of February 2012 of the International Court of Justice, as intolerable[69].

To the judgement of the European Court of Human Right, as already mentioned, the dissenting opinion of the judge Pavli is attached[70], who moves away from his colleagues' decision because of 3 reasons[71]:

1. He disagrees with the conclusion reached by the Belgian Tribunals in relation to the exclusion of the territorial exception to the jurisdictional immunity principle of the State relating to *iure imperii* acts.

The territorial tort exception is provided by article 12 of the New York Convention and establishes essentially that the principle cannot be applied when the procedure has as its object an action that is strictly connected injury to the person, caused by actions or omissions committed - at least - in part on the State's territory, if the author was present in that same territory at the moment of the behavior[72].

[68] The first one attached to the International Court of Justice judgement of the 3rd of February 2012, the second one attached to the European Court of Human Rights judgement of the 12th of October 2021.

[69] Judge A. A. Cançado Trindade, Brazilian judge at the international Court of Justice, dissenting opinion to Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening, Judgement, 3rd of February 2012, 288 (306): "Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are anti-juridical acts, are breaches of jus cogens, that cannot simply be removed or thrown into oblivion by reliance on State immunity. International crimes perpetrated by States are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity. That traditional and eroded distinction is immaterial here".

[70] On the Dissenting Opinions' role see A. Paulus, Judgments and Separate Opinions: Complementarity and Tensions, speech at the Annual Seminar of the European Court of Human Rights, Strasbourg, (2019), 1-5; S. Van Bijsterveld, A Typology of Dissent in Religion Cases in the Grand Chamber of the European Court of Human Rights, (2017), in Religion & Human Rights, 223-231; Directorate-General for internal policies, policy department C: Citizens' rights and constitutional affairs, Legal affairs, Dissenting opinions in the Supreme Courts of the Member States, (2012), 31 ff.; P. Pinto de Albuquerque e D. Cardamone, Efficacia della dissenting opinion, Questione Giustizia, 148-155.

[71] On this topic see L. Pasquet, The Holy see as seen from Strasbourg: immune like a State but exempt from rules on State responsibility, (2021), blog della Società italiana di Diritto internazionale e di Diritto dell'Unione Europea; N. Winfield, European Court rejects attempt to hold Vatican liable for clerical sex abuse, (2021) in Los Angeles Times.

[72] Article 12, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

The applicants, for this reason, highlighted that the claimed conducts occurred in Belgium, both relating to sexual abuses and the policy of silence, allegedly realized, first of all, by the Belgian Catholic Church.

Therefore, the claimants asked national Courts to adopt this exception, so avoiding to the Holy See the application of the jurisdictional immunity.

However, national Courts and the European Court of Human Rights, rejected this request, on one hand, due to the exclusive applicability of this exception to *iure gestionis* acts, excluding *iure imperii* acts from the field of application[73] – which were identified in the present case – and, on the other hand, highlighting that the ecclesiastics' conducts couldn't be attributed to the Holy See under article 1384 of the Belgian civil code since acts committed by the Holy See, regarding omissions in the measures' assumption against the *paedophilia* events, took place in Rome and, so, outside the Forum State, concluding for the Pope and Holy See's absence in Belgium at the time in which these events happened.

These reasonings, according to the dissenting judge, would raise some gaps, highlighted, first of all, by the fact that the exception applicability only to *iure gestionis* acts provided for in article 12 of the New York Convention is not explicitly dictated in any treaty, but, if this approach was chosen, excluding *iure imperii* acts, this exception would become practically useless, as circumscribed to acts already excluded from the immunities' applicability.

Moreover, according to Judge Pavli, the Court didn't consider the Commentary of the UN Commission on International Law to the Draft Articles on Jurisdictional Immunities of States and Their Property[74], an act with which the Commission explicitly established that the present exception not only could but should be applied regardless of the nature of conducts taken into account, whether they are the outcome of *iure imperii* acts or *iure gestionis* acts[75].

[73] The Court of Appeal, to support this thesis, mentioned: McElhinney v. Irland, no. 31253/96, 2001; Germany v. Italy, judgement of the 3rd of February 2012; Jones and others v. United Kingdom, no. 34356/06 and 40528/06, 2014. However, in the first two cases the Court dealt with armed conflicts and acts carried out by military, which makes the circumstances different from those in analysis in the present case. In the third case, the Court dealt with acts of torture committed outside the State's territory.

[74] Commentary of the UN Commission on International Law to the Draft Articles on Jurisdictional Immunities of States and Their Property, 1991, par. 8 "The basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether jure imperil *ox jure gestionis*. This distinction has been maintained in the case law of some states involving motor accidents in the course of official or military duties. While immunity has been maintained for acts jure imperil, it has been rejected for acts *jure gestionis*. The exception proposed in article 12 makes no such distinction, subject to a qualification in the opening paragraph indicating the reservation which in fact allows different rules to apply to questions specifically regulated by treaties, bilateral agreements or regional arrangements specifying or limiting the extent of liabilities or compensation, or providing for a different procedure for settlement of disputes" p. 45; https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf.

[75] Judge Pavli highlights also that from the rough analysis carried out by the European Court of Human Rights a lack of precision and meticulousness descends, precision that turn out to be necessary in order to satisfy those minimum requirements that any judgement must have. Dissenting Opinion of Judge Pavli attached to the European Court of Human Rights Judgement, affaire j.c. et autres c. belgique, 12th October

2. Judge Pavli dissents also as from the Belgian Courts' observation on the alleged hierarchical relationship between the Holy See and the bishops. National judges, while analyzing this *vexata quaestio*, preliminarily asked themselves what kind of relationship exists between the Church and bishops in order to define the Holy See liability in light of article 12 of the United Nations Convention.

The article, as previously mentioned, establishes that a State cannot invoke jurisdictional immunity when the proceeding has a compensation action as its object, which regards the physical integrity of a person and when is attributable to a State.

For this reason, it appears intuitive that from the interpretation that is conferred to this formula, derives or not the exception applicability.

In order to understand what kind of liability the State would have assumed, in this case the Holy See, it was necessary to figure out in what role its officials set themselves and which duty bound them to the State.

Belgian Tribunals choose an international public law-approach, excluding the existence of a relationship between principal and its agent[76], an orientation that's not shared by applicants who have repeated and proved the existence of a strict nexus between the Pope - who is in charge of the Holy See - and the bishops who are its officials[77].

Considering that the immunity declaration should be a preliminary question and, so, it should overlook any assessment on the type of relationship between parties, what is really important in this comparison of opinions is the final result: according to Pavli, national Courts had preferred the Holy See's opinion without, however, explain in detail the reason for which this orientation was the most appropriate, bringing the dissenting judge to declare those judgements unreasonable and arbitrary[78].

2021, p. 11 "In all, the national courts' examination of this issue was unjustifiably cursory, particularly given the complex questions of international law raised and the importance of these arguments for the applicants. The legal reasoning presented here does not meet the minimum level of exposition required by Article 6 of the Convention (see Ramos Nunes de Carvalho e Sá, cited above, § 185)".

[76] European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12th October 2021, p. 68 and 69: " En l'espèce, l'exception au principe de l'immunité juridictionnelle des États évoquée par les requérants devant la cour d'appel était celle s'appliquant aux procédures se rapportant à une « action en réparation pécuniaire en cas de décès ou d'atteinte à l'intégrité physique d'une personne, ou en cas de dommage ou de perte d'un bien corporel » (article 12 de la Convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens; dans le même sens, l'article 15 de la Convention européenne sur l'immunité des États). Cette exception ne s'applique toutefois que si l'acte ou l'omission prétendument attribuable à l'État étranger « se sont produits, en totalité ou en partie, sur le territoire de [l'État du for] et si l'auteur de l'acte ou de l'omission était présent sur ce territoire au moment de l'acte ou de l'omission » (article 12 précité). 69. La cour d'appel a rejeté l'applicabilité de cette exception au motif notamment que les fautes reprochées aux évêques belges ne pouvaient être attribuées au Saint-Siège, le Pape n'étant pas le commettant des évêques ; qu'en ce qui concerne les fautes reprochées directement au Saint-Siège, celles-ci n'avaient pas été commises sur le territoire belge mais à Rome ; et que ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reprochées aux dirigeants de l'Église en Belgique auraient été commises. Il n'appartient pas à la Cour de substituer son appréciation à celle des juridictions nationales, leur appréciation sur ce point n'étant pas arbitraire ou manifestement déraisonnable".

[77] See Martinez L. C. Jr., Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases? (2008), 44 Texas International Law Journal, referring to the case O' Bryan v. Holy See, 2005.

[78] Dissenting opinion Judge Pavli, 26: "At the very least, the national courts' summary approach stands at odds with the requirement under Article 6 that the applicants be given a sufficiently "specific and express

For this reason, it is interesting the American legal precedent John V. Doe v. Holy See[79].

It is a proceeding against the Holy See for sexual abuses, in which the Oregon District Court, even if recognizing the role of State de facto, applied to the Holy See the exception under article 1605[80] of the Foreign Sovereign Immunities Act[81], believing that, just like in O' Bryan v. Holy See[82], the tortious conduct exception was applicable to the present case.

3. Judge Pavli dissents also from the conclusion reached by national judges on the territoriality requirement in the exception provided for in article 12. Assuming that the conducts under examination are attributable to the State with a properly justified evaluation, it would be necessary to wonder whether the other requirements established by article 12 of the Convention are reached, that is to verify if the damage occurred in the forum State with the contextual presence of the liable person in the same territory.

National Courts, in the evaluation of the omissions on the abuses' management, believed that article 1384[83] of the national civil code excluded the Holy See vicarious liability due to a lack of confirmation inside the regulatory provision of a figure similar to the one already existing between the Church and its officials.

Moreover, accepting the claimants' defense request, Belgian Tribunals didn't recognize the Holy See presence in Belgium at the time of the event, hence rejecting any kind of liability, even on the basis of article 12 of the United Nations Convention.

Actually, the International Law Commission in the Draft articles on Jurisdictional Immunities of States and Their Property had already clarified that, with the provision by which the author of the act or the omission, the State in this case, should have been present during the *tempus commissi delicti* in the territory where the conduct occurred, the international legislator did not refer to the State as a legal person but to the State's

reply" (see Ramos Nunes de Carvalho e Sá, cited above, § 185). In the face of what appears to be important evidence that was ignored or not addressed, such a decision may also border on the arbitrary and unreasonable (see Naït-Liman v. Switzerland, cited above, § 116)".

[79] Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009).

[80] 8 U.S.C. § 1605(a)(5).

[81] Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. See also Gergen J.A., Human Rights and the Foreign Sovereign Immunities Act, in Virginia Journal of International Law, (1995), 781 ff.; Belskey A.C., Merva M., Roht-Arriaza N., Implied Waiver Under the FSIA: A proposed exception to immunity for violations of peremptory norms of international law, (1989), in California Law Review, 365-415; L.G. Ferguson, C.F.B. Mcaleer JR., Playing the Sovereign Card, Defending Foreign Sovereigns in U.S. Courts, (2017), in Litigation v. 43, p. 1-6.

[82] O' Bryan v. Holy See, 556 F.3d 361 (2009).

[83] Art. 1384 Belgian civil code "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde. [Le père et la mère sont responsables du dommage causé par leurs enfants mineurs]. Les maîtres et les commettants, du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés. Les instituteurs et les artisans, du dommage cause par leurs élèves et apprentis pendant le temps qu'ils sont sous leur surveillance. La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs et artisans, ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.". Article no. 1384 establishes 3 different forms of vicarious liability: the one that regards another person's act *qualitate qua*, the one that concerns the relationship between masters and pupils, and eventually, the one between principals and people in charge.

single representative that committed the crime[84].

So, in light of this analysis, it should have been appropriate for the Tribunals – according to Judge Pavli – to ask themselves whether those liable for abuses and omissions, so bishops and officials of the Belgian Catholic Church, were in Belgium during the management of the occurrences.

In compliance with international practice, what should have been noticed, according to judge Pavli, wouldn't have been the presence of the Pope or the Holy See in Belgium at the time of the events, but the mere presence of one of their officials and/or representatives.

In those circumstances, the dissenting Judge concluded by declaring the abstractness and the inaccuracy of every explanation given by national Tribunals and, as a consequence, by the European Court of Human Rights.

He asserted that those Courts did not take adequately into account the evidence brought by the claimants, violating so the article 6 ECHR, which, on the contrary, guarantees a fair trial, in any aspect[85].

Conclusions

Holy See's role, in an international level, has always been a very controversial issue due to the strict relationship with the Vatican City State.

As it represents the Pope's moral personality, the Holy See stands above the State and interacts with it in two different ways.

Sometimes it works as it is the "executive power" of the Vatican State, setting itself at the head of its government, at the top of the political and administrative choices of the State.

In these cases, considering the indistinguishability of the Holy See and the Vatican, the tendency that unifies these figures, expanding to the first one all the characteristics that relate to the latter, is peacefully accepted.

However, when the Holy See acts as the head of the Catholic Church, outside the small territorial range of the Vatican City State, it does not work anymore as an entity assimilated to the general notion of State but it behaves as an organ at the top of a religious

[84] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, 1991, Par. 7 "The second condition, namely the presence of the author of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to ensure the exclusion from the application of this article of cases of transboundary injuries or trans frontier torts or damage, such as export of explosives, fireworks or dangerous substances which could explode or cause damage through negligence, inadvertence or accident. It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12. The article is primarily concerned with accidents occurring routinely within the territory of the State of the forum, which in many countries may still require specific waiver of State immunity to allow suits for recovering damages to proceed, even though compensation is sought from, and would ultimately be paid by, an insurance company".

[85] Judge Pavli, European Court of Human Rights, affaire j.c. et autres c. belgique (Requête n. 11625/17), 12th October 2021, paragraph 20 of the dissenting opinion: "I am therefore unable to conclude that the restriction of the applicants' right of access to a court was proportionate to any legitimate aims pursued or otherwise in compliance with Article 6 § 1 of the Convention".

organization that, as such, would not have – under a doctrinal orientation[86] – the right to be treated as a sovereign State.

Due to this subtle distinction, it is easy to understand that, in the absence of a careful analysis carried out by nationals and internationals Tribunals, the risk highlighted by doctrine is that to attribute to the Holy See all the privileges of a State without including also its responsibilities[87].

For what regards the latest judgement, even though it is far from the original judgements of the Italian Courts bond to the Ferrini case, it is perfectly in line with the last international decisions on the subject[88].

Without pausing excessively on the hermeneutical orientation chosen by the Court for the present case, it is observed that the final judgement derives from a flawed appeal with procedural and substantial mistakes, which didn't facilitate a favourable judgement, as asked by the applicants[89].

Moreover, it is estimated that the existence of alternative remedies would have marked negatively all the procedure, because if it is true that many of them could have been used only by claiming the crimes themselves, and so the sexual abuses and not, as in the present case, the method employed to internally manage these events, it is also true that, according to the Courts' opinion, the possibility to complain directly before ecclesiastic Tribunals in the Vatican City State had never been blocked to the applicants, who would have had, at least, one alternative to stand up for their claims[90].

In conclusion, although the Court considered prevailing the right to the civil jurisdictional immunity of the Holy See and recessive the right to access to a Tribunal, confirming the traditional balance already explained by the International Court of Justice in 2012, it is important to notice that in the present case, even if all the procedural and substantial mistakes were corrected, it would have been likely to observe the application of jurisdictional immunities anyway, due to the peaceful characters recognized by the Court to the Holy See, in view of the above-explained reasonings.

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[87] See also L. Pasquet, The Holy see as seen from Strasbourg: immune like a State but exempt from rules on State responsibility, blog della Società italiana di Diritto internazionale e di Diritto dell'Unione Europea, (2021).

[88] Germany v Italy; Greece Intervening, Judgement of the International Court of Justice, 3 February 2012.

[89] The Court in para. 29 of the judgement of 12th October 2021, highlighted a problem in the claimants' standing to sue. It mentioned articles no. 6, 17, 18 e 702 of the Belgian civil code, affirming the claimant's lack of standing capacity to sue before the Court in relation to the internal management of the events within the Church, through the alleged "structurally deficient" method.

[90] See Canon Law Code, Book VII, Processes, Articles 1400 ff.

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